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**STATEHOOD AND
INTERNATIONAL
LEGAL PERSONALITY
BLAINE SLOAN LECTURE**

**INTERNATIONAL ELECTION
OBSERVATION†**

W. Michael Reisman††

I come to the subject of international election observation

† This article is part of a larger manuscript in progress on international election observation. Parts of it were delivered at the Fifth Annual Blaine Sloan Lecture at the Pace University School of Law on March 17, 1992. Presented in honor of Blaine Sloan, Professor Emeritus of International Law at Pace University, the lecture series is delivered each year to the University and Law School community in order to promote scholarly debate in international law.

Sarah Whitesell, Yale J.D. 1993, helped in the research. Andrew Willard read and commented on the earlier draft. Andrew Cappel, Yale J.D. 1992, edited the text and made many valuable substantive comments.

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as something of a penitent. For a long time, I was a spotty voter. I took the right to vote and the assurance of a free and fair election for granted. I was not alone. In the United States, in many elections, less than half of our potential electorate exercises its right to vote. I would like to believe that my dereliction from this important civic privilege had justifications and aggravations. As a student and then young professor of international law, I moved often. In my personal economy of priorities, I frequently neglected to register in time to vote. And I confess that as a student of politics and a product of American Legal Realism, I was also infected with a certain amount of cynicism about the relevance of elections to the actual exercise of power.

For these reasons, when I was first invited to be an election observer for a regional international organization, I viewed the task rather cavalierly as what is known in the academy, with apologies to Veblen, as "the leisure of the theory class." This particular election justified a certain degree of cynicism. A soldier had seized power, used it brutally, and had effectively bankrupted the country. The foreign aid donors who had until then supported the government were revolted and turned off the spigot. The dictator needed a freely-elected civilian government to start the flow up again.

The local pundits knew that an election could put a popularly based government into office but could not, by itself, change the facts of power. Perhaps the people of this country knew as well, but they wanted to vote. To my surprise, I was deeply moved and even awed by the quiet and dignified determination of the urban and rural people and the extraordinary gravity that they attached to the right to select their own government. They organized themselves very efficiently. People of all ages stood, sometimes for hours, in the strong tropical sun waiting for the opportunity to vote. Men and women who, for one reason or another, were unable to vote were almost in tears. Representatives of the new opposition parties in the polling places monitored official actions with great restraint in the course of the vote counting. The dictator's party was trounced.

Since that time, I have thought a great deal about that election and about international election observation. I appreciated how superficial my views had been. I also appreciated, as did the people of that country, that the mere presence of international

election observers was an important factor in permitting them to select their own government.

When I returned to Yale, I scoured the literature to find out more about international election observation. There is actually very little written about the subject. With the exception of the seminal and still indispensable handbook prepared by Larry Garber and the Washington-based International Human Rights Law Group,¹ a non-governmental organization that has pioneered international election observation and, in my view, continues to lead the field, and a scattering of decisions by the European Commission of Human Rights and the Inter-American Commission of Human Rights, there is no other practical guide to election observation, and remarkably little scholarly or doctrinal literature. This is surprising in view of the fact that free and fair elections are a fundamental prerequisite of democracy, and democracy is basic to the achievement of many other human rights. All the more surprising is the fact that much international observation of elections has occurred over the last thirty years, and a rather rich (though often rather inaccessible) body of practice has developed. One would have expected it to have generated a substantial scholarly literature.

In 1989, I went to Namibia to observe the campaign and the organizational structures and procedural arrangements being pursued by the United Nations and by the South African Governor-General who was still effectively in control of the territory. Again I was struck by the intuitive character of much of the observation and by the absence of any clear international standard to define a free and fair election. Like pornography, it appeared to resist definition, one of those things you know when you see. With my own consciousness raised and with the zeal of a convert, I resolved to research and write a book on the subject and began to collect the material.

In the meanwhile, I had been working on a book with Carl Liederman of the New York Bar on national recognition practice and human rights and the emergence of an international principle of legitimacy based on compliance with core human rights. This project placed my study of techniques of international elec-

¹ LARRY GERBER, *THE INTERNATIONAL HUMAN RIGHTS LAW GROUP, GUIDELINES FOR INTERNATIONAL ELECTION OBSERVING* (1984).

toral observation into a larger, more coherent framework.

The invitation to deliver the Sloan Lecture happily coincides with the end of the first stage of my research and gives me the opportunity to present to an erudite and thoughtful audience what I have learned and what I have yet to learn on the subject, what matters now seem clear and what matters pose problems for which international practice has yet to find solutions. At the moment, I have many more questions than answers, but in many ways, framing questions is the province and specialty of professors of law. Questions are critical, for they focus attention and stimulate inquiry and discussion. The fact that this lectureship honors a man who spent one of his two illustrious careers in the legal service of an organization that has played an important role in international election observation and then came to Pace University to join the community of those of us who ask questions is doubly felicitous. I am honored to have this opportunity.

SOME PROVISIONAL DEFINITIONS

The term "international election observation" has come to mean the contemporaneous examination and appraisal of key phases of a particular type of national or sub-national decision-making process. That process may be called an election, a plebiscite or a referendum. Whatever the name, the common feature of all of these is that each eligible member of the population at large is supposed to have been given the opportunity to play a direct part by expressing his or her view, on an individual and secret basis, in the decision-making process, and that the outcome is determined by what the majority of the population says. For economy, I will use the term "election" as a generic reference to all of these decision processes.

The international legal system does not undertake to observe all national elections, but rather only certain critical national elections. The decisions to be taken in a national election that is to be subjected to international observation are deemed critical because certain basic *internationally* prescribed norms are at stake. The purpose of the international observation is to assure the world community that the election meets the minimum requirements of an international standard; the term of art for this conclusion is that the election has been "free and fair."

International observers come from outside the country holding the election. They may or may not be specialists in election observation, and they may operate under the auspices of international governmental organizations, non-governmental organizations (NGOs), or national governments. Other international participants, whether official or unofficial, may not view themselves as election observers, while in fact serving as functional or latent observers. The media is a good example of such functional observers.

COGNATE ELECTION SERVICES AND FUNCTIONS

Because of some remarkable recent changes, which we shall review in a moment, in international legal and political orders, certain types of national elections have become important *international* events. As a result, many different programs have been developed to facilitate these electoral processes. While the boundaries between these various programs are blurry, they can be distinguished both from one another and from international election observation.

— In what might generally be called “electoral training programs,” specialists from countries with firm democratic traditions, often sent under the auspices of non-governmental organizations, conduct seminars and workshops and help groups or individuals in a country new to popular democracy acquire the technology necessary for organizing political parties, campaigning, and conducting a free modern election. Some of these programs have been conducted covertly, and some have been viewed, in some quarters, as techniques of intervention.

— “Election monitoring” entails the observation of polling and vote-counting, usually by nationals of the country conducting the election who are not affiliated with the government. Monitors often report to the international media. In some international election supervisions, the international supervisors incorporate local monitors.

— “Policing elections” constitutes an operation in which designated personnel are authorized by the local government to oversee an election in order to ensure that certain normative standards are followed.

— In “international election supervision” an international organization or a state acting as a trustee under the authority of an international organization effectively organizes and supervises the

election in a particular country: the most impressive instances of this procedure are United Nations supervision in Namibia and, at the moment, in Western Sahara, Angola, and Cambodia. Supervision may range from directly organizing and conducting every phase of the electoral process to supervising the local electoral institutions.

International organizational election *supervision* may at first seem preferable to non-governmental organizational *observation* as a method to ensure fair and free elections. In fact, there are often resource and tactical reasons why general international organizations might wish to eschew supervision. Where the domestic political situation is volatile and election results might not be honored by all sides (a situation which is, alas, not unusual), the same international organization that certifies the election of one group may face the risk of later finding itself obliged to mediate or secure concessions from another group that has subsequently seized power. The fact that international organizations must balance often incompatible roles, such as fact-finding and mediation, can undermine both. In such circumstances, non-governmental organizations where their judgments carry the requisite authority, can carry out their responsibilities impervious to considerations such as these.

CRITICAL RELATIONS BETWEEN THE COGNATE SERVICES AND FUNCTIONS

It is worth distinguishing carefully among these various types of electoral interventions on the conceptual level, because the policies and procedures that have been prescribed to govern them and the role that outside observers are expected to play in them differ for each.

In practice, different parts of these various types of programs often overlap. Indeed in some cases, such an overlap may be consciously exploited, as for example when observers use their influence in order to require the local government to change part of its electoral system. Above all, there is a high degree of congruence among all of these diverse modes with regard to the normative code of what constitutes a free and fair election. Decisions made by actors in one mode obviously influence the subsequent establishment of norms in other contexts. Choices and judgments the Security Council or the United Na-

tions Secretariat officials made in Namibia, Western Sahara, or Cambodia about elections supervised there become integrated into a larger international code of free and fair elections. Due to this congruence of opinion concerning electoral norms, although our concern here is election observation rather than election supervision, I feel free to draw on the standards prescribed and applied by international organizations supervising elections under an international mandate. At the same time, because NGO observers also shape the normative code, our methodology must also take into account NGO practice.

As a threshold matter, it should be noted that one apparent difference among the various modes may often prove to be illusory. While the term "election observation" suggests that this form is more passive and non-interventionist than many of the other forms of international participation in national elections, this is probably not the case. Social scientists know that there is no such creature as a passive observer, everyone present in a situation is a participant. Therefore, the mere presence of international observers can alter a situation in many of the same ways as more "activist" electoral supervision.

REDUCED IMPORTANCE OF A DEMOCRATIC CONTEXT

International election observation has not, at least until now, been centrally concerned with the degree or quality of democracy in the country under observation. At first this appears surprising because free and fair elections seem inseparable from a working democracy, the converse should be equally true. Unquestionably, the maximum extent to which an election is free and fair is always related to the quality of the democratic system as a whole. Nevertheless, for a number of reasons, the presence of a fully working democracy cannot be either a criterion to be applied in international election observation or a prerequisite to the presence of observer missions.

For one thing, there is considerable difference of opinion, popular and scholarly, about what constitutes a working democracy. What has been called the "Periclean Ideal," captured in small cantons of Switzerland, perhaps, and in small town meetings, simply does not lend itself to mass politics. Mass politics democracy is still characterized by indirect representational systems. Winckler describes this in its ideal form: "The preferred

form has voters choosing between parties who present alternative platforms for future policies. This is what most people think happens regularly in Western countries."²

This ideal form is achieved most imperfectly. To paraphrase Lincoln, you can fool all the people in some critical elections. Even if there were general agreement on what constitutes a working democracy standard, such a criterion would probably not be appropriate for the situations that are likely to come under international election observation. More often than not, the election to be observed forms part of a transition from some form of autocracy or subordination in which there was little power-sharing among potential participants, toward a system that more closely approximates modern conceptions of democracy. The internal situation in these countries, even when the existing government has been democratically elected, is 'often turbulent and accompanied by many human rights violations.'³ The international concern has been to ensure that, at least, this particular fundamental decision about a new direction in national destiny is based on the popular will. To insist, in these instances, upon a full working democracy before an election can be conducted and internationally observed and certified might well put international election observation out of business.

WHICH ELECTIONS ARE OBSERVED?

Perhaps in the distant future, the international community may have the resources and political will to monitor every election everywhere or, at least, to serve as some type of ultimate appellate authority of electoral probity, a function currently performed in a limited and largely inchoate fashion by certain regional international human rights commissions. Up to now, however, international election observation has not been concerned with routine elections. Indeed, in 1991, the Third Committee of the General Assembly, in an interesting course-correction, discouraged international participation in national elections in other than exceptional circumstances. International election ob-

² CONSTITUTIONAL REFORM AND THE FUTURE OF THE REPUBLIC OF CHINA 161 (Harvey J. Feldman ed., 1991).

³ See generally Tom J. Farer, *Elections, Democracy, and Human Rights: Toward Union*, 11 HUM. RTS. Q. 504 (1989).

ervation's focus has instead been on those critical elections where voters were asked to respond to issues shaping the destiny of their country. These are what my colleagues and I at Yale have called "constitutive" decisions: they will change or strongly reinforce fundamental ways decisions are taken in the body politic and thus influence key aspects of internal public order. International election observation played a crucial role in bringing peace to Nicaragua. Likewise in Cambodia, the Secretary-General has indicated that internationally supervised elections formed a crucial component of the overall peace settlement. "Constitutive" elections are of concern to the international community because in these elections, fundamental international norms — like the establishment of a peaceful and democratic political order — are at stake, because the choices that are made there may turn out to be irrevocable. In light of such considerations, the international system as a whole (and elements within the country under observation, too) have an interest in ensuring that the election meets an international standard for fairness.

APPRAISING ELECTIONS: THE FREE AND FAIR STANDARD

The judgment of an international election observation team and, more generally, of the world community is usually put in terms of whether the election was "free and fair." Those words are, as I have said, a term of art. Elections, particularly in modern mass democracies and especially democracies marked by heterogeneity in class, culture, and ethnicity, are very untidy and often confused and confusing events. What the term "free and fair" means in a particular election and in a world of diverse political cultures, many of which are unfamiliar with the practice of modern elections, is one of the subjects we must consider today.

WHO MAKES INTERNATIONAL ELECTION LAW?

Many students and scholars still think of international law as a body of rules made by and for states in their external relations, and from their perspective the treatment of the practice of observation of elections by non-governmental entities may well seem incongruous or at least "political" rather than legal. I submit that such a view is both outdated and misleading. Contem-

porary international law is in fact a complex process in which the making, application and termination of law are performed by government and intergovernmental officials, by people in non-governmental organizations, by corporate executives, media personnel, clergymen, scholars, and by many other persons playing many other roles.⁴ Increasingly, the issue is not whether a particular rule has been formally adopted but whether expectations of what constitutes right behavior that are shared by some critical actors are applied by them to the actions of others in ways that are weighty enough to make those others change their behavior or at least take account of them. Indeed, it can be argued that international law has simply become too important to be left entirely to state officials and should include a wide variety of perspectives and a multiplicity of actors. Nowhere has the involvement of non-governmental actors in international law been more influential and profound than in the development of international human rights law. This field is particularly germane to the topic of this lecture, since human rights law constitutes both the historical and conceptual predicate upon which modern programs of international election observation has been based. As a result, it is necessary to take a closer look at the growing pattern of interrelationship between human rights, international politics and election norms.

HUMAN RIGHTS IN WORLD POLITICS

The way people are treated in their own countries, the observance of "human rights," has become a fundamental matter of international political concern. Cultural diversities notwithstanding, we all know what these basic human rights are, for the international community has authoritatively prescribed them in a series of remarkable documents. No serious scholar doubts the competence of international organizations as well as non-governmental organizations to examine official national practices in terms of compliance with those basic human rights. Indeed, few are the governments that still contend that international organizations and governments are precluded by a doctrine of "domes-

⁴ Myres S. McDougal, ET AL, *The World Constitutive Process of Authoritative Decision*, in MYRES S. MCDUGAL & W. MICHAEL REISMAN, *INTERNATIONAL LAW ESSAYS* 191 (1981).

tic jurisdiction” from examining the human rights practices of other governments and then modulating some of their political relations with those other governments by reference to the degree of compliance with international standards.

These features of contemporary international politics that we now take as self-evident are the culmination of a series of remarkable, indeed revolutionary changes in international law, that have occurred in less than a century. To measure how far reaching the changes have been, one need only compare the Covenant of the League of Nations of 1919 with the Charter of the United Nations of 1945. The preamble of the Covenant makes no reference to human rights or democracy. Even the Covenant’s system of Mandates, in which the victors of the First World War assigned themselves a “sacred trust” over components of the losers’ empires, only required the mandatory Powers to provide for the “well-being” and “development” and “freedom of conscience and religion” of their new protégés. As for the spectrum of economic and social rights, the Covenant limited itself to a commitment by its signatories to “endeavor to secure and maintain fair and humane conditions of labor for men, women and children.” In contrast with the Covenant’s Preamble, the Preamble of the United Nations Charter expresses the determination of the “peoples of the United Nations”:

To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

And in contrast with the Covenant’s vague commitment to “endeavor” to secure decent labor conditions, the Preamble of the Charter expresses the determination

to employ international machinery for the promotion of the economic and social advancement of all peoples.

Various other human rights commitments and undertakings are scattered throughout the Charter.

In 1948, the United Nations General Assembly produced the Universal Declaration of Human Rights, which proclaimed in its Preamble that:

Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

. . . a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge.

The General Assembly proclaimed that the Universal Declaration was to serve as a "common standard of achievement."

The Universal Declaration is a particularly important milestone in the emergence of the international practice of election observation, and we will return to it. But you will have noted that it was a "Declaration," voted by the United Nations General Assembly, and not a "Convention," accepted as legal by the states who were parties to it. Hence its authority, at least at its inception, was uncertain.

The common standards of achievement in the Declaration were subsequently elaborated in two separate Covenants, one on Political and Civil Rights, the other on Social and Economic Rights. In contrast with the legal ambiguity of a declaration in international law, each of these latter instruments was a treaty with an enforcement mechanism. But in international law, words are cheap. Deeds are dear. The significance of human rights in international politics would be underestimated were one to look only to these brave words and their sketchy international organizational arrangements for implementation. The great industrial democracies which, led by the United States, played a leading role in the formation and then financing of the United Nations were increasingly pressed by their own politically relevant social strata to demand human rights compliances in other parts of the world. In the United States, the national mobilization of World War II began to transform the mythical "melting pot" from an ideal in which foreign immigrants totally assimilated themselves into an Anglo-American cultural *milieu*, to one which recognized the legitimacy of a partly unassimilated dual ethnic or cultural heritage, Italian-Americans, Jewish-Americans, Mexican-Americans, etc. These groups found the generalized, non group-specific language of human rights particularly useful when pressing for the protection of co-religionists and co-ethnics abroad.

At the same time, the mass media, the neural network of mass industrial societies, routinely reported serious human rights violations that occurred abroad if for no other reason than that their drama and human interest made them newsworthy. In the process of reporting on human rights, the media gradually created for itself an appraisal and censorial function under

which they came routinely to make judgments about governmental behavior in terms of prescribed law. In doing so, they began to act as a restraint on governmental violations of law and to validate themselves as an indispensable Fourth Estate in modern mass democracies. At first, media scrutiny of human rights behavior was limited to the domestic political context. Soon, however, this function came to be extended transnationally. The technology of satellite communications permits the successors to the old wire services, national networks such as CNN and BBC, to cover human rights stories in every country and to convey vivid visual images of human rights violations everywhere on the planet.

The extension of media coverage of human rights into the international arena, however, raised the problem of what standards to apply in appraising human rights behavior in foreign countries. As outsiders, the media did not feel entitled to apply their own idiosyncratic criteria, but rather sought to find some authoritative criteria, not linked to the domestic policies of any specific country, that could be applied objectively in a variety of transnational contexts. In order to resolve this dilemma, the media seized upon international law, and in a short time, incorporated key parts of the international human rights code as "natural" standards for the appraisal of actions in other countries. Each additional invocation of these symbols and legal prescriptions has reinforced them further, to the point that, in the United States, the invocation of human rights has become a guiding part of our foreign policy and at times has acquired a remarkable force. It was a centerpiece of the Carter Administration and often touted by the Reagan Administration. To cite only one current example, to show how important human rights rhetoric has become, both the Executive and the Congress justify their conflicting policies vis-à-vis China by insisting that each is trying to promote human rights!

Alongside the media, non-governmental human rights organizations, such as Amnesty International and the International Commission of Jurists, have been particularly important catalysts in the formation of international human rights standards. The code of international human rights, the Universal Declaration, was itself initiated by non-governmental organizations, the leading ones under the inspired leadership of Eleanor Roosevelt.

With the adoption of each new international instrument declaring or defining human rights, more NGOs formed and became active in capitals where organizations with human rights competence had their headquarters. In some human rights treaties, for example the American Human Rights Convention, an explicit role is assigned to these non-governmental organizations.

NGOs specialized to human rights have developed capacities for gathering information about human rights compliance and violations in distant states. In so doing, they routinely apply existing human rights standards in their appraisals. Many also help expand the international human rights code by lobbying their own states' legislatures to adopt new human rights instruments, and to deny foreign aid or some other discretionary benefit to a government whose human rights record does not meet an applicable standard.

This latter modality is particularly effective due to an important division in the world political economy: you can divide the world social process many different ways, but one division is particularly important to our inquiry: the wealthy states have popular democratic governments and the desperately poor states have autocratic and dictatorial ones. Thus, while the governments of the poor autocratic states huff and puff about their sovereignty and independence, they need and solicit substantial assistance from the wealthy democracies. Increasingly, as a result of better information about conditions in other parts of the planet and the inclination to use human rights norms as an evaluative criterion on the part of both the media and NGOs, politically relevant strata in the democracies are less and less willing to have their governments give public money or other forms of political indulgence to support tyrannies. Tyrants rarely surrender power for money, but the evidence suggests that they may try to democratize themselves for it.

I am not suggesting that world politics can be reduced to a crusade of virtue for human rights. International politics is still an often savage and brutal business. But all politics and particularly mass politics necessarily involve the use of symbols, and the symbols of human rights and, with them, of democracy have come to play an important role on the international scene. As part of that development, valid elections — and with them, the need for reliable electoral supervision — have acquired a special

international legal and political importance.

INTERNATIONAL AUTHORITY FOR ELECTION OBSERVATION

While the growing use of international election observation thus owes its development to a complex interaction between international legal norms and the more informal work of non-governmental actors, the legitimacy of outside observation of foreign elections rests upon a well-developed body of international law that stresses the importance of free elections in the international political order.

We have had occasion, in contrasting the United Nations Charter with the Covenant of the League of Nations, to note the dramatic shift from an essentially state-oriented organization to an organization which, while carrying over some conceptions fundamental to the Covenant, introduces the radically new notion of "fundamental human rights."⁶ This sea of change must be considered more closely now.

In Article 55, the Charter linked the historic collective security ambitions of general international organizations to basic human rights:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among the nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote

(a) higher standards of living, full employment, and conditions of economic and social progress and development;

(b) solutions of international economic, social, health, and related problems; and international cultural and education co-operation; and

(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

In Article 56, the members of the Organization pledged themselves to "take joint and separate action in cooperation with the

⁶ U.N. CHARTER pmbl.

Organization for the achievement of the purposes set forth in Article 55.”

Chapter X of the Charter created a special organ, the Economic and Social Council, of twenty-seven members which, among other things, was authorized in Article 62 to

make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

With regard to the Member States themselves and their own metropolitan populations, the Charter does not explicitly incorporate free and fair domestic elections into the general rubric of basic human rights and fundamental freedoms. It does, however, take this step with regard to various non-self-governing territories for which Member States assumed responsibility. Chapter XII established the International Trusteeship System as a successor to the system of mandates that had been established by the League of Nations. Article 76 of the Charter provides in relevant part:

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the Present Charter shall be:

. . .

(b) to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the people concerned, and as may be provided by the terms of each trusteeship agreement.

The language of “freely expressed wishes” made it difficult to escape the conclusion that some form of free electoral process, at least for basic constitutive decisions associated with the transition to national independence, was an expected prerequisite of the United Nations Trusteeship system.

Trusteeship territories were to be subject to a Trusteeship Council. While the Council, as conceived in the Charter, did not have the authority to enforce the objectives expressed in Article

76 of self-government or independence of the peoples of the territory through their freely expressed wishes, the Trustee States were, for the most part, victors in the Second World War, who had committed themselves to democracy in the Atlantic Declaration and were already practicing democracy at home. As a result, the chances for the implementation of the policy through Article 76 were quite promising.

The irony that the Charter articulated a fundamental policy of allowing free expression of political choice to peoples who were not yet independent, but not to the membership of the United Nations itself, was rectified in the Universal Declaration of Human Rights of 1948. This document, which we considered earlier, extended the policy of popular government and free elections to all states. Article 21(3) 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 by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The basic text on which international election observation rests is Article 21(3) of the Universal Declaration of Human Rights. It has been confirmed by subsequent human rights instruments. The injunction of Article 21 of the Universal Declaration was reinforced in Article 23 of the Covenant on Civil and Political Rights. A specific competence for the United Nations in election supervision and observation was established in Resolution 1514(xv) in implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.⁶

This general international trend was confirmed in a number of subsequent regional international human rights conventions, some of which have assumed major importance in the international human rights movement. The European Convention on Human Rights was signed in Rome on November 4, 1950 and entered into force in 1953. Its Preamble cites the Universal Declaration of Human Rights and concludes:

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political tradi-

⁶ G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 162, U.N. Doc. A/4684 (1960).

tions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration.

The European Convention does not incorporate anything approximating Article 21(3) of the Universal Declaration. But the First Protocol to the Convention, which entered into force in 1954, stated in Article 3:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

In 1948, the Final Act of the Ninth International Conference of American States at Bogotá, Colombia adopted a text which had originally been drafted by the Inter-American Juridical Committee in 1946. The American Declaration of the Rights and Duties of Man provides in Article XX:

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.

In 1969, the Organization of American States created the American Convention on Human Rights which transformed the policy expressed in the Declaration into a conventional obligation for parties to this treaty. Article 23 provides in relevant part:

1. Every citizen shall enjoy the following rights and opportunities:

...

(b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters.

While the American Convention allows for suspension of some of the guarantees it prescribes, it specifically prohibits suspension, even in time of war, public danger, or other emergency, of Article 23. Moreover, the American Convention establishes an incipient enforcement mechanism in the form of the Inter-American Commission on Human Rights and the Inter-American Court of

Human Rights, making the content of Article 23 potentially enforceable with regard to States-Parties.

The African Charter on Human and Peoples' Rights provides in Article 13(1) that:

Every citizen shall have the right to freely participate in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

The International Convention on the Elimination of All Forms of Racial Discrimination provides in Article 5:

In compliance with the fundamental obligations laid down in Article 2 of this Convention, State Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right to everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notable in the enjoyment of the following rights:

...

(c) Political rights, in particular the rights to participate in elections — to vote and to stand for election — on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level, and to have equal access to public service.

None of these various texts mentions election observation as such. But all of them, with increasing explicitness, establish the notion that government must be popularly based and that the popular will is to be expressed in free elections.

On December 18, 1990, the Third Committee of the General Assembly enacted Resolution 45/150 by a vote of 129 to 8. It bore the title, "Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections." Two paragraphs in the preamble are particularly striking:

Reaffirming the Universal Declaration of Human Rights, which provides that everyone has the right to take part in the government of his or her country, directly or through freely chosen representatives, that everyone has the right of equal access to public service in his or her country, that the will of the people shall be the basis of the authority of government, and that this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures,

Noting that the International Covenant on Civil and Political Rights provides that every citizen shall have the right and the opportunity, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, to take part in the conduct of public affairs, directly or through freely-chosen representatives, 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, and to have access, on general terms of equality, to public service in his or her country.⁷

The Third Committee of the Assembly proceeded to stress its conviction:

[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.⁸

The Third Committee declared:

That determining the will of the people requires an electoral process that provides an equal opportunity for all citizens to become candidates and put forward their political views, individually and in co-operation with others, as provided in national constitutions and laws.

The Third Committee then affirmed the continuing value of United Nations' electoral assistance and requested that a report be prepared by the Secretary-General on the subject. That report was issued in November, 1991.⁹ It reviews United Nations experience in electoral verification in trust and non-self-governing territories in Namibia, Western Sahara, Nicaragua, and Haiti and surveys the United Nations bodies that have been in-

⁷ Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections, G.A. Res. 766, U.N. GAOR, 45th Sess., 69th mtg., at 457, U.N. Doc. 45/150 (1990).

⁸ *Id.* at para. 2.

⁹ Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms: Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections: Report of the Secretary-General, U.N. GAOR 46th Sess., Agenda Item 98(b), U.N. Doc. A/46/609 (1991).

volved in various phases of electoral assistance. Of particular importance in this report is a detailed discussion of considerations of a practical nature. The observations here are, in my view, of continuing relevance to NGO as well as international governmental organization observation with regard to procedures of observation and criteria of what constitutes a free and fair election.

These resolutions are all the more surprising in that a large number of the governments sending voting representatives to the General Assembly are not themselves the product of internal elections that would be characterized as free and fair. The point was apparently belatedly appreciated, for on November 29, 1991, the Third Committee, by a vote of 86 to 40, passed a resolution on non-interference in electoral processes.¹⁰ The Resolution asserted that the determination of the methods and institutions for the electoral process was the sole concern of the people of a particular state and that what the Assembly characterized as "attempts to interfere in the free development of that process" violated the Charter. The Assembly also concluded that there was no universal need for the United Nations to provide electoral assistance except in special circumstances and appealed to states to refrain from financing or providing overt or covert support to "undermine" the electoral process in any country.

The ambivalence apparent in this Resolution did not restrain the process of United Nations participation in national elections. On December 20, 1991, then Secretary-General Pérez de Cuéllar notified the Security Council that he intended to recommend that the Council authorize a mission to monitor elections in Angola. The Secretary-General had already initiated preparation for a small team of experts and support staff to go to Angola to provide technical assistance for the upcoming election. In a statement issued through his spokesman, the Secretary-General said:

Internationally supervised elections constitute the central element in the implementation of the Angola Peace Accords. The

¹⁰ Third Committee Says United Nations Assistance in Electoral Processes Needed Only in Special Circumstances: Committee Approves Drafts on Human Rights in Iraq, Occupied Kuwait, Afghanistan, El Salvador: also Texts on Other Rights Issues, U.N. GAOR, 3rd Comm., 46th Sess., U.N. Doc. GA/SHC/3102 (1991). A/C.3/46/L. 60.

monitoring should cover the entire electoral process, including voter registration.¹¹

The Assembly may have had second thoughts, but the international process of election observation and facilitation continues to operate.

FREE AND FAIR ELECTIONS: THE INTERNATIONAL STANDARD

As noted before, the standard applied by the international community with regard to national destiny decisions is that of "free and fair elections." What exactly does this term mean? The answer to this question is not easy, for there are enormous variations in political culture and, in particular, in the cultural environment and psycho-personal organization that undergird the complex social system called an election. Participation in an election presupposes a belief in the efficacy of personal choice and action. It presupposes a psycho-personal organization of individuation in which there has been significant ego formation — the psychological substratum of the capacity to act on one's own behalf — and a belief in the rightness and utility of making up one's own mind. This, in turn, presupposes that the person making a choice believes that the options available are sufficiently real and different to make the effort to campaign and vote worthwhile. These presumptions themselves are based on many additional meta-assumptions which involve complex notions of time and space. They are not universally shared.

The notion of an election may mean one thing to a middle-class voter in the United States and quite another to a tribesman in Papua. And even within the United States, the term's meaning may vary depending on the class, culture, ethnicity, or gender of the person using it. As the world moves closer to a homogenized global culture, many of these differences will disappear. But in the short-run, the clarification and then application of an international standard of a free and fair election to a wide diversity of cultures and political systems will require tolerance, a capacity for cultural empathy, and relativism. Yet, these agreeable properties must not be applied in ways that drain the

¹¹ Secretary-General, Statement at informal consultations of the Security Council on the Angolan request for U.N. electoral observers (December 20, 1991).

international standard of its meaning.

The United Nations Charter acknowledges this tension. It will be recalled that Article 73, dealing with non-self-governing territories, obliges members of the United Nations who have or assume responsibilities for the administration of those territories "to assist them in the progressive development of their free political institutions, *according to the particular circumstances of each territory and its people and their varying stages of advancement.*" (italics supplied). Article 76, dealing with international trusteeships, seeks to promote the progressive development toward self-government or independence of the inhabitants but adds "as may be appropriate to the particular circumstances of each territory and its peoples." The Third Committee of the General Assembly, in the important resolution "enhancing the effectiveness of the principle of periodic and genuine elections" of December 18, 1990, reiterated the point in "[r]ecognizing that there is no single political system or electoral method that is equally suited to all nations and their people"¹² Qualifications such as these are an important concession to reality and avoid an overly rigid rule which could not be met in many circumstances and would ultimately be self-defeating. We may refer to the approach as "the principle of contextuality."

The principle of contextuality itself imports that the notion of a free and fair election in any particular context will not be a mathematical operation but is perforce a prudential conclusion based on an appreciation of the total context and, in particular, of the local political culture. Elections are notoriously untidy events, incorporating many individuals over a wide area. Even in the cleanest elections, where the rules of the game are relatively clear, some violations are to be expected. This is all the more true when the stakes are high, as they invariably are in national destiny decisions, and where the temptation to some participants to cut corners correspondingly increases, and especially so when there is an expectation that electoral victory will retroac-

¹² Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections: Report of the Third Committee, U.N. GAOR 3rd Comm., 45th Sess., Agenda Item 110, at 3, U.N. Doc. A/45/766 (1990), quoting G.A. Res. 766, U.N. GAOR, 45th Sess., 69th mtg., at 457, U.N. Doc. 45/150 (1990).

tively justify and cleanse any and all delicts committed in securing it. My point is that there is no bright line rule: The existence of some violations does not necessarily signal that an election as a whole was not free and fair. As elsewhere in the law, judgments must be made as to whether the process, in its totality, attained the applicable standard.

Whenever discretion is authorized, reasonable people may disagree. The discretionary space that is required in the development and application of the free and fair election standard may itself be the source of some disagreements. For my part, I believe that whatever the context and political culture in which a particular election takes place, the key criterion of fairness is whether all of the contending parties have approximately equal opportunities to present their cases to a public which, in turn, may make a free choice. To borrow a term dear to my students, we are talking about establishing "a level playing field." The difficulty is that often one must create the field in a country where none has previously existed or, if it did, it was landscaped to incline sharply in favor of the government. Thus I cannot fully subscribe to the suggestion made by Garber and the International Law Group that the general feeling of the population as to whether or not their election was free and fair is always an important datum in determining an election's validity. In countries in which the political culture is unfamiliar with elections, the subjective appreciation may simply not be congruent with fundamental international norms.

Therefore, even while taking into account variations in local political culture, we must still determine some general rules as to what kind of an election process constitutes the basic elements of being a level playing field. What are the components of a free and fair election? I believe that Professor Franck is correct when he says,

The terms inevitably convey different meanings in various political cultures but, remarkably, evoke an amply demonstrable degree of convergent expectations.¹³

The rich body of electoral observation practice now available

¹³ Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 90 (1992).

provides a source for clarifying what expectational norms have emerged, how they have adapted themselves to the diverse circumstances presented in election observation, and what social goals animate them. I suggest that there are thirteen factors that observers must check. For each, past practices and general principles accepted by all advanced democratic political systems permit us to infer some (and sometimes substantial) consensus concerning international policy norms. While the contexts in which the principles are applied may vary, depending on local political culture and circumstances, the policies themselves should be constant for each election and thus warrant the appellation of the international standard of a free and fair election. Let me briefly set out their dimensions.

1. *Fair Maintenance of Security for All Phases*

Elections represent an effort to institutionalize, democratize, and pacify what are otherwise violent struggles for power. In a number of national destiny elections, one or more parties may try to disrupt the elections or intimidate the electorate, seeking either to prevent their participation or force them to support one or another party. Few of the critical elections that get international observation are free of such violence. But it is clear that, beyond a certain point, the failure to control such violence chills individual free choice and contaminates the freedom and fairness of an election as a whole.

2. *Fairness and Appropriateness of the Electoral System*

There is a rich political science literature on the comparative effects and advantages of different types of electoral systems for the various electoral contenders. Where a metropolitan power is supervising an election in a hitherto dependent territory and uses a system significantly different from its own electoral system, there may be a suspicion about the motives and consequences of the choice. At the same time, the social context and political culture of the territory in which the election is being conducted may in fact require some adjustment of the electoral process.

The elections conducted by Australia in Papua New Guinea in 1972, which were observed by representatives of the Secre-

tary-General of the United Nations, provide an instructive example of the types of issues involved. At the time Australia used a preferential voting system which invalidated ballots where the order of preference was not marked for all candidates. It was felt by the organizers of the Papua election that the application of a strict preferential system would result in an extremely large number of invalidations, with the result that the poll itself would be unrepresentative. An alternative "optional preferential system" also seemed unsuitable. In its stead, a "first-past-the-post" system was suggested. A United Nations Visiting Mission in 1968 expressed reservations about the choice:

While the Mission felt that there were drawbacks in the preferential system, it felt bound to acknowledge that it is probably the better system to use in the circumstances prevailing in the Territory. Loyalty to the clan or linguistic group is so strong in New Guinea that, if the "first-past-the-post" system were used, it could be expected that the largest clan or language group would succeed in having its candidate elected in every election even though that clan or language group would constitute only a small minority of the total electorate.¹⁴

In 1969, a Commission of Inquiry on Electoral Procedures was appointed by the Australian Administrator of Papua. It recommended that the optional preferential system that was then applied be retained since a majority of the people seemed to endorse it. But the Commission's recommendation was hardly enthusiastic. "[T]he understanding of the method of distributing preferences under the optional preferential system by the average Papuan and New Guinean was anything but clear."¹⁵ The Commission decided to remain with this procedure, however, because it felt that the majority of the inhabitants understood "the value of distributing preferences" and that "the people trusted the system and believed in its fairness, even though no deep understanding existed of its detailed functioning." The optional preferential system seemed to be the least undesirable of the alternatives. The Commission's Report made clear that a majority of the population was concerned that a "first-past-the-post" sys-

¹⁴ U.N. TCOR, 39th Sess., Item 6 of the provisional agenda, at 9-10, U.N. Doc. T/1732 (1972).

¹⁵ *Id.* at 10.

tem could lead to an electoral result marked by the preponderance of one particular ethnic group. Ironically, as the Commission observed, in practice the optional preferential system could often lead to a "first-past-the-post" result, and indeed in 1968, in fifty of sixty electorates in which optional preference was the system, the final result was the same as would have been obtained in a "first-past-the-post" system.¹⁶ The Papuan example is instructive owing to the recognition on the part of both observers and electors that the voting method selected would influence outcomes. In Papua, it would seem, the supervising authorities wished to allow for representation of many of the smaller ethnic and linguistic groups and chose an electoral system accordingly.

3. *Comprehensive Voter Registration Procedures*

Registration is a particularly critical event in the electoral process. The Director of the United Nations Transition Assistance Group (UNTAG) in Namibia wrote to the South African Administrator General on June 26, 1989,

... the Special Representative must at each stage, level and place satisfy himself that the conduct and the procedure of the voter registration are fair and appropriate. Moreover, the Special Representative will bring to the attention of the Administrator-General his comments and proposals in regard to any aspect of the voter registration process whenever he thinks that it is necessary. The Special Representative shall give due consideration to the way in which the Administrator-General responds to his proposals when the Special Representative makes his final determinations on the existence of free and fair conditions for the election.¹⁷

Even when registration rules are in place and may have been generally fair, the nature of the national destiny election may require their adjustment. In the 1965 Cook Islands' elections, which were observed by representatives of the United Nations Secretary-General, the New Zealand Parliament reduced the residential qualifications for voters and candidates to three

¹⁶ *Id.*

¹⁷ Agreement on Procedures in Connection with the Registration on Voters, OFFICIAL GAZETTE EXTRAORDINARY OF SOUTHWEST AFRICA, July 1, 1989, at 2. (No. 5744).

months for persons who had at some time lived in the Cook Islands for not less than a year. While this would have been odd in the context of an ordinary election, it made great sense in an election determining the future status of the territory.¹⁸

In some cases, insufficient records will influence the criteria used to establish the voter pool. In Togoland, the right to participate in the plebiscite was given to persons over twenty-one who were residing in the territory or had been there for at least twelve months in the two years preceding. There was no reference to birth qualifications, which is a recurring characteristic in most registration statutes, for there were no records of births in the territory and the use of other official records, such as tax receipts, would have unduly restricted the voter pool, many of whose members were not participants in a cash economy.

It is obvious that no matter how fair other procedures may be, an electoral process would be unfair if the class or category of those entitled to cast a vote was restrictive and effectively excluded people who would be affected by the outcome of the vote and who, by general standards, would be deemed a proper part of the voter pool. For example, Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination speaks of "universal and equal suffrage" and specifies that "race, color or national or ethnic origin" are illicit grounds for restricting participation. Other authoritative documents prohibit sexual discrimination.

I submit that the international election observer should incline to construe the contemporary international standards in this regard as strictly as possible. The human rights code prescribes equality between the sexes. Hence, a voter pool that sought to preclude women from voting ordinarily should, *prima facie*, fail the applicable standard. A franchise right based on minimum property would also be unacceptable, for it would deny equal treatment to people on the basis of their wealth. Minimum ages for the right to vote would, one would think, also be determined by reference to the international code.

On the other hand, even if one can determine a standard for

¹⁸ Note by the Secretary-General transmitting a letter dated 13 August 1965 from the representative of New Zealand, U.N. GAOR 4th Comm., 20th Sess., Annex, Agenda Items 23 and 24, at 1, U.N. Doc. A/5961 (1965).

who should be in the pool of voters by reference to international human rights law, there may still be situations where the application of those principles to particular cases may be highly problematic. In a fair number of instances, national destiny decisions must be taken in political cultures that are unfamiliar with democracy. Sometimes these decisions are taken in traditional cultures where this sort of election could well be the first. Fundamental and tightly-woven cultural features, for example, the subordination of women to men or the substantially reduced civic rights (if any) of younger males to older males, would, if applied, reduce the voting pool in a way which fell far from the international standard. In some cultures, a decision may be taken by a tribal leader or patriarch, and then dutifully followed by other members of the group, though some apparently hierarchical traditional structures may conceal a good deal of consultation and even power sharing.¹⁹ Under such circumstances, while features such as traditional power concentrations should be the target of longer-term social reconstruction, to seek to change them for a particular internationally-supervised election might encounter so much resistance that it would be counterproductive. Indeed, strenuous efforts to induce change might be viewed as threats to entrenched political elites where power is based on traditional forms of government, and who might therefore then seek to undermine the election. On the other hand, not to challenge such practices may unfairly predetermine the outcome of the election.

In seeking to resolve this dilemma, practice has shown the virtue of pragmatic and adaptable solutions to the problem of voter registration. In place of the application of a single uniform principle, in most cases of significant conflict, a settlement appears to have been negotiated among the contending parties in the election.

4. *Candidature*

Even when the pool of voters is assembled in ways that meet international standards, the result may have little effect if

¹⁹ See Khanya B. Motshabi & Shereen G. Volks, *Towards Democratic Chieftaincy: Principles and Procedures*, in AFR. CUSTOMARY L. 104 (1992).

a full range of candidates representing the spectrum of politically relevant views is not available to the voter. In national destiny elections, many of which follow long periods of dictatorship, candidates who represent key parts of the constituency or espouse views that are important to some of the voters may be barred by residency requirements which they could not have fulfilled if they were in exile. In some cases, would-be candidates who were associated in some way with the ousted regime may be barred from participation by law.

On the other hand, there have been national destiny elections in the past several years in which effective restrictions on candidature did not operate. As a result, the field may be so full of candidates and small parties that it creates administrative burdens, problems of allocation of media time and even voter confusion. In the 1990 Mongolian elections, which were internationally observed, primaries were conducted to narrow the slate of nominees. In one race, some seventy candidates had been nominated. The law required that that number be reduced to two. The observers noted:

The most significant problem associated with the primary election was the general lack of publicly-available information about the candidates and confusion among voters regarding voting procedures. This was principally due to the extraordinary number of nominees and the short time between the nomination period and the primary election, consisting of approximately one month. Under such circumstances, it was virtually impossible to educate the electorate about all of the candidates' positions, particularly given the inexperience of the opposition parties, and the electorate, with multi-party elections.²⁰

Plainly, what is required is a balance between representativeness of news and a reasonable economy of candidates, in which a field is presented which is not so crowded that the voter cannot distinguish the candidates. Obviously, this necessary procedure can lead to abuse. Whether abuse has in fact occurred in a particular election will often be a matter of judgment for the observers.

²⁰ INTERNATIONAL HUMAN RIGHTS LAW GROUP, MONGOLIA IN MIDSTREAM: A FINAL REPORT ON THE 1990 MONGOLIAN ELECTIONS 10 (1990).

5. *Public Enlightenment: Adequate Opportunity to Campaign and to Make Positions Known*

The whole idea of an election is to provide the voting body or electorate with an adequate opportunity to inform itself of the issues and options available to it and to permit it to form an enlightened opinion. In the simplest sense, this involves the freedom of candidates to move about the territory in which the election is to be held, to have access to those public spaces where the electorate can come together to hear views expressed, and to have the use of those instruments of public communication that have been established to convey information to the voters concerning the issues. Where the electorate may not fully appreciate the gravity of the decision presented in the election, especially in transitions from some form of colonial control to independence, the supervising authority often undertakes what in the Cook Islands' election was called a "public enlightenment program," using the available media and structuring access to them in ways that do not discriminate against any of the competing political parties.²¹ The New Zealand authorities prepared a number of pamphlets including a rather detailed "meaning of the Cook Islands Constitution" as well as a series of radio broadcasts.

In some circumstances, public enlightenment about voting requires a much more massive educational and even social reconstructive program. After Gorbachev's reforms in the former Soviet Union, an intense discussion within the country addressed the question of how to conduct future elections.²²

The applicable international standard is clearly reflected in the Peace Agreement achieved in El Salvador between the government and the Farabundo Marti Liberacion Nacional (FMLN) on January 16, 1992. Chapter VI of the Agreement is entitled, "Political Participation by FMLN." Item 6 of this chapter provides for the "legalization of FMLN as a political party, through

²¹ Note by the Secretary-General transmitting a letter dated 13 August 1965 from the representative of New Zealand, U.N. GAOR 4th Comm., 20th Sess., Annex, Agenda Items 23 and 24, at 10, U.N. Doc. A/5961 (1965).

²² For a discussion of the various experiments that were considered, see Jeffrey W. Hahn, *Power to the Soviets?* 38 PROBLEMS OF COMMUNISM 34 (Jan.-Feb. 1989); Max E. Mote, *Electing the USSR Congress of People's Deputies*, 38 PROBLEMS OF COMMUNISM 51 (Nov.-Dec. 1989).

the adoption of a legislative decree to that end.”²³ Item 7 provides:

Guarantee that FMLN will be able to conduct its activities normally when it becomes a political party, meaning:

- (a) Freedom to canvass for new members;
- (b) The right to set up an appropriate infrastructure (premises, printing works, etc.);
- (c) Free exercise of the right of assembly and mobilization for FMLN leaders, activists and members;
- (d) Freedom for FMLN to purchase and use advertising space in the mass media.²⁴

Item 4 provides for the “granting of licenses for FMLN mass media.”²⁵

Providing adequate opportunity to campaign and to make messages known is sometimes a complicated matter. Where the security situation in certain parts of the territory is uncertain, the government or the military which may support one particular party or faction may try to bar opposition campaigning on the ground that security cannot be assured. Sometimes this may be true, sometimes not. The El Salvador Peace Agreement of 1992 offers one solution to this problem: the chapter concerning political participation by FMLN deals explicitly with the need for special security measures for the FMLN leadership.

6. *Access to the Media Insofar as They Exist and Fairness in Reporting*

In relatively small communities, a candidate may be able to get his or her message across to the electorate by a sequence of face-to-face discussions to small groups or even in one-on-one unmediated exchanges. But the nature of mass society is such that the presentation of views of an individual to the electorate

²³ U.N. SCOR, 46th Sess., Agenda Item 31, at 39, U.N. Doc. A/46/864; S/23501 (1992).

²⁴ *Id.*

²⁵ *Id.*

must normally be accomplished through some indirect medium. Hence, the extraordinary importance of the mass media in a free and fair election, and the concomitant development of national "fairness" and "equal time" doctrines and their subsequent incorporation into international electoral standards. Where one party or faction controls all the newspapers or all of the television stations and does not provide meaningful opportunities to other factions to present their views to the electorate, a serious election pathology occurs. For example, among the many defects marring elections held in the socialist dictatorships of Eastern and Central Europe during the Cold War, control by the communist party of the media and its attendant monopoly over the shaping of images of reality and options for choice were perhaps most egregious in rendering such elections meaningless rituals.

International standards for media coverage are well illustrated in the instructions the Secretary-General of the Organization of American States gave to his observers in the Nicaraguan observed election of 1990. Nicaragua has a rich diversity of newspapers with different political orientations. The broadcast media, however, tended to be government controlled. Hence, the Secretary-General instructed that:

Radio and television broadcasts both in Managua and in the various regions should be closely monitored and special attention should be given to news coverage, particularly the extent of that coverage. The observers in Managua should also respond to complaints of interference with ten-minute programs presented by the various political parties.

Because the three daily newspapers represent distinct political leanings, it is not so important to assess the neutrality of their news content. Still, any attempt at censorship or interference with a newspaper's activities will call for an immediate investigation.²⁸

Media were deemed so critical to this election that the four Presidents of the other Central American Republics took special notice of then President Ortega's commitment to reform "election laws and legislation governing the expression of thought, information and public opinion so as to safeguard the organization

²⁸ Second Report on the Observation of the Nicaraguan Electoral Process July 13 to November 3, 1989, OEA/Ser.G CP/INF.2850/89 add. 1, Appendix 1, at 36 (1989).

and political activities of the parties in the broadest sense possible."²⁷ In addition, the Secretary-General of the Organization of American States issued a special report on observation of the passage of the electoral and mass media laws.²⁸

Views will differ on how strictly the fair and equal standard should be applied. The Organization of American States Observation Mission to the elections in Nicaragua in 1990 was particularly successful in inducing government compliance with international standards concerning this phase of the electoral process. In its third report on observation, the Organization of American States Observer Group criticized televised electoral programming for failing to provide "a spontaneous and balanced presentation of the different views and arguments." The Observers subsequently called a meeting of the political parties and of representatives of the Sandinista television system to arrange changes in program format. It was agreed that, in addition to presentations already available to the parties, debates would be presented between two of the ten contending parties each Tuesday and Thursday. The format of the debates and the time allotted to each speaker were prescribed, as were the time limits for questioning. In light of the international scrutiny, the moderator was careful in conducting the debates. There was general agreement that the fairness of this aspect of campaigning sharply improved after these agreements.

Control of television is valuable in election campaigns, because there can be latent or subliminal campaigning and advertising in the guise of how news is presented and which matters are selected and which suppressed in routine coverage. Initially, there was a report of Sandinista slanting of news, but after the fourth report of the Organization of American States, that situation appeared to have improved as well.²⁹ The Organization of

²⁷ Report of the Secretary General on Observation of the Passage of the Electoral and Mass Media Laws of Nicaragua and the Agreement on the Privileges and Immunities of Observers of the Nicaraguan Election Process, OEA/Ser.G CP/INF.2850/89, at 2 (1989).

²⁸ Report of the Secretary General on Observation of the Passage of the Electoral and Mass Media Laws of Nicaragua and the Agreement on the Privileges and Immunities of Observers of the Nicaraguan Election Process, OEA/Ser.G CP/INF.2850/89 (1989).

²⁹ Fourth Report on Observation of the Electoral Process in Nicaragua during the period from January 1 to February 15, 1990, OEA, at 1-2 (1990).

American States observers also directed their attention to how radio was being used, and towards ensuring general availability of access to the published media for all of the parties.

Even when media are generally available to various parties and candidates, the message does not always get across to the electorate. In the United States, which boasts an unparalleled media network, a "thorough" airing of the substantive issues in important elections is sometimes less than thorough. Indeed, negative advertising and carefully crafted "sound bites" can obscure the critical issues. Perhaps because of the gravity of the issues, however, this problem appears to be less severe in the national destiny decisions that have been observed.

7. Opportunities for Popular Participation in Campaigning

Electoral campaigns, particularly in large states, involve perforce the mobilization of the efforts of many individuals to prepare materials, assemble voter lists, deliver information to voters, assist in bringing voters to polls on election day, and so on. The observers must therefore scrutinize such issues as whether impediments, restrictions, or favoritism are at play in access to public transportation, and whether the transportation system is in operation on days when opposition parties hold their political rallies. It may be necessary to determine whether government buildings are being used to support prohibited partisan undertaking. Along with popular participation, many electioneering activities require the expenditure of often considerable sums of money.

In some systems, the community, through the government, contributes sufficient funds to each group deemed a significant contender to enable it to engage in many of the activities we have already considered. In many other systems, however, private campaign contributions are indispensable bases for any would-be candidate. Election observers must therefore be sensitive to instances, as in a number of prior elections, where campaign contributions to an opposition party lead to harassment by the tax authority, or opposition parties are denied a variety of economic privileges that are controlled by the state. In addition, failure to provide adequate police protection may lead to the intimidation of individuals who wish to contribute time to the candidate or party of their choice.

8. *Foreign Participation in Observed Elections*

Alongside attempts by ruling governments or parties to retain power by distorting the electoral process, foreign governments may also try to influence local elections by a variety of strategies above all through the introduction of substantial funds into the electoral process for one or several parties.

In 1989, for example, the Noriega Government of Panama protested to the Permanent Council of the Organization of American States about an alleged secret contribution of ten million dollars by the United States to the Panamanian opposition two weeks prior to the elections. The Panamanian Government also alleged that a State Department official was using advanced electronic equipment to disrupt communications in Panama.³⁰ Another instance of widespread foreign participation took place in the Nicaraguan elections in 1990. Here, the Sandinistas received more than \$400,000 of in-kind contributions, compared to \$200,000 of in-kind contributions to the Contras. In addition to the in-kind aid, however, the Contras received almost two million dollars in cash from the Agency for International Development and the National Endowment for Democracy, while the Sandinistas received only approximately \$420,000 in outside cash contributions. While Elliott Richardson and President Carter, as well as the Secretary-General ultimately negotiated various formulas that divided up the monies among the various parties, the introduction of these outside funds was a matter of great controversy.

Part of the difficulty of appraising the effect of the introduction of foreign funds on a free and fair election is that it is often difficult to establish a direct causal relationship between the disbursement of funds and how voters behave. Some voters may change their votes for money. Others use the money to reinforce or "reward" a choice they would have made in any case. Curiously, more indirect uses of money may have more "direct" consequences. An elaborate media budget appears to enhance the opportunities of a party or candidate. A critical question for

³⁰ Note from the Permanent Mission of Panama transmitting the Declaration made by His Excellency the President of Panama with Respect to the United States Government's Interference in the Panamanian Election Process, OEA/Ser.G CP/INF. 2822/89 (1989).

the observer will be whether the foreign funds act to equalize the contending parties' positions or whether they substantially increase the capacities of one contender over the others. In the first instance, the effect of the funds is to give the greatest choice to the voter. In the second, it is exactly the opposite.

An optimum arrangement would be one in which national funds are distributed entirely by an international organization which is playing a supervisory or observational role. In Nicaragua, for example, the Organization of American States group launched a substantial civic education campaign which was financed by Canada, Norway and Sweden without any complaints.

9. *Fair Districting and Parliamentary Structure*

The incorporation of a number of smaller, relatively autonomous political units within an overarching political community is a common technique of modern representative democracy. If done fairly, it can enhance opportunities for individual participation and influence in the political process. It may also be a technique for balancing and restraining the concentrations of power that can arise in a single, superordinated structure or elite. Boundaries of inferior political units may be established geographically or structurally as will be explained in a moment. The way in which boundaries are drawn between constituent parts within a unitary state, or between the component and peripheral parts of a federal system, can have great influence on the relative value of the individual vote. In particular, the presence of inferior political units can induce existing governments to engage in gerrymandering, the manipulation of the boundaries of different voting districts in ways that will unduly influence the outcome of the election so that they discriminate in favor of the gerrymanderer.

The electoral strength of disadvantaged groups may also be diluted by creating different types of parliamentary structures. In South Africa, the apartheid system established a tripartite legislature, divided into three houses according to race. This was deemed to violate international election law. In Resolution 45/150 of December 18, 1990, the Third Committee of the General Assembly, in its resolution on enhancing the effectiveness of the principle of periodic and genuine elections, stated:

[T]hat the tricameral parliament established under the system of *apartheid* is a gross violation of the principle of universal and equal suffrage and has been overwhelmingly rejected by the international community.³¹

Special problems of districting can arise when a nation has been disrupted by civil war for a lengthy period. In the United Nations' supervision of the Cambodian elections, the Report of the Secretary-General of February 19, 1992 intended to help implement the framework established by a peace Agreement that calls for an election on a provincial basis, states:

Owing to the significant demographic changes that have occurred since the last systematic and comprehensive census was carried out, adequate statistics regarding the size and the location of the Cambodian electorate are not available. Accordingly, the allocation of seats in the Constituent Assembly per province should be made only after registration of voters has been completed, it being understood that each province would elect at least one representative. By waiting until the registration of voters has been completed, a more consistent ratio of voters per representative in the Constituent Assembly can be ensured.³²

To be sure, the drawing of electoral lines will always have some consequences, not all of which violate the free and fair standard. The evaluation of whether or not districting is satisfactory depends on the values sought to be elected. Where ethnic or language communities are deemed to be legitimate political units, lines that enclose them in single districts and enhance their ability to elect a co-ethnic may be considered lawful. In systems which eschew such ethnic identifications, any line drawing that reduces or enhances the relative value of one voter against another because he or she is found in a district with more or less electors, is unsatisfactory. But the international legal system is, itself, unresolved on the basic question of whether ethnicity is a factor to be taken account of or resolutely ignored in internationally observed elections.

At this moment, the National Assembly in Taiwan is meet-

³¹ Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections, G.A. Res. 766, U.N. GAOR, 45th Sess., 69th Mtg., at 457, U.N. Doc. 45/150 (1990).

³² G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 6, U.N. Doc. A/4684 (1960).

ing in Taipei to consider constitutional amendments. One subject on the agenda is the method of electing the President. The government party, the Kuomintang (KMT), is pressing for election through an electoral college based on United States' practice. The opposition calls for direct popular election. The electoral college is widely, though not unanimously, viewed as an anachronism in the United States, and its importation and application in a small country like Taiwan would give the governing party enhanced opportunities to create districts and operate within them in order to influence who would emerge as the elector. The electoral college proposal therefore strikes me as a modern example of structural gerrymandering, for it would violate principles of equality without any corresponding gain in administrative efficiency.

A special problem of electoral districting can arise in countries where there is a general conscription system and periodic reserve service requirements. In such cases, international observers must determine whether the government is abusing its power by calling up reservists and using military discipline to try to influence how they vote or by moving reservists about the country, shifting them to districts where their votes will either substantially help a government candidate or the absence of their vote in their normal residence will be beneficial to the government. The 1990 Nicaraguan election provides a good example of alleged call-ups of this sort.³³

10. *The Neutrality of the Supervising Mechanism*

After the desired procedures and requisite criteria have been established for an electoral system, there remains the need for a mechanism for control and ongoing appraisal, since without such a mechanism, electoral laws remain mere words that the more powerful forces in the system can skew to favor themselves.³⁴

In modern political systems, elections are controlled by a network of institutions, including electoral commissions often

³³ Second Report on the Observation of the Nicaraguan Electoral Process (July 13 to November 3, 1989), OEA/Ser. G CP/INF.2850/89 add. 1, at 11 (1989).

³⁴ See generally W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION* (forthcoming 1992).

arranged hierarchically from national to local levels, by legislatures which establish policies and legal instruments to govern elections, and by courts to which parties may resort when they believe that certain aspects of the control system have not been effective. The specific nature of the supervisory and control systems is not uniform in all modern democracies, and no country's system may be taken as the sole model for international election observation.

Obviously, the supervisory and control mechanism must be neutral. Neutrality may be achieved by the selection of individuals known for their personal integrity and probity. But because neutrality in national destiny decisions is a rare commodity, more often the desired degree of neutrality is achieved by composing the supervisory mechanisms of acknowledged representatives of the different factions in such a way that they balance each other out. When the United Nations supervises an election, as in Cambodia or Western Sahara, it acts as the control authority. But since the United Nations personnel are composed of nationals of other states, the personnel of the control authority must be composed carefully, lest the neutrality of the United Nations be called into question. Thus, to take a hypothetical example, a United Nations official who is a national of a state unconnected with the country or territory in which an election is being supervised might be asked to recuse himself if he were married to a national of a state with an interest. As in other areas of the law, it is important not only that justice be done, but also that it be seen to be manifestly done.

The issue of neutrality arose in the 1972 elections in Papua, New Guinea. Australian officials had decided to establish voter identification tribunals which would be convened at polling places to decide questions about the eligibility of someone putting himself forward as a voter. The officers charged with establishing these tribunals "were directed to consult local government councils, candidates, political parties and any other interested persons or organizations before making the appointments, to ensure that those who were selected to sit in the tribunal would be acceptable to all parties concerned."³⁵

³⁵ U.N. TCOR, 39th Sess., Provisional Agenda Item 6, at 13, U.N. Doc. T/1732 (1972).

The question of the neutrality of the supervisory and control mechanism of an election was also acute in early phases of the 1990 electoral process in Nicaragua. Under the Tesoro Beach Accords, Nicaragua was obliged to establish an electoral branch with balanced participation of Sandinistas and Contras. After its establishment, the Contras claimed that it was heavily stacked in favor of the Sandinistas. The President was a Sandinista. In response to objections, the government agreed to establish a seven-member advisory board, but it was alleged that the Sandinistas stacked that by appointing representatives of parties that were essentially under its control. As a result, the opposition representatives refused to take their seats on the Board.³⁶

A second fundamental requirement for an electoral control mechanism would appear to be an effective review or appeal system. If there is a national electoral commission, operating under a statute, there must be some sort of judicial instance which can review allegations of improper behavior by the commission itself. Where the court system is not believed to be sufficiently neutral, a special electoral court constructed so as to achieve neutrality may be necessary.

11. *Appropriate Polling Procedures*

The procedures for polling must fulfill a number of different requirements. From the standpoint of the voter, the act of selection must be completely private and secret so that the voter is under no constraint or fear. As basic and obvious as this guarantee seems, it is not always fulfilled. In the 1987 Constitutional Referendum in Haiti, which was observed by many human rights groups, the absence of secrecy was noted in at least one voting district. In many of the polling places in Cap Haitien, voters could not cast a secret ballot, apparently because the envelopes into which ballots were to be put before they were inserted into the ballot box had not been delivered. Even where there were envelopes, voters sometimes cast their ballots publicly, though this was not always through the connivance of the government. The observers who noted this practice reported,

³⁶ Matthew Frumin & Nancy Perkins, International Human Rights Law Group, Preliminary Report on the Upcoming Nicaraguan Elections Report on the February 25, 1990 Nicaraguan Elections 22-24 (1990).

however, that none of the voters criticized the fact that secrecy was not ensured.³⁷

In many national destiny elections, one of the contending political forces will often have effective control of the state apparatus. If it also has a record of intimidation, the opportunities for a free vote are substantially reduced. The technical problem here is more than secrecy at the moment of the balloting. The voter must be assured that there is no way of determining before or after the casting of the ballot how he or she voted.

In some cases procedures that are adopted to ensure accuracy may undermine secrecy. In the Organization of American States observed elections in Costa Rica in 1990, the voter was required to place his right thumb print in the column for the candidates of the party of his preference. There did not appear to be a central fingerprint file in Costa Rica at the time, but the mission still noted that this could not help but have some effect on the secrecy of the balloting. It recommended that the system be revised in the future,³⁸ but did not hold that the election as a whole to be less than free and fair.

At the same time, the environment around the polling station must be sufficiently open to allow monitoring by the different parties in the election. As the 1991 Organization of American States Secretary-General's report on the observation of the Suriname election states:

Among the aspects of election day Observers were asked to pay particular attention to whether or not political organizations had representatives at the polling stations. Such participation in itself serves as a check on the electoral system and helps to strengthen the process.³⁹

Here, as in so many other areas, Justice Brandeis' famous apothegm that "sunlight sanitizes" applies. The more monitoring by different groups, the more likely that this phase of the election will meet international standards.

³⁷ See generally National Democratic Institute for International Affairs and National Republican Institute for International Affairs, *Toward a Democratic Haiti: A Report on the Constitutional Referendum of March 29, 1987 and the Electoral Process in Haiti* (1987).

³⁸ OEA/Ser.G CP/INF.3192/91 13 November 1991, at 19-20.

³⁹ OEA/Ser.P AG/Doc.2537/90, 20th Sess., 2 May 1990, at 24.

In the appraisal of appropriate polling procedures, some flexibility is required. Elections, even in systems in which they are routine events, involve the coordination of many individuals and groups. A slip-up anywhere can slow the process down. In the evaluation of whether or not this part of an election was so flawed that it undermined the free and fair character of the election as a whole, some flexibility is required. For example, in the Organization of American States monitored election in Honduras in 1989, a number of incidents disrupted the polling. Some polling places opened late because of an insufficiency of indelible ink for marking the fingers of those who had voted. The election law allowed the Chairman of the poll officials to make up for delays in opening the polls, by extending voting time up to one hour. But the radio announcement of this provision during the voting caused confusion in some polling places, since it was unclear whether it applied to all polling places or only to those that opened late. The Organization of American States mission noted that "in spite of the safeguards instituted and the orderly way in which the elections were carried out, there were some disputes about the mechanics of the election procedures."⁴⁰ But this and other problems did not affect the legitimacy of the elections.⁴¹

Where road communications are primitive and the population is widely dispersed, special balloting methods may have to be instituted. In the 1990 Mongolian election, Election Commission officials utilized a procedure of traveling ballot boxes which were taken to hospitals in remote rural areas. Such a procedure may be an economic solution to the problem if there are poll watchers accompanying the officials at all times. In the 1990 Mongolian elections, that did not always appear to be the case.⁴²

Another important but often overlooked feature of a fair polling process is the timing, in terms of agricultural or migratory cycles, of the polling. In territories where migratory patterns take critical parts of the population far from sedentary centers, the polling itself may have to become peripatetic or the timing of polling may have to be adjusted so that those nomadic

⁴⁰ *Id.* at 8.

⁴¹ *Id.* at 9.

⁴² INTERNATIONAL HUMAN RIGHTS LAW GROUP, MONGOLIA IN MIDSTREAM: A FINAL REPORT ON THE 1990 MONGOLIAN ELECTIONS 11-12 (1990).

peoples will be able to vote. The Secretary-General calculated these considerations with care for the Cambodian election:

Weighing carefully a large number of considerations, not least of which are the agricultural and migratory cycles that result from climatic conditions in Cambodia, it is felt that polling should be held in late April or early May 1993, shortly after the Cambodian New Year, when the majority of Cambodians are expected to be gathered at their respective home locations. The duration of the polling period should be no longer than three days at the most, on the understanding that there should be a single day of polling only in any one location, and that no ballot counting would take place prior to the final day of voting in all locations.⁴³

The problem may prove to be even more daunting in Western Sahara.

12. *Adequate Ballot Counting Procedures*

All of the prior procedures would be drained of significance if the results of the election were tampered with. The stuffing of ballot boxes, replacing ballot boxes with others, destruction or loss of particular boxes and other such gimmicks have been common in elections everywhere. To insure the accuracy of the counting, ballot counting must be open, available to the monitors of different contending parties and factions in the election, and subject to some authoritative review. In the ideal situation, ballot counting is conducted at the place of polling as soon as polling is concluded. Representatives of each party and faction are present to act as monitors, and international observation is also possible. Each ballot is examined by all of the interested parties before it is tallied. The results in each polling place are then certified by those present and transferred to the central electoral headquarters where all of the results from all of the polling places in the territory are totaled. Even in circumstances where there are insufficient resources to implement fully this standard, as much as can be done, should be done.

In some past national destiny elections, ballot counting procedures have presented specially acute problems. Where there have been few elections before and the political culture is not

⁴³ U.N. SCOR, at 9, U.N. Doc. S/23613 (1992).

familiar with this technique, the mechanics of vote counting selected may prove to be the weak link in a fair election. In the 1988 National Assembly elections in the Republic of Korea, which were observed by a number of human rights groups, the Korean Catholic organizations filed a lawsuit after the election alleging that the computer program used by the election authority, which had been prepared by a U.S. company, had been purchased by the government party.

The program was allegedly designed to generate a two million vote margin of victory in the event of a three- or four-candidate race, and a four million vote margin in a two-candidate race. Ultimately, the DJP's Roh Tae Woo won by two million votes in a four-candidate race. That the Democratic Justice Party (DJP), rather than Korean Broadcasting Service (KBS), purchased the computer program strengthened the implication in the minds of some Koreans of a conspiracy to fix the election returns by computer fraud.⁴⁴

13. *Implementation of Results*

It would seem obvious that the results of an election must be implemented with full fidelity. A dictator who allows elections to be held and agrees to implement them on the condition that he likes the results is hardly conducting a free and fair election. Unfortunately, this has happened. Public international condemnation has not been a constant factor. The political reasons which enter into such calculations are understandable if nonetheless deplorable. More puzzling is the general failure of some NGOs that engaged in observation of those elections to follow-up and to issue appraisals of the extent, if any, of the implementation of the election. The International Human Rights Law Group is an outstanding exception. It follows up, often examining in great detail the extent of implementation.⁴⁵

⁴⁴ Craig S. Kramer & Michele M. Lee, International Human Rights Law Group, The April 26, 1988 National Assembly Elections in the Republic of Korea 28-29 (1989).

⁴⁵ See Matthew Frumin & Nancy Perkins, International Human Rights Law Group, Interim Report on the Nicaraguan Elections and Issues Concerning the Transfer of Political Power (1990) (examining the Amnesty demobilization, transfer of control of the army and police, changes in the control of the media, disposition of property and destabilizing action by party cadres).

In Suriname, an internationally supervised and certified election appeared to be implemented. But the military that had controlled the country before the election continued to be the dominant force. The elected government was unable to exercise full power and carry out the wishes of the people. Hence, the election was not implemented in any real fashion. The regional and international organizations that participated in the observation of this election decided to ignore this result. Unfortunately, it became impossible to pretend otherwise when the former dictator seized power again.⁴⁶

The most melancholy case I know of in this regard occurred in Panama in 1989. Under international pressure, the then-dictator, Manuel Antonio Noriega, allowed internationally supervised elections to be conducted. The results were against Noriega's candidate. The electoral commission candidly admitted, after the fact, that it had falsified the results because it concluded that an accurate statement would have led to a military coup and violence. Oddly, this statement, which was quoted in full, was included in the report of the Inter-American Commission on Human Rights without any accompanying note of condemnation! In some instances, the implementation of an election that was free and fair may require commitments by other countries to respect the results. For example, a neighboring country that has territorial claims or fears that a party might come to power in its neighbor that may have territorial claims on it or a neighboring state that is providing haven for insurrectionists or an exile government may have to commit itself to respect the results of the election in the proximate country. This was, to some extent, the situation prevailing in the Namibian case. In the Five Power letter to the President of the Security Council, on April 10, 1978, the Permanent Representatives to the United Nations of Canada, France, the Federal Republic of Germany, the United Kingdom, and the United States concluded:

Neighbouring countries shall be requested to ensure to the best of their abilities that the provisions of the transitional arrangements, and the outcome of the election, are respected. They shall

⁴⁶ *Suriname Voters Give a Strong Rebuff to Military*, N.Y. TIMES, Nov. 27, 1987, at A13; Howard W. French, *Suriname, in Army's Ever-Tighter Grip, Skids from Tranquility to Turmoil*, N.Y. TIMES, Oct. 21, 1990, at 3.

also be requested to afford the necessary facilities to the United Nations Special Representative and all United Nations personnel to carry out their assigned functions and to facilitate such measures as may be desirable for ensuring tranquility in the border areas.⁴⁷

The success of the Namibian elections more than a decade later depended in no small degree on changes in policy and attitude on the part of the governments of South Africa, the Soviet Union and through it Cuba with attendant changes in Angola.

Insistence by the world community that the results of an internationally supervised election be accepted by the power process within the state in which the election took place is critical. Internationally observed elections that are not implemented are worse than elections that never took place, for they undermine the very belief in the efficacy of elections and the relevance of international law. International commitments to democracy that do not insist upon compliance with popular referenda mean little. In June, 1991, the Organization of American States issued the so-called "Santiago Declaration,"⁴⁸ in which it confirmed its commitment to democratic government and agreed to convene foreign ministers in any case in which an elected democratic government was forcefully overthrown. The commitment was to be tested quite soon. In late September, President Aristide of Haiti, who had been elected in an internationally observed election which was unanimously confirmed to have been free and fair, was overthrown by the military. The Santiago Declaration was applied and Foreign Ministers met at the Council of the Organization of American States in a special session, and a sanction program was put in place. The efficacy of a sanction-based strategy, however, against targets who — like the Haitian military — are not rational economic actors but rather opportunistic thugs was immediately placed in doubt. After wreaking great injury on the Haitian economy and increasing the covert migration of Haitians from the country, the sanction program was finally unilaterally restructured by the United States. The military are still in power in Port au Prince. Aristide is still in Caracas.

⁴⁷ U.N. SCOR, at 5, para. 12, U.N. Doc. S/12636 (1978).

⁴⁸ The Santiago Commitment to Democracy and the Renewal of the Inter-American System, OEA/AG-Res. 1079 (XXI-0/91), 4 June 1991.

The Haitian example shows how a real international commitment to the results of an election must involve a commitment on the part of the world community to use force when it is the only way of vindicating a national election that it has undertaken to observe and certify. The notion that national sovereignty precludes such a use of force is patently absurd, for it uses the word sovereignty to oppress the people of a country and to protect those who have violated a people's internationally recognized rights to choose, in an election that is free and fair, their own government.

CONCLUSION

At the moment, it appears that human rights has become an important strut of international politics. While that happy development could be reversed, if it continues, we may expect more international election observation by both governmental and non-governmental organizations. Individuals and private groups have done much to create and develop this means of implementation of human rights. I hope this discussion today will encourage some of you, too, to carry this important work to a new and better stage.