Fordham International Law Journal

Volume 18, *Issue* 5 1994 *Article* 10

Multinational Election Monitoring: Advancing International Law on the High Wire

Gregory H. Fox*

*New York University School of Law

Copyright ©1994 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). http://ir.lawnet.fordham.edu/ilj

MULTINATIONAL ELECTION MONITORING: ADVANCING INTERNATIONAL LAW ON THE HIGH WIRE

*Gregory H. Fox**

The United Nations, born in a spirit of post-war optimism, quickly fell victim to the paralysis of the Cold War. Conflicts seemingly appropriate for U.N. mediation were quickly moved beyond its reach by extensive superpower involvement. In each such conflict in which East and West asserted an interest — primarily a series of proxy wars conduct barely beneath the surface of local civil wars — settlement was elevated to an issue of global importance. As a result, internal conflict ravaged countries such as Somalia, Ethiopia, Mozambique, Angola, Zaire, Vietnam, Cambodia, and El Salvador long past the point at which concerted multinational efforts at mediation might have produced peace.

It is no small irony that while the United Nations was effectively excluded from these conflicts at their early incendiary stages, it has been called upon in the post-Cold War era to address many of their most destructive consequences. The rebuilding of states shattered by war and plagued by stagnant development, poor governance, and incessant internal strife has become the United Nations' most visible and costly task in the 1990's. With international resources never plentiful and now shrinking, however, the U.N. is eager to find ways to avoid the prospect of certain states becoming virtual wards of the international system. Self-sufficiency for these states has therefore become an important U.N. goal.

At the center of multilateral efforts to assist such states in repairing their social fabrics has been the monitoring of national elections. The proliferation of election monitoring has proceeded on the assumption that democratic states will be both more viable economically and less prone to internal conflict. In its typically diffuse fashion, the international legal order has in-

* Adjunct Professor, New York University School of Law. This Essay is adapted from the Author's presentation at International Law Weekend/94, sponsored by the International Law Association, on October 27, 1994, at the House of the Association of the Bar of the City of New York, and is printed here with the consent of the ILA.

stitutionalized this commitment to democratic governance in an uneven manner. Nevertheless, the rise of election monitoring has been paralleled by a steady growth of other incentive systems designed both to induce states to hold free and fair elections and to maintain the integrity of democratic regimes once established. Often, an entire range of such incentives — including the withholding of recognition, bilateral and multilateral assistance, and membership in regional organizations — is brought to bear on a particular state while election monitoring efforts are underway.

This comprehensive form of social engineering — sometimes referred to as "nation building" — is remarkable in two respects. First, in marshalling a notion of democratic legitimacy the U.N. missions have rendered judgment on an issue traditionally at the heart of state sovereignty: how national leaders are chosen. The notion of popular sovereignty implicit in a monitored vote goes far beyond traditional human rights laws' pronouncement that certain domestic policies are no longer sovereign prerogatives. The theory of popular sovereignty speaks to the more fundamental question of *who holds sovereign power* within a state. In many ways, national discretion on this question embodies the essence of political autonomy. Yet the validity of electoral choice is increasingly a judgment entrusted to individuals and organizations with no more connection to a state than their presence during a vote.

Second, and related to the first, is the high-stakes nature of U.N. electoral missions. Many of these missions have been to states with little tradition of peacefully transferring power through elections. Despite the essentially experimental nature of democratic systems in such societies, U.N. electoral missions vest the prestige of the international community in their successful outcome. They do so by making two crucial assumptions. The first is that a democratic political system is appropriate to the state in question, regardless of its economic circumstances, prior political experience, or current state of social cohesion. The second is that the victorious party or candidate is entitled to international recognition as the state's legitimate government. Both of these assumptions may be proven wrong (or appear to be proven wrong) by a variety of events: the results of an extremely close election may be rejected by claims of fraud; a coup may topple the elected government; the incumbent government

may refuse to yield power; the winning party may begin to oppress its opponents; new guarantees of party pluralism may institutionalize old ethnic rivalries; and the high expectations of instant social reform that often accompany democratic transitions may not materialize. The prospect of one or more of these events occurring after a monitored election is not insubstantial. Yet it is equally clear that continued support for international monitoring will depend on their *not* occurring with any great frequency. As the Somalia experience demonstrates, only one perceived failure can lead to widespread cynicism about the viability of "nation building" efforts.

As a legal matter, election monitoring is most fruitfully analyzed as an issue of human rights. This is by no means the only possible perspective. Secretary-General Boutros-Ghali has recently described election monitoring as an aspect of the peacekeeping process that he terms "post conflict peace building."[1] For him, such missions represent efforts to bring societies torn by war or otherwise rendered chaotic into an orderly existence regulated by law.

The human rights approach, however, has the advantage of linking the practice of monitoring with the normative basis for holding elections in the first place. The norm of political participation is found in all comprehensive human rights treaties, as well as others concerned with the rights of specific groups. The most widely ratified treaty addressing the subject is the International Covenant on Civil and Political Rights,[2] Article 25 of which guarantees a right to "genuine periodic elections." As of July 1994 there were 127 state parties to the Covenant.[3] Other treaties containing such a guarantee include the First Protocol to the European Convention on Human Rights (Article 3), the American Convention on Human Rights (Article 23), the African Charter on Human and Peoples Rights (Article 13), the International Convention on the Elimination of all Forms of Racial Discrimination (Article 5(c)), and the Convention on the Political Rights of Women (Article 1). The non-binding documents

1. *Report of the Secretary-General: An Agenda for Peace*, U.N. Doc. A/47/277 & S/24111 (1992).

2. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (1966).

3. *Report of the Human Rights Committee to the General Assembly*, U.N. GAOR 49th Sess., Supp. No. 40, at 1, U.N. Doc. A/49/40 (1994).

of the Conference on Security and Cooperation in Europe, most notably the Copenhagen Document, also contain extensive and innovative provisions on political participation.

Despite this widespread and firm grounding in treaty law, the international community has only recently become active in addressing the question of whether elections are the only legitimate means for choosing national leaders and, assuming this is the case, how elections should be conducted. It is true that prior to the missions of the post-Cold War era, the United Nations had a fairly impressive track record in monitoring both referenda and elections in colonial territories. These began in the late 1950's and continued through the successful Namibia mission of 1990. Yet the institutional framework for monitoring elections in sovereign states emerged only in April 1992, when the United Nations established a Unit for Electoral Assistance within the Secretariat. The Unit has been in such demand that it was recently upgraded to a Division of the Department of Peacekeeping Affairs. In the first year of its operation, the Division received thirty-two requests for assistance from Member States. As of June 1994 the number had increased to fifty-two requests; twenty-nine of these came from Africa, ten from Eastern Europe, twelve from Central and South America, and one from Asia. Prior to the establishment of the office the United Nations had monitored elections in only two states: Nicaragua and Haiti.

With the expertise of the Electoral Division now in-house, monitored elections have become virtual fixtures in U.N.-brokered peace accords to end civil wars. The United Nations' involvement in Angola, Cambodia, Mozambique, and Liberia are examples of this sort of activity. This increase in activity has signalled a newfound interest on the part of the United Nations in questions of domestic governance. Two quotations reflect this changed perspective. In January 1990, the United Nations was asked to monitor the first elections of the post-communist era in Romania. The United Nations declined, with an unnamed U.N. spokesperson explaining that "the United Nations does not monitor internal elections in a country."[4] By 1993 the U.N. had been regularly monitoring internal elections for several years. In the Spring of 1993, Secretary General Boutros-Ghali identified

4. *U.N. Says it Won't Monitor Romanian Elections*, Reuters, Jan. 25, 1990, *available in* LEXIS, News Library, Wires File.

transitions to democracy as one of three crucial goals of the United Nations. Explaining the nature of U.N. involvement he stated rather bluntly, "Democracies almost never fight each other. Democratization supports the cause of peace. Peace in turn is a prerequisite to development. So democracy is essential if development is to be sustained over time. Without development there could be no democracy. Societies that lack basic well-being tend to fall into conflict. So three great priorities are interlocked."[5] In a period of three years, the United Nations moved from declaring it has no role to play in domestic elections to elevating electoral assistance to one of its three core goals.

The primary impetus for U.N. action was, of course, the end of the Cold War. Prior to 1989, advocacy of democracy was a particular flashpoint for conflict between East and West. One consequence of this submerging of law into politics was that little consensus developed on precisely what was meant by "democracy." Yet the effects of the Cold War do not fully explain why concern for elections and democratic political institutions was, for many years, missing from the human rights agenda. Failure to address electoral issues was as characteristic of human rights NGOs as it was of official U.N. bodies. Progress occurred in other areas of human rights, beginning primarily in 1966 with the promulgation of the International Covenant on Civil and Political Rights. Why were electoral issues absent? At least three reasons are evident.

The first is the uniquely intrusive nature of participatory rights. As noted above, these rights speak to issues profoundly local in character. How should leaders be chosen? What are the specific requirements of the process for doing so? Have all interested elements within a society been included? In addressing these questions the right to political participation makes a distinction between those regimes chosen by legitimate processes and those that are not. Because an electoral process is, by definition, a means to an end of empowering a representative government, a legally flawed process necessarily results in a government that is itself illegal. For states hesitant to accept human rights norms in general, this highly intrusive doctrine would certainly be unacceptable.

5. Boutros Boutros-Ghali, *An Agenda for Peace: One Year Later*, ORBIS, Summer 1993, at 323.

The second reason why electoral issues were not more prominent on the international human rights agenda is that democratic systems, as we know them today, are relatively recent phenomena. Universal male suffrage, even in Western states, did not become widespread until the late nineteenth century. Full adult suffrage was not common in much of Western Europe until the mid-twentieth century. In the United States, poll taxes (a significant barrier to minority participation) were not eliminated by constitutional amendment until 1964. If full participatory democracy was not prevalent on the national level until recently, it is somewhat unrealistic to expect that such a system would emerge as an international norm.

A final reason for the international community's lack of focus on participatory rights is that international law has traditionally failed to distinguish between regimes chosen by democratic procedures and those chosen by other means. The general rule has been (and likely remains) that any group in effective control of a state is entitled to recognition as its legitimate government. There have been some exceptions, such as the policies of Woodrow Wilson, and others are now beginning to emerge. But the effective control principle predominates, and it is rather clearly at odds with the democratic legitimacy principle undergirding a right to political participation.

Today, each of these three barriers to an effective right is in retreat. Elected governments are increasingly common among states in all regions of the world. The strong notions of sovereignty that precluded international concern with the quality of domestic governance have been so eroded by the ubiquity of human rights norms that the objection carries little more than rhetorical weight. A legal barrier of sovereignty is further belied by the ongoing existence of a roster of "pariah" governments — Libya, Iraq, Myanmar, the Haitian Junta — which are effectively condemned not for any single policy but for their very existence.

As noted, there has also been change in the norms of recognition, though the degree of movement has been less drastic than in the other two areas. The case of Haiti is illustrative. After President Aristide was ousted by a military coup on September 29, 1991, the U.N. General Assembly and the Organization of American States ("OAS") quickly condemned the coup as "illegal," called on states not to recognize the new government and refused to seat delegates from the junta as Haiti's representa-

tives. As a result, for the entire period of President Aristide's exile the representatives of "Haiti" in the United Nations and OAS were those appointed by Aristide during his short term in office.

Two other developments in the field of recognition are noteworthy. First, a 1992 amendment to the OAS Charter and the 1991 CSCE Moscow Document provide that if the democratically-elected government of a member state is overthrown by an anti-democratic coup, the other member states will refuse to recognize the usurping government and work to return the legitimate government to power. Second, the Badinter Arbitration Commission of the International Conference on the Former Yugoslavia, empowered by the United Nations and the EC to address recognition issues involving the former Yugoslav republics, held that the existence of democratic institutions was one important criterion in the requirements for community recognition.

The democratic legitimacy principle underlying these acts is increasingly reinforced by a web of institutional norms, each of which has incorporated notions of legitimacy to a greater or lesser degree. The Security Council justified armed intervention in Haiti primarily on the grounds that the military junta refused to yield power to an elected government. The General Assembly has also taken up the question of participatory rights, condemning a number of states for either failing to hold elections or for overturning the results of "valid" elections. Electoral issues have begun to appear on the dockets of human rights tribunals, which are developing an increasingly sophisticated jurisprudence on electoral matters. One of the most interesting decisions by the U.N. Human Rights Committee involved a Zambian citizen who was effectively excluded from the national political process on the grounds that he belonged to a banned opposition party. Zambia at the time was a one-party state. The Committee held that the banning of all but one official political party violates Article 25 of the Political Covenant.[6] It reasoned that a genuine election cannot take place where the government monopolizes all political associations. Given that one-party states were quite common only a few years ago (and continue in many countries) this holding is remarkable.

6. Bwalya v. Zambia, Commun. No. 314/1988, *reprinted in* 14 HUM. RTS. L.J. 408 (1993).

What does this practice suggest for the future of international efforts to foster transitions to democratic government? That democracy is becoming a normative goal of international law seems fairly clear. But the growth of the institutional web mentioned above will, I believe, soon come into conflict with other aspects of the international legal system that present significant obstacles to the full assimilation of a norm of democratic government. The continued viability of the norm will depend on whether a reasonably coherent compromise can be reached between these conflicting imperatives. Let me identify two potential barriers.

The first stems from the right's necessary focus on regime legitimacy. As noted, where proper electoral procedures are not followed — either through failure to hold an election at all, electoral fraud, by staging a coup, by the refusal to allow victorious candidates to assume office, or any other means — a strong conception of the right would conclude that the incumbent government holds office illegally. The government is, in other words, illegitimate. What follows from this designation? If a regime is by law not representative of its people, should its delegates be seated in the U.N. General Assembly or in any other membership organization? South Africa and Haiti appear to be direct precedents for a negative answer. Should assistance from international lending institutions be denied to such regimes? The European Bank for Reconstruction, established in 1990, provides in its Charter that it will only lend to pluralist democracies. Are illegitimate regimes more appropriate candidates for intervention, either unilateral or multilateral? Again Haiti is illustrative. Does the logic of the Security Council's action in that case create a precedent for collective action against other regimes whose very existence flouts a democratic norm?

As this rather disconnected list of potential sanctions suggests, the possibilities for enforcement of a norm of democratic legitimacy are potentially infinite. If a government is defined by international law as illegal, *every point of interaction* with that government, either by individual nations or international organizations, presents a stark choice. If one continues business as usual with that government then its entitlement to carry on the activity in question is affirmed. On the other hand, if one treats the regime as a pariah, in the manner of the white-ruled South African government, then the norm's core assumption that the re-

gime is not entitled to act of behalf of the state is affirmed. If the latter course is followed, given the number of undemocratic states in the world, the potential exists to create a rather large class of legally inferior, pariah states.

The second problem is one raised by the 1991 elections in Algeria: whether the democratic processes ought to be opened to parties or individuals who are opposed to the very idea of political pluralism. In Algeria, the Islamic Salvation Front ("FIS") won a sufficiently large majority in the first round of parliamentary elections to ensure that the constitution could be amended without obstacle. The FIS ran on a platform promising an Islamic theocracy, which Algerian authorities and other observers interpreted as meaning an end to political pluralism and perhaps even elections altogether. Before the second round of voting could take place, the government canceled the elections on the justification it was saving the democratic system from a group that would surely destroy it.

Algeria is only the most dramatic example of a clash between the right of a political group to organize and run for office and the right of other citizens, not supporting that party, to continue to live under a democratic system. Somewhat less dramatic examples of the same conflict are presented by the German government's attempts to ban far right parties under provisions of the German Constitution. Of course, the central historical example of this phenomenon is the Nazi party's rise to power in Weimar Germany through electoral successes.

National practice generally favors exclusions. Many states retain the legal right to ban even small extremist parties on the theory that despite problems of speculating as to their ultimate dangerousness, to wait until parties present an actual threat of assuming power is to court a backlash and perhaps even civil war. Two prime examples of states with aggressive anti-extremist laws are Germany and Israel. The United States generally permits all groups open access to the political process. But it is important not to take too legalistic a perspective when evaluating this practice. Germany has a history on this subject that looms large in its collective memory; the United States does not. Moreover, during the 1950's, when many in the United States did perceive a threat to democratic institutions, a broad and debilitating array of anti-subversive legislation resulted. The core of these laws was upheld by the Supreme Court. In sum, while the de-

gree of reactions to extremist parties varies widely, few societies allow perceived threats to their core political values to go wholly unchecked.

In political theory and constitutional law circles this is hardly a new question. For international lawyers, however, it is virtually a case of first impression raised by the newfound concern for electoral processes. The position of international law on this issue reflects the treaty drafters' memory of the Weimar experience. The Political Covenant and the Universal Declaration of Human Rights both contain provisions allowing for the exclusion of anti-democratic actors from the political process. These provisions have been tested and upheld by human rights tribunals. Yet more so than many other human rights norms, these provisions rest on an enormously controversial value choice. Is "democracy" at core a set of procedures that are oblivious to the views advocated by its participants, concerned only with equal electoral competition among all factions? Or is democracy a substantive entitlement to enjoy certain fundamental rights that cannot be abridged even if a majority of citizens votes in favor of restrictions? For international law to take one perspective or the other could, depending on one's view, represent prudent foresight or a disastrous courting of intolerance. That is, a norm permitting bans could either make clear to the world's new democracies the limits of acceptable political discourse or present a ready-made instrument for oppression to societies that are primarily in need of more openness.

These two problems will surely persist if the international community deepens and broadens its concern with democratic governance. This appears to be the case: the United Nations is developing an elaborate administrative infrastructure to respond to the steady increase in requests that it monitor national elections. Yet the practice of monitoring may itself help to clarify the law. Multilateral election monitoring is both a creature of international law and one of its important sources. While the legal basis for monitoring is grounded in human rights treaties, much of our understand of participatory norms derives from the United Nations' thirty-year repertoire of monitoring practice. Whether this process of normative development continues in the future will almost certainly depend on the continued success of these missions.