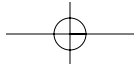
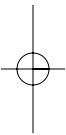
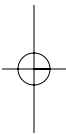


Part One

CURRENT POLICY AND PRACTICE



Chapter One

The Theory of Collective Response

Charles Sampford and Margaret Palmer

Threats to democracy involve office holders' abuse of the official powers given to them within a democracy through the unconstitutional extension of those powers either temporally or substantively. This abuse is most dramatic in a coup d'état. Here the military (and occasionally a president) uses power constitutionally endowed for the purposes of protecting the state to take over that state by seizing power from other institutions (including the legislature and the courts). The less dramatic but eventually just as damaging threat is the erosion of democracy. In this case, officials abuse their constitutional powers to take over gradually the state's institutions or to fill them with their own cronies.

While well-established democracies regard coups and erosions within their own borders as intolerable attacks against the sovereignty of the people, they have traditionally given little more than a rebuke when such attacks have occurred within other, more fragile democracies. This chapter examines the basis for a more decisive response by an international coalition of democracies to threats to the democratic institutions and officials chosen by another nation's people. First, it considers the nature of traditional international responses (which generally have done more to support regimes that overthrow democracies than to undermine them) and the dynamics that have often led to a general tolerance of coups and erosions. Second, it reviews the recent thinking in international law and relations that offers a theoretical justification for a shift to an active international resistance to these threats. Next, the chapter posits that democratic states do not have to wait for changes in international law and relations to solidify in order to combat coups and erosions, and it discusses possible strategies against these threats. Finally, it considers how international law may change if the trend in current thinking continues.

NATURE OF THE THREAT AND TRADITIONAL RESPONSE

The divergence between national and international attitudes of democracies to attacks on democracy stems from a fundamental shift in domestic law and political theory with regard to the basis of sovereignty and political legitimacy. This shift has been from effective control,¹ that is, the ability to govern, usually established through what may be called “the prior successful use of force”² and maintained largely through oppression, to “the consent of the governed”³ (a shift that was, of course, fundamental to the North Atlantic Enlightenment). It occurred first in the United States and France and has come to be almost universally acknowledged as a matter of domestic constitutional law and theory.⁴

The basis of sovereignty and political legitimacy in international law, however, has generally remained the pre-democratic (indeed, pre-Enlightenment) criteria of effective control. The tests for the legality of a regime vary; they include Hans Kelsen’s test of whether the regime is “by and large effective,”⁵ and the doctrine of state necessity, a doctrine originally used to justify emergency action by members of a constitutional government⁶ but later reworked to allow the validation of a wide range of actions by usurpers. A long line of cases has allowed usurpers legitimacy under these two tests.⁷ Despite the sophisticated analysis associated with them, both are based simply on the “prior successful use of force.” Use of force has been the foundation for sovereign legitimacy and participation in international relations for the last 350 years, since the Peace of Westphalia ended the Thirty Years War in 1648.⁸

This dichotomy leads to a fundamental difference in the principles of legitimacy applied domestically and internationally, a difference that has been sustained only because democracies have tended to compartmentalize domestic and international law so that their fundamentally different principles can stand without apparent contradiction. Thus, while democracies have frequently condemned coups d’état, in practical terms they have provided little support for the ousted regime while unwittingly making it possible for usurpers to maintain their control over a state.

For example, states have accepted the representatives of a new regime as ambassadors and as legal occupants of embassies and high commissions.⁹ The United Nations (UN) has also accepted their delegations. The UN charter itself is silent on challenges to the legitimacy of the government submitting credentials,¹⁰ and the UN has no objective criteria for determining whether a government is legitimate.¹¹ However, decisions by the Credentials Committee of the UN are not simply of technical interest. They have important legal implications. For example, when the General Assembly decides by an overwhelming majority to endorse the representatives of a putative gov-

ernment, such a decision “is either constitutive of a putative government’s *de jure* status or persuasively declaratory of the presence of underlying facts sufficient to establish that status.”¹² As a result, a decision endorsing particular representatives and thus their government allows that government, for example, to determine what foreign military assistance should be “invited” in particular circumstances, and to take part through the UN in decision-making affecting other countries.¹³

Apart from formal representation in international organizations, the international community has also allowed unconstitutional regimes to take part in international trade and in negotiating new sovereign debt. Problematically, this means that the international community has effectively accepted the right of these unconstitutional regimes to act on behalf of the people they rule; most significantly, this right “confer[s] on [a regime] the privileges freely to borrow in the country’s name (international borrowing privilege) and freely dispose of the country’s natural resources (international resource privilege).” Succeeding democratic governments cannot refuse to pay the debts incurred by oppressive predecessors without being punished by banks and governments of other countries and being excluded from international financial markets. The borrowing privilege allows corrupt governments to stay in power and saps the capacity of succeeding democratic governments, saddled with this debt, to implement necessary structural reforms, thus making them less successful and stable. The borrowing privilege “further strengthens the incentives toward coup attempts: whoever succeeds in bringing a preponderance of the means of coercion under his control gets the borrowing privilege as an additional reward.”¹⁴

The resource privilege wrongly allows corrupt governments to convey good title to the resources of the state. The international community has accorded such governments the right to pass ownership of resources to others—domestic cronies and overseas buyers—whom the rest of the world has then recognized as the legitimate owners of those resources. (Contrast robbery by private agents who then sell merchandise to a fence; although possession passes to the fence, ownership does not.) This situation is disastrous in many developing countries, where resources often form a large part of the economy. Whoever controls this revenue stream can afford soldiers and arms to stay in power; this fact provides a strong incentive toward undemocratic acquisition and irresponsible use of political power. This idea partly explains the correlation between resource wealth and economic progress: “Severe poverty is more persistent in resource-rich countries because the special incentives arising from the international resource privilege make them more prone to corrupt government, coup attempts and civil wars.”¹⁵ Thus, the international resource privilege should be assigned only to those governments that come to power democratically (or that later gain acceptance through democratic elections).¹⁶

Overall, action that is criminal within the domestic law of democratic nations has been handsomely rewarded by other democracies on the basis of sovereignty in international law. As long as international law and practice reward such behavior, the international game is weighted in favor of coup makers and against their victims—which in democracies are the people. Moreover, in international law, sovereignty traditionally shields a state from intervention in its domestic affairs. When applied to a nondemocratic state, however, the problem with arguing that a “sovereign entity” has the “ongoing prerogative to determine the shape of its governing institutions through internal processes, without the coercive intervention of outsiders”¹⁷ is that the argument overlooks the fact that genuine choice is often absent. Such absence of choice makes a mockery of the notion of self-determination, upon which the proscription against intervention is heavily dependent.¹⁸ Rather than the will of the state, for example, the event of a coup after a democratically elected government has taken office is the will of a handful of criminals.¹⁹

Although early thinkers conceded a right of unilateral intervention in cases of gross abuses of human rights,²⁰ the principle of nonintervention in the domestic affairs of states is well established under the UN Charter.²¹ While some modern publicists still argue for a right of intervention in the event of widespread human rights abuses,²² the consensus at present is that even in the most egregious cases, the charter prohibits intervention without the consent of the relevant state unless the intervention is done in self-defense or the Security Council has determined that there is a threat to international peace and security.²³ Apologists for the nonintervention norm point out that in the post–World War II international system prescribed by the UN Charter, “War is to be renounced as an instrument of national policy. Human rights are to be affirmed. But in its substantive provisions, the Charter clearly privileges peace over dignity: the threat or use of force is prohibited in Article 2(4); protection of human rights is limited to the more or less hortatory provisions of Articles 55 and 56.”²⁴

While international peace is an essential object of any system of international relations, it should not come at any price. The rules need to be changed in favor of the democratic victims of coups. Treason and other acts that threaten or overthrow democratically elected governments should not be rewarded; instead, they should be treated as crimes against the people whose state has been stolen from them. One can draw an analogy to a company in which the head office is occupied by terrorists. Securities commissions or equivalent bodies do not assume that those occupying the head office can trade in the name of that company and sell or mortgage its assets. However, in international law, that is exactly how coup makers have been treated.

CHANGES TO INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

We have seen how the neat divide between international and domestic law has allowed democratic nations to hold on to two conflicting principles for the ascription of legitimacy. However, this compartmentalization seems increasingly under threat. Recent shifts examined in international law and international relations theory support the possibility of more active international responses to internal threats to democracy. Paving the way for a break from historical state practice are changing attitudes about sovereignty, democracy, and international security.

Sovereignty and Recognition Policy

Effective control (the prior successful use of force) was rejected as a principle of domestic legitimacy by democratic nations over 200 years ago, yet it remains as a principle of international legitimacy. This inconsistency cannot be sustained much longer. The Warsaw Declaration and the Community of Democracies are a very substantial move in a new direction.

A major restraint on rejecting the principle of recognizing prior successful use of force is the extent to which it is embedded in international law and the uncertain consequences of replacing it. Nevertheless, as it did in domestic law, the recognition of governments in the international context is evolving away from effective control and toward an insistence on democratic governance, at least at the regional level.²⁵ The European Community guidelines, for example, adopted in the wake of the break-up of the Soviet Union, provide that recognition of new states in eastern Europe will follow if, “subject to the normal standards of international practice and the political realities in each case, those new States which . . . have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.”²⁶ In what can effectively be seen as a tool of nonrecognition, the OAS amended its charter in September 1997 to allow for the suspension of a member whose government takes power through undemocratic means.²⁷ The UN Credentials Committee, acting with a high degree of consensus, has already refused to recommend accreditation of representatives in five cases.²⁸

Further, national courts in new or fragile democracies may now be more willing to accept that sovereignty rests with the people. In an important precedent, noteworthy for its courage and common sense, the Fijian Court of Appeal held that although there was effective control by the military-appointed government following two coups in May 2000, the attempted change in the

legal order was invalid.²⁹ In so finding, the court relied heavily on affidavits from a wide range of civil society organizations, including churches, union groups, employer groups, women's groups, and human rights organizations.

The forces of globalization are weakening the integrity and strength of sovereign states. Specifically, challenges from globalization come in the form of an expanding right of self-determination, regional integration, international agreements on environment and natural resources, and refugee flows from failed states (those where internal government has collapsed).³⁰ The globalization trend is also reflected in the new willingness of the Security Council to see threats to peace and security from nontraditional sources. Globalization is fundamentally changing the institutional context of "strong" or autonomous states based on independent political communities, which have provided the assumptions on which constitutional and international law have been based. Indeed, interdependence means that efficacy is no longer solely dependent on internal factors but is increasingly dependent on a state's capacity to interact with the rest of the world.

The Irreversibility of Democracy

The recent practices of states and the resolutions of international and regional organizations point to a developing idea about the irreversibility of democracy. The irreversibility approach respects countries that are not democracies and confines effective support against unconstitutional changes in government to those countries that have become democracies. In his address to the Organization of African Unity (OAU) in 2000, UN Secretary-General Kofi Annan, after speaking on the problems confronting Africa and of the great potential of its people to overcome them, concluded, "My friends, I feel the winds of change blowing afresh today. This time they are the winds of democracy, of respect for individual dignity, and for the rule of law. I am convinced this process is irreversible. We must take heed of it, and respect the will of the people, who are insisting more and more that their votes be fairly counted, and their voices clearly heard."³¹

Those who doubt the idea of the irreversibility of democracy may query why a democratic government should be irreversible and other forms of government, inimical to democracy, not be. In fact, the idea of "irreversibility" has had some unsavory and potentially disturbing antecedents. These include the Concert of Europe (in which European monarchies agreed that it was their mutual right to intervene within each other's countries if one of the monarchies was overthrown by a popular uprising) and the Brezhnev Doctrine (in which the communist states could be invaded to ensure that they did not slip out of the socialist fold). Why could a country with a newly minted coup not

validly argue that democracy had failed and that it had decided to pursue a different form of government?

The response to this objection involves the fundamental difference between the Community of Democracies and the Concert of Europe or the Brezhnev Doctrine. Before the advent of democracy, those who had effective control of a territory were deemed to speak on behalf of those who lived within it. This was obviously a fiction—especially for those who were actively using their sovereign power to torture their “citizens.” However, the advent of democracy changed all that. We no longer have to guess at what the people want. For the first time in history, we have a fair approximation of people’s desires and views. The reason for the irreversibility of democracy is that, once the people have effectively spoken, changes in what they have ordered should not be made without their consent.

The Emergence of Democracy as a Right

In recent years, democracy has begun to emerge as a human right. Thomas Franck said a over decade ago that “Democracy . . . is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes.”³² Given their presence in a large number of UN documents, including the charter, human rights are clearly a matter of international concern.³³ The evolution of their importance has been brought about by both the effects of globalization and the influence of new actors. W. Michael Reisman speaks of a new “contemporary international decision process, which includes . . . governments, inter-governmental organizations, and, in no small measure, the media.”³⁴ He credits this process with having taken “a hitherto normatively uncertain human rights ‘standard of achievement,’ refashioned it into the ‘international protection of human rights,’ and elevated it to an imperative level of international law. Indeed, it is increasingly characterized as *jus cogens*.”³⁵

Threats to democracy are clearly also threats to other, established, fundamental human rights. Reisman, for example, claims that

the tendency among some diplomats, and even human rights lawyers, to see the violation of the right to democratic government that is expressed in Article 21 [of the Universal Declaration of Human Rights] as lamentable, of course, but somehow less urgent than other human rights violations, is a serious error. . . . When that happens, all the other human rights that depend on the lawful institutions of government become matters for the discretion of the dictators. And when that happens, those rights cease. Military coups constitute a terrible violation of the political rights of the collectivity, and they invariably bring in their wake serious violations of all other human rights. . . . democracy

is the condition sine qua non for the realization of many other internationally prescribed human rights.³⁶

Many international human rights instruments have recognized the importance of democracy. Paragraphs 1 and 3 of Article 21 of the 1948 UN Declaration of Human Rights (generally seen as now having declaratory status in customary international law) reiterate the right to representative government,³⁷ as does Article 25 of the International Covenant on Civil and Political Rights (ICCPR). In April 1999, the UN Commission on Human Rights, established under the ICCPR, voted 51–0 (with two abstentions—China and Cuba) to “take all measures within its power to secure for all people the fundamental democratic rights and freedoms to which they are entitled” and affirmed “the right of democratic governance.”³⁸ In the United Nations Millennium Declaration,³⁹ member states agreed that “democratic and participatory government best assures the right of people to live their lives free from the fear of violence, oppression or injustice.”⁴⁰ This trend toward emphasizing the importance of democracy has continued in the United Nations.⁴¹

As detailed in chapters 3 and 4, regional organizations have also emphasized the importance of democracy. The Organization of American States (OAS) has created a Unit for the Promotion of Democracy. According to Article 3(d) of the OAS Charter: “The solidarity of the American States . . . require(s) the political organization of those States on the basis of the effective exercise of representative democracy.” Article 2(b) provides that one of the essential purposes of the OAS is “to promote and consolidate representative democracy, with due respect for the principle of non-intervention.” In June 1991, the OAS General Assembly promulgated the Santiago Commitment to Democracy and the Renewal of the Inter-American System,⁴² which required the organization to respond in the case of “sudden or irregular interruption” of democracy in a member state. This was followed by a second resolution, 1080, “Representative Democracy,”⁴³ which required an immediate convocation of the Permanent Council in the event of any illegitimate interruption in democratic governance. The council could then decide to convene an ad hoc Meeting of the Ministers of Foreign Affairs or a special session of the General Assembly to consider what actions might be taken consistent with the charter and international law. The OAS continues to reiterate the importance of democracy.⁴⁴ Most recently, it strongly condemned the April 2002 coup in Venezuela (the coup was quickly reversed) and has been working toward a solution to the political unrest in that country.⁴⁵

At its 1999 summit, the Organization of African Unity said that from then on, any regime that mounted a coup would not be allowed to join the OAU and would not be welcome at OAU summits.⁴⁶ The preamble to the Constitutive

Act of the new African Union⁴⁷ recognizes the need to “consolidate democratic institutions and culture, and to ensure good governance and the rule of law,” with an objective being to “promote democratic principles, popular participation and good governance.” The principles according to which the Union is to function (Article 4) reiterate this commitment; in addition, they specify “condemnation and rejection of unconstitutional changes of governments.”⁴⁸

The Conference on Security and Cooperation in Europe (CSCE) in 1990 reaffirmed its commitment to democracy in the Copenhagen Document,⁴⁹ which provides that:

The participating states declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government . . . they recognise their responsibility to defend and protect the people against the activities of persons, groups or organizations that engage in or refuse to renounce terrorism or violence aimed at the overthrow of that order or that of another participating state (para. 6).

In the Paris Charter,⁵⁰ adopted shortly after the Copenhagen Document, participating states agree to “support each other with the aim of making democratic gains irreversible.”⁵¹

The CSCE meeting in Moscow, following the failed Soviet coup attempt of August 1991, condemned coups and resolved to: “Support vigorously, in accordance with the Charter of the United Nations, in case of overthrow or attempted overthrow of a legitimately elected government of a participating State by undemocratic means, the legitimate organs of that State upholding human rights, democracy and the rule of law, recognizing their common commitment to countering any attempt to curb these basic values.”⁵² The Commonwealth of Nations,⁵³ though it does not have a constituent document in the manner of other bodies, has endorsed democracy in significant declarations⁵⁴ and suspended Zimbabwe for failing to uphold democracy in the March 2002 elections.⁵⁵

Peace and Security

The close link between human rights—including democracy—and peace is increasingly being recognized. As noted by the Carnegie Commission: “The original decision to enshrine a commitment to uphold human rights in the UN Charter reflected more than a humanitarian or idealist impulse of member governments. The founders of the UN were primarily interested in preventing another world war, and many had concluded that the terrible human rights abuses by the Nazis were the early warning signs of a potential aggressor.”⁵⁶

Regional organizations make the same connection in the context of upholding democracy. The preamble to the OAS Charter, for example, states that “representative democracy is an indispensable condition for the stability, peace and development of the region.” The relevant literature also points to a strong argument that the spread of democracy is conducive to world peace.⁵⁷ Democratization does reduce the risk of a country being involved in war, either as a target or as an initiator: “Shared power between the executive and legislature, each largely staffed by officials pressured by public opinion” is the aspect of democratization that reduces the probability of war; “to the extent that changes towards democracy bring with them constraints on the executive branch of government, the attendant reduction in the risk of war appears quite robust.”⁵⁸ Further, the most reliable path to stable *domestic* peace in the long run is to democratize as much as possible, even though, in the short run, a democratizing country will have to live through an unsettling period of change.⁵⁹

Conversely, situations that are inimical to human safety occur in countries where democracy is spectacularly missing or threatened: authoritarian, repressive regimes are also a threat to world peace. Not only do they create suffering and economic deprivation at the domestic level, but the rapidly expanding refugee flows from such countries have security implications.⁶⁰ As demonstrated by events in the Great Lakes region of central Africa, refugee warriors can regionalize the conflict of their country of origin by employing refugee camps as a base of operations and refugees as a shield. In these cases, forced migration represents a direct security burden. Further, changes are likely in the balance of political opportunity and feelings of relative deprivation within a community hosting refugees. The effects of these changes will be compounded by the challenges to group identity, which can exacerbate preexisting tensions within a country and lead to conflict.⁶¹ In these cases, migrants cause an indirect security burden, which is potentially as explosive as the direct security burden.⁶²

In analyzing action by the Security Council under Chapter VII of the UN Charter,⁶³ even cautious analysts such as Michael Byers and Simon Chesterman argue that “the Security Council may legitimately consider the threat to or removal of a democratically elected government by a force internal to the State in question as a factor which could, together with other factors such as mass killings or refugee flows, in some circumstances *contribute* to a threat to international peace and security under recently expanded conceptions of that term.”⁶⁴ The Security Council has in fact found a threat to peace and security in instances where the internal situation gave rise to massive refugee flows, for example, Iraq (repression of the Kurdish minority)⁶⁵ and a violent coup in Haiti.⁶⁶ In the latter case, following the failure of sanctions to dis-

lodge the military regime over a period of three years, the Security Council passed Resolution 841 of 1993, which concluded that in these “unique and exceptional circumstances” the continuation of the “humanitarian crisis, including mass displacements of population” threatened international peace and security in the region.⁶⁷

The Security Council has taken an even more generous view of what constitutes a threat to the peace by expanding its definition of such threats: “The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.”⁶⁸ These sources have been interpreted to include starvation (Somalia),⁶⁹ genocide and serious humanitarian crises (Rwanda, Burundi, and Zaire), and civil wars (Liberia and Angola).⁷⁰ Again, such catastrophes, with the threats they constitute to domestic and international peace, simply do not occur in functioning democracies.

Coercive Humanitarian Intervention

The limited but growing recognition of the possibility of intervention on humanitarian grounds is the first crack in the arguments used to support the principle of nonintervention. Recently, the UN secretary-general has shown a preference for such intervention over sovereignty, based on his strong view that the purpose of the international system is to protect the rights of individuals rather than states in these circumstances.⁷¹ Some have even argued that the prohibition on intervention in Article 2(4) of the UN charter must be modified in light of the right to self-determination,⁷² and that because the Security Council has only been prepared to intervene in a small number of humanitarian catastrophes, its responsibilities in this respect have not been fully discharged, and a right of unilateral humanitarian intervention therefore continues.⁷³

It is premature to engage in a detailed analysis of the arguments for and against the U.S.-led 2003 invasion of Iraq. However, at first sight, the arguments concerning the humanitarian aspect of the intervention are at least as fierce as those over the NATO intervention in the humanitarian crisis in Kosovo. Jurists have explored the gap between positive international law and morality in the context of Kosovo, and they have found the former wanting.⁷⁴ A key point here is that those who intervene must themselves comply with international law, or the credibility of the entire class of such interventions suffers. The legality of the NATO bombing of Kosovo is dubious, and the reasons given by NATO for seeking to circumvent the authority of the UN Security Council are questionable.⁷⁵ But the fact that the requirements of law and morality were seen by many as so removed from one another in the

Kosovo action exposed just how threadbare the existing international legal framework can be when it comes to dealing with human rights catastrophes.⁷⁶

In any case, the intervention in Kosovo may have helped in the development of a new norm of humanitarian intervention:

In the main, a clear consensus does appear to have taken shape among a broad cross-section of States, and it is a consensus which favoured an armed response to halt, or at least alleviate, the humanitarian catastrophe at the heart of the conflict raging in Kosovo. This approval occurred in full knowledge that the Security Council resolutions had not endorsed armed intervention, but was not based only on an assumption that the intervention was a moral one; rather, it was perceived by states as a matter upon which international law deliberated—where it permitted coercive action in cases of extreme humanitarian hardship through the exercise of the right of humanitarian intervention.⁷⁷

Others disagree.⁷⁸ However, such a view is at least consistent with the dictum in the Nicaragua case that “reliance by a State on a novel right or an unprecedented exception to the principle [of nonintervention] might, if shared in principle by other States, tend toward a modification of customary international law.”⁷⁹

Humanitarian concerns are one possible—though uncertain and controversial—basis⁸⁰ for collective military intervention by the UN to protect democracy, if the threat to or overthrow of democracy is accompanied by large-scale human rights abuses (especially if the atrocities are widely reported),⁸¹ as in Haiti. Indeed, there was arguably a respectable tradition of (unilateral) humanitarian intervention before the post-World War II system of international relations.⁸² Overall, however, the weight of opinion,⁸³ including that of the International Court of Justice (ICJ),⁸⁴ is that *unilateral* interventions (i.e. those not authorized by the Security Council) solely to restore democracy (or to allow a democratically elected government to take power) contravene international law, even when the result is, morally, a good one; and in both Grenada and Panama, this may be said to have been the case.⁸⁵ Michael Levitin describes the dilemma thus: “If international law is to become more relevant, law must be made more nearly congruent with its moral basis. Thus the international community ought to recognise a norm of humanitarian intervention, and in order to distinguish between lawful and unlawful interventions, the international community ought to assign juridical significance to the wishes of the affected state’s *citizens*.”⁸⁶

Several worthwhile initiatives have been taken to develop guidelines for humanitarian intervention which could be used in the absence of Security Council authorization for military intervention.⁸⁷ They prescribe some common conditions for the use of force:

- There are gross and widespread human rights abuses, which the government of the particular state, under pressure to do so, is unable or unwilling to stop.
- There has been a failure of more peaceable measures (which have been tried consistently with the urgency of the situation) to stop these abuses.
- The Security Council has failed to act or it is known that a right of veto will be exercised if intervention is proposed. An immediate report must be made to the Security Council of any action undertaken.
- A group of states (rather than a single hegemonic power or such a power with the help of a client state or ally) is willing to act. Preferably these states are “disinterested.”
- The force used is proportionate and is used solely for the purpose of stopping the abuses and restoring peace; civilian casualties and retribution are avoided as much as possible; and the peacemaking force withdraws as soon as its goal has been met.
- Appropriate resources are provided for the rebuilding of the society.

While it is beyond the scope of this chapter to discuss fully, this final point is perhaps the most difficult to satisfy, even where considerable resources and good will are evident: post-intervention Afghanistan and Iraq demonstrate the pitfalls of seeking to achieve a representative form of government where there is little or no tradition of this.

JUSTIFIED AND POTENTIALLY EFFECTIVE INTERNATIONAL RESPONSES TO COUPS

Although changes to international law and international relations justify a greater international role in preventing and deterring coups and erosions, not all responsibility for protecting democracy should be assigned to the international community. The first line of defense should be a democracy's own domestic initiatives. As discussed in chapter 6, the main role of the international community should be to support a domestic response to threats to democracy. However, international support can be crucial to the survival of democracy, particularly when domestic responses appear ineffective. Not for the first time in international affairs, the greater the resolution of democratic nations to act, the less likely they will be called on to do so. The less resolute the Community of Democracies, the more likely that individual democracies will be challenged and the more likely other democracies will have to face dilemmas, messy decisions, and violent outcomes.

Although the last section argues that change is afoot in international law and international relations to make democracies more comfortable in threatening to

provide ultimate guarantees for democracy to their fellows, democracies can commit to many kinds of support now without breaching international law. Indeed, the list of things that can be done is such that a sufficiently resolute group of democracies could effectively ensure that no future coups occur in any member of their group.

The Long Term: Aid and Political Leadership

This chapter focuses primarily on responses to immediate threats to democracy. However, the international community (and especially the Community of Democracies) must not neglect the lengthy and essential process of democracy building. Properly targeted aid programs are essential—in particular, to fight poverty and build a literate and strong civil society so that populations themselves are vigilant in demanding and protecting democracy.⁸⁸ Foreign aid donors also should be wary of funding militaries in unstable democracies; creating an effective civilian police force is more important. Youth strategies are essential for ensuring that the rising (and perhaps disaffected) generation supports democracy.⁸⁹

Democratic governments should also continuously educate their publics about the need for long-term commitments of aid to help other countries achieve lasting democracy.⁹⁰ Such an approach tests political will and the normal inclination toward short-term thinking and crisis management. It requires sustained, persistent public education so that the long-term interests of the world become the immediate interests of those with the power to make a difference. The use of analogies to the democracy that voters so value at home is central to this argument. Governments should mount the case that the more credible the threat of action, the less likely they are to have to engage in intervention to protect other democracies. In any case, there is an element of self-defense in any consideration of whether to intervene: undemocratic governments are likely to show as little interest in the human rights of other countries' citizens as they show for their own. They are far more likely to breed and support terrorists than those of democratic nations, for two reasons: first, their own use of violence without the sanction of law may lead their internal victims to turn to lawless violence themselves; and second, they are unlikely to have any qualms about using terrorists to surreptitiously pursue their foreign policies.

International responses should not be limited to those by other democratic governments, however, although an exploration of the possibilities is beyond the scope of this chapter. International civil society and international business can also have a large role to play. Professions such as law, accountancy, and the military should see themselves as having a global reach and should

develop their codes of ethics to make participation in, and support for, a coup or democratic erosion clearly unethical and likely to lead to shame and expulsion. Similarly, banks should have principles for how they deal with usurpers—not just as a matter of ethics but as a matter of prudence for the future of their “sovereign” loan books.⁹¹

Diplomatic Support and Recognition of a Government in Exile

As indicated, the primary focus of any strategy should be to bolster the likely effectiveness of domestic responses. International collective action should include (initially) diplomatic pressure and offers of mediation as well as continuing recognition of, and support for, the democratic regime, and total non-recognition of any regime that attempts to overthrow it. If a democratically elected government is overthrown, however, and some or all of its members flee the country, they may be supported by friendly governments as the government in exile.

Once a government is recognized as the legitimate government in exile, it has the power to bind its state through treaties and other legal agreements (at least in the eyes of the states that continue to recognize it), dispose of assets abroad, protect its nationals, represent the state in judicial proceedings and international fora, and, possibly, consent to armed intervention in the state—that is, the use of force against the effective government.⁹² The international community should, however, pay attention to the quality of the overthrown government. It may be argued that the democratic credentials of the ousted regime had been damaged. If this were the case, then the international assistance would be conditional on any such damages being rectified and dealt with through constitutional processes. The best way to make a determination about an ousted democratic government’s quality and to set any necessary conditions for its return would be by way of a tribunal established under a multilateral convention for the protection of democracy. This option is far preferable to the ad hoc whims of states. Conditions might include:

1. Where a president has been alleged to be corrupt and there is immunity from prosecution, the president would be required to waive all immunities.
2. The coup leaders could be allowed to plead issues of the ousted government’s quality in justification or mitigation during their trial.
3. Where a court allegedly has been stacked, the court, if sitting in exile, must include nominees of other states during the period of exile and for a certain time after its return (this will almost always be quite easy to achieve, as courts in exile rarely have a full complement of judges).

Once considerations of the quality of the overthrown government in exile have been satisfied, it should retain full judicial, executive, and legislative branches. There is much value in retaining the shell of a democratic government in exile in the territory of its allies, pending a return to democracy at a later date. Such a government can provide some direction to the attempts to seek the return to democracy. It can provide legitimacy to the restoration process and may make life difficult for the new regime and its supporters. Courts of the exiled government can issue declarations. They also might issue warrants for the arrest of coup leaders whenever they step onto the territory of any pro-democratic nation that is prepared to recognize the warrant. Trials could be conducted on friendly territory. The national courts of other countries (and in particular those that are signatories to any multilateral convention for the protection of democracy) should give full faith and credit to any decisions of the courts of recognized governments in exile.

Recognition Policy in the United Nations

The UN Credentials Committee (or another representative UN group) should be given a mandate to establish whether a particular government is a representative one.⁹³ If a country were discredited altogether (and this is possible),⁹⁴ it would not be able to participate in the General Assembly. “More significantly, the symbolic damage to a regime can be enormous. The international community will likely take steps to isolate the regime. International organizations may withhold financial assistance. [Discreditation] may also result in the loss of jurisdictional immunities and the right to sue in the name of the Member State in domestic as well as international tribunals.”⁹⁵ In addition, other states could freeze assets of the member state abroad and provide assistance to the opponents of the regime. The momentum generated by delegitimizing a government might prompt the Security Council and individual member states to impose sanctions. Regional organizations might take actions pursuant to the UN vote. “In sum, discreditation is powerful medicine.”⁹⁶

In a world where unrepresentative government is a common phenomenon, it is tempting to formalize in advance a procedure that would deny recognition to such governments. To this end, credentials could be considered first by the Credentials Committee and then by the General Assembly, which would use agreed checklists, including respect for human rights.⁹⁷ Chesterman, noting the use of preconditions for recognition of a state included in the European Community Guidelines, concludes that “the recognition or non-recognition of regimes depending on their commitment to democracy may well provide the most effective means of fostering a right to this form of polity.”⁹⁸

Coercive Intervention: Sanctions and Military Intervention

Sanctions

The Security Council can authorize and mandate collective sanctions under Chapter VII if it determines that there is a threat to peace and security. The effectiveness of sanctions is open to debate, however, and unless carefully chosen, they have the potential to create great hardship among the population.⁹⁹ Sanctions in the form of an effective refusal by all or most states to accord the delinquent state the benefits of membership in the international community are probably the most effective and devastating response, with an impact so great that a credible threat of its use might mean that it would never have to be used. Targeted sanctions are appropriate as part of a comprehensive strategy aimed at restoring democracy. Examples include freezing the assets of government members and imposing travel restrictions on them and their families. Unilateral sanctions are also a legitimate response. In the Nicaragua case,¹⁰⁰ the United States ceased economic aid, reduced Nicaragua's sugar import quota, and imposed a trade embargo. In response to Nicaragua's protests concerning the sanctions, the International Court of Justice held that "it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention."¹⁰¹

Military Intervention to Protect Democracy

Collective rather than unilateral military intervention remains the best approach. The key lies in making the UN Security Council more effective.¹⁰² That said, the authors do not hold that intervention without Security Council approval would never be justified.¹⁰³ The question is: who is to decide and by what process is the justification established? Interventions must be subject to international law and be subjected to an independent tribunal (see below). Reisman takes a more radical line, urging democracies to "back up their insistence on respect for constitutional democracy in all other states with a claim of a customary right to unilateral humanitarian intervention for its violation." If this is done, "that norm, in itself, will act to deter coups." There is a danger that this approach will be used as a fig leaf for intervention based on ulterior motives, as in the past. But that danger "is now minimized when the government that has been usurped was elected in internationally monitored free and fair elections."¹⁰⁴

Clearly, armed intervention should be a credible *last resort* that would be carried out in the unlikely case that other measures, including sanctions, failed.¹⁰⁵ The response should be sufficiently likely, however, that rational officials in the affected country, who were not part of a coup plot, would have

a reasonable expectation that resistance to the coup would be effective, and also safer than joining the plot or sitting on the sidelines. This would contribute to the overall goal of making an effective response so likely that no rational coup maker would ever attempt the overthrow of a democratic regime.

Although intervention may be justified by gross abuses of human rights, and an argument can be mounted that the denial of democracy is both a gross violation in itself and leads to other violations, the authors would prefer to see pro-democratic intervention justified in its own right and subject to its own constraints. There are two bases for intervention—by invitation and by prior treaty. These are more legally defensible than intervention justified on humanitarian grounds, which was discussed earlier.

Military Intervention by Invitation Intervention by invitation is exactly that—intervention spurred by an invitation for military assistance from the threatened or deposed democratic government: if the invitation is from the government recognized as the de jure government, then there is no “intervention” in any case. Some controversy surrounds intervention by invitation,¹⁰⁶ especially where the government seeking assistance has been deposed; by the effective control argument, a regime that is firmly in control of the territory of the state (the de facto regime) would be the only entity able to give such consent. For some, however, such a presumption is less persuasive where “a small, repressive military clique overthrows a popular and democratically elected government.”¹⁰⁷

Here, political legitimacy is increasingly important. David Wippman suggests that state practice will support such interventions (evidenced for example by the British intervention in Tanganyika to restore democracy in 1964) where they are small and swift, result in there being only a brief discontinuity of the democratic government’s control, and amount to assistance by an ex-colonial power to a former colony. This situation allows other states to turn a blind eye, even if the intervention is not strictly legitimate according to international law. Further, an unconstitutional regime arguably has no right to refuse consent. If one can legitimately recognize the government in exile, one can legitimately recognize its request for assistance to restore it. If the intervenor continues to recognize the ousted government, and that government requests intervention, then intervention is, as far as the intervenor is concerned, a matter of intervention by invitation.

Mutual Intervention Treaties It is axiomatic that clear and credible commitments made in advance are more likely to be effective deterrents than the vague possibility of decisions taken after the occurrence of a coup (i.e., subsequent to the commission of the act intended to be deterred). If organized by prior agreement between a democratically elected government and others

(e.g., members of a regional organization), intervention treaties will serve to increase the predictability of military intervention—by providing an agreement to it in advance in a bilateral or, preferably, multilateral treaty. This approach also gets over the legitimacy question. The agreement of a democracy to intervention to protect its form of governance is hard to gainsay. It also reminds one that a democracy belongs to the people of a state; they are the ones wronged and are the ones who should ultimately say how the wrong can be righted.

The aim of intervention by way of these treaties, also known as “invasion pacts,” would be to restore as many members of the elected government as possible. The primary reason for returning office holders to the positions they held prior to the interruption to democracy is that they were the officials chosen by the democratic constitution through which populations express their choice of officials. However, there exists a secondary set of highly practical reasons: the provision of continuity in legitimacy and a clear point of reference and negotiation for a return to democracy. Democratically elected officials provide the same kind of reference points formerly provided by hereditary monarchies—but with far greater legitimacy in modern eyes.¹⁰⁸

There is little precedent generally for the use of invasion pacts, apart from the cases of Cyprus and, more recently, Bosnia.¹⁰⁹ One question is “whether peremptory norms prevent states from entering into treaties authorizing future military intervention in the absence of consent from the State’s then-existing government.”¹¹⁰ There is no reason states cannot cede aspects of their sovereignty through the conclusion of treaties. One example is Article 4 of the Charter of the African Union, which provides for “the right of the *Union* to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.”¹¹¹ However, while all agreements place some limitations on state sovereignty, Wippman argues that agreements authorizing military intervention are different “because they go directly to the heart of State independence and the other central values associated with State sovereignty.”¹¹² On this argument, intervention treaties are void *ab initio* (from the beginning).¹¹³ On the other hand, it is not so clear that absolutist statements about state sovereignty can be made anymore. Holding them up against a treaty signed by a people’s democratic representatives is increasingly difficult and, arguably, increasingly untenable. As the prior successful use of force gives way to the consent of the governed as the test for international as well as domestic sovereign legitimacy, sovereignty will be seen as a basis for the legitimacy of such treaties among democracies.

Intervention treaties among democracies to protect their members from unconstitutional overthrow would set out all the responses likely to occur with an emphasis on:¹¹⁴

- Recognition policy.
- Support for ousted institutions.
- Enforcement of the orders of democratically legitimate courts.
- Smart sanctions.
- Refusal of international credit.
- Refusal to recognize sovereign borrowings by coup regimes.
- Nonrecognition for the purposes of international trade.
- Ultimately, general sanctions and military intervention.

Such treaties also should create a new legal tribunal (or empower an existing one)¹¹⁵ to determine the legalities of actions taken in pursuance to the treaty, and signatories should agree to be bound by the decisions of the tribunals. Such tribunals should be able to give speedy determinations, in line with the rule-of-law principle that those who seek to enforce international law should be bound by international law. Ideally, all states would become parties to intervention treaties. However, even in the absence of universal ratification, where a tribunal has been established under such a treaty, nonmembers should be able to take action consistent with the treaty: for example, assisting states which are parties to the treaty to achieve goals legitimized by tribunal decisions.

The necessity for multilateral treaties to protect democracy is made more urgent by the events of September 11, 2001. In reaction to those events, the United States has developed, unilaterally, a foreign policy of preventive intervention.¹¹⁶ While few mourn the overthrow of Saddam Hussein (a key objective of the new policy), the vehicle for the shift—the war on terrorism—means a revision of the nonintervention principle in a context where the result is not so much intervention to protect democracy against its violent overthrow, as intervention to chase and seize terrorists in countries that harbor them. Again, no one can mourn the downfall of the Taliban in Afghanistan. But such interventions are done with the help of regimes that are themselves abusers of human rights: Pakistan's military regime came to power in a coup and shows few signs of being prepared to return the country to democracy,¹¹⁷ and Uzbekistan was “an ignored Central Asian despotism” before it became the strategic partner of the United States. Human rights abuses by other allies such as China and Russia also are being ignored. Security claims are thus taking precedence over claims to human rights, including the right to democracy, with the likelihood that the protection of democracy will be seen as a lesser

priority to winning the war on terrorism.¹¹⁸ It should be recognized that any moves to support democracy are themselves likely to interfere with the conditions that give rise to terrorism. In the long run, therefore, these two objectives should be pursued concurrently. Indeed, it may be that they only can be pursued concurrently.

Some may wonder whether democracies will be willing to enter into mutual intervention treaties. In robust liberal democracies—those with the greatest capacity and will to support democracies at risk—such action must take into account popular will. Unless politicians can show that vital national interests are at stake, those who vote governments in and out of office are not going to want to send their sons and daughters to risk their lives in dangerous places (as the intervention in Somalia highlighted). Nor will they be willing to look beyond national problems legitimately calling for taxpayers' money. As mentioned above, leadership at home is thus as crucial as international leadership.

The question also arises as to whether it should be legitimate to invade another country in order to *create* democracy, one apparent aim of the intervention in Iraq. This chapter is directed toward the protection of democracies already established by a state's own people. Intervention to create democracy is clearly far more controversial: the last twenty years have seen the greatest flowering of democracy in history, but all of these democracies were established through domestic movements that empowered formerly oppressed peoples to seize democracy for themselves. The Community of Democracies itself is testament to this. Democratic transitions within members of the CD over the last twenty-five years were achieved by their own people. While there was international assistance for democratic forces at various times, this was always assistance to home-grown forces and it did not take the form of military intervention.¹¹⁹

DEALING WITH EROSION

The response to erosions of democracy will necessarily be different from the response to coups d'état, although some of the mechanisms suggested above for dealing with the overthrow of elected governments might be applied to prevent erosion in democratic regimes as well. The key issue with respect to erosions is that the government in question initially had democratic legitimacy, and the point at which such legitimacy was lost is not always clear. Such a context inevitably shifts the international community's responses toward the "softer" end of the spectrum of options: for example, using aid to bolster democratic institutions, especially the courts, the media, and civil society, and

encouraging a commitment by governments to legality.¹²⁰ The international community is even more likely than in the case of coups to emphasize domestic rather than international responses—and some international responses that could work for coups will rarely be applicable to erosions (in particular the recognition of a government in exile or intervention by invitation—and, in most cases, treaties—to protect democracy).

Nevertheless, the availability of international action as an ultimate guarantor should be woven into anti-erosion strategies. There should be a recognition that, at a certain point, a once democratically elected government loses its right to represent the people and has no more legitimacy than a government installed by a coup—with similar consequences. When a once democratically elected government “steals” an election, that point is reached. Sometimes it may be reached earlier.

Nullity

Long before a government loses its legitimacy, the international community in general (and the Community of Democracies in particular) should take serious measures to uphold democratically endorsed constitutions, even if the government in question does not. Attempts by a government to exercise powers it does not have under the state’s constitution should be treated as “nullities,” that is, of no legal effect (see chapter 6). Sometimes there will be room for legitimate disagreements concerning the interpretation of a particular constitution, and other states should not presume to insist on their own interpretations over that of an independent judiciary. However, if a government intent on eroding democracy corrupts the courts, stacks them with compliant judges, or fires judges who show they are prepared to exercise independent judgment, then other democracies can discount the decisions of those courts. If an independent, constitutionally appointed court can continue in being, perhaps with the assistance of other democracies, then an authoritative interpretation of the state’s constitution should be possible. However, the lack of such an ongoing court-in-being should not mean that actions of governments who erode democracy are judged to be lawful and constitutional. In particular, actions affecting the appointment and independence of members of the judiciary that have the appearance of corruption should be taken at face value: the assumption should be made that such actions were taken to avoid having particular government moves ruled unconstitutional, and that the intentions behind those actions were corrupt.

These considerations suggest a creative and effective invocation of the doctrine of “nullity” and the idea that “cheating does not count.” As there is no public power without legal warrant, and only an independent judiciary can

warrant that the public power is legal, then interfering with the judiciary's independence is self-defeating. To put it another way: the consequence of attempting to take away the right of the people to challenge the constitutionality of a particular action by a government is not to render such challenges ineffective, but to lead observers to assume that the challenges would have been successful. The Supreme Court should not be seen merely in negative terms—as an institution that can declare a particular action by a government invalid. It is also the only institution that can declare the action valid. Other democracies can conclude that, where the constitution throws plausible doubt on the constitutional validity of a purported exercise of power by a leader eroding democracy, that exercise of power is not valid.

There is an understandable nervousness about one government—even a democratic one subject to the rule of law—interpreting the constitution of another state. The correct body to interpret the constitution of a state is its own independent judiciary. However, if the head of government of a state has incapacitated that judiciary, that leader should not be rewarded for such action.

Education and Codes of Ethics

Mature democracies should recognize that the erosion of democracy is not a phenomenon limited to developing countries with newly democratic governments: it is a problem for all democracies. Such recognition has the advantage of targeting the real problems within democracies and avoids stigmatizing the erosion of democracy as a problem in “new,” “fledgling,” “weak,” “vulnerable,” and by implication “inferior” democracies.

The international community should recognize the temptation that all politicians face and develop ethical codes and other elements of national integrity systems to channel, even control, the behavior of politicians. Here education of the public about what they should be able to expect from their politicians in a properly functioning democracy will ensure that a vigilant pool of voters is ready to correct any excesses. If the international community is shown to be concerned about relatively limited abuses, the generally more serious abuses in fragile democracies will be seen, properly, as even more heinous.

INTERNATIONAL LAW: THE FUTURE

If democracies were prepared to make credible forward commitments to refuse to recognize coup regimes, this action would by itself deter most coups in most

countries. One of the factors preventing such a response by the international community is the belief that action to protect democracy in another state might be contrary to the target state's "sovereignty." The issue of sovereignty arises only in the minds of democratic leaders because of the dichotomous approach to sovereignty in domestic and international law discussed above. However, once there is similarity between attitudes to sovereignty in domestic and in international law—and as it has been noted, changes in attitude to this end have already begun—this reason for inaction will dissolve. When that happens, international law will change forever, and for the better. However, it has to be conceded that such a change would have such far-reaching consequences that its acceptance will be contested in the immediate future—or at least until it is clear that the globalization trend means that upheavals in one state have automatic and negative consequences in others.

A Paradigm Shift

The paradigm shift within domestic constitutional theory whereby a government's legitimacy is viewed as being dependent on the consent of the governed has reversed the direction of power, authority, and accountability; power is no longer seen as emanating from the all-powerful "sovereign" but, instead, stems from the consent of the people. Domestically, this puts the people at the center of constitutional jurisprudence. Instead of asking the traditional jurisprudential question about what power the people habitually obey, the question becomes: whom does the political leadership represent? Internationally, this shift does not merely change the direction of authority and accountability; it also affects the units that are recognized. Instead of recognizing regimes on the basis of whether the populace habitually obeys them, regimes will be recognized on the basis of whether they have been chosen by those to whom they are accountable.

The full acceptance of this principle means that a government only represents internationally those whose consent it has sought and gained. Such acceptance would involve no change for democratic regimes. However, the government of an undemocratic regime would be seen as representing only those whose consent it has sought, whether these constitute a party, an ethnic group, or the beneficiaries of a restricted franchise. Thus, a government that has not sought a mandate from a group of people would not be seen as speaking for those so excluded.¹²¹

Recent trends, indeed the whole dynamic of global ideological and economic change, are undermining the traditional response to threats against democratic governments outlined above, and making a more active response justifiable. Indeed, the world is close to a position where democracy has reached

the status of a global entitlement, with democracies having a duty to help other nations realize this right. The authors predict that, within twenty years, the prior successful use of force will be as contemptible a claim to recognition in international law as it is within the domestic constitutional law of existing democracies. Within twenty years, it will be impracticable for usurpers to overthrow democratically elected regimes because of the consequent denial of recognition and, to a lesser extent, because the intervention of others will be unequivocally sanctioned.¹²² During those twenty years, the justification for what we would now call “intervention” will have been worked out as part of an emerging international constitutional jurisprudence. This paradigm shift will have fundamental consequences for the nature, content, and practice of international law. It will lead to a whole new jurisprudence and political philosophy, and a different approach to many issues, such as the following.

Liability for “Sovereign Debt”

If a government is not accountable to all of its citizens, then the people are not responsible for the actions of the government. This changes the dynamics and nature of sovereign debt.¹²³ When the international debt collectors call, the people can legitimately claim: “You did not contract with us; you contracted with them. Look to recover your funds from those to whom you lent them.” Such an approach would make international law look more like domestic law.¹²⁴ The inevitable consequence, that loan funds would dry up for all but democracies, rendering dictatorial regimes economically nonviable, is fully intended.

Cheating Does Not Count

A government’s power to claim to represent a group of people and to make commitments in their name would be dependent on its having gained the people’s consent. According recognition dependent on such consent will make it in the interest of governments to gain it. The wonderful side effect of ensuring that *cheating does not count* results. Rigging elections will cease to be a clever strategy. Such rigging will merely ensure that the riggers have denied themselves any possibility of gaining the consent that is the condition of representing a people in the international community. If a government fails to gain the support of the people, then it will have forfeited the claim to speak for them, and others may claim that right.¹²⁵

Elections as a License to Govern

Elections should not be seen as the means by which governments lose office; rather, they should be seen as the means by which aspirants gain office. Under

this approach, elections can be likened to a license to govern that is issued for a limited period for a broad but finite number of activities and is subject to conditions and revocation. The only way to get a new license is to go through the licensing authority. If those who aspire to govern threaten the licensing authority, any license they claim is invalid. If they steal the license—as Robert Mugabe did in the last elections in Zimbabwe—it is invalid. If governments do not use the license in permitted ways, then they lose their validity. Similarly, electoral fraud makes it impossible to win a new mandate, a new license. Forging the license is not clever; it is merely dishonest and does not confer validity.

Elimination of the Conflict Between Sovereignty and Human Rights

If sovereignty is seen as extending only over those to whom the sovereign power is democratically accountable, then members of any group over which that sovereign power is claimed have a right to democratic participation. Sovereignty is no longer the recognition of a power over a people but the collective right of a people to participate in, and benefit from, an independent political community, participating as an equal in the community of nations. To put it another way, sovereignty *becomes* a human right.

Legitimizing Intervention in Nondemocratic Regimes

If governments represent only those whose consent they have sought, action to prevent them from oppressing those whose consent they have not sought ceases to be seen as “intervention” in the traditional sense. Those who try to protect the oppressed would not be interfering in the internal workings of a sovereign territory or trying to break down the walls around a sovereign state. They would be involved in a conflict between international legal persons—helping to defend one against attack from another. What would previously have been called “intervention” will take on a different character, more like action taken to assist the self-defense of a sovereign government. It still might be called “intervention” as it will still involve “coming between” persons. However, taking such action will lose its normative stigma.¹²⁶

CONCLUSION

Democracies face a growing contradiction in views about the basis of legitimacy and sovereignty in the arenas of domestic and international law, policy, and theory. They have been protected from that contradiction only by the compartmentalization of domestic and international law. That compartmen-

talization is under threat and is ultimately unsustainable. However, the consequences of this change are so far reaching that many still reject it and thereby ignore the many ways in which democracy in other nations can be protected legitimately—through individual and, especially, collective action. Rather than trying to avoid the consequences of this paradigm shift, the international community should think it through, understand its possibilities and potential undesirable consequences, and provide a road map for handling the change to achieve the former and avoid the latter.

However, it is not necessary to wait for changes in international law to protect democracy. Even under current international law, a community of democratic states could effectively abolish coups d'état among its membership. Combating erosions of democracy is more difficult because of their gradual nature, and because of the fact that the erosion of democracy converts constitutional institutions that are entitled to the support of other democratic nations to institutions that have no right to international support because they have voided their claims to domestic support. Nonetheless, the development of counter-coup measures will provide the context for their analogical extension to counter-erosion measures. The institutions that are created to regulate such measures can be of great use in defining the basis for interventions in cases of erosion.

NOTES

1. "A legal order is regarded as valid if its norms are by and large effective (that is, actually applied and obeyed)." See H. Kelsen, *Pure Theory of Law*, trans. Max Knight (Gloucester, Mass.: Peter Smith, 1989).

2. Those who gain power by force are the legitimate rulers of a state and gain the right to represent that state in international affairs.

3. The legitimacy of the government is determined by whether it governs with the consent of the people it purports to represent.

4. "With the words 'We, the People,' the American Revolution inaugurated the concept of the popular will as the theoretical and operational source of political authority. On its heels, the French Revolution and the advent of subsequent democratic governments confirmed the concept. . . . It took the formal international legal system time to register these profound changes, but by the end of the Second World War, popular sovereignty was firmly rooted as one of the fundamental postulates of political legitimacy." W. M. Reisman, "Sovereignty and Human Rights in Contemporary International Law," *American Journal of International Law* 84 (1990): 867.

5. Kelsen, *Pure Theory of Law*, 212. In contrast to this, postcolonial courts have first made a factual finding of efficacy and have then based validity on such a finding. Kelsen also distinguishes between the coercive orders of a legislator and those of

a gunman: see pp. 44–45, and H. Kelsen, “Professor Stone and the Pure Theory of Law,” *Stanford Law Review* 17 (1965): 1144. The doctrine has (guarded) approval from some commentators: see, for example, S. A. de Smith and R. Brazier, *Constitutional and Administrative Law*, 8th ed. (New York: Penguin Books, 1998), 71.

6. *Special Reference by His Excellency the Governor-General*, 1955 PLD FC 435. Note de Smith’s concern that state necessity is “the unruliest of all horses, which can gallop away with constitutional law into the domain of political expediency.” S. A. de Smith, “Constitutional Lawyers in Revolutionary Situations,” *West Ontario Law Review* 7 (1968): 98.

7. For a good overview, see T. Mahmud, “Jurisprudence of Successful Treason: Coup d’état and Common Law,” *Cornell International Law Journal* 27 (1994): 104. See also F. Hassan, “A Juridical Critique of Successful Treason: A Jurisprudential Analysis of the Constitutionality of a Coup d’état in the Common Law,” *Stanford Journal of International Law* 20 (1984): 191–257; A. O. Ekpu, “Judicial Response to Coup d’état: A Reply to Tayyab Mahmud (from a Nigerian Perspective),” *Arizona Journal of International and Comparative Law* 13 (1996): 1–30. For an example of courts grappling with the evident problems of these doctrines, see *Zafar Ali Shah v. Pervez Musharraf*, *Chief Executive of Pakistan*, PLD 2000 SC 869.

8. The peace “marked man’s abandonment of the idea of a hierarchical structure of society and his option for a new system characterized by the coexistence of a multiplicity of states, each sovereign within its territory, equal to one another, and free from any external earthly authority. The idea of an authority or organization above the sovereign states is no longer. What takes its place is the notion that all states form a world-wide political system or that, at any rate, the states of Western Europe form a single political system. This new system rests on international law and the balance of power, a law operating between rather than above states and a power operating between rather than above states.” See L. Gross, “The Peace of Westphalia, 1648–1948,” *American Journal of International Law* 42 (1948): 28–29.

9. The international community even moved to facilitate this process in the last decades of the twentieth century. Instead of the previous distinction between recognition of states and recognition of governments—which allowed judgments to be made on the moral character of the government in question—there is a current trend to avoid using official recognition of governments in favor of simply recognizing states.

10. In fact, there is no express provision in the charter that allows the General Assembly to make determinations about the legal legitimacy of governments: see B. R. Roth, *Governmental Illegitimacy in International Law* (New York: Oxford University Press, 1999), 256.

11. See M. Griffin, “Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy Through Its Accreditation Process, and Should It?” *International Law and Politics* 32 (2000): 725–85.

12. Roth, *Governmental Illegitimacy in International Law*, 258.

13. Roth, *Governmental Illegitimacy in International Law*, 253.

14. T. W. Pogge, “The Influence of the Global Order on the Prospects for Genuine Democracy in the Developing Countries,” *Ratio Juris* 14, no. 3 (2001): 335. See also C. Sampford, “Sovereignty and Intervention,” address to closing plenary to the 1999

World Congress on Legal and Social Philosophy, in T. Campbell and B. Leiser, eds., *Human Rights in Theory and Practice* (Aldershot: Ashgate, 2001).

15. Pogge, "The Influence of the Global Order," 337. See also P. Collier, *Economic Causes of Civil Conflict and Their Implications for Policy* (Washington, D.C.: World Bank, 2000), available at www.worldbank.org/research/conflict/papers/civilconflict.pdf.

16. Pogge makes the point that while other states benefit from being able to have a steady, reliable supply of resources available from anyone in power, the buying of oil from Nigeria's Sani Abacha, for example, meant propping up a hated dictator with funds he could spend on arms and soldiers. Pogge, "The Influence of the Global Order."

17. Roth, *Governmental Illegitimacy in International Law*, 330.

18. There has been relatively little emphasis on the internal aspect of self-determination, and, in any event, the content of the right of self-determination is "imprecise and ill-defined." See E. J. Cárdenas and M. F. Cañas, "The Limits of Self-Determination," in *The Self-Determination of Peoples: Community, Nation and State in an Interdependent World*, ed. W. Danspeckgruber (Boulder, Colo.: Lynne Rienner, 2002), 102. But the potential for a wide interpretation of the internal aspect is evident in the Friendly Relations Declaration, that is, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, annex to GA Res. 2625 (XXV), adopted without vote on October 24, 1970. The declaration provides that only "a government representing the whole people belonging to the territory without distinction as to race, creed or colour" can be considered to be complying with the right of self-determination. See R. McCorquodale, "Self-Determination: A Human Rights Approach," in *Self-Determination in International Law*, ed. R. McCorquodale (Dartmouth, N.H.: Ashgate, 2000), 484. Others also seem to view democratic rights as being part of the internal aspect of self-determination: see Cárdenas and Cañas, "The Limits of Self-Determination" (discussion in terms of rights of minorities); A Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (New York: Cambridge University Press, 1995).

19. See also S. A. Garrett, *Doing Good and Doing Well: An Examination of Humanitarian Intervention* (Westport, Conn.: Praeger, 1999), chap. 2. For a criticism of the relativist view of human rights (in our context, political participation), see F. R. Tesón, "International Human Rights and Cultural Relativism," *Virginia Journal of International Law* 25 (1985): 895.

20. Grotius concedes a right of intervention in *De Jure Belli est Pacis*, chap. 25, when a ruler practices atrocities toward his subjects; Vattel disagrees but then says that "if the prince, attacking the fundamental laws, gives his people a legitimate reason to resist him, if tyranny becomes so unbearable as to cause the Nation to rise, any foreign power is entitled to help an oppressed people that has requested its assistance." See *Le Droit de Gens*, chap. 4, para. 55. Contrast Kant's approach. His Preliminary Article 5 prescribes that "No state shall by force interfere with the constitution or government of another state." Immanuel Kant, *Perpetual Peace*, ed. L. W. Beck (Indianapolis, Ind.: Bobbs-Merrill, 1957), 7.

21. See Articles 2(4) and 2(7) in particular. See also the International Court of Justice, *Corfu Channel Case* (1949), 29; and International Court of Justice, *Nicaragua (Merits)* (1986), 14, 106–7.

22. F. R. Tesón, “Kantian International Liberalism,” in *International Society: Diverse Ethical Perspectives*, eds. D. Mapel and T. Nardin (Princeton, N.J.: Princeton University Press, 1998), 103–13; F. R. Tesón, “The Kantian Theory of International Law,” *Columbia Law Review* 92, no. 1 (1992): 53–102; W. M. Reisman, “Humanitarian Intervention and Fledgling Democracies,” *Fordham International Law Journal* 18 (1995): 794–805; T. Farer, “A Paradigm of Legitimate Intervention,” in *Enforcing Restraint: Collective Intervention in Internal Conflicts*, ed. L. F. Damrosch (New York: Council on Foreign Relations Press, 1993), 316–47.

23. For a survey of the authorities, see S. Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001); Roth, *Governmental Illegitimacy in International Law*; see also Franck, who specifically denies a right of intervention; T. M. Franck, “The Emerging Right to Democratic Governance,” *American Journal of International Law* 86 (1992): 46–91. There are two responses. First, as noted below, some argue that such a norm may be emerging. Second, consent may be given by the ousted government or, better still, by a previously signed treaty.

24. Chesterman, *Just War or Just Peace*, 45. See also Roth, *Governmental Illegitimacy in International Law*.

25. As Kofi Annan has said, “States are now widely understood to be instruments in the service of their peoples, and not vice versa. . . . [The aim of the Charter] is to protect individual human beings, not to protect those who abuse them.” K. A. Annan, “Two Concepts of Sovereignty,” *Economist*, September 18, 1999, 49–50. Murphy concludes: “In sum, notions of democratic legitimacy are certainly present in contemporary practice concerning recognition of States. However, the evidence of these notions is not uniform, and it derives exclusively from the practice of States that are themselves democratic. Further, there is no effort by even democratic States to apply these notions to existing States where governments lack legitimacy.” See S. D. Murphy, “Democratic Legitimacy and the Recognition of States and Governments,” in Fox and Roth, *Democratic Governance and International Law*, 139.

26. Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, *British Yearbook of International Law* 62 (1991): 559–60.

27. See new Article 9 of the OAS Charter, contained in the “Protocol of Washington,” *International Legal Materials* 33 (1994): 1005. (The protocol came into effect in September 1997.)

28. In Haiti, the military government had toppled a democratically elected government; in Sierra Leone, democratically elected President Kabbah had been deposed; in Cambodia, the decision was deferred, leaving Cambodia’s seat unoccupied following Hun Sen’s coup; in Liberia, the representatives of Samuel Doe continued to be accredited though he had lost power in 1990; decisions were deferred repeatedly on Afghanistan despite the Taliban’s nearly total control over the territory.

29. *The Republic of Fiji v. Prasad* (2001) FJCA 1, available at www.paclii.org/fj/cases/FJCA/2001/1.html.

30. For a survey of these, see N. Schrijver, "The Changing Nature of State Sovereignty," *British Yearbook of International Law* 70 (1999): 65–98.

31. See "Secretary-General Says United Nations Stand 'Ready to Help Africa, Wherever and However It Can,'" Press Release SG/SM/7485/Rev.1AFR/253/Rev.1, July 10, 2000.

32. Franck, "The Emerging Right to Democratic Governance," 46.

33. The Report of the Secretary-General to the 56th session of the UN General Assembly also highlighted this: "Once considered to be the sole territory of sovereign States, the protection of human rights is now viewed as a universal concern." See *Road Map Toward the Implementation of the United Nations Millennium Declaration*, A/56/326, para. 200.

34. W. M. Reisman, "Unilateral Action and the Transformation of the World Constitutive Process: The Special Problem of Humanitarian Intervention," *European Journal of International Law* 11, no. 1 (2000): 13.

35. Reisman, "Unilateral Action and the Transformation of the World Constitutive Process," 15. Article 53 of the Vienna Convention on the Law of Treaties defines *jus cogens* as a peremptory norm of general international law and states that "for the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

36. W. M. Reisman, "Sovereignty and Human Rights in Contemporary International Law," in *Democratic Governance and International Law*, eds. G. H. Fox and B. R. Roth (Cambridge: Cambridge University Press, 2000), 256. Note too the view of Lauterpacht that "ultimately, peace is more endangered by tyrannical contempt for human rights than by attempts to assert, through intervention, the sanctity of human personality." H. Lauterpacht, *International Law and Human Rights* (London: Stevens and Sons, 1950), 32.

37. These state respectively: (1) "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives"; (3) "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

38. United Nations, "Promotion of the Right to Democracy," E/CN.4/RES/1999/57 (1999).

39. UN General Assembly Resolution A/55/L.2 of September 2000.

40. Paragraph 50. This instrument was preceded by innumerable other declarations: for example, (then) Secretary-General Boutros-Ghali stated at the World Conference on Human Rights in 1993 that "the process of democratization cannot be separated. . . from the protection of human rights" (Vienna Declaration and Programme of Action, June 1993, p. 17); Boutros-Ghali followed this up with *An Agenda for Democratization* (UN Doc. A/51/761, December 20, 1996).

41. For example, UN General Assembly Resolution, "Promotion of a Democratic and Equitable International Order" (A/RES/56/151). See also A/RES/56/96, "Support

