

**THE MISPLACED RELIANCE ON FREE AND FAIR ELECTIONS IN NATION BUILDING: THE ROLE OF CONSTITUTIONAL DEMOCRACY AND THE RULE OF LAW**

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*In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.*

James Madison<sup>1</sup>

## I. INTRODUCTION

### A. *Statement of the Thesis and Scope of This Paper*

The end of the Cold War has brought many changes to the field of United Nations peacekeeping. However, most of the changes have been changes in size and quantity—more operations and bigger operations—rather than different types of operations.<sup>2</sup> Currently, as in the past, U.N. peacekeeping operations to relieve internal conflict or civil war continue to focus almost exclusively on ending military conflicts and then holding free and fair elections.<sup>3</sup> However, this focus only addresses half of Madison’s formula for framing a stable government: “[enabling] the government to control the governed.”<sup>4</sup>

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1. THE FEDERALIST NO. 51, at 356 (James Madison) (Benjamin Fletcher Wright ed., 1974).

2. The pace and scope of operations undertaken just after the end of the Cold War may have been a short-lived phenomenon. Cf. *Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 52nd Sess., Supp. No. 1, para. 108, U.N. Doc. A/52/1 (1997) [hereinafter *SG Annual Report—1997*] (suggesting that possibilities for peacekeeping and post-conflict peace-building operations by the United Nations may have been exaggerated because of initial post-Cold-War euphoria).

3. See, e.g., *id.* paras. 112, 114 (stating that the U.N. missions in the Balkans and Liberia are to monitor the cease fire and pave the way for elections).

4. THE FEDERALIST NO. 51, *supra* note 1, at 356.

As we enter a new era with vast new possibilities, it is time to reexamine our peacekeeping goals and the means we have chosen to reach those goals. The end of the Cold War has brought not only the ability to conduct more operations free from the Cold-War Security Council veto, it has also brought a political climate that will allow the United Nations to structure many peacekeeping operations to focus on free and fair elections *and* to assist the country in forming a government that will “control itself” after the elections. It is time for the United Nations to explicitly embrace the second half of Madison’s formula and seek ways to build a lasting peace around a government that is based on democratic principles and the rule of law. Recently, the United Nations has begun to recognize the role of “good governance” for meeting the objectives of sustainable development, prosperity, and peace.<sup>5</sup> However encouraging this may seem, it is still not clear that this good governance requires a form of government that is designed to control the power of the ruling elite, nor is there any indication of how good governance is to be achieved.

There are vast amounts of literature on when the United Nations should intervene and on the type of military intervention that is appropriate in various circumstances.<sup>6</sup>

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5. See *SG Annual Report—1997*, *supra* note 2, para. 22. According to the report, “good governance comprises the rule of law, effective state institutions, transparency and accountability in the management of public affairs, respect for human rights, and the meaningful participation of all citizens in the political processes of their countries and in decisions affecting their lives.” *Id.*

6. See, e.g., Henry Wiseman, *Peacekeeping in the International Political Context: Historical Analysis and Future Directions*, in *THE UNITED NATIONS AND PEACEKEEPING: RESULTS, LIMITATIONS AND PROSPECTS: THE LESSONS OF 40 YEARS OF EXPERIENCE* 32, 50–51 (Indar Jit Rikhye & Kjell Skjelsbaek eds., 1990) (suggesting nongovernmental institutions could initiate discussions on ideas for new methods of peacekeeping, and eventually, with governmental support, the institutions could plan for deliberations on the future of peacekeeping efforts); Yasushi Akashi, *The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Areas Mandate*, 19 *FORDHAM INT’L L.J.* 312, 320–21 (1995) (arguing U.N. intervention should occur when the will of the parties in conflict is to reach agreement, and if a decision to intervene is made, the parameters of the intervention should be explained to all parties before the intervention is deployed); Commander Roger D. Scott, *Getting Back to the Real United Nations: Global Peace Norms and Creeping Interventionism*, 154 *MIL. L. REV.* 27, 32–33 (1997) (emphasizing the underlying principle of the U.N. Charter is that states should resort to the use of military force as a defense only and should therefore resolve disputes by peaceful means); Shashi Tharoor, *The Changing Face of Peace-Keeping and Peace-Enforcement*, 19 *FORDHAM INT’L L.J.* 408, 426 (1995) (concluding in order for peacekeeping to remain effective, it must not be used in inappropriate situations or undermined by equating peacekeeping with war-making); Anne Orford, *Locating the International:*

This paper will not discuss those issues. Rather, its focus is on defining and achieving the ultimate goals of peacekeeping and nation-building operations once the decision has been made to intervene. In particular, I am not advocating intervention for the purpose of establishing democracies. The line between the sovereign and the international has not blurred to the point that the world could or should take up the democratic equivalent of the Great Crusades. However, once intervention is justified by other conditions, or once intervention has been requested by the nation itself, it is time to critically examine the goals of any intervention and the means chosen to reach those goals.

In the past, the idea of holding free and fair elections has dominated the thinking and therefore the means and the goals of most operations.<sup>7</sup> The United Nations has developed specific, mandatory tools for bringing about free and fair elections; what it has not developed are the tools for developing stable governments after the elections. While the United Nations feels it can dictate the conduct of elections—down to suspending incompatible laws, running its own public information radio station, or initiating prosecutions<sup>8</sup>—it is powerless to do anything stronger than encouraging good governance once the elections are over.<sup>9</sup> In some cases, the United Nations is powerless even in the face of pre-existing framework agreements that set the terms for U.N. intervention and contain specific requirements for the new form of government.<sup>10</sup>

In this article, I will argue that peacekeeping and nation-building operations should be a means for achieving lasting peace and stability and for protecting human rights. I will

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*Military and Monetary Interventions After the Cold War*, 38 HARV. INT'L L.J. 443, 443-44 (1997) (questioning the justifications for international economic and military intervention since the end of the Cold War).

7. See *SG Annual Report—1997*, *supra* note 2, para. 38 (indicating the U.N. has received 80 requests for electoral assistance in the past five years).

8. See John Linarelli, *Peace-Building*, 24 DENV. J. INT'L L. & POL'Y 253, 260 (1996) (stating that the United Nations follows the World Bank model of recommending, but not requiring a democratic government).

9. See Daniel J. Blessington, *From Dayton to Sarajevo: Enforcing Election Law in Post War Bosnia and Herzegovina*, 13 AM. U. INT'L L. REV. 553, 604 (1998).

10. Cf. *United Nations: Report of the Secretary-General on an Agenda for Peace—Preventive Diplomacy, Peacemaking and Peace-Keeping*, U.N. GAOR, 47th Sess. para. 60, U.N. Doc. A/47/277 (1992) [hereinafter *Agenda for Peace—1992*] (suggesting the Cold War was an obstacle to the use of Chapter VIII of the Charter, which is devoted to regional arrangements or agencies for dealing with matters relating to maintenance of international peace and security).

then assert that free and fair elections, by themselves, have not and can not achieve those goals. While neutrality is essential for military forces during the military phase of a peacekeeping operation, once the operation moves to the nation-building phase it is time for the United Nations to be non-neutral regarding the form of government to be created by the newly peaceful nation. The United Nations should actively encourage and take concrete steps to promote a form of government that will control itself and that will protect the fundamental human rights of its citizens. In the same way that the United Nations has developed procedures for achieving free and fair elections, it should develop procedures to help countries form and nurture stable, democratic forms of government.

In support of my argument, I will examine the evidence for the “democratic peace” and the ability of democracies to protect human rights and to enhance the economic well being of the citizens and the nation. I will also question the United Nations formula for monitoring free and fair elections and probe the lessons to be learned from a few recent case studies of nation-building interventions centered on free and fair elections. In conclusion, I will argue that it is time for the United Nations to reject the premise of neutrality in nation-building interventions and to openly and vigorously promote the formation of democratic governments founded on the rule of law.

### *B. Definitions*

Nation Building: Many types of peace interventions undertaken by various organizations are grouped under the general rubric of peacekeeping.<sup>11</sup> The term has been used to describe everything from the Gulf War multinational coalition to the United Nations Temporary Executive Authority that oversaw the transition of western New Guinea from Dutch colonial rule.<sup>12</sup> In 1992, Secretary General Boutros-Ghali defined several forms of peace operations in his *Agenda for*

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11. See Tharoor, *supra* note 6, at 415 (referring to the British doctrine of “Wider Peace-Keeping” and the U.S. Army Field Manual on peacekeeping). For years, the United Nations Special Committee on Peacekeeping Operations declined to define the term peacekeeping “on the grounds that to define peacekeeping was to impose a strait-jacket on a concept whose flexibility made it the most pragmatic instrument at the disposal of the world organization.” *Id.* at 414.

12. See generally UN PEACEKEEPING, AMERICAN POLITICS, AND THE UNCIVIL WARS OF THE 1990S (William J. Durch ed., 1993) (history of various U.N. peacekeeping operations).

*Peace*, including preventive diplomacy, peace making, and peacekeeping.<sup>13</sup> In addition, he defined and addressed a related concept that he called “post-conflict peace-building.”<sup>14</sup> It is this last category of peacekeeping operations that is the focus of this paper.

According to Boutros-Ghali, post-conflict peace building is “action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict.”<sup>15</sup> The U.S. Army defines a similar, but more expansive, operation that it calls “nation assistance.”<sup>16</sup> According to the Army, “[t]he goals of nation assistance are to promote long-term stability, to develop sound and responsive democratic institutions, to develop supportive infrastructures, to promote strong free-market economies, and to provide an environment that allows for orderly political change and economic progress.”<sup>17</sup> In this article, I will use the term “nation building” to encompass the governmental goals expressed in both peace building and nation assistance.

Democracy: Just as there are many definitions of peacekeeping, there are also many definitions of democracy.<sup>18</sup> A “democratically elected” government is all that many people

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13. See *Agenda for Peace—1992*, *supra* note 10, para. 20.

The terms preventive diplomacy, peacemaking and peace-keeping are integrally related and . . . are defined as follows:

Preventive diplomacy is action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur.

Peacemaking is action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations.

Peace-keeping is the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. Peace-keeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace.

*Id.*

14. See *id.* para. 21.

15. *Id.*

16. See DEP’T OF THE ARMY, FIELD MANUAL 100-5, OPERATIONS 13-6 (June 14, 1993) (interpreting its term “nation assistance” as essentially equivalent to the United Nations “peace building” operations).

17. *Id.*

18. See generally Fareed Zakaria, *The Rise of Illiberal Democracy*, FOREIGN AFF., Nov.–Dec. 1997, at 22.

require for democracy.<sup>19</sup> For them, the modern view of democracy is satisfied once elections are held.<sup>20</sup> However, further inquiry into the subject will often elicit other requirements for true democracy—requirements such as the rule of law, protection of individual and human rights, protection of minority rights, separation of governmental powers, checks and balances of power, and protection of private property rights.<sup>21</sup> As Anthony Lake recognized in a 1993 address to the School of Advanced International Studies: “Our strategy must view democracy broadly—it must envision a system that includes not only elections but also such features as an independent judiciary and protections of human rights.”<sup>22</sup> In his first Annual Report, Secretary General Kofi Annan includes many of the same elements when he defines what he calls “good governance”:

[G]ood governance comprises the rule of law, effective state institutions, transparency and accountability in the management of public affairs, respect for human rights, and the meaningful participation of all citizens in the political processes of their countries and in decisions affecting their lives.<sup>23</sup>

Clearly, something more than elections are required before a country can be said to have a democratic government—rather than merely having a democratically-elected government.

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19. *See id.* at 24.

20. *See id.* (quoting Samuel P. Huntington: “Elections, open, free and fair, are the essence of democracy, the inescapable sine qua non.”). Zakaria argues that democracy is distinct from constitutional liberalism and that while we are seeing an increase in democratically elected governments these governments are often “illiberal democracies” rather than liberal democracies founded in constitutionalism. *See id.* at 23–24.

21. From reading some of the international relations literature, one begins to wonder why the term “democracy” has picked up such a bad reputation. Some authors go out of their way to avoid calling a democracy a democracy. Kishore Mahbubani berates the world community for trying to push democracy on nations in the Far East. He argues instead for “good governance.” According to Mahbubani, the elements of good governance include “a society marked by the rule of law,” “principles of equality under the law,” freedom from “arbitrary justice,” a “modern legal system with due process, an independent judiciary, and a modern penal and civil code.” *See* Kishore Mahbubani, *An Asia-Pacific Consensus*, FOREIGN AFF., Sept.–Oct. 1997, at 149, 157; *see also* A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 379–82 (1968) (discussing constitutionalism).

22. Anthony Lake, *From Containment to Enlargement*, 4 U.S. DEP’T OF STATE DISPATCH 658, 660 (1993)(addressing the John Hopkins University School of Advanced International Studies).

23. *SG Annual Report—1997*, *supra* note 2, para. 22; *see also* Mahbubani, *supra* note 21, at 157 (adopting the phrase “good governance”).

It is “constitutional democracy” that has the power to bring lasting peace and stability, as opposed to the “elective despotism” that can come from mere free and fair elections.<sup>24</sup> The importance of the distinction between elective democracy and constitutional democracy cannot be overstated. “[T]he former stress[es] the *process* by which people freely choose their representatives, who, in turn, enact whatever laws they deem necessary on behalf of the people; while the latter, suspicious of the process, set[s] *limits* on what the people, through their representatives, may do.”<sup>25</sup> The term democracy, as used in this paper, refers to a constitutional democracy that is designed “not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.”<sup>26</sup> It is a democracy based on fundamental human rights, sound governmental structures that control the powers of those who govern, and the rule of law.<sup>27</sup>

## II. THE EVIDENCE FOR DEMOCRACIES AND FREE-MARKET ECONOMIES

The focus on the importance of constitutional democracies and free-market economies is more than American arrogance about the superiority of our system of government. Ours is not the only democratic, free-market nation, nor is our Constitution or exact form of government capable of being exported wholesale to every nation in the world.<sup>28</sup> The evidence for democracies and free-market

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24. See THE FEDERALIST NO. 48, at 345 (James Madison) (Benjamin Fletcher Wright ed., 1974) (quoting from *Notes on the State of Virginia* by Thomas Jefferson).

25. Stephen P. Marks, *The New Cambodian Constitution: From Civil War to a Fragile Democracy*, 26 COLUM. HUM. RTS. L. REV. 45, 105 (1994) (emphasis in original).

26. THE FEDERALIST NO. 51, *supra* note 1, at 357–58.

27. As Justice Jackson so eloquently noted, “[l]iberty is not the mere absence of restraint, it is not a spontaneous product of majority rule, it is not achieved merely by lifting underprivileged classes to power, nor is it the inevitable by-product of technological expansion. It is achieved only by a rule of law.” ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 76 (1955).

28. Perhaps the ugly connotations internationally attached to the word democracy come from the efforts by some to force a particular form of democracy on every nation, as if democracy were something that could be applied with a rubber stamp. I agree with the sentiment expressed by another author on this subject:

When, like so many others before me, I stress the imperative of democratization, I do not mean that some states should imitate others slavishly, nor do I expect them to borrow political systems that are alien to them, much less to gratify certain Western States—in fact, just the

economies is based on the growing realization, supported by empirical research, that democracies foster peace, that free-market economies bring prosperity, and that both encourage individual freedom and the protection of human rights.

A. *The Democratic Peace*

As then Secretary General Boutros-Ghali remarked in his 1992 *Agenda for Peace*: “There is an obvious connection between democratic practices—such as the rule of law and transparency in decision-making—and the achievement of true peace and security in any new and stable political order.”<sup>29</sup> By this statement, Boutros-Ghali not only accepted the proposition that democracy is a means for securing lasting peace, he also observed that true democracy is based on the rule of law and not merely on free and fair elections.

Along with the growing recognition that democracy brings domestic peace and stability, there is an expanding consensus that democracies also bring international peace. As one author points out, “[I]n the modern international system, democracies have almost never fought each other.”<sup>30</sup> In a paper on a “new paradigm” for peace, John Norton Moore champions the dual roles of democracy and deterrence and lays out the case for the democratic peace.<sup>31</sup> As Moore indicates, there are many theories on why nations go to war or remain at peace; however, only “one factor has a startlingly strong real-world correlation with war.”<sup>32</sup> Independent works by several authors “have all concluded

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opposite. Let us state, forcefully, that democracy is the private domain of no one. It can and ought to be assimilated by all cultures. It can take many forms in order to accommodate local realities more effectively. Democracy is not a model to copy from certain states, but a goal to be achieved by all peoples!

Christina M. Cerna, *Universal Democracy: An International Legal Right or the Pipe Dream of the West?*, 27 N.Y.U. J. INT’L L. & POL. 289, 291–92 (1994) (quoting U.N. Secretary General Boutros Boutros-Ghali, *Human Rights: The Common Language of Humanity*, in UNITED NATIONS: WORLD CONFERENCE ON HUMAN RIGHTS, THE VIENNA DECLARATION AND PROGRAMME OF ACTION (1993)).

29. *Agenda for Peace—1992*, *supra* note 10, para. 59.

30. BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD* 4 (1993).

31. See generally John Norton Moore, *Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance*, 37 VA. J. INT’L LAW 811 (1997).

32. *Id.* at 822.

that democracies rarely, if ever, wage war against one another.”<sup>33</sup>

One has only to look at recent history to see the peaceful power of democracy and free market economies. Countries that had been sworn enemies for years have ceased to fight and begun to cooperate after they made the transition to democracy and free market economies. This phenomenon can be seen in the West with the relations between France and Germany,<sup>34</sup> and in the East between South Korea and Japan.<sup>35</sup> Wars are, however, just one form of “non-peaceful” behavior. By other measures as well, democracies tend to resolve their differences by peaceful means.<sup>36</sup> Democracies are more adept at negotiation and compromise because they are built on these very foundations. A democratic ruler is a person who understands the need to consider all sides of an issue, to negotiate, to work together toward a common goal, and to compromise.<sup>37</sup> “In contrast, totalitarian and non-democratic systems are more likely to see specialists in violence and ruthless leaders take charge.”<sup>38</sup> A survey of

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33. *Id.* See also Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 88–90 (1992). *But see* Zakaria, *supra* note 18, at 35 (arguing that “without a background in constitutional liberalism, the introduction of democracy [i.e. elections] in divided societies has actually fomented nationalism, ethnic conflict, and even war.”).

34. See F. ROY WILLIS, *FRANCE, GERMANY, AND THE NEW EUROPE 1945–1967*, at 309–311, 328–336, 353–356 (1968).

35. While there can be some argument about whether South Korea has become a true democracy, the nation has been making advances toward free markets and democracy since their first elections in 1948, with dramatic progress since 1988. South Korean cooperation with Japan has developed since the mid-sixties, despite a long and brutal occupation of Korea by the Japanese from 1910 to 1945. See BRIAN BRIDGES, *JAPAN AND KOREA IN THE 1990S*, at 90–108, 118–127 (1993).

36. See, e.g., Lori Fisler Damrosch, *Constitutional Control Over War Powers: A Common Core of Accountability in Democratic Societies?*, 50 U. MIAMI L. REV. 181, 189 (1995) (restating the firmly established proposition that democracies virtually never go to war with each other); Kent Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352, 353 (1985) (urging that a central feature of democracy is tolerance); Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT’L L. & BUS. 398, 459 (1996–1997) (noting that peace is more likely among democracies); Louis B. Sohn, *The New Dimensions of United Nations Peacemaking*, 26 GA. J. INT’L & COMP. L. 123, 125 (1996) (suggesting the United Nations charter stands as proof that nations, in the essence of democracy, face their differences and find common ground).

37. See Moore, *supra* note 31, at 848–49. Moore argues that democratic leaders are more likely to have a “commitment to voluntary agreement and an aversion to extreme violence.” *Id.* at 848.

38. *Id.* at 849. As other authors have noted, “[T]he greatest threats to human liberty and happiness in this century have been caused not by disorder

countries that support terrorism will show a similar correlation between democracies and terrorism: in general, democracies do not support terrorist activities.<sup>39</sup>

*B. Protection of Individual and Human Rights*

In the past few years, the international community has increasingly turned to democratization, international law, and international institutions to foster and protect human rights.<sup>40</sup> As Boutros Boutros-Ghali put it, “The process of democratization cannot be separated, in my view, from the protection of human rights. More precisely, democracy is the political framework in which human rights can best be safeguarded.”<sup>41</sup> In peacekeeping operations, where the United Nations or other international coalitions are present, the pressure to “do something” about human rights violations is particularly strong.<sup>42</sup> However, any temporary action taken during a peacekeeping operation can only improve the situation during the time that the peacekeepers are present. To effect long-term improvements, fundamental changes in domestic laws and governmental structures are necessary.

At the same time that scholars of international law and international relations were forming a consensus regarding the democratic peace, the research and evidence continued to point toward democracies as the best guarantors of human rights. Soon after Bruce Russett published his seminal work on the democratic peace,<sup>43</sup> a new book by R.J. Rummel laid out alarming evidence on “genocide and government mass murder,” which Rummel calls “democide.”<sup>44</sup> Rummel’s results “clearly and decisively show that democracies commit less democide than other regimes. These results also well illustrate the principle underlying all [his] findings on war, collective violence, and democide: The less freedom people have, the greater the violence; the more freedom, the less the violence.”<sup>45</sup> As Rummel so aptly points out, “[T]otalitarian

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but by brutally strong, centralized states, like Nazi Germany, Soviet Russia, and Maoist China. The Third World is littered with the bloody handiwork of strong states.” Zakaria, *supra* note 18, at 32.

39. See Lake, *supra* note 22, at 661.

40. See Cerna, *supra* note 28, at 291.

41. *Id.* (quoting Boutros-Ghali).

42. See e.g., B.G. Ramcharan, *Reforming the United Nations to Secure Human Rights*, in PREFERRED FUTURES FOR THE UNITED NATIONS 193 (Saul H. Mendlovitz & Burns H. Weston eds., 1995).

43. See RUSSETT, *supra* note 30.

44. R.J. RUMMEL, DEATH BY GOVERNMENT at xv (1994).

45. *Id.* at xv-xvi.

communist governments slaughter their people by the tens of millions; in contrast, many democracies can barely bring themselves to execute even serial murderers.”<sup>46</sup> After eight years of painstaking, gruesome research, Rummel sums up his conclusions quite succinctly:

[P]reliminary research seemed to suggest, that there was a positive solution to all this killing and a clear course of political action and policy to end it. And the results verify this. The problem is Power. The solution is democracy. The course of action is to foster freedom.<sup>47</sup>

Again, we can look to recent history and current events to validate Rummel’s conclusions. In Iraq the population is allowed to starve and is denied medical care<sup>48</sup> because Saddam Hussein is more concerned about stopping weapons inspections than feeding his people.<sup>49</sup> In Cambodia, Rummel calculates that approximately two million Cambodians were killed,<sup>50</sup> and tales of patients in their hospital beds being turned out into the streets, as well as other humanitarian atrocities by the Khmer Rouge are well known.<sup>51</sup> As I write, North Koreans continue to starve because the North Korean government refuses to freely open its borders and face the end of the Cold War.<sup>52</sup> Some estimates put the North Korean famine death toll in the tens of thousands,<sup>53</sup> and recent visits to North Korea confirm that food shortages have existed long

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46. *Id.* at 2 (emphasis in original).

47. *Id.* at xxi.

48. See Bill Richardson, *Message to Iraq*, WASH. POST, Nov. 30, 1997, at C7.

49. See John M. Goshko, *U.N. Urges Iraq to End Standoff*, WASH. POST, Jan. 15, 1998, at A25.

50. See RUMMEL, *supra* note 44, at 4 tbl.1.2.

51. See Dith Pran, *The World: A Reminiscence: the Killing Fields; Could the Vietnamese Withdrawal Bring Back Cambodia’s Nightmare?*, N.Y. TIMES, Jan. 1, 1989, at D1 (describing how “the Khmer Rouge also emptied the cities, even moving patients out of hospitals, leaving some to die along the roads with plasma bottles still attached to their arms.”); see also Mona Charen, *The Khmer Rouge Record Demands We Act Now*, CHI. TRIB., Oct. 3, 1989, at C19 (stating, “[L]ike Nazis in a synagogue, the Khmer Rouge set about systematically destroying a civilization.”); Wilbur G. Landrey, *Signing Cambodia Peace Treaty Was the Easy Part*, ST. PETERSBURG TIMES, at A2 (discussing the practice of “sending men, women, children and hospital patients to work and survive . . . in Cambodia’s fields and forests.”).

52. See Keith B. Richburg, *Beyond a Wall of Secrecy, Devastation; Rare Closeup Reveals a North Korea That No Longer Functions*, WASH. POST, Oct. 19, 1997, at A1.

53. See Marcus Noland, *Why North Korea Will Muddle Through*, FOREIGN AFF., July–Aug. 1997, at 105, 110.

enough to produce a generation of young adults that is shorter than the older generation.<sup>54</sup>

Clearly, a government that is willing to starve or murder millions of its citizens, to conduct political purges, or to torture political prisoners is not going to be concerned about other, less basic human rights. Democide is the ultimate abrogation of human rights norms.

### C. *Economic Growth*

In his 1992 book entitled *Constitutional Environments and Economic Growth*, Gerald Scully compares economic growth and economic efficiency with political freedom in 115 countries.<sup>55</sup> His study shows that “[p]olitically open societies, subscribing to the rule of law, private property, and the market allocation of resources, grow at three times the rate and are two and one-half times as efficient economically in transforming inputs into national output as societies in which these rights largely are proscribed.”<sup>56</sup> Scully’s findings underscore the significance of the choice of governmental systems to the economic prosperity of a country and validate what the world had already learned from watching the economic collapse of the Soviet Union and its satellites.<sup>57</sup> “Hope of an increased standard of living through a paternalistic, authoritarian control of man and his resources by the government has turned to despair.”<sup>58</sup>

The old notion that economic growth flows from an adequate labor force and sufficient capital breaks down in the face of Scully’s research. As Scully indicates, the historically accepted model of economic growth “posits a very simple relationship between the growth rate of per capita national income and the growth rate of the capital-labor ratio.”<sup>59</sup> However, nothing in this capital-labor model “considers the institutional framework in which capital (physical and human) is accumulated, invention or innovation is made, or inputs are converted to output (the

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54. See Kevin Sullivan, *Survival Instinct: Don’t Bet the Collective on North Korea’s Imminent Collapse*, WASH. POST, Mar. 9, 1997, at C1.

55. GERALD W. SCULLY, *CONSTITUTIONAL ENVIRONMENTS AND ECONOMIC GROWTH* 12 (1992).

56. *Id.*

57. See *id.* at 212–215 (reasoning that certain human characteristics needed for a prosperous economy must be protected by the political setting of that society).

58. *Id.* at 8.

59. *Id.* at 9.

efficiency of the transformation function).”<sup>60</sup> Accordingly, “raising [the capital-labor] ratio in Tanzania or the Soviet Union in theory has the same effect on per capita incomes as in the United States.”<sup>61</sup> Reality belies the accuracy of this model.

Without adding the complication of civil war and United Nations intervention, Scully’s theory can easily be validated by looking at Germany and Korea. Both nations were divided at the end of World War II.<sup>62</sup> Korea remained divided after the Korean War.<sup>63</sup> In both countries, the two halves started out on fairly even footing.<sup>64</sup> The case of Germany is well known: West Germany rose to become the economic powerhouse of Europe, while the East German economy sputtered<sup>65</sup> and its environment was decimated.<sup>66</sup> While some of the differences can be attributed to the economic assistance provided to West Germany under the Marshall Plan,<sup>67</sup> East Germany and other Warsaw Pact countries also received economic assistance and subsidized oil from the Soviets.<sup>68</sup> In any event, post World War II economic assistance cannot account for the huge disparity in the economic conditions of the two Germanies when the Berlin Wall fell.

In the two Koreas, despite similar life expectancies and literacy rates, in 1991 (the last year for which figures are available)<sup>69</sup> North Korea’s per capita GNP was estimated at \$1,038,<sup>70</sup> while 1996 figures show South Korea’s per capita

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60. *Id.*

61. *Id.* at 10.

62. See HENRY ASHBY TURNER, JR., THE TWO GERMANIES SINCE 1945, at 30 (1987); BONG-YOUN CHOY, KOREA: A HISTORY 204 (1971).

63. See BUREAU OF PUBLIC AFFAIRS, U.S. DEP’T OF STATE, BACKGROUND NOTES: NORTH KOREA 6 (1996) [hereinafter BACKGROUND NOTES: NORTH KOREA]. The report states that after WWII North and South Korea went to war and upon signing an armistice in 1953 remained divided. Despite continuing reunification efforts, North and South Korea are still divided. See *id.*

64. See CHOY, *supra* note 62, at 206; TURNER, *supra* note 62, at 23 (addressing Germany’s poor economic condition after WWII, not distinguishing between East and West).

65. See TURNER, *supra* note 62, at 185–188 (describing the general economic lag of East Germany compared to the economy of West Germany); 20 THE NEW ENCYCLOPÆDIA BRITANNICA 124 (15th ed. 1997) [hereinafter BRITANNICA] (emphasizing that West Germany’s economy is the fourth largest in the world).

66. See BRITANNICA, *supra* note 65, at 53.

67. See TURNER, *supra* note 62, at 70.

68. See *id.* at 111, 184.

69. See BACKGROUND NOTES: NORTH KOREA, *supra* note 63, at 1; BUREAU OF EAST ASIAN AND PACIFIC AFFAIRS, U.S. DEP’T OF STATE, BACKGROUND NOTES: SOUTH KOREA 1 (1997) [hereinafter BACKGROUND NOTES: SOUTH KOREA].

70. See BACKGROUND NOTES: NORTH KOREA, *supra* note 63, at 1.

GNP to be \$10,800.<sup>71</sup> In addition to the differences indicated by per capita GNP, some analysts estimate that between 1991 and 1996, North Korea's economy shrank by as much as 30 percent.<sup>72</sup> South Korea's road to democracy and a free market economy has been much rougher than that in West Germany, and the country continues to make needed reforms. Even so, the differences between North and South are striking. North Korea's repeated famines are well documented and have culminated in an unprecedented invitation for several international relief organizations to operate in Pyongyang.<sup>73</sup> According to one Washington Post foreign correspondent, who traveled to North Korea with a U.S. congressional representative,

North Korea's predicament largely has been portrayed as a massive food shortage brought on by twin natural disasters—destructive floods last year followed by this year's drought and record-high summer temperatures. But what was revealed on this trip is that the food crisis is just part of an overall breakdown of the country's state-controlled and centrally planned system.<sup>74</sup>

What the Korean and German experiences and Scully's research should be telling the United Nations and the world is that during nation-building operations, the economic condition of a nation can be dramatically affected by guiding the nation toward a constitutional democracy and a free-market economy.<sup>75</sup> Alternatively, the United Nations can continue the pattern of holding elections and then encouraging loans and foreign aid to improve economic

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71. See BACKGROUND NOTES: SOUTH KOREA, *supra* note 69, at 1.

72. See Noland, *supra* note 53, at 107.

73. See Richburg, *supra* note 52, at A1 (observing the overall decline of North Korea's economy and the devastating famine in that country).

74. *Id.*

75. The methods for "guiding" a nation toward a free-market economy are well beyond the scope of this paper, and like democracies, free-market economies also do not come in a one-size-fits-all formula. At the general level, as one author puts it, "the conventional wisdom has it that there are two ways to reform a centrally planned economy—the successful, Asian, gradual approach, and the unsuccessful, European, 'big bang' approach." Noland, *supra* note 53, at 111. My point is that regardless of the approach, the fact remains that transition should be encouraged because free-market economies have vast potential to improve the living conditions and overall wealth of a nation. *But cf.* Orford, *supra* note 6, at 455–56 (arguing that international monetary intervention by the IMF and others may have caused much of the turmoil in the former Yugoslavia and contributed to the breakdown into violence).

conditions. The democratic, free-market method has shown that it can produce dramatic results; the elections and aid method often produces only temporary peace at an enormous cost.<sup>76</sup>

If we turn our attention to recent U.N. operations in Haiti and Cambodia, to name just two, the world community sought to improve the condition of the citizens through free elections and an infusion of foreign aid and foreign capital.<sup>77</sup> However, without proper government structures that are based on the rule of law, a large portion of the aid and capital have literally gone to waste or encouraged further government corruption.<sup>78</sup> Worse even than aid going to waste is the distortion of the economy and squandering of the abilities of a nation that can be brought on by too much aid.<sup>79</sup> In these situations, the citizenry and the government focus their efforts on getting aid grants rather than on improving the conditions in the country and running the government.<sup>80</sup> One writer had this to say about the distortions caused by the large amounts of foreign aid provided to Haiti over the years:

[T]he succession of governments in the post World-War II era only thought of foreign aid and subsidies, of projects originating from the outside . . . . In short, there was never any effort to think up

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76. I am not advocating for the end to all foreign aid. Rather, I am advocating for an intelligent foreign aid policy that will encourage free markets and constitutional democracy rather than foreign aid that serves only as a temporary band-aid for the nation's ills.

77. See WORLD SURVEY OF ECONOMIC FREEDOM 1995-1996, at 140 (Richard E. Messick ed., 1996) [hereinafter WORLD SURVEY] (referring to the 1993 U.N.-monitored elections for the Cambodian national assembly).

78. See Ndiva Kofele-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation*, 28 VAND. J. TRANSNAT'L L. 45, 65 (1995); Cf. Marguerite Laurent, *Forces Against the Development of an Independent Judiciary in Haiti*, NAT'L B. ASS'N MAG., Mar.-Apr. 1996, at 13 (inferring that the injection of foreign aid into Haiti will only result in further corruption among the wealthy elite who control the government).

79. See *id.* (arguing that "[f]oreign missions and their non-governmental organizations and the humanitarian services sector" stunt the development of the economy and democracy in Haiti).

80. See WORLD SURVEY, *supra* note 77, at 140 (suggesting that Cambodia's dependency on foreign aid has led to corruption and "diminished" optimism toward pursuing a free economy); see, e.g., Laurent, *supra* note 78, at 13 (postulating that foreign missions and their non-governmental organizations and the humanitarian services sector may have been an efficient alternative, the "white knights" during Duvalier's reign; however, at the moment they are competing with the fledgling development of democracy and self-determination in Haiti).

ways of mobilizing local resources. . . . Recently, however, it appears likely that the international political climate will reduce considerably the funds available to countries such as Haiti, and that sooner or later Haiti will have to attempt to live within its means. At that point Haiti, by necessity, will have to rely on local abilities, and we will finally have to ask, what is Haiti? It will have to be debated as external aid will cross the line and become a contribution and not a substitution. The problem is that in the interim, we are witnessing a systematic destruction of the means to create an authentically local policy.<sup>81</sup>

While the international community sees situations such as the one in Haiti in terms of a need to “do something” to end the suffering and as an occasion to send in humanitarian aid to relieve the misery and poverty, there is evidence in Haiti at least, that monetary aid to relieve poverty is not the only focus of the poor.<sup>82</sup> Perhaps they know, more so than the international community, that what they really need are the conditions that will give them a chance to better themselves and that this betterment has the greatest likelihood of occurring in a country with a stable government that protects human rights and respects private property.<sup>83</sup> According to one first-hand observer,

Contrary to what one would expect from a situation in which all the elementary needs of eliminating poverty are unsatisfied, amelioration of material conditions has almost never been mentioned. Instead, the need for justice, the end of . . . the problems caused by a lack of security have largely dominated popular demands. In the presence of an inhuman spectacle of misery and its urgent material needs, one tends to forget that the primary needs of people are liberty, justice, and security.<sup>84</sup>

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81. Georges Anglade, *Rules, Risks, and Rifts in the Transition to Democracy in Haiti*, 20 *FORDHAM INT'L L.J.* 1176, 1212 (1997).

82. See Laurent, *supra* note 78, at 12 (arguing that “[s]ince 1986, Haitians have shown a willingness and commitment to continue the struggle against Neo-Duvalierism and for equitable and peaceful coexistence.”).

83. See *id.* Again, this is not to say that the international community should stop sending in humanitarian aid to relieve suffering. It is more a call for an examination of the ultimate goals of the aid, a critical look at the effects of the aid, and an analysis of where the aid can best be put to use to improve the conditions of the population in the long term.

84. Anglade, *supra* note 81, at 1190.

Other researchers are also highlighting the same economic phenomenon that Scully illuminates, thereby strengthening the argument that there is more to spurring economic growth than providing economic and humanitarian aid and an infusion of capital. In an important study in 1995, Freedom House supplemented its annual survey of political rights and civil liberties with a survey that focused on economic freedom.<sup>85</sup> The findings are striking.

The 1995 *Survey's* most important finding is that modern economists have ignored a crucial variable in their search for the answer to why some societies are prosperous and some chronically poor. . . . [W]hereas only twenty-seven of those nations sampled, with just 17 percent of the world's population, merited a "free" rating, these twenty-seven nations produced 81 percent of total world output. By contrast, the twenty nations rated "not free" contain more than a third of the world's people yet produce only 5 percent of total output. The *Survey* thus joins a handful of recent studies in showing that economic freedom is the surest path to growth and development.<sup>86</sup>

When you add in the additional Freedom House finding that "[w]ith few exceptions, countries the *Survey* rated economically 'free' during 1995 also earned a 'free' rating on political rights and civil liberties," the correlation between democratic freedom and economic development becomes unmistakable.<sup>87</sup>

With evidence this strong, it is wasteful and irrational for the United Nations and the world to continue to hide the truth about freedom and democracy under a bushel basket of political neutrality and humanitarian aid. If the goals of U.N. nation-building operations can best be met by helping to transform a nation into a democratically and economically free country that is governed by the rule of law, it is time to openly accept this fact and explicitly aim for a democratic outcome.

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85. See WORLD SURVEY, *supra* note 77, at 5 ("spotlighting those countries where citizens are denied the freedom to buy, sell, trade and otherwise pursue economic opportunities" and advocating their need for economic freedom).

86. *Id.* at 9.

87. *Id.* at 10.

### III. THE MISPLACED RELIANCE ON FREE AND FAIR ELECTIONS IN NATION-BUILDING OPERATIONS

#### A. *The United Nations Handbook on Elections*

To understand why United Nations dependence on free and fair elections is inadequate, one must look at the way the United Nations conducts and monitors elections. At the same time, a look at the methods the United Nations has developed and used to monitor and conduct elections also shows that the United Nations is not adverse to substantial “interference” in the internal workings of a nation once it has been invited in to perform a specific task.<sup>88</sup> This observation should raise the question of why similarly “intrusive” measures seem to be off-limits when it comes to building and strengthening an agreed upon governmental structure.

In 1994 the United Nations Centre for Human Rights published a handbook on election monitoring.<sup>89</sup> Consistent with the U.N. neutrality doctrine, the U.N. handbook indicates that the

United Nations human rights standards relating to elections are broad in nature and thus may be achieved through a wide variety of political systems. United Nations electoral assistance does not seek to impose any given political model. Rather, it is based upon a realization that there is no single political system or electoral methodology which is appropriate for all peoples and States.<sup>90</sup>

The U.N. handbook on elections goes on to state that there are many examples that “provide useful guidance for the construction of democratic institutions that both respond to domestic concerns and conform to international human rights norms.”<sup>91</sup> However, what the U.N. handbook gives, it then takes away by again emphasizing that each State is in the best position to shape its own system, based on the “particular needs, aspirations and historical realities of the people involved, taken within the framework of international

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88. See Ibrahima Fall, *Forward* to U.N. CENTRE FOR HUMAN RIGHTS, HUMAN RIGHTS AND ELECTIONS: A HANDBOOK ON LEGAL, TECHNICAL AND HUMAN RIGHTS ASPECTS OF ELECTIONS at v (1994) [hereinafter U.N. ELECTIONS HANDBOOK] (presenting U.N. procedures and criteria for conducting and monitoring elections).

89. See U.N. ELECTIONS HANDBOOK, *supra* note 88.

90. *Id.* para. 17.

91. *Id.*

standards.”<sup>92</sup> While there can be no quarrel with the concept that each nation must shape its own system, it is unfortunate that the United Nations feels that it is unable to come out and state that each nation should shape its system within the bounds of a constitutional democracy that is designed to protect human rights, to control the newly elected government, and to insure that later elections will indeed take place. When U.N. operations are undertaken in accordance with pre-agreed principles for constitutional democracy, as they were in Namibia and Cambodia, there is clearly no need for the United Nations to remain neutral toward any form of government after the elections.

One wonders how the U.N. monitors would respond to a state’s attempt to set up a government that contemplates holding only one election for all time. Certainly, such a plan would meet strong and vocal resistance were it to be stated out in the open. One would hope that if a state openly professed its desire to form such a government, the United Nations would decline to intervene and monitor elections. Even the U.N. handbook on elections states that each nation should be free to shape its own government is constrained by the condition that the government be formed “within the framework of international standards.”<sup>93</sup> Presumably, these standards would include those in the Universal Declaration of Human Rights.<sup>94</sup> Unfortunately, the United Nations method of monitoring elections can set up a *de facto*, “one-election” government, with nary a complaint—or at least no complaint until the second election is not held.<sup>95</sup>

The limits of U.N. aspirations for monitored elections can be seen not only in the above quoted language, but also in the methods that the U.N. handbook on elections advocates for implementing free and fair elections. The handbook contains an admirable list of requirements for holding free and fair elections,<sup>96</sup> but then goes on to counsel *temporary* measures for meeting these requirements.<sup>97</sup> According to the handbook, “[O]f particular importance *for periods of elections*

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92. *Id.*

93. *Id.*

94. *Universal Declaration of Human Rights*, G.A. Res. 217(III)A, U.N. GAOR, 3d Sess., Supp. No. 127, U.N. Doc. A/810 (1948) [hereinafter *Declaration of Human Rights*] (recognizing that the will of the people requires periodic elections, not just one election for all time).

95. See U.N. ELECTIONS HANDBOOK, *supra* note 88, para. 72 (stating that no specific schedule of periodicity is required).

96. See *id.* paras. 115–17.

97. See *id.* para. 116.

are freedom of expression, of information, of assembly, of association, and of movement, as well as general freedom from intimidation.”<sup>98</sup>

The human rights protections and procedures that the commission is willing to require for a free and fair election mirror many protections that are essential for constitutional democracy and that are provided for in the Universal Declaration of Human Rights.<sup>99</sup> However, the United Nations is not willing to require the necessary legal or constitutional reforms that would help insure the continued protection of human rights and the occurrence of the next election.<sup>100</sup> The U.N. handbook on elections makes the U.N. position crystal clear by stating that “laws in force which might have the effect of discouraging political participation should be repealed *or suspended*.”<sup>101</sup> In a later section entitled “States of Emergency,” the U.N. handbook on elections advises that “[s]tates preparing for elections should carefully review such [emergency] laws with a view to their repeal *or suspension* during the campaign period.”<sup>102</sup> Indeed, when the U.N. monitored the elections in Cambodia under their mandate from the 1991 Paris Accords,<sup>103</sup> they followed their prescribed pattern of merely suspending laws that were in conflict with the standards for free and fair elections or of setting up temporary measures for fostering free elections—with predictable results after the U.N. election monitors left Cambodia.<sup>104</sup>

To give the United Nations credit, the U.N. handbook on elections does recognize,

[G]uarantees for the fundamental right of periodic free and fair elections with universal, equal and non-discriminatory suffrage and secret balloting, and for the right to be elected and to have access to the

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98. *Id.* para. 26 (emphasis added). The handbook goes on to extol the virtues of an independent judiciary, of principles of non-discrimination, and of other fundamental human rights. *See id.* para. 31.

99. *Compare Declaration of Human Rights, supra* note 94, arts. 7–22, with U.N. ELECTIONS HANDBOOK, *supra* note 88, para. 31.

100. *Cf. Nhan T. Vu, The Holding of Free and Fair Elections in Cambodia: The Achievement of the United Nations’ Impossible Mission*, 16 MICH. J. INT’L L. 1177, 1233–34 (1995) (noting that even when election results were announced in Cambodia, human rights abuses continued).

101. U.N. ELECTIONS HANDBOOK, *supra* note 88, para. 32 (emphasis added).

102. *Id.* para. 52 (emphasis added).

103. *See Final Act of the Paris Conference on Cambodia*, U.N. GAOR, 46th Sess., Annex, Agenda Item 24, U.N. Doc. A/46/608 (1991) [hereinafter *Paris Accords*].

104. *See id.* at 25.

public service on equal terms, should be enshrined in the Constitution or other high organic law of the State. The legal authority for the rights of free expression, opinion, information, assembly and association should also rest in the highest law of the land.<sup>105</sup>

Unfortunately, the handbook does not make this the cornerstone of its election-monitoring and nation-building program, nor has the United Nations worked toward devising methods to implement these requirements—even when the requirements are included in the peacekeeping framework agreement.

Some will make the argument that nations will be much less likely to request United Nations election-monitoring assistance if the United Nations does not remain neutral toward forms of government. While this is certainly true in the general case, in peacekeeping and nation-building operations, the situation is markedly different from the case of a nation that voluntarily requests United Nations assistance because it has unilaterally decided to hold its first free and fair election. A nation that has already reached that crossroad on its own will be more likely to accept U.N. assistance in voluntarily altering its laws to accommodate the present and future elections. Any additional safeguards and guarantees of sovereign integrity can be worked out as part of the framework agreement leading up to any election-monitoring operation. If the framework agreement, and its attendant conditions, is not satisfactory for either the nation or for the United Nations, either party will then be in a position to call off the operation before it begins.

Just as a nation may decide to decline U.N. assistance if it is seen as an unacceptable intrusion on that nation's sovereignty, the United Nations could also decline to use its limited resources to monitor elections unless a nation is willing to enact the reforms that will protect human rights and make constitutional democracy and future elections possible. In 1988 the United Nations refused to deploy troops to Angola until the Angolan parties "revealed a tangible commitment to peace and to honoring their undertakings to each other under their peace agreement."<sup>106</sup> There is no reason why the United Nations should not condition peacekeeping and election-monitoring missions on a

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105. U.N. ELECTIONS HANDBOOK, *supra* note 88, paras. 129–30.

106. Tharoor, *supra* note 6, at 416.

requirement that the nation agree to form a government that will embrace the rule of law, protect fundamental human rights, and insure future elections.

I am not suggesting that a nation seeking peacekeeping and election assistance should give the United Nations *carte blanche* to write its constitution. However, I am advocating for the United Nations and the world community to insist that a nation agree to some basic constitutional and human rights fundamentals before the world community expends its valuable human and financial resources for peacekeeping and nation building. A nation should also be willing to agree to a reasonable amount of continued U.N. monitoring of its constitutional transition—with appropriate enforcement mechanisms included in the framework agreement.

The concept of having a nation agree to a basic constitutional structure and human rights fundamentals before the United Nations will intervene is neither unique nor unworkable. The U.N. peacekeeping operations in Namibia and Cambodia were preceded by agreements on basic constitutional principles,<sup>107</sup> and the NATO intervention in Bosnia-Herzegovina was preceded by a draft constitution.<sup>108</sup> What is needed, however, is the international resolve and U.N. enforcement mechanisms to see these measures through by providing postelection assistance and monitoring of the constitutional transition.

### *B. The Popular View of “Democratic Self Determination”*

Unfortunately, the U.N. handbook on elections is not the only authority that seems to have a single-minded focus on free and fair elections. Throughout the literature and speeches on international law and international relations, one finds reference to “freely elected democracies” or hears speakers extolling the virtues of elections—without any mention of the democratic principles or the rule of law that

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107. See *The United Nations Plan for Elections in Namibia*, U.N. S.C. Res. 435, 37th Sess., at 18–19, U.N. Doc. S/15287 (1978) [hereinafter *Namibian Principles*].

108. Draft Constitution of Bosnia and Herzegovina, 35 I.L.M. 117 (1996). The draft constitution itself was never adopted and contains many arguably unwise compromises. One wonders if the negotiators at Dayton would have been better served by convincing the parties to adopt a draft constitutional framework consisting of a list of agreed human rights protections and governmental requirements, such as the principles adopted for Namibia. Duly elected delegates to a constitutional convention could have worked out the details at a later date.

true democracies require.<sup>109</sup> Remarks such as the following are not uncommon: “Democracy has been easier to achieve than the protection of human rights, perhaps because the implementation of democracy is technically more easily accomplished (e.g., a popularly elected government) . . . .”<sup>110</sup> In a 1992 panel discussion hosted by the American Society of International Law, several international law scholars discussed the role of elections in international law, the emerging norm of self determination through elections, and the basic requirements for free and fair elections.<sup>111</sup>

The panel noted a trend of breaking through the sovereignty barrier and taking steps to promote elected governments as the accepted international norm.<sup>112</sup> There were tangential references to “whether elections are synonymous with ‘democracy,’” but the democracy issue was left behind in a wake of requirements for free and fair elections and discussions of what the world community should do to promote such elections.<sup>113</sup> Gregory Fox described a relatively new phenomenon in the law of international recognition, where nations were increasingly “conditioning [the] recognition of new states upon a commitment to electoral democracy.”<sup>114</sup> Unfortunately, Fox did not see an equal commitment to democracy as he saw to elections. As he noted, most of the international agreements and U.N. covenants that discuss the right to elections and political participation do not tie elections to democracy and often do not use the term democracy at all.<sup>115</sup> In fact he saw a “commitment to elections regardless of possibly unpleasant outcomes,” such as the election of a government that was opposed to further elections.<sup>116</sup>

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109. Elizabeth F. Defeis, *Elections and Democracy: Armenia, A Case Study*, 20 LOY. L.A. INT'L & COMP. L.J. 455, 455–56 (1998) (noting that some democratically elected governments still infringe on constitutionally protected rights, or improperly usurp power in violation of constitutional limits).

110. Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429, 451 (1997).

111. See *National Sovereignty Revisited: Perspectives on the Emerging Norm of Democracy in International Law*, 86 AM. SOC'Y INT'L L. PROC. 249, 249 (1992) [hereinafter *Emerging Norm of Democracy*] (discussing the “emergence of political participation as an accepted international norm.”). Panel participants included Gregory H. Fox, Karen Engle, Claudio Grossman, Thomas Carothers, and others. See *id.* at 249–271.

112. See *id.* at 258.

113. *Id.* at 250.

114. *Id.*

115. See *id.* (citing Algeria, former Soviet Georgia, and Haiti as examples).

116. *Id.*

This emphasis on electoral self-determination can be traced to the end of colonialism and to the U.N.-approved method for assisting former colonies<sup>117</sup> “to develop self-government . . . according to the particular circumstances of each territory and its peoples.”<sup>118</sup> Since 1956 the United Nations has monitored approximately thirty elections in former colonies or other “non-self-governing territories.”<sup>119</sup> The U.N. practice of monitoring elections can be traced back to its first use in the 1948 elections in South Korea—elections which led to a nation marked by years of military rule, coups, violent suppression of student demonstrations, and other human rights abuses.<sup>120</sup> One can only wonder what the result would have been in South Korea if the United Nations had not departed so soon after that first election and had remained to assist the nation’s transition to democracy. The Korean War may have been avoided, and the transition to democracy may have occurred much more quickly, with far less human suffering. The record of postelection governments in many former colonies is much the same. Elections have brought new regimes into power, but have done nothing to limit the power of the new regime over its own people.<sup>121</sup> The results have played out in country after country.<sup>122</sup>

It is time to find new ways of thinking about nation-building operations. The current method of placing almost total reliance on free and fair elections—as an end in themselves—has shaped U.N. nation-building interventions and consequently shaped the outcome of those interventions as well. Elections are only a beginning. It is time to view elections as a means to a greater end—an end characterized by constitutional democracy and the rule of law. Only by doing so can we hope to foster the greater goals of the United Nations Charter “[t]o maintain international peace and security” and encourage “respect for human rights and for fundamental freedoms for all.”<sup>123</sup>

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117. See Franck, *supra* note 33, at 52–56.

118. U.N. CHARTER art. 73.

119. *Emerging Norm of Democracy*, *supra* note 111, at 251.

120. See BACKGROUND NOTES: SOUTH KOREA, *supra* note 69, at 3–4.

121. See *Emerging Norm of Democracy*, *supra* note 111, at 264 (citing India, Pakistan, Guatemala, and South Korea as examples).

122. See *id.* at 263–65 (noting that portions of Asia, such as China, North Korea, Vietnam, Myanmar, Indonesia, Singapore and Pakistan present a mixed picture).

123. U.N. CHARTER art. 1, paras. 1, 3.

## IV. NEUTRALITY: AN IMPEDIMENT TO NATION BUILDING

The United Nations has been monitoring elections since 1948,<sup>124</sup> with most monitoring occurring in former colonial countries. The electoral transition in these former colonies has given international legitimacy to the use of election monitoring as a means “to develop self-government” for those countries.<sup>125</sup> These colonial transitions, as well as the other U.N. monitored elections, have also given international legitimacy to elections as a way to measure a nation’s will and give effect to one of the fundamental purposes of the United Nations, “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . .”<sup>126</sup>

It is now time for the United Nations to work to complete the purposes outlined in Article 1(2) and “take other appropriate measures to strengthen universal peace.”<sup>127</sup> History clearly shows that democracies strengthen universal peace. By clinging to an outdated mandate for complete neutrality toward different forms of government, the United Nations is impeding its ability to meet its purposes of strengthening universal peace, of solving economic problems, and of advancing fundamental freedoms and respect for human rights.<sup>128</sup>

In a 1995 follow-up to his *Agenda for Peace*, Secretary General Boutros-Ghali spoke of “advanc[ing] international consensus on the crucial importance of economic and social development as the most secure basis for lasting peace.”<sup>129</sup> In a section on intrastate conflicts, Boutros-Ghali highlights “the collapse of state institutions” as a central feature of intrastate conflicts.<sup>130</sup> He then goes on to point out that in these intrastate conflicts “international intervention must extend beyond military and humanitarian tasks and must

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124. See U.N. ELECTIONS HANDBOOK, *supra* note 88, para. 7 (recounting that “United Nations activity in the field of elections began with the official observation of the Korean elections of 1948.”).

125. U.N. CHARTER art. 73; see also Franck, *supra* note 33, at 50–51.

126. U.N. CHARTER art. 1, para. 2.

127. *Id.*

128. See U.N. CHARTER art. 1, paras. 2–3. As I have stated earlier, neutrality in nation building is a separate issue from neutrality during peacekeeping operations. See UNITED NATIONS AND PEACEKEEPING, *supra* note 6, at 42–44. (arguing that one of the fundamental features of a successful peacekeeping mission is the neutrality of those enforcing the peace).

129. *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations* para. 3, U.N. Doc. A/50/60 (1995).

130. *Id.* paras. 12–13.

include the promotion of national reconciliation and the re-establishment of effective government.”<sup>131</sup> Unfortunately, he then severely limits the ability of the United Nations to effect lasting and needed changes by stating that the United Nations cannot “impose a new political structure or new state institutions. It can only help the hostile factions to help themselves and begin to live together again.”<sup>132</sup> While the United Nations cannot “impose” a new political structure, it can refuse to expend its resources to assist unless the State is willing to agree to a new political structure that comports with constitutional democracy. As one commentator so aptly expressed it,

U.N. electoral missions have tended to emphasize the formal acceptability of, and/or rituals associated with, political campaigning, balloting and validation of political control. This approach promotes an impoverished conception of democratic change to people who may have placed very high hopes on the benefits of such a change.<sup>133</sup>

Some authors take this argument a step further and assert that elections without constitutionalism create the breeding ground for ethnic division and violence because political leaders use ethnic divisions to rally support and gain votes.<sup>134</sup> Without a need for consensus and with no constitutional protections for basic human rights and equal protection of the societal minorities, majoritarian power leads to totalitarian abuses.<sup>135</sup>

Unfortunately, neutrality toward the form of “new political structure” a nation chooses to adopt often forces the United Nations and the monitored nation to accept a temporary solution. For nations that have blatantly violated human rights norms or otherwise disintegrated to the point that U.N. intervention becomes necessary, neutral election

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131. *Id.* para. 13.

132. *Id.* para. 14.

133. Ibrahim J. Gassama, *Safeguarding the Democratic Entitlement: A Proposal for United Nations Involvement in National Politics*, 30 CORNELL INT’L L.J. 287, 290 (1997).

134. See Zakaria, *supra* note 18, at 38. “Political scientists Jack Snyder and Edward Mansfield contend, using an impressive data set, that over the last 200 years democratizing states went to war significantly more often than either stable autocracies or liberal democracies. In countries not grounded in constitutional liberalism, the rise of democracy often brings with it hyper-nationalism and war-mongering.” *Id.*

135. See *id.* (pointing to “Napoleon III’s France, Wilhelmine Germany, and Taisho Japan . . . Armenia and Azerbaijan and Milosevic’s Serbia” as examples).

monitoring is a woefully inadequate “solution.”<sup>136</sup> The United Nations must assist such a nation to form a working and viable constitutional democracy that will encourage peaceful stability and protect human rights.<sup>137</sup> To do any less squanders U.N. resources and places the nation’s population back into peril. In effect, without an emphasis on constitutional democracy, U.N.-monitored elections may do nothing more than sanction a new type of majoritarian tyranny or set the nation up for its next violent coup. This is not an appropriate role for the United Nations and not an outcome to which United Nations member nations should commit their valuable and limited resources.

The evidence for the transforming power of constitutional democracies is clear: they are more peaceful, more protective of human rights, and more economically prosperous. As Moore recognized,

[P]eacekeeping, collective security, and humanitarian operations undertaken by the United Nations are likely to be concentrated in those totalitarian and failed government settings in which government structures may be the largest single factor in producing the problem. As such, continuation of the “traditional” sovereignty-bound concept of non-intervention with respect to government structures in these settings of U.N. action may be to powerfully contribute to the long-run irrelevance of many such actions.<sup>138</sup>

#### V. THE CASE OF CAMBODIA: BACK TO WHERE WE STARTED

Twentieth Century history is replete with examples of the value of the transition to democracy and free-market economies. The foremost case study in support of the ability of constitutionalism to transform a country can be seen through the democracy-building measures undertaken in Japan and West Germany after World War II.<sup>139</sup> As a result of the democratic transformation, these two once-aggressive and abusive countries have become some of our strongest

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136. See Moore, *supra* note 31, at 887. “While it may be attractive to hope for non-involvement in the face of outrageous behavior, in such settings it is likely that only involvement can carry out the mission.” *Id.*

137. See *id.* at 860.

138. Moore, *supra* note 31, at 877.

139. See *id.* at 877–78. “It is also relevant to note that the best outcome of any war in the 20th Century was the outcome of World War II, characterized by direct action to install democratic governments in the former Axis States.” *Id.*

partners in peace; their economic success is well known, and their human rights records are admirable.<sup>140</sup> In the past decade, the end of the Cold War and the disintegration of communism have led numerous nations voluntarily down the path to constitutional democracy.<sup>141</sup> Although the path is neither easy nor short, it is a trip that more and more nations consider to be worth the effort.<sup>142</sup> The reasons, as stated above, are clear: democracy brings peace, prosperity, protection of human rights, and a multitude of other benefits.<sup>143</sup> Against this backdrop, it is doubly puzzling that the world community is not demanding more democratic nation building during U.N. operations. There is no more blatant example of the need for a new and openly embraced focus on democratic nation building than the recent events in Cambodia.

#### A. *History*

The Cambodian nation has a long and at times, great history. However, beginning in the fifteenth century, Cambodia, then called Kampuchea, became the object of almost constant fighting and shifts in power between the native Khmer Kingdom, Siam, and Vietnam.<sup>144</sup> In the 1800s, France established a protectorate over Cambodia, offering freedom from the Thai government and insulation from Vietnamese advances.<sup>145</sup> The French retained the monarchy in Cambodia, trained the civil service, built roads, ports, and other public facilities, and exported rice and rubber from the area.<sup>146</sup> During World War II, the French administrators cooperated with the invading Japanese forces until near the end of the war.<sup>147</sup> At that point, the French were expelled from Cambodia, and the Japanese installed Norodom Sihanouk as the king.<sup>148</sup> Soon after the war, despite American dissatisfaction with a return to French colonial rule

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140. *See id.* at 878.

141. *See* Tina Rosenberg, *Overcoming the Legacies of Dictatorship*, FOREIGN AFF., May–June 1995, at 134, 134–35.

142. *See id.*

143. *See* Moore, *supra* note 31, at 877–78.

144. *See* DAVID P. CHANDLER, A HISTORY OF CAMBODIA 80–81, 94 (1983) (noting the political instability and frequent fighting in Cambodia during that period).

145. *See id.* at 139–41 (detailing France's involvement in Cambodia's history).

146. *See id.* at 160–61.

147. *See id.* at 166.

148. *See id.* at 171.

in Indochina, France regained control of Indochina and Cambodia, which it held until 1953.<sup>149</sup> At that time, Cambodia was granted independence under the rule of King Sihanouk, who soon thereafter abdicated the throne to his father and took the title Prince Sihanouk.<sup>150</sup> For years Sihanouk struggled to maintain Cambodia's neutrality in the face of blatant violations of its territory by North Vietnamese and Vietcong forces.<sup>151</sup> He acquiesced to their presence, but granted the United States the right of "hot pursuit" against them.<sup>152</sup> In 1969 the United States started a secret bombing campaign against North Vietnamese and Vietcong sanctuaries.<sup>153</sup>

The bombings were quickly followed by a succession of horrors. Prince Sihanouk was overthrown and U.S. and South Vietnamese forces fought against North Vietnamese forces throughout the border regions of Cambodia, turning it into a battlefield for the Vietnam War.<sup>154</sup> The 1973 withdrawal of U.S. forces from South Vietnam set the stage for the 1975 reign of terror and resultant democide of two million Cambodians by the Khmer Rouge.<sup>155</sup> Vietnam invaded Cambodia in December 1978, thereby plunging the country into a new war for more than a decade.<sup>156</sup> Despite urgings by ASEAN<sup>157</sup> and a U.N. International Conference on Kampuchea in 1981, little progress was made toward a settlement until 1987 when Indonesia began working with the various factions.<sup>158</sup> In 1989 the Paris Conference on Cambodia was held, with a view toward ending the civil war

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149. *See id.* at 173, 175–90.

150. *See id.* at 190.

151. *See* STANLEY KARNOW, *VIETNAM: A HISTORY* 589–90 (1983) (discussing the turmoil of Vietnam and Cambodia's attempts to remain neutral).

152. *Id.* at 590.

153. *See id.* at 604; James A. Schear, *Riding the Tiger: The United Nations and Cambodia's Struggle for Peace*, in U.N. PEACEKEEPING, AMERICAN POLITICS, AND THE UNCIVIL WARS OF THE 1990S 135, 136 (William J. Durch ed., 1996).

154. *See* KARNOW, *supra* note 151, at 44–45.

155. *See id.*

156. *See id.* at 45.

157. ASEAN (Association of Southeast Asian Nations) was formed in 1967 by the countries of Indonesia, Malaysia, Philippines, Singapore, and Thailand to promote political and economic cooperation in the region. A united Vietnam was granted membership in 1995. Other nations have also joined. *See* Nobuo Kiriya, *Institutional Evolution in Economic Integration: A Contribution to Comparative Institutional Analysis for International Economic Organization*, 19 U. PA. J. INT'L ECON. L. 53, 55 (1998); *see also* ASEAN Home Page (visited Oct. 6, 1998) <<http://www.asean.or.id/>> for more information about ASEAN.

158. *See* Steven R. Ratner, *The Cambodia Settlement Agreements*, 87 AM. J. INT'L L. 1, 4 (1993).

in Cambodia now that the Vietnamese appeared ready to pull out.<sup>159</sup> The Conference reached a stalemate over the issue of an interim government for Cambodia during its transition.<sup>160</sup> At this point, the United Nations again became involved and basically agreed to run the Cambodian elections and many other aspects of the Cambodian government during the transition.<sup>161</sup> Cambodian sovereignty was to be exercised by a twelve member Supreme National Council (SNC) until the elections.<sup>162</sup> The Paris Peace Accords were signed in 1991,<sup>163</sup> and the United Nations Transitional Authority in Cambodia (UNTAC) was established to oversee the withdrawal of forces, to monitor the elections, and to improve human rights conditions in Cambodia.<sup>164</sup>

### B. *The Paris Accords*

The Paris Accords provided “[p]rinciples for a new constitution for Cambodia”<sup>165</sup> that were ostensibly based on the 1982 constitutional principles for Namibia;<sup>166</sup> however, the Cambodian principles laid out only the barest of constitutional frameworks. It required that the yet to be drafted constitution would be the supreme law of the land, and that the constitution would

contain a declaration of fundamental rights, including the rights to life, personal liberty, security, freedom of movement, freedom of religion, assembly and association including political parties and trade unions, due process and equality before the law, protection from arbitrary deprivation of property . . . ; and freedom from racial, ethnic, religious or sexual discrimination.<sup>167</sup>

According to the principles, the constitution must also conform to international human rights standards and must provide access to the courts to enforce the above rights.<sup>168</sup>

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159. *See id.* at 5; Tracy Dahlby, *China Opposes ASEAN's Plan on Cambodia*, WASH. POST, July 16, 1981, at A28.

160. *See* Ratner, *supra* note 158, at 6.

161. *See id.* at 12–14.

162. *See* Schear, *supra* note 153, at 139. The 12 members would include six from the SOC and two each from the other three factions. *See id.*

163. *See Paris Accords*, *supra* note 103, at 7.

164. *See id.* at 5–6.

165. *Id.* at 46.

166. *See* Marks, *supra* note 25, at 56.

167. *Paris Accords*, *supra* note 103, at 46–47.

168. *See id.*

The only mention of government structure in the principles is found in the requirement for “a system of liberal democracy, on the basis of pluralism” and in the requirements for periodic and genuine elections and an independent judiciary.<sup>169</sup> The constitutional principles are contained in six short paragraphs that cover perhaps a half page and are devoted to human rights and electoral democracy.<sup>170</sup> By contrast, nearly two pages of the Paris Agreement are dedicated to the preservation of the “sovereignty, independence, territorial integrity and inviolability, neutrality and national unity of Cambodia,”<sup>171</sup> and another full page is dedicated to foreign aid—or as it is called in the Paris Accords, the “rehabilitation and reconstruction of Cambodia.”<sup>172</sup> These are surely classic examples of putting the cart before the horse: sovereignty and territorial integrity is of little consequence to a country that is in constant violent internal turmoil, and rehabilitation and reconstruction is virtually impossible in a country that lacks peaceful political stability.

### C. *The 1993 Elections*

The time before the May 1993 elections was marked by “politically inspired violence and abuses of administrative power,” and “UNTAC found itself in daily squabbles with the SOC over such matters as police excesses, voter intimidation, the rights of opposition parties to fair media access, and the confiscation of campaign materials and media equipment by customs agents.”<sup>173</sup> UNTAC took several measures to control the political violence and establish the conditions for elections. At one point, UNTAC established a “UNTAC Special Prosecutor’s Office with powers to arrest and detain suspects and to prosecute cases before Cambodian . . . courts.”<sup>174</sup> In a unique move, UNTAC also set up and ran the only free radio station in the country.<sup>175</sup> “Several studies conclude that the 1993 elections probably could not have taken place or succeeded without the flow of information provided largely by

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169. *Id.* at 47.

170. *See id.* at 46–47.

171. *Id.* at 48.

172. *Id.* at 55. Before elections were held or a constitution was drafted, the international community raised \$880 million for Cambodia’s rehabilitation. *See* Schear, *supra* note 153, at 149.

173. Schear, *supra* note 153, at 167.

174. *Id.*

175. *See id.* at 169.

'Radio UNTAC.'"<sup>176</sup> UNTAC also drafted the electoral laws, registered the voters, issued directives and used its own forces to control political violence, and at times provided transportation to candidates when the Cambodian government refused to grant equal access to air transportation.<sup>177</sup> Unfortunately, consistent with the U.N. policies and procedures outlined in the elections handbook, these measures were temporary and lasted only as long as UNTAC lasted.

The elections were held from 23 to 28 May 1993.<sup>178</sup> The constitution was adopted on 24 September, and UNTAC's mandate ended in late September.<sup>179</sup> By the end of 1993, most UNTAC personnel had departed the country.<sup>180</sup> The United Nations continued to maintain a human rights oversight mission in Phnom Penh,<sup>181</sup> and there are some Cambodian Non-Governmental Organizations (NGOs) who are receiving U.S. and other monetary assistance for democracy building efforts.<sup>182</sup>

#### D. *The 1993 Constitution*

As mentioned above, the 1993 Constitution actually began as a list of "Principles for a New Constitution for Cambodia" in Annex 5 of the Paris Accords.<sup>183</sup> While these principles were "drawn from a 1982 proposal of the five-state 'Contact Group' that prepared recommendations for Namibia's transition to independence,"<sup>184</sup> they were infused

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176. U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-96-15BR, BRIEFING REPORT TO THE CHAIRMAN AND RANKING MINORITY MEMBER, COMMITTEE ON INTERNATIONAL RELATIONS, CAMBODIA: LIMITED PROGRESS ON FREE ELECTIONS, HUMAN RIGHTS, MINE CLEARING 14 (1996) [hereinafter GAO REPORT ON CAMBODIA].

177. See Schear, *supra* note 153, at 162-63, 167-69.

178. See *id.* at 169.

179. See A GLOBAL AGENDA: ISSUES BEFORE THE 49TH GENERAL ASSEMBLY OF THE UNITED NATIONS 104 (John Tessitore & Susan Woolfson eds., 1994).

180. See *id.* at 104-05.

181. See GAO REPORT ON CAMBODIA, *supra* note 176, at 19 (noting that at one point after UNTAC left, "Cambodia's co-Prime Ministers attempted to close the UNCHR office . . . in response to its criticism of human rights abuses, but backed down under international (including U.S. government) pressure.").

182. See *Statement on the Situation in Cambodia: Hearing Before the Senate Comm. on Foreign Relations, Subcomm. on East Asian and Pacific Affairs*, 105th Cong. (1997), available in WESTLAW, 1997 WL 541213 (statement made by Stanley O. Roth, Assistant Secretary of State for East Asian and Pacific Affairs) [hereinafter *Situation in Cambodia*].

183. Marks, *supra* note 25, at 56.

184. *Id.* Stephen Marks was the "head of human rights education, training and information for the United Nations Transitional Authority in Cambodia." *Id.* at 45 n.\*.

with vague guarantees of a “liberal democracy” and dominated by electoral provisions.<sup>185</sup> The Namibian principles, in contrast, provided for “a system of government with three branches” and then went on to outline the independent nature of the branches and the requirement that the “Constitution will determine the organization and powers of all levels of government.”<sup>186</sup>

Some authors contend that the Cambodian constitutional principles set up “the political foundation of a government able to protect human freedoms” because the principles “go beyond recognizing free elections as the sole process for choosing a government after internal strife, and beyond committing the elected regime to guaranteeing the human rights of its people, by identifying the path—labeled ‘liberal democracy, on the basis of pluralism’—it is to follow.”<sup>187</sup> However, a close reading of the paragraph dealing with this “liberal democracy, on the basis of pluralism”<sup>188</sup>

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185. *See id.* at 57.

186. *Namibian Principles*, *supra* note 107, at 20.

187. Ratner, *supra* note 158, at 27.

188. *Paris Accords*, *supra* note 103, at 47. The entire text of Annex 5 follows:

Principles for a new constitution for Cambodia

1. The constitution will be the supreme law of the land. It may be amended only by a designated process involving legislative approval, popular referendum, or both.
2. Cambodia’s tragic recent history requires special measures to assure protection of human rights. Therefore, the constitution will contain a declaration of fundamental rights, including the rights to life, personal liberty, security, freedom of movement, freedom of religion, assembly and association including political parties and trade unions, due process and equality before the law, protection from arbitrary deprivation of property or deprivation of private property without just compensation, and freedom from racial, ethnic, religious or sexual discrimination. It will prohibit the retroactive application of criminal law. The declaration will be consistent with the provisions of the Universal Declaration of Human Rights and other relevant international instruments. Aggrieved individuals will be entitled to have the courts adjudicate and enforce these rights.
3. The constitution will declare Cambodia’s status as a sovereign, independent and neutral State, and the national unity of the Cambodian people.
4. The constitution will state that Cambodia will follow a system of liberal democracy, on the basis of pluralism. It will provide for periodic and genuine elections. It will provide for the right to vote and to be elected by universal and equal suffrage. It will provide for voting by secret ballot, with a requirement that electoral procedures provide a full and fair opportunity to organize and participate in the electoral process.

shows that the “pluralism” referred to is electoral pluralism and the “liberal democracy” is an electoral democracy, not necessarily a constitutional democracy—as that term is described earlier in this article.<sup>189</sup> The remainder of the paragraph on liberal democracy contains requirements for universal voting rights, secret ballots, and a “full and fair opportunity to organize and participate in the electoral process.”<sup>190</sup> The only specific mention in all of Annex 5 to governmental structure is the requirement for “[a]n independent judiciary [to] be established, [and] empowered to enforce the rights provided under the constitution.”<sup>191</sup>

The remaining constitutional principles are also a shadow of the Namibian principles. While both sets of principles call for a “declaration of fundamental rights,” the Cambodian version omits freedom of speech and press.<sup>192</sup> While this provision can probably be read into the requirement that any declaration be consistent with the Universal Declaration of Human Rights, it is curious that in a list of rights that is nearly identical to Namibia’s list, freedom of expression was excluded from the Cambodian principles. Both principles go on to stipulate that “[a]ggrieved individuals will be entitled to have the courts adjudicate and enforce these rights.”<sup>193</sup>

Cambodia began its constitutional transition with a set of principles that were missing several important constitutional protections. Cambodia then compounded its problems when it drafted its 1993 constitution by deviating significantly from the text and the spirit of the constitutional principles laid down in the Paris Accords. A full review of the Cambodian Constitution is beyond the scope of this paper; however, a brief history of past Cambodian constitutions and a look at a

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5. An independent judiciary will be established, empowered to enforce the rights provided under the constitution.

6. The constitution will be adopted by a two-thirds majority of the members of the constituent assembly.

*Id.* at 46–47.

189. See Marks, *supra* note 25, at 57.

190. *Paris Accords*, *supra* note 103, at 47.

191. *Id.*

192. Compare *Namibian Principles*, *supra* note 107, at 20, with *Paris Accords*, *supra* note 103, at 46.

193. *Paris Accords*, *supra* note 103, at 46; *Namibian Principles*, *supra* note 107, at 20.

few provisions and omissions in the current constitution should serve to illustrate the point.<sup>194</sup>

Cambodia has had several governments and constitutions in the past few decades that have “run the gamut from constitutional monarchy, to presidential regime, to radical Marxism-Leninism, to Soviet-style Communist Party rule, to the new ‘liberal democratic’ constitutional monarchy.”<sup>195</sup> As with so many other communist constitutions, the problem with past Cambodian constitutions was not with their particular provisions or omissions, the problems arose in how the constitutions were applied, or more to the point—ignored. Marks calls these constitutions “ornamental appendages of political regimes;”<sup>196</sup> Chandler chose the more concise but equally descriptive phrase “decorative constitutions.”<sup>197</sup> With a long history of these decorative constitutions, Cambodia’s transition to constitutionalism and the rule of law would not be an easy one. Added to this impediment was Cambodia’s recent history of human rights atrocities and Pol Pot’s purge of almost every educated citizen in the nation, including most citizens with any legal training.<sup>198</sup> As I write this article, Cambodia’s government is once again in violent turmoil following a July 1997 partial coup,<sup>199</sup> and the July 1998 elections have done little to restore stability.<sup>200</sup> Consequently, any analysis of the Cambodian Constitution may be rather moot, but I hope still worthwhile for the lessons it may reveal for other nations.

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194. For an excellent and extensive review of the constitutional assembly’s work and of Cambodian constitutional provisions as they compare to the principles and to prior Cambodian constitutions, see generally Marks, *supra* note 25.

195. *Id.*, at 51.

196. *Id.*

197. *Id.* (quoting David P. Chandler, Presentation to the Constitutional Seminar, Phnom Penh, Cambodia (Apr. 1, 1993)).

198. See Dolores A. Donovan, *The Cambodian Legal System: An Overview*, in REBUILDING CAMBODIA: HUMAN RESOURCES, HUMAN RIGHTS, AND LAW 69, 74, 87 (Frederick Z. Brown ed., 1993).

199. See Tyler Marshall, *U.S. Decries Cambodian Takeover; Execution Reported*, L.A. TIMES, July 9, 1997, at A4 (describing the takeover and the ensuing violence); see also *Calling a Coup a Coup*, THE WASH. POST, July 9, 1997, at A22 (noting that U.S. officials “declin[ed] to label it a coup—because then the law would require a cutoff of aid.”).

200. See *Monitors Agree Strongman Won Cambodian Election*, DALLAS MORNING NEWS, Aug. 6, 1998, at A9; Lance Raspbridge, *Political Squabbling Threatens Cambodia*, DALLAS MORNING NEWS, Oct. 3, 1998, at A33.

Cambodia's new constitution sets up a constitutional monarchy.<sup>201</sup> While there can be no general quarrel with the ability of a democracy to also accommodate a monarchy, the proof of democracy in such a system is in the constitutional details and in the day-to-day operation of the system. The Cambodian Constitution begins well enough by stating that the "King of Cambodia shall reign but shall not govern."<sup>202</sup> However, the constitution goes on to make the king the "Supreme Commander of the Royal Khmer Armed Forces" and the "Chairman of the Supreme [C]ouncil of [N]ational Defense;"<sup>203</sup> gives him the authority to sign and ratify treaties and to declare war, after a vote of approval by the National Assembly;<sup>204</sup> and the power to "make a proclamation . . . putting the country in a state of emergency after agreement with the Prime Minister and the President of the Assembly."<sup>205</sup> While the current king, King Sihanouk, has tended to be a unifying force, a peacemaker, and a general supporter of human rights, there is no guarantee that future kings will not expand their role within the broad context of the powers granted in the Constitution.<sup>206</sup> In a country ruled by military power for much of its recent history, a king who is also Supreme Commander of the Armed Forces could be powerful enough for any ambitious monarch to wield while he is the "Head of State for life."<sup>207</sup>

Other than a reference to the U.N. Charter and the Universal Declaration of Human Rights,<sup>208</sup> the constitution does very little to advance the cause of human rights. In the same article containing the Universal Declaration reference, the constitution goes on to state that "[e]very Khmer citizen shall be equal before the law."<sup>209</sup> The wording is important because it leaves the Assembly free to define "citizen" in a way that excludes Cambodians of Vietnamese descent, who have been targets of mass murder and widespread

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201. See Sonia K. Han, *Building a Peace that Lasts: The United Nations and Post-Civil War Peace-Building*, 26 N.Y.U. J. INT'L L. & POL. 837, 850 (1994).

202. CAMBODIAN CONST. ch. 2, art. 7.

203. *Id.* ch. 2, arts. 23-24.

204. See *id.* ch. 2, arts. 24, 26.

205. *Id.* ch. 2, art. 22.

206. Cf. Jennifer S. Bermen, *No Place Like Home: Anti-Vietnamese Discrimination and Nationality in Cambodia*, 84 CAL. L. REV. 817, 825 (1996) (citing Sihanouk's desire for a peaceful repatriation of ethnic Vietnamese in 1989); KARNOW, *supra* note 151, at 44, 589 (noting attempts to prevent conflicts throughout Sihanouk's reign).

207. CAMBODIAN CONST. ch. 2, art. 7.

208. See *id.* ch. 3, art. 31.

209. *Id.*

discrimination in the past.<sup>210</sup> This reference to “citizens” permeates the constitution in both its human rights articles and in the articles dealing with political participation.<sup>211</sup> There is evidence from the constitutional deliberations that the term citizen was “intended to justify discrimination.”<sup>212</sup> Basic rights for citizens are also couched in guarded language. The right to freedom of expression is limited by an admonition that the right cannot be exercised “to affect the good traditions of the society,”<sup>213</sup> and the media is dealt with by a clause indicating that “[t]he regime of the media shall be determined by law.”<sup>214</sup> The constitution is also notably lacking in many basic criminal due process rights.<sup>215</sup> Any hope that the Constitutional Council (Cambodia’s constitutional court) will be the protector of individual rights is extinguished by the requirement that only allows citizens to “appeal against the Constitutionality of the laws as through their representatives or the President of the Assembly.”<sup>216</sup> There is no provision for a citizen to bring a direct constitutional appeal.<sup>217</sup>

After a comprehensive comparison of the new constitution with the prior communist constitution, Marks had this comment:

Clearly the drafters did not choose to draw from the language or normative richness of relevant international standards. In fact, it is a sad commentary on the whole process that most of the rights and duties are expressed in wording similar to that of the SOC [communist] Constitution of 1989.<sup>218</sup>

The Paris Accord principles for the new constitution stated that “Cambodia’s tragic recent history requires special measures to assure protection of human rights.”<sup>219</sup> Other than the addition of a reference to the Universal Declaration of Human Rights, which is not necessarily supported by other enumerated rights in the 1993 constitution, it appears

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210. See Marks, *supra* note 25, at 70–73.

211. See CAMBODIAN CONST. ch. 3.

212. Marks, *supra* note 25, at 72.

213. CAMBODIAN CONST. ch. 3, art. 41.

214. *Id.*

215. See Marks, *supra* note 25, at 79.

216. CAMBODIAN CONST. ch. 10, art. 122(2).

217. See *generally* CAMBODIAN CONST. (lacking a provision for direct appeal by a citizen).

218. Marks, *supra* note 25, at 75.

219. *Paris Accords*, *supra* note 103, at 46.

that the Cambodian drafters felt that the old human rights protections were “special” enough.<sup>220</sup> In addition, the Paris Accord principles for “universal” political participation seem to be jeopardized by the use of the term “citizens.”<sup>221</sup> Finally, the promise of an independent judiciary to enforce the rights provided under the constitution is an empty promise when the constitutional procedures require the consent of the Assembly to challenge any of the Assembly’s laws.<sup>222</sup>

There is no reason why the United Nations should have been left powerless to insure that the Cambodian Constitution lived up to the promises made to the world and to the Cambodian people in the Paris Accords. The world community has spent almost two billion dollars and peacekeepers have lost their lives trying to live up to their side of the bargain.<sup>223</sup> If the United Nations failed to enforce the constitutional principles contained in the Paris Accords, it is because the United Nations chose to set itself up for failure by not providing for an effective enforcement mechanism or remedy. In South Africa, the South African Constitutional Court recently found the new South African Constitution to be unconstitutional because it did not conform to its pre-agreed constitutional principles.<sup>224</sup> The court sent it back to the drafters for revision.<sup>225</sup> In the Dayton Peace Agreement for Bosnia-Herzegovina, the draft constitution provided for the impartiality and independence of the Bosnian Constitutional Court by requiring that the President of the European Court of Human Rights select three of the nine court members.<sup>226</sup>

There is no reason why the Paris Accords could not have provided for a similarly constituted provisional tribunal, or for an established international tribunal, to review the draft Cambodian Constitution to insure that it conformed to the pre-agreed constitutional principles. Any shortcomings could have been referred back to the Cambodian Constitutional Assembly for revision. The United Nations is willing to take concrete and often intrusive action to guarantee free and fair

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220. *See id.*

221. *Id.* at 14; *see also* Marks, *supra* note 25, at 70–73.

222. *See* CAMBODIAN CONST. ch. 10, art. 122.

223. *See* Jeff Trimble et al., *Into the Valleys of Death*, U.S. NEWS & WORLD REP., June 21, 1993, at 45–46.

224. *See* Frederick Schauer, *Constitutional Invocations*, 65 FORDHAM L. REV. 1295, 1295 n.1 (1997).

225. *See id.*

226. *See* BOSNIA & HERZEGOVINA CONST. art VI, § 1(a), *reprinted in* 35 I.L.M. 117, 123 (1996).

elections.<sup>227</sup> It should not shy away from equally concrete measures to guarantee that a nation lives up to its promise to adopt a constitution that protects human rights and establishes a constitutional democracy. To do anything less is a reckless waste of scarce U.N. resources and a pointless endangerment of dedicated peacekeepers.

To be sure, UNTAC faced many daunting challenges, exacerbated by Cambodia's long history of civil war and heinous human rights violations, and by all accounts, UNTAC did a commendable job with the mission they were given. Furthermore, I am not suggesting that a simple insistence on a constitution that conformed to an improved version of the Paris Accord principles would have solved all of the problems that UNTAC faced, nor solved all the political problems in Cambodia. However, holding elections under suspended laws, with UNTAC exercising prosecutorial authority and running the only free radio station in the country—in a country with Cambodia's history—and then departing shortly after the elections were held and the “new” constitution was ratified, is either a sure recipe for failure or evidence that hope really does spring eternal.<sup>228</sup>

UNTAC's sole focus on setting up the conditions for and holding free and fair elections left Cambodia stranded with little chance of building a stable peace. Permitting Cambodia to adopt a constitution that did not meet even the guarantees of its already minimal framework principles, and then immediately ending UNTAC's mandate, left Cambodia stranded at the very start of a difficult transition—and stranded without the proper constitutional tools to effect needed changes. Elections are not a transition; they are merely a beginning. Until the world community aims at the proper target, it cannot hit the mark. Until that target is constitutional democracy—instead of mere elections and empty “decorative constitutions”—we are wasting precious resources.

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227. See U.N. ELECTIONS HANDBOOK, *supra* note 88, paras. 115–17.

228. See GAO REPORT ON CAMBODIA, *supra* note 176, at 14 (concluding that the 1993 elections probably could not have taken place or succeeded without the flow of information provided largely by “Radio UNTAC”). “The United Nations Transitional Authority in Cambodia (UNTAC), established to implement the accords, . . . concluded its mandate in late 1993 with the formation of a duly elected government in Cambodia.” *Id.* at 1.

*E. The Current Situation in Cambodia*

Despite free and fair elections, a written constitution, \$1.9 billion spent on UNTAC, and millions more in foreign aid, Cambodia is now back in a state of violent turmoil after a partial coup in July 1997 where Hun Sen, one of Cambodia's co-prime ministers, ousted Prince Ranhariddh, the other co-prime minister, and began a purge of Ranhariddh's supporters.<sup>229</sup> Even before the coup, Cambodia was making little progress toward improving its human rights record or enforcing the rights guaranteed by the new constitution.<sup>230</sup> Even after the July 1998 elections, the country continues in a state of unrest "as members of the political elite egoistically bicker over the results, while the 11 million peasants endure staggering hardships."<sup>231</sup>

Significantly, the Cambodian Interior Ministry was still drafting the new election law in 1996, despite the fact that the new law was scheduled to have been drafted and reviewed by December 1995.<sup>232</sup> In addition, like much of the constitutional drafting in 1993, the "[m]inistry deliberations and work [were] not open to public oversight and participation."<sup>233</sup> By early 1996, the human rights front was fairing no better:

According to human rights NGOs, the United Nations Center for Human Rights (UNCHR) office in Phnom Penh, and USAID [U.S. Agency for International Development] documents, Cambodian military and police forces continued to violate human rights frequently during the past 2 years. These sources reported numerous cases of extortion, beatings, robberies, and other violations by soldiers and police. . . . [Also], (1) few Cambodians had received due process or fair trials in the past 2 years; (2) prosecutors and judges lacked basic training and skills for properly investigating, preparing, presenting, and deciding cases; and (3) trained

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229. See Schear, *supra* note 153, at 151. "[T]he operation would draw staff members from over 100 countries. Its costs would run to an estimated \$1.9 billion." *Id.* See also Marshall, *supra* note 199, at A4 (describing the takeover and the ensuing violence); *Calling a Coup a Coup*, *supra* note 199, at A22 (noting that U.S. officials "declin[ed] to label it a coup—because then the law would require a cutoff of aid.").

230. See GAO REPORT ON CAMBODIA, *supra* note 176, at 2.

231. Raspbridge, *supra* note 200, at A33.

232. See *id.* at 11.

233. *Id.* at 13.

public defenders remained scarce. . . . In late 1994, NGOs reported that they found a secret government prison where prisoners were tortured and denied basic human needs. According to the Department of State, this prison was closed in 1994.<sup>234</sup>

Other impediments to effective constitutional government existed before the coup as well. “The government closed some newspapers and prosecuted several members of the press, enacted restrictions on press freedoms, and tightly controlled broadcast licenses. Several members of the press were beaten or killed and their attackers set free.”<sup>235</sup> Corruption and scandal plagued the government.<sup>236</sup> One of the largest scandals was caused in 1994 after it was discovered that the two co-prime ministers had authorized the military to be the only lawful exporters of Cambodia’s rare and valuable timber.<sup>237</sup> The timber scandal not only benefited the rulers at the expense of the nation,<sup>238</sup> but it also allowed the military to finance itself, free from the control of the legislature.<sup>239</sup> A year after adopting the constitution, the Assembly had only passed two measures, both dealing with the budget, and had been in session fewer than twenty days.<sup>240</sup>

It is interesting to note that many of the problems mentioned above are caused by Cambodia’s lack of democratic experience and habits, and a corresponding dearth of laws and regulations in the very areas that UNTAC took over during the peacekeeping and election-monitoring phases of its operation.<sup>241</sup> It should not be surprising that the Cambodian government could not accomplish these basic governmental tasks after UNTAC’s departure when they could not accomplish them during UNTAC’s stay. One commentator noted:

A final lesson, clearly evident in UNTAC’s case, is the absolute importance for multi component operations

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234. *Id.* at 17.

235. *Id.* at 19.

236. *See id.* at 17.

237. *See* Henry Kamm, *Despite U.N.’s Effort, Cambodia Is Chaotic*, N.Y. TIMES, July 4, 1994, at A1 (describing the scandal which heightened a crisis of confidence in the government and caused alarm to ambassadors from countries that provide economic aid).

238. *See id.*

239. *See id.* “Giving the military the right to sell timber independently also violates the budget law.” *Id.*

240. *See id.*

241. *See* Marks, *supra* note 25, at 48–49 (describing Cambodia’s undemocratic political history and human rights violations).

to be followed by coherent packages of post-transition assistance. . . . “You don’t go from 22,000 personnel to effectively zero,” as one diplomat observed, “without some negative impact.” Still, a long-run international presence beyond a certain level is risky. It can stifle self-reliance and incur resentments against UN-style “neocolonialism.”<sup>242</sup>

This quotation shows the basic conflict in nation-building operations between helping too little and helping too much. Unfortunately, in UNTAC’s case, they may have helped too much, for too short a time. Once again, the pattern of U.N. assistance can be traced back to the narrow focus on the importance of holding just one free and fair election<sup>243</sup>—as if that one election is the panacea that will cure the nation’s problems and bring it peace, stability, human rights, and prosperity.

Incredibly, even after the July 1997 coup, the world focus on improving conditions in Cambodia continued to be on the importance of holding elections in 1998.<sup>244</sup> In September 1997, when the Assistant Secretary of State for East Asian and Pacific Affairs briefed the Senate subcommittee regarding the situation in Cambodia, he stated the administration’s position that “[u]ntil there is a restoration of the Paris Peace Accords, and free and fair elections are held, the United States will not conduct business as usual with [Cambodia].”<sup>245</sup> He then went on to list the “core principles” of the U.S. policy toward Cambodia.<sup>246</sup> The list was focused almost exclusively on the

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242. Schear, *supra* note 153, at 175–76 (footnotes omitted).

243. See Kamm, *supra* note 237, at A1; see also *Emerging Norm of Democracy*, *supra* note 110, at 264 (criticizing the tendency of democracy advocates to focus too narrowly on the importance of elections).

244. See *Situation in Cambodia*, *supra* note 182.

245. *Id.*

246. See *id.* The full list is:

1. The violence that overturned the results of the 1993 elections is unacceptable; fighting must stop immediately.
2. All political parties, including FUNCINPEC, must be allowed to operate freely in Cambodia.
3. There must be free and fair elections in 1998.
4. There should be no political role for the leaders of the Khmer Rouge; those responsible for crimes against humanity should be brought to justice.
5. The framework of the 1991 Paris Accords on Cambodia, which paved the way for UN-conducted elections in 1993, must be reinstated.

need for elections and for full political participation. The United States was not the only entity that focused on the need for elections in Cambodia. “The ASEAN Ministers’ statement stressed the importance of holding free and fair elections in Cambodia . . . and reaffirmed the necessity for all political parties in Cambodia to participate fully in the elections.”<sup>247</sup>

Unfortunately, this current world faith in the ability of mere elections to once again “solve” the problems in Cambodia is driven by the 1991 Paris Accords, which, in turn, were driven by the U.N. focus on neutrality and free and fair elections. Thus, we see how the United Nations single-minded policy of free and fair elections dictates the world’s response, despite the policy’s failure in the past.

To be sure, the problems in Cambodia run deep—there is no single cause, nor single cure. However, many actions that were taken to assist in free and fair elections as a means to transform Cambodia were inadequate and shortsighted. Regrettably, these actions were also entirely consistent with the U.N. policy of neutrality and with the guidelines in the U.N. handbook on elections discussed earlier.<sup>248</sup>

Free and fair elections have become the only answer to the problem, and the U.N. policy, structure, and expertise all focus on the elections principle. As Moore explained in his article about paradigms, “[w]ays of thinking about a problem become dominant as they seem to offer the best explanation at any point in time for understanding or dealing with the problem.”<sup>249</sup> Or to put it another way, “[p]eople who are only good with hammers see every problem as a nail.”<sup>250</sup>

## VI. CONCLUSIONS

There is no doubt that any transition to democracy can be complicated and difficult, and the task of drafting a new constitution is not to be undertaken lightly. Many scholars of constitutionalism and democratic transitions have endeavored to illuminate these complex subjects.<sup>251</sup> The point

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*Id.*

247. *Id.*

248. See U.N. ELECTIONS HANDBOOK, *supra* note 88, at 23.

249. Moore, *supra* note 31, at 818.

250. GLENN VAN EKEREN, SPEAKER’S SOURCEBOOK II: QUOTES, STORIES & ANECDOTES FOR EVERY OCCASION 304 (1994) (quoting psychologist Abraham Maslow).

251. See generally JAN-ERIK LANE, CONSTITUTIONS AND POLITICAL THEORY (1996); JON ELSTER & RUNE SLAGSTAD, CONSTITUTIONALISM AND DEMOCRACY (1989); CARL J. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY (1968).

of this article is not to compete with these scholars. Rather, it is to put the nation-building goal of transitioning to a constitutional democracy out in the open. Much of the world has also recognized that constitutional democracies and free-market economies are the best form of government to protect human rights and achieve lasting peace and stability.<sup>252</sup> The next step is the recognition that it is senseless for the United Nations and the world community to remain neutral toward forms of government, particularly during peacekeeping and nation-building operations, just as they have realized that it is senseless to be neutral toward a state that commits human rights violations against its citizens within its own borders.

While there are many formidable challenges in setting up a new democracy, the world will continue to learn from experience. However, regardless of the difficulties, the evidence for democracies is clear, and the need for U.N. “neutrality” diminishes daily. It is time to (1) focus on the constitutional principles contained in any peacekeeping and nation building framework agreement, (2) develop measures to enforce compliance with those principles in the draft constitution, and (3) develop programs to assist the government to comply with its new constitution after it comes into effect. All indicators point toward the need to adopt a new goal for peacekeeping and nation building. A goal to set up nations that are obliged to control themselves *after* they pass the landmark event of that first free and fair election. A goal that the United Nations and the world should *not* be neutral toward.

In peacekeeping operations—the one area where democracy is perhaps the most needed—misplaced reliance on neutrality and elections hampers the world’s ability to transform nonpeaceful nations into peaceful and prosperous constitutional democracies. Although many peacekeeping efforts point discreetly in the direction of democracy; although former Secretary General Boutros-Ghali can write about the need for the democratic trappings of government; although the research and literature indicate that democracies offer the best hope of achieving peace, stability, and the protection of human rights; the United Nations cannot seem to bring itself to openly adopt a democratic goal for nation building. Simple and open recognition of the value

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252. See *id.*; cf. *Emerging Norm of Democracy*, *supra* note 111, at 261–62 (discussing the positive impacts of newly emergent democracies, while cautioning against oversimplifying the benefits of democracy).

and goal of constitutional democracy is the first step toward turning U.N. peacekeeping into true nation building. The transition to democracy in a war-torn country may not be smooth and may not be easy, but it is essential that we try. Until constitutional democracy is openly stated as a permissible and preferred goal for nation-building operations, the harder work of bringing forth the transitions will remain stalled in obscurity.