

THE RIGHT TO DEMOCRATIC ENTITLEMENT: TIME FOR CHANGE?

BEN CHIGARA

*“... do justice to the afflicted and needy.
Deliver the poor and needy: rid them out of the hand of the wicked.”¹*

The right to democratic entitlement is well documented in international law. Numerous universal and regional constitutional treaties are premised on it and reverend it. National constitutions of most States espouse themselves to it. International civil society champions it. It is a right that resides at the core of the United Nations' originating vision for a secure and peaceful world – steered on the twin rails of social justice and respect for human rights. The current Zimbabwe crisis that came to a head at the 2002 Presidential election suggests that mere institutionalisation of this right under international law, regional law and national constitutional laws is not in itself sufficient to ensure its enjoyment. For this right to pass from enchanting rhetoric to practice that promotes and upholds the dignity of human beings everywhere in the world, procedural and other accounting strategies need to be developed so that impunity for its breach is stopped. This article examines the possibilities of enjoyment of this right in transitional States under present international arrangements. It concludes that for this to happen the international community needs urgently to demonstrate its commitment to the enjoyment of this right through (1) consistent application of interventionist mechanisms such as the SHIRBRIG initiative in situations where the right is at issue and, (2) development of efficient international, regional and national election audit systems with power effectively to strike down elections that breach the said right.

¹ Psalm 82:3-4.

Introduction

Condemnation of the 2002 Zimbabwe Presidential Election is widespread and convincing. The election has been variously described by the United States (US), the European Union (EU), Australia, New Zealand, Sweden, Norway and by observers of the fourteen member Southern African Development Community (SADC)² of which Zimbabwe itself is a member as "... fundamentally flawed and inconsistent with norms and standards of the SADC...", "... a systematic subversion of democracy", and as "... [a] poll marked by numerous, profound irregularities that ended in an outcome that thwarted the people's will. [Consequently] Mugabe can claim victory but not democratic legitimacy".³ Glenys Kinnock, Co-President of the EU/ACP (African Caribbean and Pacific) Joint Assembly in the European Parliament (EP) described it as "... a coldly calculated, pre-determined outcome resulting from draconian legislation, widespread and sustained political violence and intimidation".⁴ This condemnation stemmed from months of State sponsored political violence and intimidation, including torture, murder and rape of opposition party members and workers, repressive security legislation, a huge propaganda campaign by State media and, on the election day itself, the disenfranchisement of large numbers of people as a result of government engineered queues which forced people to wait in many regions for up to thirty hours.⁵ Reduction of polling stations in urban areas where opposition support was strongest resulted in several thousands of registered voters failing to cast their votes even after three days and two nights of queuing. Curiously, neither the South African nor Nigerian election observer teams wished to describe the election as free and fair though they both approved the result.⁶

² See *Financial Times*, Thursday 14 March 2002, p.1. Discussing the constitution of the SADC, its purposes and functions, and the phenomenal challenges that threaten failure of the organisation's economic agenda see Chigara B. (2002) "Trade Liberalisation: Saviour or Scourge of SADC States?" *Miami Journal of International and Comparative Law*, vol.10 No1.

³ See *The Independent*, Thursday 14 March 2002, p.1

⁴ European Parliamentary Labour Party Press Release, Richard Howitt-PRZimelections13022002.doc.

⁵ *Ibid.*

⁶ See *Financial Times*, Thursday 14 March 2002, p.1.

Two things are clear from reports of events leading up to Zimbabwe's 2002 Presidential election. The first is the general discontentment of the Zimbabwean populace with its government. The second is a determination of that government to continue to hold onto power.⁷ What the long voter-queues showed particularly in the urban areas was a people that had waited long enough for a realistic opportunity to exercise their right to decide on the leadership they deserved and wished to have. Three consecutive days and two nights in a queue accompanied by swarms of aggressive anopheles mosquitoes hunting for warm human blood would not hurt, so long as it gave them the opportunity to get rid of a regime widely perceived to be repressive, arrogant and corrupt.⁸ But for many, even that opportunity proved illusory.⁹ Even President Mugabe's loyal African allies – Nigeria and South Africa faced embarrassment as their election observers broke ranks with the official verdict that the election was "legitimate though it could not be said that conditions had existed for a free and fair election" and called the election a scandal.¹⁰ The Commonwealth observers found that "... thousands of people were disenfranchised and conditions did not allow for a free expression of will by electors".¹¹

This article examines the possibilities for enjoyment of the right to democratic entitlement in developing States that are dominated

⁷ See Chigara, B. (2001) "From oral to recorded governance: Reconstructing title to real property in 21st century Zimbabwe", *Common Law World Review*, vol.30 No.1 pp.36-65.

⁸ *The Observer* writes that Zimbabwean Generals, government Ministers and close relatives of President Mugabe have made millions of dollars from the illegal smuggling of "blood diamonds" from the Democratic Republic of Congo where the Zimbabwean Army has been deployed since 1998. "Mugabe men's blood gems", *The Observer*, 3 March 2002, p.4. For commentary on the deployment of Zimbabwean troops in the DRC and evaluation of the effect on the SADC of its organ on conflict prevention management and resolution see Chigara Ben (2000) "Operation of the SADC Protocol on Politics, Defence and Security in the Democratic Republic of Congo", *African Journal of International and Comparative Law*, vol.12 No.1 pp.58-69.

⁹ See "Frustrated voters in pavement protest", *The Times*, Monday 11 March 2002 p.17.

¹⁰ See *The Independent*, Friday 15 March 2002, p.15.

¹¹ *Ibid.*

by repressive,¹² arrogant and corrupt governments that fake democratic requirements with the hope of ordaining themselves with external legitimacy even though they may not have secured internal legitimacy of their own people. Discourse¹³ conceptualises democracy as:

- an entitlement that all societies possess,
- a human right that individuals are able to exercise through accepted procedures,
- a criterion for the recognition of legitimate governance,
- a justification for intervention and use of force, and as
- an overriding principle upon which the international system is ordered.

What is at issue is the right of people everywhere, freely to decide their destiny by giving their consent to be governed by those that preside over them. Free and fair elections alone do not constitute democratic governance.¹⁴ However, the right freely to elect without prior authorisation the leadership of a State is a fundamental requirement of the democratic process. In conjunction with other rights, it fosters representative and accountable governance. The article shows that it is still the case in some so called “transitional States”¹⁵ that where the electorate is determined peacefully to remove from office a failed, repressive and corrupt government, enjoyment of the right to democratic entitlement depends on the establishment and development by the United Nations of mechanisms, processes

¹² What Lord Browne Wilkinson described in *ex. Parte Pinochet Ugarte No.3* [1999] 2WLR p.827 as unofficial acts of governments for which State immunity from prosecution does not apply, acts that are prohibited by international law. They include such acts as torture, murder and crimes against humanity.

¹³ Burchill, R. (2001) “The Developing International Law of Democracy”, *Modern Law Review*, vol.64 No.1 pp.123-34 at p.126.

¹⁴ Arguing that supporters of democracy as an international legal principle have shown a tendency towards an unquestionable acceptance of new legal rules that appeared almost overnight see Burchill, *ibid.* p.123.

¹⁵ Teitel (2000) defines transitional States as States moving from illiberal to liberal rule. *Transitional Justice*, OUP, p.11. This begs the question whether countries such as Zimbabwe are actually moving from illiberal rule such as was opposed during colonialism to liberalism to a better system of governance or an even worse off one.

and structures that guarantee real and free expression of the will of the people about who should lead them. These mechanisms should be capable of stopping in its tracks governmental abuse of individuals' rights immediately State terror is at issue. State terror is a threat always to the object and purpose of the United Nations – the maintenance of peace and Security in the world. Victims of State terror would rather they had not been violated at all than be told that instigators of their assailants have been banned from travelling to Europe and suspended from one or two intangible fraternal organisations that serve more as ego brushes of constituent governments than as forums for enforcement of their official objectives. Governments that use rape to intimidate their populations into submission to their own will to stay in power should not be allowed to last an extra moment or day among the colloquium of legitimate governments that do not represent a threat to international peace and security. Particularly in SADC States where the AIDS pandemic is beyond imagination, a raped woman would rather she had never been raped at all than be told that her attacker has been sentenced – no matter how severe the sentence. Similarly tortured, murdered and disappeared persons and their relatives would much rather the consequent status of “victim” had not come to refer to them as a result of State terror that the international community foresaw or knew about and did nothing significant to stop.

1. Governments as trustees of the public

Personal failure is often kinder than public failure in that with the former, the individual remains relatively supreme both during and after that event. That is not the same with the latter because the stakes are much too high. Football managers in England and elsewhere are only too aware of the customary right of their supporters to ask them to step down and a new manager appointed if the performance of the team threatens the fortunes or even the reputation of the club. As one British minister of sport put it, football is cruel in that failing managers are summarily dismissed while in politics, they get five years. Whether they like it or not, and as a condition to their holding office public office bearers in democratic States are betrothed to the corollary duty periodically to submit to re-appointment or rejection of the same people, what

Franck¹⁶ calls the validating process by which people choose those they entrust with power. "To achieve such a system of autochthonous validation, those who hold or seek political power have made a farsighted bargain comparable to John Locke's social compact. *They have surrendered control over the nation's validation process to various others: national electoral commissions, judges, an inquisitive press and, above all, the citizenry acting at the ballot box.*" This is a far cry from Zimbabweans' experience in the 2002 Presidential elections. EU election monitors were thrown out of Zimbabwe although they had participated in the previous four elections. Judgment of the High Court of Zimbabwe to allow voting to continue for another day was disregarded. Consequently, several tens of thousands of people that had voted in previous elections were stripped of their right to vote. In opposition party strongholds, inefficient practices were deliberately employed to minimise the number of registered voters that could actually cast their vote. This is inconsistent also with the practice expected of member States by the SADC because the constitution of the SADC premises pursuit of the organisation's objectives on democratic practice. Similarly, the Harare Declaration of Commonwealth States of which nearly all member States of the SADC are parties declares that democratic practice shall determine the issue of governance in member States' territories.

Trustees hold office only by appointment of the proprietors themselves and not by default. As trustees of a people, a government operating under democratic dictate of its constitution must stand or fall in accordance with the universally recognised standards of democracy. Trustees' only currency is the will and trust of the benefactor. Once that runs out, the benefactor, in this case the electorate has every right to revoke that currency and without hindrance to appoint another set of trustees of their own choice. Governments are instituted to secure the inalienable rights of their peoples. Governments derive their just powers from the consent of the governed.¹⁷ This underlines the deontological internal aspect of

¹⁶ Franck, T.M. (1992) "The Emerging right to Democratic Governance", *American Journal of International Law*, vol.86 p.46 at p.50.

¹⁷ The centrepiece of the US Declaration of Independence. Discussed also in Franck, T.M. (1992) "*The Emerging right to Democratic Governance*", *American Journal of International Law*, vol.86 p.46. For Allot, "*All government is conspiracy. Good*

the right to democratic entitlement that people possess against their own governments exclusive of any external contribution. But the right to democratic entitlement has a teleological justification in the sense that it has enormous capacity to advance other social goods such as peace, freedom, respect for human rights and economic prosperity.¹⁸

President Mugabe has sought to ward off accusations of electoral impropriety by invoking “non-interference in the matters of sovereign independent Zimbabwe”. This begs the question whether his regime has legitimate authority to the shield of “non-interference in the internal affairs of a sovereign State”, itself a well-established principle of international law.¹⁹ Jurisprudence shows that because the will of the people is the basis of the authority of government, regimes that inhibit expression of that will lack legitimacy.²⁰ Secondly, it is now widely recognised that the manner in which a State treats its citizens is of interest to other States. The international community’s response in 1990 to Iraq’s brutality against its Kurdish population and in 1999 to Milosevic’s against Albanian Kosovors are recent examples of application of the principle. Oppenheim²¹ writes that while there is general agreement that by virtue of its personal and territorial authority a State can treat its own nationals according to its own discretion, it is recognised also that there are limits to that discretion. When a State commits

government is a conspiracy in favour of the people. Bad government is conspiracy against the people. Allot, P. (1988) “State Responsibility and the Unmaking of International Law”, *Harvard International Law Journal*, vol.29 No.1 p.1 at p.25.

¹⁸ Analysing the deontological and teleological contents of “freedom” as a good see Feldman, D. (2nd edn. 2002) *Civil Liberties and Human Rights in England and Wales*, Oxford University Press, New York, pp.5-10. He concludes that behind every teleological justification lurks a deontological belief and that the set of beliefs that best serves to justify rights and liberties is one that is consistent with Raz’s thesis that freedom of will and a capacity for self directed action within a social environment are the most important of human characteristics.

¹⁹ See Cassese, A. (1986) *International law in a divided world*, Clarendon Press, Oxford, pp.143-8.

²⁰ Roth, B.R. (2000) *Governmental Illegitimacy in International Law*, Oxford University Press, New York, p.3.

²¹ Oppenheim’s *International Law* (Jennings R. and Watts, A. eds. 9th edn. 1992) Longman, London & New York, p.442.

cruelties against and persecutes its nationals "... in such a way as to deny their fundamental human rights and to shock the conscience of mankind, the matter ceases to be of sole concern to that State and even intervention in the interest of humanity might be legally permissible".²² Thirdly, non-interference in the internal affairs of States was intended to shield legitimate governments from aggressors that threatened independence of the target State. President Mugabe's actions themselves are the biggest threat to Zimbabwe's survival as skilled labour continues to leave the country, food riots loom and starvation threatens a country that when President Mugabe first came to power in 1980 prided itself on being "the bread basket of Africa" – exporting beef and dairy products to the European Community and many other products to various parts of the world.

2. International law requirement of democratic governance

Literature regularly attributes to the end of the Cold War, the emergence of the requirement under international law of the right to democratic entitlement. In particular, the turn around in US foreign policy from appeasement of autocratic States during the Cold War to democratic enlargement²³ after the Cold War is often cited as the trigger to the evolution of the right to democratic entitlement. In an effort to impede the possible spread of communist governments the US during the Cold War made itself strange bed fellows with States that demonstrated little if any respect for the rights of their own citizens. Those States got economic aid in exchange for their promise not to embrace communism. Uncharitable

²² Discussing policy objections to humanitarian intervention see Kritsiotis, D. (1998) "Reappraising Policy Objections to Humanitarian Intervention", *Michigan Journal of International Law*, vol.19 No.4 pp.1005 – 1050. Discussing new requirements that the UN should impose on any future humanitarian intervention missions post NATO's intervention in Kosovo (1999) see Chigara, B. (2001) "Humanitarian Intervention Missions: Elementary considerations, humanity and the good 'Samaritans'", *Australian International Law Journal*, forthcoming.

²³ Eckert, A.E. (1999) "Free Determination or the Determination to be free? Self-determination and the Democratic Entitlement", *UCLA Journal of International Law and Foreign Affairs*, vol.4 p.55.

commentators view adoption by the US of the foreign policy of democratic enlargement after the Cold War as an attempt at self-atonement for this Cold War indiscretion. This is perhaps not a sufficient explanation for pursuit of a policy with such universal appeal and purpose. Democracy's importance lies in its promise and real potential to realise the UN's mission and to further the organisation's purposes. It is associated with peace, respect for human rights and economic prosperity. Western policymakers are convinced that democracy is the matrix that will disperse those goods throughout the world.²⁴ But this right has more antiquated origins than that. Properly understood as the individual and collective right of a population to determine who shall manage its public affairs and welfare, the right to democratic entitlement is evidenced by three rights in the armour of human rights law. These are the right to freedom of expression, the right to self-determination, and the right to free and open elections.²⁵ Some argue that the right to democratic entitlement thus construed requires that where a democratically elected government is overthrown then article 39 of the UN Charter, which refers specifically to matters threatening international peace and security should be invoked and humanitarian assistance given to restore democratic rule.²⁶ In this sense the right to democratic entitlement is linked to the right to humanitarian intervention.

a. The right to self-determination

Eminent jurists²⁷ refer to the right to self-determination as the most probable source of the right to democratic entitlement. However, that is problematic first, because a certain class of people can only

²⁴ *Ibid.*

²⁵ "Self-determination is the historic root from which the entitlement grew". Franck, T.M. (1992) "The Emerging right to Democratic Governance", *American Journal of International Law*, vol.86 p.46 at p.63.

²⁶ See Fielding, L.F. (1995) "Taking the next step in the development of new human rights: The emerging right of humanitarian assistance to restore democracy", *Duke Journal of Comparative and International Law*, vol. 5 p.329.

²⁷ Franck writes that "Self-determination is the historic root from which the entitlement grew". (1992) "The Emerging right to Democratic Governance", *American Journal of International Law*, vol.86 p.46 at p.52.

make claims to the right to self-determination under international law. The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations of 24 October 1970 limited application of the right to self-determination of peoples to three categories of people only, that is, those under colonial, alien, or racist domination, all of which are becoming rarer and rarer.²⁸ Many potential beneficiaries would be excluded that the norm targets if the right to democratic entitlement were limited to the scope of the right to self-determination. Secondly, linking the right to democratic entitlement to the right to self-determination misconstrues the content of the latter right in that until now, it has never been associated with a single outcome. Eckert²⁹ writes that mandating that a people's freedom is inextricably linked to a particular procedural model of democracy significantly constrains their right to make a free determination of their own political status. Similarly, equating democracy with contingent procedural elements such as multi-party system, elections does not in itself secure the goods associated with democracy.

The right to self-determination is often cited as an example of *jus cogens*. Consequently, any treaty calculated to place restrictions on its exercise or to deny it should be null and void.³⁰ Practice of this principle under the UN resulted in granting of political independence to colonial territories via the trusteeship scheme established under Chapter XII of the UN Charter (1945).³¹ General Assembly Resolution 1514 (XV) of 14 December 1960³² – the declaration that deals with self-determination is often cited as an example of soft law, though

²⁸ See Cassese, *International Law in a Divided World*, 1994, p.134. On the scope of the right to self-determination see generally Cassese, A. (1995) *Self Determination of Peoples*, Cambridge University Press, Cambridge.

²⁹ (1999) "Free Determination or the Determination to be free? Self-determination and the Democratic Entitlement", *UCLA Journal of International Law and Foreign Affairs*, vol.4 p.55. at p.57.

³⁰ Cassese, *International Law in a Divided World*, 1994, p.136.

³¹ See UN Charter, *ibid.* Chapter XII, Articles 75-91. This replaced the institutions of the mandate system under the Covenant of the League of Nations. For further discussion see Sorensen, M. (1968) ed. *Manual of Public International Law*, Macmillan, p.508.

³² *UN Monthly Chronicle*, Vol. II No. 5 (June 1965). p.55.

UN General Assembly Resolutions were not initially intended to have a binding effect on Member States of the UN.³³ In fact, the declaration appears to give itself normative binding authority in its concluding remarks by comparing itself with the UN Charter. This is perhaps because it mimics the language of the preamble and various sections of the UN Charter itself. In this sense it emboldens and gives glow to the purposes of the UN Charter and perhaps warns against familiarity with the text of the Charter to the point of inaction. It concludes with a clarion call upon all States to "...observe faithfully and strictly the provisions of the Charter of the UN, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity".³⁴ It states also that:

- 1) *denial of or impediments to freedom constitute a serious threat to world peace;*
- 2) *it is necessary to promote social progress and better standards of life and larger freedom;*
- 3) *conditions must be created that ensure stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples;*
- 4) *Universal respect for, and observance of human rights and fundamental freedoms for all be pursued at all times.*

Textual analysis of this declaration suggests that what is critical is world peace. To achieve that it is important to pursue social progress, by which is meant better standards of life based on the pursuit of larger or ever increasing and not diminishing freedoms, including equal rights and self-determination of all peoples – both as a collective entity and as individuals. The right to self-determination that encapsulates equality of people individually within States and collectively as State entities. Ultimately this way

³³ See Higgins, R. (1994) *Problems and Process: International Law and How We Use It*, Oxford University Press, New York, pp.22-3; Chigara, B. (2001) *Legitimacy Deficit in Custom: A Deconstructionist Critique*, Ashgate, Aldershot, pp. 11-14.

³⁴ *UN Monthly Chronicle*, Vol. II No. 5 (June 1965). p.55.

of thinking confers as against governments the individual's right to be let alone – “the most comprehensive of rights and the right most valued by civilised men”.³⁵ As against other States, this right to be let alone that the individual enjoys against the State translates into the norm against intervention in the affairs of States. This is a principle so democratic that its fair application purchases equity among States, respect among States and freedom of States to pursue their best interests. But an individual will not be let alone by the State, and could not claim breach of his right to be let alone if he breaches the rights of others to be free and to be let alone, neither could a State that breached its democratic duties and responsibilities towards its citizens expect other States to welcome it as a worthy member among the community of States that uphold their citizens' democratic entitlements of freedom and equality with others. Such an individual/State cannot when penalised by the State or by the International Community for breach of the democratic chain that ensures national and international peace respectively plead the right to be let alone or the principle of non-intervention in the affairs of a sovereign independent State respectively because to do so would be to threaten national peace or international peace and security respectively. Article 39 of the UN Charter, which underlines the UN's mission, would severely be compromised. Hence the argument that where a democratically elected government is overthrown, Article 39 of the UN Charter which refers specifically to matters threatening international peace and security should be invoked, and humanitarian assistance given to restore democratic rule.³⁶ This is because “... The way in which a government treats its own citizens is now a legitimate matter of international scrutiny on the part of governments and human rights non-governmental organisations (NGOs) such as Amnesty International and Human Rights Watch.”³⁷

³⁵ Justice Louis D. Brandeis, dissenting opinion in *Olmstead v. United States*, 277 US 438 at 478.

³⁶ See Fielding, L.F. (1995) “Taking the next step in the development of new human rights: The emerging right of humanitarian assistance to restore democracy”, *Duke Journal of Comparative and International Law*, vol. 5 p.329.

³⁷ Wheeler, N.J. (2001) “*Humanitarian Vigilantes or Legal Entrepreneurs: Enforcing Human Rights in International Law*” in Jones, P and Caney, S. *Human Rights and Global Diversity*, Frank Cass Publishers, pp.139-162 at pp.139-40.

The ICJ in the *Case Concerning East Timor (Portugal v. Australia)* hinged political legitimacy to preside over a people on that people's prior demonstration of free choice so to be governed by their rulers.³⁸ Free choice is the nexus to governmental legitimacy. To the extent that the 2002 Zimbabwe Presidential election has been condemned universally for its abuse of the electorate's right freely to determine who will preside over them, the right to democratic entitlement remains illusory for the Zimbabwean population in spite of numerous references to it in UN Human rights treaties, Commonwealth States and SADC documents that apply to Zimbabwe.

Growing global consensus for democracy that links to democratic governance satisfaction of States' obligations and responsibilities under the various human rights treaties recommends that more than any other factor of international life, it is both the deontological and teleological strength of the inalienable rights of people against their governments that is the locus of the right to democratic entitlement. Although the stock of human rights treaties in force do not explicitly declare this right, collectively, their compulsion of it is unmistakable in the obligations and responsibilities that they impose on the State *vis a vis* the individual. For instance article 21 of the Universal Declaration of Human Rights (1948) refers to the right of individuals to participate in the governance of their country through participation in periodic and genuine elections to be held by secret vote or by equivalent free voting procedures. This principle is emphasised further in article 25 of the International Covenant on Civil and Political Rights (1966). In article 13 of the African Charter on Human and Peoples' Rights (1981) the principle is severely restricted and watered down, pointing perhaps to an almost insipid reluctance among the majority of African leaders to submit themselves to their populations – what Mazrui in his Reith lectures describes as the “African Condition”³⁹ that resists necessities of life to its own detriment. Legomsky's evaluation of the reason why after more than half a century the UN appears to have merely scratched the surface of the vision of the organisation's founding fathers shows

³⁸ See http://www.icj-cij.org/icjwww/icasess/ipa/ipa_ijudgments/ipa_ijudgment_19950630.pdf para. 15.

³⁹ Mazrui, A. (1980) *The African Condition*, Heinemann Educational Books Ltd, London, p.xv.

that there is nothing peculiarly African about failure in this regard. This failure is seen by some as "... part and parcel of the human condition – a state of affairs that no law and no organisation can repair. Others ... believe that, if only we work at this project long enough and hard enough, and not allow even major setbacks to divert us, we can at least approach the dreams and the aspirations of 1945".⁴⁰

b. The right to free and open elections

Through their own inconsistencies and incoherencies, governments often unwittingly plot their own downfall. Since its belated independence in 1980, Zimbabwe has held five separate elections to elect a national assembly and one to elect an executive President. None of the previous elections could have prepared the Zimbabwean electorate for the events that have compelled the international community to refuse to legitimate the 2002 Presidential election – something that the country badly needs if its economy is successfully going to be rescued from its rapid decline of recent years. Just before the election economists described Zimbabwe's economy as the fastest shrinking economy in the world. Without international legitimacy, President Mugabe's government will find it difficult if not impossible to secure economic aid and to attract foreign investment, which aid and investment that country badly needs. Ultimately, President Mugabe's downfall may result from the widespread poverty and starvation threatening the country. Even the most autocratic rule cannot prevail over a starving population that has little else but its own life to lose. Legitimacy is key to survival of any governance because:

Those who claim to govern cannot demonstrate that they have fulfilled the requirements of the democratic entitlement, even if they purport to recognise that entitlement. ... Increasingly, ... governments whose legitimacy is questioned are turning to the international system for that validation which their national polis is as yet unable to give. They do so to avoid the alternative –

⁴⁰ Legomsky, S.H. (2001) "The UN and the Protection of Human Rights", *Washington University Journal of Law and Policy*, vol.5 p.7 at p.9.

*persistent challenge to authority by coups, countercoups, instability and stasis – and to enable themselves to govern with essential societal acquiescence. What they seek is legitimization by a global standard monitored by processes of the international system.*⁴¹

Given that the international community has refused to legitimate the 2002 Zimbabwe Presidential election, continued rule of that country by President Mugabe will almost certainly break Zimbabwe's ailing economy. The EU, Commonwealth States, US and other individual countries have taken already measures against Zimbabwe, including imposing economic sanctions with the hope that President Mugabe will resign. The scope of this sanction regime is most probably going to be expanded until President Mugabe complies with the international requirement of democratic entitlement for his country. This strategy is patronising to the target State's population. First, it is as if the population had previously bestowed internal legitimacy to the incumbent government by validating it through the electoral process when in fact the sanction regime is described as the international community's protest at the absence of internal legitimacy. Secondly, it is said that sanction regimes under these circumstances operate to strangle a government to collapse or to submission. But nothing can be further from the truth. In reality, such sanction regimes operate to maximise suffering of the target State's population and to aggravate it to the point where it voluntarily takes violent measures to topple its unwanted repressive and autocratic government. How does this happen? – only through violence of the people against an illegitimate government. Often this violence sacrifices peace in the target State itself and almost always threatens regional stability. Should the UN resort to this approach, which threatens peace and security with the hope of achieving conditions that will allow in the target State, enjoyment of the right to democratic entitlement? I think not. The risk taken to threaten relative peace and security in the target State by introducing punitive sanctions may backfire with

⁴¹ Franck, T.M. (1992) "The Emerging Right to Democratic Governance", *American Journal of International Law*, vol.86 p.46 at pp.50-1.

the consequent turmoil spiralling out of control to result in a failed State of which Somalia is one. Secondly, the means that we use to arrive at our goals are themselves like seeds sown into the ground and whose fruit will be our harvest once we reach our goal. Violent means nurture and beget violent outcomes. ZANU (PF) having failed to negotiate with a defiant Ian Smith resorted to means whose fruit is its government's current defiance of the international community and repression of Zimbabweans in general. For this reason, economic sanctions that exacerbate instability in troubled States appear to be counterproductive.

However, such sanction regimes might be desirable where government and population are at one against international opinion. In other words, where there is internal legitimacy and validation of government practice that is inconsistent with requirements of international law, the errant State can serve to rehabilitate the target State and its people into everyone else's world. Where a population is already pleading to the international community for international assistance to stop an errant government direct intervention of the UN to thwart that government should be the main priority because a government that lacks both internal legitimacy of its people and external legitimacy of other States is a threat to world peace and security. Such intervention provides immediate rescue of the target State's population from abuse of its errant government and declares the sanctity of the human rights at issue.

With neither internal nor external legitimization of the 2002 Presidential election and with the international community incrementally resorting to economic sanctions against President Mugabe's government, it appears that Zimbabwe is tittering towards economic and political explosion that threatens world peace. That is perhaps what President Mbeki of South Africa sought to avoid by appearing to legitimate the outcome of the election in the first instance. Nonetheless, legitimization of a process that is inspired by fear of triggering undesirable consequences is not the same as that premised on satisfaction of predetermined standards. It contradicts the purpose of externally confirming that the government has secured internal legitimacy. It appears that nothing short of nullification and re-run of the 2002 Presidential election will restore internal and external legitimacy to Zimbabwe. But this may be difficult because in politics, compromise and not justification often prevails even counter to recognised positive laws of both the State

and international law. Were this to happen in this instance, and President Mugabe given a “face saving” option that did not justify the electorate’s right to democratic entitlement, the question would have to be asked about the validity in law of a bargain in a situation where it was manifestly evident that the promissory could not stick to his side of the bargain so that the promisee would never realise the exchange. International human rights law could avoid this type of conundrum by making the United Nations accountable for its promise to individuals, including its promise of the right to democratic entitlement. The UN should be encouraged and supported to develop mechanisms, systems and structures for the actualisation of its noble goals.

Intimidation of the electorate, disenfranchisement of the electorate, passing of repressive laws that made criticism of the incumbent President illegal and punishable with a term of imprisonment, exclusion of election observers that previously attended similar elections, bandaging of the electoral role and the rape and murders of opposition supporters and their candidates combined to make this election difficult to accept as a true expression of the will of the people of Zimbabwe contrary to article 19 of the UDHR (1948), article 25 of the ICCPR (1966) and article 13 of the ACHPR (1981). The right freely and openly to elect those that shall preside over the electors is the fundamental building bloc of any democracy.⁴²

c. The right to freedom of expression

One of the unforeseen dividends of the Second World War was that it compelled thinking about the need for protection of the dignity of the human being under international law. The visionary leaders that gathered at San Francisco to hammer out strategies for securing lasting peace in the immediate aftermath of the Second World War appeared determined particularly to reconfigure the entire relationship in law between the power of governments and freedoms of the individual.⁴³ Legomsky writes

⁴² See *ex parte Alcnobury* [2001] 2 All ER929.

⁴³ See Franck T.M. (1999) *The empowered self: law and society in the age of individualism*, Oxford University Press, New York, p.198.

that they set out to do nothing less than create a new world order.⁴⁴ The new approach required States voluntarily to agree to be bound by rules that created rights for individuals as against the State. This shattered previous assumptions about the relationship between the individual and his State under international law. Previously international law had subordinated each person to a sovereign, similar to the way slaves, had belonged to masters and women to their husbands.⁴⁵

*From this subordination followed several consequences, each limiting the subject's personal autonomy. In particular, each person injured by his or her sovereign was entitled by national law only to whatever remedy the sovereign grudgingly chose to allow. In most jurisdictions until quite recently, this meant, in practice, that there could be no realistic expectation of redress. For example, the maxim – 'The King can do no wrong' – largely immunised British governments from litigation initiated by a citizen seeking a remedy for alleged wrongs.*⁴⁶

Persons injured while in a foreign State and denied redress by its laws depended solely on the will of their own State to obtain on their behalf redress from the offending State. Often, this was an illusory remedy as States demonstrated little regard for their citizens' private causes, particularly where the offending State was an ally. Thus, individuals' protection depended on the conduct of their State, and Stateless persons were entitled to no protection whatsoever. "Moreover, a State's own citizens were almost at its mercy, and international law had little to say about mistreatment of persons by their own government."⁴⁷ According to Legomsky, the new approach was law at its noblest.⁴⁸

⁴⁴ Legomsky, S.H. (2001) "The UN and the Protection of Human Rights", *Washington University Journal of Law and Policy*, vol.5 p.7 at p.8.

⁴⁵ Franck T.M. (1999) *The empowered self: law and society in the age of individualism*, Oxford University Press, New York, p.196.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.* p.197.

⁴⁸ Legomsky, S.H. (2001) "The UN and the Protection of Human Rights", *Washington University Journal of Law and Policy*, vol.5 p.7 at p.8.

Treaty bodies that monitor States' compliance with their obligations supervise most of these treaties.⁴⁹ They go a long way to ensure that the rhetoric of conference halls solidifies into actual experience for the millions of people across the world. They are however inhibited from doing more by what Cohen⁵⁰ calls the classic discourse of official denial of reports of treaty bodies. In literal denial, State officials refute that anything of the sort mentioned in the report ever happened. Interpretive denial involves State officials arguing that what actually happened is really something else. Implicatory denial argues that what happened is of no consequence because it is justifiable. Cohen observes a tendency when denial is at play, to link up the denial chain, starting with literal denial, and if it fails, moving on to interpretive denial and if that fails, invoking implicatory denial. This has the potential of sapping the determination of litigants that already would have had to exhaust local remedies as a condition to engaging extra-territorial human rights bodies. One way of limiting official denial is to review the reporting strategies, so that they become less attractive for States to engage the denial routine. However, in spite of these difficulties it is indisputable that treaty bodies are impacting enjoyment of respective convention rights in States Parties' territories.

A common theme that runs through the stock of over fifty human rights treaties and which points to the right to democratic entitlement is the right to freedom of expression. Grounded in the Universal Declaration of Human Rights (UDHR) (1948) which is often described as merely ephemeral and aspirational in that it failed to extract from States a binding commitment, the right to freedom of expression is couched in article 19. It is also evident in the International Covenant on Civil and Political Rights (ICCPR) (1966) – article 19. The Human Rights Committee (HRC) supervises state compliance with the ICCPR. The HRC has

⁴⁹ Discussing operational procedures of several of these treaty bodies, their potential and limitations see Chigara, B. (2002) *Amnesty in International Law*, Longman, London, pp.129-60.

⁵⁰ Cohen, S. (1996) "Government Responses to Human Rights Reports: Claims, Denials, and Counterclaims", *Human Rights Quarterly*, vol. 18 p.517 at pp.522-34.

established a steady jurisprudence on the application of the article 19.⁵¹ It is also evident in the African Charter on Human and Peoples' Rights (ACHPR) (1981) – article 9(2). The African Commission on Human and Peoples' Rights – the body that monitors States parties' compliance with this the ACHPR has built up a comparable jurisprudence to that of similar treaty bodies in spite of the numerous operational difficulties it faces. It is not so much the jurisprudence of these treaty bodies on this right that this article is concerned with as its philosophical basis which it is held points to the right to democratic entitlement.

The utility of the right freely to express our opinions lies in that it maximises personal autonomy. Such autonomy enables people to choose from the widest possible range of options where none could definitively be shown to be right or wrong.⁵² It extends also to freedom of political choice, and bolsters democratic processes by encouraging rational debate “which, it was confidently expected would render it more likely that the best solution would found for any problem.”⁵³ It is also argued that the benefits of a general principle permitting freedom of expression far outweigh the disbenefits resulting from particular applications of the rule.⁵⁴ This market-place-of-ideas model of free speech acknowledges equality of individuals caught up in the same place at the same time and sharing certain common challenges, hopes and fears. Only the affirmation of “faith in fundamental human rights [and] in the dignity and worth of the human person, ...and better standards of life in larger freedom”⁵⁵ can release the true potential of time and of the human beings it has assembled together for the discovery of answers to common challenges and fears and the actualisation of common hopes and aspirations. For this reason, commentators link to the freedom

⁵¹ See Ghandhi, P.R. (1998) *The Human Rights Committee and the Right of Individual Communication*, *Law and Practice*, Ashgate, Aldershot; McGoldrick, D. (1991) *The Human Rights Committee, Its Role in the Development of the International Covenant on Civil and Political Rights*, Clarendon Press, Oxford.

⁵² See Feldman, D. (2nd edn. 2002) *Civil Liberties and Human Rights in England and Wales*, Oxford University Press New York, p.764.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Preamble to the UN Charter (1945).

of speech political discourse as a prerequisite for any country that aspires to democracy.⁵⁶ Particularly because State affairs are often complex and even perplexing, it is only through open speech that stakeholders are able to contribute to the search for optimum outcomes. In this sense freedom of speech lends itself to the service of efficient government that is accountable ultimately to the electorate. It recognises a time honoured value that holds that wisdom is the most widely distributed gift that no one has monopoly over. But ZANU (PF) appears to proceed on the understanding that only it is the legitimate custodian of Zimbabwe's destiny and that is unquestionable even by the electorate, not to mention fraternal, regional and international standards. McGregor⁵⁷ writes, "... war veterans' interventions have politicised all areas of public sector work and have seriously undermined the scope for professionalism within the public service. The ruling party has used veterans' disruption to newly conflate party and State structures at district and provincial level, and to set up new channels of authority." This conflation of party and State structures is a threat to the rule of law that safeguards freedom of speech where rule of law refers to "...those institutional restraints that prevent governmental agents from oppressing the rest of society".⁵⁸ Where the right to freedom of expression is denied, there cannot be any real scope for enjoyment of the right to democratic entitlement.

3. A people abandoned: Zimbabweans and the infamous 2002 Presidential Election

Events leading up to the 2002 Zimbabwe Presidential election pointed to a country tittering towards anarchy. In his analysis of the relation between the church and the State in independent

⁵⁶ See Feldman, D. (2nd edn. 2002) *Civil Liberties and Human Rights in England and Wales*, Oxford University Press New York, p.765. See also Meiklejohn, A. (1965) *Political Freedom: The Constitutional Powers of the People*, Oxford University Press, New York.

⁵⁷ (2002) "The politics of disruption: war veterans and the local state in Zimbabwe", *African Affairs*, vol.101, No.402, pp.9-38.

⁵⁸ Dyzenhaus, D. (ed.) (1999) *Recrafting the rule of law: The limits of legal order*, Hart Publishing, Oxford, p.1.

Zimbabwe, Dorman⁵⁹ writes that the initiation in 1997 by the Zimbabwe Council of Churches (ZCC) of the National Constitutional Assembly (NCA) which resulted in defeat of government proposals in the referendum on a new constitution for Zimbabwe set the stage for the violent elections of June 2000. McGregor⁶⁰ writes that:

From February 2001, veterans stormed local authorities in districts where the political opposition had strong support – primarily but not exclusively in Matabeleland and Midlands Provinces. They locked district council and other local government offices, closed some schools and demanded the dismissal of numerous officials, councillors, teachers and workers. Officials were suspended from their jobs and subjected to a procedure of ‘vetting’ by war veterans in which they were accused of a wide range of offences from dancing on the photograph of the President, to campaigning for the opposition party, to maladministration and corruption. This process has received little comment from President Mugabe, war veterans, or party leaders – in contrast to war veterans’ interventions in other areas, such as land and labour issues – yet its consequences are potentially far-reaching.

Unprecedented relative success of the opposition in the 2000 national assembly elections inspired hope that in spite of widespread intimidation of the electorate by the government and even murder and torture of opposition supporters and activities, the ballot box still represented the best hope for Zimbabweans democratically to get rid of a repressive arrogant and incompetent regime. But that limited success appears also to have awakened President Mugabe to the challenge that lay in wait for him in the 2002 Presidential election. His strategy was not to endear himself to the electorate by admitting failure to manage a once illustrious economy in the region and to suggest possible strategies of recovery. No! He sought to put the fear of God in them and if they persisted against him, to deny

⁵⁹ Dorman, S.R. (2002) “Rocking the boat?: church-NGOs and democratization in Zimbabwe”, *African Affairs*, vol.101, No.402, pp.75-92.

⁶⁰ (2002) “The politics of disruption: war veterans and the local state in Zimbabwe”, *African Affairs*, vol.101, No.402, pp.9-38.

them finally by disenfranchising them. Impotent they would feel in his grip, while he reproached internationally acknowledged values. In these circumstances what possibilities remained for Zimbabweans to enjoy the right to democratic entitlement?

Politicisation of the Zimbabwean bench through hounding out of office of the Chief Justice of Zimbabwe, Justice Antony Gubbay and other senior justices, and appointing to senior positions of junior judges aligned to ZANU (PF) meant that Courts, which previously checked the executive, could no longer be relied upon to safeguard the rights of people labelled as enemies of ZANU (PF). Once one was publicly identified as an enemy of ZANU (PF),⁶¹ then all the safeguards of police protection and due process did not apply for them. The Police even ignored previous Court Orders⁶² to "... ignore instructions of the executive that were contrary to judicial decisions".⁶³ As a consequence, *press freedom*, which was already under threat, was severely compromised. Bombs went off at nearly all the precincts of the independent press. Their editors were frequently arrested and tortured and then released without charge. This applied also to local human rights NGO personnel that previously investigated allegations of human rights abuse. Activists of these organisations found themselves targets of the same brutality. They soon found themselves scrambling for the shores of Europe in search of political asylum and more importantly a "good" chance to report the extent of human rights violations occurring in Zimbabwe. But even the hope of those fleeing Zimbabwe to alert the international community about human rights violations in Zimbabwe died immediately they landed on the shores of Europe whereupon they found themselves incarcerated in detention centres alongside criminals while their applications for asylum were processed.

⁶¹ See "Beaten, tortured, killed: Mugabe's Taliban bring terror to his people", *The Observer*, Sunday 3 March 2002, p.1.

⁶² See also "Opposition fears extra polling day will be ignored", *The Times*, Monday 11 March 2002 p.17. In the event, the opposition fear was justified.

⁶³ See *The Commercial Farmers Union v. Comrade Border Gezi and others* Case No. H.C. 3544/2000 HE. <http://www.samara.co.zw/cfu/courtorder.htm> For commentary see Chigara, B. (2001) "From oral to recorded governance: Reconstructing title to real property in 21st century Zimbabwe", *Common Law World Review*, vol.30 No.1 pp.36-65.

Meanwhile human rights abuse in Zimbabwe stood a better chance of going unreported. In this way Europe became an unwitting accomplice to President Mugabe's strategy to deny Zimbabweans enjoyment of their established right to democratic entitlement.

With no Courts or independent press or local human rights NGOs with full working knowledge of the tactics of governmental agencies that effectively could be relied upon to check on the executive, perhaps Zimbabweans should have looked up to regional institutions such as the SADC and the OAU (now African Union) to prevent President Mugabe from denying them their right to democratic entitlement. But at numerous meetings at poignant times both SADC and OAU leaders cuddled up with President Mugabe in spite of their full knowledge of his campaign of terror against his people. The OAU turned a very blind eye and a very deaf ear to Zimbabweans' plight under President Mugabe as he intensified his campaign of terror against his people and deflected attention from a government that had ruined a formerly thriving economy. Perhaps fraternal organisations like the Commonwealth States and the EU – Zimbabwe's largest trading partner could have stepped in when Zimbabweans needed them most. Commonwealth States Heads of Governments Meetings (CHOGM) and Commonwealth Ministerial committees on numerous occasions shied away from taking action even when the United Kingdom Prime Minister and his Foreign Secretary respectively pressed for tangible action to be taken to stop President Mugabe's campaign of terror against those he perceived as opponents of ZANU (PF). Prince Charles, who is to succeed the Queen as the head of the Commonwealth warned that: "... if the Commonwealth could not stand up for liberal democracy and human rights, it deserved to be treated with international contempt".⁶⁴ This is surprising for an organisation that regards respect for human rights and democratic government as the centrepiece of its architecture. Paragraph 9 of the Harare Declaration (1991) states:

Having reaffirmed the principles to which the Commonwealth is committed, and reviewed the problems

⁶⁴ See "Commonwealth damned by Charles over Zimbabwe", *The Sunday Times*, 10 March 2002, p.1.

and challenges which the world, and the Commonwealth as part of it, face, we pledge the Commonwealth and our countries to work with renewed vigour, concentrating especially in the following areas:

- 1) *the protection and promotion of the fundamental political values of the Commonwealth;*
- 2) *democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government;*
- 3) *fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief.*

At a conference of CHOGM held in Australia, immediately before Zimbabwe's 2002 Presidential election, Tony Blair described as "... a fudge to hold together a fragmented club" the decision not to take action on Zimbabwe until after the election. For its part the EU huffed and puffed but took no decisive action when it needed to. In this period Zimbabweans might be excused for thinking that the UN was probably in intensive care unit. Besides a series of demonstrative press releases of the High Commissioner for Human Rights expressing concern over the deteriorating situation in Zimbabwe because of the scale of documented cases of rights abuses against members of opposition groups, the independent media and human rights organisations⁶⁵ and expressive reports of UN experts over erosion in Zimbabwe of the right to freedom of opinion and expression the UN has done little else to ensure enjoyment of the right to democratic entitlement by Zimbabweans particularly in the

⁶⁵ Mary Robinson stated that "... most recently, Bills have been passed to further restrict political activity and participation, while legislation curbing freedom of expression is being considered there is real human rights crisis in Zimbabwe. ... recent human rights breaches are aggravated by a climate of impunity which has become evident in the country particularly since attacks against the judiciary have intensified". (2002) "High Commissioner for Human Rights Concerned over Deteriorating Situation in Zimbabwe", Press Release, 16.01.02.
<http://www.unhchr.ch/hurricane/hurricane.nsf/view01/3AE6CD8A9EEEE747C1256B43004B98D4?opendocument>

2002 Presidential election. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions and the UN Special Rapporteur on the right to freedom of opinion and expression on 22 August 2001 expressed concern to the Zimbabwean government about allegations that a hit list had been compiled by the Law and Order section of the Zimbabwe Republic Police (ZRP) and the Central Intelligence Organisation (CIO) that included Basildon Peta, news editor of the weekly Financial Gazette and correspondent for the Independent of London and the Star of Johannesburg; Geoff Nyarota, editor of the Zimbabwe Daily News; Iden Wetherell, editor of the Zimbabwe Independent; Mark Chavunduka and Cornelius Nduna, editor and news editor of the Standard Newspaper respectively.⁶⁶ The only action the UN took on this occasion was to “appeal to the Government to take all necessary measures to ensure that the right to freedom of opinion and expression is fully protected, in accordance with article 19 of the UDHR and the ICCPR”.⁶⁷ Similarly, the UN Special Rapporteur on the Independence of judges and Lawyers expressed grave concern over President Mugabe’s nullification of a Supreme Court order of 27 February 2002 that struck down electoral legislation on the grounds that it had been improperly enacted. By an executive edict published in the Government Gazette on 5 March 2002 President Mugabe reinstated the same legislation, asserting that it had been validly enacted and “shall be deemed to have been lawfully” adopted.⁶⁸ The Special Rapporteur underlined the seriousness of this action thus:

Seen in the light of previous attacks, harassment and intimidation of the judiciary by the executive and others, as well as defiance of court orders by the Government, are indicative that Zimbabwe is no longer a government of laws but of men who have no regard whatsoever for the independence of the judiciary and the majesty of law.

⁶⁶ “UN Experts concerned over reports of death threats against journalist in Zimbabwe”, UN Press Release.24.08.01 www.unhchr.ch/hurricane/hurricane.nsf/view01/04F4192BE94AACBAC1256AB2002F3DB3?opendocument

⁶⁷ *Ibid.*

⁶⁸ “UN Rights Expert concerned over developments in Zimbabwe”, UN Press Release. 7.3.02. www.unhchr.ch/hurricane/hurricane.nsf/view01/47427BCA3AD051F7C1256B7500389885?opendocument

*Defiance of court orders in effect is the defiance of the rule of law. When it is the Government and its agents who defy then governmental lawlessness becomes the order of the day.*⁶⁹

When the UN makes demonstrative comments of disapproval of a government's campaign of State terror against its own people and expresses disgust at a government's abuse of basic human rights of individuals on which pursuit of the UN mandate is based that are as serious as this and stops at that, the question ought to follow: When does State terror legitimate direct UN intervention to uphold the human dignity of victims within their own States?⁷⁰ Is it only after genocide has been reported as in the case of Rwanda? If so then the UN's mandate should be revised to an international organisation concerned with punishing perpetrators of genocide. This would enable creation of institutions for stopping governments from perpetrating terror against their own people something the UN Charter already proscribes. Where was the UN when President Mugabe was challenging all that it purports to stand for in the 2002 Presidential election? If the UN continues with what appears to be a "let others try first and if the problem persists, then we step in" kind of approach, then it might as well revise its mission statement of "never again 'this' and never again 'that'" to something else because the same practices continue to happen under its very own nose. Unless the human rights violations in question are massive, sudden and unprecedented, the United Nations appears to drag its feet like lawyers who often get there after the war and not before. This approach might suggest to would be tyrants that if they planned their campaign of terror to stretch over a long period where people are killed in trickling numbers, tortured intermittently and raped discretely, then they might get away with it. Or is the UN after Somalia hesitant now to engage in "abortive missions"? If it is, what then is the hope for those caught up between a government that

⁶⁹ *Ibid.*

⁷⁰ Discussing when, if ever, States may Deploy military force against another State even without prior security council authorisation see Franck, T.M. (2001) "When, If Ever, May States deploy Military Force Without Prior Security Council Authorisation?" *Washington University Journal of Law and Policy*, vol.5. pp.51-68.

uses State terror and a UN that is hesitant to stand up for its norms when they are being questioned as one Zimbabweans found themselves in the two years leading up to the 2002 Presidential election and also during that election?⁷¹ That the state of protection of human rights of individuals should raise these questions at all about an organisation established to establish and maintain world peace shows the inadequacy of present mechanisms for the protection of human dignity under the UN system. It recommends perhaps the need urgently to develop mechanisms for the prevention of similar outcomes elsewhere in the future. The status quo manifests a frightening sense of complicity with President Mugabe's of the organisations to which Zimbabweans had reason to look up to for protection from abuse in the last two to three years. In the two years leading to the 2002 Presidential election, the period with the worst countrywide violation of human rights since Zimbabwe's independence from Great Britain in 1980, not a single Security Council Resolution was passed on the situation in Zimbabwe. There is no gainsaying speculating about the Security Council's omission given that the situation in Zimbabwe threatened and continues to threaten enjoyment by Zimbabweans of the right that Justice Brandeis described as "the most comprehensive of rights and the right most valued by civilised men".⁷²

After the Rwanda genocide of 1994, the Zimbabwe crisis should mark the watershed of what international civil society has for some time now been agitating for, that is, creation at least of a United Nations (UN) Police and Security Force under the mandate of the Security Council of a *democratised UN*.⁷³ Members of the civil society that work together to hold governments, business, and international agencies accountable for their responsibilities and commitments have been advocating this for some time now. They are fierce advocates for issues that the inter-State dynamic has conveniently sidestepped for decades such as equity and sustainability. They are providers of

⁷¹ See "Zimbabwe Opposition to Challenge poll win in Court", *The Guardian* Friday 12th April 2002 p.13.

⁷² *Supra*.

⁷³ See Anderson, J.B. (2001) "Global Governments and Democratisation", *Washington University Journal of Law and Policy*, vol.5 p.27 at p.31.

voluntary services for the needy.⁷⁴ The UN's mission is to secure lasting peace, so that the world will never again witness tragedies and human suffering akin to the Second World War.

Acknowledgment of the fact that the Westphalian inter-State compact of the UN requires for the delivery of the organisation's purpose, a radical shift from inter State niceties to establishment of Transcensual mandated institutions and mechanisms that guarantee and further respect for human rights and the rule of law by all governments: our only hope for peace. It is so obvious that if we are going to have world law, we need world peace. For that to happen we need the kind of political institutions that are capable of giving us that law, of administering that law, and of judging under that law.⁷⁵ It is puzzling therefore that the actions of those shaping and developing the structures on which our present and future lives are predicated appear indifferent to this fact. For the most part the present political institutions appear to reduce us to mere spectators of State terror when it arises. At best we appear to be toothless bulldogs whose bark is the only thing those threatening our world peace have to take note of as they wreak horror and havoc and prowl with impunity in our stare or glare. They even indulge us in the luxury of negotiating with them on their own terms about their transgressions, and we play along because of our desperation. Yet such tyrants are no more than trustees that must submit themselves to the will of those they rule over. Errant trustees not only lose the privileges of trusteeship. Often they end up in jail.

4. Upholding the right to democratic entitlement: International responsibility for promotion of respect for international human rights of individuals

a. The Focal Point for Electoral Assistance Activities initiative

The UN has always recognised the need progressively to develop mechanisms that facilitate realisation of its objectives as set out in the UN Charter, the UDHR and other documents. General Assembly Resolution (GAR) 46/137 reiterates the significance of the Universal

⁷⁴ *Ibid.* p.28.

⁷⁵ *Ibid.* p.30.

Declaration of Human Rights (UDHR) (1948) and the International Covenant on Civil and Political Rights (ICCPR) (1966), which establish that the authority to govern shall be based on the will of the people, as expressed in genuine and periodic elections. It emphasises that:

- 1) *periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed,*
- 2) *that determining the will of the people requires an electoral process that provides an equal opportunity for all citizens to become candidates and put forward their political views, individually and in cooperation with others, as provided in national constitutions and laws,*
- 3) *the international community should continue to give serious consideration to ways in which the United Nations can respond to the requests of Member States as they seek to promote and strengthen their electoral institutions and procedures.*

Therefore, the declaration reinforces the idea that States are required under international law to promote and strengthen democratic practice necessary for enjoyment of the right to democratic entitlement. To that end, in 1991 the UN Secretary-General designated the Under-Secretary-General for Political Affairs as the Focal Point for Electoral Assistance Activities. The Electoral Assistance Unit (re-designated as the Electoral Assistance Division (EAD) in 1994) was subsequently established in the Department of Political Affairs to assist the Focal Point in carrying out his/her functions. In practice, the objectives of United Nations electoral assistance are essentially two-fold:

- 1) to assist Member States in their efforts to hold credible and legitimate democratic elections in accordance with internationally recognized criteria established in universal and regional human rights instruments, and
- 2) to contribute to building the recipient country's institutional capacity to organize democratic elections that are genuine and periodic and have the full

confidence of the contending parties and the electorate.⁷⁶

States' voluntary uptake of this facility underlines the enduring centrality to international order of the doctrine of sovereignty. The State has to need and to request this facility. Obviously governments bent on disenfranchising their populations by bandaging the electoral register, enacting legislation that impede free expression of opinion, and expel observer groups from friendly nations will not request the UN for this service. While the majority of Zimbabweans would have liked to see more external election observers participating in the 2002 Presidential election, ultimately it was their government that had to decide whether or not the UN EAD was to be invited or not. This points to a fundamental weakness in the inter-State model of international relations. The presumption here is that governments will ordinarily invite the organ. The fact however is that repressive regimes will not. Perhaps the organ should be enabled to invite itself to monitor national elections or at the request of human rights NGOs working in the country. Given the centrality of right to democratic entitlement in the UN system, continued membership of the organisation should be made to depend on EAD satisfaction that national elections had passed off freely and fairly.

b. The Standby High Readiness Brigade (SHIRBRIG) initiative

The Standby High Readiness Brigade (SHIRBRIG) initiative is probably the most radical and most promising initiative targeted at realising the main purposes of the UN listed in the preamble of the Charter and other places. The organisation's founding fathers were determined to reaffirm faith in fundamental human rights, in the dignity of and worth of the human person. Article 1(3) of the Charter states that one of the purposes of the UN is to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms. And article 55c requires the UN to promote universal respect for, and observance of, human rights and fundamental freedoms for all. The UN has achieved so much in the

⁷⁶ See UN Department of Political Affairs, "Context and Objectives of UN Electoral Assistance", <http://www.un.org/Depts/dpa/eadwebsite5.htm>

area of treaty creation to denominate issues that States should defer to individuals as recognition of their human dignity. In matters of enforcement, more still needs to be done if denominated rights such as the right to democratic entitlement are to be realised by all persons on earth. Enforcement has suffered largely because the UN appears to have been premised upon two very wrong presumptions, “first, that the Security Council could be expected to make speedy and objective decisions as to when collective measures were necessary; and second, that States would enter into the arrangements necessary to give the Council an effective policing capability”.⁷⁷ Creation of *link mechanisms* that compensate for the current enforcement deficit by promptly responding to intrastate crises that threaten or cause actual breach of human rights is probably the next big step in the effort to promote respect for human dignity among States. To that end, in 1993 a UN planning team was mandated to “develop a system of stand-by forces, able to be deployed as a whole or in parts anywhere in the world, within an agreed response time, for UN peace-keeping operations and missions”.⁷⁸ This resulted in the creation of the system known as UN Stand-by Arrangement System (UNSAS) based upon commitments by Member States to contribute specified resources to the UN for peacekeeping operations mandated under Chapter VI of the UN Charter.

That effort was carried forward when on 15 December 1996, Austria, Canada, Denmark, The Netherlands, Norway, Poland and Sweden signed a Letter of Intent on co-operating on the establishment of a framework for a multinational force (SHIRBRIG). This was followed up by the signing of a Memorandum of Understanding (MOU) on setting up a Steering Committee to supervise the establishment of the Brigade, and a MOU on establishing a permanent planning element (the PLANELM). The PLANELM, which was established in Denmark, is a small permanent multi-national staff of the Brigade responsible for the development of standard operating procedures for the Brigade, to work on the concept of operations and to organize and conduct joint exercises. On

⁷⁷ Franck, T.M. (2001) “When, if ever, may States deploy Military Force without prior Security Council authorisation?” *Washington University Journal of Law & Policy*, vol.5 pp.51-68 at p.52.

⁷⁸ <http://www.shirbrig.dk/Frames/Main.htm>

deployment, the PLANELM forms the nucleus of the deployed SHIRBRIG HQ staff.⁷⁹ Already 14 nations have signed one or more SHIRBRIG documents necessary for them to participate in the organ. Five more nations Czech Republic, Hungary, Ireland, Jordan and Senegal have participated as invited observers. This broad appeal of SHIRBRIG recommends enthusiasm about the whole project. Nonetheless, participation of States more experienced at peace-keeping missions would benefit the organ enormously because at the moment not all contributions under the UNSAS meet the set readiness and self-sufficiency targets. Some of the allocated forces are not fully prepared and none of the staff officers and the units are trained or have co-operated before deployment. Precious time is still lost from the moment a Security Council decision is made to the actual deployment of the peacekeeping force. Moreover, it is essential that more States participate in the organ for two reasons. First, the case-by-case approach to deployment of the organ to be applied by participating nations upon request of the Security Council does not auger well for the legitimacy of the organ. This may justifiably court the charge of inconsistent application of the organ in similar cases and poison the water for it. After similar experience with application of the doctrine of recognition of States⁸⁰ the UN system should seek to avoid inconsistencies in its practice. However, this may be necessary in the early stage of the organ because the size of the brigade may still be too small to cope with all the requests that may come from the Security Council. For instance whilst still considering a Security Council inquiry on whether the organ would be available for a potential mission in UNIFIL, another informal inquiry was received from the UN on 16 June, asking if the organ would be available for a mission in Ethiopia and Eritrea (UNMEE).⁸¹ A small organ could

⁷⁹ *Ibid.*

⁸⁰ Discussing the Taiwan/Beijing discrepancy and the case of Prince Sihanouk and Kampuchea see Chigara, B. (2001) *“Legitimacy Deficit in Custom: A Deconstructionist Critique”*, Ashgate, Aldershot, pp111-2.

⁸¹ This followed from an agreement between Ethiopia and Eritrea to cease hostilities on 18 June 2000. This led eventually to the deployment of the organ for the newly established United Nations Mission in Ethiopia and Eritrea (UNMEE). It was the relative quick response to the request that UNMEE was able to prevent possible breach of that cease-fire agreement like many before it. Slow responses impede effectiveness of UN missions.

not magically do everything. Human, technical, practical and other resources need to be stocked up before any spending can occur, and the same applies for SHIRBRIG. Secondly, continued availability of the organ is necessary because of the unpredictable fashion in which events that threaten peace and security erupt around the world. Upon its return from (UNMEE) SHIRBRIG went into a reconstitution period, which meant that it would not be available for deployment for a period of anything up to twelve months. The whole purpose of SHIRBRIG was to make available to the UN a rapid reaction army that would respond to missions such as preventive deployments, cease fire monitoring, supervising the separation of forces, as well as support for humanitarian aid operations. The brigade's reaction time is set at 15-30 days following the decision of the participating nations to make them available for deployment upon request by the United Nations. Had a situation arisen requiring its deployment in while it was in "reconstitution mode" resort would have to have been had to the traditional painstakingly slow methods of coalition building and then deployment. But intrastate disturbances – what SHIRBRIG was principally designed to assist with – are usually very flammable and can engulf the whole country in a matter of days – before any coalition can be established. Consequently, the humanitarian catastrophe sought to be stopped with the use of organs such as SHIRBRIG may yet flourish because of the "on and off mode" practice necessitated by limitations in resource. With involvement of many more States in SHIRBRIG, it should be possible to have sufficient self-contained units to be deployed in troubled spots of the world while other units are in "reconstitution mode". This would eliminate from SHIRBRIG the "on and off" mode which could be used by calculating villains to injure their populations. Countries that have met all the procedural requirements for participating in SHIRBRIG include Argentina, Austria, Canada, Denmark, Italy, The Netherlands, Norway, Poland, Romania, and Sweden. Finland has signed all documents less the PLANELM MOU. Spain has signed the Letter of Intent and Steering Committee MOU. The Letter of Intent has been signed by Portugal and Slovenia.

Conclusion

This article examined the possibility for enjoyment of the right to democratic entitlement in transitional States that are dominated

by repressive, arrogant and corrupt governments that fake democratic requirements in order to ordain themselves with external legitimacy even though they may not have secured internal legitimacy of their own people. It showed that the right to democratic entitlement is arguably the most comprehensive of rights and the right most valued by civilised men. The UN's founding fathers premised realisation of the organisation's objectives on respect of this right. It is established in the preamble of the UN Charter itself, in several provisions thereof, and in numerous treaties that premise promotion of respect of the dignity of mankind. Yet some governments of transitional States are led by people that were themselves brutalised by colonial or racist governments. These leaders are only too keen to use the same force to deny their own people the rights that they were previously denied under alien or racist rule. Under the UN system, international law opposed colonialism and championed the right of people everywhere to self-determination. Further, the UN developed principles that together galvanised democratic practice envisaged by the right to self-determination. These include the right to freedom of expression and the right to democratic entitlement. Both these rights are evident in numerous international and regional human rights instruments. They have been made the basis and purpose of fraternal organisations such as the Commonwealth States and the SADC. Collectively, these rights are immutable that international peace and security depend on democratic practice that enhances respect for human dignity.

The infamous 2002 Zimbabwe Presidential election challenges national, regional, and international conceptions of democratic entitlement of all Zimbabweans freely and fairly to participate in the governance of their country by electing a leader of their own choice. The election was characterised by disenfranchisement of large sections of the electorate first by bandaging of the electoral register, and where that was not possible, by tactical misadministration of the election process in areas where opposition support was strongest so that in the end many people simply were not given the chance to cast their vote on who Zimbabwe's President should be for the next six years. It was also characterised by widespread use of State terror and intimidation, including torture, murder and rape, repressive security legislation, and a huge propaganda campaign by State media and persecution of the independent press. With neither the local

Courts nor local NGOs nor regional and fraternal organisations there to shield them from President Mugabe's persecution Zimbabweans had every reason to expect the United Nations whose own basic laws were being flouted to intervene for two reasons. First, to stop State terror and second to ensure observance of the right of Zimbabweans to participate in the governance of their own country by electing freely and fairly the President of their country. The UN Security Council passed no resolution on Zimbabwe's state of affairs in spite of the fact that State terror appeared to have been invoked to the service of securing an election result for President Mugabe. The UN Human Rights Commissioner's demonstrative comments of concern and expressions of concern by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions and the UN Special Rapporteur on the right to freedom of opinion and expression made no difference at all both to President Mugabe and to the victims of his campaign of terror. The EU's delay in taking measures which it could have in order to dissuade increasing State terror and subsequent decrying of the election result as foul are of little comfort to Zimbabweans that were denied the right freely and fairly to participate in the governance of their country in the 2002 Presidential election. Zimbabweans were left alone to confront President Mugabe's campaign of terror as if the UN Charter had not yet come into existence, and if it had, as if the founding fathers had intended it to apply to "all people" except Zimbabweans under President Mugabe's rule.

Perhaps the Zimbabwe crisis should mark a watershed in the area of human rights protection, particularly the protection of the right to democratic entitlement on which much of what the UN claims to stand for is premised. Greater support should be given to SHIRBRIG so that it will be able to intervene in *Zimbabwe-like* situations and ensure that the claim of the UN Charter to pronounce human rights "for all people" rings true. Countries that preach human rights should be encouraged to ready themselves to defend those rights through SHIRBRIG whenever and wherever they are threatened. By acceding to SHIRBRIG States will ensure also that this organ is constantly available to a needy world, killing off its current "on/off mode". Knowledge of its continued presence will discourage temptation of illegitimate governments to use State terror against their populations. Further, it will reduce seriously the possibility that participating States will turn down Security Council

requests to intervene in troubled spots purely for lack of human resources. Only through immediate direct intervention in *Zimbabwe-like* situations to prevent human rights abuses can we claim still to be true to the vision of a peaceful and secure world of the UN's founding fathers. Raped women, tortured men and women, murdered persons and victims of fear would much rather they were living ordinary lives and not the lives of victims, whatever the promise of UN tribunals for those guilty of committing these crimes. Perhaps the time has come for the UN to take decisive action that will make real the promise of democracy contained in the UN Charter and various other treaties and declarations. The international community cannot convince itself that by postponing determination of the perceptive issue of external legitimacy until after the election has occurred they can affect the substantive issue of internal legitimacy, which is the goal in all elections. That is a sure way of facilitating denial of the enjoyment of the right to democratic entitlement in *Zimbabwe-like* situations. Intervention that ensures enjoyment of that right should be the goal. Development of UN organs like SHIRBRIG so that they are available all the time for such deployment, and deploying them in *Zimbabwe-like* so that they can ensure enjoyment of the right to democratic entitlement is what is required if we are to remain true to the imagination of the UN's founding fathers to "ensure respect for the dignity of all people". There is no gain decrying elections as "... a coldly calculated, pre-determined outcome resulting from draconian legislation, widespread and sustained political violence and intimidation"⁸² if we foresaw the predetermination of a government to ordain itself with external democratic legitimacy at the expense of internal democratic legitimacy of its population, and did nothing about it. That approach plays straight into the hands of the illegitimate government's strategy to deny its population the right to democratic entitlement. Direct intervention for the purpose of securing democratic entitlement may no longer be an option.

⁸² *Supra*, p.1.