

Overcoming Dilemmas of Democratisation: Protecting Civil Liberties and the Right to Democracy

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Abstract

The on-going global shift toward democratic government, vividly joined in recent years by the Arab World, is tempered by the many challenges of democratic transitions. The toppling of an autocratic leader does not automatically mean the rise of democracy. Elections do not guarantee the protection of civil liberties. And democratic leaders are not immune from the seductions of power and the incentives of dismantling democracy's institutional checks and balances. The costs to a society and the international community for democratic reversals are high in terms of civil liberties, human rights, human development and political instability. Strengthening international legal instruments including mechanisms to enhance accountability for violence against journalists and proscribe the subversion of democratic institutions as a *crime against democracy* can help overcome these conundrums.

Keywords

crime against democracy; protection for journalists; Arab Spring; democratic transitions; democratic backsliding; creeping coup; democratic erosion; right to democracy

“The war of dictators on their people is not less criminal, not less violating than the wars led between countries.”

Tawakkul Karman, 2011 Nobel Peace Laureate, in address to the Munich Security Conference, 5 February 2012.

1. The Pitfalls of Democratic Transitions

The global shift towards democratic norms of governance since the end of the Cold War has been one of great historical significance. In the late 1980s, only a third of the world's population lived under some form of democratic government. By the early 2000s, with the expansion of political pluralism in Central Europe, Latin America, Africa and Asia, that figure had expanded to nearly 70 per cent.¹ It was during this era, then, that for the first time in history a

¹) Freedom House, *Freedom in the World: The Annual Survey of Political Rights and Civil Liberties 2012* (Freedom House, New York, 2012).

majority of the world's citizens were living in a political system where they had a voice in political discourse, rights to exercise basic liberties, and a role in selecting their government leaders.

The continuing struggle for democratic rights in countries that retain closed governing systems reveals the universal aspiration for democracy across regions, cultures and economic development. This has been vividly seen in the political revolutions in the Arab World since 2011. Even though this region had been considered by some to be culturally predisposed to autocratic rule, citizens there, especially youth, collectively articulated a different, democratic vision for their future, making it the last major geographic area to head down the path of democratisation.

The democratisation process is often a tumultuous one though. Some 55 per cent of all democratisers have experienced at least one episode of backsliding toward autocracy.² Democratic transitions are threatening to those who have enjoyed a monopoly of authority. Movements for democratic reform, consequently, often face fierce and at times brutal resistance. With tens of thousands of civilians killed in Syria alone, the human toll from the popular movements calling for democracy in Libya, Yemen, Egypt, Bahrain and Tunisia has been substantial.

Even for those transitions that avoid the polarising effects of violence, nascent democratisation processes are vulnerable to being hijacked by political opportunists who seize the momentum for change in order to pursue their own ideological or economic interests. This is a worry in the Arab World where Islamist parties may seek to use electoral means to pursue policies that ultimately diminish civil liberties and basic human rights for some or all in a population. In later stages of democratic transitions, even leaders who have come to power through democratic means may be tempted to govern undemocratically, taking advantage of still weak democratic institutions to limit dissent, independent media and checks on their time in power.

Such derailments of the democratisation process present knotty dilemmas for international actors committed to advancing democratic rights. For some, such complications raise questions over the very viability of advancing democracy in societies without democratic legacies. For others, the challenge of democratisation presents uncertainty over just how the international community can effectively engage with these democratisation movements, especially when the process begins to wobble from its goal of expanded liberties and accountable governance.

²) M. Halperin, J. Siegle and M. Weinstein, *The Democracy Advantage: How Democracies Promote Prosperity and Peace* (Routledge, New York, 2010 rev.) pp. 71–78.

International actors have historically been influential in shaping governance expectations faced by democratisers by setting human rights and governance standards. This was the case during the Cold War when democratic standards were overlooked, and at times actively undermined, in order to maintain support in the superpower rivalry. It is not a coincidence, then, that the surge in democratisation has unfolded since the end of the Cold War. The international community, in turn, has been increasingly active since 1990 in supporting democratisation movements. This support is nested in a rich and expanding international legal framework. Among the rights and freedoms set forward “as a common standard of achievement for all peoples and all nations” in the United Nations’ Universal Declaration of Human Rights adopted in 1948 are the rights to liberty, movement, opinion, expression, media, assembly, association, political participation, and periodic and genuine elections governed by universal and equal suffrage.³ Such standards have been subsequently embraced in various forms by regional organisations such as the Organization of American States (OAS), the African Union (AU) and the European Union (EU). It is the growing commitment to these shared democratic values that helps explain why democratic transitions have tended to occur in geographic clusters – be it Latin America, Central Europe, Africa, Asia, and, recently, the Middle East. The democratic standards and values upheld in one nation shape the expectations and standards of its neighbours, the so-called “neighbourhood” or “demonstration” effect.

The international community’s role in upholding the right to democracy has become more trenchant with growing global interconnectedness. A key dimension of this phenomenon is the dramatically greater access to information that exists today even compared to a decade ago. The explosion of mobile phones, the Internet, Facebook and Twitter, among other communication platforms, has significantly expanded the level of real-time global awareness of repressive governance, stolen elections and backsliding democratic transitions. Coverage of the Arab Worlds’ protests (and at times brutal reprisals) has made these events global phenomena. As the lack of reliable information has historically been an impediment to global collective action, the markedly elevated levels of awareness made possible by the new information technology compel the international community to act with greater responsibility to support human rights and political freedoms in contemporary democratising contexts when these are being subverted. It is a duty with which Raoul Wallenberg would be familiar. His example, in turn, is a challenge to the international community to identify meaningful avenues through which it can effectively advance the cause of freedom in the face of democratisers’ dilemmas.

³) Universal Declaration of Human Rights, United Nations General Assembly Resolution 217 (III), preamble, adopted on 10 December 1948 (hereinafter UDHR).

The focus of this essay is to examine measures for strengthening the international legal framework to overcome the conundrums facing democratic transitions. It begins by reviewing the important developmental, economic and security implications that flow from governance regimes and the institutional context in which many democratisation undertakings are born. The article then reviews two key stages of the democratisation process where democratic transitions face particular vulnerability to backsliding – and measures by which international law can be strengthened to reduce these vulnerabilities.

2. An Outcome with Consequences

While the process of democratisation is subject to setbacks, these must be considered against the alternatives. In addition to providing more space for the exercise of civil liberties and the protection of human rights, democracies generally create more prosperous, healthy and secure societies. This is especially relevant in the developing world where poverty remains so pervasive – and where 70 per cent of contemporary democratisation is taking place.⁴ Even in these low-income contexts, democracies typically realise growth rates that are 30 per cent faster than that experienced in autocracies.⁵ This translates into improved living standards. Low-income democracies, on average, generate life expectancies a decade longer, child mortality rates 50 per cent lower, secondary school enrolment levels that are 40 per cent higher, and cereal yields 30 per cent more robust than autocracies in the same income cohort.⁶ In short, while there is variance in performance, the track record shows that the type of governance system a country has in place matters for the social and economic opportunities available to its citizens.⁷

Democracies also tend to more peaceful – the so-called “democratic peace”.⁸ Not only are democracies highly unlikely to go to war with one another, they are also less conflict-prone overall.⁹ Democracies were home to less than 25 per cent of the world’s 21 on-going conflicts in 2012.¹⁰ This is particularly relevant given that over 90 per cent of contemporary conflicts are internal.¹¹ In comparison,

⁴ Halperin *et al.*, *supra* note 2, p. 67; 60 per cent of democratisers are in Africa and Latin America.

⁵ *Ibid.*, p. 32.

⁶ *Ibid.*, pp. 37–46.

⁷ D. Kaufmann, A. Kraay and M. Mastruzzi, *Governance Matters VIII: Aggregate and Individual Governance Indicators, 1996–2008*, World Bank Policy Research Working Paper No. 4978 (World Bank, Washington, 2009).

⁸ I. Kant, ‘Perpetual Peace: A Philosophical Sketch (1795)’, in H. Reiss (ed.), *Kant: Political Writings* (Cambridge University Press, Cambridge, 1991).

⁹ B. Russett and J. Oneal, *Triangulating Peace: Democracy, Interdependence, and International Organizations* (W.W. Norton, New York, 2001).

¹⁰ M. Marshall and B. Cole, *Global Report 2011* (Center for Systemic Peace, Vienna, VA, 2011) p. 5.

¹¹ *Ibid.*

democracies are better able to accommodate the many competing interests of a society via non-violent resolution of disagreements. Democracies' relatively greater stability is also evident in the humanitarian arena. Democracies are responsible for less than 10 per cent of the world's refugees and internally displaced persons.¹² This reflects democracies' relatively stronger propensity to avoid humanitarian catastrophes. As Nobel Laureate Amartya Sen famously observed, "[n]o substantial famine has ever occurred in any independent country with a democratic form of government and a relatively free press".¹³

The costs from this instability are high. No low-income conflict-affected country is on track to meet the United Nations' Millennium Development Goals of halving poverty by 2015.¹⁴ Autocratic states try to maintain stability through coercion and patronage networks. However, those with high levels of corruption and human rights abuses increase their risks of conflict breaking out in the future.¹⁵ Political exclusion and inequality affecting regional, religious or ethnic groups are similarly associated with higher risks of civil war.¹⁶ The costs to neighbouring states are also significant with conflict estimated to curtail GDP growth in neighbouring countries by 0.7 per cent per year.¹⁷ Internal conflicts are also likely to spill across borders a third of the time.¹⁸ The costs to the international community from this autocratic instability are also significant, totalling USD 16.7 billion for humanitarian responses in 2010 alone.¹⁹

There are many reasons for democracies' superior performance. Three overarching qualities stand out: shared power, openness and capacity for self-correction.²⁰ These features maintain checks and balances on power that help ensure that citizens' preferences are interjected into the policy dialogue. The result is a series of constant adjustments and moderate course corrections. These characteristics underscore that democracy is a robust process entailing more than elections.²¹ Freedom of speech, opinion, expression, media, peaceful assembly and association, belief and movement are part and parcel of a participatory, competitive political environment. Inherent in the concept of democracy is tolerance of

¹² Halperin *et al.*, *supra* note 2, p. 94.

¹³ A. Sen, *Development as Freedom* (Knopf, New York, 1999) p.152.

¹⁴ World Bank, *World Development Report 2011: Conflict, Security, and Development* (The World Bank, Washington, 2011) p. 5 (hereinafter WDR).

¹⁵ *Ibid.*, pp. 8–9.

¹⁶ F. Stewart, 'Horizontal Inequities as a Cause of Conflict: A Review of the CRISE Findings', background paper for WDR.

¹⁷ WDR, *supra* note 14, p. 5.

¹⁸ P. Collier, 'Conflict and Development', World Bank Development Research Group (World Bank, Washington, 2001).

¹⁹ Global Humanitarian Assistance Development Initiative, *GHA Report 2011*, p. 6.

²⁰ Halperin *et al.*, *supra* note 2, pp. 46–52.

²¹ R. Dahl, *On Democracy* (Yale University Press, New Haven, 1998) pp. 35–43.

opposition and dissent. There is a recognition that in any body of citizens there will be a range of opinions, perspectives and competing interests. Democracy does not assume consensus or harmony.²² Rather it is in the expectation of disagreement that democracy was established as a systematised process for aggregating these varied perspectives in a transparent and even-handed manner. Minorities and losing candidates remain stakeholders in the political system knowing that their inalienable political rights and civil liberties are protected, contributing to stability.

Democracy, then, is not an event, repeated periodically. Instead, it is a governing process that must be upheld daily. Recognising this refutes the concept of “illiberal democracies”.²³ The term attempts to capture cases where there are elections or majority rule but basic rights and liberties are not respected. In fact, the concept is an oxymoron, which muddies the conceptual waters of political governance. A state cannot be a democracy if it does not provide space for civil society, a free press, inclusive political participation and political equality.²⁴ Rather, an illiberal form of governance is a variant of authoritarianism. Making the distinction is important since the number of *soft* or *semi* authoritarians²⁵ in the global system has risen since the end of the Cold War.²⁶ Reacting to shifting global norms, these regimes are attempting to accrue the reputational benefits of democracy by adopting certain democratic practices or symbols, such as elections. However, nearly every autocratic regime in the world today holds at least some notional form of elections in the attempt to legitimate their claim on power. Reducing the repressiveness of an autocratic regime is not the same as moving toward a democratic system.

These clarifications also highlight the important differences between the concepts of democracy and democratisation. Democratisation is the process by which a state develops and consolidates the institutions of a democracy. It reflects those political systems that are in the process of a democratic transition. As a result, democratisers are typically a hybrid form of governance exhibiting emerging institutions of democratic accountability but where protection of basic rights and checks on the executive remain weak. Given that the starting point for most democratic transitions is a system where power has been concentrated in the executive branch, in fact, a key indicator of democratic strengthening is the degree to which institutions of accountability on the executive have been

²²) S. Huntington, *American Politics: The Promise of Disharmony* (Belknap, Cambridge, MA, 1983).

²³) F. Zakaria, ‘The Rise of Illiberal Democracy’, 76:6 *Foreign Affairs* (1997) pp. 22–43.

²⁴) T. Carothers, ‘Zakaria’s Complaint’, 72 *The National Interest*, pp. 137–143; R. Kagan, ‘The Great Unwashed’, 229 *The New Republic* (2003) pp. 27–38.

²⁵) M. Ottoway, *The Rise of Semi-Authoritarianism* (Carnegie Endowment for International Peace, Washington, 2002).

²⁶) Marshall and Cole, *supra* note 10, pp. 10–13.

established.²⁷ While a hybrid form, democratisers distinguish themselves from the semi-authoritarians referenced above in that they are making some genuine efforts to advance their democratic institutions.

Democratisers also tend to be resilient. While backsliding is common, of those democratisers that do regress, two-thirds resume a positive trajectory within three years.²⁸ Once people have had basic freedoms, they do not want to give these up. Backtracking, then, does not spell the end of the democratisation experience – an important reality for democratic reformers and their international supporters to consider. On the other hand, until democratic institutions are consolidated, backsliding is a constant possibility, even for states that have made considerable progress.

3. Why Democratisers Are Vulnerable

Recognising that democratisation is a viable and worthy goal, the challenge faced is overcoming the often turbulent process of democratic transitions and the dilemmas that at times emerge from this process. To do this, it bears reviewing the context in which most democratisation takes place and why democratisers are so prone to backsliding.

Experience has shown that the early years of a democratic transition are most risky. More than half of all democratic backsliding takes place in the first five to six years of a transition.²⁹ This risk diminishes over time, with less than 10 per cent of backsliding occurring once a country has been engaged in the democratisation process for 15 years or more. In other words, momentum for democracy builds the longer a country stays on a democratic path. Still, instances of backsliding even 20 or more years into the democratisation experience do occur. This includes a military coup in Mali in 2012 that reversed a democratisation process that had been underway since 1991. The on-going risk of backsliding faced by democratisers underscores the reality that democratic consolidation is typically a decades' long process.

A key factor for democratisers' uphill struggle is that they must overcome entrenched and overlapping autocratic political and economic interests.³⁰ Lacking popular support, exclusive regimes rely on strong ties to key constituencies – political party, security sector, ethnic group, geographic region – to stay in power.

²⁷ Accountability refers to mechanisms by which public authorities are obliged to be responsive to the preferences of the general public, maintain the transparency and fairness of public institutions, operate within established constraints, and face sanction for abuses of power. J. Siegle, 'Building Democratic Accountability in Areas of Limited Statehood', paper presented at the International Studies Association Annual Conference, 1–4 April 2012.

²⁸ Halperin *et al.*, *supra* note 2, p. 74.

²⁹ *Ibid.*, p. 71.

³⁰ J. Siegle, 'Overcoming Autocratic Legacies', 9:3 *Development Outreach* (2007) pp. 6–8.

Regimes reward these groups through patronage – political appointments, jobs, contracts, educational opportunities and other benefits. As in other monopolistic or oligarchic relationships, the privileges that accrue to those in the network come at the expense of the rest of society who suffer from fewer opportunities, services and overall lower economic productivity. Over time, this arrangement leads to deep and widening disparities in a society.

The problem often persists after an autocratic regime has been toppled because of significant collective action challenges.³¹ Supporters of a former autocratic regime have much to lose if their privileged positions are threatened. Moreover, because of their close knit networks, they are well-informed, organised and resourced. Thus reformers do not begin a transition with a neutral playing field but one that is highly unbalanced and embedded in a society's economy. Reformers represent the interests of the majority but they are fragmented, difficult to organise and operate with limited information. Old guard supporters play on this lack of cohesion through misinformation campaigns that further impede organisation and mobilisation. In short, given the institutional history, pushback from rear-guard interests is not only common but to be expected – often from the earliest days of a transition.

Meanwhile, democratic reformers are under intense pressure to deliver jobs, services and a stronger economy in the first months and years of a transition. The euphoria of toppling an autocrat may soon give way to democratic disillusionment with citizens questioning whether democracy brings any tangible differences. In fact, because of the entrenched autocratic institutional legacies – corruption, patronage, limits on access to credit and business licenses, undefined property rights, stunted markets, *etc.* – turning an economy around quickly in the early years of a transition is very difficult. Typically democratic reformers inherit an economy that is contracting – a trajectory that often continues for three to five years – until new, more broad-based institutions can be established. After this point, democratic transitions tend to yield increasingly more steady growth.³² It is in the first five years that most democratic backsliding occurs, however. That is, economic stress feeds political dissension, opening the door to a return of an autocratic system.

Democratic transitions then can be seen as periods of norms-setting or, perhaps more accurately, norms competition. In addition to pressures from rear-guard interests, democratic transitions are also vulnerable to *hijackings* by those

³¹) M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, Cambridge, MA, 1965).

³²) J. Siegle, 'Explaining the Variation in Economic Performance of Developing Country Democratizers', paper prepared for the Community of Democracies' seminar on "Democracy and Development: Poverty as a Challenge to Democratic Governance", Bamako, Mali, 29–30 March 2007.

with divergent ideological, religious or economic interests. Seizing the opportunity of a transition, such *spoilers* redirect the momentum toward their ends. Arguably, this is the sequence that took place following the protests against the Shah of Iran in 1979. Iranians had mobilised to reject the tyranny of this autocratic system only to have this groundswell redirected under the banner of a charismatic religious leader, Ayatollah Khomeini, who affirmed his desire to see democracy take root in Iran. Instead, nationalist and Islamist fervour were fused to justify a theocratic governance model that while adopting certain democratic practices, in fact, did not respond to popular preferences or allow checks on the Supreme Leader.

Since most democratic transitions are emerging from a political context where power is consolidated within the executive overcoming autocratic inertia requires establishing checks and balances on the Office of the President or Prime Minister.³³ Insights from earlier transition experiences reveal that such state institutions can emerge but they take time, typically a decade or more.³⁴ Consequently, non-state actors play a vital role in upholding new norms of democratic accountability during this interim period. In particular, civil society groups, media and public access to information and communications technology are essential forces for accountability.³⁵ These actors and tools generate independent information – the lifeblood of accountability. Information enables independent assessment and oversight as well as educating the general public, effectively empowering them to protect their interests. Civil society networks, moreover, create links between and across social, geographic and economic groups in a society. The density of such networks enhances the social cohesion of a population enabling them to sustain popular pressure for democratic reform over the extended period until state accountability institutions can gain traction. While it should be recognised that not all civil society actors represent the public good (*e.g.* racist organisations, gangs, criminal networks), the depth of civil society networks is a key predictor of successful democratic transitions.³⁶

4. Dilemmas of Transition

In the often intense tug-of-war over governance and human rights norms that are democratic transitions, it is unsurprising that there are scenarios where

³³) Siegle, *supra* note 27.

³⁴) *Ibid.*; J. Barkan, 'Legislatures on the Rise?', 19:2 *Journal of Democracy* (2008) pp. 124–137.

³⁵) Siegle, *supra* note 27.

³⁶) A. Karatnycky and P. Ackerman, *How Freedom is Won: From Civic Resistance to Durable Democracy* (Freedom House, New York, 2005); R. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton University Press, Princeton, NJ, 1993); J. Siegle, 'Social Networks and Democratic Transitions', 12:1 *Developing Alternatives* (2008) pp. 39–45.

democratic progress is side-lined and new or resurgent autocratic tendencies emerge. This section of the article examines two periods of the democratisation process where such vulnerabilities are particularly acute – the period immediately following a democratic opening and the succession challenge later in the transition process when democratically-elected leaders may be tempted to subvert still weak checks and balances and perpetuate their hold on power.

4.1. *Early Stages – Establishing Space for Open Dialogue*

In Egypt's first multiparty parliamentary elections in January 2012 following the ousting of the long-time secular autocratic ruler, Hosni Mubarak, the country's oldest Islamist party, the Muslim Brotherhood scored a commanding victory. Together with more ultra-orthodox parties, Islamists controlled 70 per cent of the seats of the legislative body that would write Egypt's first democratic constitution. In June 2012, the Muslim Brotherhood also gained control of the executive branch with the Egypt's first competitive presidential election with the election of Mohamed Morsi in Egypt's first competitive presidential election. This followed a pattern seen in Tunisia where the dominant Islamist party, Ennahda, controlled 41 per cent of the seats following the first free and fair elections. Similar patterns of growing Islamist party influence have been observed in Libya, Yemen, Jordan, Morocco and Syria.³⁷

Islamist parties call for the installation of *Sharia* (or Islamic) law as the official legal code of the society. As Khairat el-Shater, the chief strategist of the Egyptian Muslim Brotherhood, explained, “[t]he Islamic reference point regulates life in its entirety, politically, economically, socially; we don't have this separation” between religion and government.³⁸ For some, the intention is that Islamic authority would supersede that of the state. As one Tunisian Islamist described it, “[w]e don't accept that [democracy's freedom is absolute]. In our religion, freedom is limited to the freedom God gives you ... [If the state] tries to silence us, we will use any means – violence too.”³⁹ In effect, then, the interpretation of the law by religious leaders would trump that of democratically elected and administered institutions.

Of particular concern to many democracy proponents have been the threats to civil liberties and tolerance that have emerged with the move toward political pluralism. This has been a palpable concern with regards to the rights of women. While women played prominent roles in the course of the protests in the Arab

³⁷ B. Mikail, ‘Religion and Politics in Arab Transitions’, *FRIDE Policy Brief* (2012) p. 2.

³⁸ D. Kirkpatrick, ‘Keeper of Islamic Flame Rises as Egypt's New Decisive Voice’, *The New York Times*, 12 March 2012.

³⁹ M. Fisher, ‘In Tunisia After the Arab Spring, Islamists' New Freedoms Create New Muslim Divide’, *The Washington Post*, 29 April 2012.

World, the lifting of restrictions on political participation has led to a resurfacing of conservative values regarding Sharia, polygamy, family code, restrictions on women's right to interact with men outside the household, religious instruction and limitations on the role of women in public life. More generally are fears that women may lose citizenship rights in what in some cases are emerging as male-dominated constitutions.⁴⁰ Similarly, leading Islamists have called for the requirement that women wear a *hijab* in public even in countries like Tunisia, Egypt, and Libya where women have long had the freedom to choose their attire in line with their own values and beliefs.

Some also worry about the Islamists' tolerance for dissent. The Egyptian Muslim Brotherhood has historically been a highly hierarchical organisation. This approach has been applied to the transition period where all members are expected to follow the party line rather than their own conscience.⁴¹ In this way, the party remains a society within a society. Members who have resisted this insular and hierarchical approach have been reprimanded or expelled.⁴² To critics, such an approach bypasses the legislature as a place of political debate, vesting real decision-making authority within the party leadership.⁴³

This has been accompanied by anxieties over growing intolerance toward religious minorities. In Cairo, there have been attacks on Coptic Christians, which comprise 10 per cent of the Egyptian population. This has resulted in dozens of deaths and the burning of several churches. Fearing more severe religious persecution and restrictions on space for religious freedom, thousands of Coptic Christians have started to emigrate.⁴⁴ In Libya, attempts to re-establish the Jewish community have been met with armed resistance from autonomous militia groups.⁴⁵

These challenges are a reminder that expanding political participation does not automatically lead to greater civil liberties. More broadly it fuels long-held fears that democratisation in Muslim dominated countries is highly susceptible to being subverted by religious authorities or ideologies resulting in ultraconservative governments. This would create a context where a minority interpretation of Islamic social codes would be enforced on all members of a society. Moreover, since religious authorities operate outside of democratic processes, mechanisms for accountability would be limited. This is a reiteration of an often heard

⁴⁰ I. Coleman, 'Why the Arab Spring Hasn't Been Better for Women', *The Atlantic*, 8 March 2012; R. Sweis, 'Arab Spring Fails to Allay Women's Anxieties', *The New York Times*, 7 March 2012.

⁴¹ Kirkpatrick, *supra* note 38.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ J. Fleishman, 'A Dynamic Islamist Rises in Egypt', *The Los Angeles Times*, 6 May 2012.

⁴⁵ Foreign and Commonwealth Office, *Religious Freedom and Rights of Minorities, Rights of Women and Rights of People with Disabilities*, 2011 Foreign and Commonwealth Office Report, <fcohrdreport.readandcomment.com/the-arab-spring/religious-freedom-rights-of-minorities-rights-of-women-rights-of-people-with-disabilities/>, accessed on 17 May 2012.

warning that democratic elections in the Islamic World would result in “one man, one vote, one time”.⁴⁶

The threat to civil liberties in Egypt also comes from a second powerful source – Egypt’s military. The Supreme Council of the Armed Forces controlled the transition process from the ousting of Hosni Mubarak until the election of Mohamed Morsi and the military, and has long had a hand on the governance steering wheel in Egypt. During the transition period the military has tried to institutionalize its privileged role in Egyptian politics in the drafting of the new constitution, creating doubts about its commitment to democratic reform. The military has similarly shown limited tolerance for dissent since the revolution, specifically targeting journalists and bloggers who have criticised the military.⁴⁷ Estimates are that 12,000 civilians have been arrested, tried in military courts, and sentenced to extended jail terms, sometimes in solitary confinement since the Egyptian protests began.⁴⁸ At times journalists are beaten while in custody, part of a pattern of attacks against the press in Egypt.⁴⁹ The intimidation and violence towards journalists is a particularly pernicious threat to the emergence of democracy since the independent flow of and access to information is a fundamental requirement in a democratic society.⁵⁰ The absence of a free press and independent voices, moreover, undercuts the capability to draw attention to and advocate for other civil liberties.

The transitional military government also put forward new regulations on non-governmental organisations (NGOs) that would make it more difficult for these civil society organisations to register, ban funding from international sources, and enable the government to oversee and reject any civil society organisation activity with which it disagrees. It is feared the regulations establish an instrument to politicise civil society while intimidating NGOs that are attempting to play investigative and oversight roles.⁵¹

In considering how best to uphold the Wallenbergian tradition to such dilemmas of the democratisation process in the Arab World, it is important to keep in

⁴⁶ Phrase coined by former US Assistant Secretary of State Edward Djerejian in 1992 during the Algerian civil war.

⁴⁷ Freedom House, *Countries at a Crossroads 2011* (Freedom House, New York, 2011).

⁴⁸ ‘Egypt: Retry or Free 12,000 After Unfair Military Trials,’ 10 September 2011, Human Rights Watch, www.hrw.org/news/2011/09/10/egypt-retry-or-free-12000-after-unfair-military-trials, accessed 12 October 2012.

⁴⁹ ‘Egyptian Journalists Report Being Brutalized’, 7 May 2012, Committee to Protect Journalists, <cpj.org/2012/05/egyptian-journalists-report-being-brutalized-in-cu.php>, accessed 26 May 2012.

⁵⁰ D. Mijatovic, ‘Protection of Journalists from Violence’, Issue Discussion Paper, Commissioner for Human Rights, Council of Europe, 4 October 2011.

⁵¹ ‘NGO Law Monitor: Egypt’, 17 May 2012, International Center for Not-for-Profit Law, <www.icnl.org/research/monitor/egypt.pdf>, accessed 26 May 2012; ‘Egyptian Rights Groups Criticize Proposed NGO Law’, Project on Middle East Democracy, <pomed.org/blog/2012/01/egyptian-rights-groups-criticize-proposed-ngo-law.html>, accessed 26 May 2012.

mind several lessons from previous democratic transitions. First is that establishing new democratic and accountable institutions will take time; so sustained engagement will be needed. Second, until these institutions can be established, human rights actors and independent media are the primary champions for advancing civil liberties and democratic norms. Third, democratic processes tend to be self-correcting so long as the basis for access to information, scrutiny and debate exist. For example, even in the months after the Muslim Brotherhood won a plurality of seats in Egypt's parliamentary elections, they have faced popular disappointment for failing to address the country's severe unemployment and economic challenges.⁵² They also lost the support of many Egyptians for violating their promise not to field a candidate in the country's first presidential elections. Such governance challenges tend to foster moderation in political systems. Fourth, support for Islamist parties does not necessarily reflect widespread illiberal values within these societies. Islamist parties were far better organised than other political parties who been banned during the autocratic era. Building on this advantage, many Islamist parties built national networks from which they provided social services, earning reputations for honesty.

An implication from these previous transition experiences is that there are strong reasons why international proponents of democracy and human rights should continue to engage with all parties involved in these democratic transitions, even if Islamist parties emerge as the dominant force. The Egyptian military, for example, has suggested that it will assert control if it does not approve of the policies of the elected president. International support for such a *Praetorian Guard* model in the interest of secularism pre-empts opportunities for self-correction and short-circuits the democratic institution-building process. It allows the military to justify its political presence indefinitely. It also gives Islamists a rationale to circumvent the legal process and attempt to take power through violence. This mirrors the experience in Algeria following the cancelled presidential elections in 1992 that Islamists were expected to win. The action set off a brutal decade long civil war that left more than 150,000 dead and the population highly polarised. Algeria has yet to move toward democracy and society remains a boiling pot. Giving Islamist parties a stake in a democratic system can therefore strengthen stability. As Tunisia's secular leader of the Constituent Assembly, Mustapha Ben Jafar, observed, "[b]efore the revolution, these extreme movements existed but they were forced underground. Now everything is in the open, and thank God for that."⁵³

⁵² For instance, a Gallup poll in Egypt showed that support for the Muslim Brotherhood had declined from 63 per cent to 42 per cent in the four months since their parliamentary victory. R. Pollard, 'Islamists Stage Rallies to Restore Favour among Disappointed Voters', *Sydney Morning Tribune*, 25 May 2012.

⁵³ Fisher, *supra* note 39; L. Montgomery, 'Islam Without Extremes – A Muslim Case for Liberty: Interview with Turkish Author Mustafa Akyol', *The Washington Times*, 20 April 2012.

The strategic focus of international engagement in the short and medium term, therefore, should be on keeping the window of dialogue and free flow of information open. Domestic media and civil society actors can then play their roles of challenging society to consider the advantages and disadvantages of various courses of action, and to advance popular understanding and acceptance of democratic principles and values, including the upholding of civil and religious liberties and the protection of human rights. In Tunisia, for example, civil liberty leaders organised a read-in to warn against the ignorance they believe leads to religious extremism.⁵⁴

In an open civic environment, Islamist leaders will be required to articulate policy positions on a wide range of priority concerns to society. This includes how Islamic values should be applied. On this issue, there is great variance among Islamists. Some argue that Islam should be imposed on all state institutions while others hold that now that they have entered a democratic era, the party's role of resistance is over and there should be a separation between politics and religion.⁵⁵ This "post-Islamist" view holds that politicians will always be fallible and should not be trusted to accurately judge divine will. Since there is no consensus interpretation, ultra-orthodox adherents will need to build broader coalitions in order to govern.⁵⁶ Debates such as this caused a split in the Egyptian Muslim Brotherhood leading to the fielding of a multiple presidential candidates in 2012.⁵⁷ In short, with the space for debate, radical positions can be expected to lose support and more pragmatic views prevail. In Tunisia, for example, Rachid Ghannouchi, Ennahada's spiritual leader made a point of meeting with Tunisia's Jewish leaders after an extremist cleric called for the murder of Tunisian Jews.⁵⁸ He supports excluding Islamic law from Tunisia's constitution so that attention can be focused on the country's more pressing problems, like unemployment.

4.1.1. Education and Advocacy

There is a strong foundation in international law for the protection of civil liberties, a free press, human rights, and democracy in these democratising contexts. The United Nations Charter, in its preamble, affirmed the commitment to human rights for all.⁵⁹ This is reiterated in the Universal Declaration of Human Rights, which recognises that "equal and inalienable rights of all members of the human

⁵⁴ Fisher, *supra* note 39.

⁵⁵ *Ibid.*; M. Akyol, *Islam without Extremes: A Muslim Case for Liberty* (W.W. Norton, New York, 2011).

⁵⁶ N. Brown, 'Egypt and Islamic Sharia: A Guide for the Perplexed', 15 May 2012, Carnegie Endowment for International Peace, <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10109&LangID=E>, accessed 18 May 2012; Montgomery, *supra* note 53.

⁵⁷ Fisher, *supra* note 39; Kirkpatrick, *supra* note 38.

⁵⁸ Fisher, *ibid.*

⁵⁹ United Nations, Charter of the United Nations, 24 October 1945, 1 *UNTS* XVI, preamble.

family is the foundation of freedom, justice, and peace in the world”.⁶⁰ The concluding paragraph of the preamble establishes that the achievement of these human rights is the responsibility of “every individual and organ of society” and call for “progressive measures, national and international, to secure their universal and effective recognition and observance”.⁶¹ The Declaration, furthermore, makes an explicit and prescient link between stability and human rights relevant to contemporary democratising societies in the Arab World: “[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”⁶²

The entitlement of women to all of the same rights as men is addressed in Article 2: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, property, birth or other status.”⁶³ Importantly, the right to religion is expressly subject to limitations, including “the fundamental rights and freedoms of others”.⁶⁴ The rights of women to vote, hold office and to exercise public functions were further reiterated in the 1952 Convention on the Political Rights of Women and the Convention on the Elimination of All Forms of Discrimination against Women.⁶⁵

The rights of free speech and press are clearly outlined in Article 19 of the Universal Declaration: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁶⁶ Likewise, the guarantee of the right to participate in civil society is highlighted in Article 20: “Everyone has the right to freedom of peaceful assembly and association”⁶⁷ and Article 23: “Everyone has the right to form and to join trade unions for the protection of his interests.”⁶⁸

The Declaration in Article 21 is also clear about the broader rights required for a robust democracy: “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. Everyone has the right to equal access to public service in his country. The will of the people shall be the

⁶⁰ UDHR, *supra* note 3, preamble.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*, Article 2.

⁶⁴ *Ibid.*, Article 29(2); *see also* International Covenant on Civil and Political Rights, preamble, 999 UNTS171 (9 December 1966). (hereinafter ICCPR)

⁶⁵ UN General Assembly, Convention on the Political Rights of Women, 20 December 1952; UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, Article 7.

⁶⁶ UDHR, *supra* note 3, Article 19.

⁶⁷ *Ibid.*, Article 20.

⁶⁸ *Ibid.*, Article 23 (4).

basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”⁶⁹

The international community’s commitment to freedom, justice and peace is further reinforced in the two main global human rights treaties, the International Covenant on Civil and Political Rights⁷⁰ and the International Covenant on Economic, Social and Cultural Rights.⁷¹ Moreover, at the 2005 UN World Summit, the international community formally expressed its commitment “to actively protecting and promoting all human rights, the rule of law and democracy” recognising that these “are interlinked and mutually reinforcing and they belong to the universal and indivisible core values and principles of the United Nations”.⁷² As to claims that international engagement on human rights concerns is a violation of national sovereignty, the International Court of Justice has recognised for some time that violations of basic human rights “are the concern of all states” and all states “have a legal interest in their protection”.⁷³ The authoritative 1970 Declaration on Principles of International Law, moreover, expressly affirmed that the United Nations Charter prohibits “any forcible action” by a state that “deprives peoples ... of their right to self-determination”.⁷⁴

This strong normative tradition, regularly affirmed by United Nations members, provides a solid starting point for engagement in democratic transitions. New government leaders need to be aware of their obligations under international human rights law to provide space for civil society, independent voices, a free press, and civil liberties for all, including women. Given the array of new actors involved in these transitions, it cannot be assumed that these norms and obligations are understood.⁷⁵ International partners can further reinforce the seriousness of this issue through sustained advocacy campaigns that keep the spotlight on violations of these protections including repeated inquiries, visits to civil

⁶⁹ *Ibid.*, Article 21.

⁷⁰ ICCPR, *supra* note 64, preamble.

⁷¹ International Covenant on Economic, Social, and Cultural Rights, 993 *UNTS* 3 (1966); J. Paust, ‘International Law, Dignity, Democracy, and the Arab Spring’, University of Houston Public Law and Legal Theory Series 2012-A-3.

⁷² 2005 World Summit Outcome, UN General Assembly Resolution 60/1 (24 October 2005), para. 119; Paust, *ibid.*

⁷³ *Belgium v. Spain, Case Concerning Barcelona Traction Light and Power Co.*, 5 February 1970, ICJ 4, paras. 33–34.

⁷⁴ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (24 October 1970), UN General Assembly Resolution 2625, 25 UN GAOR, Supp. No. 28.

⁷⁵ Part of this education would be to remind leaders in these transitioning contexts of their rich human rights traditions. Egypt, Iran and Lebanon were members of the Commission on Human Rights that drafted the Universal Declaration of Human Rights in 1948. They, as well as Iraq and Syria, were also among the original 48 signatories of the Declaration.

society actors who have been detained, international awards, petitions and media stories.⁷⁶

International partners should also strongly advocate for the establishment or strengthening of independent professional associations (e.g. for journalists, human rights defenders, and watchdog groups). By establishing peer-to-peer dialogue and self-regulation, such networks are influential in raising professional standards for these roles in democratising societies while building public trust for the respective profession.⁷⁷ In the process they can generate guidelines of appropriate professional communications, thereby distinguishing individuals providing public goods and services from those that are pursuing self-interest (financially or ideologically) under the guise of civil society. An established association, furthermore, provides a credible collective point of contact for negotiations with the government. Associations, in turn, provide a safer vehicle through which to pursue protections for and inquiries into cases where civil society actors have been persecuted.⁷⁸

4.1.2. Domestic Legal Protections for Journalists and Human Rights Defenders

Another focal point of international engagement is to engage legislative authorities to pass domestic laws that provide explicit protections for human rights defenders and journalists.⁷⁹ This includes decriminalising charges of libel and defamation against journalists (measures frequently abused to jail independent voices), except in cases of hate speech or incitement to violence.⁸⁰ In most new democratisers, however, no such protections exist. Journalists and human rights defenders are attractive targets of attack by authorities who resent the attention or criticism they may receive for their actions. Given their unique role in informing and educating society, violence and intimidation against journalists cannot be treated as an ordinary crime. At the least, statutes requiring thorough and independent investigations into attacks on these civil society actors should be instituted.⁸¹ These investigative processes should be provided judicial powers to compel the production of evidence, interview witnesses, ensure access to state information, and disclose their findings.⁸²

⁷⁶ International attention on the case of Azerbaijani journalist and newspaper editor Eynulla Fatullayev is instructive in this regard. Mijatovic, *supra* note 50, pp. 14–15.

⁷⁷ Mijatovic, *ibid.*, p. 16.

⁷⁸ M. Perkins, 'Violence Against the Press in Latin America: Protections and Remedies in International Law', 78:2 *Journalism and Mass Communication Quarterly* (Summer 2001) p. 283.

⁷⁹ This designation is used broadly to include bloggers, citizen journalists, amateur photographers, and others who capture and disseminate independent information.

⁸⁰ Mijatovic, *supra* note 50. See also *Mahmudov and Agazade v. Azerbaijan*, 18 December 2008, ECHR, Appl. no. 35877/04.

⁸¹ Mijatovic, *ibid.*

⁸² B. Saul, 'Prosecuting War Crimes at Balibo under Australian Law: The Killing of Five Journalists in East Timor by Indonesia', Legal Studies Research Paper no. 09/109, The University of Sydney Law School, October 2009.

By removing the cloak of impunity surrounding attacks on activists and media personnel, a deterrent can be established for future such crimes.⁸³ This, in turn, has a stabilising effect for the broader society. Journalists and human rights workers, serve as a layer of protection for the rest of society by shining the light of inquiry on violence committed against ordinary citizens. Mexico offers a model of such national laws. In an effort to overcome the impunity for attacks on journalists, Mexico has amended its constitution, making attacks against journalists a federal crime, and has empowered federal authorities, including the Attorney General, to investigate and prosecute crimes against journalists and others that limit the right to information or freedom of expression.⁸⁴ In the past, Mexican federal authorities have not stepped in to investigate violence against journalists, saying that such cases fell outside their jurisdiction. Law enforcement officials at the state level, meanwhile, have routinely failed to hold perpetrators of such crimes to account.⁸⁵ The new measures will also set aside federal funds for the protection of journalists including security cameras, escorts, armoured vehicles, and temporary relocation.⁸⁶

4.1.3. International Protections

In cases where national authorities are not persuaded to strengthen the domestic legal framework to protect information networkers in a society, international actors should consider referring the country to the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression. The Special Rapporteur operates under the Office of the United Nations High Commissioner for Human Rights. The mandate of the Special Rapporteur is to undertake fact-finding country visits to gather all relevant information relating to the violations of the right to freedom of opinion and expression, especially threats or use of violence against journalists.⁸⁷ Based on these inquiries, the Special Rapporteur releases a country report with his findings and recommendations to

⁸³) F. LaRue, 'Human Rights Council Holds Panel Discussion on the Protection of Journalists in Armed Conflict', United Nations Office of the High Commissioner for Human Rights, Press Release, 3 June 2010, <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10109&LangID=E.>, accessed 18 May 2012.

⁸⁴) 'Mexico: Constitution Amended, Federal Authorities Given Powers to Prosecute Crimes against Free Expression', 14 June 2012, Article 19, www.article19.org/resources.php/resource/3330/en/mexico:-constitution-amended,-federal-authorities-given-powers-to-prosecute-crimes-against-free-expression, accessed 12 October 2012.

⁸⁵) *Ibid.*

⁸⁶) 'Mexican President Signs Law to Protect Journalists', 25 June 2012, Journalism in the Americas, www.knightcenter.utexas.edu/blog/00-10564-mexican-president-signs-law-protect-journalists, accessed 12 October 2012.

⁸⁷) Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, United Nations Office of the High Commissioner for Human Rights, <www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>, accessed 18 May 2012.

improve the right to freedom of opinion and expression. He or she may also issue urgent appeals and letters of allegation to UN member states on alleged violations.⁸⁸ While the Office of the Special Rapporteur operates with limited resources, it provides a valuable service in generating independent inquiries into the status of protections for journalists and human rights defenders, thereby establishing a reliable public record for all international actors to use in assessing the space available for individuals and organisations fulfilling the vital societal role of generating and disseminating information.

Bilateral and multilateral actors engaged in these democratising contexts can put more teeth into such assessments by withholding funding to central or provincial governments in transitional states that do not uphold protections for journalists, especially in cases where these individuals have been targeted by violence without resolution. Doing so is also justified on developmental grounds. Without active media and civil society watchdog groups, the vulnerability of corruption expands significantly. In fact, unregulated funding flows are likely to boost autocratic actors' hold on power, undercutting both the political and developmental objectives of such funds.⁸⁹

Despite such practical interventions, the reality remains that worldwide over 90 per cent of cases where journalists have been murdered go unsolved.⁹⁰ Roughly 75 journalists and media staff are killed around the world each year.⁹¹ While the legal rights to freedom of speech, expression and media are guaranteed, the application of these protections for journalists and human rights defenders in practice is lacking. Responsibility for investigating such violence largely rests with domestic law enforcement officials. Yet if the state is in some way a party to such violence, it has little incentive to conduct credible investigations. In fact, it is the desire for opacity that likely motivates the violence against these civil society actors in the first place.

To overcome this shortcoming in implementation of legal protection, further steps are needed to strengthen international jurisdiction of crimes against journalists and human rights defenders when national authorities resist doing so. One such step would be for the United Nations Security Council to pass a new resolution, expanding on Resolution 1738, adopted in 2006, condemning attacks against journalists in conflict situations.⁹² The Security Council should make clear, consistent with the United Nations Charter and previous human rights

⁸⁸) *Ibid.*

⁸⁹) Zimbabwe, Burma, North Korea and Angola, among others, fit this characterisation. See also B. Bueno de Mesquita and H. Root, 'The Political Roots of Poverty: The Economic Logic of Autocracy', 68 *The National Interest* (2002) pp. 1–16.

⁹⁰) Mijatovic, *supra* note 50, p. 16.

⁹¹) '914 Journalists Killed since 1992', Committee to Protect Journalists, <cpj.org/killed/>, accessed 26 May 2012.

⁹²) United Nations Security Council Resolution 1738 (2006), S/C 8929.

conventions, that organised attacks against journalists in all contexts, including those in transitional situations, constitutes a grave breach of these agreements. Not only do these attacks undermine the creation and sustaining of legitimate governance, but in an increasingly globalised world reliant on access to independent information, they impede the capability of international bodies, especially the United Nations, from fulfilling their obligations. The Secretary General should, in turn, be requested to provide regular reports updating the status and progress of attacks against civil society actors. Moreover, armed attacks by a government against a number of its own citizens not only violates human rights law but also constitutes crimes against humanity under customary international law over which there is universal jurisdiction.⁹³

International jurisdiction for these crimes is increasingly falling to regional courts. The Inter-American Court of Human Rights (IACHR) is the regional court with the most developed case law for the protection of journalists and human rights defenders against violence in this area.⁹⁴ The IACHR works in coordination with the Inter-American Commission, which operates out of the Organization of American States' headquarters. The Commission is responsible for hearing complaints of human rights violations. If it determines that a complaint has exhausted domestic legal remedies and a state has not corrected a violation, the Commission may forward cases to the IACHR. Individuals and NGOs cannot take cases directly to the Court, though they can participate if the Commission appeals their cases to the Court.⁹⁵ The American Convention authorises the Court to assess damages and corrective remedies when it finds human rights violations by governments.⁹⁶

In a series of cases the IACHR has upheld the American Convention on Human Rights' free-expression guarantees.⁹⁷ In 1999, the IACHR ordered the government of Guatemala to pay USD 161,000 to the family of American journalist Nicholas Blake who was killed by Guatemalan security forces in 1985.⁹⁸ After years of petitioning the Guatemalan government to investigate Blake's

⁹³ J. Paust, 'The International Criminal Court Does Not Have Complete Jurisdiction over Customary Crimes against Humanity and War Crimes', 43 *John Marshall Law Review* (2010) pp. 681, 684–697.

⁹⁴ M. Perkins, 'Violence Against the Press in Latin America: Protections and Remedies in International Law', 78:2 *Journalism and Mass Communication Quarterly* (Summer 2001) pp. 275–290.

⁹⁵ Perkins, *supra* note 78, p. 278.

⁹⁶ Organization of American States, *American Convention on Human Rights*, "Pact of San Jose", No. 17955, approved 22 November 1969, Article 63.

⁹⁷ *Ibid.*, Article 13(3): "The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or any other means tending to impede the communication and circulation of ideas and opinions."

⁹⁸ Perkins, *supra* note 78, p. 275.

disappearance, the journalist's family took the case to the Inter-American Commission, which referred the case to the IACHR in 1995. The Court ruled in 1997 that the Convention confers on Blake's survivors a right to expect that authorities effectively investigate disappearances and murder, prosecute and punish those convicted, and compensate the family for damages they suffered.⁹⁹

Another case involving a 1999 ruling by the Inter-American Commission in the murder in 1988 of a well-known Mexican journalist, Hector Felix Miranda, established that a state violates the right to free expression as protected under the American Convention when it fails to investigate thoroughly the attack on a journalist, even when agents of the state did not commit the attack itself.¹⁰⁰ (Miranda was killed by two men associated with a racetrack that Miranda had implicated with corruption and narcotic trafficking).¹⁰¹ The case has particular relevance with the rise of illicit networks that wish to remain in the shadows and will intimidate journalists who publish stories about them.¹⁰² Miranda's case was brought to the Inter-American Commission on Human Rights by the Inter-American Press Association on the grounds that the Mexican government had failed to prosecute the instigator of the murder.¹⁰³ The Commission ruled that the lack of a serious investigation by Mexican authorities violated not only Miranda's right to freedom of expression but "that of the citizens in general to receive information freely and to learn the truth about the events that took place".¹⁰⁴ The effect of these rulings has been to require governments to investigate attacks on the press, punish journalists' assailants, indemnify journalists' survivors, and to the extent possible create conditions to protect journalists.¹⁰⁵

A 1997 case from Peru decided by the Inter-American Commission established the principle that governments must extend a basic level of protection to journalists working in zones of civil unrest.¹⁰⁶ In 1988, two journalists, Hugo Bustios Saavedra and Eduardo Rojas, covering Peru's guerrilla war with the Shining Path were intentionally targeted in a military ambush. The Commission concluded that the attack was not only a sign of harassment and intimidation of those functioning as journalists but under the American Convention's right to free expression, the government has a responsibility to guarantee the safety of journalists covering wars or internal disputes.¹⁰⁷ The Commission added that making the work of the press possible even when dealing with irregular armed

⁹⁹) Inter-American Court of Human Rights (Ser. C, No. 27), 12 (1996).

¹⁰⁰) Perkins, *supra* note 78, pp. 279–280; Report No. 5/99 Inter-Am. C.H.R. Case 11.739 (Mexico), OEA/ser.L/R (1999) (hereinafter Miranda Case).

¹⁰¹) Perkins, *ibid.*, p. 280.

¹⁰²) *Ibid.*, p. 282.

¹⁰³) *Ibid.*, p. 280.

¹⁰⁴) *Miranda* case, *supra* note 100, 56.

¹⁰⁵) Perkins, *supra* note 78, p. 275.

¹⁰⁶) *Ibid.*, p. 281.

¹⁰⁷) *Ibid.*

combatants requires the utmost protection. “It is the journalists who are risking their lives to bring the public an independent and professional view of what is really happening in areas of conflict.”¹⁰⁸

Relevant to the Arab Spring transitions, the African Court on Human and Peoples’ Rights (ACHPR), to which both Libya and Tunisia are signatories, may increasingly fulfil this function. The Court came into force on 25 January 2004 after it was ratified by 15 countries in the African Union. To date, 26 members have ratified the Protocol. While the Court’s import remains to be seen, having only delivered its first judgement in 2009, with jurisdiction over all cases and disputes concerning the interpretation and application of the African (Banjul) Charter on Human and Peoples’ Rights, the ACHPR may be an important venue for overcoming impunity for crimes against civil society actors. Another avenue of recourse in Africa is the Community Court of Justice (CCJ) established by the 15 member Economic Community of West African States (ECOWAS) in 1975. In 2005, the CCJ’s jurisdiction was revised to include violations of human rights in member states as well as permit individuals to bring cases before the Court. The Media Foundation of West Africa took advantage of this access to bring a case regarding the torture and detention of journalist, Musa Saidu Khan, by Gambian state security agents. The CCJ ruled in Saidu Khan’s favour in 2010, ordering the Gambian government to pay USD 200,000 in damages.¹⁰⁹ The Arab League adopted a Charter of Human Rights in 2004 to which seven states are signatories and three (Yemen, Qatar and Saudi Arabia) have ratified. Referring unsolved cases of violence against human rights defenders and journalists to these regional bodies may help reduce perceptions of impunity that abound surrounding violence against civil society actors.

In sum, while there are significant threats to civil liberties in early stages of democratic transitions, there are a variety of national, regional and international legal instruments that can be employed in the effort to maintain space for critical dialogue. This, in turn, enables the processes of democratic self-correction to unfold. In the end, if authorities persist in stifling civil liberties, more robust international remedies, including those discussed in the upcoming section, can be pursued.

4.2. Creeping Coups and Responding to the Subverting of Democratic Institutions

In the January 2010 presidential elections in Ukraine, Viktor Yanukovich defeated Prime Minister Yuliya Tymoshenko with 49 per cent versus 46 per cent

¹⁰⁸) Report no. 38/97 Inter-Am C.H.R., Case 10.548 (Peru), OEA/ ser.I./R (1999).

¹⁰⁹) ‘ECOWAS Court Orders Gambia to Pay Tortured Journalist’, 17 December 2010, Committee to Protect Journalists, <cpj.org/2010/12/ecowas-court-orders-gambia-to-compensate-tortured.php>, accessed 29 May 2012.

of the vote in a process that was widely regarded to have met international standards. The outcome was a startling turnabout for Yanukovych who as the prime minister of the ruling party was defeated in the 2004 presidential elections after millions of Ukrainians peacefully gathered in Kiev and other cities to protest the fraud of an earlier electoral round in what became known as the Orange Revolution, launching Ukraine onto its democratic transition. Yanukovych's victory was also significant since it held out a model of how rehabilitated autocrats could succeed in a democratic political system, providing a viable alternate for other of the world's remaining autocrats to foster political change in their respective countries.

Rather than burnishing his new credentials as a democrat, however, Yanukovych has reversed many of the reforms adopted in the wake of the Orange Revolution. By securing favourable Constitutional Court rulings, he has been able to effectively overturn reforms that reduced the power of the presidency as well as increased restrictions on peaceful assembly, independent media, opposition organisations and private businesses.¹¹⁰ While there is still a range of views covered by national media, some media outlets have been closed and local media is largely controlled by government. Investigative journalists have faced physical intimidation and unexplained disappearances.¹¹¹ Reflecting the political economy relationships central to the power equation in the Ukraine, business magnates who control many media outlets benefit from their ties to influential politicians. Yanukovych, meanwhile, has come to own an estate outside of Kiev while his two sons have amassed power and wealth.¹¹²

With the restoration of the pre-Orange Revolution Constitution, the president can issue decrees, exercise power over the courts and law enforcement agencies, appoint and remove the prime minister, and appoint regional governors. Parliament has subsequently largely become a rubber-stamp.¹¹³ It has adopted a new law giving an appointed council the right to select and dismiss judges, establishing a tool of political leverage over the judiciary.¹¹⁴ With the renewed powers of the presidency, Yanukovych was able to oust Tymoshenko as prime minister and replace her with a loyalist. State prosecutors then brought a series of varying criminal charges against Tymoshenko and her political allies. She was convicted in 2011 of abusing her office as prime minister for signing a gas deal with Russia without seeking cabinet approval (a charge independent experts view as politically motivated). This generated a seven year prison sentence. Tymoshenko was also banned from public office for an additional three years and given a fine of

¹¹⁰) Freedom House, *Freedom in the World 2012: The Arab Uprisings and their Global Repercussions*, Ukraine Country Report (Rowman & Littlefield Publishers, New York).

¹¹¹) *Ibid.*

¹¹²) *Ibid.*

¹¹³) *Ibid.*

¹¹⁴) *Ibid.*

roughly USD 190 million.¹¹⁵ Street protests against Tymoshenko's prosecution were suppressed by police and protest leaders arrested. Numerous former members of Tymoshenko's party have also been imprisoned. The cumulative effect of these efforts has been to weaken viable political opposition to Yanukovych's Party of the Regions.¹¹⁶

Ukraine's path of a democratically-elected leader moving to dismantle institutional checks and balances allowing him to consolidate power, minimise oversight and potentially extend his time in office is another troubling democratisation dilemma. This process of legitimate leaders incrementally (or at times rapidly) diminishing democratic institutions with the result being a reversion to an autocratic or semi-authoritarian state has been labelled a "creeping coup". Reflecting a combination of autocratic impulses, pushback, the seduction of power once in office, and unconsolidated democratic institutions, creeping coups dot the landscape of countries undergoing political transitions in the 21st century.¹¹⁷ Historically, some of the more recognisable creeping coups that have unfolded include Russia (Vladimir Putin), Zimbabwe (Robert Mugabe), and Cote d'Ivoire (Laurent Gbagbo) in the early 2000s, as well as Peru (Alberto Fujimori), Belarus (Alexander Lukashenka), and Haiti (Jean Bertrand Aristide) in the 1990s. Perhaps the most infamous and destructive creeping coup was that of Adolf Hitler in Nazi Germany who was elected chancellor in 1933 only to quickly subvert all other competing sources of power in Germany and deny Jews basic civil liberties and human rights. The unwillingness of Germans and the broader international community to confront the dismantling of Germany's democratic institutions resulted not only in the loss of civil liberties of Germans but ultimately the stability of all of Europe. In the end, the lives of millions of people around the world were adversely affected.

The deterioration of democratic institutions in a democratising state presents a conundrum for both domestic and international actors attempting to promote the rule of law. Domestically, military leaders may be placed in a position where they are forced to choose between support for their elected civilian leaders or for the constitution. This, in turn, raises questions over whose interpretation of the constitution should be followed, especially if the constitutional court has already been compromised and the leader is calling on military leaders to use force against the population to suppress opponents. This was the choice faced by Niger's armed forces in 2009 when former President Tandja, seeking a constitutionally-prohibited third term, weakened the authority of the Parliament, limited space for independent media, and pushed through a constitutional amendment

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ States considered by some observers to be facing creeping coups include Venezuela, Ecuador, Bolivia, Nicaragua, Turkey, and Mongolia, among others.

that would allow him to stay in office.¹¹⁸ Overriding constitutionally mandated term limits is an increasingly tempting ploy for extending incumbent leaders' time in office in Africa. Six leaders have been able to amend their constitutions since 2002. Another four have tried and failed.¹¹⁹

International partners are similarly placed in the awkward position of determining at what point does a fairly elected leader lose legitimacy as a head of state? How serious of an infringement of the rule of law must be crossed for such a determination to hold? On what basis should such judgements collectively be made?

4.2.1. An Evolving Consensus in Responding to Unconstitutional Transfers of Power

A starting point to guide these judgements is the growing international consensus for responding to outright coups against democratically elected governments or unconstitutional seizures of power. The foundation for this position draws from the United Nations Charter and human rights conventions that explicitly recognise the rights to association, political participation and freedom of expression, as well as that "the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by the equivalent free voting procedures".¹²⁰ These principles were affirmed by the United Nations General Assembly in 2001 in a resolution on promoting and consolidating democracy.¹²¹

As the proportion of the world's states that are democratic has increased, the interest in formalising the legally recognised means for gaining legitimate power has also grown. Doing so has also been seen as a means of mitigating the regional instability caused by irregular transfers of power. From the 1960s to the mid-1990s coups were a common means of changing government, particularly in Africa and Latin America, which accounted for nearly 70 per cent of all coups.¹²² In total there were 94 coup attempts between 1950 and 2010. As a result, regional organisations and inter-governmental bodies, largely led by the OAS, began adopting *democracy charters* that recognised representative democracy as the universally accepted governance model that was indispensable for stability, peace and

¹¹⁸ 'US Condemns Niger Third Term Bid', *BBC News*, 2 July 2009, <news.bbc.co.uk/2/hi/africa/8130212.stm>, accessed 29 May 2012.

¹¹⁹ Africa Center for Strategic Studies, *Africa and the Arab Spring: A New Era of Democratic Expectations*, ACSS Special Report No. 1 (2011), p. 18.

¹²⁰ UDHR, *supra* note 3, Articles 17–22; ICCPR, *supra* note 64, Articles 18–22, 25.

¹²¹ UN General Assembly Resolution 55/96 on promoting and consolidating democracy, UN Doc. A/RES/55/96 (28 February 2001).

¹²² J. Powell and C. Thyne, 'Global Instances of Coups from 1950 to 2010: A New Dataset', 48:2 *Journal of Peace Research* (2011) pp. 249–259. While the number of coups has been steadily declining since the 1960s, 12 of the 18 coup attempts since 2003 have been successful.

development.¹²³ Not only was democracy a right but member governments had an obligation to promote and defend it as the basis for the rule of law within their respective regions.¹²⁴ These charters, furthermore, specified the steps to follow should there be unconstitutional interruptions of the democratic order including visits from the representatives of the regional body, emergency meetings of regional leaders, and if necessary the suspension of the offending state from the regional organisation.¹²⁵

While international responses to coups in practice have been inconsistent, they have evolved over time to become more predictable and cogent. Today when a coup against a democratic government occurs, it is almost universally condemned. Regional actors are often in the lead in denouncing the action and withholding recognition of the coup leaders.¹²⁶ Bilateral donors follow with the withdrawal of non-humanitarian financial assistance. This has also increasingly been the stance of international organisations like the World Bank and International Monetary Fund. Absent a timely resolution, individual states will also institute a freeze on all assets controlled by the coup participants, targeted sanctions and a travel ban on the responsible individuals and their families.

This largely characterises the regional and international responses to military coups in Niger (2009), Honduras (2010) and Mali (2012) all of which resulted in a return to constitutional rule within a year. These principles were less forcefully applied in Mauritania, where the military leader responsible for the coup competed for and won the subsequent election as a civilian. Neither were there strong regional or international positions taken in Asia during military coups in Bangladesh and Thailand, though these also eventually saw a return to civilian rule.

¹²³) Inter-American Democratic Charter (IADC); African Charter on Democracy, Elections, and Governance; Economic Community of West African States Protocol on Democracy and Good Governance; Millbrook Commonwealth Action Programme (CAP) on the Harare Declaration, 1995; OSCE Charter of Paris; OSCE Office of Democratic Institutions and Human Rights (ODIHR); European Convention on Human Rights; EU Copenhagen Criteria; Arab Charter on Human Rights; Community of Democracies Warsaw Declaration. *See also* T. Piccone, 'International Mechanisms for Protecting Democracy', in M. Halperin and M. Galic (eds.), *Protecting Democracy: International Responses* (Lexington Books, New York, 2005).

¹²⁴) IADC, *supra* note 123, Articles 1–2; African Charter, Article 4.

¹²⁵) IADC, *ibid.*, Articles 17–22; African Charter, Articles 14, 16, 23–26, 44; Millbrook CAP; The Treaty on European Union, Article 6; The European Union, Treaty of Nice (2001); the Inter-American Charter builds on OAS General Assembly Resolution on Representative Democracy, OAS AG/RES. 1080 (XXI-0/91) which calls for an immediate convocation of the OAS Permanent Council in the event of irregular interruptions of the democratic process or the legitimate exercise of power in any of the Organization's member states.

¹²⁶) Early invocations of OAS Resolution 1080 were made in response to the 1991 military coup of then-president, Jean-Bertrand Aristide of Haiti, Alberto Fujimori's suspension of Congress, the Supreme Court, and the Constitution in Peru in 1992, and similar measures taken by Jorge Serrano in Guatemala in May 1993.

Following the lead of the regional organisations, the United Nations has also taken an increasingly active stance against interruptions of constitutional government. Supporting the OAS, the UN General Assembly condemned the 1991 coup in Haiti, which it described as “the attempted illegal replacement of the constitutional president of Haiti”.¹²⁷ Determining the matter to constitute a threat to international peace and security, the UN Security Council subsequently took the unprecedented step of authorising collective action under Chapter VII of its Charter, involving a trade embargo¹²⁸ and ultimately a multinational force.¹²⁹ The UN Security Council also invoked Chapter VII in responding to the military coup in Sierra Leone against the democratically elected government of President Ahmed Kabbah in 1997.¹³⁰

In an important extension of this principle, the United Nations has also considered the obstruction of a democratically elected government to represent a threat to peace and security warranting a collective response. In Côte d’Ivoire, after incumbent President Laurent Gbagbo refused to cede power after losing an election in November 2010, the UN Security Council recognised the winner of the election, Alassane Ouattara, as president and approved the standing Chapter VII authorisation in Côte d’Ivoire to protect civilians affected by the post-election violence. In condemning the attacks, threats, and obstruction of the armed forces of Côte d’Ivoire, the resolution “stressed that those responsible for such crimes under international law must be held accountable”.¹³¹ Once Gbagbo was arrested by forces loyal to Ouattara, Gbagbo was turned over to the International Criminal Court where he faces individual criminal responsibility for crimes against humanity including murder, rape, other acts of sexual violence, persecution and other inhuman acts committed during the post-election conflict.¹³²

4.2.2. Triggering the Response Sequence in Cases of Creeping Coups

The evolution of more decisive international responses to coups provides a framework for responding to creeping coups. These unconstitutional extensions of power are just as destructive as military coups. They disenfranchise entire societies and weaken human rights protections to millions. When sustained, the lost

¹²⁷) UN General Assembly Resolution 46/7, UN Doc. A/RES/46/7 (11 October 1991).

¹²⁸) UN Security Council Resolution 841, UN Doc. S/RES/841 (16 June 1993).

¹²⁹) UN Security Council Resolution 940, UN Doc. S/RES/940 (13 July 1994).

¹³⁰) UN Security Council Resolution 1132, UN Doc. S/RES/1132 (8 October 1997).

¹³¹) UN Security Council Resolution 1975, UN Doc. S/RES/1975 (30 March 2011).

¹³²) Arrest Warrant of 23 November 2011 (*The Prosecutor v. Laurent Gbagbo*) ICC-02/11-01/11; Côte d’Ivoire is not party to the Rome Statute but it had accepted jurisdiction of the ICC in 2003, which it reconfirmed in December 2010 and May 2011. *New Suspect in the ICC’s Custody: Laurent Gbagbo Arrived at the Detention Centre*, 30 November 2011, International Criminal Court Press Release, <www.icc-cpi.int/NR/exeres/4814FA54-AF2D-4EA3-8A89-9E809318D1D8.htm>, accessed 29 May 2012.

human potential at both the individual and collective level is enormous, though often unrecognised. As internal conflicts and humanitarian crises tend to spill across borders, all neighbouring states also have a stake in the legitimacy and legality of a government in place. International actors, in turn, end up committing a disproportionate share of their diplomatic energies and financial assistance budgets to these troubled states.

The need to develop an effective response to creeping coups, therefore, is strong. The same sequence of actions that have emerged in the evolution of responses to military coups – country visits, condemning the deterioration of constitutional governance, calling emergency meetings of the relevant regional and international bodies, undertaking attempts to restore constitutional order, and sanctioning leaders who persist in holding power illegally – are appropriate in the context of a creeping coup.

There are two distinctive features of creeping coups that make them particularly vexing challenges around which to mount an effective collective response, however. The first is their incrementalism. Coups tend to happen relatively suddenly and leaders are replaced overnight. The event is thus easily recognisable. Creeping coups, on the other hand, happen gradually, with the withering of democratic institutions over time. Determining just when a state has lapsed from being a democracy or reverted to autocracy is open to interpretation, at least initially. The other distinctive feature is that, unlike in regular coups, the leaders in question command a degree of legitimacy. They may have come to power in a legal, transparent and popularly supported manner – and therefore have earned the respectability of both domestic and international audiences. However, as previously established, democracy is a process of governance and not an event. Leaders can be democratically elected though not govern democratically. Making that distinction is essential in order to respond to creeping coups. The added legal and collective action challenge of creeping coups, then, is in their identification.

Establishing an effective mechanism for responding to creeping coups requires an institutional trigger that can collectively mobilise international actors into the established coup response sequence. Creating such a trigger is important lest the vagaries of a slowly deteriorating process and inchoate international response allow the reversion to autocracy to occur in silence. Indeed, this is largely what occurred when even as Vladimir Putin was dismantling independent media in a piecemeal fashion in the early 2000s there was disagreement in the international community whether this was a systematic manoeuvre or simply a means of bringing unregulated media outlets into line.¹³³ To create an institutional trigger will require establishing or expanding democracy monitoring mechanisms within

¹³³ 'Ten Years Ago, Russia's Independent NTV, The Talk of the Nation, Fell Silent', 30 May 2012, Radio Free Europe/Radio Liberty, <www.rferl.org/content/russia_independent_ntv_fell_silent/3557594.html>, accessed 30 May 2012.

international bodies with a democracy mandate. The logical primary entities to do this would be the regional inter-governmental bodies that have adopted democracy charters. Creating a mechanism for democratic deterioration would involve building on the established structures within these organisations¹³⁴ to systematically assess the integrity of democratic institutions of all states within the region and detect signs of sustained¹³⁵ deterioration.

The democracy assessments would need to be based on explicit criteria reflective of the robust features of democratic systems of governance. As an illustration and possible starting point, in its 2001 Democratic Charter, the OAS identified the following essential elements of representative democracy: “respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of sovereignty of the people, the pluralistic system of political parties and organisations, and the separation of powers and independence of the branches of government”.¹³⁶ To be seen as independent and credible, the assessments would need to be led by technical experts informed via multiple sources of analysis. In order to serve their purpose of documenting changes in the integrity of democratic institutions over time, these assessments would need to be undertaken on a regular basis (*e.g.* quarterly). Moreover, as discussed earlier, the targeting of independent media is often an early indicator of this deterioration and thus is something of a canary in a coal mine for democratic erosion. To maximise the potential deterrent effects, these results would need to be publicly disseminated. This will make widely known when and where deterioration is unfolding. The disclosures will also proactively stimulate dialogue between a state seen as deteriorating and their regional counterparts.

To capture the dynamic nature of democratic deterioration, this monitoring process will likely find it advantageous to establish categories of democratic institutional integrity. Akin to the bond credit rating process of governments (AAA, AA, BBB, junk bond status, *etc.*) these categories would better enable assessing the state of deterioration. Like the credit ratings, these scores would also widely

¹³⁴) The EU’s ODIHR, for example, monitors the conditions in its 55 member states. The AU and its regional economic communities likewise have peace and security monitoring mechanisms that include political components.

¹³⁵) The specification of sustained patterns of deterioration is essential to distinguish a systematic institutional weakening from isolated episodes or questionable policies that would not merit this categorisation. See E. Brimmer, ‘Vigilance’, in Halperin and Galic, *supra* note 123, pp. 248–249.

¹³⁶) IADC, *supra* note 123, Article 3; this builds on its 1959 Santiago Declaration, in which the OAS identified eight principles and attributes of a democratic system for reference in determining whether political regimes were democratic. Santiago Declaration, Fifth Meeting of Consultations of Ministers of Foreign Affairs, Santiago, Chile, 12–18 August 1959, Final Act, OAS Off. Rec. OEA/Ser. C//II.5.

convey to the broader community of partners (investors) the institutional risk involved in engagements with the rated state. These ratings would also provide explicit trigger mechanisms at which international actions can be mobilised prior to the full reversion to autocracy – overcoming a key challenge currently faced in responding to creeping coups. For example, the assessment process may establish categories of states that demonstrate “strong democratic institutional integrity”, “marginal institutional integrity”, “mixed governance institutions” and “mostly autocratic” qualities. States that deteriorate from the “strong” to “marginal” category would be put on notice, precipitating an executive level visit from the respective regional organisation conveying concern and an expectation that the monitored country would provide a report of remedial actions they are taking within a specified time (*e.g.* three to six months). The objective of early remedial action would be to try and prevent the full slide into autocracy rather than waiting to reverse this result once it had already occurred. Moreover, under conditions of deterioration protections for human rights are also at risk.¹³⁷ States that continued to decline from “marginal” to “mixed” would no longer be considered democracies and would be suspended from participating in regional organisation activities. International assistance could also be suspended at this juncture. This is warranted since a deteriorating democracy is likely unable to provide the transparency and accountability necessary to ensure these resources are properly managed.¹³⁸ Given that exclusive leadership often engages in high-level corruption both to sustain their patronage networks and for self-enrichment, international actors may also initiate coordinated corruption investigations to identify ill-gotten gains that demonstrate further criminal wrong-doing. Many of these illicit transactions involve transnational financial institutions that fall under the regulatory jurisdiction of international actors.¹³⁹

States that transitioned into the “mostly autocratic” grouping would be considered to have undergone an unconstitutional change in government that would trigger the full measure of regional and international responses as would a military coup. Condemnations, sanctions, asset freezes and travel bans would

¹³⁷) Brimmer, *supra* note 135, p. 235.

¹³⁸) This would be consistent with emerging donor responses to systemic corruption or human rights violations. After Malawian security forces fired on protesters in July 2011, killing 18, the US Millennium Challenge Corporation suspended aid, stating its expectation “that countries maintain a demonstrated commitment to political pluralism, human rights, and the rule of law”. M. Cohen, ‘Malawi Aid Suspension Following Protest May Curb Economic Growth, Investment’, *Bloomberg News*, 27 July 2011.

¹³⁹) While not invoked in the explicit defence of democracy, international precedents in this area are steadily evolving including agreements reached with European banks to reveal ill-gotten Nazi assets; the World Bank’s Stolen Asset Recovery Program (StAR) that seeks to work with injured actors and international financial institutions to identify and recover illegal diversions; the US drug kingpin designation that identifies individuals alleged to be key actors in the illicit narcotic trafficking trade and mobilize international cooperation to freeze these individual’s assets.

be collectively applied by all regional members and their international partners who would then focus on re-establishing constitutional order with the current or an interim leadership. To the extent that human rights violations and violence against the population constituting crimes against humanity had occurred, the leadership could be referred to the International Criminal Court. If national or international laws specifying that the undermining of democratic institutions constitutes a “crime against democracy” (see below), then the individual responsible leaders should be prosecuted on these grounds as well.

International organisations focused on democratic development such as the Community of Democracies, the Commonwealth and the United Nations Democracy Fund may also conduct parallel assessments to keep their members informed. These bodies would then work in collaboration with the regional organisations to coordinate any remedial actions that were required. If the regional body were unable or unwilling to recognise the degree of democratic deterioration or initiate a response when such deterioration occurred, then the international organisations would be obliged to take the lead in mobilising such a response.

To give further teeth to the international legal framework proscribing unconstitutional seizures of power, additional measures against the leaders of coups and creeping coups can be considered. The first is to withdraw recognition of these leaders as the legitimate head of state for their countries. The justification for this is that they are no longer serving in this capacity on a legal basis as the representatives of a people who can exercise their self-determination. The UN Credentials Committee, for example, has periodically refused to recommend accreditation of representatives presented to the UN.¹⁴⁰ An implication of regional or international monitoring organisations’ determination that a state is no longer a democracy could be that a state’s accreditation standing would be put up for review by the Credentials Committee. Precedents for withdrawing such recognition provide a guide for how this action would work in the case of a creeping coup. The brutal use of force by the governments of Muammar Qaddafi in Libya and Bashar al-Asaad in Syrian against popular uprisings in 2011 and 2012 so affronted international sensibilities that states from around the world revoked their recognition of these regimes and their designated ambassadorial representatives.¹⁴¹ In the case of Libya, this recognition was transferred to the main opposition group, the National Transition Council. In Côte d’Ivoire, after the incumbent, Laurent Gbagbo, failed to leave power after losing an election regional and international actors deemed to be fair, the United Nations and much of the international

¹⁴⁰ C. Sampford and M. Palmer, ‘The Theory of Collective Response’, in Halperin and Galic, *supra* note 123, pp. 24–27.

¹⁴¹ ‘International Recognition of Libya’s Rebel Movement’, *Reuters*, 22 August 2011; ‘Tunisia to Withdraw Recognition of Syria Government’, *Reuters*, 4 February 2012.

community transferred recognition as the legitimate head of state to the electoral victor, Alassane Ouattara.¹⁴² This occurred in the midst of a rapidly escalating post-election standoff when Gbagbo still controlled the state security forces. The recognition, thus, served to further marginalise Gbagbo and his claims of continued legitimate authority.

A second related measure is that international actors and financial institutions can deny sovereign lending authority to regimes that have lost recognition. They would, therefore, no longer be able to access credit in the name of the state, for which citizens would be obligated to repay.¹⁴³ This instrument was applied in the case of Côte d'Ivoire, thereby cutting the regime off from lines of credit that it could use to perpetuate its hold on power and control of the security sector.¹⁴⁴ Without access to these assets, Gbagbo had to resort to increasingly more desperate measures to fund his regime (including the nationalisation of the country's banks and cocoa sector), though with limited success. Such measures have not been commonly employed in the past out of a conventional view of sovereignty based on the control of territory. However, as sovereignty is increasingly recognised as being endowed from citizens, then the withdrawal of sovereign borrowing authority is a logical action once the determination has been made that the leadership is no longer the legitimate, constitutionally-based authority. Any subsequent loans made to that leadership, therefore, would not be the liability of citizens or an eventual democratic government, elevating the risk of premium faced by international financial institutions that continue to lend to such discredited regimes.¹⁴⁵

4.2.3. Crime against Democracy

Simultaneous to strengthening the monitoring and response mechanisms to creeping coups, proponents of democracy rights should also consider deepening the global legal foundation for making the unconstitutional interruption of democratic governance a prosecutable crime under international human rights law. The establishment of individual criminal responsibility under international law would help solidify the legal remedies available when citizens' right to democracy has been blocked or interrupted. While such rights are clearly enunciated in the United Nations Charter, the Universal Declaration of Human Rights, and all other major global human rights conventions,¹⁴⁶ participation in the overthrow of a democratically elected government is not currently identified as a crime.¹⁴⁷

¹⁴² United Nations Security Council Resolution 1962, UN Doc. SC/10132 (20 December 2010);

¹⁴³ Sampford and Palmer, *supra* note 140, pp. 25, 47.

¹⁴⁴ 'Government in Ivory Coast Seizes Banks', *The New York Times*, 17 February 2011.

¹⁴⁵ Sampford and Palmer, *supra* note 140, p. 47.

¹⁴⁶ *Supra* notes 3, 64, 123.

¹⁴⁷ B. Tittmore, 'Prohibiting Serious Threats to Democratic Governance as an International "Crime Against Democracy"', background paper prepared for the International Task Force on Threats to Democracy sponsored by the Council on Foreign Relations, May 2002, p. 13.

Doing so would signify states' shared condemnation of these violations at the international level making those responsible for interrupting democracy liable for prosecution not only in the state against which the threat was perpetrated but in any other state that is a party to an international instrument recognising such a crime.¹⁴⁸ Establishing accountability for crimes against democracy would complement a defendant's corresponding responsibility for war crimes, crimes against humanity, and other established crimes under international law that frequently accompany unconstitutional interruptions in democracy.¹⁴⁹

The breadth of individuals who are injured by the interruption of democratic processes and the rule of law is extensive: through disenfranchisement, loss of civil liberties, violation of the constitution, political instability, risks to regional security, and use of force against those who protest. The recognition that international human rights cannot be guaranteed within a state absent a democratic system of government, moreover, has been considered to warrant international deterrence.¹⁵⁰ In addition, there is a growing recognition of the links between democratic governance and peace within and between states, a link acknowledged in international human rights conventions, international and regional organisations, and the decisions of international human rights tribunals. All of these developments have further substantiated the acceptability of threats to democracy as an international crime.¹⁵¹

There are two principal mechanisms by which crimes against democracy might be prescribed under international law: the development of a multilateral treaty on crimes against democracy and the inclusion of a crime against democracy within the subject matter jurisdiction of the International Criminal Court.¹⁵² A multilateral treaty, convened by a state or intergovernmental organisation, and designed to have a large number of parties to which participating states propose and negotiate a treaty text would appear to be the most expedient mechanism for establishing a treaty on crimes against democracy.¹⁵³ Such a treaty would aim to establish that state parties would ensure that all acts proscribed under the treaty are

¹⁴⁸ *Ibid.*

¹⁴⁹ The crime against democracy is defined as the threat or use of force to remove or replace a democratic government or to prevent the installation of a democratically elected government. *Ibid.*, p. 4; see also M. H. Halperin and K. Lomansey, 'Protecting Democracy Abroad: Bringing Despots to Justice', 22 *The Washington Quarterly* (1999); M. Halperin, 'Democracy and Human Rights: An Argument for Convergence', in S. Power and G. Allison (eds.), *Realizing Human Rights: Moving from Inspiration to Impact* (Palgrave Macmillan, New York, 2000) pp. 249, 259; T. Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* (1992) p. 46; G. Fox, 'The Right to Political Participation in International Law', 17 *Yale International Law Journal* (1992) p. 539.

¹⁵⁰ Tittmore, *supra* note 147, pp. 20–21.

¹⁵¹ *Ibid.*, pp. 19–20.

¹⁵² *Ibid.*, p. 61. For a draft convention on Crimes Against Democracy, please see Halperin and Galic, *supra* note 123, Appendix B, pp. 327–333.

¹⁵³ *Ibid.*, p. 64.

punishable under their criminal law and to take measures necessary to establish jurisdiction over individuals alleged to have committed offences under the treaty.¹⁵⁴ This would generally entail either prosecuting or extraditing the individual for prosecution before another appropriate court.¹⁵⁵ Such a court might include the respective regional court or International Criminal Court. Given that enforcement of the treaty might be hindered if the perpetrators remain within the jurisdiction of the affected state, non-prosecutorial penalties, such as freezing personal assets of the defendants and their supporters and issuing travel bans, could be imposed.¹⁵⁶

Prosecuting individuals suspected of having committed a crime against democracy under the ICC is a second possible approach that could be pursued concurrently to a multilateral treaty. The focus in this case would be to supplement Article 5 of the Rome Statute to include a definition of crimes against democracy. Currently the Rome Statute is limited to four serious crimes of concern to the international community as a whole: genocide, crimes against humanity, war crimes and the crime of aggression.¹⁵⁷ While the treaty negotiators favoured limiting the Court's jurisdiction to core crimes to promote the broadest acceptance of the Court and to enhance its credibility and moral authority,¹⁵⁸ there are provisions for making amendments to the Statute.¹⁵⁹ The process for an amendment would involve an "Assembly of States Parties", a standing body comprising representatives of each state party together with states with observer status that have signed the statute or final act. Amendments would require the concurrence of two-thirds of the parties to the treaty and only binds those states that specifically accept the amendment.¹⁶⁰

While both approaches would be time consuming and would require states willing to champion these initiatives in order to gain momentum, establishing such mechanisms would help fill a significant gap in international law currently. Even the process of creating this legal framework, however, given the growing potency of the International Criminal Court, could be expected to have a meaningful deterrent effect on leaders contemplating extending their powers or time in

¹⁵⁴) Such an initiative would provide an impetus for all democratic and democratising states to review their national legal framework to ensure that subverting democratic institutions constituted a prosecutable criminal act by regional or international courts if the constitution in the affected country were suspended or judiciary otherwise compromised.

¹⁵⁵) Tittmore, *supra* note 147, pp. 71–72.

¹⁵⁶) *Ibid.*, p. 74.

¹⁵⁷) Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9 (1998), corrected by the *procès-verbaux* of 10 November 1998 and 12 July 1999, entered into force 1 July 2002.

¹⁵⁸) Report of the Ad Hoc Committee on the Establishment of the International Criminal Court, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), para. 54.

¹⁵⁹) Rome Statute, *supra* note 157, Articles 121–123.

¹⁶⁰) *Ibid.*, Articles 121(3) and 121(5).

office extra-constitutionally. It would thus draw needed attention and focus on the challenge of creeping coups while elevating democratic norms.

5. Conclusion

The human rights, economic and social costs caused by the dismantling of democratic institutions is both severe and extensive, affecting all citizens in that society as well as stability in neighbouring countries and the broader international community. Paralleling the global shift toward democracy, there is a growing recognition of the incongruency between the protections provided under human rights conventions and the *defacto* protections on the ground.

The popular protests to end long established political monopolies in North Africa and the Middle East that began in 2011 reflect the on-going and universal aspirations for democracy around the world. Experience has shown, however, that the democratisation process is fraught with challenges and pushback. Democratic backsliding is often part of that process – and reversions to autocracy are possible. As with childhood development, democracies are most vulnerable in their first five years of life. They face rear-guard efforts to subvert the process from those with much to lose from a more inclusive political process. Until new democratic institutions and values are embedded in a society, democratic transitions are vulnerable to being hijacked by leaders or ideologies serving their own agendas. The end of autocratic rule, therefore, does not automatically mean universal political participation, respect for civil liberties, and the protection of human rights.

For those democratic transitions that survive past childhood, further trials await in adolescence. This time the threats are most likely to come from within the democratisation movement. Democratic leaders may be seduced by the power, privileges and riches they have at their disposal. They may thus be tempted to undermine nascent checks and balances so as to extend their term in office, tilt the electoral playing field in their favour, deepen patronage networks, suppress dissent and target political opponents.

International actors have a vital role to play in helping democratic transitions stay on track. This involves a combination of diplomatic engagement and sharpening international legal remedies to subversions of democracy. Engagement in the early period of democratic transitions is critical to maintain space for dialogue and information sharing. It is with this space that journalists and human rights defenders can foster awareness and attention on issues of importance to citizens. Ensuring space for these civil society actors, therefore, is indispensable to all other civil liberties and for democratic self-correction to take effect.

Given the unique role of journalists and human rights defenders as the eyes and ears of a society and the international community, violence targeted at these

actors is particularly egregious. If national authorities are unable or unwilling to investigate and prosecute the perpetrators of these crimes, such cases must be taken up by international courts. With rising democratic standards and the growing resonance of regional democratic charters and human rights conventions, the world's regional courts such as the Inter-American Court of Human Rights are increasingly central to overcoming this impunity.

Democratic deterioration through creeping coups is another serious threat to the democratisation process with equally damaging outcomes for civil liberties, human potential and peace and security. It is also problematic in that the political actors involved in subverting democratic institutions often have a degree of legitimacy, having gained power through democratic means. The piecemeal fashion in which democratic institutions are weakened, furthermore, makes the identification of the point of democratic reversal much more difficult than is the case in the event of a conventional coup.

Responding to creeping coups will require the creation of institutional triggers that will alert regional and international actors in a reliable and collective manner when significant and sustained democratic erosions have occurred. Once the determination has been made that a state is no longer democratically governed, neighbouring countries, regional bodies and international actors must mobilise as they would to a conventional coup. Given the pseudo-democratic nature of a growing number of autocratic systems, sophisticated monitoring and standards are required.

National and international actors can make the evolving normative framework of human rights conventions and democracy charters more meaningful by explicitly identifying the subversion of legitimate democratic government as a prosecutable crime. This will legally recognise what is commonly understood, while establishing broader jurisdictional coverage at the national, regional and international levels to prosecute violators of this public good.

Drawing inspiration from the example of Raoul Wallenberg, the international community should not accept the unacceptable, even if it remains common practice. Rather it must act creatively to protect democratic rights in what are often fluid contexts in a dynamic legal environment.