Reinforcing Participatory Governance Through International Human Rights Obligations of Political Parties

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Contemporary human rights law has seen direct international obligations extended to armed groups and businesses. This Article argues that international human rights obligations are crystallizing with respect to a further category of nonstate actor, political parties, albeit only in relation to political participation rights. After briefly examining the largely procedural nature and scope of those rights under international law, this Article surveys existing international and transnational sources of obligations of political parties, including both those in power and in opposition. In an effort to buttress these sources and encourage their proliferation, this Article then considers rationales for such obligations, building in part upon the rationales for human rights obligations of businesses and armed groups. Finally, the Article offers some thoughts on possible means of implementing political parties' emerging international obligations in respect of political participation rights.

Introduction

States have traditionally stood alone as subjects of international law. Modern practice and scholarship have extended international legal personality or status, in varying degrees, to international organizations, individuals, armed groups, and businesses.[1] Political parties have not figured in this expansionary process, yet they are natural bearers of direct international obligations corresponding to political participation rights—essentially, the rights to vote and to stand in free, periodic elections—as enshrined in all major international human rights instruments, and as discussed further in

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1. Antonio Cassese, International Law 71 (2d ed. 2005); David Weissbrodt, *Business and Human Rights*, 74 U. Cin. L. Rev. 55, 60 (2005).

Part I.[2] Though largely overlooked by scholarship,[3] such obligations are arguably already crystallizing with respect to political parties.

Political parties are defined generically by the Council of Europe as associations "presenting candidates for elections in order to be represented in political institutions and to exercise political power."[4] More concretely, political parties can be identified by reference to the law of the countries in which they operate. Since the late 1990s, the overwhelming majority of states have been multiparty democracies[5] and have regulated, to a greater or lesser extent, the establishment and operation of political parties.

Because this Article asserts a strict correspondence between human rights obligations of political parties and political participation rights, Part I examines in some detail the essentially procedural nature and scope of those rights under international law. Challenging the orthodox view that only states bear human rights obligations, Part II canvasses existing international and transnational sources that exhort or obligate political parties to respect participation rights. It is on the collective basis of hard and soft law sources—treaties, judgments, and resolutions of the kind invoked in the human rights literature on businesses and armed groups, supplemented by novel material sources such as election observation reports and the charters of transnational political party networks—that international obligations of political parties are crystallizing. Part III considers the unique nature and function of political parties as a basis for attributing international human rights obligations to them, taking as a reference point the literature asserting human rights obligations of businesses and armed groups. Part III addresses separately political parties in general and political parties in power, touching as it does upon fundamental questions about the lines between state and nonstate and between law and politics.

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2. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 21(1), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights]; International Covenant on Civil and Political Rights arts. 25(a), 25(c), Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR]; Org. of Am. States, American Convention on Human Rights art. 23(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights]; Org. of Afr. Unity, African (Banjul) Charter on Human and Peoples' Rights art. 13, June 27, 1987, OAU Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58 [hereinafter African Charter on Human and Peoples' Rights]; League of Arab States, Arab Charter on Human Rights art. 24, Sept. 15, 1994, *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (1997) [hereinafter Arab Charter on Human Rights]; Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Mar. 20, 1952, E.T.S. No. 9, 214 U.N.T.S. 262.

3. *But see* Tim Wood, *Extending International Human Rights Obligations to Political Parties*, 2(3) Cambridge J. Int'l & Comp. L. 431 (2013) (offering a brief, preliminary examination of this topic).

4. Eur. Comm'n for Democracy Through Law (Venice Comm'n), *Code of Good Practice in the Field of Political Parties and Explanatory Report*, ¶ 11, Study no. 414/2006, CDL-AD(2009)021 (Mar. 14, 2009) [hereinafter Venice Comm'n Code]; *see also* Org. for Sec. and Cooperation in Eur. [OSCE] & The Venice Comm'n, Guidelines on Political Party Regulation ¶ 9 (2011) [hereinafter OSCE Guidelines on Political Party Regulation]; U.N. General Assembly, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, ¶ 9, U.N. Doc. A/68/299 (Aug. 7, 2013) (by Maina Kiai) [hereinafter Kiai, *Rights to Freedom of Peaceful Assembly and of Association*].

5. Thomas M. Franck, *Legitimacy and the Democratic Entitlement*, *in* Democratic Governance and International Law 25, 27–28 (Gregory H. Fox & Brad R. Roth eds., 2000).

Finally, by way of conclusion, this Article explores possible mechanisms for promoting compliance with the obligations it outlines. On the model of existing legal literature on nonstate actors, however, and in the spirit of progressive development, this Article's primary purpose is to highlight and offer a foundation for the assertion that international human rights duties are emerging with respect to political parties. Detailed implementation of these emerging duties is a matter for a future article.

I. The Nature and Significance of Internationally Enshrined Participation Rights

The status of states as international legal subjects is unambiguous. So too is their obligation to respect and protect all internationally enshrined human rights, including that of political participation, which bind them as a matter of custom or treaty.[6] Far more ambiguity surrounds nonstate actors, whose international legal status has been posited relatively recently and whose international human rights obligations, if any, are contested.[7]

Rather than settling the abstract question of whether nonstate actors as a class are full subjects of international law, legal literature has stressed the importance of identifying which specific human rights obligations might bind a given nonstate actor.[8] In this vein, while serving as Special Representative of the United Nations ("UN") Secretary-General, John Ruggie asserted that the duties of businesses correspond to "virtually the entire spectrum of internationally recognized human rights."[9]

Where political parties are concerned, this Article makes the less ambitious claim that their human rights obligations correspond solely to the internationally enshrined right of political participation. Put differently, the argument here is that political parties have a single international obligation: not to engage in what might broadly be called anti-participatory conduct. Thus, before turning to obligations, this Article begins by considering the underlying right to political participation.

A. Participation Rights' History

A right to participate in politics was arguably the first human right to be guaranteed internationally—that is, over and above statutes or constitutions of individual states. This is no mere trivia if, as Thomas Franck has

6. *See, e.g.*, John Knox, *Horizontal Human Rights Law*, 102 Am. J. Int'l L. 1, 1 (2008).

7. *See, e.g.*, *id.* at 1–3.

8. *See, e.g.*, Jose E. Alvarez, *Are Corporations "Subjects" of International Law?*, 9 Santa Clara J. Int'l L. 1, 31 (2011).

9. U.N. Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Annex 12, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter Ruggie, *Guiding Principles on Business and Human Rights*].

written, the weight accorded to an international norm increases in proportion to its "pedigree."[10] At the Vienna Congress of 1815, the victorious Great Powers revoked from France those territories conquered by Napoleon and, through a series of treaties, annexed them to France's neighbours.[11] Protestants and Catholics who had previously inhabited separate states were brought together, with international provision made for their peaceful coexistence. Formerly French Catholics who found themselves folded into Protestant Swiss cantons, for example, were guaranteed by treaty the ability to compete "for seats as representatives" in the cantonal assembly "without difference of religion."[12] A century later, following World War I, the triumphant Entente Powers handed what had been Austro-Hungarian territory to Italy, on condition that "[d]ifferences of religion, creed or confession shall not prejudice any Austrian national in . . . admission to public employments" and "functions."[13] This timeline is striking. Through the end of World War II, in accordance with absolute sovereignty, states were generally free to treat their citizens as they saw fit. International law was said to govern relations among states, not within them, and it fell to states to entrench human rights domestically, if at all.[14] It was only in 1948 that the Universal Declaration of Human Rights ("Universal Declaration") broke decisively with this international deference by extending a series of fundamental rights directly to individuals.[15] Among these was the right "to take part in the government of [one's] country," directly or through representatives "freely chosen" in "periodic and genuine elections."[16] What had begun at the Vienna Congress as an internationally enshrined right to direct political participation—a right to stand for election and to serve in office—now metamorphosed, in the face of a "structurally transformed" public sphere,[17] into a complex right encompassing other forms of participation.

Solemn though it is, the Universal Declaration remains a mere resolution of the UN General Assembly, setting out "standard[s] of achievement"

10. Thomas M. Franck, The Power of Legitimacy Among Nations 94 (1990).

11. *See, e.g.*, Acte final du Congrès de Vienne, art. 65 (annexing Belgium to the Netherlands), art. 76 (annexing Bienne and Bale to Switzerland) (June 9, 1815), *available at* http://mjp.univ-perp.fr/traites/1815vienne.htm, *archived at* http://perma.cc/5QAD-EVLZ.

12. *Id.* art. 77; *see also id.* art. 118 (incorporating Le Traité entre le Roi des Pays-Bas et la Prusse, l'Angleterre, l'Autriche et la Russie du 31 mai 1815); *id.* Annex, art. II, *reprinted in* British and Foreign State Papers 784 (H.M. Stationery Office 1833) (guaranteeing with respect to Belgians folded into the Netherlands, "l'admission de tous les Citoyens, quelque soit leur croyance religieuse, aux emplois et offices publics"). *But see* Gregory Fox, *The Right to Political Participation in International Law*, 17 Yale J. Int'l. L. 539, 546 (1992) (tracing "the late emergence of participatory rights in international law" to 1948 and after).

13. Treaty of Saint Germain-en-Laye art. 66(2), Sept. 10, 1919, 49 Stat. 3027, 8 L.N.T.S. 27.

14. Walter Kälin & Jörg Künzli, The Law of International Human Rights Protection 6 (2009).

15. *Id.* at 14.

16. Universal Declaration of Human Rights, *supra* note 2, art. 21(1).

17. Jürgen. Habermas, The Structural Transformation of the Public Sphere 227–28 (1989); *see also* Samuel Huntington, Political Order in Changing Societies 418 (1968).

rather than legal rules.[18] It is not a treaty, signed and ratified by states, and therefore not a strictly binding instrument, although its provisions—including on political participation—are said by some to have crystallized over time into customary international law.[19] So it was without redundancy that participation rights were enshrined again, in 1966, in the International Covenant on Civil and Political Rights ("ICCPR"), a treaty binding over 160 states.[20] Echoing the Universal Declaration, the ICCPR articulates a general legal right "[t]o take part in the conduct of public affairs, directly or through freely chosen representatives," as well as a specific right "[t]o vote and to be elected at genuine periodic elections" ensuring "free expression" of the voters' will.[21]

Regional human rights instruments from the American Convention on Human Rights to the Arab Charter on Human Rights have mirrored this bifurcated conception of political participation rights—as general and specific, substantive and procedural.[22] The African Charter on Human and Peoples' Rights enshrines a general right to participate directly or indirectly without a specific right to vote,[23] while, exceptionally, the European Convention on Human Rights ("ECHR") expresses a specific right to vote

18. Universal Declaration of Human Rights, *supra* note 2, art. 21(1); *see also* Nigel Rodley, *Can Armed Groups Violate Human Rights?*, *in* Human Rights in the Twenty-First Century: A Global Challenge 297, 306 (Kathleen E. Mahoney & Paul Mahoney eds., 1993).

19. *See* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 Am. J. Int'l. L. 46, 61 (1992); Eibe Riedel, *Standards as Sources: Farewell to the Sources Triad in International Law?*, 2 Eur. J. Int'l. L. 58, 69 (1991). With regard to the possible customary status of participation rights specifically, see also Jean d'Aspremont, *The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks*, 22 Eur. J. Int'l. L. 550, 554 (2011) (noting that "to a large degree, states consider the adoption of the main characteristics of a democratic regime to amount to an international obligation and act accordingly toward non-democratic states"), 556 ("[N]on-democratic states . . . try to portray their political regimes in a democratic fashion.").

20. Jean d'Aspremont, *Responsibility for Coups d'Etat in International Law*, 18 Tulsa J. Int'l. & Comp. L. 451, 467 (2010).

21. ICCPR, *supra* note 2, art. 25 ("Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors . . . ."). Given its focus on political parties, this Article will not address the further aspect of equal access to public service employment, as set out in Articles 21(2) of the Universal Declaration of Human Rights and 25(c) of the ICCPR.

22. American Convention on Human Rights, *supra* note 2, art. 23.1 ("Every citizen shall enjoy the following rights and opportunities: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters . . . ."); Arab Charter on Human Rights, *supra* note 2, art. 24 ("Every citizen has the right: (1) To freely pursue a political activity. (2) To take part in the conduct of public affairs, directly or through freely chosen representatives. (3) To stand for election or choose his representatives in free and impartial elections, in conditions of equality among all citizens that guarantee the free expression of his will.").

23. African Charter on Human and Peoples' Rights, *supra* note 2, art. 13(1) ("Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.").

without the more general participation clause.[24] In all instruments, political participation is protected in conjunction with an overarching prohibition on discrimination on grounds that include political opinion.[25]

B. Participation Rights' Content

The right to political participation is not a right to democracy. The omission of the word "democracy" from participation rights' various iterations has been much remarked upon.[26] Its omission reveals democratic governance to be a collective "value"[27] or "political ideal," in contrast to "the [individual] right to popular participation," which is "required by international law."[28] Political participation is just one part of democratic governance, alongside "the rule of law, the separation of powers, the independence of the judiciary," and others.[29] Some of these parts, including political participation, are internationally protected. But their aggregate, democracy as such, is not a human right on the international plane.[30]

Unique among so-called first-generation human rights, the right to political participation serves not so much to limit the exercise of state power over individuals as to limit individuals' "enforced exclusion" from the exercise of state power.[31] The bifurcated structure of participation rights reveals a two-pronged approach to preventing such exclusion. The general 'take part' clause demands ongoing, substantive participation in governmental participation, while the specific 'elections' clause establishes a procedural right to participation in regular elections and increasingly requires political pluralism.

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24. Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 2, art. 3 ("The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."). The right to vote under the Convention has been interpreted to include a corresponding right to stand for legislative election. *See, e.g.*, Gitonas and Others v. Greece, App. Nos. 18747/91, 19376/92 & 19379/92, 1997-IV Eur. Ct. H.R. 1233, ¶ 39.

25. ICCPR, *supra* note 2, art. 2(1); African Charter on Human and Peoples' Rights, *supra* note 2, art. 2; Arab Charter on Human Rights, *supra* note 2, art. 3(1); Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 4, 2000, E.T.S. No. 177.

26. *See e.g.*, Henry J. Steiner, *Political Participation as a Human Right*, 1 Harv. Hum. Rts. Y.B. 77, 87 (1988); Rafaa Ben Achour, *Le Droit International de la Démocratie*, *in* Cours Euro-Mediterraneens Bancaja de Droit International (Vol. IV) 325, 338 (2000); Allan Rosas, *Article 21*, *in* The Universal Declaration of Human Rights: A Commentary 299, 306 (Asbjorn Eide et al. eds., 1992).

27. G.A. Res. 60/1, ¶ 135, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

28. Guy Goodwin-Gill, Free and Fair Elections 73 (2006).

29. G.A. Res. 59/201, ¶ 1, U.N. Doc. A/RES/59/201 (Dec. 20, 2004); *see also* World Bank, World Development Report 2000/2001: Attacking Poverty 113 (Sept. 2000) (adding "independent media" to the elements of democracy).

30. Franck, *supra* note 5, at 25.

31. *See* Heiner Bielefeldt, *Philosophical and Historical Foundations of Human Rights*, *in* International Protection of Human Rights: A Textbook 3, 7 (Catarina Krause & Martin Scheinin eds., 2d ed. 2012); *see also* Habermas, *supra* note 17, at 277.

1. *The General 'Take Part' Clause*

First is the general clause, setting out, in the words of the ICCPR, a right "[t]o take part in the conduct of public affairs."[32] So indeterminate is this aspect of the right that Henry Steiner equates it with economic and social "programmatic right[s]" to employment, food, or housing; such rights amount to legal ideals to be implemented progressively, "in different ways in different contexts."[33] On this view, political participation is a "starting point" rather than a culmination,[34] and elections are just one "part of a broader process"[35] running "both backwards and forwards" from them.[36] Political participation in this general, substantive sense continuously supplements the work of elected representatives[37] rather than confining itself to their occasional election.[38] If in its origin the general clause of participation rights was a concession to people's democracies and other systems in which emphasis fell upon direct participation at the local level,[39] today a substantive conception of participation has gained ground even in liberal democracies, as through impact assessments in environmental matters.[40] Authors approvingly contrast substantive forms of political participation with the reductive, formalistic,[41] and even "staged"[42] nature of elections, and the UN Secretary-General has reminded governments that triumph in periodic polls is not "sufficient to produce good governance."[43]

2. *The Specific 'Elections' Clause*

Although voting or being elected in genuine elections is explicitly only one means of political participation,[44] it is principally "election rights" that have retained the attention of international law.[45] For James Crawford and Susan Marks, a "preoccupation with elections is a striking feature of inter-

32. ICCPR, *supra* note 2, art. 25(a).

33. Steiner, *supra* note 26, at 130.

34. Jonas Ebbesson, *The Notion of Public Participation in International Environmental Law*, 8 Y.B. OF INT'L. ENV. L. 51, 72 (1997).

35. U.N. Comm'n on Human Rights, Res. 2001/41, ¶ 4, U.N. Doc. E/CN.4/Res/2001/41 (Apr. 23, 2001).

36. GOODWIN-GILL, *supra* note 28, at 71.

37. Steiner, *supra* note 26, at 100; Ebbesson, *supra* note 34, at 64.

38. Steiner, *supra* note 26, at 100–01; James Crawford & Susan Marks, *The Global Democracy Deficit*, *in* REIMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY 72, 81 (Daniele Archibugi, David Held & Martin Köhler eds., 1998).

39. Steiner, *supra* note 26, at 126; Ebbesson, *supra* note 34, at 59, 70; Rosas, *supra* note 26, at 306.

40. Ebbesson, *supra* note 34, at 88.

41. Steiner, *supra* note 26, at 103, 112.

42. HABERMAS, *supra* note 17, at 215.

43. U.N. Secretary-General, *Strengthening the Role of the U.N. in Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections and the Promotion of Democratization*, ¶ 50, U.N. Doc. A/68/301 (Aug. 9, 2013); *see also* Steiner, *supra* note 26, at 102.

44. Steiner, *supra* note 26, at 87; Ebbesson, *supra* note 34, at 70.

45. GOODWIN-GILL, *supra* note 28, at 101; *see also* Jean d'Aspremont, *supra* note 19, at 557 (noting that "states are only customarily obliged to abide by democracy to the sole extent that their effective leaders . . . are chosen through free and fair elections.").

national legal discussions of democracy."[46] Those who assert a customary status for participation rights—citing the embrace of political participation, in principle if not in practice, even by undemocratic states—stress that the corresponding obligations are strictly "electoral and procedural."[47]

There are good reasons for international law to emphasize this specific, procedural manifestation of political participation. The first reason is positive, acknowledging that though elections may not be sufficient for meaningful political participation, much less for democracy, they are nonetheless a "necessary"[48] and even "essential"[49] component. This consensus, spanning regional human rights bodies from the Organization of American States ("OAS") to the Council of Europe and the African Union ("AU"),[50] rests in part upon a quantitative foundation. Elections provide for participation by the greatest number of people, in contrast to other, narrower forms of participation such as issue-specific lobbying.[51] Elections are the occasion, notes a UN Special Rapporteur, for participation by the "broader range" of civil society.[52]

The second reason is essentially negative, with electoral participation as shorthand—as proxy—for political participation more generally. Under this view, elections offer an "empirical test"[53] and the best measure of political participation "in practice."[54] They are without the "comparable difficulty" of assessing participation under the more "indeterminate 'take

46. Crawford & Marks, *supra* note 38, at 80; *see also* Ben Achour, *supra* note 26, at 351; U.N. Comm'n on Human Rights, Res. 2003/36, pmbl., U.N. Doc. E/CN.4/RES/2003/36 (Apr. 23, 2003).

47. d'Aspremont, *supra* note 20, at 465; *see also* d'Aspremont, *supra* note 45, at 554 (noting that "to a large degree, states consider the adoption of the main characteristics of a democratic regime to amount to an international obligation and act accordingly toward nondemocratic states"); *id.* at 557 (noting that "the obligation rests only on an electoral and procedural understanding of democracy"); Fox, *supra* note 12, at 543 (noting that "treaties establish a right to political participation amongst signatory states, and evidence an *emerging universal right to political participation not contingent upon treaty agreements*.") (emphasis added). *But see* Ben Achour, *supra* note 26, at 339; Eur. Comm'n & NEEDS, Compendium of International Standards for Elections, 26 (2d ed. 2007); Christian Tomuschat, Human Rights: Between Idealism and Realism 61 (2d ed. 2008) (all asserting that participation rights are among the provisions of the Universal Declaration that have not crystallized into customary law due to persistent objections).

48. Goodwin-Gill, *supra* note 28, at 88.

49. Gregory Fox, *The Right to Political Participation in International Law*, *in* Democratic Governance and International Law 48, 49 (Gregory Fox and Brad Roth eds., 2000); Ebbesson, *supra* note 34, at 70.

50. Org. Am. States, General Assembly, Inter-American Democratic Charter art. 3, Sept. 11, 2001, 40 I.L.M. 1289 [hereinafter Inter-American Democratic Charter]; Comm. on Legal Affairs and Human Rights, *Racist, Xenophobic and Intolerant Discourse in Politics*, § II(A)(2), Doc. 9904, Eur. Par. Ass. (Sept. 11, 2003); Afr. Union, Declaration on the Principles Governing Democratic Elections in Africa art. II(2), AHG/Decl.1 (XXXVIII) (July 8, 2002) [hereinafter Afr. Union, Declaration on the Principles Governing Democratic Elections in Africa].

51. Steiner, *supra* note 26, at 100–01; *see also* Habermas, *supra* note 17, at 232.

52. Kiai, *Rights to Freedom of Peaceful Assembly and of Association*, *supra* note 4, ¶ 10.

53. Fox, *supra* note 12, at 604–05.

54. Yves Beigbeder, International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy 27 (1994).

part' clause,"[55] even if the right to vote is understood somewhat differently in different systems.[56]

A third possible reason for the centrality of elections to participation rights is similarly negative, acknowledging the tension between international human rights law and state sovereignty, and the particular intrusiveness of an international standard for the "fundamental question of who holds sovereign authority within a state" (and of that authority's legitimacy).[57] Limiting the standard's application to periodic transfers of power arguably tempers the perceived interference with the innermost workings of state sovereignty.

3. *Electoral Participation and Political Party Pluralism*

The realization of participation rights depends largely upon certain key actors, and a recurring question in relation to political participation is whether the genuine periodic elections required by international law can be satisfied in one-party states.[58] From the perspective of liberal democracies, the answer has always seemed obvious: choice by way of "party pluralism" is essential for political participation.[59] But participation rights were given legal effect during the Cold War, when elections in socialist democracies were one tool among many to advance ostensibly collective goals.[60]

Such one-party states "sever[ed] political participation from democratic control," yet they did not consider themselves "to be in instant violation" of participation rights upon ratification of the ICCPR.[61] Neither, crucially, did other states. Some form of election was required, but this "distant objective" of international law allowed "considerable room for variation."[62] The International Court of Justice held that "[e]very state possesses a fundamental right to choose and implement its own political . . . systems,"[63] while the UN General Assembly regularly hailed "the richness and diversity . . . of free and fair electoral processes."[64]

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55. Steiner, *supra* note 26, at 106, 111.

56. Goodwin-Gill, *supra* note 28, at 75; *see also* Steiner, *supra* note 26, at 132.

57. Fox, *supra* note 12, at 544; *see also* d'Aspremont, *supra* note 45, at 551–52; Fox, *supra* note 49, at 50; Franck, *supra* note 19, at 50; S.C. Res. 841, U.N. Doc. S/RES/841 (June 16, 1993) (highlighting the link between participation and legitimacy in international responses to coups d'etat).

58. Steiner, *supra* note 26, at 84, 92.

59. Fox, *supra* note 49, at 55; *see also* Steiner, *supra* note 26, at 109–10.

60. Steiner, *supra* note 26, at 125, 132; Rosas, *supra* note 26, at 307; Fox, *supra* note 49, at 44, 48–49.

61. Steiner, *supra* note 26, at 93, 125.

62. Goodwin-Gill, *supra* note 28, at 117; *see also* Ben Achour, *supra* note 26, at 339; Rosas, *supra* note 26, at 306.

63. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 258 (June 27); *see also* Goodwin-Gill, *supra* note 28, at 114.

64. *See, e.g.*, G.A. Res. 60/164, U.N. Doc. A/RES/60/164 (Mar. 2, 2006).

As the fog of the Cold War has receded, however, the procedural content of participation rights has come into clearer view.[65] It is increasingly accepted that "genuine choice in an election requires multiple political parties," and that such choice goes to the heart of a free and fair electoral process.[66] With varying degrees of legal force, regional instruments of the Organization for Security and Cooperation in Europe ("OSCE"), the AU, and the Commonwealth of Independent States now direct member states to entrench political pluralism.[67] Regional human rights treaty bodies have played a role too, with the African Commission on Human and Peoples' Rights articulating a "right to multiparty democracy,"[68] and the European Court of Human Rights ("ECtHR") holding that "there can be no democracy without pluralism."[69] The General Assemblies of both the OAS and the UN have declared "a pluralistic system of political parties" to be among the "essential elements of democracy."[70]

This makes intuitive sense, as it is arguably only through multiparty competition that procedural participation rights further substantive ends. "[P]olitical parties [act] as catalysts for debate and dialogue," giving voters a chance to react to competing visions of society.[71] The value of pluralist elections as a kind of society-wide dispute-settlement mechanism has been recognized by international actors from the ECtHR to the World Bank.[72]

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65. *See, e.g.*, Ben Achour, *supra* note 26, at 347 (describing a shift from the equivalence of political regimes to the exclusive legitimacy of liberal democracy); Fox, *supra* note 49, at 86, 90.

66. Fox, *supra* note 49, at 89; *see also* Franck, *supra* note 5, at 27, 29.

67. Org. for Sec. & Cooperation in Eur., Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE art. I(3), June 29, 1990, *reprinted in* Eur. Comm'n, Compendium of International Standards for Elections 143 (2d ed. 2007) ("[Participating states] recognize the importance of pluralism with regard to political organizations."); Afr. Union, Charter on Democracy, Elections and Governance art. 3.22, Jan. 30, 2007, *reprinted in* Eur. Comm'n, Compendium of International Standards for Elections 70 (2d ed. 2007) ("State Parties shall implement this Charter in accordance with the following principles: . . . Strengthening political pluralism and recognising the role, rights and responsibilities of legally constituted political parties . . . ."); Commonwealth of Independent States, Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms art. 9(2), Oct. 7, 2002, *reprinted in* Eur. Comm'n, Compendium of International Standards for Elections 122 (2d ed. 2007) ("In genuine elections there is real political pluralism, ideological diversity and a multi-party system . . . .").

68. Afr. Comm'n on Human and Peoples' Rights, Resolution on Elections in Africa, Res. 133, ¶ 1, ACHPR/Res.133(XXXXIIII)08 (Nov. 24, 2008); *see also* Afr. Comm'n on Human and Peoples' Rights, Resolution on Electoral Processes and Participatory Governance in Africa, Res.184, ACHPR/RES.184(EXT.OS/IX)2011 (Mar. 1, 2011).

69. Refah Partisi (The Welfare Party) and Others v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98 & 41344/98, 2003-II Eur. Ct. H.R., ¶ 69 (2003); Socialist Party and Others v. Turkey, App. No. 21237/93, 1998-III Eur. Ct. H.R., ¶ 41 (1998); Freedom and Democracy Party v. Turkey, App. No. 23885/94, 1999-VIII Eur. Ct. H.R., ¶ 37 (1999).

70. Inter-American Democratic Charter, *supra* note 50, art. 3; G.A. Res. 59/201, ¶ 1, U.N. Doc. A/RES/59/201 (Dec. 20, 2004).

71. Kiai, *Rights to Freedom of Peaceful Assembly and of Association*, *supra* note 4, ¶ 37; *see also* Steiner, *supra* note 26, at 101 (describing a chance to "react" to "competing political parties").

72. Refah Partisi (The Welfare Party), 2003-II Eur. Ct. H.R., ¶ 97; World Bank, World Development Report 2000/2001: Attacking Poverty 113 (2001); *see also* U.N. Secretary-General, *Strengthening the Role of the U.N. in Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections and the Promotion of Democratization: Rep. of the Secretary-General*, ¶ 4, U.N. Doc. 58/212 (Aug. 4, 2003)

By holding rulers to account in a relatively peaceful way, multiparty elections lower the risk of violent challenges to authority within states[73] and enhance peace and security among them.[74] They correlate with economic development[75] and the protection of human rights more generally.[76]

A final observation on the nature of multiparty elections is in order. By their campaign rallies and advertising, such elections reveal the distinctive complex of rights implicit within political participation.[77] These rights, consisting of assembly, association, and expression, have collectively been baptized "campaign rights" when exercised in specifically political contexts.[78] Without undermining political participation's status as a "distinct right,"[79] these adjacent rights animate and are animated by its exercise.

C. *Participation Rights' Corresponding Duty-Bearers*

Rights imply corresponding obligations, so who bears the obligations corresponding to political participation rights? As the sole full subjects of international law, states are "principally" responsible for their realization.[80]

(noting that "competition of various political interests through effective institutions provides a nonviolent avenue for resolving differences").

73. *See* Franck, *supra* note 19, at 51; *see also* G.A. Res., 62/150, pmbl., U.N. Doc. A/RES/62/150 (Dec. 18, 2007).

74. Org. for Sec. & Cooperation in Eur., Copenhagen Document, *supra* note 67, pmbl.; Afr. Union, Declaration on the Principles Governing Democratic Elections in Africa, *supra* note 50, art. II(2); *see also* Franck, *supra* note 19, at 88; Org. for Sec. and Cooperation in Eur., Office for Democratic Inst's and Human Rights, Election Observation Handbook 19 (6th ed. 2010) [hereinafter OSCE Handbook].

75. World Bank, World Development Report 2000/2001: Attacking Poverty 113 (2001).

76. Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 Global Pol'y 127, 131 (2010) (noting that even Richard Posner, vociferous critic of the efficacy of international human rights law, "maintain[s] that unlike ratification of human rights treaties, 'democracy . . .' ha[s] been shown to enhance human rights protection;" though in so maintaining Posner "assumes that democracy . . . occur[s] entirely exogenously of" those treaties).

77. *See* Steiner, *supra* note 26, at 77 (noting that "the right of political participation forms part of a complex of related rights"); Kiai, *Rights to Freedom of Peaceful Assembly and of Association*, *supra* note 4, ¶ 12 (noting that "the rights to freedom of peaceful assembly and of association are implicit in the right to take part in the Government of one's country"); *see also* Eur. Comm'n, Handbook for EU Election Observation 5 (2d ed. 2008) [hereinafter Eur. Comm'n Handbook] ("The right to participate cannot be exercised in isolation; genuine and democratic elections can only take place where there is enjoyment by all persons, without discrimination, of their fundamental freedoms and political rights. These include the freedoms of expression, association, assembly and movement."); d'Aspremont, *supra* note 45, at 557 ("[T]he free and fair character of elections inevitably requires respect for some of the elementary political and civil rights . . . .").

78. *See* Goodwin-Gill, *supra* note 28, at 102; Habermas, *supra* note 17, at 228; *see also* U.N. Human Rights Comm., *General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (June 12, 1996) [hereinafter U.N. Human Rights Comm., *General Comment No. 25*]; OSCE Guidelines on Political Party Regulation, *supra* note 4, ¶ 6; Jawara v. The Gambia, Comm. Nos. 147/95 & 149/96, Afr. Comm'n on Human & Peoples' Rights, A.H.R.L.R. 107 (2000) ¶ 68 (May 11, 2000); Beigbeder, *supra* note 54, at 105.

79. Andres Aylwin Azocar et al. v. Chile, Case 11.863, Inter-Am. Comm'n H.R., Report No. 137/99, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 31 n.5 (1999).

80. Steiner, *supra* note 26, at 109.

Given the essentially procedural terms in which international law understands political participation, this means that states must establish an electoral system and provide, among other things, for constituency delimitation, electoral authorities, voter registration, and balloting.[81] The suffrage states enshrine must be universal for adults, the campaigning they allow must be free, and the balloting they oversee must be fair.[82] States wield more power than other organs of society over people within their jurisdiction,[83] so it is natural that states should bear these burdens.

However, as already noted, international law after World War II has increasingly looked beyond states and directly addressed itself to individuals. The Universal Declaration did so unquestionably in articulating individual rights; Andrew Clapham suggests that it did so also in respect of corresponding obligations, noting the Declaration's near-total omission of the word "state."[84] The Universal Declaration addresses itself to "every organ of society"[85] and affirms that "[e]veryone has duties to the community,"[86] suggesting that international human rights were conceived by the drafters not as "privileges granted by states" but as manifestations of inherent "individual dignity" to be respected by public and private actors alike.[87]

Iterations of participation rights, in particular, support this view. Article 21 of the Universal Declaration, for example, does not address itself to states as duty-bearers, but rather to "[e]veryone" as rights-holders.[88] Its counterpart in the ICCPR, Article 25, addresses "[e]very citizen" as holder of a right to political participation.[89] Further support comes by way of the Human Rights Committee, the UN treaty body responsible for monitoring states' implementation of the ICCPR.[90] Its General Comments are technically recommendations rather than rules, but they carry real weight nonetheless.[91] On ICCPR Article 25, the Human Rights Committee has commented that "[v]oters should be able to form opinions independently, free of violence . . . or manipulative *interference of any kind*," and without

81. Goodwin-Gill, *supra* note 28, at 113.

82. Fox, *supra* note 49, at 85; *see also* OSCE Handbook, *supra* note 74, at 21–24.

83. Knox, *supra* note 6, at 18–19.

84. *See, e.g.*, Andrew Clapham, *Non-State Actors*, *in* International Human Rights Law 561, 564 (Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran eds., 2010).

85. Universal Declaration of Human Rights, *supra* note 2, pmbl.

86. *Id.* art. 29(1).

87. Clapham, *supra* note 84, at 563, 568. *But see* Rodley, *supra* note 18, at 304 (dismissing it as a "structural evolution of considerable moment to compound one novelty with another, namely the imposition of duties on individuals").

88. Universal Declaration of Human Rights, *supra* note 2, art. 21(1).

89. ICCPR, *supra* note 2, art. 25.

90. *Id.* art. 28.

91. *See* Christian Tomushat, Human Rights: Between Idealism and Realism 39 (2d ed. 2008). It has been suggested that treaty body comments might have legal significance by virtue of Article 31.3(b) of the Vienna Convention on the Law of Treaties, which invokes "subsequent practice . . . which establishes the agreement of the parties" for purposes of treaty interpretation. Vienna Convention on the Law of Treaties, art. 31.3(b), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention on the Law of Treaties].

"*any form of coercion* or compulsion."[92] In other words, interference with and compulsion of voters is forbidden by both state actors and nonstate actors.

The wording of these provisions takes on added significance when contrasted with that of another widely-ratified treaty, the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"). Like the ICCPR, CEDAW enshrines participation rights, albeit specifically with regard to women. Unlike the ICCPR, CEDAW explicitly addresses "States Parties," which alone must "take all appropriate measures to eliminate discrimination" in political life and to "ensure . . . the right . . . [t]o vote . . . and to be eligible for election."[93] Yet, despite CEDAW's express reference to states, the UN treaty body monitoring its implementation has interpreted the nondiscrimination obligations as binding political parties directly, as will be seen in Part II of this Article.[94]

Against this backdrop, it comes as something of a surprise that the UN Human Rights Committee has interpreted the ICCPR as imposing "obligations on States Parties" alone, saddling the state with protection "not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities."[95] In particular, where participation rights are concerned, it is for "states [to] ensure that, in their internal management, political parties respect the applicable provisions of Article 25 in order to enable citizens to exercise their rights thereunder."[96]

In short, between the Human Rights Committee, at a universal level, and its most prominent regional equivalent, the ECtHR,[97] the consensus is that obligations corresponding to participation rights bind states alone, leaving no room even for "complement[ary]" international obligations of nonstate actors.[98] If political parties are to be bound at all, this view holds, it is only indirectly, by way of national legislation.

92. U.N. Human Rights Comm., *General Comment No. 25*, *supra* note 78, ¶ 25 (emphasis added).

93. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, at 193 (Dec. 18, 1979).

94. U.N. Comm. on the Elimination of Discrimination Against Women, 16th Sess., Jan. 13–31, 1997, *CEDAW General Recommendation No. 23: Political and Public Life*, U.N. Doc. A/52/38 (1997) [hereinafter *CEDAW General Recommendation No. 23*].

95. U.N. Human Rights Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

96. U.N. Human Rights Comm., *General Comment No. 25*, *supra* note 78, ¶ 27.

97. Refah Partisi (The Welfare Party) and Others v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98 & 41344/98, 2003-II Eur. Ct. H.R., ¶ 103 (holding that it is for states to "impos[e] on political parties . . . . the duty to respect and safeguard the rights and freedoms guaranteed by the Convention"); *see also* Goodwin-Gill, *supra* note 28, at 163.

98. *See* Clapham, *supra* note 84, at 563; *see also* Ruggie, *Guiding Principles on Business and Human Rights*, *supra* note 9, Annex 11 (noting that business's human rights obligations "exist[ ] independently of States' . . . and do[ ] not diminish those obligations.").

II. Existing International Sources Exhorting Political Parties to Respect Participation Rights

The orthodox consensus just presented—whereby states alone have international obligations corresponding to participation rights—is unconvincing and unsatisfactory. In reality, expectations, exhortations, and obligations are regularly articulated with respect to political parties. They are articulated at a universal level by UN organs and on a regional basis by such bodies as the Economic Community of West African States ("ECOWAS"), the OSCE, and the Commonwealth of Independent States. Some expectations or obligations are addressed to political parties in concrete situations, and some to political parties in the abstract; for purposes of this Article, that distinction is immaterial. In so far as the *source* is either international or transnational, political parties are elevated "onto the international agenda" and their conduct is defined as an "area of international concern."[99]

This Part surveys specific duties that might be considered as crystallizing for political parties at the pre-electoral, campaign, and post-electoral stages of political participation. It proceeds on the basis of categories of sources of international law that have been invoked in the human rights literature on nonstate actors more familiar to international human rights law, namely businesses and armed groups, as well as sources unique to political parties, such as election observation reports and the charters of transnational political party networks. These sources of law range from international and regional instruments of hard and soft law to mechanisms of self-regulation by transnational political parties.

A. Hard Law: Regional Treaties

Treaties are arguably the preeminent source of international law. Treaties relating specifically to the conduct of electoral participation have been concluded on a regional basis by members of the ex-Soviet Commonwealth of Independent States ("CIS") and ECOWAS, respectively.[100] Each of these binding regional conventions invokes in its preamble the international human rights instruments enshrining political participation rights,[101]

99. Christine Chinkin, *Sources*, *in* International Human Rights Law 103, 121 (Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran eds., 2010).

100. Commonwealth of Independent States, Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms art. 9(2), Oct. 7, 2002, *reprinted in* Eur. Comm'n, Compendium of International Standards for Elections 122 (2d ed. 2007) [hereinafter Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms]; Econ. Cmty. of W. Afr. States [ECOWAS], Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, Dec. 21, 2001, A/SP1/12/01 [hereinafter ECOWAS Protocol on Democracy and Good Governance].

101. Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms, *supra* note 100, pmbl.; ECOWAS Protocol on Democracy and Good Governance, *supra* note 100, pmbl.

thereby linking states parties' regional commitments to their universal obligations under the ICCPR.[102]

Beyond setting out the obligations of states, however, the operative provisions of the CIS Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms forbid any "political party" within member states from using "methods of psychic, physical, [or] religious compulsion or calls for violence or threats of violence or any other forms of coercion," and require political parties to "accept the voting returns and results of democratic elections."[103] The ECOWAS Protocol on Democracy and Good Governance similarly directs that the political "party and/or candidate who loses the election shall concede defeat to the political party and/or candidate finally declared the winner."[104]

By virtue of these two treaties, political parties in twenty-six states from Turkmenistan to Togo face direct, binding international obligations relating to the campaign and post-electoral stages of political participation. There are two possible explanations for these regional phenomena. First, both regions are home to relatively new democracies of the kind that have tended to enshrine political parties in their national constitutions.[105] Treaty and constitutional developments alike can be seen as an effort to address anti-participatory conduct characteristic of local political cultures.[106]

A second, more cynical possible explanation recognizes the strategically partisan nature of ruling political parties in availing themselves of treaties as a tool of "domestic politics."[107] This notion of seeing state for government and government for ruling party—piercing the veil of state—will be returned to in Part III. For now, suffice it to say that given the contemporary tendency to "internationalize[ ]" questions of "regime legitimacy"[108] —as a result of which ruling parties may find their campaign tactics scrutinized and restricted—political parties in power might naturally seek to "bind" their competitors correspondingly.[109] To quote Nigel Rodley, who was writing in the context of armed groups, governments would be "profoundly neglectful of their own interests . . . to allow the standards to be

102. *See* Vienna Convention on the Law of Treaties, *supra* note 91, art. 31.3(a) (stating that "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" shall be taken into account); *id.* art. 31(3)(c) (stating that "relevant rules of international law applicable in the relations between the parties" shall be taken into account).

103. Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms, *supra* note 100, arts. 8(3), 9(7).

104. ECOWAS Protocol on Democracy and Good Governance, *supra* note 100, art. 9.

105. Ingrid van Biezen, *Party Regulation and Constitutionalization: A Comparative Overview*, *in* Political Parties in Conflict-Prone Societies: Regulation, Engineering and Democratic Development 25, 38 (Benjamin Reilly & Per Nordlund eds., 2008).

106. *See* Steiner, *supra* note 26, at 97.

107. *See* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 Int'l Org. 421, 430 (2000).

108. Fox, *supra* note 49, at 50.

109. *See* Abbott & Snidal, *supra* note 107, at 426.

framed as applying to their own behaviour and not to that of their opponents."[110]

This more cynical explanation for the obligations binding political parties in CIS and ECOWAS states recalls a longstanding controversy about whether treaties can in fact ground obligations of nonstate actors. One school of thought holds that treaties can bind only states because only states are parties to them.[111] A competing school of thought holds as a "fundamental principle" that "treaties are not concluded on behalf of governments, but on behalf of states lawfully representing all their citizens" and, as such, can directly bind those citizens—and legal persons—within states.[112] Under this view, treaties' formal legitimacy is divorced from questions about their inclusivity or the process leading to their conclusion. What matters, according to the rules of treaty interpretation, is that treaties "be read as meaning what they say," not least where they purport to bind nonstate actors.[113]

B. Soft Law Instruments

Notwithstanding this controversy over treaties' ability to bind nonstate actors, the overriding narrative of contemporary international law has been the marginalization of treaties and other traditional sources, namely custom and general principles.[114] Especially with the rise of international organizations in the second half of the twentieth century, alternative "norm-creating processes" have proliferated.[115] The boundaries of human rights law in particular have been pushed steadily outward by the resolutions and reports of international bodies, otherwise known as soft law.[116]

Despite their formally nonbinding status, such soft law instruments have a "capacity to obligate"[117] frequently as powerful as that of conventional or customary sources.[118] This is in no small part a result of international law's

110. *See* Rodley, *supra* note 18, at 316.

111. *See, e.g.*, Olivier De Schutter, *The Status of Human Rights in International Law*, *in* INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK, *supra* note 31, at 39, 46; *see also* Chinkin, *supra* note 99, at 112–13 (asserting that "non-state actors that cannot be treaty parties may be held to be bound by rules of customary international law"). *But see* Philip Alston & Bruno Simma, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 AUSTL. Y.B. INT'L. L. 82, 99 (1988) (noting that even "customary international law can only be triggered, and continue working, in situations in which States interact").

112. *The Law of Non-International Armed Conflicts*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 603, 608 (Dieter Fleck ed., 2d ed. 2008).

113. *See* Knox, *supra* note 6, at 30–31.

114. *See, e.g.*, FRANCK, *supra* note 10, at 206; Riedel, *supra* note 19, at 63.

115. Riedel, *supra* note 19, at 61.

116. Alston & Simma, *supra* note 111, at 98; Chinkin, *supra* note 99, at 104; *see also* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 24 (1995) ("[T]he passing of binding decisions is not the only way in which law development occurs. Legal consequences can also flow from acts which are not, in the formal sense, 'binding.'").

117. FRANCK, *supra* note 10, at 29; *see also* Fox, *supra* note 49, at 68–69; Franck, *supra* note 19, at 67 (describing the soft OSCE Charter as being "weighted with the terminology of opinio juris").

118. Chinkin, *supra* note 99, at 121; Riedel, *supra* note 19, at 68; FRANCK, *supra* note 10, at 206.

receptiveness to secondary or material sources. For example, soft law standards may be assimilated as "tools of interpretation" of treaty provisions,[119] or as manifestations of the state practice required for rules of custom.[120] Others see instead in the articulation of norms on "paper" that are violated in practice a species of general principles "on the international plane."[121] Alternatively, soft law is taken to be more than mere "auxiliary evidence" of the three formal sources of international law, which in any case do not constitute a "numerus clausus."[122] This view stresses the "accumulative effect" of various instruments[123] as giving rise to "combination norms" with a life of their own.[124]

What emerges from these perspectives on soft law is the importance of interaction between hard law provisions—such as the political participation rights set out by treaty in the ICCPR and possibly as custom under the Universal Declaration—and universal, regional, or intergovernmental soft law sources, such as those that follow, which expound corresponding duties at the pre-electoral, campaign, and post-electoral stages of political participation.

C. *Universal Sources of Soft Law*

Universal sources of soft law, including resolutions by the UN Security Council and UN General Assembly as well as reports from various UN bodies, help to clarify political parties' duties under international treaties.

1. *UN Security Council Resolutions*

Legal literature on businesses as well as armed groups invokes UN Security Council decisions as a source of human rights obligations of nonstate actors.[125] Political parties are among the nonstate actors that the Security Council has addressed directly.

Consistent with the UN Secretary-General's observation that "zero-sum politics" extend both "before and after an election" period,[126] Security Council resolutions tend to address political parties at the pre-electoral stage of political participation. For example, following a 1996 *coup d'état*, the Security Council "demand[ed] that all of Burundi's political parties and factions . . . initiate unconditional negotiations immediately, with a view to

119. Riedel, *supra* note 19, at 83.
120. Chinkin, *supra* note 99, at 121.
121. Alston & Simma, *supra* note 111, at 89, 102.
122. Riedel, *supra* note 19, at 63–64.
123. Chinkin, *supra* note 99, at 122.
124. Riedel, *supra* note 19, at 68.
125. *See, e.g.*, Alvarez, *supra* note 8, at 5–6; Clapham, *supra* note 84, at 576.
126. U.N. Secretary-General, *Strengthening the Role of the U.N. in Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections and the Promotion of Democratization*, ¶ 5, U.N. Doc A/68/301 (Aug. 9, 2013).

reaching a comprehensive political settlement" that would include elections.[127]

Such mandatory language is admittedly rare. Yet, in so far as mere expectations of the international community are a basis for nonstate actors' human rights obligations, Philip Alston sees no obstacle in the fact that the Security Council typically "calls upon" nonstate actors to act a certain way rather than directing them to do so.[128] In this vein, the Security Council has "call[ed] upon . . . political parties to redouble their efforts" at publishing an electoral list, a "crucial" step toward Côte d'Ivoire's then-anticipated 2009 elections.[129] Similarly, in 2010, the Security Council called upon "all political parties in Nepal to expedite the peace process" and transition toward elections.[130]

2. *UN General Assembly Resolutions*

Resolutions of the UN General Assembly are likewise a recognized source of the human rights exhortations of nonstate actors.[131] The General Assembly first addressed itself to political parties in 1954, ahead of a planned election in the then-trusteeships of Ewe and Togoland, "recommend[ing] that the political parties in the two Territories collaborate closely with the . . . Authorities with a view to carrying out the identification of the adult persons for electoral purposes."[132]

That exception aside, and in contrast to the Security Council, the General Assembly has tended to address political parties with respect to the campaign stage of the electoral process. In deploying the second-ever international election observation mission to the then-colony of Ruanda-Urundi in 1960, the Assembly "appeal[ed] to all parties . . . to exert their efforts to achieve an atmosphere of understanding, peace and harmony for the good of their Territory."[133] And on the eve of British Guiana's independence, in 1965, the General Assembly "appeal[ed] to the main political parties to resolve existing differences so as to enable the Territory to achieve independence in an atmosphere of peace and unity."[134] More recently, returning its attention to a now-independent Burundi, the Assembly "urge[d] all political parties . . . to settle disputes through negotiation and dialogue."[135]

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127. S.C. Res. 1072, ¶ 6, U.N. Doc. S/RES/1072 (Aug. 30, 1996).

128. U.N. Gen. Assembly, *Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Mission to Sri Lanka*, ¶ 27, U.N. Doc E/CN.4/2006/53/Add.5 (Mar. 27, 2006) (by Philip Alston).

129. S.C. RES. 1865, ¶ 21, U.N. Doc. S/RES/1865 (Jan. 27, 2009).

130. S.C. RES. 1921, ¶ 5, U.N. Doc. S/RES/1925 (May 28, 2010).

131. *See, e.g.*, Alston & Simma, *supra* note 111, at 98; CHRISTIAN TOMUSHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 39 (2d ed. 2008).

132. G.A. Res. 750(VIII), ¶ B(2), U.N. Doc. A/RES/750(VIII)A-C (Dec. 8, 1953).

133. G.A. Res. 1579, ¶ 5, U.N. Doc. A/RES/15/1579 (Dec. 20, 1960).

134. G.A. Res. 2071, ¶ 4, U.N. Doc. A/RES/20/2071 (Dec. 16, 1965).

135. G.A. Res. 159, ¶ 4, U.N. Doc. A/RES/50/159 (Feb. 28, 1996).

The year 2003 marked a significant shift in the General Assembly's attitude toward political parties. For the first time, it directed its attention not to political parties in specific situations, but to political parties in general, "underlin[ing] the key role that political leaders and political parties can and ought to play in strengthening and promoting democracy by combating racism . . . and related intolerance," and "encourag[ing] political parties to take concrete steps to promote solidarity, tolerance and respect" for minority groups.[136] This development followed the Durban Declaration of the 2001 World Conference Against Racism, as well as annual resolutions of the then-Commission on Human Rights, addressing political parties in the very same terms.[137] The General Assembly resolution was explicitly "[g]uided" by the Universal Declaration and ICCPR,[138] suggesting a self-conscious potential to "complement[ ]" hard law with "new sets of expectations" corresponding, in this case, to participation rights.[139]

If the General Assembly's exhortation that political parties not indulge in xenophobia might be seen as going beyond the procedural nature of participation rights and into the substance of party platforms and policies, a subsequent report by the UN Special Rapporteur on freedom of association puts this into perspective. That report notes "the inclination of actors in the electoral contest to exploit racial, ethnic, religious, political, national or social origin, among other distinctions explicitly prohibited in Article 2 of the ICCPR, *with a view to excluding opponents*."[140] Seen in this light, as a conjunction of internationally enshrined rights of participation and prohibitions on discrimination, the exhortation against xenophobia represents a campaign-stage procedural obligation of political parties toward opposing candidates and supporters.

136. G.A. Res. 159, ¶ 9, U.N. Doc. A/RES/58/159 (Mar. 2, 2003).

137. World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration and Plan of Action, Aug. 21–Sept. 8, 2001, ¶¶ 83, 115, U.N. Doc. A/CONF.189/12 (endorsed in G.A. Res. 266, ¶¶ 1, 6, U.N. Doc. A/RES/56/266, (May 15, 2002)); U.N. Comm'n on Human Rights., Res. 2005/36, pmbl., U.N. Doc. E/CN.4/RES/2005/36 (2005); *see also* Comm'n on Human Rights, Res. 2000/40, U.N. Doc. E/CN.4/RES/2000/40 (Apr. 20, 2000); Comm'n on Human Rights, Res. 2001/43, U.N. Doc. E/CN.4/2001/43 (Mar. 4, 2001); Comm'n on Human Rights, Res. 2002/39, U.N. Doc. E/CN.4/2002/39 (Apr. 23, 2002); Comm'n on Human Rights, Res. 2003/41, U.N. Doc. E/CN.4/RES/2003//L.11/Add.4 (Apr. 23, 2003); Comm'n on Human Rights, Res. 2004/38, U.N. Doc. E/CN.4/RES/2004/38 (Apr. 19, 2004).

138. G.A. Res. 159, ¶ 9, U.N. Doc. A/RES/58/159 (Mar. 2, 2003).

139. *See* Andrew Clapham, *U.N. Charter-Based Protection of Human Rights*, *in* International Protection of Human Rights: A Textbook 79, 82 (Catarina Krause & Martin Scheinin eds., 2d ed. 2012).

140. Kiai, *Rights to Freedom of Peaceful Assembly and of Association*, *supra* note 4, ¶ 15 (emphasis added).

3. *Reports of UN Organs and Bodies*

Reports of various UN organs and actors are a third, often overlooked, category of soft law sources[141] that may apply to political parties, among other nonstate actors. For example, in a report concerning Sierra Leone, the UN Secretary-General "urge[d] all political parties and their supporters . . . to create a peaceful and conducive environment for an electoral process."[142] That expectation went to the campaign stage of political participation, as did a 2012 report by the UN Special Rapporteur on racism asserting that "political parties bear considerable responsibility for promoting solidarity, tolerance and respect" and exhorting "political parties to base their . . . activities on respect for human rights."[143]

Crucially, political participation need not only be respected where opponents are concerned. The UN treaty body responsible for monitoring implementation of CEDAW interprets Article 7 of that Convention—enshrining participation rights for women—to impose direct international obligations upon political parties' internal functioning. Specifically, CEDAW's treaty body takes the view that "[p]olitical parties must embrace the principles of equal opportunity and democracy," and that they "have a responsibility to ensure that women are included in party lists and nominated for election."[144] This further conjunction of nondiscrimination and participation rights amounts to a duty of political parties at the pre-electoral stage of political participation.

D. Regional Sources of Soft Law

Like those of the UN Security Council and General Assembly, resolutions and decisions of regional organizations—the Council of Europe, the AU, and the OAS—constitute soft law that fleshes out legally binding norms,[145] not least by clarifying whether they apply to nonstate actors.

1. *Resolutions and Decisions of Council of Europe Bodies*

Echoing the UN Committee on the Elimination of Discrimination against Women, the Parliamentary Assembly of the Council of Europe ("PACE") has addressed itself to the internal processes of political parties in the regional body's forty-seven member states, declaring, with regard to the

141. *See, e.g.*, Alston & Simma, *supra* note 111, at 98; Higgins, *supra* note 116, at 23 ("Resolutions are but one manifestation of state practice. But in recent years there has been an obsessive interest with resolutions as an isolated phenomenon. Intellectually, this is hard to understand or justify.")

142. U.N. Secretary-General, *Rep. on the United Nations Integrated Peace Building Office in Sierra Leone*, ¶ 60, U.N. Doc. S/2011/554 (Sept. 2, 2011).

143. U.N. Human Rights Council, *Rep. of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, ¶¶ 62, 29, U.N. Doc. A/HRC/20/33 (May 15, 2012).

144. *CEDAW General Recommendation No. 23*, *supra* note 94, ¶¶ 22, 28.

145. Kälin & Künzli, *supra* note 14, at 76.

pre-electoral stage, that "political parties have a responsibility to ensure a fair minority representation in elected institutions."[146]

At the campaign stage, too, PACE has "call[ed] on political parties in Council of Europe member states to base their actions on . . . observing the principles of 'fair play' in electoral campaigns,"[147] while a subsidiary body of the Council of Europe, the Venice Commission for Democracy through Law, exhorts that political "[p]arties in democratic systems . . . reject the use of violence as a political tool and . . . not seek to disrupt meetings of rival parties."[148] Finally, at the post-electoral stage, PACE "calls in particular on the political parties in power to adopt the responsible attitude necessary to ensure the proper functioning of the institutions needed for a democratic society."[149]

Though distinguished by its prominence and judicial function, the ECtHR also falls under the aegis of the Council of Europe. It has wielded its adjudicative jurisdiction to deny protection under the ECHR to claimant political parties that have themselves "resorted to illegal or undemocratic methods [or] encouraged the use of violence" in electoral campaigns.[150] Because the Court imposes this consequence by way of the abuse of rights doctrine, the resulting obligation on political parties may be seen to be contingent. Nonetheless, as noted by a Special Rapporteur of the International Law Commission in connection with state responsibility, the doctrine of abuse of rights itself amounts to an "*obligation* not to exceed certain limits in exercising" rights accorded under international law, "and not to exercise [those rights] with the sole intention of harming others."[151] It is therefore an obligation that, in the eyes of the leading international human rights court, extends beyond states to bind political parties with respect to the campaign stage of political participation.

2. *Resolutions of African Union Bodies*

Sources not originating in Europe or the UN devote markedly less attention to discrimination by political parties; their focus is on the fairness of the electoral process itself. Consider the solemn resolution of the fifty-four-member AU known as the Declaration on the Principles Governing Democratic Elections, which—like the 2003 UN General Assembly resolution

146. State of Human Rights and Democracy in Europe, EUR. PAR. Ass. Res. 1547, ¶ 82 (Apr. 18, 2007).

147. The Code of Good Practice for Political Parties, EUR. PAR. Ass. Res. 1546, ¶¶ 16, 13(1)(5) (Apr. 17, 2007).

148. OSCE GUIDELINES ON POLITICAL PARTY REGULATION, *supra* note 4, ¶ 47.

149. The Honouring of Obligations and Commitments by the Republic of Moldova, EUR. PAR. Ass. Res. 1955, ¶ 6 (Oct. 16, 2013).

150. United Communist Party of Turkey v. Turkey, App. No. 19392/92, Eur. Ct. H.R., ¶ 23 (1998).

151. *See* Robert Ago, *The Internationally Wrongful Act of the State, Source of International Responsibility: 3rd Report on State Responsibility*, *in* 2 Y.B. Int'l L. Comm'n 1971, 199 ¶ 68, U.N. Doc. A/CN.4/246/Add.1-3 (1973) (emphasis added).

considered above—invokes in its preamble, and elaborates upon, the Universal Declaration and ICCPR.[152]

The Declaration stipulates, on the campaign stage of political participation, that "[n]o individual or political party shall engage in any act that may lead to violence," and, with an eye firmly on ruling parties, that "[e]very candidate and political party shall respect the impartiality of the public media by undertaking to refrain from any act which might constrain or limit their electoral adversaries from . . . air[ing] their campaign messages."[153] As for political party obligations at the post-electoral stage, the AU Declaration echoes the sub-regional ECOWAS treaty discussed above, stating that "[e]very citizen and political party shall accept the results of elections proclaimed to have been free and fair by the competent national bodies."[154]

On the model of its parent body, the AU, the African Commission on Human and Peoples' Rights has—albeit with regard to country-specific situations—exhorted political parties to respect participation rights. It "[a]ppeal[ed] to all political parties and their supporters to exercise tolerance and observe democratic rules during the campaign and after the elections" in Zimbabwe in 2008, and "[u]rge[d] all political parties and others concerned in South Africa to accept the results of the election if it [were] declared to be substantially free and fair."[155]

3. *Resolutions of the Organization of American States*

In a similar country-specific approach, the General Assembly of the OAS has, at the pre-electoral stage, "call[ed] upon the Government of Haiti, political parties and civil society . . . to commit themselves fully" to the appointment of an electoral authority.[156] At the post-electoral stage, the OAS General Assembly has "[u]rge[d] all political parties in Guyana to accept the unequivocal results" of the final tabulation.[157]

E. Intergovernmental Sources of Soft Law

Though not fitting within the above categories, two further soft law sources are nonetheless bases for the emerging human rights obligations of

152. Afr. Union, Declaration on the Principles Governing Democratic Elections in Africa, *supra* note 50, pmbl.

153. *Id.* arts. IV(8), IV(11).

154. *Id.* art. IV(13).

155. Afr. Comm'n on Human and Peoples' Rights, Resolution on the Forthcoming Election Runoff in Zimbabwe, Res. 132, ACHPR/Res.132 (XXXXIII)08 (May 22, 2008); Afr. Comm'n on Human and Peoples' Rights, Resolution on South Africa, ¶ 3, Res. 9, ACHPR/Res.9(XV)94 (Apr. 27, 1994).

156. Org. of Am. States, General Assembly, Support for Democracy in Haiti, AG/RES. 1831, ¶ 5 (June 5, 2001).

157. Org. of Am. States, General Assembly, Declaration on Guyana, AG/DEC. 19 (XXVII-O/98) (June 3, 1998).

political parties: intergovernmental election observation reports and non-binding codes of conduct.

1. *Election Observation Reports*

Studies of internationally enshrined participation rights regularly invoke reports of intergovernmental election observation missions.[158] Because election observation has its genesis in the political participation provisions of the Universal Declaration and ICCPR,[159] observers' reports in turn "hone[ ] the normative content" of those same rights.[160] Election observation reports also elucidate the bearers of corresponding obligations.

As discussed in Part III, such reports document anti-participatory conduct by political parties. Beyond this essentially passive role, however, election observation missions of the AU, the Commonwealth, and the OSCE, among others, actively exhort pro-participatory conduct by political parties. For example, AU observers of Sierra Leone's 2012 election stated, in connection with the pre-electoral stage, that "[p]olitical parties should . . . [u]ndertake affirmative action for participation of women."[161] As for inclusivity in the course of campaigning, a Commonwealth observation mission to South Africa declared that "political parties [in addition to the Independent Electoral Commission] also have a responsibility" to "reach those eligible for special voting,"[162] and OSCE observers of Kyrgyz Republic elections suggested that "political parties should consider and encourage the production of voter information and campaign material in languages used by national minorities."[163]

Similarly, at the campaign stage, a Commonwealth election mission in Guyana "call[ed] upon political parties and stakeholders to play their roles responsibly and to adopt a constructive approach to the entire electoral process in order to ensure a peaceful poll."[164] Going further and adopting an obligatory tone, OSCE observers in the Former Yugoslav Republic of Macedonia stated that "political parties must recognize the full consequences that electoral malfeasance poses to the integrity of an electoral process, and demonstrate a concerted commitment to bring such practices to an end . . . . Ballot-box stuffing, vote buying, encouraging or condoning violence,

158. *See, e.g.*, Fox, *supra* note 49, at 89; Goodwin-Gill, *supra* note 28, at 96.

159. *See, e.g.*, OSCE Handbook, *supra* note 74, at 17; Eur. Comm'n Handbook, *supra* note 77, at 14; Fox, *supra* note 49, at 85.

160. Franck, *supra* note 19, at 69; *see also* Fox, *supra* note 12, at 543; Goodwin-Gill, *supra* note 28, at 5.

161. Afr. Union Comm'n, Rep. of African Union Elections Observation Mission to the 17 November 2012 General Elections in the Republic of Sierra Leone 18 (2012).

162. Commonwealth of Nations, Secretariat, Report of the Commonwealth Observer Group, National and Provincial Elections in South Africa 40 (1999).

163. OSCE & Office for Democratic Inst's & Human Rights, Election Observation Mission Final Report, Kyrgyz Republic Parliamentary Elections 28 (2010).

164. Commonwealth of Nations, Secretariat, Report of the Commonwealth Observer Group, Guyana National and Regional Elections 28 November 2011 39 (2012).

group voting or intimidating citizens and election officials are unacceptable practices."[165]

2. *Nonbinding Codes of Conduct*

International codes of conduct, a recognized soft law source for human rights obligations of businesses,[166] also exist for political parties. Within the Council of Europe, for example, the Venice Commission on Democracy through Law has prepared a Code of Good Practice in the Field of Political Parties, which the Parliamentary Assembly of the Council of Europe subsequently endorsed.[167]

This Code states that "[p]olitical parties must comply with the values expressed by international rules on the exercise of civil and political rights," namely in the ICCPR and the ECHR.[168] It alludes to those same instruments' provisions on nondiscrimination, stipulating that political parties "must not discriminate against individuals" on internationally protected grounds by way of "restrictions on membership."[169] Parties in power are singled out with the exhortation that they "should not abuse or seek advantage from their ruling position to create discriminatory conditions for other political forces."[170]

At a universal level, the Inter-Parliamentary Union ("IPU"), an international association comprising some 160 national parliaments and holding permanent observer status at the United Nations,[171] has adopted the Declaration on Criteria for Free and Fair Elections that was in turn recognized by the UN General Assembly.[172] Having reaffirmed the Universal Declaration and ICCPR in its preamble, the IPU Declaration addresses the campaign stage of the process by prescribing that "no candidate or political party shall engage in violence" and that "[e]very candidate and political party competing in an election shall respect the rights and freedoms of others."[173] As to the post-electoral stage, the IPU Declaration directs that "[e]very candidate and political party competing in an election shall accept the out-

165. OSCE & Office for Democratic Inst's & Human Rights, Election Observation Mission Final Report, Former Yugoslav Republic of Macedonia, Parliamentary Elections 25 (2006).

166. *See, e.g.*, Alvarez, *supra* note 8, at 6; Kälin & Künzli, *supra* note 14, at 84; Riedel, *supra* note 19, at 59.

167. The Code of Good Practice for Political Parties, Eur. Par. Ass. Res. 1546, ¶ 3 (Apr. 17, 2007) (endorsing the Venice Comm'n Code, *supra* note 4).

168. Venice Comm'n Code, *supra* note 4, ¶ 17.

169. *Id.* ¶¶ 19, 108.

170. *Id.* ¶ 195.

171. Goodwin-Gill, *supra* note 28, at 6–7.

172. G.A. Res. 49/190, U.N. GAOR, Supp. No. 49, U.N. Doc. A/49/49 (1994) (adopting Inter-Parliamentary Union, *Declaration on Criteria for Free and Fair Elections* (Mar. 26, 1994), *available at* http://www.ipu.org/cnl-e/154-free.htm, *archived at* http://perma.cc/WN5K-72X6).

173. Inter-Parliamentary Union, *Declaration on Criteria for Free and Fair Elections*, arts. 3(9), 3(10) (Mar. 26, 1994), *available at* http://www.ipu.org/cnl-e/154-free.htm, *archived at* http://perma.cc/WN5K-72X6.

come of a free and fair election."[174] Expanding upon the IPU Declaration is the Code of Conduct for Political Parties prepared by the International Institute for Democracy and Electoral Assistance ("IDEA"), a specialized international organization.[175] Focusing on the campaign stage, the IDEA Code mandates that a "party that has subscribed to this Code will . . . respect the right and freedom of all other parties to campaign . . . without fear" and generally "organize and conduct its election campaign in a manner that contributes toward a congenial and peaceful atmosphere."[176] In particular, political parties should neither "coerce [n]or offer monetary or other kinds of inducements to persons to vote" for them, nor "engage in or permit any kind of violent activity to demonstrate party strength or prove supremacy."[177] The Code further stipulates that "[s]peakers at political rallies will avoid using language that . . . (a) is inflammatory . . . or (b) threatens or incites violence,"[178] and political parties in power will "not (a) abuse a position of power, privilege or influence for a political purpose . . . or (b) use official . . . or other public resources for campaign purposes."[179]

Finally, at the post-election stage, political parties are to "accept the outcome of an election that has been certified" and "submit any grievance only to the relevant dispute settlement agency."[180]

F. Legal Pluralism: Self-Regulation by Transnational Political Party Networks

Sources surveyed so far for evidence of political parties' crystallizing human rights obligations have largely reflected the top-down framework of an international system dominated by states and intergovernmental organizations. Pluralist legal theorists perceive this framework as yielding to an informal "global (not inter-national!) law" which arises from "globalization processes in multiple sectors of civil society."[181] Accordingly, legal pluralists call for less attention to be paid to treaties and "activities of the United Nations,"[182] and more to "practices" of global networks of nonstate actors.[183]

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174. *Id.* art. 3(11).

175. *About Us*, Int'l Inst. for Democracy & Electoral Assistance, http://www.idea.int/about/, *archived at* http://perma.cc/MQM9-LKEB.

176. Int'l Inst. for Democracy & Electoral Assistance, Code of Conduct for Political Parties: Campaigning in Democratic Elections 16–17 (1999) [hereinafter Int'l Inst. for Democracy & Electoral Assistance, Code of Conduct for Political Parties].

177. *Id.* at 20.

178. *Id.* at 18.

179. *Id.* at 20.

180. *Id.* at 19.

181. Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, *in* Global Law Without a State 3, 4 (Gunther Teubner ed., 1997).

182. Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 Yale J. Int'l. L. 301, 309–10 (2007).

183. Teubner, *supra* note 181, at 9.

Though overlooked in existing pluralist literature, political parties are among the nonstate actors forging transnational networks. They do so typically with a view to offering technical assistance to kindred parties abroad, in the case of ideologically aligned, universal networks,[184] or to advancing substantive agendas, in the case of regional, cross-partisan networks.[185] Invariably, their networks' founding documents establish norms of electoral conduct for member parties—norms framed by reference to the Universal Declaration and the ICCPR. This "jurisgenerative" phenomenon[186] will be examined here through the lens of three types of transnational political party networks, namely party internationals, regional party conferences, and Europarties.

1. *Party Internationals*

Party internationals bring together national political parties with similar ideologies from across the globe. Liberal International, for example, comprises eighty-five national political parties with sufficient "political relevance" to meaningfully represent "Liberal opinion" within their respective countries.[187] Full members include the Liberal Party of Canada and Britain's Liberal Democrats, but most come from developing countries such as Burundi's *Alliance démocratique pour le renouveau*, Morocco's *Union constitutionelle*, Thailand's Democrat Party and Honduras' *Partido liberal de Honduras*.[188] A longstanding rival, Socialist International, counts "168 political parties and organisations" from the French *Parti Socialiste* to the Australian Labour Party, by way of Zimbabwe's Movement for Democratic Change, Lebanon's Progressive Socialist Party, and Malaysia's Democratic Action Party.[189]

To the right of the spectrum exist two ideologically inspired transnational associations. Centrist Democrat International brings together over sixty-five political parties "guided by the principles of Christian or integral humanism."[190] These include Belgium's *Christen-Democratisch & Vlaams*

184. Nat'l Democratic Inst., Minimum Standards for the Democratic Functioning of Political Parties ii (2008).

185. *See, e.g.*, Conferencia Permanente de Partidos Políticos de América Latina y el Caribe, *Primera Declaración de Oaxaca* (adopted Oct. 12, 1979), *available at* http://www.copppal.org.ar/?q=actividades/primera-declaraci%C3%B3n-de-oxaca, *archived at* http://perma.cc/D5GW-8FEJ; Int'l Conference of Asian Political Parties, *ICAPP Charter and Major Understandings*, art. 1 (2014), *available at* http://www.theicapp.org/download.php?filename=icapp_new%2Fcontent%2F14115355051.pdf&ori_fn=ICAPP+Charter+and+Major+Understandings+%282014%29.pdf, *archived at* http://perma.cc/62K8-4RWH.

186. *See* Berman, *supra* note 182, at 304.

187. Liberal Int'l, *Constitution*, art. 9 (June 2011), *available at* http://www.liberal-international.org/editorial.asp?ia_id=532, *archived at* http://perma.cc/46ZY-3MYL.

188. *Full Members*, Liberal Int'l, http://www.liberal-international.org/editorialIndex.asp?ia_id=523, *archived at* http://perma.cc/3XQU-2N66.

189. *About Us*, Socialist Int'l, http://www.socialistinternational.org/about.cfm, *archived at* http://perma.cc/WCK2-WYUX.

190. *History*, Centrist Democrat Int'l, http://www.idc-cdi.com/index.php, *archived at* http://perma.cc/L97J-SRPT.

party, Angola's *Union nacional para la independencia total de Angola*, and Paraguay's *Partido democrata Cristiano*.[191] The International Democrat Union, meanwhile, comprises eighty-plus center-right political parties.[192] Among these are the U.S. Republican Party, Peru's *Partido Popular Cristiano*, the Belarusian Popular Front, and Namibia's Democratic Turnhalle Alliance.[193]

Access to these extraordinary networks entails obligations of varying degrees. Member parties of Centrist Democrat International, for example, are to be "guided by . . . [t]he recognition and promotion of personal rights as defined in the Universal Declaration of Human Rights and the International Covenants that complement it,"[194] and members of the International Democrat Union commit to "advancing . . . basic personal freedoms and human rights, as defined in the Universal Declaration of Human Rights," specifically including "the right to free elections and the freedom to organise effective parliamentary opposition."[195] Liberal International "emphasise[s] the universal significance of the Universal Declaration of Human Rights . . . as well as the two International Covenants [on Civil and Political Rights and on Economic, Social and Cultural Rights]," and "expect[s] all liberals and liberal parties, whether inside or outside government, to take the lead in promoting and developing respect for human rights and fundamental freedoms in their respective countries."[196] For its part, Socialist International applies "in the strictest way" a "code of conduct" requiring member parties "to act in accordance with the Universal Declaration of Human Rights and the other important conventions adopted by the United Nations."[197]

Most striking about this transnational "self-organizing" process[198] is that, rather than be "foreclosed by realist and positivist visions of international law,"[199] according to which the Universal Declaration and ICCPR apply only to state actors, political parties are voluntarily submitting themselves to corresponding norms. Member parties that fall short face discipline

191. *Parties*, Centrist Democrat Int'l, http://www.idc-cdi.com/parties.php, *archived at* http://perma.cc/L66N-WR3T.

192. *Membership*, Int'l Democrat Union, http://www.idu.org/membership.aspx, *archived at* http://perma.cc/QAX9-L5LD.

193. *Regional Unions*, Int'l Democrat Union, http://www.idu.org/regional_list.aspx, *archived at* http://perma.cc/Q83A-NWH5.

194. *History*, Centrist Democrat Int'l, http://www.idc-cdi.com/index.php, *archived at* http://perma.cc/MR6Z-57ZH.

195. Int'l Democrat Union, *Declaration of Principles*, *available at* http://www.idu.org/principle.aspx, *archived at* http://perma.cc/6TTB-HFSR.

196. Liberal Int'l, *Ottowa Human Rights Appeal* (1987), *available at* http://www.liberal-international.org/site/Manifesto.html#5, *archived at* http://perma.cc/6JC6-WWZS.

197. Socialist Int'l, *Ethical Charter of the Socialist International*, art. 3 (Oct. 27–29, 2003), *available at* http://www.socialistinternational.org/viewArticle.cfm?ArticleID=24, *archived at* http://perma.cc/5WST-UZ92.

198. Teubner, *supra* note 181, at 11.

199. Berman, *supra* note 182, at 308.

in the form of "exclusion."[200] Liberal International may "suspend" any existing member party that "does not adequately represent Liberal opinion,"[201] and within Socialist International, an Ethics Committee "monitor[s] respect for the Ethical Charter by member parties" and recommends action in "cases of non-compliance."[202]

At the height of the Arab Spring, in 2011, Socialist International exercised this power to expel the governing parties of both Tunisia and Egypt. In the case of Tunisia's *Rassemblement constitutionnel démocratique*, Socialist International simply referred to the incompatibility of the party's conduct with "the values and principles which define our movement."[203] Its decision to expel Egypt's National Democratic Party explained in more detail that the violence playing out in Tahrir Square was "totally incompatible with the policies and principles of any social democratic party anywhere in the world," and concluded, "a party in government that does not listen, that does not move and that does not immediately initiate a process of meaningful change in these circumstances, cannot be a member of the Socialist International."[204] Months later, Côte d'Ivoire's governing *Front populaire ivoirien* was likewise expelled on account of "grave violations of human rights" and "the party's ongoing failure to respect the democratically expressed will of the people."[205]

2. *Regional Conferences of Political Parties*

In parallel with the universal, ideologically-aligned party internationals, transnational political party networks have formed along regional, cross-partisan lines. First among these was the *Conferencia Permanente de Partidos Politicos de América Latina y el Caribe* ("COPPPAL"), founded in 1979. It counts fifty member parties from twenty-seven countries, including Argentina's *Partido Socialista Popular*, Colombia's *Partido Liberal*, Cuba's *Partido Communista de Cuba*, and Haiti's *Fusion des Sociaux-Démocrates Haïtiens*.[206] Its Asian counterpart, the International Conference of Asian Political Parties

200. *See, e.g.*, Int'l Democrat Union, *Statutes*, arts. 5, 7, *available at* http://www.idu.org/structure.aspx, *archived at* http://perma.cc/6ULU-VKMB.

201. Liberal Int'l, *supra* note 187, arts. 4, 9.

202. Socialist Int'l, *Statutes of the Socialist International*, arts. 5(3), 5(1)(3), *available at* http://www.socialistinternational.org/viewArticle.cfm?ArticleID=27, *archived at* http://perma.cc/J7NM-BY4X.

203. Socialist Int'l, *SI Decision on Tunisia*, *available at* http://www.socialistinternational.org/viewArticle.cfm?ArticleID=2085, *archived at* http://perma.cc/G8GV-KE5R.

204. Socialist Int'l, *Letter to the General Secretary of the National Democratic Party* (Jan. 31, 2011), *available at* http://www.socialistinternational.org/images/dynamicImages/files/Letter%20NDP.pdf, *archived at* http://perma.cc/Y5PP-CYDA.

205. Socialist Int'l, *SI Presidium addresses situation in Côte d'Ivoire* (Mar. 19, 2011), http://www.socialistinternational.org/viewArticle.cfm?ArticleID=2104, *archived at* http://perma.cc/N2FE-H39E.

206. *Partidos Miembros*, Conferencia Permanente de Partidos Politicos de América Latina y el Caribe, http://www.copppal.org.ar/institucional/partidos-miembros, *archived at* http://perma.cc/SZ7R-47UT.

("ICAPP"), was launched in 2000 on the explicit model of COPPPAL, with which ICAPP seeks eventually to "conven[e] a global convention of political parties."[207] Among the political parties represented on ICAPP's Standing Committee are the Liberal Party of Australia, the Communist Party of China, the Indian National Congress, Iran's Islamic Motalefeh Party, Japan's Liberal Democratic Party, and the United Russia Party.[208]

COPPPAL's network norms and disciplinary mechanisms mirror those of the more ideologically cohesive party internationals. The Latin American network's founding document commits member parties to the "promotion and defence of the human rights set out in the Universal Declaration" and, in particular, of "democracy and the legal-political institutions that ensure political participation."[209] Member parties are subject to oversight by a designated committee as well as the plenary, which are together responsible for "ensuring that member parties act to defend the principles of COPPPAL."[210]

ICAPP is less inclined to make explicit "normative assertions."[211] The extraordinary range of "competing ideologies" represented within the Asian network is apparent from its membership.[212] Besides the reduced scope for cooperation that follows from such diverse members, heterogeneity of values in and of itself may impede normative ordering of a transnational network.[213] Unique among transnational political party networks, ICAPP's founding document omits any reference to the Universal Declaration or ICCPR, although the network does mandate "[u]pholding the United Nations Charter,"[214] which itself stipulates, in Article 55(c), "uni-

207. Int'l Conference of Asian Political Parties, *Declaration of the 6th General Assembly*, 2 (Dec. 2–3, 2010), *available at* http://www.theicapp.org/download.php?filename=icapp_new%2Fcontent%2F13184857701.pdf&ori_fn=ICAPP-6GA-003.pdf, *archived at* http://perma.cc/NFL5-BL6W.

208. *Members of the Standing Committee*, Int'l Conference of Asian Political Parties, http://www.theicapp.org/inc/member_list.php?gisu_pid=0&menu_no=1011, *archived at* http://perma.cc/LN9R-XQA9.

209. Conferencia Permanente de Partidos Politicos de América Latina y el Caribe, *Primera Declaración de Oaxaca* (Oct. 12, 1979), *available at* http://www.copppal.org.ar/?q=actividades/primera-declaraci%C3%B3n-de-oxaca, *archived at* http://perma.cc/D5GW-8FEJ.

210. Conferencia Permanente de Partidos Politicos de América Latina y el Caribe, *Estatuto*, arts. 45, 10 (Oct. 11, 1999), *available at* http://www.copppal.org.ar/?q=actividades/estatuto-de-la-copppal, *archived at* http://perma.cc/3XE6-5GKG.

211. *See* Berman, *supra* note 182, at 303 (noting that "we inhabit a world of multiple normative communities, some of which impose their norms through officially sanctioned coercive force and formal legal processes, but many of which do not").

212. International Conference of Asian Political Parties, *Declaration of the 6th General Assembly*, 1 (Dec. 2–3, 2010), http://www.theicapp.org/download.php?filename=icapp_new%2Fcontent%2F13184857701.pdf&ori_fn=ICAPP-6GA-003.pdf, *archived at* http://perma.cc/NFL5-BL6W.

213. *See* Anne-Marie Slaughter, A New World Order 199 (2004).

214. Int'l Conference of Asian Political Parties, *ICAPP Charter and Major Understandings*, pmbl., *available at* http://www.theicapp.org/download.php?filename=icapp_new%2Fcontent%2F14115355051.pdf&ori_fn=ICAPP+Charter+and+Major+Understandings+%282014%29.pdf, *archived at* http://perma.cc/62K8-4RWH.

versal respect for, and observance of, human rights and fundamental freedoms."[215]

3. *Europarties*

Europe has no regional, cross-partisan network of political parties equivalent to COPPPAL, ICAPP, or CAPP. Instead, reflecting the continent's high degree of supranational integration, the emergence of political parties in the European Parliament ("Europarties") blurs the line between international and transnational processes of political party association. Though provided for by international treaty,[216] Europarties' membership is transnational, consisting not of individual EU citizens but of national political parties sharing a given ideology. For example, members of the conservative European People's Party span twenty-seven EU member countries and include Ireland's *Fine Gael*, the Polish People's Party, and Montenegro's Nationalist Party.[217] Parties with observer status, drawn from EU neighboring states, include Armenia's Republican Party, Georgia's United National Movement, Moldova's Liberal Democratic Party, and Turkey's Justice and Development Party.[218]

Another Europarty, the Party of European Socialists, has thirty-four member parties ranging from Britain's Labour Party and Greece's Pan-Hellenic Socialist Movement to Slovenia's Social Democrats and Croatia's Social Democratic Party.[219] Among its observer parties are Egypt's Social Democratic Party, Israel's Labour Party, Palestine's Fatah Party, and Tunisia's *Forum démocratique pour le travail et les libertés*.[220]

On pain of losing their status and EU funding, Europarties are required to observe the Charter of Fundamental Rights of the European Union,[221] itself modeled on the Universal Declaration and the ICCPR, which states, by way of participation rights, that "[e]very citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament."[222] These principles are in turn reflected in Europarties' internal regulations, such as the European People's Party's requirement that members

215. U.N. Charter art. 55, para. (c).

216. Consolidated Version of the Treaty Establishing the European Community art. 191, Oct. 11, 1997, O.J. (C 340) 173 (1997).

217. *Member Parties*, Eur. People's Party, http://www.epp.eu/member-parties, *archived at* http://perma.cc/92D5-UNH7.

218. *Id.*

219. *PES Member Parties*, Party of Eur. Socialists, http://www.pes.eu/en/about-pes/pes-members/parties, *archived at* http://perma.cc/J62N-49L9.

220. *Id.*

221. Regulation 2004/2003, of the European Parliament and of the Council of 4 November 2003 on the Regulations Governing Political Parties at European Level and the Rules Regarding their Funding, pmbl., 2003 O.J. (L 297/1).

222. Charter of Fundamental Rights of the European Union art. 39, 2000 O.J.C 364/01.

promote "free and pluralistic democracy,"[223] and the Party of European Socialists' declaration that "[d]emocracy must be pluralistic, transparent, truly representative of society's diversity and enable everyone to participate."[224]

As is true of the party internationals and COPPPAL, Europarties' "coordination of behaviour"[225] is backed by non-legal sanctions including "suspension" and "exclusion" of member parties.[226] Through this transnational associative process, the participation rights enshrined in the EU Charter of Rights—and, by extension, the universal human rights instruments—come to bind political parties throughout the EU and their affiliates around the world.

III. Rationales for International Human Rights Obligations of Political Parties with Respect to Participation Rights

It is not in the nature of the international and transnational sources considered above to justify their exhortations. This Part strives to buttress those sources, and to encourage their proliferation, by offering rationales for regarding political parties as having obligations corresponding to political participation rights. It considers the nature and function of both political parties in general and political parties in power as a basis for attributing international human rights obligations to them, taking as a reference point the literature asserting human rights obligations of businesses and armed groups. Political parties in power are considered separately to elucidate the paradox of a nonstate actor controlling the state.

A. Political Parties in General

This section offers seven rationales for regarding political parties as duty-bearers under international human rights law. Rationales for extending international legal status to nonstate actors naturally vary with the actor in question.[227] But because businesses and armed groups are relatively familiar nonstate actors to international human rights law, justifications for the imposition of human rights obligations upon them will here serve as a broad, analogical framework with respect to political parties.

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223. Eur. People's Party, *Statutes of the European People's Party*, art. 3 (Dec. 7, 2011), *available at* http://www.epp.eu/sites/default/files/content/documents/EPP%20Statutes%2C%202011%20%28EN%29.pdf *archived at* http://perma.cc/2QB3-SQ2A .

224. Party of Eur. Socialists, *Declaration of Principles*, art. 1 (Nov. 24, 2011), *available at* http://pes.cor.europa.eu/news/documents/news/2011/adopted_pes_declaration_principles.pdf, *archived at* http://perma.cc/PE8J-84EG.

225. Teubner, *supra* note 181, at 14.

226. Eur. People's Party, *supra* note 223, art. 9; *see also* Party of Eur. Socialists, *Declaration on SMER Suspension from PES* (Oct. 12, 2006), *available at* http://www.pes.eu/en/about-pes/pes-documents, *archived at* http://perma.cc/726C-KUAZ.

227. *See* Cassese, *supra* note 1, at 134.

To analogize among nonstate actors for this very specific purpose is in no way to deny the fundamental differences between them. Rather, it simply takes as a starting point the discourse that has already developed around businesses and armed groups. In fact, some of the specific characteristics that make it impractical or controversial to impose international human rights obligations on businesses and armed groups will be seen precisely *not* to bear on political parties.

Rationale 1: Internationally Recognized Importance

Scholars have cited sheer importance to society as a basis for international human rights obligations of businesses.[228] The importance of political parties is similarly recognized, including among human rights treaty bodies. Notwithstanding its ultimate conclusion that international obligations can bind political parties only indirectly by way of national legislation, even the UN Human Rights Committee notes political parties' "*significant* role in the conduct of public affairs and the election process."[229] At a regional level, the ECtHR has repeatedly alluded to "the *primordial* role played in a democratic regime by political parties,"[230] deeming "political parties [to be] a form of association *essential* to the proper functioning of democracy."[231] The Inter-American Commission on Human Rights has similarly affirmed that political "parties are institutions *needed* in democracy."[232]

Political science literature highlights what it is that makes political parties so important in pluralist systems. First is their role in "structur[ing] the electoral process by nominating candidates" for election and, in turn, offering citizens a choice of leaders[233]—a vocation described by a UN Special Rapporteur as "the key difference between political parties and other associations."[234] Rare is the contemporary democracy where independent candidates can come to power without the support of a political party,[235]

228. *See, e.g.*, Weissbrodt, *supra* note 1, at 59 (noting corporations' "importance in the world" as well as recent efforts to impose international human rights standards on them). Nor, as will be seen below, is this importance necessarily transnational: international human rights norms are considered applicable even to solely national businesses.

229. U.N. Human Rights Comm., *General Comment No. 25*, *supra* note 78, ¶ 25 (emphasis added); *see also* U.N. Comm'n on Human Rights, Res. 2005/36, ¶ 9, U.N. Doc. E/CN.4/RES/2005/36 (2005) (underlining political parties' "key role . . . in strengthening democracy").

230. *See, e.g.*, Refah Partisi (The Welfare Party) and Others v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98 & 41344/98, 2003-II Eur. Ct. H.R. ¶ 87 (emphasis added).

231. *See, e.g.*, United Communist Party of Turkey v. Turkey, App. No. 19392/92, Eur. Ct. H.R. ¶ 25 (1998) (emphasis added).

232. Whitbeck v. Guatemala, Inter-Am. Ct. H. R., Report No 21/94, Case 10.804(b), OEA/Ser.L/II.88 rev. 1, ¶ 8 (1994) (emphasis added).

233. Philippe Schmitter, *Parties Are Not What They Once Were*, *in* Political Parties and Democracy 67, 72 (Larry Diamond & Richard Gunther eds., 2001).

234. Kiai, *Rights to Freedom of Peaceful Assembly and of Association*, *supra* note 4, ¶ 9.

235. Pippa Norris, Building Political Parties: Reforming Legal Regulations and Internal Rules: Report Commissioned by International IDEA 2004 26 (2004); OSCE Guidelines on Political Party Regulation, *supra* note 4, ¶ 157.

prompting the OSCE to identify in political parties the single "most widely utilized means for political participation."[236]

The second function of political parties is "symbolic integration" of citizens within a jurisdiction,[237] uniting them across geographical, ethnic, or other lines on the basis of shared political opinion and a stake in governance.[238] Third is political parties' role in "aggregating the interest[s]" of particular groups of citizens into "general objectives."[239] Political parties are not alone in performing this role—they are more "oligopoly" than monopoly[240]—and recent decades have seen growing enthusiasm for more substantive political participation, as through interest groups and social movements.[241] But such vehicles are not alternatives to political parties in that they do not structure political competition or, crucially, accede to government.[242]

This last vocation—a readiness and ability to govern, alone or as part of a coalition—is the fourth and final function of political parties.[243] A capacity to come to power is political parties' distinguishing feature from an international law perspective.[244] It is the basis on which human rights obligations have previously been said to attach to political parties, albeit only under domestic law, in keeping with the orthodox perspective that nonstate actors lack international legal status.[245] It is also the primary basis on which universal and regional human rights treaty bodies single out the importance of political parties in a way not true of other domestic nonstate actors.

236. OSCE Guidelines on Political Party Regulation, *supra* note 4, ¶ 10; *see also* Kiai, *Rights to Freedom of Peaceful Assembly and of Association*, *supra* note 4, ¶ 9 (describing "political parties as central vehicles through which individuals can take part" in public affairs).

237. Schmitter, *supra* note 233, at 72.

238. Exemplifying this function at a regional level is the provision, in the EC Treaty, for "[p]olitical parties at European level" to promote "integration within the Union" and "contribute to forming a European awareness." *See* Consolidated Version of the Treaty Establishing the European Community art. 191, Oct. 11, 1997, O.J. (C 340) 173 (1997). That said, Europarties are not so much political parties in their own right as networks of national parties, as was seen in Part II, *supra*.

239. Schmitter, *supra* note 233, at 73.

240. Habermas, *supra* note 17, at 228; *see also* Schmitter, *supra* note 233, at 73.

241. Martin Kohler, *From National to Cosmopolitan Public Sphere*, *in* Reimagining Political Community: Studies in Cosmopolitan Democracy 231, 238 (Daniele Archibugi, David Held & Martin Kohlër eds., 1998).

242. Stefano Bartolini & Peter Mair, *Challenges to Contemporary Political Parties*, *in* Political Parties and Democracy 330, 336, 342 (Larry Diamond & Richard Gunther eds., 2001); Schmitter, *supra* note 233, at 85.

243. Schmitter, *supra* note 233, at 73.

244. Refah Partisi (The Welfare Party) and Others v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98 & 41344/98, 2003-II Eur. Ct. H.R. ¶ 87.

245. *Id.* ¶ 103; *see also* Kiai, *Rights to Freedom of Peaceful Assembly and of Association*, *supra* note 4, ¶ 30 (noting that because of their "particular objectives," political parties "may therefore be subject to specific requirements").

Rationale 2: Societal Expectations Attaching to Democratic Public Interest Institutions

In limiting the depth of businesses' international human rights duties relative to those of states, John Ruggie reasoned that, "[w]hile corporations may be considered 'organs of society', they are specialized economic organs, not democratic public interest institutions."[246] Without fully subscribing to Ruggie's reasoning, according to which nonstate actors serving democratic public ends would bear the same range and breadth of human rights obligations as states, this Article suggests that political parties are the very definition of democratic public interest institutions. The four functions just enumerated make this clear.

It follows that political parties can be presumed to give rise to at least as high a "basic expectation of society" as that on which Ruggie founds the "responsibility to respect human rights" of self-interested businesses.[247] Such an expectation is expressed, among other sources, in the assertion by the Parliamentary Assembly of the Council of Europe that "political parties bear a particular responsibility . . . for the legitimacy of the democratic process."[248]

Significantly, Ruggie's reference to societal expectation does not qualify the society in question as necessarily global or international. Many commentators, including those writing on the human rights obligations of nonstate actors, have understood human rights norms to bind specifically multinational businesses,[249] consistent with the orthodox view that international law has no role to play absent a "transnational component."[250] This understanding would limit the pertinence of an analogy to political parties, because, with the possible exception of the European Parliament, political parties operate by definition within a single state.

In fact, the literature on point explicitly addresses all businesses, including those that do not operate across borders. In part, this is to avoid accusations of discrimination in the application of human rights norms.[251] But, crucially, as Ruggie himself notes, it is also because the mischief sought to be addressed—reduced regulatory control—manifests itself in connection with "national firms" as well as transnational ones.[252]

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246. U.N. Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 53, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) [hereinafter Ruggie, *Framework for Business and Human Rights*].

247. Ruggie, *Guiding Principles on Business and Human Rights*, *supra* note 9, Annex 6.

248. Eur. Par. Ass. Res. 1546, The Code of Good Practice for Political Parties, ¶ 5 (Apr. 17, 2007); *see also* Venice Comm'n Code, *supra* note 4, ¶ 18.

249. *See, e.g.*, Knox, *supra* note 6, at 19.

250. *See* Rodley, *supra* note 18, at 304.

251. Weissbrodt, *supra* note 1, at 60, 65, 66.

252. Ruggie, *Framework for Business and Human Rights*, *supra* note 246, ¶ 15.

More than either international or national businesses, political parties by their public, democratic vocation arguably give rise to an expectation of respect for human rights in their respective societies.

Rationale 3: International Expectations Attaching to Aspirant Representatives of a State

Expectations of a different kind—"legitimate expectations of the international community"—underlie human rights obligations of armed groups that "aspire to represent a people before the world."[253] Such groups' "very pretention to represent the country" similarly grounds international humanitarian obligations.[254] Former UN Special Rapporteur Philip Alston identifies expectations of the international community as one of three bases on which international human rights obligations arise, alongside the orthodox conception of "obligations assumed by states" and the converse notion of inherent "rights of individuals."[255]

Admittedly not all armed groups aspire to represent a people,[256] just as not all political parties aspire to govern their state[257] (although preparedness to do so is, at least in theory, among their core functions). But some political parties do aspire to govern[258] and, by implication, to become "exclusively entitled in international law to represent that State" on the world stage.[259] In such cases, parallels to the armed groups addressed by Alston and Jean Pictet are striking.

Though conceding the "relevance of the aspiration to govern" as a moral proposition,[260] Nigel Rodley dismisses the Alston-Pictet rationale as a basis for legal obligations of armed groups. Rodley objects that any conceivable balance of obligations between state and nonstate actors in armed conflict

253. U.N. General Assembly, *Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Mission to Sri Lanka*, ¶¶ 25, 27, U.N. Doc E/CN.4/2006/53/Add.5 (Mar. 27, 2006) (by Philip Alston) [hereinafter U.N. General Assembly, *Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Mission to Sri Lanka*].

254. Jean S. Pictet, Les Conventions de Genève du 12 août 1949: Commentaire II [The Geneva Conventions of August 12, 1949: Commentary] 34 (1959) (confining international humanitarian obligations to armed groups exerting territorial control) (translation by author). *But see* U.N. General Assembly, *Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Mission to Sri Lanka*, *supra* note 253, ¶ 26 (noting that although control over territory may be relevant, the key factor is aspiration to represent a people); Jann Kleffner, *The Collective Accountability of Organized Armed Groups for System Crimes*, *in* System Criminality in International Law 238, 249 (Hermand Van Der Wilt & Andre Nollkaemper eds., 2009) (noting that "this territorial qualification is not necessary").

255. U.N. General Assembly, *Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Mission to Sri Lanka*, *supra* note 253, ¶ 26.

256. Rodley, *supra* note 18, at 301 (noting that some armed groups seek "merely to impede government or draw attention to perceived injustice").

257. Norris, *supra* note 235, at 4 (classifying parties by type, including "fringe" and "minor").

258. *See, e.g.*, Refah Partisi (The Welfare Party) and Others v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98 & 41344/98, 2003-II Eur. Ct. H.R. ¶ 103; Venice Comm'n Code, *supra* note 4, ¶ 59.

259. *See* Stefan Talmon, Recognition of Governments in International Law: With Particular Reference to Governments in Exile 67 (1998) (offering a definition of government in international law).

260. Rodley, *supra* note 18, at 301.

flies in the face of the "practical imbalance" between them.[261] But the diffuse wartime obligations rejected by Rodley differ qualitatively from the discreet obligations, corresponding strictly to participation rights, asserted here with respect to political parties.

Further support for the Alston-Pictet rationale lies in the coherence—and, by extension, the perceived legitimacy—of international rules purporting to bind states.[262] If the obligations corresponding to participation rights, for example, are to exert real compliance pull over states—or, more accurately, as will be discussed below, the political party that happens to be in power in a given state—those obligations must arguably be seen to bind opposing political parties as well.

Rationale 4: Status as Quasi-Public Actors or Emanations

The literature on businesses and armed groups does not, and probably cannot, frontally challenge the orthodox separation of state from nonstate, of public from private, or the corollary confinement of human rights to "relations between governments and governed."[263]

Yet, for their part, political parties are increasingly seen to have acquired "(quasi-) official status as part of the state" and to have evolved from private associations into "public service agencies."[264] The OSCE and the Council of Europe's Venice Commission for Democracy through Law describe political parties as "public actors,"[265] and Henry Steiner notes their "ambiguous position, in some respects independent and 'nongovernmental,' in other respects integrally part of a framework of governance."[266] Illustrating this ambiguity, the prohibition on interference in internal affairs under the Vienna Convention on Diplomatic Relations has been interpreted specifically to bar diplomats from donating to political parties in their host states.[267]

The suggestion here is not that political parties are state emanations in the strict sense of international law. In no liberal democracy are political parties a creature of the state; such a prospect is expressly discouraged by best practices in political party regulation.[268] As Habermas has put it, po-

261. *Id.* at 301.

262. *See* Franck, *supra* note 10, at 175.

263. Rodley, *supra* note 18, at 299; *see also* Knox, *supra* note 6, at 20 (contrasting the "power of government" from "that of private actors").

264. Biezen, *supra* note 105, at 27; *see also* Habermas, *supra* note 17, at 176 (tracing political parties' "fus[ion] with the organs of public authority" back as far as the nineteenth century).

265. OSCE Guidelines on Political Party Regulation, *supra* note 4, ¶ 6.

266. Steiner, *supra* note 26, at 110.

267. Lucius Caflisch, *Collecte de renseignements par des membres de représentations diplomatiques étrangères en Suisse*, 5 Revue Suisse de Droit International et Européen 627, 629 (1995).

268. Venice Comm'n Code, *supra* note 4, ¶ 14; *see also* OSCE Guidelines on Political Party Regulation, *supra* note 4, ¶ 170 (recommending that legislation "require" political parties to be "financed, at least in part, through private means").

litical parties have "not yet entirely withdrawn from civil society."[269] But the role of the state within political parties everywhere is substantial and growing. On the one hand, this involvement is ostensibly positive and facilitative, with many democracies, especially new ones, enshrining political parties in their constitutions.[270] At a supranational level, regional instruments in Africa and the Americas commit states to "strengthening" the capacity of political parties.[271]

On the other hand, the nexus between political parties and the state is negative and regulatory.[272] Registration requirements for political parties exist almost universally, with electoral authorities variously requiring the deposit of party constitutions, lists of officers or supporters, and payment of fees.[273] Far from violating association rights, at least on their face, such requirements may seek legitimately to mitigate party fragmentation.[274] Crucially for purposes of this Article, the legal status attendant on registration gives political parties an "apparatus" that can bear international obligations, a characteristic lacking from most armed groups.[275]

More pointed state intervention comes by way of political party financing,[276] driven partly by concern for corruption or undue influence by private donors[277] but mostly by declining political party membership. The significance and implications of declining party membership are debated,[278] but it has unquestionably made political parties more dependent on subsidies.[279] In this way, a distinctive nexus emerges between states and political parties, whether in power or in opposition.

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269. Jürgen Habermas, The Postnational Constellation 112 (2001).

270. Biezen, *supra* note 105, at 38.

271. Afr. Union, Charter on Democracy, Elections and Governance, *supra* note 67, art. 27(1); Inter-American Democratic Charter, *supra* note 50, art. 5.

272. Steiner, *supra* note 26, at 110; Biezen, *supra* note 105, at 27.

273. Norris, *supra* note 235, at 8–9; *Registration Requirements for Parties (Chamber 1)*, ACE Electoral Knowledge Network, http://aceproject.org/epic-en/CDTable?question=PC001&view=country&set_language=EN, *archived at* http://perma.cc/4G79-XV5T.

274. Norris, *supra* note 235, at 6; *see also* Venice Comm'n Code, *supra* note 4, ¶ 70.

275. *See* Cassese, *supra* note 1, at 141; *see also* U.N. General Assembly, *Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, *Addendum: Mission to Sri Lanka*, *supra* note 253, ¶ 26.

276. Steiner, *supra* note 26, at 110.

277. Venice Comm'n Code, *supra* note 4, ¶ 155; *see also* Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4, Annex, art. 7.3 (Dec. 9, 2003) (directing state parties to "consider" measures "to enhance transparency in . . . the funding of political parties").

278. Norris, *supra* note 235, at 23–24 (noting, inter alia, that the literature is "heavily influenced by the experience of Western Europe and Anglo-American democracies, where the historic roots of most major party organizations were established as the franchise expanded in the late 19th and early 20th century, during the pre-televison era"); *see also Political Parties: Lonely at the Top*, The Economist, Aug. 4, 2012, *available at* http://www.economist.com/node/21559901, *archived at* http://perma.cc/3NJQ-UJPF; Bartolini & Mair, *supra* note 242, at 337–38 (arguing that what "we observe here [about political parties] is adaptation rather than degeneration").

279. Norris, *supra* note 235, at 8, 12; Biezen, *supra* note 105, at 25.

Rationale 5: Correlation Between International Human Rights-Holding and Duty-Bearing

In the context of nonstate actors, holding human rights under international law implies corresponding obligations. Scholars contend that the fact that businesses are addressed at all by international instruments endows them with international legal personality[280] and, in turn, makes them liable for international human rights violations. Notwithstanding the state's increased role in political party regulation—or perhaps precisely because of it—a number of international instruments likewise address political parties, typically articulating rights of political parties against the states in which they operate.

Such collective rights of political parties are distinct from the rights of assembly and association of individual party members alluded to in Part I. For example, regional treaties binding ex-Soviet and West African states guarantee political parties as such the "freedom of campaigning"[281] and "the right to carry out their activities,"[282] respectively. Beyond the hard law of treaties, African "political parties shall have the right to freedom of movement, [and] to campaign and to express political opinions,"[283] and across Eurasia, "[p]olitical parties, as collective instruments for political expression, must be able to fully enjoy" the freedoms of association and expression.[284]

Although the ECHR makes no explicit guarantee for political parties themselves, a long line of judgments under the Convention stand for the proposition that "protection of opinions and the freedom to express them . . . applies . . . to political parties."[285] That these judgments have arisen

280. *See* Alvarez, *supra* note 8, at 5 (noting that "corporations . . . have been the de facto subjects of a large number of treaties dealing with everything from labor law to environmental protection").

281. Commonwealth of Independent States, Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms, art. 13(4), Oct. 7, 2002, *reprinted in* EUR. COMM'N, COMPENDIUM OF INTERNATIONAL STANDARDS FOR ELECTIONS 122 (2d ed. 2007).

282. ECOWAS Protocol on Democracy and Good Governance, *supra* note 100, art. 1(i); *see also* Massaër Diallo, *Présentation*, *Le protocole additionnel de 2001 de la CEDEAO: place et rôle dans la promotion de la démocratie et la gouvernance en Afrique de l'Ouest, Atelier d'appropriation, de dissémination et de mise en oeuvre des instruments régionaux de gouvernance démocratique en Afrique de l'Ouest*, 3 (Oct. 16–19, 2007), *available at* http://www.oecd.org/fr/csao/evenements/41506905.pdf, *archived at* http://perma.cc/TY8P-EQSC ("Depuis juillet 2005, les États signataires l'ayant ratifié ont atteint le nombre des 9 nécessaires pour que le Protocole s'applique à tous.").

283. Afr. Union, Declaration on the Principles Governing Democratic Elections in Africa, art. IV(5), AHG/Decl.1 (XXXVIII) (July 8, 2002).

284. OSCE GUIDELINES ON POLITICAL PARTY REGULATION, *supra* note 4, ¶ 33; *see also* OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE, art. I(7.6), June 29, 1990, *reprinted in* EUR. COMM'N, COMPENDIUM OF INTERNATIONAL STANDARDS FOR ELECTIONS 143 (2d ed. 2007) (stating that participating states will provide political parties "with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities"); Kiai, *Rights to Freedom of Peaceful Assembly and of Association*, *supra* note 4, ¶¶ 38–39 (articulating human rights of political parties as such at a universal level).

285. Refah Partisi (The Welfare Party) and Others v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98 & 41344/98, 2003-II Eur. Ct. H.R. ¶ 88; *see, e.g.*, United Communist Party of Turkey v. Turkey, App. No. 19392/92, Eur. Ct. H.R. ¶ 25 (1998); Republican Party of Russia v. Russia, 12976/

from complaints brought by political parties themselves only proves the point: where nonstate actors are concerned, the grant of standing before international adjudicative bodies further evidences international legal personality.[286] Denial of the same is revealed to reflect a "'rule of procedure'" rather than any intrinsic, substantive impediment to international legal status of nonstate actors.[287]

In short, the international legal standing of political parties as rights-holders is well established, raising the question of correlation between international human rights and obligations. It has been said that the enshrining of individual rights in the Universal Declaration was a "small and logical step" from the earlier revelation, at Nuremburg, that individuals have direct obligations under international law.[288] The same logic surely applies in reverse: to hold human rights under international law can imply corresponding international obligations.

Where political parties are concerned, at least on the domestic plane, this reasoning is well established. A UN Special Rapporteur has written that campaign rights are guaranteed only to political parties "complying with international human rights norms and standards,"[289] and the Inter-Parliamentary Union has declared that "party and campaign rights carry responsibilities to the community."[290] At a regional level, the Council of Europe's Venice Commission reasons that because political parties "enjoy the benefits of the guarantees of those principles[, including human rights,] . . . they must also respect and promote those very same principles,"[291] and an OSCE election observation report asserts that political parties "should demonstrate the political will for the conduct of democratic elections commensurate with the broad privileges they enjoy."[292] This correlative logic also infuses decisions of the ECtHR in claims brought by political parties, which, by way of the abuse of rights doctrine (as discussed in Part II), are

07, Eur. Ct. H.R. (2011); Partidul Comunistilor (Nepeceristi) v. Romania, 46626/99 Eur. Ct. H.R. (2005) 46626/99 (Feb. 3, 2005); Communist Party v. Germany, 250/57 Eur. Comm'n H.R. Dec. (1957).

286. *See* Alvarez, *supra* note 8, at 5 (noting that businesses "are indirect claimants in the World Trade Organization (WTO) dispute settlement system and direct claimants in investor-state arbitration").

287. Andrew Clapham, *Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups*, 6 J. Int'l Crim. Just. 899, 901–02 (2008).

288. Kälin & Künzli, *supra* note 14, at 15.

289. Kiai, *Rights to Freedom of Peaceful Assembly and of Association*, *supra* note 4, ¶ 33.

290. Inter-Parliamentary Union, *Declaration on Criteria for Free and Fair Elections*, art. 3(9) (Mar. 26, 1994), *available at* http://www.ipu.org/cnl-e/154-free.htm, *archived at* http://perma.cc/WN5K-72X6.

291. Venice Comm'n Code, *supra* note 4, ¶ 16.

292. Org. for Sec. & Cooperation in Eur. & Office for Democratic Inst's & Human Rights, Election Observation Mission Final Report: Albania Parliamentary Elections 28 (2009); *see also* OSCE Guidelines on Political Party Regulation, *supra* note 4, ¶ 23 ("As a result of having privileges not granted to other associations, it is appropriate to place certain obligations on political parties due to their acquired legal status.").

denied Convention protection if they have themselves flouted "the rights and freedoms recognised in a democracy."[293]

Rationale 6: Established International Legitimacy in Contrast to that of Other Nonstate Actors

As the introduction to this Part acknowledged, although they are all nonstate actors, businesses, armed groups, and political parties differ from each other in fundamental ways. Certain unique features of businesses, for example, give rise to "risks" attendant on their being accorded international legal status, with Jose Alvarez warning that "not all of the results will be progressive."[294] The international legal personality of political parties is comparatively uncontroversial, even if governmental resistance to moves that might "'internationalize' political opposition" is probably inevitable.[295]

The inherent legitimacy of political parties under international law, as reflected in their endowment with collective human rights, stands in stark contrast to armed groups, which lack even the fundamental right to exist.[296] States jealously guard against the extension of either international rights or obligations to armed groups, fearing that international legal status of any kind would accord such groups legitimacy on the world stage.[297]

Admittedly, armed groups and political parties blur somewhat in societies experiencing or emerging from civil war, as exemplified by Sinn Fein in the UK, UNITA in Angola, or Hezbollah in Lebanon.[298] Still, if politics is the continuation of war by different means, those means differ significantly. When political parties seek to wrest control of the state, by definition they do so through elections.[299] Marred as those elections may be by anti-participatory conduct of political parties—conduct which violates opposing

293. *See, e.g.*, Refah Partisi (The Welfare Party) and Others v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98 & 41344/98, 2003-II Eur. Ct. H.R. ¶ 98; *see also* Guy Goodwin-Gill, Codes of Conduct for Elections: A Study Prepared for the Inter-Parliamentary Union 60 (1998) (summarizing ECtHR case law with the proposition that "political organizations must follow the rules of the game if they are to enjoy the protection of the Convention").

294. Alvarez, *supra* note 8, at 9. Alvarez appears to have in mind the increased rights of corporations, which pursue private interests, relative to states, which pursue public interests, as exemplified by investment treaty arbitration. *Id.*

295. Goodwin-Gill, *supra* note 28, at 100. Such opposition of governing parties might be explicit or implicit, couched, in the latter case, in terms of an intrusion upon state sovereignty.

296. Kleffner, *supra* note 254, at 260.

297. *See* U.N. General Assembly, *Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Mission to Sri Lanka*, *supra* note 253, ¶ 26; Clapham, *supra* note 287, at 924.

298. Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 Colum. L. Rev. 1751, 1782 (2005) (noting that the "visible organization may be the avowedly political expression of this movement, while its clandestine cousin may describe itself as the military wing"); Mikael Eriksson, Targeting Peace: Understanding UN and EU Targeted Sanctions 137 (2011); U.N. Human Rights Council, *Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1,* ¶ 37, U.N. Doc. A/HRC/3/2 (Nov. 23 2006).

299. Venice Comm'n Code, *supra* note 4, ¶¶ 99, 185; Kiai, *Rights to Freedom of Peaceful Assembly and of Association*, *supra* note 4, ¶ 30.

voters' or candidates' participation rights—this conduct tends at least to be nonviolent. In Canada, for example, a political party might fund automated phone calls deliberately misdirecting opposition supporters to the wrong polling station.[300] In Jamaica, a political party might seek to impugn opposition candidates on the basis of a protected minority status.[301]

Even where anti-participatory conduct by political parties takes a violent turn, the violence by definition is episodic, like elections themselves.[302] It is more akin to "riots [and] isolated and sporadic acts" than to armed conflict as defined under international law.[303] During Zimbabwe's 2008 election, for example, hundreds of women opposition supporters were "abducted, beaten and gang raped" at ZANU PF party "base camps" by men chanting partisan slogans or wearing party-issued t-shirts.[304] Without diminishing in any way the gross criminality of that episode, it remains arguably a "deviant" form of electoral contestation rather than a rejection of politics in its broad sense.[305] The "ability to plan, coordinate and carry out" violence is as peripheral to political parties as it is central to armed groups.[306]

Reflecting the inherent legitimacy of political parties, international actors monitor and report on political parties' conduct in a way that they have historically hesitated to do in respect of armed groups,[307] with such reports serving to evidence international human rights obligations of the nonstate actors concerned.[308] Within the UN system alone, the Secretary-General reported "friction between youth wings of the political parties" in Ne-

300. Canadian Press, *Robocall Complaints about the Federal Election Have Doubled Since March*, National Post (Aug. 21, 2012), http://news.nationalpost.com/2012/08/21/court-records-say-robocall-complaints-doubled-to-1394-specific-occurrences-in-last-years-election/, *archived at* http://perma.cc/XV4P-ZTEU.

301. Garfield Myers, *JLP Suggests Love for Women Will Work for Party*, Jamaica Observer (Dec. 18, 2011), http://www.jamaicaobserver.com/news/JLP-suggests-love-for-women-will-work-for-party_10415031, *archived at* http://perma.cc/J8SS-XFL3.

302. *See* Kiai, *Rights to Freedom of Peaceful Assembly and of Association*, *supra* note 4, ¶ 11 (noting election periods "are often highly charged," though they often do not have clearly defined beginnings or ends).

303. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, June 8, 1977, 1125 U.N.T.S 609; *see also* Rodley, *supra* note 18, at 313; Cassese, *supra* note 1, at 125.

304. AIDS-Free World, Electing to Rape: Sexual Terror in Mugabe's Zimbabwe 15–18 (2009).

305. *See* Andreas Mehler, *Political Parties and Violence in Africa*, *in* Votes, Money and Violence: Political Parties and Elections in Sub-Saharan Africa 194, 210 (Matthias Basedau, Bero Erdmann & Andreas Mehler eds., 2007); *see also* Yasmin Khan, *South Asia: From Colonial Categories to a Crisis of Faith?*, *in* The Blackwell Companion to Religion and Violence 367, 371 (Andrew R. Murphy ed., 2011) (noting the view that "violence in South Asia [is] part and parcel of political life and just another tool on the spectrum of political methods").

306. *See* Prosecutor v Ramush Haradinaj et al., Case No. IT-04-84-T, Judgment, ¶ 60 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008) (defining armed groups in the context of "armed conflict" in international law).

307. *See* Clapham, *supra* note 84, at 579.

308. *See id.* at 576; Clapham, *supra* note 287, at 922.

pal,[309] and the Security Council noted reports of "violence perpetuated by youth groups associated with some political parties" in Burundi.[310] A UN country rapporteur dispatched to Bosnia and Herzegovina by the then-Human Rights Commission reported that "[m]embers of the SDA [party] have been implicated in acts of violence and other abuses directed against members of, or potential voters for, other parties."[311] Moreover, as noted in Part II, intergovernmental organizations regularly mount election-specific monitoring missions intended to deter anti-participatory conduct "by the implicit threat of negative reporting."[312] The mandates of these missions encompass the entire electoral process, including conduct of political parties, rather than singling out the actions of authorities.[313] To "acknowledge the situation as a whole, including any abuses or atrocities committed by the opposition," is consistent with what humanitarian observers have long aspired to do in armed conflict.[314] Electoral observers may never have gone so far as to reject the results of an election on the sole basis of "unfair campaigning," as is their prerogative,[315] but neither have they shied from reporting anti-participatory conduct by political parties. For example, UN observers in Haiti in 1990 "note[d] that the public demonstrations of some political parties have sometimes been disrupted by supporters of other organizations,"[316] and EU observers in Pakistan in 2008 reported "several clashes between party supporters . . . and four major attacks against political party gatherings killing more than 100 party supporters."[317]

By the fact of such reporting—by scrutinizing the electoral conduct of political parties against a backdrop of internationally enshrined participation rights—international observers implicitly affirm that corresponding obligations accrue to political parties.[318]

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309. U.N. Secretary-General, *Report of the Secretary-General on Children and Armed Conflict in Nepal*, ¶ 18, U.N. Doc. S/2010/183 (Apr. 13, 2010).

310. S.C. Res. 1902, pmbl., U.N. Doc. S/RES/1902 (Dec. 17, 2009).

311. U.N. Comm'n on Human Rights, *Situation of Human Rights in the Territory of the Former Yugoslavia*, ¶ 13, U.N. Doc. E/CN.4/1997/5 (July 17, 1996) (by Elisabeth Rehn).

312. Beigbeder, *supra* note 54, at 35.

313. See OSCE Handbook, *supra* note 74, at 49 (noting the range of activities and entities that should be assessed in the pre-election period); Eur. Comm'n Handbook, *supra* note 77, at 135 (noting that observers at rallies will assess whether "speakers use appropriate non-inflammatory language"); Beigbeder, *supra* note 54, at 184–85.

314. Rodley, *supra* note 18, at 318 (also noting that a failure to report on the conduct of nonstate armed groups in war would be "misleading").

315. Beigbeder, *supra* note 54, at 145 (noting that it is easier for observers to approve of election results than to reject them because of political, financial and other reasons).

316. U.N. Gen. Assembly, First Report of the United Nations Observer Group for the Verification of the Elections in Haiti, ¶ 79, U.N. Doc. A/45/870 (Dec. 14, 1990).

317. Eur. Union, Election Observation Mission, Islamic Republic of Pakistan Final Report: National and Provincial Assembly Elections 32 (2008).

318. Clapham, *supra* note 84, at 576; Clapham, *supra* note 287, at 922–23 (detailing international observers' reporting on nonstate actors' violations of human rights relating to children in armed conflict).

Rationale 7: Capacity for Violation of Human Rights

For both businesses and armed groups, sheer effectiveness of human rights law is perhaps the fundamental rationale for direct international obligations, recognizing that individuals and groups need human rights protection against private as well as state action.[319] Far from negating the positive societal contributions of some nonstate actors, this rationale embraces the "paradox that their capacity to violate contains within it the potential [to protect]."[320]

That paradox is readily apparent where political parties and participation rights are concerned. Realization of political participation is a central function of political parties, as this Article discusses.[321] But by virtue of their oligopoly over participation in public affairs, political parties have an equivalent power to thwart those rights. In the electoral context, as Guy Goodwin-Gill notes, a "peaceful campaign . . . is not solely the responsibility of the government . . . [but] is attributed in large measure to the conduct of the political parties."[322]

Both positive and negative impacts are traceable to political parties' nature as "collective instruments"[323] with an "audience . . . and the moral authority" to mobilize supporters.[324] Political parties' collective capacity depends upon strong internal discipline and coherence,[325] recalling the "structures and processes" of armed groups.[326] Both types of nonstate actors constitute a "systemic environment"[327] marked by a "shared commitment to its purposes, a feeling of voluntariness and spontaneity in serving them."[328] Much would be missed by focusing solely, as does criminal law, upon individual actors.[329]

To be sure, each political party's collective spirit differs in strength and scope. The notion that political parties generate "loyalty . . . expressed

319. Knox, *supra* note 6, at 18–19; Clapham, *supra* note 287, at 902.

320. Clapham, *supra* note 84, at 562; *see also* Weissbrodt, *supra* note 1, at 58 ("The issue becomes maximizing the good that companies do while eliminating the abuses they commit.").

321. *See supra* Rationale 1.

322. Goodwin-Gill, *supra* note 28, at 145.

323. OSCE Guidelines on Political Party Regulation, *supra* note 4, ¶ 33.

324. U.N. Human Rights Council, *Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, ¶ 62, U.N. Doc. A/HRC/20/33 (May 15, 2012); *see also* Parliamentary Assembly of the Council of Eur., Comm. on Legal Affairs and Human Rights, *Racist Discourse in Politics*, § II(C)(iii)(31), Doc. 9904 (Sept. 11, 2003) (noting that "politicians and political parties—because of their profile, access to the media and role as opinion leaders—should if anything be subjected to closer scrutiny than other individuals and groups").

325. Schmitter, *supra* note 233, at 73; Bartolini & Mair, *supra* note 242, at 340.

326. Kleffner, *supra* note 254, at 245; *see, e.g.*, Randal C. Archibold, *Haiti Elections in Doubt as Ex-Presidents Stir Pot*, N.Y. Times, June 8, 2014, at A6 (noting that "the political party he [Aristide] founded and continues to inspire has routinely sent thousands of people into the streets").

327. Kleffner, *supra* note 254, at 238.

328. Osiel, *supra* note 298, at 1789; *see also* Kleffner, *supra* note 254, at 239 (noting, without expanding, that armed groups are not "the only nonstate actors which may constitute 'systems'").

329. Osiel, *supra* note 298, at 1838; *see also* Kleffner, *supra* note 254, at 238 (noting that a focus on individual responsibility under such circumstances is "incomplete").

toward[ ] the broader organization" is in some ways an ideal type contrasting with the reality, particularly in emerging democracies, of "poorly institutionalized" parties that are "little more than a convenient label" for prominent individuals.[330] Here, too, political parties recall armed groups, some of which are mere "loosely organized bands,"[331] and even businesses, which at the smaller end of the spectrum have "less capacity as well as more informal processes and management structures."[332] Recognizing this, the literature on businesses allows for flexible human rights duties "proportional" to size and capacity.[333] Similar flexibility can and should inform human rights obligations of political parties, given their varying degrees of influence and sophistication.

A further question that cuts across nonstate actors, by virtue of their collective nature, is that of attribution of responsibility for human rights violations. Where political parties are concerned, the ECtHR made a start at addressing this issue in its judgment arising from the prohibition of the Turkish political party *Refah Partisi*. In assessing the claimant political party's conduct leading to its dissolution by Turkey, the ECtHR naturally looked to the "actions of the party's leaders."[334] However, it also took into account "acts and remarks of the other *Refah* members who were MPs or held local government posts," deeming these to have "formed a whole" and, as such, to be "imput[able] to Refah" itself.[335]

The ECtHR did not stop there, finding that anti-participatory "acts and speeches" of less prominent individuals "are imputable to a party unless it distances itself from them."[336] This standard broadly conforms to Ruggie's suggestion that a business is responsible for violations of international human rights where it "was aware or should have been aware of its contribution."[337] Left unanswered in *Refah Partisi* was the range of individuals whose anti-participatory conduct might be imputed to a political party. The conduct of party officials and candidates is undoubtedly attributable to a political party; legally nonbinding sources, such as the voluntary code of conduct developed by the International Institute for Democracy and Elections Assistance, direct political parties to "prohibit" and "forbid[ ]" their officials and candidates from violating opponents' participation rights.[338]

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330. Norris, *supra* note 235, at 21, 4; *see also* Biezen, *supra* note 105, at 27.

331. Kleffner, *supra* note 254, at 261.

332. Ruggie, *Guiding Principles on Business and Human Rights*, *supra* note 9, Annex 14.

333. *Id.*

334. Refah Partisi (The Welfare Party) and Others v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98 & 41344/98, 2003-II Eur. Ct. H.R. ¶ 101.

335. *Id.* ¶ 115.

336. *Id.* ("The Court accordingly concludes that the acts and speeches of Refah's *members* and leaders cited by the Constitutional Court in its dissolution judgment were imputable to the whole party") (emphasis added); *see also* Mehler, *supra* note 305, at 203 (problematizing a hypothetical attribution standard that would require political party leaders to have "explicitly called" for misconduct).

337. Ruggie, *Framework for Business and Human Rights*, *supra* note 246, ¶ 80.

338. Int'l Inst. for Democracy and Electoral Assistance, Code of Conduct for Political Parties, *supra* note 176, at 15, 19.

Registered party members are another category whose anti-participatory conduct may be attributed to a political party. The UN Human Rights Council has encouraged political parties to develop internal regulations dissuading members from certain forms of conduct,[339] while international, nonbinding codes of conduct exhort political parties to "prohibit" anti-participatory conduct by members.[340] In a similar vein, a 2010 report by the UN Secretary-General stated unambiguously that "political parties are accountable for the activities of their respective youth wings."[341]

More complicated is the wider category of party supporters. On the one hand, a Commonwealth observation report on elections in Nigeria declared, "[p]olitical parties are also culpable for the increase of tension, as their supporters were often involved."[342] On the other hand, relevant provisions of international political party codes of conduct direct political parties merely to "take all reasonable steps to discourage [anti-participatory] conduct by their supporters."[343]

Broadly speaking, Ruggie suggests that a business's responsibility should encompass human rights violations "which may be directly linked to its operations, products or services by its business relationships."[344] On this model, nonstate actors—including political parties—might be conceived of as lying at the center of a sphere of influence, surrounded by "concentric circles" of relationships in which the actor's "influence" and "responsibility . . . decline from one circle to the next."[345]

B. Political Parties in Power

Few, if any, nonstate actors' spheres of influence can equal that of a political party in power. The paradox of a nonstate actor controlling the state has potentially dire implications for the participation rights of that actor's opponents. A ruling party's partisan and governmental capacities must therefore be distinguished not simply for conceptual clarity, but for the efficacy of international human rights law.

339. Human Rights Council Res. 18/15, 18th Sess., Sept. 12-30, U.N. Doc. A/HRC/RES18/15, ¶ 8, (Oct. 14, 2011).

340. Int'l Inst. for Democracy and Electoral Assistance, Code of Conduct for Political Parties, *supra* note 176, at 19–20.

341. U.N. Secretary-General, *Report of the Secretary-General on Children and Armed Conflict in Nepal*, ¶ 17, U.N. Doc. S/2010/183 (Apr. 13, 2010).

342. Commonwealth of Nations, Report of the Observer Group, Nigeria State and Federal Elections 14 and 21 April 2007, 48 (2007).

343. Int'l Inst. for Democracy and Electoral Assistance, Code of Conduct for Political Parties, *supra* note 176, at 15.

344. Ruggie, *Guiding Principles on Business and Human Rights*, *supra* note 9, Annex 17.

345. *See* Ruggie, *Framework for Business and Human Rights*, *supra* note 246, ¶ 66.

1. *Piercing the 'Veil of Statehood'*

Allusion was made in connection with Rationale 4, above, to the ingrained divide between state and nonstate actors, a divide that much of the literature asserting human rights obligations of nonstate actors strives to bridge precisely by establishing an "official connection" to the state.[346] A common refrain is that the "nominally nongovernmental actor may be acting so much like a government, or in such close complicity with it, that it should be treated according to the same standards."[347]

But a ruling political party does not just act *with* or *like* a government; it *is* the government. The ability to "form governments," alone or in coalition, is the principal difference between political parties and other nonstate actors,[348] and where a political party accedes to power, it will, as noted by the ECtHR, "direct the work of a considerable portion of the State apparatus."[349] Such power is the basis on which a winning political party implements, to a greater or lesser extent, the promises made during its election campaign.[350]

This power is also a retort to the view that international human rights obligations should be confined to the state because the state's authority, "unlike that of private actors, is not necessarily checked by any domestic laws, since governments may have the power to change the laws that purport to restrict them."[351] Where the nonstate actor in question is a ruling political party, by definition, it has within its sphere of influence much or all of the state's "institutional apparatus."[352]

This is illustrated by analogy with the International Law Commission's Articles codifying the law on state responsibility, a source not ordinarily invoked in asserting human rights obligations of nonstate actors—for one thing, because the Articles operate in the interstate realm of public international law, not the individual-state realm of international human rights law; for another, because, as their title suggests, the Articles focus precisely upon attribution to states, not to nonstate actors. Nonetheless, in rationalizing the so-called triumphant rebel rule, whereby a state is retroactively imputed with "conduct of an insurrectional movement which becomes [its] new Government," the Articles make an extraordinary amalgam of nonstate

346. *See* Rodley, *supra* note 18, at 310.

347. Knox, *supra* note 6, at 20.

348. Kiai, *Rights to Freedom of Peaceful Assembly and of Association*, *supra* note 4, ¶ 9.

349. Refah Partisi (The Welfare Party) and Others v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98 & 41344/98, 2003-II Eur. Ct. H.R. ¶ 103.

350. Kiai, *Rights to Freedom of Peaceful Assembly and of Association*, *supra* note 4, ¶ 30; *see also* Refah Partisi, 2003-II Eur. Ct. H.R. ¶ 87 (noting parties' "capacity to implement those proposals once they come to power").

351. Knox, *supra* note 6, at 20.

352. *See* Rodley, *supra* note 18, at 301 (noting that armed opposition groups lack the institutional apparatus of the state held by the government in power).

and state actors.[353] They invoke the "continuity between the [armed] movement and the eventual government,"[354] with the former "substitut[ing] its structures for those of the previous Government"[355] and "becom[ing] the ruling organization of that State."[356] This language might equally describe a political party that comes to power.

Even here, however, the amalgam is not absolute. The International Law Commission notes that attribution of triumphant rebels' conduct to the state under general international law does not preclude parallel responsibility of the nonstate actor itself under a specialized heading such as international human rights law.[357] A sliver of light separates the nonstate actor from the state over which it presides. This approach arguably embodies what Anne-Marie Slaughter has urged as piercing "the veil of statehood" in order to regard "'states' internationally" the way we regard "'governments' domestically": that is, "as complex conglomerates of different institutions responsible for different governance functions."[358]

Slaughter had in mind the disaggregation of separate branches of the state, but the same logic can be extended to ruling political parties, to which we routinely refer in discussions of domestic affairs as "Tories," "Democrats," and the like, instead of, say, "the state." In this vein, international relations scholarship has begun to criticize that discipline's tendency to read government action as "reflecting a country's geopolitical position or economic structure" rather than simply "political leanings of parties" in power.[359] Government itself, on this view, is "another class of private actor,"[360] coming and going as the state endures.

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353. Report of the Int'l Law Comm'n on the Work of its Fifty-third Session, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 10(1), U.N. GAOR 56th Sess., Supp. No. 10, U.N. Doc. A56/10 (2001) [hereinafter ILC Draft Articles]; *see also* d'Aspremont, *supra* note 20, at 469 (stressing the uniquely retroactive nature of Article 10(1)).

354. ILC Draft Articles, *supra* note 353, art. 10 cmt. 4.

355. *Id.* art. 10 cmt. 7.

356. *Id.* art. 10 cmt. 5. The Articles implicitly exclude this rationale from extending to a ruling political party, defining "insurrectional movement" by reference to the "threshold for the application of the laws of armed conflict in Additional Protocol II of 1977" of the Geneva Conventions, as set out earlier in this Article. ILC Draft Articles, *supra* note 353, art. 10 cmt. 9. d'Aspremont suggests that a "less rigid criterion" is not "inconceivable," though he too has armed groups rather than political parties in mind. d'Aspremont, *supra* note 20, at 470.

357. ILC Draft Articles, *supra* note 353, art. 10 cmt. 16; *see also* Kleffner, *supra* note 254, at 241 (noting that a state's "collective accountability" is not exclusive of separate international criminal responsibility of a nonstate actor).

358. Slaughter, *supra* note 213, at 12, 32; *see, e.g.*, Jiménez de Aréchaga, International Law in the Past Third of a Century (Vol. 159) 278 (1978) (noting, without any conscious connection to Slaughter's thesis and on the specific question of the international delict of denial of justice, that "[a]lthough *independent of Government, the judiciary* is not independent of the State") (emphasis added).

359. Stephanie Hofman, European Security in NATO's Shadow: Party Ideologies and Institution Building 13 (2013); *see also id.* at 2 ("[I]nternational cooperation among democracies cannot be divorced from the preferences of national political parties.").

360. Abbott & Snidal, *supra* note 107, at 452–53. Arguably this perspective is implicit in the international legal tenet of the continuity of states. *See, e.g.*, Aguilar-Amory and Royal Bank of Canada Claims (Gr. Brit. v. Costa Rica) (Tinoco Arbitration), Award, 1 R.I.A.A. 369, 377 (1923).

Human rights claims are a rare area where international law appears, at times, to explicitly disaggregate ruling political parties from the states they govern, if not always to progressive effect. For example, ruling on a complaint against Zimbabwe arising out of serious anti-participatory conduct by ZANU PF, the African Commission on Human and Peoples' Rights held that "the ZANU (PF) is a political party (the ruling party) in Zimbabwe and just like any other party in the country, distinct from the government . . . even though some of the members of the Zimbabwe government, cabinet ministers, also hold top ranking positions in the party."[361] The ECtHR, in the complaint brought against Turkey by political party *Refah Partisi*, reasoned that words and deeds of "the Prime Minister elected on account of his position as the leader of his party, could incontestably be attributed to Refah," the political party, as distinct from the state itself.[362]

One might object that, within the state-centric framework of international human rights adjudication, this conceptual clarity comes at the price of justice, at least in so far as liability of a ruling party is (wrongly) seen to exclude responsibility of the state. Leaving aside that state-centricity is by its very nature what the literature on nonstate actors rejects, to focus on this vice is to overlook a corresponding virtue. Disaggregation of ZANU PF from Zimbabwe might have let Zimbabwe off the hook before Africa's regional human rights treaty body. But in U.S. district court, following service of civil process on Zimbabwean President Robert Mugabe in his capacity as ZANU PF leader, ZANU PF's anti-participatory conduct resulted in a default judgment against the party itself.[363] State officials, it was held, cannot "extend their protection from liability, under the mantle of inviolability, to non-state individuals and entities used as agents and conduits to execute private wrongful actions."[364] In other words, disaggregation of ruling parties defeats the assertion of state immunity. It might similarly undermine invocations of the act of state doctrine.[365]

2. *Ruling Parties' Conflict of Interest in Regulating Political Participation*

A recurring rationale for direct international obligations of nonstate actors is that the state, left to its own devices, may prove "inadequate" in regulating human rights violations by private actors.[366] This rationale

361. Afr. Comm'n on Human and Peoples' Rights, Zimbabwean Human Rights NGO Forum v. Zimbabwe, Comm. No. 245/2002, A.H.R.L.R. 128, ¶¶ 137–41 (2006).

362. Refah Partisi (The Welfare Party) and Others v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98 & 41344/98, 2003-II Eur. Ct. H.R. ¶ 113.

363. Tachiona v. Mugabe, 169 F. Supp. 2d 259 (S.D.N.Y. 2001); *see also* Tachiona v. Mugabe, 386 F.3d 205, 222 (2d Cir. 2004) (overturning the District Court decision allowing service on President Mugabe, but recognizing that ZANU PF "is, after all, a private entity and not an agency or instrumentality of a foreign state").

364. Tachiona v. Mugabe, 169 F. Supp. 2d 259, 307 (S.D.N.Y. 2001).

365. *See generally* Michael J. Bayzler, *Abolishing the Act of State Doctrine*, 134 U. Pa. L. Rev. 325 (1986).

366. Knox, *supra* note 6, at 20; Clapham, *supra* note 84, at 564.

comes to the fore in literature asserting human rights obligations of businesses given the regulatory "race to the bottom" among states seeking to lure or retain investment.[367] If government regulation of businesses may sometimes be inadequate, surely government self-regulation is even more so.

The very notion of the rule of law is conceived by some as "a fiduciary duty owed to citizens of a State by their constitutionally responsible rulers" and, moreover, as a general principle or customary rule of international law.[368] The suggestion that such a duty comprising loyalty and fairness, among other elements, might apply to the state itself is challenged on the basis that no state's legislative branch, for example, has ever given a "voluntary undertaking" of the kind associated with fiduciary relationships at common law.[369] A ruling political party arguably gives just such an undertaking in "overtly seek[ing] to wield political power" through an election campaign, in the course of which most political parties will explicitly "commit[ ] to exercise such power for the public good."[370]

Whether viewed as a fiduciary breach or not, the potential for self-interested conduct by ruling parties is nowhere more apparent than in their oversight of political participation and, more specifically, of elections. As Steiner notes, these do not come about passively, "with the benefit of the state's permission"; rather, "[g]overnments must design and administer an electoral process."[371] In the face of the partisan bias that potentially enters the participatory process as a result,[372] regional legal and normative instruments stress the importance of separating state from ruling political party,[373] with particular emphasis upon the existence of an "independent or

367. *See, e.g.*, Ruggie, *Framework for Business and Human Rights*, *supra* note 246, ¶ 15; Clapham, *supra* note 84, at 565.

368. Ndiva Kofele-Kale, The International Law of Responsibility for Economic Crimes: Holding State Officials Individually Liable for Acts of Fraudulent Enrichment 113–14 (2006); *see also* Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 Queen's L.J. 259, 286 (2005) (referring to both "legal and political institutions" of a state); *id.* at 268 (describing the fiduciary duty of such institutions as "ensuring that delegated powers are used equitably to further public goals").

369. *See*, Fox-Decent, *supra* note 368, at 298.

370. *See, e.g.*, Venice Comm'n Code, *supra* note 4, ¶ 59; *see also* Refah Partisi (The Welfare Party) and Others v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98 & 41344/98, 2003-II Eur. Ct. H.R. ¶ 87 (noting the "proposals for an overall societal model which [political parties] put before the electorate"); Kofele-Kale, *supra* note 368, at 146 (2006) (describing the "voluntary assumption" of a fiduciary duty by individual elected officials).

371. Steiner, *supra* note 26, at 110.

372. OSCE Guidelines on Political Party Regulation, *supra* note 4, ¶ 207 (noting the "inevitable incumbency advantage"); Norris, *supra* note 235, at 6 (noting that "incumbents holding elected office have the power to shape the legal and constitutional rules of the game"); *see also* Abbott & Snidal, *supra* note 107, at 453 (describing how officials "pursue forms of legalization that maximize their opportunities for reelection").

373. Commonwealth of Independent States, Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms art. 19(2)(g), Oct. 7, 2002, *reprinted in* Eur. Comm'n, Compendium of International Standards for Elections 122 (2d ed. 2007) ("[T]he law . . . should provide for separation of party and state."); OSCE, Document of the Copenhagen Meeting of the Conference on the

neutral" electoral authority to oversee the central event of political participation.[374] The risk that such independence might be compromised or circumvented is the very basis for international election observation, on the principle that "a national government with a vested interest in the outcome" must not be the "final arbiter" of whether an election has met international standards.[375]

3. *Ruling Political Parties as Actors of Persecution Under International Refugee Law*

In keeping with their emphasis upon separation of party from state, international standards condemn the use of state power and resources for partisan ends,[376] including abuse of a state's "coercive capacities" to outlaw, intimidate, or repress opposition parties.[377] Recognizing the dire implications of such abuse for opponents' political participation rights, international rules and norms stress the impartiality of law enforcement in particular[378] and generally forbid "intimidation or harassment" of opponents by incumbents.[379]

The risk of abuse of power by ruling parties arguably also informs the international legal protection afforded to refugees fleeing persecution on the basis of "political opinion,"[380] the paradigmatic example of which has always been persons "whose political party [is] outlawed."[381] International human rights play a recognized role in "establish[ing] what might be con-

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Human Dimension of the OSCE, art. I(5.2), June 29, 1990, *reprinted in* Eur. Comm'n, Compendium of International Standards for Elections 143 (2d ed. 2007) (stressing "clear separation between the State and political parties").

374. ECOWAS Protocol on Democracy and Good Governance, *supra* note 100, art. 3; *see also* Afr. Comm'n on Human and Peoples' Rights, Resolution on Elections in Africa, Res. 133, ¶ 1, ACHPR/Res.133(XXXXIIII)08 (Nov. 24, 2008) (calling on states to "[g]uarantee the independence of the Institution responsible for the management of elections").

375. Afr. Comm'n on Human and Peoples' Rights, Constitutional Rights Project and Civil Liberties Organisation v. Nigeria, Comm. No. 102/93, A.H.R.L.R. 191, ¶ 48 (1998).

376. OSCE Guidelines on Political Party Regulation, *supra* note 4, ¶ 207 (2011); *see also* Kiai, *Rights to Freedom of Peaceful Assembly and of Association*, *supra* note 4, ¶ 36 ("Public resources should not be used to tilt the electoral playing field in a party's favour"); OSCE Handbook, *supra* note 74, at 62 (indicating that abuse of resources by incumbents is a criterion of international election observation); Eur. Comm'n Handbook, *supra* note 77, at 5 (same).

377. Open Society Justice Initiative, Monitoring Election Campaign Finance: A Handbook for NGOs 99, 102–103 (2005); *see also* AIDS-Free World, Electing to Rape: Sexual Terror in Mugabe's Zimbabwe 10 (2009) (noting "rape and torture perpetrated by ZANU PF youth militia [alongside] agents of Zimbabwe's Central Intelligence Organization").

378. ECOWAS Protocol on Democracy and Good Governance, *supra* note 100, art. 19 ("[A]rmed forces and police shall be nonpartisan"); Kiai, *Rights to Freedom of Peaceful Assembly and of Association*, *supra* note 4, ¶ 36 ("[P]olice forces [and] the judiciary . . . should be impartial when controlling or limiting the activities of political parties.").

379. ECOWAS Protocol on Democracy and Good Governance, *supra* note 100, art. 10.

380. Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1941, 189 U.N.T.S. 150.

381. James Hathaway, The Law of Refugee Status 405 (2nd ed. 2014) (citing preparatory works to the Convention Relating to the Status of Refugees).

sidered persecution" within the meaning of international refugee law.[382] With an eye to violations of political participation and related rights, the EU directive implementing the 1951 Refugee Convention revealingly allows that the responsible "actors of persecution" may be "parties or organisations controlling the State" rather than the "State" itself.[383] In other words, a person will be eligible for refugee protection if he is persecuted for "an opinion, thought or belief . . . related" *either* to the state as such *or to the ruling political party*.[384]

Nor is this the sole allowance made by international law for ruling parties' abuse of power. Central to refugee law is a distinction between "non-political" and political offenses, with protection due only to persons accused or convicted of the latter.[385] As explained by the International Court of Justice in the analogous context of diplomatic asylum, the purpose of this distinction is precisely to ensure refugee protection "against any measures of a manifestly extra-legal character which a government might take or attempt to take against its *political opponents*."[386]

4. *Distinguishing Ruling Parties' Partisan and Governmental Functions in International Law*

The political offenses against which international refugee law offers protection may take a variety of forms. These range from the blatant, as where the criminalized activity is inherently outside the proper scope of the criminal law, such as "arrest or detention as a means of deterring the exercise of internationally guaranteed human rights,"[387] to the more subtle, as where the crime lacks intrinsic political substance or motivation but its prosecution is politically manipulated.[388]

The thread running through all such scenarios is the absence of a "legal interest" of the state,[389] as distinct from the manifest interest of the ruling political party. This concept is invoked here by analogy from the interna-

382. U.N. High Comm'r for Refugees, *Human Rights and Refugee Protection: Self-Study*, Module 5, Volume II, at 4 (Dec. 15, 2006).

383. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, art. 6, 2011 O.J. (L 337/9).

384. *Id.* art. 10(1)(e).

385. Convention Relating to the Status of Refugees art. 1(F)(b), July 28, 1941, 189 U.N.T.S. 150; Universal Declaration of Human Rights, *supra* note 2, art. 14(2); *see also* Asylum Case (Colombia v. Peru), Judgment, 1950 I.C.J. 266, 278 (Nov. 20) (holding that diplomatic asylum "can be granted only to political offenders who are not accused or condemned for common crimes").

386. Asylum Case (Colombia v. Peru), Judgment, 1950 I.C.J. 266, 278 (Nov. 20) (emphasis added); *see also* Guy Goodwin-Gill and Jane McAdam, The Refugee in International Law 122 (3d ed. 2007) (describing the aim as preventing "surrender of an offender to a jurisdiction in which trial and punishment might be unfairly prejudiced by political considerations").

387. Hathaway, *supra* note 381, at 239–40.

388. *Id.* at 244–46.

389. *See* Zachary Douglas, *State Immunity for the Acts of State Officials*, 82(1) British Y.B. of Int'l L. 281, 291 (2012).

tional law of immunity, where the existence or absence of a state interest determines the applicability of state immunity to individual officials abroad.[390]

Whether a state's interest is implicated depends upon the purpose behind the act and whether it was taken "in discharge of a public . . . function" rather than a private one.[391] Zachary Douglas suggests that when public power is exercised in violation of an international obligation of the state—as would be the case, for example, where a government violates its opponents' political participation rights—by definition that exercise of public power cannot be characterized as reflecting an interest of the state.[392]

In this sense, the test for state immunity differs from that for attribution of state responsibility, which is typically satisfied as soon as an official or organ of state is shown to have exercised public power.[393] Political parties in government, like individual officials in office, routinely exercise public power and expend public resources. But, as the "state's interest" standard highlights, they do not always do so for a public purpose. This standard encapsulates, in legal terms, the possible divergence between the interests of a state and those of its ruling party. At the level of individual officials, that divergence is well-recognized in the law of state immunity. Sir Arthur Watts distinguished "official acts of a head of government or of a foreign minister,"[394] in which a state has an interest, from "acts [that] they may perform in their private capacities, which may *include acts performed in a political capacity*—e.g. as leader of a political party."[395] For such partisan acts, "the State bears no greater legal responsibility than . . . [it does for] acts of private persons."[396]

The same conceptual distinction can and should extend beyond individual officials to governments as such when their actions further partisan political interests rather than public ones of the state over which they

390. *See generally id.*

391. *Id.* at 289–90, 323 (citing Herbage v. Meese, 747 F. Supp. 60, 66 (D.D.C. 1990)); *see also* Jean-Flavien Lalive, *Quelques observations sur l'immunité d'exécution des Etats et l'arbitrage international*, *in* International Law at a Time of Perplexity 369, 374 (Y. Dinstein ed., 1989) (distinguishing a state's acts as commercial counterparty from its acts as sovereign, a distinction that rests on the nature of the act and not on its purpose, such that in its commercial capacity the state may well act to safeguard the public interest, but it will nonetheless be deprived of immunity for doing so).

392. *See* Douglas, *supra* note 389, at 294, 321–322.

393. *Id.* at 294, 319. *But see* ILC Draft Articles, *supra* note 353, art. 7 cmt. 7 (incorporating a caveat for conduct of an official or entity that is "so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State"); Vienna Convention on the Law of Treaties art. 50, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (providing that a state whose consent to a treaty "has been procured through the corruption of its representative . . . may invoke such corruption as invalidating its consent to be bound by the treaty").

394. Sir Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 247 Recueil des Cours de l'Académie de Droit International 1, 13 (1994).

395. *Id.* at 111 (emphasis added).

396. *Id.*; *see also* World Duty Free v. Republic of Kenya, ICSID Case No. ARB/00/7, ¶ 178 (Oct. 4, 2006) (holding, in the face of a non-coerced bribe paid to the Kenyan President by a foreign investor, that "the Tribunal does not identify the Kenyan President with Kenya").

preside.[397] To be sure, democratic governance implies, and even requires, a certain partisan sensitivity of ruling parties to popular opinion. But, as seen in Part I, democracy is as much about individual human rights, including political participation, as it is about majority rule.

5. *Avoiding Ruling Party Manipulation of Opposition Parties' Human Rights Obligations*

To acknowledge that ruling parties may be isolated from the state they govern is to highlight a peril. Where armed groups are concerned, "[o]ppressive governments" have been among those pushing hardest for direct human rights obligations of political parties, seeing in their violation, "a pretext for restricting" opponents' rights.[398] That peril is every bit as real where political parties are concerned: not for nothing do the international codes of conduct for political parties discussed in Part II stress that they may not be invoked to "limit the activities of political parties" in opposition.[399]

Abuse by ruling political parties would in any case amount to a violation of their own international obligations as asserted in this Article. Human rights obligations of all political parties must be sufficiently determinate to mitigate this risk. Part I of this Article made a start by restricting political party obligations to the human right of political participation. Part II, in itemizing specific exhortations or obligations directed at political parties by international or transnational actors, drew out the exclusively procedural nature of political parties' crystallizing obligations, mirroring the international legal understanding of participation rights themselves. Admittedly this means embracing a concept derided by the Parliamentary Assembly of the Council of Europe as "narrowly-defined 'democracy.'"[400] But beyond mitigating the risk of anti-participatory exploitation by ruling parties, a narrow or "'thin' theory" of political party obligations is more likely to attain "universal assent" and avoid charges of neoimperialism.[401]

In the context of this Article, a thin, procedural approach entails rejecting the suggestion that political parties might have international human rights obligations relating to the substance of their positions and platforms. That suggestion, found almost exclusively in sources originating in Europe, is exemplified by the regulation that a political party in the European Parliament observe "*in its programme* . . . respect for human rights

397. *See* Watts, *supra* note 394, at 111.

398. Knox, *supra* note 6, at 20.

399. *See, e.g.*, Venice Comm'n Code, *supra* note 4, ¶ 61.

400. Parliamentary Assembly of the Council of Eur., *supra* note 324, § II(A)(8).

401. Michael Ignatieff, Human Rights as Idolatry 56 (2001); *see also* Rodley, *supra* note 18, at 317–18 (adverting to the risk of human rights law being seen "to impose unwanted or alien values on the governments and the societies they govern").

and fundamental freedoms,"[402] and by the resolution that political parties within EU member states not associate themselves with "*racist or xenophobic objectives*."[403] Similarly rejected here is the holding of the ECtHR that a political party "pursu[ing] *objectives that {a}re racist*" necessarily violates the ECHR.[404] Though meritorious, such rules fly in the face of the procedural nature of participation rights while increasing opportunities for ruling party persecution of opposition parties.

Lastly, the obligations of political parties fleshed out in Part II—like those of businesses as asserted by Ruggie—are seen to be essentially negative or passive. They comprise "due diligence *to avoid infringing* on the rights of others," rather than positive "dut[ies] *to protect*" against violations by third parties. Positive obligations corresponding to human rights, including participation rights, lie with states alone.[405]

Conclusion: Implementing Human Rights Obligations of Political Parties

Part I of this Article explored the nature and scope of internationally enshrined participation rights. Part II showed that political parties are increasingly subject to corresponding exhortations or obligations of UN organs, regional bodies such as the ECOWAS, intergovernmental election observer organizations including the OSCE, and transnational networks of political parties themselves. Part III offered several rationales for regarding political parties, whether in power or in opposition, as subject to obligations corresponding to political participation rights.

Unaddressed, so far, is the question of how such obligations might be implemented. Where businesses are concerned, John Ruggie distinguishes their international duty to respect human rights "from issues of legal liability and enforcement, which remain defined largely by national law provisions."[406] The gap between obligations and their implementation is a recurring theme in the literature on nonstate actors, which, even as it asserts international law's ability "to place direct horizontal duties on all private actors," acknowledges the limited "practical and political capacity" to

402. Regulation 2004/2003, of the European Parliament and of the Council of 4 November 2003 on the Regulations Governing Political Parties at European Level and the Rules regarding their Funding, pmbl., 2003 O.J. (L 297/1) (emphasis added).

403. *European Parliament Report on Countering Racism and Xenophobia in the European Union*, ¶ 21, A5-0049/2000, RR/232657EN.doc (Feb. 28, 2000); *see also* U.N. Human Rights Council, *Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, ¶ 62, U.N. Doc. A/HRC/20/33 (May 15, 2012) (stating that it is "essential for political parties to base their *programmes* and activities on respect for human rights") (emphasis added).

404. United Communist Party of Turkey v. Turkey, App. No. 19392/92, Eur. Ct. H.R. ¶ 23 (1998) (emphasis added).

405. Ruggie, *Guiding Principles on Business and Human Rights*, *supra* note 9, Annex 6 (emphasis added).

406. Ruggie, *Guiding Principles on Business and Human Rights*, *supra* note 9, Annex 12.

enforce those duties.[407] Nor is this incapacity confined to nonstate actors: with respect to states, although they are unquestioned international legal subjects, it is a truism that international legal enforcement mechanisms are "underdeveloped."[408]

Even so, there are ways in which the international human rights obligations of political parties might be implemented on the domestic plane, subject, on the one hand, to ruling political parties embracing the "internationalization" of their opponents' conduct around elections and, on the other hand, acknowledging their own obligation not to violate opponents' participation rights.

For one thing, unlike armed groups, political parties tend to hold assets in their names—assets that could be seized by national authorities in response to serious anti-participatory conduct.[409] Alternatively, or in addition, the flow of public funding on which political parties increasingly depend could be stopped—a course of action that the European Parliament has urged EU member states to take, "after a court ruling," against political parties that "do not respect human rights and fundamental freedoms, democracy and the rule of law as set out in the ECHR and the Charter of Fundamental Rights."[410]

In further contrast to armed groups, political parties may be dissolved and stripped of their legal status by virtue of registration requirements in most democracies.[411] Political parties could conceivably even be prosecuted in domestic courts, with France, for example, having expressly recognized their possible "criminal liabilty" as collective "legal entities."[412] On the civil front, one political party has already faced the prospect of liability in U.S. federal court for international human rights violations after it was "properly served with process through the personal service effectuated" on a visiting head of state in his capacity as party leader.[413] Although acknowledging that the "migration of international law from state actors to nonstate actors has [so far] mostly been observed at the level of individual crim-

407. Knox, *supra* note 6, at 19.

408. Franck, *supra* note 10, at 34; *see also* LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 466, ¶ 107 (June 27) (stressing the "binding force" of obligations imposed by the World Court even while acknowledging that "the Court does not itself have the means to ensure the execution of orders"); Knox, *supra* note 6, at 31 (noting that a duty not to commit genocide existed, by virtue of the Genocide Convention, "long before an international tribunal was authorized to enforce that prohibition").

409. *See* Clapham, *supra* note 287, at 920 (raising, and arguing against, the concern that extending international law to rebel groups may be ineffective because "rebel groups are unlikely to have assets in their names [and] they may be less concerned about reputational damage").

410. Eur. Parliament, Resolution of 13 December 2007 on Combating the Rise of Extremism in Europe, ¶ 12, P6_TA(2007) 0623 (Dec. 13, 2007); *see also* Eur. Comm'n for Democracy Through Law (Venice Comm'n), Guideline and Report on the Financing of Political Parties, Report (by Jacques Robert), at 13–14, cdl\doc\2001\cdl\Inf_008E.doc, CDL-INF(2001)021 (detailing specific countries' oversight mechanisms for political party financing).

411. *See* Kleffner, *supra* note 254, at 266 (adverting to the possible "dismantling of an organized armed group").

412. Clapham, *supra* note 287, at 919, 913.

413. Tachiona v. Mugabe, 169 F. Supp. 2d 259, 302 (S.D.N.Y. 2001); *see supra* Part III.

inal responsibility,"[414] Clapham also raises the prospect of political parties being prosecuted before international tribunals.[415]

A similar migration from individual to collective might occur in the targeted sanctions that penalize "intimidation of political opponents" and other anti-participatory conduct of governments.[416] In respect of Zimbabwe, asset freezes have been applied to individual members of the ZANU PF party's "Politburo" on account of their "strong ties to the Government" and its gross anti-participatory abuses.[417] There is no conceptual impediment to such sanctions being extended to ZANU PF—and other ruling parties elsewhere—as such.

But perhaps the key to implementation lies in political parties' uniquely "reputational" self-awareness, which aligns them more closely with businesses than with armed groups.[418] International human rights law operates in no small part through the "domestic audience costs" attendant on noncompliance, with "distaste for breaking the law" especially pronounced in democratic societies.[419] This underpins the "naming and shaming" function of international human rights monitoring bodies.[420] Even where norms are not strictly binding as a matter of law, as International IDEA notes in its electoral Code of Conduct, "[t]he most basic sanction is the public exposure of a failure to comply with the Code by a party."[421]

Moreover, where a political party has or might come to power, its audience is no longer solely domestic but consists instead of governments assessing each other's "legitimacy" as a function of the consent given by their

414. Clapham, *supra* note 84, at 572.

415. Clapham, *supra* note 287, at 901–02 ("[W]e can imagine any one of these [international criminal] tribunals being adjusted so that it may exercise its jurisdiction over non-natural persons (such as political parties or other legal persons) . . . .").

416. *See, e.g.*, Council Regulation (EC) 310/2002 Concerning Certain Restrictive Measures with Respect to Zimbabwe, ¶ 1, 2002 O.J. (L50/4); *see also* Council Common Position 2006/362/CFSP of 18 May 2003 Amending Common Position 2006/276/CFSP Concerning Restrictive Measures Against Certain Officials of Belarus, ¶¶ 3, 5, 2002 O.J. (L134/45) (aiming at the "speedy release and rehabilitation of all political detainees" and responding to "violations of international electoral standards in the Presidential elections"). *See generally* Eriksson, *supra* note 298, at 97 (describing elections as "reference points for sanctions"); *Robert Mugabe election victory could force West to lift Zimbabwe sanctions*, The Guardian, Aug. 2, 2013, http://www.theguardian.com/world/2013/aug/02/robert-mugabe-election-zimbabwe-sanctions, *archived at* http://perma.cc/43UR-2YLJ.

417. Council Common Position 2009/68/CFSP of 26 January 2009 Renewing Restrictive Measures Against Zimbabwe, Annex, 2009 O.J. (L23/43).

418. Clapham, *supra* note 287, at 920 ("Unlike corporations, rebel groups . . . may be less concerned about reputational damage."); *see also* Rodley, *supra* note 18, at 317–18 ("Only rarely will [armed groups] have reason to feel bound by international standards.").

419. Abbott & Snidal, *supra* note 107, at 428; *see also* Diversion of Water from the Meuse (Neth. v. Belg.), 1937 P.C.I.J. (Ser. A/B) No. 70, at ¶ 328 (June 28) (independent opinion of Judge Hudson) (asserting that, by virtue of the "different nature" of international legal sanctions, "a declaratory judgment will frequently have the same compulsive force as a mandatory judgment").

420. Clapham, *supra* note 287, at 921.

421. Int'l Inst. for Democracy and Electoral Assistance, Code of Conduct for Political Parties: Campaigning in Democratic Elections 11 (1999).

respective electorates.[422] In place of the historical de facto control standard, contemporary practice in the recognition of governments has been said to rest in part upon whether a government's rise to power accorded with citizens' exercise of their participation rights.[423] The prospect of international illegitimacy might further encourage respect for participation rights by political parties "that value their status in the international community."[424]

On balance, concerns about legitimacy and reputation, more than the prospect of forfeiture, dissolution, or prosecution, are probably the most powerful incentives for political parties the world over to respect internationally enshrined rights of political participation. These reputational forces should be harnessed by international human rights actors in working to entrench participatory democracy.

422. Franck, *supra* note 19, at 50; *see also* David Held, *Democracy and Globalization*, *in* Reimagining Political Community: Studies in Cosmopolitan Democracy 11, 22 (Daniele Archibugi, David Held & Martin Köhler eds., 1998); d'Aspremont, *supra* note 45, at 563 (asserting that "democracy w[ill] most probably remain a standard by which to assess the legitimacy of governments").

423. d'Aspremont, *supra* note 45, at 555; Fox, *supra* note 49, at 50; Ben Achour, *supra* note 26, at 355. *But see* d'Aspremont, *supra* note 45, at 555 ("The non-democratic character of a government is sometimes disregarded because of overriding geopolitical and strategic motives"); *id.* at 560 ("[T]he non-democratic origin of a government, while likely to provoke some temporary diplomatic isolation or unease, more often proves insufficient to trigger non-recognition of the new government . . . .").

424. *See* Fox, *supra* note 12, at 597.