ARTICLE

TOWARDS A RIGHT TO DEMOCRATIC GOVERNANCE IN INTERNATIONAL LAW

Udoka Ndidiamaka Owie*

ABSTRACT

In its classical positivist tradition international law was not concerned with the internal structures of states, nor did it recognise the place of actors other than states; rather it espoused the concept of domestic jurisdiction and non-interference in the domestic affairs of states as evident in the Charter of the United Nations. Nevertheless, international law has progressed from its traditional state-centrism to an acknowledgement of the place of individuals in international law as highlighted by the development of the field of human rights.

The aversion of traditional international law theorists to contemplate matters of purely national law or constitutional law, such as how a government is formed, has been challenged by the rise of democratic governments within state structures in Europe and Africa following the end of the Cold War. With the articulation of a democratic entitlement to individuals in the International Bill of Rights, as well as the aforementioned rise in democratic governments and the work of the United Nations, regional organisations, civil society in democracy and democratisation, a discourse on democratic governance has been inaugurated, opening up international law to a consideration of matters of constitutional law, which hitherto were uncharted waters.

1. INTRODUCTION

Traditionally, international law's interest in the government of a state was limited with regard to recognition, that is, to whether the government was in effective control to meet the legal criteria for statehood or, where there has been a change of government extra-constitutionally, to enable other states to determine the extent of their relations with

* LLB (Nig), BL (Nig), LLM (LSE), PhD (LSE) is a lecturer in Law at Baze University, Abuja and currently a Visiting Scholar at Osgoode Hall School of Law, York University.

UNISA university of south africa PRESS

Southern African Public Law
https://upjournals.co.za/index.php/SAPL/index
Volume 31 | Number 1 | 2016 | pp. 3–31

https://doi.org/10.25159/2219-6412/2650
ISSN 2219-6412 (Print)

such government.[1] No attention was paid to whether a government was one that enjoyed a popular mandate. Thus, 'the fact that a particular government came into power by military coup, through an uprising of parts of the population or through civil war was irrelevant for the purpose of recognition.'[2] Even at the San Francisco Conference,[3] heralding the formation of the current international legal order, international law placed a premium on the territorial sovereignty of states rather than the notion of popular sovereignty, that is, the idea that the authority of a state is vested by the consent of the governed through elected representatives. While including respect for the right of self-determination of peoples in its purposes, the pervasive notion of sovereignty encapsulated in the Charter of the United Nations (UN), as articulated as part of its principles, is territorial sovereignty expressed in the inviolability of states and non-intervention in domestic jurisdiction.[4]

This has resulted in the prevailing notion that international lawyers largely are unconcerned about democracy, which they consider purely as a matter of constitutional law. The aversion of traditional international law theorists to contemplate matters of a purely national nature is reflected in the view expressed by the American Law Institute in 1987 that international law does not 'generally address domestic constitutional issues, such as how a national government is formed'.[5] This view seems especially so when considered against the background of the principle of respect for the domestic jurisdiction of states.[6]

International law is dynamic and its involvement in democracy and democratic governance is not epiphanic – it can be traced to the right of self-determination which was instrumental in the process of de-colonisation. As a consequence of the development of human rights towards the end of the first half of the twentieth century, the articulation

1 See Montevideo Convention on the Rights and Duties of States 1933, 165 LNTS 19 Art 1; *Tinoco Claims Arbitration (Great Britain v Costa Rica*), Decision of 18 October 1923, UNRIAA (1) 369. It has, however, been asserted that the traditional criteria no longer suffice for an entity to achieve statehood, see James Crawford, *The Creation of States in International Law* (2edn, Oxford University Press 2006) 96–173. James Edmund Fawcett contended, in addition to the traditional criteria for the recognition of a government of a new state, there is a requirement to respect the right of every citizen to participate in the government of his country, directly or through representatives elected periodically by equal and secret suffrage, see James Fawcett, 'Security Council Resolutions on Rhodesia' (1965–1966) 41 British Yearbook of International Law 112; Obiora Chinedu Okafor, 'The Global Process of Legitimation and the Legitimacy of Global Governance' (1997) 14 Arizona JICL 117 121–122.

2 Erika de Wet, 'The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force' (2015) 26 European Journal of International Law (EJIL) 979 983.

3 UN,'1945: The San Francisco Conference' (*UN*) <www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/index.html> accessed 15 April 2016.

4 1 UNTS XVI, art 2 (4) and art 2 (7).

5 American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States, s 203, comment e (1987).

6 UN Charter (n 4) art 2 (7).

of a democratic entitlement in the International Bill of Rights and the reluctance to treat human rights as matters within the domestic jurisdiction of states, the issue of democratic governance came into the purview of international law.

There is a universal appeal in the democratic ideology, that is, the idea that individuals are participants in political decision-making by endowing authority to governments through the electoral process. This appeal is highlighted by the events following the fall of the Berlin Wall which marked the end of Communism and resulted in a rise in democratic governments within Europe. The mass transition to democratic forms of government was not limited to Europe. The political system of African states also underwent significant transformation, a fact which was contributed to by the economic policies of the Bretton Woods institutions, including the International Monetary Fund and the World Bank.[7] Detailing the political transformation on the African continent, Nwabueze highlighted the fact that by 1990 forty-two African countries which had authoritarian one-party or military regimes gave way to democratic systems of government by 2001.[8]

Importantly, conflict studies have shown a direct correlation between political exclusion as a form of social injustice, on the one hand, and war on the other.[9]With the revival of the UN Security Council at the end of the Cold War, the internal structures of states and governments became the focus of the Council, particularly in view of the fact that these had consequences for national peace and stability and invariably international peace, especially at the regional level. Because of the dire consequences of war on international peace and security international law has had to concern itself with what was hitherto a matter of constitutional appreciation or choice.

It is against this background that the analysis of democratic governance and its place in Africa has come to the fore. A myriad of legal instruments have been adopted with the view to entrenching democratic governance in Africa. The African Union (AU) has urged upon member states the need to establish democracy and democratic governance within their constitutional order. Indeed, democratic governance is at the core of the AU's response to the political volatility, socio-economic woes, human rights problems and development objectives of the continent. Thus, giving place to a consideration of democratic governance in international law, a place that has been sought to be widened by the views of some international scholars. Evident in the works of these scholars, is

7 These institutions were more favourably disposed towards states with democratic governments, see Thomas Franck, 'The democratic entitlement' (1994–1995) 29 Uni of Richmond LR 1 8; Patricia Armstrong, 'Human rights and multilateral development banks: governance concerns in decision-making' (1994) 88 American SocIL Proceedings 271 280 citing World Bank, *Governance: The World Bank's Experience* (Operations Policy Department, Final Draft 23 November 1993).

8 Ben Nwabueze, *Constitutional Democracy in Africa* Vol 5 (Spectrum 2004) 4.

9 Thomas Franck, 'Legitimacy and the democratic entitlement' in Gregory Fox and Brad Roth (ed), *Democratic Governance and International Law* (Cambridge University Press 2000) 25. See also Ibrahim Gassama, 'Ballots and bullets: The right to democratic governance in international law after the Egyptian coup' (2014) 32 Wisconsin ILJ 621.

a resurgence of the Kantian thesis that asserts republicanism or liberal democracy as the only means by which social justice and respect for human rights can be achieved.[10]

In the neo-Kantian view, observance of human rights and democratic rights is imperative for admission into the international community. In 1990 Michael Reisman contended that democracy is a necessary component of sovereignty for the enjoyment of full status in the international community of nations.[11] Thomas Franck in 1992, against the backdrop of the political transitions going on in Central Europe, Africa and in the Americas, propelled the issue of a right to democratic governance into international legal discourse. According to Franck,

'[U]ndeniably, a new legal entitlement is being created, based in part on custom and in part on the collective interpretation of treaties. This newly emerging "law" which requires democracy to validate governance … is also becoming a requirement of international law'.[12]

Having expressed the impetus behind this scholarly endeavour, the paper will examine the place of democratic governance in international law by considering democratic governance and its normative content. At its core the paper will analyse the extent to which democratic governance can be said to have emerged as a right in international law, and to this end the paper will engage in an analysis of international law, at both the global level and at regional levels.

2. DEMOCRATIC GOVERNANCE AND ITS NORMATIVE CONTENT

2.1. The meaning of the concept of democratic governance

An understanding of the concept of democratic governance hinges upon an understanding of the term 'democracy'. Definitions are employed to give meaning to an idea and the definitions of democracy are as varied as the subjective perspectives of those who have

10 Immanuel Kant, 'Towards perpetual peace: A philosophical sketch' (1795) in H Reiss (ed), *Kant: Political Writings* (Cambridge University Press 1990); Fernando Tesón, 'The Kantian Theory of International Law' (1992) 92 Columbia LR 53, Fernando Tesón, 'Two mistakes about democracy' (1998) 4 International Legal Theory 35 35–38. See also Fernando Tesón, *A Philosophy of International Law* (Westview Press 1998); Anne Marie Slaughter, 'International law in a world of liberal states' (1995) 6 EJIL 503; Anne Marie Slaughter, 'The real new world order' (1997) 76 Foreign Affairs 183. For a critical view see Susan Marks, 'The "emerging norm": conceptualizing "democratic governance"' (1997) 91 *American Society of International Law Proceedings* 372; Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in The International Legal Order* (Cambridge 2004) 299–311.

11 WM Reisman, 'Sovereignty and human rights in contemporary international law' (1990) 84 American JIL 866.

12 Thomas Franck, 'The emerging right to democratic governance' (1992) 86 American JIL 46.

embarked upon the task of giving meaning to the concept.[13] It is not intended to proffer a definition of democracy in this work; to do so would be imprudent because definitions of the concept already abound. Thus, a reductionist, minimalist approach will be employed in this work, considering democracy from various doctrinal perspectives with a view to discerning its minimum content.

The term 'democracy' is synthesized from the Greek words *demos* (people) and *kratos* (rule).[14] This idea of rule by people is most famously expressed in Lincoln's words to mean 'government of the people, by the people, for the people.'[15] Though seemingly straightforward, there are inherent complexities in the idea of rule by the people, for example, discerning 'the people', the type of participation or engagement in the political process, the type of political process which is to be participated in or engaged with, the field of participation or engagement, and so on.[16]

In political theory, democracy has been described as 'the extent to which the political power of the elites is minimized and that of the non-elites is maximized.'[17] It has also been defined as 'that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote.'[18]

In sociology, democracy is described as 'a social mechanism for the resolution of the problem of societal decision-making among conflicting interest groups which permits the largest possible part of the population to influence these decisions through their ability to choose among alternative contenders for political office.'[19]

Black's Law Dictionary defines democracy as 'government by the people, either directly or through representatives elected by the people.'[20] The underlying idea behind a democracy is the 'popular basis of government,' that is the idea that government is founded upon the consent of the governed which is expressed at periodic elections 'in which franchise is universal.'[21]

---

13 Cooper contends that the problem with definitions is that a concept may exist or manifest itself without a definition; and the definition does not endow meaning on the concept –rather definitions manifest the meaning perceived and sought to be conveyed; HHA Cooper, 'Terrorism: the problem of the problem of definition', (1978) 26 Chitty's LJ 105 106.

14 George Sørensen, *Democracy and Democratization: Process and Prospects in a Changing World* (3 edn, Westview Press 1997) 3.

15 Abraham Lincoln, Gettysburg Address (19 November 1863) during the American Civil War.

16 Sørensen (n 14), 3–4.

17 Kenneth Bollen, 'Political democracy: conceptual and measurement traps' (1990) 25 Studies in Comparative International Development 7 9.

18 Robert Barro, 'Determinants of democracy' (1999) 107 J of Political Economy 158 160.

19 Seymour Lipset, 'Some social requisites of democracy: economic development and political legitimacy' (1959) 53 The American Political Science Review 69 71.

20 Bryan Garner (ed), (9 edn, West Group 2009) 497.

21 Nwabueze (n 8) 4.

International law does not attempt any definition of democracy, a lack compounded by the aforementioned aversion of traditional international law for matters within the domestic jurisdiction of states. The Charter of the United Nations, as the foundational document establishing the current international legal order and despite the magniloquence of its opening, 'We the people', a phrase which is reflective of democratic principles, does not mention democracy within that instrument.[22] That is not to say that democracy has no place in international law. In fact, international instruments at global and regional levels, such as the Universal Declaration on Human Rights 1948, the International Covenant on Civil and Political Rights 1966, as well as the American Charter on Human Rights, the European Convention on Human Rights and the African Charter on Human and People's Rights have laid the legal basis of a political entitlement, in international law founded on democratic principles, and have inspired constitutional democracies at the domestic level, albeit without defining democracy.

Fox characterised definitions of democracy in two separate categories. On the one hand there is the procedural approach which is founded in political theory and focuses on periodic elections and associated rights of political participation. Thus democracy 'concerns the way in which a government is chosen, primarily through elections and not other human rights that protect citizens against governmental overreaching'.[23] On the other hand there is the substantive approach, which defines democracy on the basis of its underlying principles and not simply the electoral process.[24] Substantively, 'democracy is defined by reference to a series of rights, mostly, though not exclusively, political in nature. Effective political participations and government accountability are deemed impossible without a robust protection of rights.'[25]

There are inherent problems with both approaches, which Fox acknowledges, as can be seen in the failure of the procedural approach to address the divide between an electoral mandate obtained by a free and fair election and the subsequent actions of an elected government which compromise democracy and its democratic status.[26] Also, if democracy is merely a panoply of human rights, albeit political in nature, then is democracy a separate normative system different from international law which already provides for and protects human rights, including political ones?[27]

Democracy involves, at a minimum, the consent of the electorate expressed through periodic elections in which there is competition between candidates and an opportunity for choice by the electorate. Thus, a democratic government must be representative

22 (n 4).

23 Gregory Fox, 'Democracy, right to, international protection' *Max Planck Encyclopedia of Public International Law*, <www.mpepil.com> accessed 15 April 2016.

24 Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing 2013) 17.

25 ibid.

26 ibid.

27 ibid.

and its mandate is subject to the will of those represented who are at liberty to revoke the mandate. This model is in line with the liberal democratic view articulated in the Declaration of Independence of the United States of America to the effect that the states of America

> [H]old these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed that whenever any form of government becomes destructive to these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.[28]

Having stated it thus, a consideration of what democratic governance is becomes imperative in this discourse. If it is difficult to have an agreed definition of democracy, the problem is exponentially greater with the concept of democratic governance. But the task is not so much as to define democratic governance but to ascertain its normative content. Again, a minimum and reductionist approach to democratic governance will be adopted and this will inform the normative content of the concept.

An important starting point with regard to the normative content of democratic governance is the principle of self-determination. Although self-determination and democratic governance, including any appurtenant right, are conceptually different, to the extent that there is the similarity of 'the desire for meaningful participation in a coherent socio-political process', the right of self-determination can be argued to be the precursor to the democratic entitlement.[29] The recognition of the right of peoples to govern themselves, a right which states are duty bound to respect, as is evident in the Advisory Opinion of the International Court of Justice in the *Western Sahara case*,[30] which was instrumental in the decolonisation process, remains of fundamental importance in regard to the question of democratic entitlement and whether there is a right to democratic governance.

There is a close link between human rights and democracy and so international human rights instruments have articulated the democratic ideology. In fact, it is through human rights law that democracy came into the parlance of international law.[31] The Universal Declaration of Human Rights (UDHR) 1948 provides that:

28 4 July 1776. The English philosopher, John Locke, in advancing the liberal ideology in his classical work 'Two treatises of Government' in 1690, established the theory that the authority and thus legitimacy, of a government is founded upon the consent of the governed, see generally Peter Laslett (ed), *Locke: Two Treatises of Government* (Cambridge University Press 1988).

29 Franck (n 7) 9.

30 (1975) ICJ Reports 12.

31 Vidmar (n 24) 38.

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right of equal access to public service in his country;

3. The will of the people shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.[32]

Although the UDHR does not explicitly employ the term 'democracy', the language of entitlement regarding the ideals of democracy (democratic entitlement) evident in Article 25 is further seen in Article 28 of the UDHR to the effect that everyone is entitled to a social and international order in which the rights and freedoms contained in the Declaration can be fully realised.[33] The UDHR envisages rights of a procedural nature including competitive and periodic elections for the exercise of voting. It expresses rights which go beyond the procedural by providing for substantive rights, like the access to opportunity for public service and conditions necessary for attainment of the democratic entitlement. Though pertaining to moral aspirations rather than arrogating a legally binding nature, the UDHR laid the foundation for the legally-binding multilateral human rights instruments which came into existence in 1966.

In 1966 the UN General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic and Socio Cultural Rights (ICESCR).[34] The ICCPR expressly provides for the right and opportunity of citizens:

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;

c. To have access, on general terms of equality to public service in his country.[35]

32 Art 21; adopted by the UN General Assembly on 10 December 1948, GA Res. 217A (III), UN Doc. A/810 (1948). See generally, Jochen von Bernstoff, 'The changing fortunes of the Universal Declaration of Human Rights: genesis and symbolic dimensions of the turn to rights in international law' (2008) 19 EJIL 903–924.

33 ibid.

34 GA Res. 2200A(XXI), 21 UN GAOR Supp (No.16).

35 999 UNTS 171, art 25.

Again, though the ICESCR did not explicitly spell out a democratic entitlement, unlike the ICCPR, it envisaged and alluded to democratic societies for the attainment of rights contained therein.[36]

The normative agenda behind democratic governance was advanced by the UN Human Rights Committee.[37] The Committee, in articulating democratic standards as expressed in Article 25 of the ICCPR, opined that citizens have a right to participate in the conduct of public affairs and to have access to public service, as well as to vote and to be elected, and that states are obligated to adopt the necessary measures to give effect to the right.[38]

On a regional level, the European and American states adopted human rights instruments which similarly advance the cause of a democratic entitlement among their citizens. The preamble of the European Convention on Human Rights, 1950 states that fundamental freedoms, as the foundation of justice and peace, are best maintained by an effective political democracy. The European Convention is emphatic on the obligation of contracting states to 'hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people.'[39]

The Inter- American Convention on Human Rights, 1969 provides that:

1. Every citizen shall enjoy the following rights and opportunities:To take part in the conduct of public affairs, directly or through freely chosen representatives;

    a 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; and

    b. To have access, under general conditions of equality, to the public service of his country.[40]

The African Charter on Human and Peoples Rights, 1981 provides that:

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.

36 993 UNTS 3, see Preamble, arts 1 and 4.

37 General Comment 25 (57) UN Doc. CCPR/C/21/Rev1/Add7 (1996).

38 ibid para 1.

39 ETS 5; 213 UNTS 221; see Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms 1952 art 3.

40 OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99.

2. Every citizen shall have the right to equal access to the public service of his country.[41]

Unlike other human rights instruments the African Charter does not provide for periodic elections and suffrage. It only provides a right to free participation in government without stating the form of government which would involve such public participation. While representative participation can only be achieved through a democratic structure, the Charter excludes competition, thereby making room for party monism, the antithesis of party pluralism and democratic choice. However, with a view to addressing the democratic deficiency in the African Charter, the African Charter on Democracy, Elections and Governance (African Democracy Charter) was adopted by the eighth ordinary session of the African Union in 2007 and it provides thus:

1. State Parties shall commit themselves to promote democracy, the principle of the rule of law and human rights.

2. State Parties shall recognize popular participation through universal suffrage as the inalienable right of the people.[42]

The African Democracy Charter includes as part of its objectives the promotion of regular free and fair elections to institutionalise the legitimate authority of representative government as well as a democratic change of government; also the prohibition, rejection and condemnation of an unconstitutional change of government in member states as a serious threat to stability, peace, security and development.[43]The democratic entitlement under the African Democracy Charter goes beyond the prescriptions in the International Bill of Rights. The Charter stipulates what amounts to an unconstitutional change of government and prohibits and sanctions such.

There is no equivalent regional human rights instrument for the Asian states, states in the Middle East and Pacific states, which limits an analysis of the extent of the democratic entitlement through human rights instruments.

2.2. A Normative Content

Despite the democratic entitlement contained in the various human rights instruments the diversity of governments makes it difficult for a consensus to be reached as to what constitutes democratic governance.[44] The mutual hostility between West and East (Cold War) contributed to the lack of agreement as to the concept of democratic governance.

41 OAU Doc. CAB/LEG/67/3 rev5; 1520 UNTS 217; 21 ILM 58.

42 AU,<www.achpr.org/files/instruments/charter-democracy/aumincom_instr_charter_democracy_2007_eng.pdf> accessed 15 April 2016.

43 ibid art 2.

44 Gregory Fox and Brad Roth, 'Introduction: The Spread of Liberal Democracy and Its Implications for International Law' in Fox and Roth (ed), (n 9) 1.

The UN Human Rights Commission included, as part of the right to democratic governance, the right to peaceful association, a right to information, transparent and accountable government institutions and the rule of law in defining democratic governance, in addition to universal and equal suffrage, political participation and equal opportunity for all citizens to stand for elections as well as have access to public services.[45] Whatever democratic governance may mean it involves, at the very minimum, democratic legitimacy, political participation by the citizens in the electoral process, equal access to public services and a concomitant democratic peace.

2.2.1. Democratic legitimacy

The *fons et origo* of international law is founded in the very notion of the sovereignty of states. It is conventional wisdom that the sovereignty of a state vests in 'the people' of the state and so a government must be an expression of the will of those it represents (popular sovereignty). A democratic government therefore can be legitimised only by the popular will. By this idea of popular legitimacy, a government enjoys the mandate of 'the people' and governs by the will of 'the people'. The notion of the collective will of the people hitherto was confined to the realm of rhetoric, however in recent international practice the legitimacy of government is determined based on objective manifestations of popular will.[46] The legitimisation of mandate has come to the focus of international law with regard to the internal structures of governments. The legitimacy of a government is seen through the lens of political participation, that is it is only through participation in the electoral process that it can be said that the citizens have vested authority in a government through popular will.

2.2.2. Political Participation

The biggest impetus for democratic governance is the need by governments for legitimacy or validation. Franck argues that in the absence of validation 'the task of governance is fraught with difficulty'.[47] The validation is sought through the citizens freely participating in the political process, exercising their choice through the ballot box. Other methods of validation (and invariably assessment) include an independent national electoral agency, an independent judiciary, a free press, election monitoring mechanisms either at a regional or global level. It is no more uncommon for sovereign states to request the monitoring of their elections. Indeed the international community places a premium on an election which is adjudged to be transparent, that is, to have

45 Promotion and Consolidation of democracy, UN ESCOR, 53d Sess, UN Doc E/CN4/Sub2/2001/32, at 17 (2001). See also Nsonguruwa Udombana, 'Articulating the right to democratic governance in Africa' (2002–2003) 23 Michigan JofIntL1209 1235.

46 Brad Roth, *Governmental Illegitimacy in International Law* (Clarendon Press 1999) 2.

47 Franck (n 9) 29.

been free and fair. The transparency then provides the basis for an assessment of the objective manifestations of popular will.

James Fawcett opined that in addition to the traditional criteria for the recognition of a government of a new state, there is a requirement to respect the right of every citizen to participate in the government of his country, directly or through representatives elected periodically by equal and secret suffrage.[48] Arguing in support of the legitimising (and de-legitimising) effect of political participation, Okafor suggests that popular participation in governance constitutes part of 'minimum norms' used in the evaluation of the legitimacy of governments and governance.[49]

As a normative component of democratic governance the requirement of political participation reflects liberal democratic standards. The right to political participation envisages not only the existence of mechanisms for effective participation but also the actual exercise of the right to participate in the democratic process.[50] Citizens can be said to have participated in the democratic process only when there is a choice, that is, the expression of the free will of the electorate requires competition and party pluralism.[51]

2.2.3. Equal access to public services

Democracy means more than periodic elections and, similarly, political participation means more than suffrage. Democratic governance requires that citizens should have access, on general terms of equality, to public services. Access to public services is access to political influence in policy and decision-making. If participation in decision-making, especially that which affects the lives of people is essential in a democracy, then the different groups of people within the political system should have the opportunity of political influence within the system. In the absence of this the effectiveness of democratic norms would be undermined.[52]

In pluri-cultural societies, especially as found in African political systems, the need for equal access is more pronounced and more difficult to achieve. Gender equality, as highlighted at the Beijing Declaration and Platform for Action,[53] also must be reflected in the process of deliberation and decision-making. While it is a practical impossibility for all groups to have access to political influence, what is required is equal opportunity

48 Fawcett (n 1) 112.

49 Okafor (n 1) 121–122.

50 Fox and Roth (n 44) 11.

51 On the genuineness of elections and party pluralism or monism, see Gregory Fox, 'The right to political participation in international law' in Fox and Roth (ed) (n 9) 55–59.

52 James Bohman, 'International regimes and democratic governance: political equality and influence in global institutions' (1999) 75 International Affairs 499 502–503.

53 UN Doc. A/CONF.177/20 (1995) and A/CONF.177/20/Add1 (1995) adopted at the Fourth World Conference on Women: action for Equality, Development and Peace (Beijing, 15 September 1995).

with no group being legally disadvantaged and have the reasonable expectation of being able to influence decisions that affect their lives.

2.2.4. Democratic Peace

At least in principle and unlike other forms of government, democracy fosters political inclusion.[54] On the other hand, political exclusion which is characterised by unfairness and anomie, has been shown to be the main determinants of war and peace. The idea of peace is not inherent in the concept of democratic governance but is peremptorily a concomitant of democratic governance. It is uncommon for democracies to wage war on each other and this reality has been borne out by studies of war spanning the last two centuries.[55] This does not mean that the conflicting interests of democracies do not conflict rather it means that 'democracies seem able, however, to resolve such clashes by means other than war'.[56] Importantly, a government that has assumed power on the basis of its popularity and which is an inclusive government is less likely to be threatened by dissidence.

Having considered the normative content of democratic governance, it is imperative to consider whether, and to what extent, a right to democratic governance exists in international law.

3. DEMOCRATIC GOVERNANCE IN INTERNATIONAL LAW: AN EMERGENT OR EMERGED RIGHT?

The language of democratic entitlement in international instruments causes one to wonder as to the extent to which it can be said that there is a right to democratic governance in international law. According to Franck,

> Undeniably, a new legal entitlement is being created, based in part on custom and in part on the collective interpretation of treaties. This newly emerging 'law' – which requires democracy to validate governance – is not merely the law of a particular state… It is also becoming a requirement of international law, applicable to all and implemented through global standards, with the help of regional and international organisations. The transformation of the democratic entitlement from moral prescription to international obligation has evolved gradually.[57]

The extent to which a right exists in international law is one which implicates the complexities and uniqueness of international rule-making and thus any examination of

54 Franck (n 9) 25.

55 James Crawford, 'Democracy and the body of international law' in Fox and Roth (eds) (n 9) 91.

56 ibid. See also Franck (n 12) 88.

57 Franck, id 56 47; see also Susan Marks, 'What has become of the emergent right to democratic governance?' (2011) 22 EJIL 507–524; Jean d'Aspremont, 'The rise and fall of democratic governance in international law: a reply to Susan Marks' (2011) 22 EJIL 549–570.

the existence of a right in international law or its extent requires a nuanced approach. It involves an examination of conventional (treaty) law to ascertain the contractual obligations of states and, bearing in mind that treaties cannot create rights or obligations for third parties, an examination of customary international law becomes imperative to ascertain whether there is a right to democratic governance as a rule of international law. Having considered the treaty provisions on democratic entitlement in human rights treaties, it is apposite to look at state practice to ascertain the evolution of a rule of international law according a right to democratic governance.

Although involved in monitoring elections and referenda in the decolonisation process, it was not until 1990 that the UN sent a monitoring mission to a sovereign state for the elections in Nicaragua.[58] In 1987, the Central American Heads of States reached the Esquipulas II Agreement, 1987 which called for free, internationally monitored elections to ensure legitimacy.[59] It was on this basis that Nicaragua requested the UN Secretary-General to establish an observer mission to verify its elections,[60] and, following which, the UN Observer Mission in Nicaragua (ONUVEN) was established in July 1989 and monitored the elections in Nicaragua in 1990, as the first election-monitoring mission by the UN in a sovereign state. In October 1990, an observer mission was established by the UN to oversee the elections in Haiti following the invitation of the Transitional Government of Haiti.

After these, it has become commonplace for the UN to supervise elections in conflict societies, or as part of post-conflict measures in transitional societies and even in societies where there is an absence of conflict. Thus, the UN sent an observation team for Eritrea's plebiscite on secession from Ethiopia in 1992.[61] Election monitoring or observation was authorised by the UN in Angola in 1992, Cambodia in 1993, El-Salvador in 1994, Mozambique in 1994, South Africa in 1994, Croatia and Liberia in 1997 and Central African Republic (CAR) in 1998 and 1999.[62] Pursuant to a resolution by the UN General Assembly, the Secretary-General, in 1992, established an Electoral Assistance Division within the Secretariat to enable the UN to co-ordinate its numerous involvements in democratisation.[63]

58 Yves Biegbeder, *International Monitoring of Plebiscites, Referenda and National Elections* (Martinus Nijhoff 1994) 164–169; Fox and Roth, 'Democracy and international law' (2001) 27 Review of International Studies 327–328.

59 Between Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua; <www.peacemaker.un.org/centralamerica-esquipulasII87> accessed 15 April 2016.

60 The Situation in Central America: Threats to International Peace and Security and Peace Initiatives, UN Doc A/44/642 (1989).

61 GA Res 47/114 (1992); UN Doc A/47/544 (1992).

62 UN, Basic Facts About the United Nations (UN Department of Public Information 2000) 80.

63 GA Res 46/137 (1991).

In addition, there is the 'parallel and reinforcing norm building' activity within regional frameworks.[64] The Organization of American States (OAS) has been involved in election monitoring in Nicaragua in 1990, in Suriname in 1991, El Salvador, Paraguay, Panama and Peru in 1992.[65] The Organization for Security and Co-operation in Europe (OSCE),which was established as a mechanism to facilitate East-West dialogue during the Cold War,[66] at the end of the Cold War found itself involved in transitional elections throughout Eastern and Central Europe.[67] Democratic governance is important to the OSCE and the Maastricht Treaty includes democracy as a requirement for admission of new members, and the position is validated by the European Court of Human Rights in *United Communist Party of Turkey and Ors v Turkey*.[68]

Within the AU election observation missions which have been sent to monitor elections on the African continent include, but are not limited to Mali, Rwanda, Swaziland, Republic of Guinea, Republic of Madagascar, Malawi, Mauritania, Tunisia and Nigeria.[69]

Non-governmental organisations have played an active part in fostering the democratic entitlement, for example, The Carter Center has monitored elections in over 100 countries.[70] The international community has come to rely on the results of the observation or monitoring missions as providing evidence as to whether an election meets with internationally acceptable standards.

That the domestic structures within states and the structure of governments have become the focus of international law as well as international efforts to provide for a democratic entitlement within the framework of human rights and efforts to ensure that elections are fair and meet with internationally acceptable standards are not enough to assert that there is a right to democratic governance in international law. International law on the issue remains equivocal. The democratic entitlement in the International Bill of Rights and the practice of election monitoring point to an emerging right, nevertheless customary international law evident in state practice negates the existence of such a right.

64 Franck (n 12) 62.

65 Larman Wilson and David Dent, 'The United States and the OAS' in David Dent (ed), *U.S.- Latin American Policy Making: A Reference Handbook* (Greenwood Publishing 1995) 25; Sara Steinmetz, *Democratic Transition and Human Rights: Perspectives on U.S Foreign Policy* (State University of New York Press 1994) 206.

66 Formerly known as the Conference on Security and Cooperation in Europe.

67 See Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 ILM 1305; and Charter of Paris for a New Europe 1990 <www.osce.org> accessed 15 April 2016.

68 133/1996/752/951(ECtHR, 30 January 1998) [45] <http://hudoc.echr.coe.int/eng?i=001-58128> accessed 15 April 2016.

69 For reports of missions see <www.au-elections.org> accessed 15 April 2016. See also the African Democracy Charter on monitoring of elections of state parties (n 42) arts 19 and 20.

70 See <www.cartercenter.org> accessed 15 April 2016.

Generally speaking, the extent to which the entitlement contained in the UDHR and the ICCPR is a substantive right must be assessed against the backdrop of a few factors including, first, the non-binding nature of the UDHR. Secondly, there is the contractual nature of the ICCPR which is subjected to the *pacta tertiis nec nocent nec prosunt* principle codified in Article 34 of the Vienna Convention on the Law of Treaties that a treaty cannot create rights or obligations for third parties without their consent.[71] Thirdly, there is also the enforcement handicap of international law.

The complex nature of international law is such that measures available to enforce the obligations of state parties to human rights instruments are quite limited. Firstly, the importance of human rights treaties is such that universality of consent to be bound to the treaties is sought and it would be against the spirit and purpose of the treaties to allow states to terminate or to suspend the application of a treaty where there has been a breach of the treaty by a state party. [72] Secondly, the prohibition against the use of force is a peremptory norm of international law from which there can be no derogation. Thus, states are not entitled to a unilateral use of force to enforce the obligations of state parties. In fact, unilateral action in defence of human rights has been rejected in international law with regard to the alleged right of humanitarian intervention.[73] Similarly, unilateral use of force in defence of democracy, that is, pro-democratic intervention, has been roundly rejected.[74] The absence of an enforcement mechanism in international law is not a negation of the existence of international law with its appurtenant rights and obligations but merely a uniqueness of international law.

The question as to the existence or extent of the right to democratic governance is compounded by the fact that state practice does not support claims as to the existence of such a right. Nothing precludes a state, in the exercise of its sovereignty, to request for or consent to election monitoring or observation: this point was acknowledged by the International Court of Justice in the *Nicaragua* case.[75] The instances relied on in support of the right to democratic governance involve the consent of the states involved, for example, Haiti and Nicaragua which requested election monitoring. Similarly, in

71 1155 UNTS 331.

72 ibid art 60. See also UNHRC, 'General Comment 26' (1997) UN Doc CCPR/C/21/Rev1/Add8/Rev1 [5] that there can be no renunciation of or withdrawal from the ICCPR.

73 See evidence of Ian Brownlie, Christine Chinkin, Vaughan Lowe and Christopher Greenwood to the Foreign Affairs Committee of the United Kingdom House of Commons (reprinted in 2000) 49 International and Comparative Law Quarterly (ICLQ) 876–943; Bruno Simma, 'NATO, the United Nations and the use of force: legal aspects' (1999) 10 EJIL 1–22; Antonio Cassese, '*Ex iniuria ius oritur*: are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?' (1999) 10 EJIL 23–30; for a different view see Christopher Greenwood, 'Humanitarian intervention: the case of Kosovo' (1999) 10 Finnish YBIL 141–175.

74 The invasion of Panama by the United States in 1989 was condemned by the United Nations General Assembly, see A/RES/44/240 (29 December 1989).

75 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* Merits Judgment [1986] ICJ Reports 14.

Sierra Leone, upon the expulsion of the democratically-elected president by the military junta in 1997, there was a conspicuous effort by the international community not to justify intervention in the country or the return of President Kabbah to power on the basis of pro-democracy ideals. More recently, the overthrow of the first democratically-elected president of Egypt by the military in 2013 was not condemned by the UN Security Council as a subversion of democracy or even by the great powers in Western democracies that in the past, albeit unsuccessfully, asserted a right to pro-democratic interventions.[76]

Thus the extent to which the efforts have crystallised as a substantive right in international law at the global level is limited. This failure is because, if such a right existed, then there would be a correlative duty on the part of states to ensure democratic governance, including the subjection of their elections to international monitoring and observation. Importantly, the International Court of Justice held in the *Nicaragua* case that,

> A state, which is free to decide upon the principle and methods of popular consultation within its domestic order, is sovereign for the purpose of accepting a limitation of its sovereignty in this field.[77]

The UN General Assembly has acknowledged that in the exercise of sovereignty states may request assistance in the form of election monitoring to strengthen and develop their electoral institutions and processes and that 'UN electoral assistance and support for promotion of democratization are provided *only* at the specific request of states'.[78]

In recent times the UN has changed focus from election monitoring to electoral assistance through its Electoral Assistance Division, Peace Keeping Operations and the UN Development Project. In the OAS and OSCE regions, where these regional organisations have shown commitment to democratic governance through extensive involvement in election monitoring, the UN now generally refers requests for monitoring to these organisations, itself concentrating on long-term technical assistance through capacity building.[79] However the UN has had to accede, where the circumstances of a raging armed conflict with large-scale impact on human lives and security, to a request to validate the integrity of an electoral process, as in 2010, by certifying the presidential elections in Côte d' Ivoire.[80]

Global claims as to a right to democratic governance pertain to *lex ferenda* aspirations and do not reflect the realities of *lex lata*. Franck does not assert that such a right exists. He argues that although, in view of state practice, international law is

76 See Gassama (n 9).

77 (n 75) 131.

78 A/RES/66/163 (19 December 2011) preambular paras 4 and 8 (emphasis supplied).

79 Eric Bjornlund, *Beyond Free and Fair: Monitoring Elections and Building Democracy* (Woodrow Wilson Center Press 2004) 62.

80 See S/RES/1603 (2005) and S/RES/1765 (2007).

headed in that direction it is yet to arrive there. Writing eight years after his inaugural work on the right to democratic governance, Franck asserted that,

> We are witnessing a sea in change in international law, as a result of which the legitimacy of each government will one day be measured definitively by international rules and processes. We are not quite there yet, but the outlines are emerging of such a new world, in which the citizens of each State will look to international law and organization to guarantee them fair access to political power and participation in societal decisions.[81]

The complexities of international rule-making with a marked absence of a law-making body and court with compulsory and comprehensive jurisdiction in a system dependent on the expression of consent of states makes the arrival time at the destination indeterminate. In view of these realities, it has been asked whether international law is prepared to accept a right to democratic governance.[82] States jealously guard their sovereignty and are insistent that requests for election monitoring and democratisation efforts are concomitant with state sovereignty and should not be interpreted as a limitation of sovereignty by an assertion of a substantive right for democratic governance in international law. In addition, the overwhelming rejection of a right of pro-democratic intervention makes this possibility even more far-fetched.

While the above represents an accurate statement with reference to the state of general international law, some states have sought to modify international law at the regional level. International law recognises such regional rules, whether as custom or under treaty.[83]

3.1. The European Union Practice

The regional practice of the European Union (EU) is less equivocal than that of international law and lends itself to an assertion that 'the democratic governance norm may be taken seriously in Europe, at least'.[84] This assertion is made against the backdrop of the requirement for admission into the EU,[85] the jurisprudence of the

81 Franck (n 9) 29.

82 Fox (n 23) 48.

83 In the articulation of the sources of international, art 38 of the Statute of the ICJ (annexed to the Charter of the UN) (n 4), includes international conventions, whether general or particular, establishing rules expressly recognised by the contesting states as well as custom, as evidence of a general practice accepted by states. Custom can also be regional, see *The Asylum Case (Colombia v Peru)* [1950] ICJ Reports 266.

84 Simpson (n 10) 309. See also Ilias Bantekas, 'Austria, the European Union and art 2 (7) of the UN Charter', American Society of International Law Insight February (2000) 1 that 'It is perhaps possible that at an EU level we are witnessing the emergence of a customary obligation of democratic governance. Such an obligation is assumed by a state's membership in the European Union.'

85 Membership into the EU, inter alia, requires that the 'candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of

European Court of Human Rights and the practice of the European states highlighted by the 'ostracisation' of Austria by fourteen European states following the proposal to form a coalition government with the Austrian Freedom Party, a party notorious for its sympathies with Nazi policy and practices.[86]

3.2. The Organisation of American States' Practice

With regard to the American States, it has been asserted that:

> [D]emocratic legitimacy as a criterion to recognize a government, although not universally accepted yet, has gained special momentum in the framework of the Organization of American States (OAS) to such an extent that one may validly contend that we in the process of formation of a regional customary international law rule.[87]

The OAS was established in 1948 by the OAS Charter as its constitutive instrument to achieve peace and justice, promote solidarity, strengthen collaboration and defend their sovereignty, territorial integrity and independence.[88] The Charter recognised that American solidarity and good neighbourliness meant the consolidation of individual liberty and social justice based on the respect for human rights and that its achievement was actualised within the framework of democratic institutions.[89] Acting upon the conviction that representative democracy is 'an indispensable condition for the stability, peace and development of the region' the Charter was amended by a Protocol (Cartagena Protocol) in 1985 which proclaimed among the purposes of the OAS the promotion and consolidation of representative democracy.[90] The Protocol included within the principles of the OAS 'the solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy'.[91]

In 1991, acting through its General Assembly, the OAS adopted a Resolution on Representative Democracy (Resolution 1080), wherein the member states agreed to intervene, by diplomatic means, in the domestic affairs of a member state in order

minorities', see Presidency Conclusions, Copenhagen European Council 21–22 June 1993 para 7Aiii <www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf> accessed 15 April 2016.

86 See Simpson (n 10) 309.

87 Vasiliki Saranti, 'Democratic Legitimacy as a Criterion for Recognizing a Government: Towards the Emergence of a Regional Customary Rule in the Americas? A Reply to Professor Erika de Wet' (2016) American Society of International Law Unbound <www.asil.org/blogs/democratic-legitimacy-criterion-recognizing-government-towards-emergence-regional-customary> accessed 15 April 2016.

88 119 UNTS 3 art 1.

89 ibid preambular para 5.

90 OAS Treaty Series No 66 art 2 (b).

91 ibid art 3 (d).

to protect the democratic order.[92] It was on the basis of this Resolution that the OAS intervened, albeit non-militarily, in Haiti between 1991-1996, Peru in 1992, Guatemala in 1993 and Paraguay in 1996. A further amendment was made to the OAS Charter in 1992 by the Protocol of Washington to introduce sanctions, by way of suspension from participation in the activities of the OAS, for the subversion of the democratic process in member states where that has been accomplished through force.[93]

The OAS had committed itself to the defence of democracy and representative democracy, as articulated in Resolution 1080, in the Americas in a myriad of instruments including the Santiago Commitment to Democracy and the Renewal of the Inter-American System,[94] the Declaration of Nassau,[95] and the Declaration of Managua for the Promotion of Democracy and Development.[96] Importantly, the Inter-American Democratic Charter (IADC) which was unanimously approved by the OAS General Assembly in September 2001 provides that American peoples have a right to democracy which their governments are obligated to promote and defend.[97]

It further asserts representative democracy as the basis of the rule of law and of constitutional regimes in American states and that all citizens have a right and responsibility to 'participate in decisions relating to their own development'.[98] The IADC also provides that where there has been an unconstitutional interruption of the democratic order of a Member State that a decision to suspend the Member State from participation in the OAS may be taken.[99] With regard to electoral observation for compliance, the IADC does not establish a duty upon Member States. Rather, American states have discretion as to whether to request advisory services or assistance to strengthen and develop their electoral institutions and processes including preliminary missions,[100] and electoral observation missions which 'shall be carried out at the request of the Member state concerned'.[101]

Despite the nature of the IADC as soft law emanating from a Resolution of the OAS, a non-binding resolution may be source of legal obligation if it provides an authoritative

92 AG/Res1080 (XXI-0/91) 5 June 1991; see also Saranti (n 87).

93 1- E Rev OEA Documentos Oficiales OEA/SerA/2 Add3 (SEPF) art 9.

94 OAS GAOR 21RegSess; OEA/SerP/AG doc2734/91 (4 June 1991).

95 [AG/Dec1 (XXII-0/92)].

96 [AG/Dec4 (XXIII-0/93)].

97 Doc OEA/SerP/AG/Res 1(2001); 40 ILM 1289, art 1.

98 ibid arts 2 and 6.

99 ibid art 21.

100 ibid arts 23.

101 ibid art 24.

interpretation to a treaty and this is evident in the jurisprudence of the Inter-American Court of Human Rights,[102] and international legal scholarship.[103]

3.3. Democratic Governance within Africa

Under the defunct Organisation of African Unity (OAU) a number of instruments addressing democracy and unconstitutional changes in government were adopted. Firstly, the Decision on Unconstitutional Changes of Government in Africa (Algiers Decision) was adopted in July 1999 which condemned all types of unconstitutional changes of government as being 'anachronistic and in contradiction of its commitment to the promotion of democratic principles and constitutional rule'.[104] It was recognised that 'the principles of good governance, transparency and human rights are essential elements for building representative and stable governments and contribute to conflict prevention',[105] and it was decided that member states that had come to power unconstitutionally should restore constitutional legality.[106]

Secondly, the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government was adopted in Lomé in July 2000 (Lomé Declaration) wherein a set of common values and principles of democratic governance was agreed to, which include the adoption of a democratic constitution, promotion of political pluralism and participatory democracy, democratic change and free and periodic elections.[107] It was also decided, under the Lomé Declaration, that there should be a mechanism for the condemnation of unconstitutional changes in government which would not be tolerated or recognised by the OAU. By this mechanism it was envisaged that a period of up to six months would be given for the restoration of constitutional order following an unconstitutional change in government and during this period, the government concerned should be suspended from participation in the policy organs of the OAU. At the end of the suspension, if no constitutionality is restored, then a range of targeted sanctions including visa denials and trade restrictions could be implemented.

102 OC-10/89 Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of art 64 of the American Convention on Human Rights Series A No 10 (1989) paras 45–47.

103 Saranti (n 87); Douglass Cassel, 'Honduras: Coup d'etat in constitutional clothing?' American Society of International Law Insight, 29 July 2009; Lelia Mooney, 'Introductory Note to the Inter-American Juridical Committee: Resolution on the Essential and Fundamental Elements of Representative Democracy and Their Relationship to Collective Action within the Framework of the Inter-American Democratic Charter' 48 ILM 1233; Christine Chinkin, 'Sources' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran and David Harris (eds), *International Human Rights Law* (2edn, Oxford University Press 2014) 75 91.

104 AHG/Dec150 (XXXVI) (Algiers, Algeria 12–14 July 1999).

105 AHG/Dec141 (XXXV) para 5.

106 AHG/Dec142 (XXXV) para 1.

107 AHG/Decl5 (XXXVI).

The right to democratic governance in Africa is evident in the African Democracy Charter which provides for regular, transparent, free and fair elections as well as obligates state parties to inform the Commission about scheduled elections and to invite the Commission to monitor the elections.[108] It also provides for equal participation irrespective of gender and physical ability.[109] Importantly, it provides for sanctions for subversion of the democratic process and institutions in state parties and authorises the Peace and Security Council (PSC) to 'take any initiatives to restore democracy', which include enforcement action and punitive economic measures.[110]

By the Charter,[111] the AU Heads of Government re-affirmed their commitment to holding regular and free elections in accordance with the Declaration on the Principles Governing Democratic Elections in Africa.[112] In carrying out their obligations under the Charter, member states are required to implement the Charter in accordance with certain principles including respect for human rights and democratic principles, access to state power in accordance with the constitutions of states, representative and participatory governance, periodic elections which must be transparent, free and fair, complete rejection of unconstitutional changes in government and political pluralism.[113] The inability to enforce compliance does not obliterate the existence of the right, at least in Africa.

There is an obligation arising under the Charter on state parties to inform the African Commission of scheduled elections and invite it to send an electoral observer mission.[114] In addition, the Chairperson of the Commission is required to first send an exploratory mission during the period prior to elections.[115] The language of the Charter is explicit on the mandatory nature of the obligations upon states and the Chairperson with regard to electoral observer missions by its use of the word 'shall'; it does not leave it to the discretion of states or the Chairperson of the Commission. In fact, it envisages a two-stage process whereby the Chairperson first sends an exploratory mission prior to the elections and, subsequently, during the elections. This goes beyond the practice obtainable under the framework of the UN whereby states are at liberty (as against being obligated) to request observer missions. Here they are obliged only with regard to 'advisory services or assistance for strengthening and developing their electoral institutions and processes'.[116]

108 (n 42) arts 17–20.

109 ibid arts 29–31.

110 ibid arts 23–25.

111 ibid art 17.

112 AHG/Decl 1(XXXVIII).

113 (n 42) art 3.

114 ibid art 19.

115 ibid art 20.

116 ibid art 18 (1) and 18 (2).

The Charter proscribes illegal means of acquiring power or maintaining it as an unconstitutional change of government liable to appropriate sanctions by the AU. The Charter provides an expansive catalogue of actions that would amount to an unconstitutional change of government to include a coup d'etat against a democratically-elected government, an intervention by mercenaries to replace a democratically-elected government, any replacement of a democratically-elected government by armed rebels, a refusal by an incumbent government to relinquish power to the winning candidate after free, fair and regular elections, or any constitutional or legal amendment which is an infringement on the principles of democratic change of government.[117]

The African Democracy Charter entered into force on 15 February 2012 upon ratification by fifteen member states. The Charter has been ratified by twenty-three of the fifty-four AU member states and does not apply to the remaining thirty-one AU members, who nevertheless are bound by the Constitutive Act of the AU of 2000 which expressly condemns any unconstitutional change of government. The AU Constitutive Act includes within its objectives the promotion of 'democratic principles and institutions, popular participation and good governance'.[118] The Act includes, as part of the principles in accordance with which the Union functions, to be the 'respect for democratic principles, human rights, the rule of law and good governance' as well as the 'condemnation and rejection of unconstitutional changes of government'.[119] The Act provides sanctions against governments which have come to power unconstitutionally by excluding them from the activities of the AU.[120] African Heads of Government have re-affirmed their strong commitment to the provisions of Articles 4(p) and thirty of the AU Constitutive Act and urged all African states that have not done so to sign and(or) ratify the African Democracy Charter.[121] Having considered the conventional (treaty) basis of democratic governance in Africa, an evaluation of state practice evident in the response by the AU to subversions of the democratic process of member states becomes apposite.

117 ibid art 23. The sanctions include suspension of governments that come into power illegally from the African Union, exclusion of the perpetrators from elections to restore the democratic order of from positions of responsibility in political institutions as well as criminal prosecution and punitive economic measures on the state, see ibid art 25.

118 OAU Doc CAB/LEG/23.15, art 3 (g).

119 ibid art 4 (m) and (p) respectively.

120 ibid art 30.

121 AU Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacity of the AU to Manage Such Situations, Assembly/AU/Dec253 (XIII), Doc Assembly/AU/7(XIII).

3.3.1. Central African Republic (CAR) in 2003

Following a coup d'etat on 15 March 2003, the unconstitutional CAR government was suspended from the activities of the AU, the suspension was lifted two years later on 24 June 2005 following presidential elections and a return to democratic rule.[122]

3.3.2. Togo in 2005

Upon the demise in 2005 of President Gnassingbé Eyadéma and the assumption of power by the Togolese military, the Peace and Security Council of the AU condemned the action of the military and suspended it.[123] The Economic Community of West African States (ECOWAS) imposed sanctions on the new government based on Article 45 of the Protocol A/SP1/12/01 on Democracy and Good Governance supplementary to the Protocol relating to the Mechanism of Conflict Prevention, Management, Resolution, Peacekeeping and Security of December 2001. It was upon a consideration that the conditions for the resumption of activities within the Union were fulfilled that the PSC lifted the suspension.[124]

3.3.3. Mauritania in 2005 and 2008

While in Saudi Arabia attending the funeral of King Fahd, President Sid'Ahmed Taya of Mauritania was deposed by a military coup on 3 August 2005.[125] The PSC swiftly responded by condemning the action of the military junta and suspended Mauritania's participation in the AU until the restoration of the constitutional order.[126] Following the holding of presidential elections in March 2007 the suspension was subsequently lifted.[127]

On 6 August 2008 the arrest of the new democratically-elected president of Mauritania and key officials of his government by the Presidential Guards and the assumption of power by General Abdel Aziz attracted the condemnation of the AU with suspension from its activities and an order for the release of the President and other officials as well as the restoration of democracy in Mauritania.[128] Following the

122 PSC/PR/COMM (XXXIII) – (ii) 24 June 2005.

123 PSC/PR/COMM (XXIV) 7 February 2005.

124 PSC/PR/COMM (XXX) 27 May 2005.

125 Konstantinos Magliveras, 'The sanctioning system of the African Union: part Success, part Failure?' (Expert Roundtable on 'The African Union: The First Ten Years' Institute of Security Studies, Addis Ababa, 11–13 October 2011)<www.academia.edu/1103678/THE_SANCTIONING_SYSTEM_OF_THE_AFRICAN_UNION_PART_SUCCESS_PART_FAILURE> accessed 15 April 2016.

126 PSC/PR/Stat(XXXVI)–(ii), 4 August 2005; PSC/PR/COMM (LVII) 21 June 2006.

127 PSC/PR/COMM (LXXVI) 10 April 2007.

128 PSC/PR/COMM (CLIV) 7 August 2008.

establishment of a national transitional unity government, the AU reconsidered and lifted its sanctions against Mauritania.[129]

3.3.4. Guinea in 2008

Following the coup and suspension of the Constitution by the military in Guinea on the death of President, Lansana Conte on 22 December 2008, the AU condemned the actions of the coup plotters, suspended Guinea and imposed sanctions on those who masterminded the coup.[130] On 10 December 2010, following the democratic election of a new president the sanctions were lifted.

3.3.5. Madagascar in 2009

Political tensions between the democratically-elected President of Madagascar, Marc Ravalomanana and the opposition led by the mayor of the capital city of Antananarivo, Andry Rajoelina, were followed by military support for his removal and led to the forcible resignation of the President, the seizure of power and formation of a transitional government by Rajoelina in March 2009. The PSC condemned the unconstitutional change of government and suspended Madagascar from the AU.[131] The Extraordinary Summit of the Heads of State and Government of the Southern African Development Community (SADC) responded by condemning the action, calling for a restoration of the constitutional order and suspending Madagascar from the SADC to which it belonged.[132]

3.3.6. Niger in 2010

Despite a ruling by the Constitutional Court of Niger on the illegality of a constitutional referendum to dissolve the Republic of Niger and to create a new one under a presidential system of government, President Mamadou Tandja changed the constitutional order in what was an attempt to perpetuate his time in office. The ECOWAS promptly responded by condemning the action and imposing sanctions on the government, actions which were endorsed by the AU.[133] Amidst efforts to resolve the problems in Niger, the military organised a coup d'etat on 18 February 2010. The AU condemned the coup and

129 PSC/MIN/COMM (CXCVI) 29 June 2009.

130 PSC/PR/COMM (CLXIV) 24 December 2008, PSC/PR/COMM (CLXV) 29 December 2008 and PSC/PR/COMM (CCIV) 17 September 2009 respectively.

131 PSC/PR/COMM (CLXXXI) 20 March 2009.

132 <http://news.bbc.co.uk/2/hi/africa/7973319.stm> accessed 15 April 2016 and <www.sadc.int/news-events/news/sadc-lifts-madagascar-suspension/> accessed 15 April 2016.

133 PSC/AHG/COMM3 (CCVII) 29 October 2009.

suspended Niger's participation in the Union.[134] Following the holding of parliamentary and presidential elections in Niger the sanctions were lifted.[135]

3.3.7. Côte d'Ivoire in 2010

Following his defeat at the presidential polls in Côte d'Ivoire in November 2010, President Laurent Gbagbo refused to accept the election results, thus preventing the President-Elect, Alassane Ouattara from assuming office. Despite international pressure from the UN, AU and ECOWAS to vacate office, Gbagbo was recalcitrant, resulting in the decision of the PSC to suspend Côte d'Ivoire from participating in the activities of the AU.[136] With the arrest of Gbagbo in April 2011 and the assumption of office by Ouattara, the suspension was lifted.[137]

3.3.8. Mali in 2012

In March 2012, amidst fears of a Tuareg rebellion, some members of the military forces of Mali deposed President Toure ahead of presidential elections. An extra-ordinary summit of ECOWAS Heads of States and Government was held in Abidjan on 27 March 2012 resulting in the condemnation of the putsch and suspension from ECOWAS.[138] The PSC immediately condemned the action and suspended the government from the AU.[139] It was not until October 2012 that the suspension was lifted.[140]

3.3.9. Guinea-Bissau in 2012

On the heels of the Mali coup a military coup was carried out in Guinea-Bissau on 12 April 2012 just weeks ahead of the presidential election with the presidential candidates and incumbent president arrested. ECOWAS condemned the action but did not suspend the government instead it favoured an approach of cooperating with the government to ensure the restoration of democracy.[141] The AU condemned the coup and suspended the

134 PSC/PR/COMM2 (CCXVI) 19 February 2010.

135 PSC/PR/COMM (CCLXVI) 16 March 2011.

136 PSC/PR/COMM1 (CCLII) 9 December 2010.

137 *Report of the Chairperson of the Commission on the Situation in Cote d'Ivoire* PSC/PR/2 (CCLXXIII) 21 April 2011.

138 <www.bbc.com/news/world-africa-17526575> accessed 15 April 2016.

139 PSC/PR/COMM (CCCXV) 315th Meeting 23 March 2012.

140 PSC/MIN/COMM.2 (CCCXXXIX) 339th Meeting 24 October 2012.

141 Erika de Wet, 'From Freetown to Cairo via Kiev: the unpredictable road of democratic legitimacy in governmental recognition' (2016) *American Society of International Law Unbound*, <www.asil.org/blogs/free-town-cairo-kiev-unpredictable-road-democratic-legitimacy-governmental-recognition> accessed 15 April 2016.

government.[142] It was not until the successful conduct of parliamentary and presidential elections in April and May 2014 that the AU decided to lift the suspension.[143]

3.3.10. Egypt in 2013

In July 2013 the Head of the Egyptian army led a coalition to oust its first democratically-elected President, Mohammed Morsi and suspended the constitution. Despite the ambivalence of Western states in characterising the action as a coup,[144] the AU condemned the ousting as being illegal and suspended the government pending the restoration of democracy.[145] The suspension was lifted following the holding of presidential election in May 2014.[146]

3.3.11. CAR in 2013

The constitutional order of the CAR was subverted in March 2013 when rebels of the Séléka coalition took over the capital city, Bangui and seized power from President François Bozizé. The AU condemned the subversion, suspended the government and imposed a number of targeted sanctions including travel restrictions and an asset freeze on the leaders of the Séléka coalition.[147] It was only with the conclusion of presidential elections and the first round of parliamentary elections which resulted in the swearing in of President Faustin-Archange Touadéra on 30 March 2016 that the suspension and sanctions imposed by the AU in CAR were lifted.[148]

Legal claims to a right of democratic governance are on a more certain legal footing with regard to Africa than in any other region or in a global context. First, the commitment of African States in the Lomé Declaration to adopt democratic constitutions, ensure political pluralism, participatory democracy, democratic change and periodic elections is reiterated in the African Democracy Charter. Although the Charter has come into force, albeit not yet ratified by all African States, the combined effect of the African Democracy Charter and Articles 4(p) and 30 of the AU Constitutive Act (binding on all AU states) is that African states have assumed a binding obligation to ensure that constitutional orders are not truncated and, in the event of such truncation, the democratic order must be restored. With no limitation on the sovereign capacities of these states to enter into these agreements, the commitments are valid and binding. The principle that agreements are binding, expressed in the maxim pacta sunt servanda,

142 PSC/PR/COMM (CCCXVIII) 318th Meeting 17 April 2012.

143 PSC/PR/COMM (CDXLII) 442nd Meeting 17 June 2014.

144 De Wet (n 141).

145 PSC/PR/COMM (CCCLXXXIV), 384th Meeting 5 July 2013.

146 PSC/PR/COMM2 (CDXLII) 442nd Meeting 17 June 2014.

147 PSC/PR/COMM (CCCLXIII) 363rd Meeting 25 March 2013.

148 PSC/PR/COMM (DLXXXVI) 586th Meeting 31 March 2016.

underlies international law and international organisations like the AU. The Vienna Convention on the Law of Treaties, in giving expression to this principle, provides that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'.[149]

Secondly, an examination of customary international law evident in the practices of the AU in CAR in 2003, Togo in 2005, Mauritania in 2005 and in 2008, Guinea in 2008, Madagascar in 2009, Niger in 2010, Côte d'Ivoire in 2010, Mali in 2012, Guinea-Bissau in 2012, Egypt in 2013 and CAR in 2013, which condemned and imposed sanctions for unconstitutional subversions of the democratic process in African states, shows the crystallisation of a right to democratic governance in Africa. The requirement for the formation of a rule of customary international law has been met by the constant, general and uniform practice of the AU over time.[150] But state practice alone is not enough for the formation of a rule of customary international law, there must be evidence of a belief that the practice is legally obligatory (*opinio juris*).[151] The instances above, as evidence of state practice, are supported by *opinio juris* deducible from the activities of the ECOWAS and the myriad of legal instruments within the framework of the AU, for instance the AU Constitutive Act, the African Democracy Charter and the AU Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacity of the AU to Manage Such Situations.[152]

4. CONCLUSION

The ubiquity of the democratic ideology is evident in the universal value placed on democracy. The realisation of a society based on justice, equality and respect for human rights which are fundamental to sustainable socio-economic development is better assured under a democratic government as against other forms of government and this is evident in the pro-democratic movement seen in the mass transitions to democratic structures since 1990 and the recent Arab Spring.

Although democracy is the foundation of a nation's socio-political and economic development, it does not constitute the totality of that development. The electoral process consequently must evolve with other aspects of nation building in a dynamic

149 (n 71) art 26.

150 See the *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* [1996] ICJ Reports 3; *The Asylum Case (Colombia v Peru)* [1950] ICJ Reports 266; *Case of the S.S. Lotus (France v Turkey)* [1927] PCIJ, Series ANo.10; *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Reports 226.

151 *North Sea Continental Shelf Cases* id 44.

152 Assembly/AU/Dec253 (XIII) DocAssembly/AU/7 (XIII). See also African Union's Ezulwini Framework for the Enhancement of the Implementation of Measures of the AU in Situations of Unconstitutional Changes of Government in Africa <www.peaceau.org/uploads/ezulwini-framework-english.pdf> accessed 15 April 2016.

relationship. Thus, global efforts are geared towards the evolution and development of democracy into a viable instrument of social change, not in a theoretical or abstract sense but in terms of an intrinsic transformation of its philosophical base, its processes, institutions, and operators. Consequently, the paper has established the normative content of democratic governance and argued, although the substantive right to democratic governance may still be emerging at the global level and is progressively coalescing into a right at the European and American regional levels, the right has become established within the framework of the AU.

In an increasingly interdependent global economy facing an increasingly elusive peace, combined with the political and socio-economic challenges of Africa, the translation of democratic governance from more than just a procedural manifestation in periodic elections and political participation enshrined in national constitutions into a veritable tool for the transformation of the political and socio-economic architecture of Africa and the actualisation of human rights is imperative.