

DEMOCRATIC ENTITLEMENT IN INTERNATIONAL LAW? STILL FAR FROM THE PROMISED LAND

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1. Introduction

In the past two decades, or so, there have been claims by many distinguished international law and political science scholars that a norm of, or right to, democratic governance or political participation has now been established or is fast being established in international law. These claims are based on some old and recent developments in the international system, namely: international pronouncements and treaties on political rights; the right to self-determination; the practice of election monitoring in sovereign states; transitions from un-elected to elected governments in many countries; and the efforts of regional organisations in the promotion of elected governments.

This article examines these developments and the claims derived from them in order to determine whether a right to democratic governance or popular political participation actually does exist or is being created in international law. It seeks to establish that contrary to prevalent assumptions, there is currently no right or emerging right to democratic governance, or to popular political participation, or even to elected governments in international law. The article argues that although there has been an increase in the number of countries using elections to choose their political leaders, this development is attributable to factors other than an emergent international norm or obedience to any international rules.

Moreover, this development and the efforts of international and regional organisations to promote it cannot justify a conclusion that a right to democracy or popular participation exists or is emerging because the system of governance being adopted or promoted is generally neither democratic nor permissive of, or conducive to, popular

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participation in governance. Accordingly, there is a need to go back to the drawing board if the laudable objective of enabling states' citizens to participate in the governance of their states is to be realised.

The article begins by considering the true meanings of the terms “democracy” and “political participation” before proceeding to consider and challenge the bases on which the democratic entitlement thesis is built. It suggests the democracy in its true sense is not being practiced, and cannot feasibly be practiced, in the vast majority of modern states. It also suggests that the right of citizens to participate in the governance of their countries will remain elusive until the current assumptions are abandoned and a political paradigm that truly respects popular sovereignty and enables popular governance is created.

2. Meaning of democracy and popular political participation

Generally attributed to the people of ancient Athens, the widely used term ‘democracy’ is a derivative of the words *demos* which means “the people”, and *kraiten* or *kratos* which means “to rule” (Williams, 1993: 19; Sorenson, 1993: 3; Dahl, 1998: 11 – 12). Democracy therefore refers to governance or rule by the whole or majority of the people of a state. “The pure idea of democracy, according to its definition”, Mill (1972: 256) writes, “is the government of the whole people by the whole people”. And according to Austin (1859: 10), democracy properly construed, signifies a form of government “in which the governing body is a comparatively large fraction of the entire nation [...] it signifies the body of the nation”. For Maine (1886: 59), democracy “is the government of the state by the Many, as opposed, according to the old Greek analysis, to its government by the Few, and to its government by One [...] Democracy is most accurately described as inverted Monarchy”.

It has also been noted that “originally democracy was understood to mean that the people governed themselves directly, that is, without mediation through chosen representatives, or, if necessary, by rotating the governing offices among the citizens” (Arblaster, 1987: 60; Ibegbu, 2003: 10). In a democracy, Rawls (1999: 194) writes, “all citizens are to have an equal right to take part in, and to determine the outcome of the constitutional process that establishes the laws with which they are to comply”.

Democracy has also been defined as a system where governance is entrusted to the whole or majority of the people, so that there are more “citizen-magistrates” than private citizens (Rousseau, 1986: 69). Daes has defined democracy in similar terms, as “a form of government in which the people rule and in which the political power is held by the many rather than by the one or the few” (1990: 177; see also Weale, 1999: 14; Burchill, 2001: 82; Sorenson, 1993: 3).

But, perhaps nothing captures the essence of democracy as well as this eulogy by Pericles to the democracy of ancient Athens:

Our constitution is called a democracy because power is in the hands not of a minority but of the whole people. Everyone here is equal before the law, and no one, so long as he has it in him to be of service to the state, is kept in political obscurity because of poverty [...] We are free and tolerant in our private lives, but in public affairs we obey the laws, especially those which are for the protection of the oppressed.... Our city is open to the world, and we have no periodical deportations in order to prevent people observing or finding out secrets which might be of military advantage to the enemy.... Here each individual is interested not only in his own affairs, but in the affairs of state as well: even those who are mostly occupied with their own business are extremely well-informed on general politics. We Athenians, in our own persons, take our decisions on policy or submit them to proper discussions: we do not think there is an incompatibility between words and deeds, since the worst thing is to rush into action before the consequences have been properly debated” (*The Peloponnesian War*, Penguin Classics, pp.117-9, cited in Beetham, 2002: para. 5).

Democracy thus refers to a government *of* the people, *for* the people and *by* the people. As Rousseau has succinctly explained, the sovereign power of the people to make law or govern in a democracy cannot be delegated to representatives:

Sovereignty cannot be represented, for the same reason that it cannot be alienated. It contains essentially in the general will, and will cannot be represented; will either is or is not, your own; there is no intermediate possibility [...] Deputies of the people are not, and cannot be, its representatives; they are merely its agents, and can make no final decision. Any law which the people has not ratified in person is null and void; it is not a law... Since law is only a declaration of the general will, it is clear that the people cannot be represented in the legislative power. This shows that, if the matter were properly examined, we should find that very few nations have laws (1986: 104).

Since democracy eschews delegation or representation, it follows that that system of governance does not permit political factions or the struggle for the peoples’ votes.

Even though executive functions could be delegated, the selection of the delegates would, like jury service, be accomplished by lot. According to Montesquieu, selection by lot is natural to democracy because “it is a method of selection which affronts no one; it gives each citizen a reasonable hope of serving his country” (quoted in Rousseau, 1986: 119). In the view of Rousseau (1986: 120), selection by lot is essential to democracy because:

public office is not an advantage but a heavy responsibility, which cannot justly be imposed on one rather than on another. The law alone can impose this burden on anyone whom the lot designates. For then, since the conditions are equal for all, and the choice depends on no human will, there is no specific application to impair the universality of the law.

The pre-requisites for the practice of democracy are: a small population, socio-economic equality among the citizens, and simplicity of the issues requiring decision (Mill, 1972: 217-8; Rousseau, 1986: 72; Caraley, 1989: 21; Held, 1996; de Tocqueville 2000; Cohen, 2005: 239). According to Rousseau (1986: 72), democracy requires:

a very small state where the people can readily be assembled, and where each citizen can easily be acquainted with the rest; second great simplicity of manners and morals, to provide against the necessity of discussing questions which are too numerous and too difficult; it also requires great equality of rank and fortune, for otherwise equality of rights and authority could not long subsist; and finally little or no luxury.

Thus democracy would be virtually impossible to achieve in large and complex polities, a point clearly underlined by Rousseau:

In the strict sense of the term, there never has been, and there never will be, a real democracy. It is against the order of nature for the majority to govern and for the minority to be governed. It is impossible to imagine a people remaining constantly assembled to attend public business; and it is easy to see that committees could not be set up for this purpose without changing the form of administration (1986: 71).

For Mill, the ancient Greek idea of rule by the people is pure folly in any community other than a small town. In large societies, he says, it is impossible for the people to meet all the time and to take decisions on all matters of state, many of which are very complex. The people can only take part in “very minor portions of public business (1972: 217- 8; see also Held, 1996: 107). Dahl made a similar point when he observed that democracy, as rule by the people “is not an empirical system. It consists only of

logical relations among ethical postulates. It tells us nothing about the real world. From it we can predict no behaviour whatsoever” (1956: 51). Because of the impracticality of democracy in large, complex societies, Rousseau suggested that such a system of governance could only exist in a land exclusively populated by divine beings: “if there were a people of gods,” he says, “it would govern itself democratically. So perfect a form of government is not for men” (1986: 73).

Consistent with the above (and correct) understanding of democracy, that system of governance does not exist anywhere in the world; and is not capable of existing anywhere but the smallest of countries the population of which does not exceed a few thousand. According to Burnheim (1985: 1), “democracy does not exist in practice. At best we have what the ancients would have called elective oligarchies with strong monarchical elements”. Similarly, Dahl (1998: 42) has observed that, “no state has ever possessed a government that fully measured up to the criteria of a democratic process. None is likely to”. Beetham (2002: para.49) has also come to the conclusion that “democracy is nowhere fully realized. There is always a gap between principle and practice, between aspiration and reality”. Even in ancient Athens, the whole people did not govern; rather the right to governance was limited to a manageable section of the population: “*Demokratia* was rule by male citizens only to the exclusion of women, free foreigners, and slaves” (Hansen, 1989: 4).

Popular political participation means that the citizens of a given state have the inalienable right actually to take part regularly in the governance of their state and in the determination of important matters of state. This popular participation may be through regular referenda, plebiscites or other methods for the ascertainment of popular will. And this participation must not be at the pleasure of a ruling elite but on the basis of popular sovereignty as enshrined in a popular and supreme constitution.

Popular sovereignty implies that the ultimate political power resides in the people. This being the case, political governance in a polity should not only be instituted by, but should also be subject to, the will of the people. As Rousseau (1986: 110) had stated, not only should the sovereign (i.e. the people) decree that a government should be set up, “the form it gives to the administration is provisional, and continues until the people is pleased to ordain otherwise”. Popular sovereignty implies that the people

have the right to participate in the setting of the agenda of government and to overrule the decisions of, or laws made by, elected officials if need be. As Rousseau pointed out, “the instant the people is legitimately assembled as a sovereign body, all jurisdiction of the government ceases, the executive power is suspended, and the person of the humblest citizen is as sacred and inviolable as that of the first magistrate” (1997: ch. 4). The ability of the people (the sovereigns) to change the law is a basic requirement of the exercise of sovereign will:

There is no fundamental law in the state, which cannot be revoked, not even the social compact. For if all the citizens came together to break this compact by common accord, there would be no doubt that it was very legitimately broken...it would be absurd for all the citizens together to be unable to do what each one of them could do separately (Rousseau, 1986: 111):

Dahl has similarly insisted that the policies of government must always be “open to change by the members” of the community if they so choose (1998: 38).

Popular sovereignty and participation thus signify that, although citizens do not necessarily have to take all political decisions directly as in a democracy, elected representatives are delegates of the people in the true sense of that word and must remain subject to popular will. The people will therefore have the right, at any time, to withdraw, suspend, or limit the authority of elected officials. As Rousseau (1986: 60-61) again pointed out, those who are chosen by the people to exercise political power have:

absolutely nothing more but a commission, an office in which the rulers, as mere officials of the sovereign, exercise in its name the power of which it has made them the depositories, and which it can limit, modify, or resume whenever it pleases; for the alienation of such a right is incompatible with the nature of the social body, and contrary to the purpose of the association.

Similarly, Milton had noted that “the power of kings and magistrates is nothing else, but what is only derivative, transferred and committed to them in trust from the people, to the common good of them all, in whom the power yet remains (quoted in Patterson, 1932: 10).

Popular political participation therefore is not, and cannot be satisfied merely by, the holding of periodic ballots for the election of political rulers. Elections should be the beginning and not the end of political participation; and they should be for the selection of delegates who are subject to the popular will. It should not be for the

enthronement of exclusive rulers. In fact, elections designed to choose exclusive rulers serve to close the door of participation to the citizenry and converts representatives from servants to the masters of the people. Such elections are inimical to popular sovereignty.

Based on the foregoing, is there truly a right or an emerging right to democratic governance, or to popular political participation, or even to elected governments in international law? To answer this question, the ensuing sections consider the effects of the Universal Declaration on Human Rights (UDHR) 1948 and other international declarations on governance, and the International Covenant on Civil and Political Rights 1966. They further examine the implications of the recognition of the right of peoples to self-determination, the practice and implications of international election monitoring, and the efforts of regional organisation in the promotion of elected governments. Finally, it considers whether the practice of states has created a right to democracy or popular political participation in customary international law.

3. International declarations on political governance

What may be regarded as the first major international pronouncement on political governance was made in article 21 of the Universal Declaration of Human Rights (UDHR) 1948.² Sub-paragraph 1 of the article states that, “everyone has the right to take part in the government of his country, directly or through freely chosen representatives. Sub-paragraph 2 states that, “everyone has the right to equal access to public service in his country,” while sub-paragraph 3 provides that, “the will of the people shall be the basis of the authority of government”, and that this will is ascertainable through “periodic and genuine election, which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures”. These provisions appear to be a recognition that people ought to be governed by governments of their choice – governments in which they should be free to participate without any unjustifiable impediments. They also appear to be recognition that sovereignty belongs to the people, although the expression of this sovereignty is confined to participation in periodic elections. Twenty years after the

²Adopted without opposition on 10/12/48 by the UN General Assembly by Res. 217A.

UDHR, the International Conference on Human Rights meeting in Tehran proclaimed³ that, the UDHR is “a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community”.⁴ The proclamation urges peoples and governments all over the world to dedicate themselves to the principles of the UDHR and to strive to provide for all human beings a life consonant with freedom, dignity, and welfare.

Some scholars have cited the above provisions as creating a right to democratic governance in international law. According to Joyner (1999: 338), the UDHR, along with the UN Charter, and the Declaration on the Granting of Independence to Colonial Peoples, “constitute in essence, what can be called a UN’s Bill of Democratic Rights and Duties”. Ezetah (1997: 508) believes that, “the right to democratic governance is clearly borne out by article 21 of the Universal Declaration” and has become a peremptory norm of international law. Similarly, Fox (2007: 7) submits that article 21 posits a “democratic norm”, while Fox and Roth (2001: 79), contend that the “assertion of a democratic entitlement in international law is grounded in the right to political participation as established in Article 21 of the UDHR, Article 25 of the ICCPR, and the counterpart articles of regional human rights instruments”. Cerna (1995: 291), on her part, suggests that democracy became an international legal right following the publication of the UDHR; while Ibegbu (2003: 88) insists that article 21 guarantees a right to democracy in international law.

But article 21 of the UDHR could not rightly be said to have created a conventional right, much less a right to democratic governance or political participation. Being only a General Assembly declaration, the provisions of the UDHR not only did not have an obligatory force, but they were not meant to have such force. They were merely a formulation of desired goals to which nations should aspire. The preamble to the declaration makes this clear by describing the document as:

a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect

³ The Proclamation of Tehran, Proclaimed by the International Conference on Human Rights at Tehran, on 13 May 1968.

⁴ Ibid, article 2.

for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.

Similarly, the Tehran Proclamation referred to the provisions of the UDHR as 'principles' to which nations should dedicate themselves. Thus, as Hillier (1988: 682) has observed, "the UDHR serves to provide a standard for states to aim at. The precise effect of the resolution was to urge states to establish procedures for the future protection of human rights". It has also been noted that the declaration "is not and does not purport to be a statement of law or of legal obligation" but "a common standard of achievement for all peoples of all nations" (Roosevelt, 1948: 751). Robinson, a former United Nations High Commissioner for Human Rights also describes the declaration as "a remarkable document, full of idealism, imbued with a sense of hope and a determination to learn lessons from and not to repeat the mistakes of the past" (1998).

Could it be said, however, that a right to democracy or political participation has arisen from the status of the UDHR as part of customary international law? The UDHR has certainly provided the inspiration for the international human rights covenants,⁵ the human rights covenants of regional organisations,⁶ and the bill of rights of many countries. Many of the primary rights recognised by the UDHR have been enacted in these instruments and have been so widely and universally recognised that they have assumed the status of customary international law. Such primary rights include the right to life, right to freedom from slavery or servitude, right to freedom from torture or cruel and inhuman treatment or punishment, right to freedom from racial discrimination, right to freedom from arbitrary arrest and detention; right to fair hearing; right to peaceful assembly; right to private and family life, etc. Where a state violates any of these rights, the state will be deemed to be in violation of international law. Thus state practice has crystallised these UDHR provisions on primary human rights into customary international law (Waldock, 1965; Nayar, 1978). In *Filartiga v*

⁵ The International Covenant on Civil and Political Rights 1966, and the International Covenant on Economic, Social and Cultural Rights of 1966.

⁶ Examples are the European Convention on Human Rights (ECHR) 1950; The American Convention on Human Rights 1969; The African Charter of Human and Peoples Rights (ACHPR) 1981. The constitution of almost every nation recognises these primary rights as well.

Pena-Irala,⁷ the US District court, in a case brought by a Paraguayan citizen against another Paraguayan citizen (a former police chief) for torture, held that human rights contained in the UDHR, which have been confirmed by state practice, have become part of the law of nations. Accordingly, US courts have jurisdiction to hear complaints about torture that took place in Paraguay.⁸

Arguably, the elevation of some UDHR provisions to the status of customary international law does not extend to the non-primary rights. These rights which include the right to work and choice of employment,⁹ the right to rest and leisure,¹⁰ the right to free education,¹¹ the right to cultural life,¹² the right to adequate standard of living,¹³ the right to political asylum,¹⁴ the right to take part in the government and public service of one's country,¹⁵ and the right to social security¹⁶ have not been confirmed by state practice. Although the European Charter of Human Rights (ECHR) 1950 and its various Protocols, the African Charter on Human and Peoples' rights (ACHPR) 1981, and the constitution of many states have included some of these non-primary rights, they are regarded as ideals to aspire to and not positive rights of citizens. States are not bound to recognise or implement these rights, and a breach of them would not be regarded as a breach of the law of nations. Accordingly, many states, including those that have acknowledged them, have frequently disregarded these rights. As Robinson (1998) has observed:

Daily, in every part of the world, we see examples of the failure to put into practice the rights so clearly set out in the Universal Declaration. Despite all the legislation, procedures and mechanisms that are in place, millions are still routinely deprived of their basic rights. Millions of refugees and internally displaced persons cannot return to their homes. Many of them belong already to generations born in refugee camps. Religious and ethnic minorities are persecuted; opposition to oppressive regimes is met with brutal force; those who speak in defence of human rights are silenced, imprisoned, killed; women

⁷(1980) 19 I.L.M. 966. US Circuit Court of Appeals, 2nd Circuit.

⁸ See also: *Re: Estate of Marcos* 25F. 3d 1467 (9th Cir. 1992); *Abebe-Jire v. Newego*, U.S.D. Ct. N.D.Ga. August 19, 1993; *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993); *Tadic v. Karadzic*, 70 F. 2d 232 (2d Cir. 1995)

⁹ Article 23.

¹⁰ Article 24.

¹¹ Article 26.

¹² Article 27.

¹³ Article 25.

¹⁴ Article 14.

¹⁵ Article 21.

¹⁶ Article 22.

and children are the most vulnerable to abuse; the elderly and disadvantaged are cast aside, even by resource-rich societies.

Thus, although article 21 of the UDHR appears to recognise the sovereignty of the people and the need for some popular participation in governance, it did not create a law or an enforceable right; and state practice has not crystallized those ideals into customary international law.

Apart from the UDHR, there have been other international declarations on “democratic” governance. In 1993, the World Conference on Human Rights, in their “Vienna Declaration and Programme of Action”,¹⁷ declared that, “the international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world”. In 1997, the Inter-Parliamentary Union (IPU), in the “Universal Declaration on Democracy”, proclaimed that democracy is inseparable from the rights set forth in the international instruments, like the UDHR, the ICCPR and ICESCR 1966, the International Convention on the Elimination of All Forms of Racial Discrimination 1965, and the International Convention on the elimination of All Forms of Discrimination against Women 1979.¹⁸ Previously, in 1991, the Commonwealth of Nations had affirmed its belief that an individual has the “inalienable right to participate by means of free and democratic political processes in framing the society in which he or she lives”.¹⁹

These declarations, however, do not create any right or obligation in international law; therefore no political governance rights could arise from them. Moreover the declarations, including the UDHR, do not call for the establishment of democracy or governments that ensure popular participation; rather, in addition to calling for the respect of human rights, they merely call for the establishment of elected governments and the freedom of all citizens to vote or be voted for in the elections. As the Inter-Parliamentary Union (IPU) 1997 Declaration on Democracy states:

Democracy [...] requires the existence of representative institutions at all levels and, in particular, a Parliament in which all components of society are

¹⁷ A/CONF.157/23), 12 July 1993, Article I (8).

¹⁸ Article 6.

¹⁹ Article 4 of the Harare Declaration issued by the heads of states and governments of the Commonwealth on 20 October 1991, available at: [http:// www.thecommonwealth.org](http://www.thecommonwealth.org).

represented and which has the requisite powers and means to express the will of the people by legislating and overseeing government action. The key element in the exercise of democracy is the holding of free and fair elections at regular intervals enabling the people's will to be expressed. These elections must be held on the basis of universal, equal and secret suffrage so that all voters can choose their representatives in conditions of equality, openness and transparency that stimulate political competition.²⁰

4. International treaties on political governance

The only international instrument that could be said to have created legal obligations on national political governance is the International Covenant on Civil and Political Rights (ICCPR) 1966. Article 25 of the Covenant provides that every citizen shall have the right and the opportunity, without any distinction of any kind such as, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and without unreasonable restrictions:

to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and 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; to have access, on general terms of equality, to public service in his country.

It has been said that article 25 of the covenant “guarantees the right to democracy” (Ibegbu, 2003: 88), and that it forms part of the foundation for the assertion of democratic entitlement in international law (Fox and Roth, 2001: 79; Joseph, *et al*, 2004: 678).

The provisions of article 25, though inspired by article 21 of the UDHR, contain two important differences from the earlier document. In the first place, article 21(3) of the UDHR states that the “will of the people shall be the basis of the authority of government”. This provision, which tends to recognise the sovereignty of the people, was omitted from article 25 of the ICCPR. Had it been included, there might have been a basis for suggesting that there is a legal obligation on states to institute governments only at the will of the people. But as Coleman and Maogoto (2004: 8) have noted, “article 25 of the covenant speaks of the right to participate in public affairs – including the right to genuine and periodic elections – but it does not purport to condition governmental authority on respect for the will of the people”.

²⁰ Articles 11 and 12.

What article 25 seems to mean is that where states already have elected governments, then the right to vote or be voted for should be extended to all citizens without discrimination. Where, however, there are un-elected governments, there is no requirement for them to introduce elections since the will of the people need not be the basis of authority of the government. This interpretation is re-enforced by the fact that when that covenant was made, most signatory states were governed by dictatorial or un-elected governments. As Coleman and Maogoto (2004: 8) further observe, “the language of article 25 was intentionally drafted broadly enough to accommodate the wide range of government systems in place among the initial parties to the covenant”. And since the covenant came into force, many signatory states are still under un-elected governments, without being charged with breaching the provisions of article 25.

The second difference between the ICCPR and the UDHR provisions is that, although the phrase “public affairs” in article 25(a) of the ICCPR has been interpreted by the HRC to include the exercise of legislative, executive, and administrative powers,²¹ the provision does not guarantee citizens a right to participate in the governance of their countries. As the *travaux preparatoire* of the covenant explains, paragraph (a) is the general rule, while paragraph (b) is the application of that rule (Bossuyt, 1987: 469-475; Otto, 1993; Joseph, *et al*, 2004; Nowak, 2005). This implies that political participation by citizens is to be exercised through the election of representatives to govern on their behalf. As Otto (1993: 380) points out:

the general rule confines the idea of democracy to the narrow arena of public affairs of the state. The specification of elections as its application in paragraph (b) further limits the general rule by orienting implementation towards a concern with democratic form rather substance.

Thus only the right to vote in elections without discrimination is guaranteed under article 25.

The Human Rights Committee (HRC) has categorically confirmed this interpretation in *Marshal v Canada*.²² There, in determining the scope of the right of every citizen to

²¹ See General comment 25, of 12/07/96 (CCPR/C/21/Rev. 1/Add. 7).

²² Also known as *Mikmaq Tribal Society v Canada*, Communication No. 205/86.

take part in the conduct of public affairs, directly or through freely chosen representatives, without unreasonable restrictions, it held:

Surely, it cannot be the meaning of article 25(a) of the covenant that every citizen may determine either to take part directly in the conduct of public affairs or to leave to freely chosen representatives. It is for the legal and constitutional system of the state party to provide for the modalities of such participation [...] It must be beyond dispute that the conduct of public affairs in a democratic state is the task of representatives of the people, elected for that purpose, and public officials appointed in accordance with the law [...] Article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of article 25(a).

As Joseph, *et al*, (2004: 657) have observed, the Marshal decision appears to confirm that article 25 does not guarantee a citizen a right to direct participation in public affairs, beyond the specific instances mentioned in article 25(b) and (c). The interpretation that article 25 protects against discrimination in the electoral process was applied by the HRC in one of the communications that have come to it under the First Optional Protocol to the ICCPR.²³ In that communication, the author, Mr. Bwayla, challenged the banning of his party from taking part in the Zambian election because the country had a one party system. The author also claimed that he was sacked from his job and removed from his home and then detained for 31 months in consequence of his belonging to a proscribed party. All these he alleged contravened article 25 of the ICCPR. The Committee held that the actions of the Zambian government contravened Article 25 in that it discriminated against the complainant because he belonged to a party other than the official one.

It may therefore be concluded that article 25 of the ICCPR neither obligates states to introduce democratic governments nor guarantees citizens a right to political participation. The provision has also not led to the enhancement of the sovereignty and political rights of the ordinary citizen. As Joseph, *et al*, (2004: 655, 678) have observed, “it does not seem that article 25 is a sufficiently sophisticated mechanism to redress many of the structural flaws in contemporary political systems”, and that all

²³Communication No. 314/1988, UN Doc. CCPR/C/48/D/314/1988 (1993); the Protocol of 16 Dec. 1966, establishes the complaints mechanism under the ICCPR.

such political systems “seem to contain systemic deficiencies that perpetuate the power of certain elites”.

5. The right to self-determination

Some scholars have relied on the existence of the right to self-determination as the basis for asserting the existence of a right to democratic governance or a right to political participation in international law. According to Franck (1996: 91), the right to self-determination is “the historic root from which the democratic entitlement grew”. Article 1 of the ICCPR, he says, makes the right of self-determination applicable to citizens of all nations and entitles them to determine their collective political status through democratic means. “The right”, he says, “now entitles peoples in all states to free, fair and open participation in the democratic process of governance freely chosen by each state” (1992: 58-9). Ezetah also claims that the right to self-determination has given rise to a right to democracy as an obligatory norm of international law. “The right to democracy as an internal aspect of self-determination of all peoples and nations”, he says, “can properly be classified as an overriding customary international law” (1997: 504). Ezetah further suggests that, being an aspect of the right to self-determination, the right to democracy is a peremptory norm which states have a “positive obligation” to protect and which entitles the Security Council to take coercive measures under chapter VII of the Charter (1997: 509).

But the right to self-determination, as presently formulated and applied in international law, cannot correctly be said to have given rise to a right to democracy or political participation in international law for at least three reasons. In the first place, the right to self-determination does not contemplate democratic governance or political participation; rather, it has been designed with only the freedom of people under foreign domination in mind. The Independence Declaration of 1960²⁴ and the Declaration on Friendly Relations, 1970 make this clear.²⁵ Both of these documents

²⁴ Article 1.

²⁵ Article 1 of the ICCPR only made a statement of the right of self-determination without explaining its meaning or how it might be contravened. The HRC, in its comment on the provision failed to define the right, but instead referred to other international instruments:

define a violation of the right of self-determination as the “subjection of peoples to alien subjugation, domination and exploitation”. This means that the denial of an opportunity to choose one’s political leaders or to participate in political governance was not recognised as a denial of self-determination since they do not emanate from “aliens”.

All situations in which the right to self-determination has been held to apply *ab initio* have involved alien domination, subjugation or exploitation. These are colonial and trust territories,²⁶ apartheid South Africa,²⁷ Southern Rhodesia (Zimbabwe),²⁸ the Palestinian people,²⁹ Tibet,³⁰ Eritrea,³¹ East Timor,³² and Western Sahara.³³ Where the right of self-determination have been recognised outside the above circumstances, the recognition has usually occurred after the event, i.e. after a claim has been realised by local effort. Examples include Bangladesh, Slovakia, the breakaway states of the former USSR, the breakaway states of the former Yugoslavia, and the re-unification of Germany. These *ex post facto* recognitions followed the long-standing criteria for statehood in international law – the existence of a defined territory, permanent population, and government; and the capacity to enter into relations with other states.³⁴ Moreover, the Declaration on Friendly Relations outlines the modes of exercising self-determination as “the establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people”. Each of these methods of self-determination envisages freedom from some form of domination. The right to

The right and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law [...] In connection with article 1 of the Covenant, the Committee refers to other international instruments concerning the rights of all peoples to self-determination, in particular the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations.

²⁶ UNGA Res. 1514(XV) 1960.

²⁷ See (GA Res. 2396 (XXIII) 1969; GA Res. 31/6 1976). Although South Africa may be seen as an exception, the apartheid system is to be regarded as alien domination in that the indigenous population was being oppressed by a migrant minority community.

²⁸ Southern Rhodesia (Zimbabwe) (GA Res. 2024 (XX) and Res.216 of 11 and 12 Nov. 1965.

²⁹ (GA Res. 2672 C (XXV) 1971; GA Res. 3236 (XXIX) 1974; GA Res. 33/24 1978.

³⁰ GA Res. 1353 (XIV), 1723 (XVI), 2079 (XX) 1961.

³¹ Eritrea, GA Res. 390 (V) 1950.

³² *East Timor Case (Portugal v. Australia)*, ICJ Reports 1995, p. 90.

³³ *Western Sahara Case*, ICJ Reports 1975, p. 12.

³⁴ Article 1 of the Montevideo Convention on the Rights and Duties of States 1933.

political participation or the right to choose a country's political leaders was not indicated or contemplated as a mode of exercising the right of self-determination.

Secondly, although the right to self-determination has become part of international jurisprudence, state practice, in furtherance of the doctrine of *uti possidetis*, has confined its application to the colonial context.³⁵ As Otto (1993: 378) has observed, the self-determination principle “has been severely restricted in its practice. It has never been a right belonging to everyone. Rather, the principle has generally been applied narrowly to peoples of European colonies”. Simpson (1994: 125) has similarly commented that any potential role self-determination might have had in promoting a norm of democratic entitlement has been diminished by the fact that the right has become decidedly conservative and statist and has come to be “identified exclusively with decolonisation”. Cassese (1995: 108) has also noted that, “the practice of states, as it has developed in the United Nations, shows that no right to self-determination accrues under current international law to peoples of sovereign states or to minority groups living in sovereign states”. Thus although the process of decolonisation has led to many successful cases of external self-determination, there have been few cases of self-determination outside the colonial context (Archibugi, 2003: 488; Nowak, 2005).

Finally, the right to self-determination, including its internal aspect, does not translate to a right to democracy or popular participation. This is because any right to the latter would be a right available to individuals *qua* individuals, whereas the right to self-determination avails only “peoples” and cannot be exercised by individuals as such.

According to Cassese:

The Human Rights Committee has taken the view that it can only consider communications emanating from individuals alleging that they are victims of breaches of their *individual rights* by the state complained of. Consequently, according to the Committee, no complaint can be lodged by individuals

³⁵ Derived from Roman law, *uti possidetis*, (fully expressed as *uti possidetis ita possidetis*), the phrase literally means “as you possess, so you possess”. According to the Osborne’s Concise Law dictionary, it originally referred to a decree of the Roman praetor that ownership of property in question should remain in the person in possession. *Uti possidetis* appears to be of two types – *uti possidetis juris* (based on legal title), and *uti possidetis de facto* (based on actual occupation) of the property in question. The doctrine, which was first applied during the process of decolonisation in South America, maintains that the boundaries of existing states are sacrosanct and that nations under colonial rule must achieve independence on the basis of their existing international boundaries.

concerning alleged contraventions of article 1 on self-determination” (1995: 142, emphasis added).

Shaw (2008: 292) has also remarked that, “the principle is seen as a collective one and not one that individuals could seek to enforce through the individual petition procedures provided in the First Optional Protocol to the Covenant”. In *Kitok v Sweden*,³⁶ the HRC held that an individual could not rely on Article 1 of the ICCPR to claim a remedy for the violation of the right of self-determination. According to the Committee, Article 1 deals with the rights conferred on peoples, and that only an aggregate of peoples entitled to self-determination could bring an action. In the opinion of the Committee, “whereas the Optional Protocol provides a recourse procedure for individuals claiming that their rights have been violated, article I of the Covenant (i.e. ICCPR) deals with rights conferred upon peoples, as such”.³⁷ Similarly, in *Ominayak v Canada*,³⁸ and in *Marshall and others v Canada*,³⁹ the HRC held that individuals cannot bring action under Optional Protocol 1 to enforce the collective rights of self-determination.

Moreover, the right to self-determination, in current international law could only be exercised by the whole people of a given territory; fractions of the population are not “peoples” capable of exercising the right. As Higgins (1994: 124) has pointed out, the emphasis placed on the principle of territorial integrity by relevant instruments and state practice “means that “peoples” is to be understood in the sense of all the people of a given territory [...] Minorities as such do not have a right of self-determination”. Similarly, Wheatley has observed that:

The right to self-determination is possessed by the people (the whole population of the state); it is not held by those who consider the territory to be the historical “homeland” of their national, ethnic, linguistic, or religious group, or their ‘nation,’ or their “people”. Nor is it held by particular minorities within the state, or even by a majority of the population (2002: 231; see also Thornberry, 1993: 115).

³⁶ Communication 197/1985.

³⁷ However there is no mechanism for such group enforcement under the First Optional Protocol to the human rights covenants.

³⁸ Communication No. 167/1984.

³⁹ Communication No. 205/1986.

Therefore, where the opportunity of political participation is denied to a section of a country the members of that section cannot assert a right to political participation at the HRC because the denial does not affect the whole people.

The only ground on which a section of the population of a state may claim a right to self-determination is that of exclusion from voting or being voted for in representative elections on the ground of “race, creed or colour”.⁴⁰ As Cassesse (1995: 114) has observed, any right to internal self-determination in the Declaration on Friendly relations 1970 is available only to “racial or religious groups living in a sovereign state which are denied access to the political decision-making process; linguistic or national groups do not have a concomitant right”. Thus with the exception of discrimination on racial or religious grounds, people do not have a right under international law to governments of their choice, or to political participation. As Cassesse further writes:

It is difficult to discern any consistent action taken in the international arena to protect the rights of peoples subjected to authoritarian or despotic governments, and based on the principle that such governments are in violation of their people’s right to self-determination (1995: 102 –3; see also Crawford, 2000: 95).

The right to self-determination, as currently recognised in international law cannot, therefore be said to have created a right to political participation:

Strictly speaking, the right to democracy (by which he meant elected government) cannot be derived from the right to self-determination since the later has a specific historical and legal content, that is, it deals with the right of the people under colonial domination to determine their political status. (Ibegbu, 2003: 95, see also Simpson, 1994: 125).

6. Election monitoring in sovereign states

Some commentators have cited the practice of election monitoring in independent and sovereign states as evidence of the existence of a norm of democratic governance in international law. Franck (1992: 50-51, 71-77), for instance believes that governments across the world are now being validated and legitimised by the UN and regional organisations through the monitoring and certification of their elections. Similarly Fox and Roth (2001: 330) have opined that, “a determination as to whether an

⁴⁰Declaration on Friendly Relations 1970.

election was conducted properly speaks to the legitimacy of the purported victor's mandate to govern". And in the view of Crawford (1993: 123), the practice of election monitoring points to the development of international law in "pro-democratic directions" (see also Franck, 2000; Fox, 2000; 2007: 3).

The trend of election monitoring by the UN in sovereign states began in Nicaragua in 1989 following the political crisis in that country. A request was made by the presidents of five South American countries and of Nicaragua to the Secretary General of the UN to send an observer mission to monitor the coming elections in the country. The Secretary General consequently formed the United Nations Observer Mission to Verify the Electoral Process in Nicaragua (ONUVEN). The Secretary General, in setting up the observer mission stated that the "mission should not be construed as any kind of value judgment as to the laws in force in Nicaragua governing the electoral process".⁴¹ The following year, the UN Secretary General set up an election observer mission called the United Nations Observer Group for the Verification of the elections in Haiti (ONUVEH)⁴² to monitor the elections in that country. The mission was set up following a request made by Haiti's interim president due to the unsettled political situation in the country.

In 1992, the Secretary-General established an Electoral Assistance Division within the UN to deal with and co-ordinate future electoral monitoring and assistance activities.⁴³ Since then the UN has received request for electoral monitoring or assistance from over 140 countries. There are two main categories of United Nations electoral assistance – Standard Electoral Assistance activities and Major Electoral Missions.⁴⁴ The former involves the provision of technical and logistic support for the conduct and monitoring of the elections, while the latter, which takes place as part of a wider peace-keeping operation, entails the organization and conduct of the election by the UN itself subject to the express mandate of the General Assembly or the Security Council and the agreement of all the parties concerned.

⁴¹ Secretary General's Nicaragua Letter, July 5, 1989.

⁴² The mission was authorised by General Assembly Resolution 45/2/1990.

⁴³ Pursuant to GA Res. 46/137 (1991).

⁴⁴ See <http://www.un.org/Depts/dpa/ead/ea>.

A related development is the practice of election monitoring by some regional organisations, especially the Organisation of American States (OAS), the Organisation for Security and Co-operation in Europe (OSCE), and the African Union (AU); and by International Non-governmental Organisations (INGO). Article 23 of the Inter-American Democratic Charter,⁴⁵ for instance, states that member states are responsible for organizing, conducting, and ensuring free and fair elections but that they, “in the exercise of their sovereignty, *may request* that the Organization of American States provide *advisory services or assistance* for strengthening and developing their electoral institutions and processes, including sending preliminary missions for that purpose” (emphasis added). Article 24 adds that further to a request by a member state, “the government of that state and the Secretary General shall enter into an agreement establishing the scope and coverage of the electoral observation mission in question”.

The OSCE has similar provisions. The Office for Democratic Institutions and Human Rights has the mandate to assist member states in their “democratisation” process and to provide electoral assistance and to undertake election observer missions.⁴⁶ Such electoral assistance and observation are, however not compulsory but must originate from prior requests from the states concerned or as a follow-up to recommendations included in an earlier observation’s final report.⁴⁷ Any election observation under the auspices of the AU is also undertaken at the invitation of the states holding the elections. The African Charter on Democracy, Elections and Governance 2007,⁴⁸ establishes a commission for the observation of national elections in Africa. Article 19(1) of the Charter provides that “each state party shall inform the Commission of scheduled elections and invite it to send an electoral observer mission”. There is no sanction on any state whose government fails to invite AU monitors to its elections. Some international NGOs like the Electoral Institute of Southern Africa (EISA),

⁴⁵ Adopted by the General Assembly at its special session held in Lima, Peru, on September 11, 2001.

⁴⁶ “Such projects have included assisting with legislative reviews, drafting of rules and regulations, training domestic observers, and training law enforcement agents and election administrators on new election legislation, as well as offering voter education.” – See <http://www.osce.org/odihr/?page=election&div=assistance>.

⁴⁷ See http://www.osce.org/publications/odihr/2005/11/17148_478_en.pdf.

⁴⁸ Adopted by the 8th ordinary session of the Assembly of Heads of States and governments in Addis Ababa, Ethiopia on 30 January 2007, available at: <http://www.africaunion.org/root/AU/Documents/Treaties/text/Charter%20on%20Democracy.pdf>.

Electoral Reform International Institute (ERIS), International Institute for Democracy and Electoral Assistance (International IDEA), International Foundation for Election States (IFES), and the Carter Centre also undertake election monitoring in different countries either at the invitation, or with the permission, of the state concerned.

But the practice of election monitoring in sovereign states does not justify a conclusion that a right to democracy or popular political participation exists in international law. In the first place, it has always been clear in all relevant instruments and to all parties concerned, as we have seen above, that election monitoring or assistance could take place only with the assent of the state holding the election. There has never been any pretension or suggestion that such monitoring or assistance is pursuant to any international law obligation or as a result of any right to political participation or democracy. The UN Electoral Assistance Division has pointed out that electoral assistance by the UN is conducted in conformity with the basic principles of the sovereign equality of states and respect for their territorial integrity and political independence. Accordingly, two “pre-conditions” must be met before any electoral assistance may be provided:

The first is the need for a formal written request for electoral assistance from the Government of the requesting Member State; The second is that an assessment be conducted to determine whether the United Nations should provide assistance and, if so, the most appropriate type of assistance.⁴⁹

The General Assembly has also stressed the voluntary nature of election monitoring activities. The Assembly has, in different resolutions between 1990 and 2006, affirmed that states should respect the sovereignty and territorial integrity of other states and that “it is the concern solely of peoples of each state to determine methods and to establish institutions regarding the electoral process as well as to determine the ways for its implementation”.⁵⁰ Similarly, Boutros-Ghali (1996: 4) has observed that the involvement of the UN in countries’ “democratisation process” is one merely of assistance and advice, and that the UN “*must receive a formal request before it can assist member states in their ‘democratisation’ processes*” (emphasis added). Election monitoring by regional organisations are also, as we have seen above, subject to the request of the state conducting the elections.

⁴⁹ See <http://www.un.org/Depts/dpa/ead/overview.html>.

⁵⁰ See e.g. GA Res.45/151 (1990), para, 2 and 4; GA Res/50/172 (1995); GA Res. 60/164 (2006).

Furthermore, all election monitoring and assistance activities are subject to the Declaration of Principles for International Election Observation, and the Code of Conduct for Election Observers 2005.⁵¹ These documents have been endorsed by all election monitoring and observing organisations, including the UN, the EU, the OSCE, the OAS, the AU, the IPU, the Asian Network for Free Election (ANFREL), EISA, ERIS, International IDEA, IFES, and the Commonwealth of Nations. Article 12 of the Code of Practice states that no election monitoring or observation mission should be undertaken unless the government of the country holding the elections satisfies two “pre-requisite” conditions. The first condition is that it “issues an invitation or otherwise indicates its willingness to accept international election observer missions” in sufficient time and according to the requirements of the observers. The second condition is that the government must give a guarantee, *inter alia*, of unimpeded access of the observers to relevant election sites, technology and materials, and of their movement, accreditation, security, liberty, and freedom of public speech. Furthermore, the Code of Conduct provides that international observers, “must respect the laws of the host country and the authority of the bodies charged with administering the electoral process”, and “must follow any lawful instruction from the country’s governmental, security and electoral authorities.”⁵²

It is therefore clear that states are not required by international law to submit their electoral process to international observation or monitoring; nor are they required to have an electoral process in the first place. It is noteworthy that in some cases, the Electoral Assistance Division of the UN has declined requests for electoral assistance on the ground of lack of mandate. For example, when invited to monitor elections in Zambia in 1991, the Secretary General declined because, according to him, there were no special circumstances authorising him to monitor elections in sovereign states. He also declined to monitor elections in Romania in 1990 because there was no authorisation from the General Assembly or Security Council to do so.⁵³ Moreover, failure by a state to invite or allow monitors to attend its elections does not attract any

⁵¹ Made at the United Nations, New York on 27 October 2005, available at: http://www.osce.org/documents/odihr/2005/11/16968_en.pdf.

⁵² The OSCE handbook on Election contain similar provisions; see http://www.osce.org/publications/odihr/2005/11/17148_478_en.pdf.

⁵³ See “U.N. says It won’t Monitor Romanian Elections” (*NEXIS, CURRENT Library, Reuters*, Jan.25, 1990).

legal consequences; since there is no obligation to invite monitors, no question of punishment for non-compliance can arise. The General Assembly has,⁵⁴ in fact, described unsolicited election monitoring as a violation of international law:

Any activities that attempt, directly or indirectly to interfere in the free development of national electoral processes [...] or that are intended to sway the result of such processes, violate the spirit and letter of the principle established in the Charter and the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

Second, a finding by UN, regional, or INGO observers that an election was seriously flawed has few international legal implications. Although such a finding may be an embarrassment to the “winner”, it will not prevent him or her from taking office or representing the state in the international arena. There is no sanction in international law for failure to meet international election standards, assuming such a standard exists (Fabry, 2009). A few cases may be cited as illustrations of this point: the elections in Peru and Haiti in 2000 were reported by OAS monitors as being tainted by serious irregularities, but the OAS and the international community did not take any action against the countries or the regimes that emerged from the electoral processes (Boniface, 2002: 377). Similarly, the presidential and parliamentary elections in Kenya in 2007,⁵⁵ Zimbabwe in 2008,⁵⁶ Azerbaijan and Belarus in 2008⁵⁷ have all been declared short of international standards by international monitors. Yet these negative reports have not negated the result of the elections or the status of the victors as heads of state or government.⁵⁸ It may therefore be concluded that while states may submit their electoral processes to external monitoring, such submission is voluntary and not mandatory according to any international law obligation or any right to democracy or popular participation.

⁵⁴ In A/Res/45/151 titled “Respect for the Principles of National sovereignty and Non-Interference in the Internal Affairs of States in their electoral Processes”.

⁵⁵ See some observer reports on: <http://www.kenyavotes.org/results>.

⁵⁶ See, e.g., the EISA Observer Mission’s Report, available at: <http://www.eisa.org.za/PDF/zimomr08.pdf>.

⁵⁷ See <http://www.osce.org/odihr-elections/html>.

⁵⁸ See ‘Decision on the Situation in Kenya Following the Presidential Election of 27 December 2007,’ 2 February 2008, Assembly/AU/Dec. 178 (X); The ‘African Union Summit Resolution on Zimbabwe,’ 1 July 2008, Assembly/AU/Dec. 219 (XII); OSCE Report on Belarus Parliamentary Election of 28 September 2008, available at http://www.osce.org/documents/odihr/2008/11/35145_en.pdf; Statement of Preliminary findings and Conclusions on the 15 October 2008 Presidential Election in Azerbaijan,’ 16 Oct. 2008, available at http://www.osce.org/documents/odihr/2008/10/34414_en.pdf.

7. Instruments of regional organisations

The instruments of some regional organisations have made significant provisions relating to political governance in member states. These organizations are the European Union (EU), the Organization of Security and Cooperation in Europe (OSCE), the Organization of American States (OAS), and the African Union (AU). However, other regional groupings like the Arab League, the Association of South East Asian States (ASEAN); the South Asian Association for Regional Cooperation (SAARC); and the states of Oceania have not made significant regional instruments on national political governance. This sub-section will therefore focus on the initiatives and prescriptions of the EU, the OSCE, the OAS, and the AU on governance to determine whether they have created a right to democracy or popular political participation for the citizens of their member states.

The Treaty of the European Union⁵⁹ makes copious provisions aimed at institutionalising “democratic” governance in member states. The Treaty confirmed the member states’ “attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law”.⁶⁰ Article 6 (1) of the Treaty reaffirms that “the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member states”.⁶¹ In the Case of *United Communist Party of Turkey and Others v. Turkey*,⁶² the European Court of Human Rights held that “democracy is without doubt a fundamental feature of the European Public Order”.

Membership of the European Union is predicated on the existence or continued existence of “democratic” government. Under article 49 of the Treaty, “any European state which respects the principles set out in Article 6(1) may apply to become a member of the Union”. Accordingly a state will not be admitted if it does not have a system of government that meets the union’s “democratic” criterion and does not subscribe to the principles of liberty, “democracy”, respect for human rights, and the

⁵⁹ The Maastricht Treaty; done at Maastricht on the 7th day of February 1992 and came into force on 1 November 1993.

⁶⁰ Paragraph 3 of the preamble to the Treaty.

⁶¹ Added by the Treaty of Amsterdam on 1 May 1999.

⁶² 133/1996/752/951, (Judgment of the European Court of Human Rights, (January 30, 1998), para. 45.

rule of law. This position was reinforced in a declaration by the heads of governments of EU member states in Copenhagen in 1993. The declaration re-stated the conditions for the admission of new members to include the existence of stable institutions guaranteeing democracy, the rule of law, respect for and protection of human rights and minorities, the existence of a functioning market economy, the capacity to cope with market forces and competitive pressures within the Union, and the ability to take on the obligations of membership, including economic and monetary union. New members are required to create the conditions for their integration through the adjustment of their administrative and judicial structures, as underlined by the Madrid European Council in December 1995.

The European Commission has also resolved that, “the right to political participation in the political process is a fundamental and universal human right, as is the establishment of representative democracy”.⁶³ Additionally, the Charter of Fundamental Rights of the European Union 2007⁶⁴ states that the Union “is based on the principles of democracy and the rule of law”.⁶⁵ Further expressions of commitment to “democratic” governance by European countries are seen in the Charter of Paris.⁶⁶ In that Charter, members of the OSCE⁶⁷ “undertake to build, consolidate and strengthen democracy as the only system of government of our nations”. The OSCE also adopted the Moscow Document,⁶⁸ which condemns “unreservedly forces which seek to take power from a representative government of a participating state against the will of the people as expressed in free and fair

⁶³ European Commission Resolution 78/95 of 22 May, Human Rights in the World, para. 60, 1995 O.J. 126.

⁶⁴ 2007/C 303/01, available at: <http://eur-lex.europa.eu/en/treaties/dat/32007X1214/htm/C2007303EN.01000101.htm>.

⁶⁵ *ibid*, paragraph 2 of the preamble. The Charter is not yet binding, but there ongoing talks to incorporate the provisions into the EU treaty.

⁶⁶ CSCE Charter of Paris for a New Europe, signed on Nov. 21, 1990.

⁶⁷ Formally Council for Security and Co-operation in Europe (CSCE). It comprises 55 countries from Europe, Central Asia, and North America. The participating countries are Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Holy See, Hungary, Iceland, Ireland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom, United States of America, Uzbekistan.

⁶⁸ CSCE, document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for human Rights, Pluralistic Democracy, the Rule of Law, and the Procedures for Fact-finding, Oct. 3, 1991, 30 ILM (1991), p.1670.

elections”.⁶⁹ Where a government is overthrown in a coup, the members are expected not to recognize the new government.⁷⁰ Existing members of the Union are also required by article 6(1) to continue to maintain democratic traditions. Member states that violate these principles, in a “serious and persistent”, way may have some of their rights deriving from the application of the Union Treaty suspended.

Wheatley (2002: 234-5) captures the near-consensus among commentators when he states that the “irreversible progress towards democratic governance” is now complete in Europe and that democracy is now the only legitimate form of government in that continent. Accordingly, any state that is not democratic would be breaching an international obligation (see also Franck, 1992: 65-67; 2000; Burchill, 2001: 86-97; Fox and Roth, 2001; Beutz, 2003: 394-5; Fox, 2007). There is little doubt therefore that the EU has demonstrated a clear intention to make the institution of liberal representative governance obligatory on member states and intending member states of the organisation. However, this is not to say that a right to democratic governance now exists in the EU. What the EU and the OSCE have institutionalised is the practice of selecting political rulers by elections. Such a system of government is quite different from democratic governance and does not guarantee or enable popular participation in governance.

Moreover, Governance in EU states is moving even further away from the citizens of member states with the increasing centralization of European governance and the expansion of the jurisdiction of the EU Parliament. Now, the Parliament has jurisdiction in matters of citizenship, education and vocational training, youth, social security, employment, industry, consumer protection, and culture. It also extends to justice and home affairs, energy, customs, the environment, internal market, common commercial policy, space, transport, agriculture and fisheries, among others. And for member states that also belong to the single monetary union, or the Schengen scheme, EU jurisdiction extends to monetary, currency, and immigration policies. These powers have been granted to the EU institutions by the Maastricht Treaty of 1992 and its replacement, the Lisbon Treaty of 2007 that were not ratified by the people of

⁶⁹ *ibid*, para.17.1., 30 ILM, p.1677.

⁷⁰ *ibid*.

Europe.⁷¹ Important EU decisions are also not subject to popular vote. And although the Lisbon treaty makes a reference to the possibility of a million EU citizens calling upon the EU Commission to present a proposal, the treaty contains, as yet, no details on how this idea might become a reality. The expansion of the jurisdiction of the EU and its institutions means that political power and decision-making are being concentrated in fewer people than had hitherto been the case in national governance. Thus, rather than being at the vanguard of popular participation, the EU may be regarded as taking governance even further away from the people of Europe.

In the OAS, current provisions on political governance are to be found in the Inter-American Democratic Charter 2001.⁷² Article 1 of that Charter states that, “the peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it”. It also states that, “democracy is essential for the social, political, and economic development of the peoples of the Americas”. Article 17 of the Charter entitles member states whose “democratic political institutional process or whose legitimate exercise of power” is at risk, to seek assistance from the organisation. Upon the request for assistance, the Secretary General of the OAS may, “with prior consent of the government concerned”, visit the country, analyse the situation, and submit a report to the Permanent Council, which may adopt “decisions for the preservation of the democratic system and its strengthening”.⁷³ These provisions are similar to the Santiago Declaration of 1991,⁷⁴ and the Washington Protocol of 1992⁷⁵ that preceded the Charter. Because of these provisions, it has been claimed that the OAS “appears to spearhead a vigorous international regime for the defence of democratic rule in the hemisphere” (Boniface, 2002: 366). It has also been claimed that:

There is now a right to democracy in the Americas in the sense that a concern for the promotion and defence of democracy in the inter-American system has

⁷¹ Only in the Republic of Ireland was the Lisbon Treaty put to a referendum. Although the Irish people originally rejected the Lisbon Treaty in June 2008, that outcome was rejected by the EU hierarchy. Consequently, a new referendum was held on 2 October 2009 as a result of which the treaty was approved.

⁷² Adopted by the General Assembly at its special Session held in Lima, Peru on Sept. 11, 2001.

⁷³ The kind of interventions permissible are diplomatic initiatives, and where that fails, suspension of the country from the OAS. See Articles 20, 21 and 22 of the Inter-American Democratic Charter 2001. And even upon suspension, the country concerned is still required to fulfil its obligations and diplomatic initiatives remains ongoing – Art. 21.

⁷⁴ The Declaration on the Collective Defence of Democracy, Res. 1080.

⁷⁵ The Protocol was ratified in 1997.

evolved into a normative obligation and, most important, is being implemented through collective action” (Munoz, 1996: 30).

But these claims are exaggerated; the instruments cited do not seem to have created a positive right to political participation in the Americas. In the first place, the OAS is primarily concerned with the restoration of a deposed elected government in member states in order to “strengthen or preserve democracy”. All interventions by the OAS has been in response to the interruption of the tenure of elected governments, as happened in Haiti in 1991, Peru in 1992, Guatemala in 1993, Paraguay in 1996, Venezuela in 2002, and Bolivia and Ecuador in 2005 (see Boniface, 2002; Herz, 2008). But in order to intervene in any member state to restore “democracy”, the OAS must receive an invitation or SOS from the government under threat. What happens, though, where coup plotters successfully topple a “democratic” government and detain or assassinate the officials? Obviously, the coup leaders, in charge of the government, would not invite the OAS to preserve the country’s “democracy”. Although the Charter is silent on this, the logical inference is that the organisation has no *locus standi* to intervene in such circumstances other than to suspend the country concerned from the organisation. Similarly, in countries with no existing “democratic” government, or in countries where there has been a manipulation of the electoral process, or a denial of political rights, the OAS appears unable to do anything.

Secondly, although, article 1 of the Democratic Charter speaks of a right to democracy, there is no mechanism for enforcing that right; and that provision, (along with the other provisions of the Charter), is understood to be political in nature and not meant to create actual rights. Article 1 was adopted with the following “statement of understanding”, which was included at the instance of Canada:

Canada understands that the Inter-American Democratic Charter is political in nature. We further understand that the ‘Right to Democracy’ is the right of individuals to the elements of democracy as set out in relevant international instruments. We acknowledge that states have the obligation to promote and defend the individual human rights which constitute the elements of democracy (Graham, 2002: 7).

Thus member states of the OAS are still free to adopt any form of government they choose, although democracy would be the preferred option. As Graham (2002: 7) has observed:

The negotiating success of the proponents of the Charter lay, in part, in the fact that they were not pressing for a legally binding instrument. It is an expression of political determination that expands the mechanism by which the organisation can promote and defend democracy.

One study has therefore concluded that the OAS “has tended to use these instruments only for the most extreme cases of democratic interruption, such as coups and *autogolpes*, and never directly in relation to violations of electoral or constitutional procedures” (Leglar, *et al*, 2007: 58; Beutz, 2003: 395).

Finally, the provisions of the Democratic Charter are subject to the provisions of the OAS Charter of 1967. Article 3(e) of the OAS Charter unequivocally provides that each member state is entitled to choose, “without external interference, its political, economic, and social system and to organize itself in the way best suited to it, and has the duty to abstain from intervening in the affairs of another state”. Under Article 17, “each state has the right to develop its cultural, political, and economic life freely and naturally. In this free development, the state shall respect the rights of the individual and the principles of universal morality”. Furthermore, article 19 of the Charter states that:

No State or group of States has the right to intervene, directly or indirectly, *for any reason whatever*, in the internal or external affairs of any other state. The foregoing principle prohibits not only armed force *but also any other form of interference or attempted threat* against the personality of the state or against its political, economic, and cultural elements (emphasis added).

The instruments and practices of the OAS do not, therefore, warrant a conclusion that a right to “democratic” governance, or to popular political participation is now available to the people of the Americas. The references to democracy in the OAS Charter and the Inter-American Democratic Charter should be read as references only to the assumption of political office through elections, and the right of citizens to vote in the elections. As Dominguez (1997: 2) explains:

By democratisation we mean the shift to free, fair, and competitive elections, held at regular intervals, in the context of guaranteed civil and political rights, responsible government (i.e., accountability of the executive, administrative, and coercive arms of the state to elected representatives), and political inclusion (i.e., universal suffrage and non-prescription of parties).

For the African Union, article 4 of the Constitutive Act of the union 2000,⁷⁶ provides that member states should refrain from interfering in the internal affairs of other states; that the union may collectively intervene in another state “in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity”; that there should “be respect for democratic principles, human rights, the rule of law and good governance”; and that there should be “condemnation and rejection of unconstitutional changes of governments”. The last two principles were the only references to democracy and good governance in the Act and are merely a statement of objectives and intentions similar to those in Article 21 of the UDHR 1948. Thus, while reinforcing the principle of non-interference, the Act does not create any entitlement or right to elected governments.

The African Charter on Democracy, Elections, and Governance 2007 has made more copious and pointed references to and provisions on “democratic” governance. Some of the stated objectives of the Charter are the promotion of “the holding of regular free and fair elections”; the institutionalisation of “legitimate authority of representative government as well as democratic change of governments”;⁷⁷ the prohibition, rejection, and condemnation of “unconstitutional change of government in any Member state as a serious threat to stability, peace, security and development”;⁷⁸ and the nurturing, support, and consolidation of “good governance by promoting democratic culture and practice, building and strengthening governance institutions and inculcating political pluralism and tolerance”.⁷⁹ The principles of the Charter include, the respect for human rights and democratic principles; promotion of representative systems of government; and the holding of regular, transparent, free and fair elections.⁸⁰

These objectives and principles promote the institutionalisation of representative governance and a right of citizens to be involved in the election of their political leaders. Article 4 of the Charter admonishes state parties to “commit themselves”, to the promotion of “democracy, the principle of the rule of law and human rights, and

⁷⁶ Adopted by the thirty-sixth ordinary session of the Assembly of Heads of States and Government, 11 July 2000, in Lome, Togo.

⁷⁷ Article 2(3).

⁷⁸ Article 2(4).

⁷⁹ Article 2(6).

⁸⁰ Article 3.

to “recognize popular participation through universal suffrage as the inalienable right of the people”; while article 5 provides that member states “shall take all appropriate measures to ensure constitutional rule, particularly constitutional transfer of power”. In the event of the toppling of a “democratically elected” government by force or other unconstitutional assumption or retention of power, the Peace and Security Council of the union may take appropriate actions, including the suspension of the state and its government from membership and activities of the Union. The Peace and Security Council may also take appropriate diplomatic initiatives to restore “democratic” governance in the state concerned.⁸¹

Although it may be said that the Charter of Democracy, Elections and Governance has recognised the right of citizens of African states to be involved in the election of the governments of their countries, it has not created a veritable right to democracy or popular political participation. The notion of democracy in the AU corresponds to that of the EU, the OSCE, and the OAS. Therefore, the objectives of the Charter would be met if a state holds regular, free, and fair elections under the principle of universal suffrage for the selection of political rulers. Moreover, the Charter is subject to the provisions of the Constitutive Act of the African Union 2000, which enshrines respect for the sovereignty and independence of member states and of their freedom from external interference. Accordingly, the AU does not have a right to intervene in a Member state to enforce any political rights of citizens.⁸²

8. State practice on democracy and popular political participation

Having seen that international and regional treaties, resolutions and initiatives have not created a right to democracy or popular participation, it now needs to be considered whether general state practice has created that right in international law. Some scholars believe that the adoption of liberal “democracy” as a form of government has become so widespread and so accepted by states that there is now a right to democratic governance, or a right to political participation in customary international law. Franck has, for example, stated that:

⁸¹ See article 25.

⁸² Article 4.

This newly emerging 'law' which requires democracy to validate governance – is not merely the law of a particular state that, like the United States under its constitution, has imposed such a precondition on national governance. It is also becoming a requirement of international law, applicable to all and implemented through global standards (1992: 47).

Franck also claims that people “almost everywhere” are now demanding that their governments should be validated by “Western style multi-party democratic processes” and that, democratic governance “is now rapidly becoming a normative rule of the international system” (1996: 84; see also Doyle, 1986: 1162; Franck, 1994; 2001; Crawford, 1994: 4-7; Buergenthal, 1997; Fabry, 2009).

Similarly, Ratner (2000: 449-450) claims that, “governments around the world, responding to the desires of their people for a full participatory role in deciding their nation’s future, have moved toward adopting democratic forms of governance” not merely as a matter of good policy but as a matter of duty. Grossman (1992: 249), on his part, claims that, “democracy is obtaining recognition as the valid form of government in both declarations and practice”. In the view of Cerna (1995: 290-291), democracy became an international legal right since 1948 following the enactment of the UDHR. Ibegbu went even further to claim that the right to democracy has become a peremptory norm of international law. According to him:

The right to democracy has become a customary international law. This is evidenced by the existence of a general states’ practice confirmed by *opinio juris sive necessitatis* ... Since customary law and general principles of law recognised by civilized nations bind *erga omnes*, it is right to affirm that the right to democracy now creates obligations *erga omnes*. Consequently all states are bound to establish a democratic system of government (2003: xx, xxiv; see also Ezetah, 1997: 504).

Building on this theme, the claim has been made that the demise of Communism marks the “end of history as such; that is the end point of mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of human government” (Fukuyama, 1989: 3-4; 1992; McFaul, 2004; Fukuyama and McFaul, 2007). Fox is, however, more circumspect in his assertion of the democratic entitlement. In his view, although there is a movement towards democracy in the international system and although many international organizations now engage in a broad range of democracy promotion activities, the existence of a right to democracy,

should be considered as still uncertain because only a few international instruments have yet described democracy as a right (2007: 3).

The claims about the existence or emergence of a right to democracy in customary international law has not, however, been borne out by the evidence. For a rule to achieve the status of customary international law, it must necessarily satisfy two conditions. The first is that the rule must have become widely accepted and applied by most, if not all, states of the international community. The second is that states must apply the rule out of a sense of legal obligation; this is usually expressed as *opinio juris sive necessitatis*. Article 38 (1)(b) of the Statute of the ICJ⁸³ describes international custom as “evidence of a general practice accepted as law”. In the *Asylum Case*,⁸⁴ the ICJ defined it as a “constant usage, accepted as law” by states. Accordingly, “mere usage, such as acts done out of courtesy, friendship or convenience rather than out of obligation or a feeling that non-compliance would produce legal consequences” does not amount to custom (Hillier, 1998: 66).

As for the prevalence of state practice required to create customary international law, the ICJ held in the *North Sea Continental Shelf Cases*⁸⁵ that “state practice, including that of states whose interests are specially affected, should... be both extensive and virtually uniform”. Even though it is not a requirement that every state must have embraced the practice, it must have been embraced by a vast majority of states as to put non-complying states in an uncomfortable and defensive position. Similarly, in the *Nicaragua Case*,⁸⁶ the ICJ held that:

The court does not consider that for a rule to be established as customary law, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as an indication of the recognition of a new rule. If a State acts in a way, *prima facie*, inconsistent with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the state’s

⁸³ Contained in the charter of the United Nations 1945.

⁸⁴ *Columbia v Peru*, ICJ Reports 1950, p.266.

⁸⁵ ICJ Reports, 1969, p. 3, para.74. See also the *Nicaragua Case (Merits)*, I.C.J. Reports 1986, p.14.

⁸⁶ I.C.J. Reports (1986) at p.98 para. 186.

conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than weaken the rule.

Have states now overwhelmingly accepted democratic governance or the right of their citizens to political participation; and have they accepted them out of a sense of international legal obligation? These questions must be answered in the negative for the following reasons:

First, although there has, in the last three decades, been a significant increase in the number of countries choosing their governments through elections, these developments are attributable to factors other than compliance with any international obligation to institute any particular form of governance. Many countries have embraced the liberal “democratic” systems in order to satisfy Western donor countries or the conditionalities of international financial institutions, especially the IMF and the World Bank (Ake, 1996; Bratton and van de Walle, 1997: 219-20; Carothas, 1997: 91; Monga, 1999: 69; Joseph, 1999). The influence of the IMF and the World Bank was particularly strong in Africa between 1990 and 1994 when the “Third Wave” of democratisation was said to have taken place on that continent (Schraeder, 1995; Callaghy and Ravenhill, 1993). For this reason, it has been said that the IMF and the World Bank have become more powerful in Africa than the former colonial masters (Ake, 1996: 72). In South and Central America where the “democratic” wave was also very strong, such economic pressure was also prominent, as was the influence of the USA, the regional and global super power, to whom many countries in the region looked up for assistance (Dominguez and Linderberg, 1997).

Other countries have embraced “democracy” because their rulers wanted to put a veil of respectability over their dictatorial rule. As Dahl (1998: 49) observed, “because of the appeal of democratic ideas, in the twentieth century despotic rulers have often cloaked their rule with a show of ‘democracy’ and ‘election’”. This has especially been the case in Africa where many dictators transformed themselves into “democratic” civilian leaders, as was the case in Ghana, Niger, Togo, Burkina Faso, Gambia, Cote d’Ivoire, Cameroon, Gabon, and Guinea (Diamond and Platter, 1999:

xi, 157; Joseph, 1999).⁸⁷ According to Joseph, “as presentability became the effective criterion for obtaining the stamp of international approval, both African regimes and their foreign sponsors engaged in democracy as illusion” (1999: 11). Similarly, in Pakistan, General Pavez Musharaf, who had come to power through a military coup in 1999, transformed himself into an “elected” civilian president in order to present a façade of respectability to his Western allies. But many of these so-called democratic transitions did not alter the real authoritarian nature of the regimes. As Carothas has observed, the regimes had to do “a balancing act in which they impose enough repression to keep their opponents weak and maintain their own power while adhering to enough democratic formalities that they might just pass themselves off as democrats” (1997: 91; see also Diamond, 1996; Zakaria, 1997). This state of affairs has been interestingly described as the “democratization of disempowerment” (Schraeder, 1995: 1161).

Yet other countries have instituted elections as a result of domestic pressure for political change (Schaefer, 1995: 1160; Bratton and van de Walle, 1997; Joseph, 1999; Monga, 1999). As Monga explained in relation to Africa, the National Conference convened in Benin Republic to bring that country’s dictatorship to an end, encouraged people throughout the continent to engage in “classic expressions of opposition to authoritarianism such as popular uprising and civil disobedience, as well as exploring new forms in the collective quest for liberty” (1999: 48). Similarly, in Central and South America the transition to multi-party election politics was largely due to the pressure mounted by the people against military dictatorship following years of armed conflict, wars, and economic hardship. In many Central American countries, Dominguez (1997: 6) notes, “the key reason for democratization was the decision of significant elites that the state of war or the state of hardship had to end”.

There has been no instance where a country has cited obedience to an international norm of democracy or political participation as a reason for a change in its form of governance – a necessary condition for the establishment of a practice as a rule of

⁸⁷ Examples of such despot to “democrat” conversion include: Mathew Kerekou of Benin Republic, Kenneth Kaunda of Zambia, Saibou of Niger, Blaise Campaore of Burkina Faso, Meles of Ethiopia, Gnassingbe Eyadema of Togo, Mobutu Sese Seko of Zaire, Lansana Conte of Guinea, Ibrahim Babangida of Nigeria; Jerry Rawlings of Ghana, Paul Biya of Cameroon, Houphouet-Boigny of Ivory Coast, Arap Moi of Kenya, Omar Bongo of Gabon, Yoweri Museveni of Uganda, and Robert Mugabe of Zimbabwe (Udombana, 2002).

customary international law. Moreover, since the turn of the Millennium, the so-called democratic Third Wave has ebbed. According to the Freedom House's annual report on "Freedom in the World," the number of "free" or "democratic" countries in the world has not only stagnated but has begun to decline in the last ten years (2009: 3). In that period alone, elected governments have been overthrown in many countries, including, Haiti (1991), Algeria (1992), Burundi (1993), Gambia (1994), Sierra Leone (1996), Ecuador (2000), Pakistan (1999), Republic of the Congo (1997), Mauritania (2008), Fiji (2006), Thailand (2006), Guinea (2008), and Madagascar (2009) without much legal repercussion. It has therefore been observed that:

there are signs that the democratic gains of 1990 – 1994 [...] are eroding. In a few countries democratization has been reversed as military forces have overthrown elected governments, spelling an end to brief democratic experiments and a return to authoritarian rule. Elsewhere, new democracies survive, but elected rulers have lapsed back into manipulating political rules in order to consolidate their personal hold on power (Bratton and van de Walle, 1997: 233; see also Diamond, 1996; Zakaria, 1997; Carothas, 1997; Puddington, 2007)

Second, matters of political governance remain domestic affairs of states. The UN General Assembly has consistently resolved⁸⁸ that the nature of government in member states is an internal affair of the states. In one such resolution,⁸⁹ the GA stated that the efforts of the international community to make the principle of periodic and genuine elections more effective "should not call into question each state's sovereign right freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other states". Boutros-Ghali (1996: 1-2) reiterated this position when he stated that "individual societies decide if and when to begin democratisation," and that "throughout the process, each society decides its nature and its pace". He cautioned that even though the international community is desirous of promoting democracy, that does not warrant the conclusion that an obligation exists to democratize, nor does it detract from the cardinal principle of state sovereignty and non-intervention in the internal affairs of states. He further stated that:

to address the subjects of democratization and democracy does not imply a change in the respect that the United Nations vows for the sovereignty of states or in the principle of non-intervention in internal affairs set out in

⁸⁸ See e.g. G.A. Res. 150, UN GAOR, 45th Sess., U.N. Doc. A/RES/45/150 (1990); G.A. Res. 151, UN GAOR, 45th Sess. UN Doc. A/RES/45/151 (1990); G.A. Res. 180, U.N. Doc./A RES/49/180 (1994).

⁸⁹ G.A. Res. 150 (1990), UN GAOR, 45th Sess.

Article 2(7) of the Charter of the United Nations. To the contrary, the founding purposes and principles of the United Nations are the very basis of the present reflection (1996: 2).

And the International court of Justice held in the *Nicaragua Case*⁹⁰ that, in the absence of a specific legal obligation, it is not mandatory on the part of a state to hold free and fair elections.

Third, there is no evidence or indication that a state will suffer any legal consequence in international law as a result of adopting a “non-democratic” form of government or failing to allow its citizens political participation. If a principle has become a rule of international law, there would of necessity, be stipulated repercussions for aberrant and unexcused behaviour; a rule of law cannot merely be a matter of choice (Wheatley, 2002: 233). But as Coleman and Maogoto (2004: 12) have observed, within the UN and regional organisations, “there is no special set of institutional procedures for handling interruptions to democratic governance, much less for addressing undemocratic regimes generally”. Although the UN authorized interventions in Haiti and Sierra Leone in the 1990s to restore elected governments, those instances were exceptional and are attributable to special circumstances not related to a right to democratic governance. In both countries the UN had been involved in the election and installation of the ousted governments; and both countries were in the grip of armed conflict that resulted in large-scale movement of refugees to neighbouring countries. The fighting in Sierra Leone also involved neighbouring countries, especially Liberia. The situation in both countries was therefore deemed to constitute a threat to international peace and security, justifying the Security Council in taking steps to restore peace under chapter VII of the Charter (Beutz, 2003: 393). Moreover, the type of interventions undertaken in Haiti and Sierra Leone has not been repeated elsewhere. This point is borne out by the fact that elected governments, as we saw above, have subsequently been toppled in many other countries without the UN taking any action.

Fourth, recognition of governments in international law and the enjoyment by heads of states and heads of governments of international privileges, are not dependent on the nature or character of the government. The government of any state usually gains

⁹⁰ ICJ Rep. (1986), p.14 at para. 261.

recognition if it manifests *de facto* or effective control over the state (Pufendorf, 1672; Lauterpacht, 1947; Kelsen, 1961; Waltzer 1980; Fox, 1992; Peterson, 1997; Roth, 1999; Murphy, 2000; Burchill, 2001; Wheatley, 2002; Coleman and Maogoto, 2004; Shaw, 2008; Fabry, 2009). As Pufendorf put it, foreigners “have no concern in examining the title whereby a man secures sovereignty, but merely follow along with the possession”. Thus, a national legal order begins to be valid under international law:

as soon as it has become – on the whole – efficacious and ceases to be valid as soon as it loses this efficacyThe government brought into permanent power by a revolution or *coup d’etat* is, according to international law, the legitimate government of the State, whose identity is not affected by these events (Kelsen, 1961: 220-21).

According to Shaw (2008: 455), “once a new government effectively controlled the country and [...] this seemed likely to continue,” international law requires that “recognition should not be withheld”. Accordingly, Wheatley (2002: 233) has observed that, “no evidence exists of the democratic credentials of a regime being relevant either in the recognition of states or in international community’s dealings with non-democratic governments”. Even if a particular state refuses to recognise a government on the ground of unconstitutional assumption of power, such non-recognition will not affect the status of the government in international law (Shaw 2008: 456); in other words, the non- recognition is merely declaratory and not constitutive. The *Tinoco Arbitration*⁹¹ exemplified this principle. There, the government of Costa Rica (headed by Tinoco) had been overthrown and the new government proceeded to revoke certain obligations entered into by the Tinoco regime with Great Britain. It was ruled that despite the non-recognition by some states of the new regime, the government was the legitimate authority in Costa Rica, since it was in *de facto* control of the state.

Moreover, states are deemed to exist independently of the nature of governments that operate them. As Roth (1999: 132) describes it, “the government does not define the state any more than the tail wags the dog”. With the exception of alien, colonial or racist domination, the international community has, therefore, generally refrained from passing judgments on the legitimacy of governments of member-states, and has

⁹¹ *Britain v Costa Rica*, 1 RIAA, p. 369 (1923); 2 AD, p. 34.

no mechanism for collective recognition of governments (Roth, 1999: 253; Coleman and Maogoto, 2004: 6). Accordingly states are free to conduct relations with regimes, even though such regimes might be considered illegitimate or unpopular (Fox, 1992: 250).

Furthermore, the UN Charter gives no powers to the General Assembly or any other organ of the UN to determine the legitimacy of the government of states or to grant or deny them recognition.⁹² As a matter of practice therefore, the UN Credentials Committee accepts the credentials of the representatives of any government in effective control of any state. As Murphy (2000: 142) observes, “the recognition practices of international organizations (e.g., the practice of the UN Credentials Committee), and international law more generally, have traditionally not specified democracy as a linchpin of governmental legitimacy”. The only time the Credentials Committee makes a judgement on the representatives of a government is on the few occasions when rival governments from the same state present different delegations to the UN.⁹³ In such situations the Committee has to choose which delegation to be accredited (Coleman and Maogoto, 2004: 6-7).

The state of international law on recognition of governments is reflected in state practice. Adopting the so-called “Estrada Doctrine”⁹⁴ most states maintain the view that formal recognition of new regimes is not necessary; instead each state considers the nature of its diplomatic dealings with particular governments on the basis of whether a government is in effective control of the territory of a given state and whether that control is likely to continue. Recognition should be implied where these conditions are present irrespective of the character of the regime (Warbrick, 1981). Only when a government with legitimacy problems manifests or is likely to manifest

⁹² See “Legal Aspects of Problems of Representation in the United Nations,” Memorandum Prepared for the Secretary-General, February 1950, U.N. Doc. S/1466, 5 SCOR, Supp., Jan.-May 1950, at 18 - 23.

⁹³ This was the case for China (1947-71); Hungary (1956-63); Congo – Leopoldville (1960); Yemen (1962); Cambodia/Khmer Republic (1973-74); Cambodia/Kampuchea (1979-90). For an account of these incidents, see Roth 1999:254-284).

⁹⁴ Named after the then Mexican Foreign Minister, Genaro Estrada, who in 1930 articulated the position of the Mexican Government on recognition of foreign governments. Estrada stated that formal recognition of governments is insulting and offends the sovereignty of other States. The Mexican government would thenceforth only decide what type of diplomatic relations it may have with other States without having to pass judgment on their governments. (See “Estrada Doctrine”, 25 *Am. J. Int’l L. Supp* (1931) at 203, quoted in Roth 1999:137-8).

hostility towards other states do those other states feel constrained to raise questions about its legitimacy. In accordance with international law and practice, un-elected governments have continued to enjoy international recognition and privileges.

Fifth, a significant amount of legal opinion suggests that no right to political participation presently exists in international law. Hillier, for example, has pointed out that “it is, so far at least, axiomatic that international law does not guarantee representative, still less democratic, governments” (1998: 726). Similarly, Wheatley (2002: 233) has observed that it is “difficult within the principles and practices of international law to identify an obligation to introduce democratic systems of government”. And, in the words of Ruiz, “the choice of a specific form of government is an internal question which each state is responsible for” (2001: 384; see also Otto, 1993: 385; Roth, 1997). Thus, Carothas cautioned that, “we must be hesitant about postulating a customary norm for democracy. The fact is that many nations do not practice democracy and do not ascribe to it as an aspiration” (1992: 254).

Finally, and perhaps most importantly, all references to the right to democracy or political participation in international and regional instruments, and in international law scholarship are largely references to the selection of national rulers by elections and the existence of political institutions of representative government.⁹⁵ They are not references to democracy in the original and correct sense of the word, or to the right of people actually to participate in the governance of their countries. As Strom, *et al*, have observed, “democracy may take many forms, but contemporary exemplars are predominantly *representative* (2006: 27, italics in original). And in this model of “democracy” the representatives generally have exclusive power to govern. According to Mill (1972: 228):

The meaning of representative government is, that the whole people, or some numerous portion of them, exercise through deputies periodically elected by themselves the ultimate controlling power, which, in every constitution, must reside somewhere. This ultimate power they must possess in all its

⁹⁵ Of all the types of representative governance, the West - inspired so-called “Liberal Democracy” is the most prominent, and often used synonymously with good governance (see Sen, 1999; Evans 2001; Fox and Roth, 2001; Langlois, 2003: 991; Fukuyama, 2007; Fabry, 2009: 722). In the words of Dunn “to reject democracy today may just be [...] to write yourself out of politics. It is definitely to write yourself more or less at once out of polite political conversation” (2005: 41).

completeness. They must be masters, whenever they please, of all the operations of government.

Similarly, Strom, *et al*, (2006: 30) have remarked that although the fundamental value of democracy is popular sovereignty, “ordinary citizens in democratic societies rarely exercise this authority directly”, but usually do so through their representatives who exercise all the powers of government.

Contemporary representative governance, Caraley (1989: 26) writes, “is a democracy of a special kind”, in which “the chief role of voters is not to decide policy in a kind of continuing referendum, but to elect officials who make policy”. The main features of this so-called “democracy” are said to be: free competition among political parties, periodic elections, and respect for the fundamental freedoms of thought, expression, and assembly (Otto, 1993: 372; Simpson, 1994: 124; Makinda, 1996: 556; Joseph, 1997: 365; Russet, 1993: 14-15; Ray, 1995: 97; Huber, *et al*, 1997: 323; Marks, 2000: 607; Mark and Warren, 2004; Schwarz, 2004, 205-6; Puddington, 2007; Lilley and Downes, 2008: 4-5). It has also been suggested that institutionalized, meaningful, and regular competition in the selection of leaders and determination of policy are the attributes of contemporary “democratic” societies along with the protection of civil and political rights and freedoms (Gleditsch and Ward, 1997: 363).

According to Huber, *et al*, (1997: 323), “current political discourse bestows the label (of democracy) frequently on any country that has held an election roughly free of fraud”. And Schumpeter (1950: 269), one of the leading authorities in modern “democratic” thought, defines democracy as the “institutional arrangement for arriving at political decisions in which the individuals acquire the power to decide by means of a competitive struggle for the peoples’ vote”. To him, democracy’s relevance lies in the ability of the people to choose their rulers in periodic elections as a way of conferring legitimacy on the government and preventing tyranny. According to Schmitter and Karl (1996: 50), modern democracy “is a system of governance in which rulers are held accountable for their actions in the public realm by citizens acting indirectly through the competition and co-operation of their elected representatives”. It has also been explained that:

What we mean by democracy is not that we govern ourselves [...] It is that our own state, and the government which does so much to organize our lives,

draws its legitimacy from us, and that we have a reasonable chance of being able to compel each of them to continue to do so. They draw it today from holding regular elections, in which every adult citizen can vote freely and without fear, in which their votes have at least a reasonably equal weight, and in which any uncriminalized political opinion can compete freely for them (Dunn, 2005: 19 – 20).⁹⁶

Conversely, a non-democracy has been defined as a government “whose officials have not been freely elected by the people” (Ibegbu, 2003: 483-4).

Democracy in modern political parlance and state practice does not refer to government of the people, for the people, by the people, but merely to government *by a few people*. In other words the *demos* has been excised from the *kraiton*. As Joseph (1997: 365) put it: “what the *demos* of modern representative democracies in fact does ... is to choose between relatively organized teams of candidates to govern”. Therefore, what are regarded today as democracies are merely different versions of elective aristocracy (Rousseau, 1986); elective oligarchy (Burnheim, 1985: 1); or representative oligarchy or aristocracy (Mill, 1972: 245 – 6). Oligarchy means governance by a small group of people; while aristocracy refers to governance by the highest social class. As forms of governance, both have a similar signification, i.e., governance of a state by only a few people. According to Austin (1859: 10):

The word aristocracy has two senses which ought to be borne in mind. It signifies properly a form of government; that is any government in which the sovereign body is a comparatively small fraction of the entire nation. But it

⁹⁶ This understanding of democracy now typifies the contemporary usage of the term (see e.g.: Huntington, 1991; 1993; Vanhanen, 1997; 2000; 2003; Foweraker & Krznaric, 2000; Burchill, 2001: 81; Munck & Verkuilen, 2002; Jagers, *et al*, 2002; Kaufmann *et al*, 2003; Beetham, 2005: 5-6; Berg-Schlosser, 2004; Freedom House, 2009). Even the definition of the “right to democracy” proffered by the Human Rights Committee does not envision democracy in its true sense. According to the Committee in its resolution entitled, “Promotion of the Right to Democracy” (UNGA Res. 55/96 of 4 Dec. 2000), the right to “substantive” democratic governance envisages, among other things:

- (a) The rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly;
- (b) The right to freedom to seek, receive, and impart information and ideas through any media;
- (c) The rule of law, including legal protection of citizens' rights, interests and personal security, and fairness in the administration of justice and independence of the judiciary;
- (d) The right of universal and equal suffrage, as well as free voting procedures and periodic and free elections;
- (e) The right of political participation, including equal opportunity for all citizens to become candidates;
- (f) Transparent and accountable government institutions;
- (g) The right of citizens to choose their governmental system through constitutional or other democratic means;
- (h) The right to equal access to public service in one's own country.

These postulations were echoed by the UN General Assembly in article 1 of its resolution “Promoting and Consolidating Democracy” of 2000.

also signifies a class elevated by political privileges; or a class elevated by social influence springing from birth or wealth, or any cause whatever.

Similarly, Rousseau (1996: 69) had observed that aristocracy is a government by a small number of citizens, such that “there are more private citizens than magistrates”. Rousseau distinguishes three types of aristocracy – natural, elective, and hereditary. Elective aristocracy, which he considered the best of the three, differs from the other two in that those in government only get there by election and not merely by the circumstances of their birth.

Bobbio (1987: 31) has also noted that contemporary representative “democracies” have not eliminated oligarchic power and that “the only difference between an aristocracy and a democracy [in the modern conception] is that in the former elites *impose* themselves and in the later elites *propose* themselves” (emphasis added). It is this act of proposition, which is done through campaign and election that differentiates elective aristocracy from natural and hereditary aristocracy. These elective aristocracies or elective oligarchies do not satisfy the requirements of democratic governance neither do they enable popular political participation. “As the world is today, there is obviously an opposition between modern democracy which is indirect and centered on elections, and ancient *demokratia*, which was direct rule by the people in assembly” (Hansen, 1989: 6-7). As Mark and Warren (1987: 2000) have observed, “if we measure even the most advanced liberal democracies against the view that democracy involves equal participation in decision-making, then they fall spectacularly short of the goal”.

Thus the putative right to democratic governance or to political participation in current international discourse simply means a right to vote or to be voted for in elections without discrimination. As Evans (2001: 624) has pointed out, “talk of democracy in the post- Cold War era usually refers to some form of representative democracy, such as that claimed to have triumphed over socialist alternatives”. Similarly, Roth (2000: 18) has observed that, “much of the current discourse on the diffusion of democratic norms is misleading,” in that it focuses “narrowly on the increasingly widespread adoption of a familiar set of institutions, ascribing to that

phenomenon the moral weight that comes with the use of the word “democracy”. It has also been pointed out that:

In the general literature on democracy, and the relevant works in international legal literature, there is a tendency to take a limited view of democracy confined to procedural aspects, most notably, voting [...] By limiting democracy to a procedure, an understanding of what democracy is or should be not only becomes limited but also allows for claims that democracy exists when in practice the will of the people has no impact as individuals are not part of the processes surrounding their lives (Burchill, 2001: 81).

International law therefore presently understands democracy to mean the existence of “the essential procedures by which a democratic society functions” and the existence of “electoral processes” to that effect (Fox, 2000: 49; Wheatley, 2002: 509). Based on this false understanding of democracy, the so-called pro-democracy prescriptions and initiatives in the international system are misleading. As Beutz has pointed out:

This purely procedural view of democracy, i.e., the understanding of democracy as an organizational form or checklist of procedures has informed most democracy-promoting initiatives on the international level. Because of the emphasis on institutional arrangements that generate political competition, democracy-promoting initiatives have focused almost exclusively on elections and other mechanisms that can foster such competition such as multi-party systems and universal enfranchisement (2003: 397).

9. Conclusion

This article has attempted to show that international treaties and instruments, and state practice have not created a right to democracy or political participation in international law. Section 21 of the UDHR did not create a binding obligation on states to introduce popular participation in governance; while article 25 of the ICCPR and the Declaration on Friendly Relations 1970 only created a right of citizens to vote and be voted for in elections without discrimination. And although many states have undergone transition from dictatorial to elected governments, such transitions are motivated not by any international right or obligation but by other factors. Moreover, although international and regional organisations have been taking measures to promote elected governance and to monitor elections in many states, such activities are undertaken on voluntary bases and do not create any political right. In any event, what is generally referred to as democracy or political participation in international instruments and discourse mean only the selection of political rulers by elections and

the establishment of political institutions for its maintenance; they do not mean democracy or the right of citizens truly to participate in the political governance of their countries.

Therefore, the putative right to democracy or political participation in international law merely refers to the right of citizens to vote or be voted for in elections without unwarranted discrimination. It does not refer to the right of citizens to democratic governance or truly to participate in the governance of their countries. Accordingly, if international law is truly to create the right of citizens to participate in the governance of their countries, it needs to go back to the drawing board. This will involve a proper understanding of the meaning of democracy and popular participation and the formulation of a political paradigm that reflects this understanding.⁹⁷

⁹⁷ This exercise is the subject of a separate article by the same author; see Modeme (2010).

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