

The Rise of Self-Determination Versus the Rise of Democracy

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Abstract

This article challenges the traditional conception that the right to self-determination does not require a certain outcome. This article examines what restrictions international law imposes on peoples' choice to freely determine their political status. This article concludes that the right to self-determination calls for the installment of a form of government which is based on the consent of the governed, is substantially representative of all distinct groups in the country and respects human rights. Regardless of these duties imposed on governments one may only conclude from State practice that it is not observed by many States. As such the rise of self-determination may not automatically be equated to the rise of democracy.

A. Introduction

The existence of the right to self-determination is well established in international law.¹ It evolved from a political principle to a human right, codified in several human rights treaties,² and is accepted as a rule of customary international law.³ Several scholars even argue that the right has acquired *jus cogens* status.⁴

Despite the prominent status of the right to self-determination within various international treaties and instruments and many scholarly writings on the subject “no norm has emerged that comprehensively defines the scope of the right to self-determination”⁵. Notwithstanding the differing interpretations of the right to self-determination, there does seem to be a consensus on the fact that there are two dimensions of self-determination: an

¹ Thomas Franck even traces the principle of self-determination back to 1000 B.C.. See T. M. Franck, ‘The Emerging Right to Democratic Governance’, 86 *American Journal of International Law* (1992) 1, 46, 53.

² *Id.*, 52-56; H. Hannum, ‘The Right to Self-Determination in the Twenty-First Century’, 55 *Washington and Lee Law Review* (1998) 3, 773, 774-775.

³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, 31, para. 52.

⁴ Supporters of this view include I. Brownlie, *Principle of Public International Law* 7th ed. (2008), 553; A. Cassese, *International Law*, 2nd ed. (2005), 65.

⁵ A. Kreuter, ‘Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession’, 19 *Minnesota Journal of International Law* (2010) 2, 363, 367-368.

external one and an internal one.⁶ However, no consensus seems to exist on the exact relationship between the two. During the Cold War more emphasis was put on the external dimension, while currently more attention is being paid to the internal meaning.⁷ Although some authors claim that the internal meaning has fully supplanted the external meaning,⁸ the majority of scholars does seem to accept that the two dimensions coexist.⁹

The external dimension is said to define the status of a people in relation to another people or States, meaning the right to political independence from alien domination or an already existing sovereign State.¹⁰ Whether this right applies to minorities and thus includes a right to secession from sovereign States is disputed.¹¹ The wording in Article 1 Charter of the United Nations is said to refer to the external dimension.¹²

The internal dimension is said to concern the relationship between a people and its own State or government.¹³ It entails a people's choice about its governance.¹⁴ Some authors argue that the internal dimension is formulated in Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic,

⁶ *Id.*, 368-369.

⁷ R. Ezetah, 'The Right to Democracy: A Qualitative Inquiry', 22 *Brooklyn Journal of International Law* (1996-1997) 3, 495, 504.

⁸ G. H. Fox, 'Self-Determination in the Post-Cold War Era: A New Internal Focus?', 16 *Michigan Journal of International Law* (1994-1995), 733.

⁹ See for example A. E. Eckert, 'Free Determination of the Determination to be Free? Self-Determination and the Democratic Entitlement', 4 *UCLA Journal of International Law and Foreign Affairs* (1999-2000) 1, 55, 68; R. Ezetah, *supra* note 7, 503-504; R. A. Miller, 'Self-Determination in International Law and the Demise of Democracy?', 41 *Columbia Journal of Transnational Law* (2002-2003) 3, 601, 617.

¹⁰ Patrick Thornberry, 'The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism', in C. Tomuschat (ed.), *Modern Law of Self-Determination: Towards a Democratic Legitimacy Principle?* (1993), 101; A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995), 5; Ezetah, *supra* note 7, 503-504.

¹¹ Fox, *supra* note 8, 738-739.

¹² This is supported by Art. 1 (3) *International Covenant on Civil and Political Rights* (ICCPR) and *International Covenant on Economic, Social and Cultural Rights* (ICESCR) which reads "The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations"; see also Fox, *supra* note 8, 738-739.

¹³ Cassese, *supra* note 10, 101; Thornberry, *supra* note 10, 101.

¹⁴ Ezetah, *supra* note 7, 504.

Social and Cultural Rights (ICESCR).¹⁵ Others disagree.¹⁶ Another contested element of the right to self-determination is the definition of *peoples*.¹⁷

This paper will examine the scope of the internal dimension of the right to self-determination. Article 1 (1) ICCPR and ICESCR states: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹⁸ But what exactly do the Covenants entitle peoples to do? Do peoples have the freedom to choose any form of government, including a dictatorship? Or does international law impose certain restrictions on the peoples’ choice?

The international community has historically answered the latter question negatively; otherwise, it was argued, one would confuse the necessary means, a free determination of political status, with a particular end, a determination to be free or democratic. A determination in which there can be only one legitimate outcome, democracy, cannot truly be considered a free act of self-determination.¹⁹

This article will question that statement. Currently, the international community already accepts that the right to self-determination is non-absolute and may be limited by the principle of territorial integrity.²⁰ This article will argue that international law also imposes at least two other limitations and possibly a third one, concluding that the right to self-determination only contains the right to opt for a certain type of government, namely a government that fulfills certain standards. These standards are derived from the limitations that will be examined in the following paragraphs.

The two first limitations are explicitly formulated in international law: they are the prohibition of racist and segregating regimes, and the international obligation to protect human rights. The third limitation is more controversial and stems from the emerging entitlement to democratic governance. Since the beginning of the 1990s it has been argued by some

¹⁵ Miller, *supra* note 9, 620; Ezetah, *supra* note 7, 509.

¹⁶ Fox, *supra* note 8, 739; Hannum, *supra* note 2, 773-777.

¹⁷ *Id.*, 739; Hannum, *supra* note 2, 774.

¹⁸ *International Covenant on Civil and Political Rights*, 16 December 1966, Art. 1, 999 U.N.T.S. 171; [ICCPR]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Art. 1, 993 U.N.T.S. 3 [ICESCR].

¹⁹ Eckert, *supra* note 9, 69-70.

²⁰ J. Vidmar, ‘The Right of Self-determination and Multiparty Democracy: Two Sides of the Same Coin?’, 10 *Human Rights Law Review* (2010) 2, 239.

scholars that the internal aspect of self-determination entails “a people’s *democratic* choice about its governance (emphasis added)”²¹. As the existence and content of a possible right to democratic governance is disputed, its ability to possibly limit the exercise of the right to self-determination is also disputable. The three limitations will be examined next.

B. The International Prohibition of Racist and Segregating Regimes

On two occasions in history the international community has explicitly outlawed a political regime, i.e. after World War II the Nazi regime and in the 1970s the Apartheid regime. The Nazi regime was called by the Nuremberg Tribunal a “complete dictatorship”²². The Nuremberg judgment describes in detail how Hitler came to power and how he used and maintained it. In addition, the Tribunal criminalized membership in certain organizations.²³

Hitler’s political program consisted of twenty-five points, of which the following is of particular interest in this context: “*Point 1*. We demand the unification of all Germans in the Greater Germany, on the basis of the right of self-determination of peoples”²⁴. This goal was to be achieved through a policy of aggressive war. In order to be able to pursue such a policy the regime had to gain complete control of the machinery of government. In addition to the series of measures aimed at subjecting all branches of government to their control, the Nazi Government also took active steps to increase its power over the German population.²⁵ In the field of education, everything was done to ensure that the youth of Germany was brought up in the atmosphere of National Socialism and accepted National Socialist teachings. The Nazi Government endeavored to unite the nation in support of their policies through the extensive use of propaganda. As a result,

²¹ Ezetah, *supra* note 7, 504. Ezetah bases this argument on Thomas Franck’s revolutionary idea that a democratic entitlement is emerging in international law, see Franck, *supra* note 1, 52.

²² *Trial of the Major War Criminals before the International Military Tribunal*, (14 November 1945 – 1 October 1946) available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf (last visited 14 June 2010), at 225.

²³ *Id.*, 12.

²⁴ *Id.*, 174.

²⁵ *Id.*, 176.

independent judgment, based on freedom of thought, was rendered quite impossible.

The second, more recent, example of a universal²⁶ condemnation of a political regime is the Apartheid regime. The crime of Apartheid is defined in both the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPCA)²⁷ and in the ICC Statute²⁸

²⁶ It should be noted that “Western” nations have never signed nor ratified the *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, 1015 U.N.T.S. 243 [ICSPCA]. For a complete list of ratifications see http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=2&mtdsg_no=IV-7&chapter=4&lang=en#Participants (last visited 24 September 2010). However, the crime of Apartheid has been endorsed – albeit in a weaker form – in other instruments, for instance in the 1977 First Additional Protocol to the Geneva Conventions (Art. 85, para. 4(c)), Art. 18(f) of the Draft Code of Crimes against the Peace and Security of Mankind, which does not mention the word “Apartheid”, but refers to “institutionalized racial discrimination” as species of crime against humanity and Art. 7 of the Rome Statute of the International Criminal Court.

²⁷ Art. 1 ICSPCA states that “Apartheid is a crime against humanity and inhumane acts resulting from the policies and practices of Apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security”. Art.2 defines the term “the crime of Apartheid”, “which shall include similar policies and practices of racial segregation and discrimination as practiced in Southern Africa [and] shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them: Denial to a member or members of a racial group or groups of the right to life and liberty of person: By murder of members of a racial group or groups; By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment; By arbitrary arrest and illegal imprisonment of the members of a racial group or groups; Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part; Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development such a groups or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

and criminalizes certain acts committed in the context of institutionalized regimes of racial segregation and discrimination. Apart from the specific situation in South Africa, the crime was used to sanction the political regime in South Rhodesia.²⁹ The term has also been used by human rights defenders and the media with regard to the Israeli occupation of Gaza.³⁰

From this it follows that the right to self-determination cannot be understood to include the right to choose a system of Apartheid or a Nazi regime. Should peoples opt for such a system, international law would not consider it to be legitimate and would possibly subject the system to sanctions, as illustrated by the South Africa and South Rhodesia cases.³¹

Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or members thereof Exploitation of the labor or the members of a racial group or groups, in particular by submitting them to forced labor; Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose Apartheid.” See GA Res. 3068, 30 November 1973.

²⁸ Art. 7 of the Statute of the International Criminal Court states that “‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. In Art. 7 para. 2(h) the term is further explained: “‘The crime of apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime”.

²⁹ M. S. McDougal & W. M. Reisman, ‘Rhodesia and the United Nations: The Lawfulness of International Concern’, 62 *American Journal of International Law* (1968) 1, 1.

³⁰ See for instance J. Dugard, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, UN Doc A/HRC 4/17, 29 January 2007; an open letter written by International Solidarity Movement: *Open letter to Bono: entertaining apartheid Israel... U 2 Bono?* available at <http://palsolidarity.org/2010/01/10627/> (last visited 20 October 2010) and Boycot Israel Apartheid Campaign: *Tell MEC to Stop Supporting Israeli Apartheid!* available at <http://www.boycottisraeliapartheid.org/node/48> (last visited 9 June 2010).

³¹ Regarding South Africa: The UN Security Council imposed sanctions upon South Africa. See for instance SC Res. 311, 4 February 1972, para. 1. The United Nations refused to recognize the South African representatives’ credentials to the UN General Assembly in 1974. See GA Res. 3206, (XXIX), 30 September 1974. See also A. Barnard, ‘Slegs Suid Afrikaners – South Africans Only? A Review and Evaluation of the International Crime of Apartheid’, 7 *New Zealand Journal of Public and International Law* (2009) 2, 317, 335-336. Regarding South Rhodesia: The UN did not recognize the regime in Rhodesia as the legitimate government. See for instance

C. The Interdependence of Human Rights

A second limitation flows from the duty under international law on all States regardless of their political, economic and cultural systems to respect human rights. This obligation is not controversial in principle, as it is enshrined in the Articles 55 and 56 of the United Nations Charter and in Article 6 of the Draft Declaration on Rights and Duties of States. Moreover, all States who voluntarily have accepted jurisdiction of a human rights court capable of evaluating its human rights record clearly accept the legality of the principle; otherwise they would not accept possible conviction when a violation has been established. Even States who are not members of regional human rights mechanisms or who frequently violate human rights do not claim that they are not bound by human rights law. They justify violations on alternative grounds.

Human rights law strives to have States respect all human rights as they are indivisible, interdependent and interrelated. The exercise of one human right may not lead to the violation or abolishment of another human right. Article 30 Universal Declaration of Human Rights (UDHR) and Article 5 ICCPR and ICESCR state that “[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein”. Consequential, this means that the exercise of the right to self-determination may not lead to the violation or abolishment of other human rights.

D. The Emerging Norm of Democratic Governance in International Law

The possible existence of a right to democracy in international law has been the subject of fierce debates in several international³², regional³³ and

SC Res. 288, 17 November 1970. See also McDougal & Reisman, *supra* note 29, 17-18.

³² For the discussion within the United Nations framework see *inter alia* an Agenda for Development, Report of the Secretary-General, U.N. Doc. A/48/935, 6 May 1994; Human Rights Commission Res. Human Rights U.N. Doc. E/CN.4/RES/1999/57, 27 April 1999; for the Inter-Parliamentary Union see the Universal Declaration on Democracy (1997).

³³ The right to democracy has only been explicitly recognized within one region, namely by the Organization of American States (OAS). See Art. 1 of the Inter-American Democratic Charter (2001) available at <http://www.oas.org/charter/docs/resolution1>

national³⁴ fora. In international scholarship, the idea was first expressed in 1988 by Professor Henry Steiner, but it was only through Professor Thomas Franks' article "The Emerging Right to Democratic Governance" that the idea gained fame internationally.³⁵ Over the years the notion has been both widely supported³⁶ and criticized³⁷ in the literature. One of the theory's

_en_p4.htm (last visited 21 October 2010); Declaration of Nuevo León (2004) available at http://www.oas.org/documents/specialsummitmexico/DeclaracionLeon_eng.pdf (last visited 21 October 2010), Draft Declaration of Quito on Social Development and Democracy, and the Impact of Corruption (2004) available at http://www.oas.org/xxxivga/DeclaracionQuito_eng.pdf (last visited 21 October 2010). Nevertheless, the issue of democracy has been widely discussed within the other regions: for Europe see for instance the OSCE Document of the Copenhagen Meeting on the Conference on the Human Dimension of the CSCE (1990) available at http://www.osce.org/documents/odhr/1990/06/13992_en.pdf (last visited 21 October 2010) and the OSCE Charter of Paris for a New Europe (1990) available at http://www.osce.org/documents/mcs/1990/11/4045_en.pdf (last visited 21 October 2010); for Africa see for instance Lomé Declaration (2000) available at <http://www.africa-union.org/root/au/conferences/past/2006/april/pa/apr7/meeting.htm> (last visited 21 October 2010), African Union Declaration on the Principles governing Democratic Elections in Africa (2002) available at <http://www.pogar.org/publications/other/elections/declaration-africa-02.pdf> (last visited 21 October 2010); for the Arab Region see the Sana'a Declaration on Democracy, Human Rights and the Role of the International Criminal Court (2004) available at <http://www.undp.org/ye/reports/Sanaa%20Declaracion%20on%20Democracy%20Human%20Rights%20and%20the%20Role%20of%20the%20International%20Criminal%20Court.pdf> (last visited 21 October 2010); for Asia see the Asian Charter on Human Rights (1998) available at http://www.unhcr.org/refworld/publisher,ASIA,,,4_52678304,0.html (last visited 21 October 2010) which contains a specific section on the right to democracy.

³⁴ The national legal German system is unique because it considers democracy to be an individually assertable right: "what is guaranteed to Germans entitled to vote is the individually assertable right to participate in the election of the Bundestag and thereby to cooperate in the legitimation of state power by the people at federal level and to have an influence over its exercise". Therefore functions and powers of substantial importance must remain for the German Bundestag. See Manfred Brunner and Others v. The European Union Treaty, Cases 2 BvR 2134/92 & 2159/92, reprinted in *1 Common Market Law Report* (1994), 57, para. 247 and Judgment of 30 June 2009, Cases 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09 available at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html (last visited 22 October 2010), paras 40-41.

³⁵ H. J. Steiner, 'Political Participation as a Human Right', 1 *Harvard. Human. Rights. Yearbook* (1988), 77 and T. Franck, *supra* note 1.

³⁶ G. H. Fox and B. R. Roth, 'Democracy and International Law', 27 *Review of International Studies* (2001) 3, 327; G. H. Fox, 'The Right to Political Participation in International Law', 17 *Yale Journal of International Law* (1992) 2, 539; Ezetah, *supra* note 7; S. Wheatley, 'Democracy and International Law: A European Perspective',

most contested elements is the formulation of the right and implicitly the underlying understanding of the concept of democracy.³⁸

Not only its content is disputed – also its relationship to other human rights remains unclear. The definition proposed by most proponents is generally deducted from, and connected to, an existing human right, i.e. the right to political participation³⁹, the right to free and fair elections⁴⁰ or the right to self-determination⁴¹. Support for such a limited approach is said to be found in the current state of international law and the current limited willingness of the international community to accept a broader concept.⁴² Such a limited conception is also endorsed in the national German legal system.⁴³ The choice for a limited conception of (the right to) democracy is contested by other authors,⁴⁴ the OAS Inter-Democratic Charter⁴⁵ and the

51 *International and Comparative Law Quarterly* (2002) 2, 225; C. M. Cerna, ‘Universal Democracy: An International Legal Right or the Pipe Dream of the West?’, 27 *New York University Journal of International Law and Politics* (1995) 2, 289; J. N. Maogoto, ‘Democratic Governance: An Emerging Customary Norm?’, 5 *University of Notre Dame Australia Law Review* (2003), 55.

³⁷ Eckert, *supra* note 9; N. J. Udombana, ‘Articulating the Right to Democratic Governance in Africa’, 24 *Michigan Journal of International Law* (2003) 4, 1209; J. Ebersole (reporter), ‘National Sovereignty Revisited: Perspectives on the Emerging Norm of Democracy in International Law’ (panel discussion), 86 *American Society of International Law Proceedings* (1992), 249; Susan Marks, *The Riddle of all Constitutions: International Law, Democracy and the Critique of Ideology* (2000), 164.

³⁸ See for instance S. Marks, ‘The “Emerging Norm”: Conceptualizing “Democratic Governance”’, 91 *American Society of International Law Proceedings* (1997), 372.

³⁹ Steiner, *supra* note 35.

⁴⁰ Franck, *supra* note 1; Fox, *supra* note 36.

⁴¹ Wheatley, *supra* note 36; Ezetah, *supra* note 7.

⁴² R. Burchill, ‘The EU and European Democracy – Social Democracy or Democracy with a Social Dimension?’, 17 *Canadian Journal of Law and Jurisprudence* (2004) 1, 185, 186. In addition Gregory Fox points out that “elections are something that international institutions can be very good at monitoring and evaluating”. See Ebersole (reporter), *supra* note 37, 270.

⁴³ See footnote 34.

⁴⁴ Marks, *supra* note 37; Miller, *supra* note 9, 608-609.

⁴⁵ Art. 1 Inter-Democratic Charter grants “the peoples of the Americas [...] a right to democracy” and imposes on “their governments [...] an obligation to promote and defend it”, however it does not define the right. The Charter does stipulate in Arts 2 and 3 that democracy should be representative and participatory. As essential elements of representative democracy the Charter lists, inter alia, respect for human rights and fundamental freedoms in their universality, indivisibility and interdependence, access to and the exercise of power in accordance with the rule of law, the holding of periodic free and fair elections based on secret balloting and universal suffrage as an

former United Nations Commission on Human Rights,⁴⁶ who all seem to favor a more comprehensive definition of democracy.

Although international consensus on, and recognition of, the existence of a right to democracy in international law might still be considered to be premature, let us assume for the purpose of this article that the right to democracy exists in international law. Regardless of whether one accepts a limited or a more comprehensive definition, it is clear that respect for human rights is at the heart of the discussion.

A consensus does appear to exist on the fact that no single model of democracy can exist.⁴⁷ However, the absence of a universal political model does not negate universal democracy. Both proponents of broad and limited perceptions of democracy consider the legitimation of governance by the consent of the governed to be the core element of a democracy.

Governance is legitimated through political participation which includes, but is not limited to free and fair elections. The right to political participation is enunciated in both Article 21 UDHR and Article 25 ICCPR. Article 25 ICCPR reads “[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives”.

expression of the sovereignty of the people, the pluralistic system of political parties and organizations and the separation of powers and independence of the branches of government (see Arts 3 and 7). The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are also mentioned as essential elements of democracy (Art. 4).

⁴⁶ Operational para. 2 Commission for Human Rights Res., Human Rights Documents. E/CN.4/RES/1999/57, 28 April 1999; stated that “the rights (*sic*) of democratic governance include, inter alia, the following:(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”.

⁴⁷ This principle has been reaffirmed on multiple occasions by the UN General Assembly: preambular para. 7 GA Res. 62/7, 13 December 2007; preambular para. 7 GA Res. 61/226, 14 March 2007; preambular para. 10 GA Res. 60/253, 2 May 2006. Also mentioned in preambular para. 8 GA Res. 55/96, 28 February 2001.

Based on Article 21 UDHR and Article 25 ICCPR, a government that is not based on the consent of the governed is not considered to be legitimate. In addition, the government must be substantially representative of all distinct groups in the country.⁴⁸ Representation should be manifest in active participation such that “representation and participation [are] experienced as part of a continuum.”⁴⁹ This means that true participation goes beyond the initial consent expressed through free and fair elections. Consequently, its exercise should continuously be guaranteed. When a State precludes effective participation, it also denies its people their right to self-determination. Acts such as mass electoral fraud, anti-democratic coups, or persecution of minority groups constitute violations of a people’s collective rights by which it is ruled.⁵⁰

As a consequence, the right to self-determination – tempered by the core components of universal democracy – only allows opting for a system that is based on the consent of the governed and that is substantially representative of all distinct groups in the country. Electing any other government could be sanctioned by national or international courts, as illustrated below.

As the exercise of one human right may not lead to the violation or abolishment of another human right, the exercise of the right to self-determination may not limit or exclude the future exercise of that right by particular groups or individuals. For instance, the right to take part in the conduct of public affairs includes not only the right to free and fair elections but also comprises of the right to participate in the elections as a candidate. The right to freedom of association allows for the establishment of political parties. However, one may not form any kind of political party. Political parties engaging in activities aimed at the destruction of any of the rights and freedoms [set forth in the European Convention on Human Rights] may

⁴⁸ This follows logically from the wording “everyone has the right to take part in the conduct of public affairs”.

⁴⁹ Thornberry, *supra* note 10, 116.

⁵⁰ The true exercise of the right to self-determination supposes a governmental system which takes into account the rights of minorities. Pure majoritarianism will by definition exclude some citizens from the decision-making process, thus making the consultation at the core of self-determination incomplete. Only a theory of democracy that takes into account the concerns of all individual components of state-based “self” is convincing as a species of self-determination. See Fox, *supra* note 8, 771.

be dissolved by the government or by a court.⁵¹ In addition to the cases brought before the European Court of Justice, a similar event has taken place in Belgium. On 21 April 2004 the Ghent Court of Appeals found three nonprofit organizations in breach of the anti-racism law as they all three assisted a political party (“Vlaams Blok”) that had clearly and repeatedly committed acts of racism and discrimination. This judgment led to the transformation of the “Vlaams Blok” into “Vlaams Belang”.⁵²

Moreover, election of a non-democratic party may also cause international institutions or other States to take sanctions. This question was raised within the European Union when Austrian elections in 1999 brought the controversial People’s Party into the government. The EU members felt that this was contrary to European values, including the value of democracy, and downgraded unilateral relations with Austria. There were calls from certain Member States for EU action to be taken but no clear legal action under the EU treaties could be taken as there had been no clear violation of Article 6 Treaty on the European Union (current Article 2).⁵³ It was argued that all Austria did was to recognize the results of a free and fair election. At the same time it was said, that had the Austrian government engaged in any practices which were contrary to established human rights protection, questions could have been raised about adherence to the principles of Article 6 TEU.⁵⁴

In conclusion, the exercise of the right to self-determination is currently limited by the core components of universal democracy. Consequently, the right to self-determination only allows peoples to opt for a system that is based on the consent of the governed and that is substantially representative of all distinct groups in the country. The reality

⁵¹ *United Communist Party of Turkey and Others v. Turkey* (1998), 26 E.H.R.R. 121, para. 60; *Socialist Party and Others v. Turkey* (1998) 27 E.H.R.R. 51, para. 53; *Freedom and Democracy Party (ÖZDEP) v. Turkey* (1999) 26 E.H.R.R. 12, para. 45.

⁵² Cour d’Appel Ghent, Decision of 21 April 2004, available at http://www.diversiteit.be/index.php?action=rechtspraak_detail&id=322 (last visited 18 November 2010) and Cour de Cassation, Decision of 9 November 2004, available at http://www.diversiteit.be/index.php?action=rechtspraak_detail&id=45 (last visited 18 November 2010); See also E. Brems, Belgium: The Vlaams Blok Political Party Convicted Indirectly of Racism, 4 *International Journal of Constitutional Law* (2006) 4, 702.

⁵³ *Treaty on the European Union*, 7 February 1992, O.J. C 224/1 (1992) [TEU].

⁵⁴ R. Burchill, ‘The Promotion and Protection of Democracy by Regional Organizations in Europe: The Case of Austria’, 7 *European Public Law* (2001) 1, 79, 84-85 and Burchill, *supra* note 42, 197.

must however be acknowledged that peoples may opt for a form of government violating these components. However, by doing so, such a government would expose itself to possible sanctions.

E. Testing the Hypothesis: The Situation in Iraq

After the 2003 invasion, the UN Security Council has reaffirmed on several occasions “the right of the Iraqi people to freely to determine their own political future and control their own natural resources.”⁵⁵ From the wording listed in subsequent resolutions it becomes clear that the Security Council imposes the restrictions discussed above on the Iraqi people. The Security Council encouraged “the people of Iraq to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender”.⁵⁶ Another paragraph reads “[w]elcoming the commitment of the Transitional Government of Iraq to work towards a federal, democratic, pluralistic, and unified Iraq, in which there is full respect for political and human rights”⁵⁷. Finally, the Security Council welcomed “the assumption of full governmental authority by the Interim Government of Iraq on 28 June 2004, the direct democratic elections of the Transitional National Assembly on 30 January 2005, the drafting of a new constitution for Iraq and the recent approval of the draft constitution by the people of Iraq on 15 October 2005”⁵⁸.

The Security Council added to these restrictions that the Government has to “play a critical role in continuing to promote national dialogue and reconciliation and in shaping the democratic future of Iraq”⁵⁹.

This supports the idea argued in the above paragraphs, namely that international law calls for the installation of a system of representative government that respects human rights and must continue to do so. The Security Council also accepts other characteristics of democracy, namely the peaceful settlement of disputes and respect for the principle of the rule of law.

⁵⁵ SC Res. 1483, 22 May 2003; See also SC Res. 1546, 8 June 2004; SC Res. 1637, 8 November 2005, SC Res. 1723, 28 November 2006.

⁵⁶ SC Res. 1483, 22 May 2003.

⁵⁷ SC Res. 1637, 8 November 2005.

⁵⁸ *Id.*

⁵⁹ *Id.*

F. Conclusion

This article examined whether international law imposes certain restrictions on the right to self-determination and has come to the conclusion that current international law imposes two restrictions on the right to self-determination, and possibly a future third one. Taken into account these limitations, the “internal” right to self-determination calls for the installment of a form of government that is based on the consent of the governed, is substantially representative of all distinct groups in the country and respects human rights.

As the international law of democracy further develops, in the future a third limitation may be imposed, namely respect for the right to democracy. This norm’s currently disputed character makes it very difficult to correctly assess its future effect on the right to self-determination.

Regardless of which definition of the right to democracy the international community will adopt in the future it is clear that the respect for human rights is at the core of the discussion. Both minimalist and more comprehensive conceptions consider the consent of the governed and the true representative character of the government to be the core components of a democratic government.

As these two core elements are currently protected under human rights law⁶⁰ it may be said that they already influence the exercise of the right to self-determination, that is in theory at least.

As stated above, respect for internal self-determination is a continuous process. The international right to self-determination does not end when a certain mode of government has been elected. The right to self-determination imposes on the government a duty to ensure that peoples under his jurisdiction have the opportunity to continuously exercise its right to self-determination. As such internal self-determination may be considered to be the extension of the external right to self-determination. As the choice for independence or a certain level of autonomy does not grant the peoples a blank check, theoretically the exercise of external self-determination should equate to the promotion or expansion of democracy, or at least democracy’s two core elements. Unfortunately history has illustrated that that is not the case, for example the creation of numerous post Cold-War States has not

⁶⁰ Although acknowledging that if the right to democracy would be recognized, a more extensive interpretation might be given to these rights as is the case in the German legal system.

dramatically increased the number of democracies, rather it has been said to have advanced an undemocratic climate in which ethnic-nationalism has blossomed.⁶¹

Similarly, any exercise of internal self-determination should respect human rights and the core components of democracy in a nation. However, in many nations – both democracies and non democracies – which formally respect the right to self-determination, the participatory rights of certain groups remain very controversial.

For these reasons the rise of self-determination may not automatically be equated to the rise of truly representative and participatory democracy.

⁶¹ Miller, *supra* note 9, 608; T. Franck, 'Tribe, Nation, World: Self-Identification in the Evolving International System', *11 Ethics and International Affairs* (1997) 1, 151; B. R. Roth, 'Evaluating Democratic Progress', in G. H. Fox & B. R. Roth (eds), *Democratic Governance and International Law* (2000), 493, 493-494.