

From the right to political participation to an emerging right to democracy through the action of the United Nations and the international election observation

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Abstract: The proliferation of electoral processes in most countries of the current international society leads us to consider that the right to political participation has become —according to international treaties and in practice— an obligatory right for the majority of States in the international arena. Apart from that, in this article we suggest that the right to political participation has been transformed into a right to political participation in democratic elections due to the action of the United Nations and the international organizations carrying out international election observation activities.

For it, after examining the United Nations organs actions to foster electoral democracy, we will study the role and the importance of the international election observation activities to promote the political participation in democratic elections. In line with it, this study examines the role of the international election observation missions as mechanisms of control, as means to promote democratic electoral practices worldwide, as instruments for the institutional reaction of the states and international organizations in case of failure to comply with international standards, and whether international election observation can even help set the foundations for the creation of international electoral customs. To end, we also analyze if this right to political participation in democratic elections can be moving towards a right to democracy.

Keywords: political participation – democratic elections – democracy – international election observation

(A) INTRODUCTION

According to data provided by the prestigious International Foundation for Electoral Systems (commonly known by its acronym IFES), 119 electoral processes were held in 2019, in which nearly two billion voters around the world headed to the polls to elect their leaders; in 2018, 115 elections were held; before these recent dates, with data confirmed, in 2015 more than 100 electoral processes were held worldwide, in which more than 804 millions of people exercised their right to vote; in 2014, 115 elections were held in which more than 2 billion people voted; in 2013, in 112 electoral processes, over 650 million people exercised their right to vote; and last in 2012, in 103 electoral appointments, more than 1.1 billion people were able to cast their ballots to choose their representatives.

This constitutes solid evidence of the essential nature of the electoral phenomenon in today's international society. The right to vote has become a right exercised frequently by citizens, and which goes beyond regions or continents; a right that is fulfilled by a large part of the world population in the multiple electoral processes that periodically take place. The world votes every day to elect its political representatives; voting has become a regular, natural and necessary act so that, among other things, these representatives can occupy their positions with legitimacy and popular support.

The strength of this data could lead us *prima facie* to conclude that political participation and democracy are generally accepted rights which enjoy the quasi-unanimous approval of the

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international community. However, this conclusion is wrong if it is only based on this quantitative information; we must transcend the quantitative to delve into the qualitative. That is, the fact that there are elections in a country does not mean that the country is democratic, nor does it even imply that the right to the political participation of the people is adequately respected.

Therefore, although the holding of elections has become widespread in today's international society, we must be aware that even authoritarian, totalitarian regimes, and single-party political systems publicly boast of carrying out electoral processes to try to grant their government an aura of legitimacy. These are political regimes in which there may be a single candidate, or several candidates who do not see their right to stand as a candidate properly respected, and who are victims of acts of intimidation, or violence; or the processes may be fraudulent or manipulated by the party in power; or simply there are situations of inequality in resources and in the means to carry out the electoral campaign. We can point out the examples of Cuba and China, with single party regimes, without competitiveness and with a clear erosion of the freedoms necessary for the development of democratic elections, but which, nevertheless, claim to hold periodic elections to elect their representatives. This should lead us to the conclusion that not all elections are equal and that not all elections can be classified as democratic.

Hence, to speak of electoral democracy, the truly important thing is to know what those elections are like; that is, under what parameters and conditions they take place, if there are elections that can be classified as clean, transparent and democratic, and others that must be qualified as undemocratic or even fraudulent. This is the scope where the fundamental work of election observation by intergovernmental organizations, such as the UN, the OSCE, the European Union, and the OAS, is enclosed.

Nevertheless, it is important to highlight that, although the holding of elections is a *sine qua non* requirement of any democracy, however, we cannot speak of a democratic system on the account of the holding of elections only. And this is because the concept of "democracy" is broader than that of "democratic elections" or "free and fair elections". Democracy implies both the holding of elections and the separation of powers, the guarantee of the fundamental rights and freedoms, judicial independence, the plurality of the media, etc., although it is true that there is a very close connection between both concepts, given that the validity of these democratic requirements are manifested in the elections.

The concept of "democracy" is linked to the history of the human being from the first political organizations and continues to be current, due to its high technical, descriptive, political and philosophical value. From its classic, more idealistic vision as "power of the people", numerous conceptualizations of the term have followed one another according to pragmatic, empirical, utilitarian, sociological, technical, and other perspectives. This great plurality shows that we are in the presence of a polysemic, multifaceted concept that is subjected to historical, political, social and cultural fluctuations which have been determining its characterization and distinctive notes.

Due to its conceptual relevance and the consensus that generated, we are going to use Robert Dahl's definition of "democracy" or "polyarchy". In his work "The Polyarchy", the American professor tries to clarify when a political system can be described as "democracy" and when it does not meet the minimum requirements to hold such a title. Dahl established eight essential parameters for the definition and measurement of democracy or polyarchy:

- “1. Freedom of association.
2. Freedom of expression.
3. Freedom to vote.
4. Eligibility for public service.
5. Right of political leaders to compete for support.
- 5.a. Right of political leaders to fight for votes.
6. Diversity of information sources.
7. Free and fair elections.
8. Institutions that guarantee that government policy depends on votes and other ways of expressing differences.”¹

As we can see, there is a clear separation between the broader concept of “democracy” proposed by Dahl and the limited concept of “democratic elections” or “free and fair elections”, which is limited to the holding of elections according to international standards and norms. Undoubtedly, although democracy not only requires the holding of democratic elections, but also involves the other parameters mentioned above, democratic elections are an essential and irreplaceable *prius*, an essential and necessary element for a political system to be considered democratic.

Consequently, in the following sections, we will examine these concepts to delimit them precisely. On the one hand, democracy as a political system; and, on the other hand, the rights to political participation and to free and fair elections both as procedural and formal principles that lead the electoral processes of a country to be carried out in accordance with international standards and norms for democratic elections. This distinction will also drive us to analyse whether in the current international order we can speak of a “right to democratic elections” or even of a “right to democracy”.

(B) THE RIGHT TO POLITICAL PARTICIPATION AS A MANDATORY RIGHT FOR STATES

The process of humanization that the international legal order underwent after the Second World War involved the repositioning of the human being at the centre of the system of norms of Public International Law. This process brought with it the approval of the key document for all subsequent development in the field of human rights, the Universal Declaration of Human Rights, in 1948, as well as numerous international treaties mandatory for States in the field of human rights protection², such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social, Economic and Cultural Rights (ICESCR), in 1966, and to which would later be added numerous binding international texts that proclaim and comprehensively protect the people human rights, creating and outlining what is known as international human rights law.

Among the rights proclaimed, in the scope of political rights, the right to political participation stands out, proclaimed by the ICCPR in its article 25, which contemplates the right of every citizen to participate politically in the public affairs of their country, as well as their right to active and passive suffrage, among others³. This is how it reads:

- “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
 - (b) To vote and to be elected at genuine and periodic elections which shall be by universal and equal suffrage

¹ R. Dahl, *A preface to democratic theory* (University of Chicago Press, 1956), at 71; and R. Dahl and Ch. Lindblom, *Politics, Economics and welfare* (Harper & Bros., New York, 1953), R. Dahl, *On democracy* (Yale University, 2012).

² M. Díez de Velasco, *Instituciones de Derecho Internacional Público* (Ed. Tecnos, Madrid, 2018), at 93.

³ E. Bernalles Ballesteros, ‘El derecho humano a la participación política’, *Derecho PUCP: Revista de la Facultad de Derecho* (nº 59, 2006), 9-32.

and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.”

This article has since become a mandatory precept for a large part of the international community thanks to its majority ratification. The countries that have ratified and therefore have bound themselves to comply with the International Covenant on Civil and Political Rights are 173 to date, an overwhelming majority of the States that make up the international community⁴. We are also facing a mandatory right that is enforceable, from a subjective or individual point of view, before the United Nations Human Rights Committee by the citizens of the member States. Article 25 of the ICCPR proclaims the right to political participation as universal, and constitutes a norm of general acceptance, a norm with *erga omnes* effect, which in a way explains the widespread election calls that international society has been experiencing in the recent decades.

In its initial formulation, Article 25 ICCPR stated the obligation of the States to seek forms of participation of their citizens in the public affairs of the State, and prescribed how elections should be held to be “genuine”; however, it did not include any pro-democratic connotation nor any mention of the concept of “democracy” in its articles. Cassese acknowledges that the “democratic” model outlined in the Covenant is so generic that states can easily contend that they comply correctly with its parameters⁵, without being democratic. In fact, without a doubt, it was this certain initial neutrality that made possible the overwhelming number of ratifications that the ICCPR has achieved to date, making this right to political participation a mandatory right for most States in the international community.

But its initial neutrality wasn’t real, because as we have seen in previous paragraph the same article 25 ICCPR prescribed how elections should be to be considered as genuine⁶, so that we can affirm that this article 25 also included a “right to free and fair elections”, without mentioning “democracy”. However, this article needed to be driven by the action of international organisations, States and other international committees, that were going to channel this first right to political participation right down the path of democratization.

(C) THE TRANSITION FROM THE RIGHT TO POLITICAL PARTICIPATION TO A RIGHT TO POLITICAL PARTICIPATION IN DEMOCRATIC ELECTIONS THROUGH THE UN ACTION

As we will analyse in the following sections, we have observed that this right to political participation has moved towards its democratization mainly due to the action of various United Nations main organs and committees.

(1) United Nations Support of the idea of “Democracy”

The Charter of the United Nations does not contain any specific reference to the term *democracy*⁷,

⁴ As of May 2021, the countries that have signed but not ratified the Pact are (6) China, Comoros, Cuba, Nauru, Palau and Saint Lucia. The countries that to date have neither signed nor ratified the Covenant are the following (18): United Arab Emirates, Myanmar, South Sudan, Malaysia, Singapore, Solomon Islands, Tonga, Tuvalu, Bhutan, Oman, Saudi Arabia, Brunei, Saint Kitts and Nevis, Niue, Cook Islands, Kiribati, Micronesia and the Holy See (Source: <https://indicators.ohchr.org/>)

⁵ A. Cassese, *Self-determination of peoples. A legal reappraisal* (Cambridge University Press, 1995), at 54.

⁶ “To vote and to be elected at genuine and 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.”

⁷ J.C. Ricci et al., *La contribution des Nations Unies à la démocratisation de l'État*, Dixièmes rencontres

which already gives us an idea of the difficulty of universalizing a concept with particular western world connotations. However, some authors have pointed out various implicit references to the concept of democracy in the Charter, mainly found within the internal dimension of self-determination and in the interaction between democracy and other areas, such as human rights, development, and international peace and security⁸. Gradually, the concept of “democracy” will appear more frequently among the different resolutions issued by the various main organs of the organization.

Thus, within the framework of the United Nations, it can be stated that the positive value of democracy is reflected for the first time in Resolution 2625 (1970); it contains the *Declaration on principles of international law*, which has been acknowledged to contain certain positive law value as general international law, and in which democracy is assimilated to the principle of the self-determination of peoples. In this sense, Mangas Martín maintains that the internal dimension of the principle of self-determination is identified with the very substance of the idea of democracy⁹.

In practice, it was necessary to wait until the detente of the cold war to find the most significant initiatives that referred to democracy in general as a concept¹⁰. Since 1989, the United Nations Organization has experienced a profound democratic impulse, and has positioned itself in favour of democracy as a form of government. Since then, all the organs of the United Nations have been imbued with this democratizing drive.

The Secretary General stressed that the impetus for democracy also came from 1989, when a new era began regarding the activities related to the electoral processes of the States that had achieved independence¹¹. During the 1990s, the Secretary-General took up in his periodic reports the Organization’s main priorities in the so-called election observation missions, thus reflecting the new trend of the Organization that implied a greater operational deployment in the field.

Along these lines, the UN Secretary-General consistently and repeatedly positioned himself in favour of promoting democratization processes in his successive annual reports; among these, we can highlight the Report prepared by Butros-Ghali in 1996 under the title “An agenda for democratization”¹², or the Report of the Secretary-General in 2000, prior to the Millennium Summit¹³, in which he declared:

“We will spare no effort in promoting democracy and strengthening the internationally recognized rule of law and respect for all human rights and fundamental freedoms, including the right to development.”

The same former Secretary-General of the United Nations (followed by successive Secretaries-General¹⁴) became an essential figure in the UN’s drive to democratize international society, as

internationales d’Aix-en-Provence, colloque des 14 et 15 décembre 2011 (Ed. Pedone, Collection: Rencontres internationales d’Aix-en-Provence).

⁸ L.A. Sicilianos, ‘Les Nations Unies et la démocratisation de l’État: nouvelles tendances’ in R. Mehdi (ed.), *La contribution des Nations Unies à la démocratisation de l’État* (Ed. A. Pedone, Paris, 2002), at 25 ff.

⁹ A. Mangas Martín, *Humanización, Democracia y Estado de Derecho en el ordenamiento internacional*, Reception Speech by Ms Araceli Mangas Martín as a full-time academic at the Royal Academy of Moral and Political Sciences, 8 april 2014, Madrid, at 102.

¹⁰ M. Mariño, C. Fernández Liesa et al., *El desarrollo y la cooperación internacional* (Universidad Carlos III de Madrid-Boletín Oficial del Estado, Madrid, 1997).

¹¹ Y. Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (Nijhoff, Dordrecht, 1994), at 148 ff.

¹² UN Secretary General Report, *An agenda for democratisation*, Supplement to reports A/50/332 and A/51/572, 17th December 1996.

¹³ UN Secretary General Report, *We the Peoples - The Role of the United Nations in the 21st Century*, A/54/2000.

¹⁴ Kofi Annan, Ban Ki Moon and currently Antonio Guterres.

evidenced by his following statements:

“A fundamental concept of transformation was underway: the democratization of the international system.”

(2) The UN General Assembly, the UN Organs and the Reinforcement of Democracy

The role of the UN General Assembly in this democratic reinforcement is crucial so that we have to highlight some of its main contributions. In 1996, the UN General Assembly approved - with 157 votes in favour, 0 against and 16 abstentions - one of its most forceful resolutions in support of democracy; we are referring to *Resolution 55/96 “Promoting and consolidating democracy”, of February 28, 2001 (A/RES/55/96)*, in which the UN plenary body urged States unequivocally to promote and consolidate democracy, inter alia by:

- “(a) Promoting pluralism, the protection of all human rights and fundamental freedoms, maximizing the participation of individuals in decision-making and the development of effective public institutions, including an independent judiciary, accountable legislature and public service and an electoral system that ensures periodic, free and fair elections;
- (b) Promoting, protecting and respecting all human rights, including the right to development, and fundamental freedoms;
- (c) Strengthening the rule of law;
- (d) Developing, nurturing and maintaining an electoral system that provides for the free and fair expression of the people’s will through genuine and periodic elections;
- (e) Creating and improving the legal framework and necessary mechanisms for enabling the wide participation of all members of civil society in the promotion and consolidation of democracy.”

Subsequently, there have been numerous resolutions of the UN General Assembly, such as the one known as the Millennium Declaration¹⁵, which have reaffirmed that a democratic and participatory government based on popular will constitutes the ideal political system in order to guarantee human rights. In line with this, successive resolutions of the highest UN plenary body have established “democracy” as a target value; among them the GA Resolution 62/7, 8 November 2007, and GA Res. 64/12, 9 November 2009, on “Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies”, in which the General Assembly reaffirms that:

“Human rights, the rule of law and democracy are interrelated, mutually reinforcing and counted among the fundamental, universal and indivisible values and principles of the United Nations.”

Likewise, the UN General Assembly has spared no effort in passing numerous resolutions, of more political content, establishing the concept of “democracy” as the objective of the United Nations by supporting new or restored democracies¹⁶ - without abstentions or votes against - or even directly appealing to the promotion of a democratic international order, of which we must highlight the most recent of 18 December 2013, on “Promotion of a democratic and equitable international order”. However, the most important UN General Assembly contribution to the promotion of democratic elections will be given to the “Principle of free and fair elections”, as we will analyse in section 5.

This progress towards the consolidation of democracy as the aim of the current international order

¹⁵ GA Res. 55/2, 18 September 2000, adopted by the Head of States.

¹⁶ See inter alia Resolution 49/30 of the UN General Assembly, ‘*Support of the United Nations system to the efforts of governments for the promotion and consolidation of new or restored democracies*’, 7 December 1994; GA Res. 50/133 “*Support of the United Nations system to the efforts of governments for the promotion and consolidation of new or restored democracies*”, 12 December 1995; GA Res. 53/31, 23 November 1998; GA Res. 54/36, 29 November 1999; GA Res. 55/43, 27 November 2000; 58/13, 17 November 2003; 58/281, 9 February 2004; GA Res. 62/7, 8 November 2007; GA Res. 64/12, ‘*Support of the United Nations system to the efforts of governments for the promotion and consolidation of new or restored democracies*’, 9 November 2009 and 66/285, 3 July 2012, etc.

also owes its development to the work of the United Nations Commission (today, Council) on Human Rights, whose activity has been decidedly focused in favour of democratization and human rights¹⁷. As Charlesworth¹⁸ outlined, the Commission adopted a series of resolutions on democracy from 1997 onwards, endorsing the process of democratisation of states and presenting ‘free and fair elections [as] an essential feature of democracy’¹⁹. In 1995, in one of its first resolutions on the promotion and consolidation of democracy, the Commission acknowledged that “democracy, development and respect for human rights and fundamental freedoms are mutually reinforcing interdependent concepts”, and that, to the extent that democracy “is the best method to facilitate individual and collective expression of freedom of expression [...], the widest possible participation in democratic dialogue of all sectors and actors of society should be promoted to in order to reach agreements on the appropriate way to solve the social, economic and cultural problems of a society.”

Within this connection between democracy and human rights, the Human Rights Commission approved in 1999 the Resolution 1999/57 entitled “Promotion of the right of democracy”, in which the right to democracy was now proclaimed directly, without euphemisms, as an essential requirement for the protection and promotion of human rights. This fundamental resolution of the then Human Rights Commission stated that:

- “1. Affirms that democracy fosters the full realization of all human rights, and vice versa;
2. Also affirms that the rights 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; 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 [...].”

In support of this approach, in 2000 the Human Rights Commission recommended a series of important legislative, institutional and practical measures to consolidate democracy (Resolution 2000/46); and in 2002, the HR Commission declared the following as essential elements of democracy²⁰:

“respect for human rights and fundamental freedoms, freedom of association, freedom of expression and opinion, access to power and its exercise in accordance with the rule of law, the holding of periodic free and fair elections by universal suffrage and by secret ballot as the expression of the will of the people, a pluralistic system of political parties and organizations, the separation of powers, the independence of the judiciary, transparency and accountability in public administration, and free, independent and pluralistic media.”

Although we do not intend to exhaust the set of resolutions of the UN organs aimed at promoting democracy as the ideal political model for the protection and defense of human rights, it is essential to also emphasize the recent Resolution 40/9, approved by the Human Rights Council on March 21st, 2019 “Human rights, democracy and the rule of law” (A/HRC/RES/ 40/9), in which the UN human

¹⁷ Previous resolutions of the Human Rights Council on promoting a democratic and equitable international order are: HRC Resolutions 8/5, 18 June 2008, 18/6, 29 September 2011, 21/9, 27 September 2012, 25/15, 27 March 2014, 27/9, 25 September 2014, 30/29, 2 October 2015, 33/3, 29 September 2016, 36/4, 28 September 2017 and 39/4, 27 September 2018.

¹⁸ H. Charlesworth, *International Legal Encounters with Democracy* (Global Policy, volume 8. Suppl. 6, 2017).

¹⁹ See e.g. UN Doc. E/CN.4/RES/1999/57, 27 April 1999; UN Doc. E/CN.4/RES/2001/41, 23 April 2001; etc.

²⁰ Human Rights Commission, resolution 2002/46.

rights body recognizes that human rights, democracy and the rule of law create an environment in which countries can promote development, protect people against discrimination and guarantee equal access to justice for all, as it had also been doing in HR Council resolutions 19 / 36, 23 March 2012, 28/14, 26 March 2015 and 34/41 24 March 2017.

Finally, we must point out that the extensive task of the United Nations in promoting democracy has materialized in its support of national democratization processes, observation and verification of elections²¹, promotion of democratic governance, support of democracies in transition, as well as, among others, in the orientation of national and regional efforts to consolidate democracy and maintain the rule of law²². In short, its role in promoting democracy and democratic elections has been transcendental, effective, and irreplaceable.

(3) The General Comment 25 of the UN Human Rights Committee and the Right to Political Participation in Democratic Elections.

The path to the “democratization” of international society had as its first precedent the right of peoples to self-determination proclaimed in the Charter of the United Nations and article 1 of the International Covenant on Civil and Political Rights. Various authors stress the customary nature of this right of self-determination; thus, for Pastor Ridruejo, the right of peoples to self-determination is:

“An international custom formed at a rapid pace and in accordance with the demands of democratization and socialization of the international society of our time [...], therefore, the existence of a customary norm of institutional origin that consecrates the right of peoples to their self-determination. Norm that undoubtedly has the character of ‘ius cogens’.”²³

This collective right to people’s self-determination laid the foundations for the development of a collective and individual right to political participation in the public affairs of the States, which was conventionally included in articles 21 of the UDHR and 25 of the ICCPR. For many scholars, article 25 ICCPR is also narrowly linked to the people’s right to self-determination, as Gutiérrez Espada affirms categorically: “Article 25 of the ICCPR is the very core of the people’s right to internal self-determination”²⁴. Hence, the most common approach is to relate internal self-determination to the political rights enshrined in the ICCPR²⁵.

Although it is true that articles 21 of the UDHR and 25 of the ICCPR complement each other to establish that the will of the people is the basis of the authority of the public power, and that said will must be expressed through genuine and periodic elections; nevertheless, this nature mainly procedural of the right to political participation (and the absence of democratic connotations in its articles) encouraged the vast majority of States in the current international community to hold elections to elect their representatives, including countries with authoritarian or semi-authoritarian regimes, even when these could not be described as democratic elections.

Consequently, this conventional right to political participation, of a more neutral and impartial

²¹ Outstanding examples in this area are the UN electoral observation missions in Namibia (1989), Nicaragua (1990), Haiti (1990) or South Africa (1994).

²² A. Badía Martí, *La participación de la ONU en procesos electorales* (Ed. Mac Graw-Hill, Madrid, 1998).

²³ J.A. Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales* (Tecnos, Madrid, 2020).

²⁴ Gutiérrez Espada, C., “El derecho a la libre determinación de los pueblos” in F.J. Ansuátegui Roig et alia (eds.), *Historia de los derechos fundamentales* (vol. 4, 3, Dykinson, Madrid, 1998).

²⁵ For a detailed study about the relationship between internal self-determination and democracy, see P. Andrés Sáenz de Santa María, ‘A right of all peoples: the internal dimension of self-determination and its relationship with democracy’, 22, *Spanish Yearbook of International Law* (2018), at 172.

nature (with nuances), could have been reduced to citizens having channels of participation in public affairs, without much delving into the conditions and requirements of how those elections should be held, which could have even been partially fulfilled within non-democratic systems. However, this article 25 would be enhanced and promoted by different UN organs, as well as those analysed in the previous section, by the Human Rights Committee, in whose General Comment 25, of 1996, the Committee would endow the right to political participation with various elements and characteristics, which were going to make it evolve towards the right to political participation in democratic elections. The Human Rights Committee added to this article the “General Comment number 25: The right to participate in public affairs, the right to vote and the right of equal access to public service”²⁶(1996), which provides more extensive regulatory and clarifying elements for the implementation of Article 25 of the ICCPR by the States to hold “authentic elections”. The most relevant arguments of General Comment number 25 can be summarized around the following points²⁷:

a) In order for the elections to be “authentic”, they must be regulated by laws that ensure the non-discrimination conditions established in article 25.

b) Regarding multipartyism, even though the Covenant does not impose specific obligations regarding the design of electoral systems, the Committee declares the freedom of individuals to stand as candidates and their connection with other Covenant rights such as freedom of expression and association.

In this General Comment 25, the Human Rights Committee outlines how an election should be carried out according to article 25 of the ICCPR:

“21. Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote, must apply, and within the framework of each State’s electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.”

Therefore, General Comment 25 represents a considerable reinforcement for the idea of the right to democratic elections. Free and fair elections require freedom of expression, assembly and association (paragraph 12); non-discrimination against citizens in their right to vote (paragraph 3); the rejection of undue restrictions for the exercise of active and passive suffrage based on political affiliation (paragraph 25); it requires free voters to support or oppose the government without undue influence or coercion (paragraph 19); and it also binds the States to explain how the representativeness of the elective bodies is guaranteed (paragraph 22). In other words, GC25 provides the appropriate legal basis to compel States to hold genuine (authentic) and periodic elections²⁸. We can affirm, therefore, that the interpretative development of article 25 of the ICCPR included in this General Comment 25 acquires great relevance since it establishes the legal basis of the “international standards for the holding of elections” and it also positions this right of political participation on the path towards a right of political participation in democratic elections.

Furthermore, the previous right to political participation will turn into a right to political

²⁶ General Comment N° 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), CCPR/C/21/Rev.1/Add.7, 57^a session, 1996.

²⁷ A. Jarillo Aldenueva, *Pueblos y democracia en Derecho Internacional* (UNED, Madrid, 2010), at 400.

²⁸ S. Varayudej, ‘A right to Democracy in International Law: Its implications for Asia’, 12 *Annual Survey of International & Comparative Law* (2010).

participation in democratic elections also thanks to the so-called “jurisprudence” of the different UN Committees.

(4) The Development of the Right to Political Participation in Democratic Elections through the “Jurisprudence” of the UN Committee of Human Rights and other UN Committees

The UN Human Rights Committee has also played an essential role in developing relevant “jurisprudence” in relation to the right to political participation, as a result of its competence to hear individual communications. Among the resolutions of this Committee, the following have singular significance, for the purposes of our research:

- *Case Oleksii Katashynskyi vs Ukraine* (2018). The Committee declares that the circumstances of the election, where the electoral commission decided not to take the voting results of one polling station into account since the records had been lost, and the failure of the State party to remedy the ensuing violation of his rights, constituted a violation of article 25 of the Covenant²⁹.
- *Case Vicencio Scarano Spisso vs Bolivarian Republic of Venezuela* (2017). The Committee concluded that the author’s detention based on his conviction for contempt in respect of the interim protection measures was arbitrary and that the proceedings against him violated the due process guarantees provided for in article 14 of the Covenant; therefore, the Committee found that his removal from office as mayor and his de facto inability to exercise his right to vote and be elected constituted a violation of article 25 (b) of the Covenant.
- *Case Mr. Valery Lukyanchik vs Belarus* (2009). The Committee concluded that the refusal to register the author as a candidate for the 2004 elections to the House of Representatives was not based on objective and reasonable criteria and was, therefore, incompatible with the State party’s obligations under article 25.
- *Case Ms. Antonio Ignatane vs Latvia* (2001). The Committee concluded that Mrs. Ignatane had suffered specific injury in being prevented from standing for the local elections in the city of Riga in 1997, because of having been struck off the list of candidates on the basis of insufficient proficiency in the official language³⁰.
- *Case Peter Chiiko Bwalya vs Zambia* (1993). The Committee observed that restrictions on political activity outside the only recognized political party amount to an unreasonable restriction of the right to participate in the carrying out of public affairs.

Furthermore, the protection of political rights is also included in many resolutions from other UN Committees³¹, such as the Committee on the Rights of Persons with Disabilities; among other resolutions, it should be noted Communication no. 4/2011 *Zsolt Bujdosó, Jánosné Ildikó Márkus and others vs. Hungary* (9 September 2013), Communication 019/2014 *Fiona Given vs. Australia* (16 February 2018), and Communication 11/2013 *Gemma Beasley vs Australia* (1 April 2016); in these resolutions, the Committee is of the view that the State party has failed to fulfil its obligations under

²⁹ “The Committee recalls that an independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws that are compatible with the Covenant. The security of ballot boxes must be guaranteed. There should be independent scrutiny of the voting and counting processes and access provided to judicial review or another equivalent process so that electors have confidence in the security of the ballot and the counting of votes”.

³⁰ The Committee notes that Art. 25 secures to every citizen the right and the opportunity to be elected at genuine periodic elections without any of the distinctions mentioned in article 2, including language.

³¹ See more information [here](#).

article 29 of the Convention on the Rights of Persons with Disabilities and it recalled that “article 29 of the Convention requires States parties to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, including by guaranteeing their right to vote”. Moreover, some resolutions of the UN Committee on the Elimination of Racial Discrimination deal with the right to political participation; for instance, the Communication 30/2003, *The Jewish community of Oslo et al. vs Norway* and Communication 6/1995, *Z.U.B.S vs Australia*.

As we can see, in all of these resolutions, the right to political participation has gained a wider reach and interpretation; it is not only a procedural or neutral right. According to this “jurisprudence”, it is not difficult to verify that the right to political participation is moving towards a new right, more completed and more focused on the development of democratic elections.

Apart from that, the most important momentum for the development of the right to political participation in democratic elections will come from the UN General Assembly and, specifically, from the rise and evolution of a new principle that was going to promote the transformation of the previous right into a right to political participation in democratic elections, the “principle of free and fair elections”.

(5) The “Principle of Free and Fair Elections” in UN General Assembly Resolutions

Having examined the role of the United Nations in promoting democracy and the right to political participation, we must analyse specifically and separately, to highlight its transcendence, the importance given by the organization’s General Assembly to the “principle of free and fair elections”. Equally, this principle finds its legal basis in the articles 21 of the Universal Declaration of Human Rights and 25 of the Covenant on Civil and Political Rights, in which it is stated that the authority to rule is based on the will of the peoples, expressed in periodic and genuine elections. We can confirm that this principle is established in the way in which elections are carried out (“periodic and genuine elections”); but the necessary guarantees that must be present in all electoral processes are also emphasized:

“It declares that determining the will of the people requires an electoral process that offers clear options and that this process must provide all citizens with equal opportunities to stand as candidates and present political options, individually and in collaboration with others.”³²

The definition of what we should understand by free, fair or genuine elections has required a considerable effort on the part of the doctrine; thus, we can understand that *free elections* are those elections that take place in a climate free from intimidation and respect for human rights and freedoms (freedom of opinion, expression and information, assembly, association, independence of the judiciary, non-discrimination, secret ballot), removing obstacles to the full participation of citizens in the electoral process. *Fair elections* are those that respect the guarantees of equal, universal and non-discriminatory suffrage, non-discrimination in electoral matters (both in active and passive suffrage), as well as legal and technical guarantees against fraud and manipulation³³. Easier is the concept of *periodic elections*, which would be those in which the period between calls is guaranteed to be adequate to continue reflecting the will of the people. Finally, “genuine elections” would be those that fulfill and unite all the previous elements:

- Free will of citizens;

³² GA Resolution 43/157, 8 December 1988.

³³ For a deep analysis, see G. Goodwin-Gill, ‘*Free and fair elections*’ (Inter-Parliamentary Union, 2006).

- Political pluralism;
- Equal access to public service; and
- Information and civic education for voters to exercise their right to vote³⁴.

According to Fox, the right to free and fair elections comprises four main elements: 1) Universal and equal suffrage; 2) The absence of discrimination between voters, candidates or parties; 3) Secret vote; and 4) Holding periodic elections³⁵.

In electoral practice, the term “free and fair elections” is often used when the requirements of international standards are met, such as article 25 of the International Covenant on Civil and Political Rights, which are intended to guarantee freedom and equality in the political participation of citizens³⁶. Later, this concept evolved towards the term of “genuine elections”, in accordance with the tendency in favour of political pluralism within the States³⁷.

The evolution of the UN towards the acceptance of democratic principles as universally recognized values and their active promotion was linked to the slow development of the United Nations human rights promotion program, which finally led - thanks to pressure from non-governmental organizations and the work of pro-democratic States - to the resolutions of the UN General Assembly with the title “Enhancing the effectiveness of the principle of periodic and genuine elections”, aimed at assisting the States that request it in the technical and legal aspects of the democratic elections, and that they were finally going to endorse the organization and observation of democratic elections in sovereign countries³⁸. In numerous resolutions, the UN General Assembly showed its strong support for the holding of democratic elections. In these resolutions, the General Assembly increasingly emphasized the importance of elections to protect the rights of citizens, in particular human rights, while proclaiming the relevance of the “principle of holding genuine elections”, to determine the true will of the people.

The issue of “Enhancing the effectiveness of the principle of periodic and genuine elections” was the subject of discussion, for the first time, at the 43rd session of the General Assembly, in 1988. The Assembly expressed it as follows:

“... Its general objective is of a practical nature; namely, to allow the international community to cooperate in the search for adequate means and means to make the principle of holding genuine and periodic elections more effective.”³⁹

The scope and relevance of this first Resolution 43/157, of 8 December 1988, should be framed within the process of disintegration of the USSR and the fall of the Berlin Wall, which facilitated the detente between the two blocks, thus allowing the reaching of a consensual resolution that advocated the principle of holding genuine and periodic elections⁴⁰, again avoiding any reference to the controversial term of “democracy”, which was not yet positively received by many countries of the former Soviet axis.

This first resolution of the General Assembly has been followed until date by many other resolutions approved under the same name (“Enhancing the effectiveness of the principle of periodic

³⁴ A. Badía Martí, *supra*, n. 22, at 40.

³⁵ G.H. Fox, ‘The right to political participation in International Law’, in G.H. Fox and B. R. Roth, *Democratic Governance and International Law* (Cambridge University, 2000), at 69.

³⁶ G. Goodwin-Gill, *supra*, n. 33.

³⁷ G.H. Fox, *supra*, n. 35, at 65.

³⁸ Y. Beigbeder, *supra*, n. 11, at 91-92.

³⁹ UN Doc. A/C.3/43/SR.55, paras. 66 and 69, at 16.

⁴⁰ See A. Jarillo Aldenueva, *supra*, n. 27, at 230.

and genuine elections”)⁴¹, annually at first since 1989, and biannually since 1993. We list just some of them below:

- United Nations General Assembly Resolution 44/146, “Enhancing the effectiveness of the principle of periodic and genuine elections”⁴².
- United Nations General Assembly Resolution 49/190, “Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization”⁴³.
- United Nations General Assembly Resolution 64/155, “Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization”⁴⁴.
- United Nations General Assembly Resolution 74/158, “Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization”⁴⁵.

These resolutions were approved by the UN General Assembly, in some cases without proceeding to vote⁴⁶, and in other cases, with overwhelming majorities in their favour⁴⁷, and have undergone a process of evolution that started from a principle of periodic and genuine elections with a more neutral formulation in the first resolutions that was derived towards a principle inextricably linked to the promotion of electoral democracy or the holding of democratic elections.

In this regard, we must highlight some of the pronouncements contained in the first resolutions, which emphasized (1) the essential nature of this principle in the efforts to protect the rights of the governed, as well as the fact that (2) to determine the will of the people, an electoral process that offers clear options and equal opportunities is necessary; also routinely collected in these resolutions was (3) the commendable value of United Nations electoral assistance, (4) insisting on the advisability of increasing the United Nations Trust Fund to finance election observation missions and meet the growing demand of electoral assistance of the States.

In the same line, these first resolutions already included provisions regarding the methodology and requirements demanded for the deployment on the ground of a UN election observation Mission, requiring (5) the Organization to try to ensure that there is sufficient time to organize and carry out an effective mission and (6) that there should be preconditions that make it possible to hold free and guaranteed elections, as well as (7) that adequate and complete reports can be presented on the results of the Mission, and (8) that UN electoral assistance work must be extended to all phases of the electoral cycle.

Likewise, all these resolutions that proclaim the “principle of genuine and periodic elections” recommend (9) that the observation activities are to be carried out in coordination with the other governmental and non-governmental organizations that are present and monitor the same electoral

⁴¹ From Res. 49/190, 9 March 1995, to present, UNGA resolutions in this field adopted the name of “Strengthening the role of the United Nations in increasing the effectiveness of the principle of celebration of authentic and periodic elections and the promotion of democratization”.

⁴² GA Res. 44/146, 15 December 1989.

⁴³ GA Res. 49/190, 9 March 1995.

⁴⁴ GA Res. 64/155, 18 December 2009.

⁴⁵ GA Res. 74/158, 18 December 2019.

⁴⁶ G. Goodwin- Gill, *supra*, n. 33.

⁴⁷ 162 votes in favor, 0 abstentions and 8 votes against, at the fifty-sixth session; 169 votes in favour, 0 abstentions and 8 votes against, at the 58th session; as well as 175 votes to none and 13 abstentions in 2017 (at the 72nd session).

process.

However, this great development of the base of international electoral observation was always constrained by three pronouncements that would be repeated in all of them, specifically the following: (10) Electoral assistance and support for democratization are only provided to the express request of the Member State concerned; (11) the freedom of all States to choose and organize their electoral institutions is emphasized and (12) the sovereign right of States to choose and develop their political, economic, social and cultural systems is proclaimed and reiterated.

Gradually, these UN General Assembly resolutions were improved, as they were added, along with the “principle of genuine and periodic elections”, specific mentions of the terms “democracy” and “democratization”, which since then would remain a constant and even emphasized in the most recent resolutions. In this sense, since Resolution 58/180 of 2003, the need to strengthen democratic processes, electoral institutions and the ability to administer fair elections has already been acknowledged (13), with the addition of (14) the advisability of cooperating with the governmental and non-governmental organizations and of sharing information and experiences to promote best practices in the provision of assistance and presentation of reports on the electoral processes.

Likewise, since this Resolution of 2003, the connection of support to the principle of periodic and genuine elections with the promotion of democratization would also become clearly incorporated (15), as deduced from the title of the resolution itself “Enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization”, and of the very text of the resolution:

“Having considered the report of the Secretary-General on the activities of the United Nations aimed at strengthening the effectiveness of the principle of holding regular and authentic elections and promoting democratization”

In subsequent resolutions, especially, since Resolution 64/155 18 December 2009, “Enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization”, the commitment to democratic elections will be even more evident, as (16) it is added the responsibility of the States to ensure that the elections are free and transparent, and that the work of the international observation of elections in relation to the promotion of free and fair elections, and its contribution to improving the integrity of electoral processes and electoral participation, will be emphasized.

Finally, as a consequence, if we analyse the last of the resolutions approved, in 2019—which was not submitted to vote—we can continue to appreciate that this principle has undergone a notable democratic reinforcement, as it is overwhelmingly considered mandatory by the States that make up the international community; specifically, in its 7th and 8th statements:

“7. Reaffirms the obligation of all States to take all appropriate measures to ensure that every citizen has the effective right and opportunity to participate in elections on an equal basis;

8. Strongly condemns any manipulation of election processes, coercion and tampering with vote counts, particularly when done by States, as well as by other actors, and calls upon all Member States to respect the rule of law and the human rights and fundamental freedoms of all persons, including the right to vote and to be elected at genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors, thereby fostering conditions in which all citizens, regardless of how they voted, whom they supported or whether their candidates prevailed, have the motivation and incentive, as well as the right and opportunity, to continue to participate directly or through elected representatives in the conduct of public affairs and their Government;[...]

Because of the above, it is evident that the General Assembly has endowed the right to political participation with a clear democratic connotation, and has established a direct connection between

the principle of free and fair elections and the development of the democratic system. After these resolutions, in our view, it is clear that when the UN General Assembly is mentioning “free and fair elections”, the UN main organ is meaning “democratic elections”, so that the right of political participation is going to be clearly linked to the development of democratic elections.

(6) The Right to Political Participation in Democratic Elections in the Human Rights Council.

Finally, in this process, we must also point out that support for the validity and development of the “Principle of genuine and periodic elections” has also been formulated by the then Human Rights Commission (today, Human Rights Council), with resolutions as clear as Resolution 2003/36, of April 23⁴⁸, that proclaims the “universal validity” of the principle of holding genuine and periodic elections by universal suffrage and by secret ballot⁴⁹.

Notwithstanding, the evolution of this principle has been reduced within the successor organ to the former Human Rights Commission, the Human Rights Council. Since the inception in 2006 of the Human Rights Council, its new structure has reduced the influence of Western states⁵⁰. Momentum has changed. Instead of promoting more in depth the Principle of genuine and periodic elections or even a right to democracy, the Human Rights Council has moved to emphasize a different goal in several resolutions: the promotion of a democratic and equitable international order⁵¹. All of these resolutions on a democratic and equitable international order are invariably supported by a coalition of African, Asian, Islamic and Latin American states along with China and Russia and are opposed by all Western members of the Council⁵², and all of them are more focused in the promotion of democracy beyond States borders (and much less in the promotion of democracy within the States). To support this goal, through Resolution 18/6, the HR Council established the mandate of the Independent Expert on the promotion of a democratic and equitable international order⁵³ for an initial period of three years. Since then, the mandate has been extended three times.

On the other hand, in March 2015, the Human Rights Council adopted resolution 28/14, which

⁴⁸ UN Commission on Human Rights Resolution 2003/36: Interdependence between democracy and human rights, 23 April 2003, E/CN.4-RES/2003/36

⁴⁹ In 2005, the Human Rights Commission passed one of its most comprehensive resolutions on democracy and the rule of law. After recalling its position on the minimum “content” of democracy, the Commission reiterated in Resolution 2005/32 of the Human Rights Commission, “Democracy and the rule of law” of 19 April 2005 (46- 0-7): “the right of every citizen to vote and be elected in authentic periodic elections without any discrimination based on race, color, sex, language, religion, political or other opinions, national or social origin, economic position, birth or other social condition, ... and that the people empowered to vote must have the freedom to choose any candidate and to support or oppose the government, without influences or undue coercion of any kind that may distort or inhibit the free expression of the will of the electors, and that the results of the authentic elections must be respected and respected...”

⁵⁰ M. Spohr, ‘The United Nations Human Rights Council’ 14 *Max Planck, Yearbook of United Nations Law*, (2010), 169–218.

⁵¹ Among others, we can mention Resolution 18/6 on the “Promotion of a democratic and equitable international order” (29 September 2011) (A/HRC/18/L.13) and Resolution 39/4 “Promotion of a democratic and equitable international order” (27 September 2018) (A/HRC/39/L.5).

⁵² H. Charlesworth, *supra*, n. 18.

⁵³ The purpose of his mandate is to promote and encourage respect for human rights and fundamental freedoms for all and respect for the principle of equal rights and self-determination of peoples, peace, democracy, justice, equality, the rule of law, pluralism, development, better standards of living and solidarity. A democratic and equitable international order means all peoples have the rights to peace, international solidarity, development and self-determination; exercise effective sovereignty over their natural wealth and resources; freely pursue their economic, social and cultural development; have equal opportunity to participate meaningfully in regional and international decision-making; and have a shared responsibility to address threats to international peace and security. A democratic and equitable international order fosters the full realization of all human rights for all, and everyone is entitled to it.

established a forum on human rights, democracy and the rule of law, providing a platform for the promotion of dialogue and cooperation on issues pertaining to these areas.

In spite of this diminished boost to the principle of periodic and genuine elections, the Human Rights Council has adopted a number of resolutions highlighting the interdependent and mutually reinforcing relationship between democracy and human rights. Recent examples include Human Rights Council resolution 18/15 of 29 September 2011 or HRC Resolution 19/36 on “Human rights, democracy and the rule of law” (19 April 2012), adopted by a recorded vote (43 to 0, with 2 only abstentions: China and Cuba)⁵⁴.

Furthermore, in the field of political rights, the Human Right Council has also adopted some resolutions to promote “Equal participation in political and public affairs”, such as Resolution 33/22 (A/HRC/RES/33/22), on 30 September 2016, or Resolution 39/11 (A/HRC/39/L.14/Rev.1), on 28 September 2018, in which the HR Council reaffirms:

“that every citizen shall have the right and the opportunity, without any of the distinctions stipulated in the International Covenant on Civil and Political Rights and without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives, and to have access, on general terms of equality, to public service in his or her country, and to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and held by secret ballot, guaranteeing the free expression of the will of the electors, and reaffirming also that the will of the people shall be the basis of the authority of government”

And imposes “the obligation of States to take all appropriate measures to ensure that every citizen has an effective right and opportunity to equal participation in public affairs [...]”.

In conclusion, we can affirm that the current Human Rights Council does not play a central role in promoting democracy at the international level; contrary to this, the HR Council is in many cases under the influence and control of countries with little democratic tradition and attachment: hence, at the present time, it is not a reference body either for the development of the principle of periodic and genuine elections. However, despite this, the HRC continues to proclaim the right to political participation in periodic and genuine elections and it continues to show in some resolutions, such as Resolution 19/36 (2012), the necessary interrelation and interdependence between human rights, democracy and the rule of law, which undoubtedly shows a future path of potential development of the right to political participation in democratic elections.

(7) The End of the way in the Transition Process from a Right to Political Participation into a Right to Political Participation in Democratic Elections.

Consequently, after our analysis, it becomes clear that the “Principle of genuine and periodic elections”

⁵⁴ See paragraphs 1 and 2: “1. Stresses that democracy includes respect for all human rights and fundamental freedoms, inter alia, freedom of association and of peaceful assembly, freedom of expression and opinion, freedom of thought, conscience, religion or belief, the right to be recognized everywhere as a person before the law and the right to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote in a pluralistic system of political parties and organizations and to be elected at genuine, periodic, free and fair elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people, as well as respect for the rule of law, the separation of powers, the independence of the judiciary, transparency and accountability in public administration and decision-making and free, independent and pluralistic media; 2. Reaffirms the right of every citizen to vote and be elected at genuine periodic elections without discrimination of any kind, such as race, color, sex, language, religion or belief, political or other opinion, national or social origin, property, birth or other status, and stresses that persons entitled to vote must be free to vote for any candidate of party for election and free to support or to oppose government, without undue influence or coercion of any kind that may distort or inhibit the free expression of the elector’s will, and that the results of genuine, periodic, free and fair elections representing the choice of the people for their representatives should be respected by the international community, as well as by all parties and stakeholders [...]”

has become a basic principle of Public international law for the promotion of the democratization of political systems; for instance, for the UN General Assembly, genuine and periodic elections and democracy were to become inextricably linked. Therefore, according to the UN General Assembly resolutions, it is clear that “periodic and genuine elections” is equivalent to “democratic elections”.

The principle of “genuine and periodic elections” or “democratic elections” implies that the elections are a legitimizing criterion of the public power⁵⁵, that the elections must be qualified as free, fair, periodic and genuine, and that the national legislation of the countries must fit these criteria.

The significance of this principle of “genuine and periodic elections” has been such that a large part of the doctrine has defended the obligation of the principle of free and fair elections within the international legal order. In 1992, Thomas Franck—in his article “The emerging right to democratic governance”—already concluded that:

“The international system is moving towards a clearly defined democratic right, in which national governments are being legitimized by compliance with international standards and systematic monitoring of compliance.”⁵⁶

As a result of the foregoing, and despite the initial greater neutrality of the principle, the new political stage that began in 1989 and the content of these resolutions in favour of the right to “genuine elections” ensured that the majority of countries in the international community gradually positioned themselves in favour of democracy as a form of government and that the United Nations reviewed and clarified its neutrality with respect to the political freedom of States⁵⁷, as can be deduced from the numerous resolutions approved by the General Assembly.

In fact, as it has been exposed, we can affirm that the original right to political participation of article 25 ICCPR has been transformed into a “right to political participation in democratic elections” thanks to—among others- the development and promotion of the “principle of free and fair elections” led by the United Nations. A right that is also being consolidated both by the continued support of the UN organs, and by the repeated and constant practice of many States, as well as by an existing *opinio iuris* regarding its mandatory nature⁵⁸, which could set the foundations for potential mandatory rules of customary origin for States in this field.

However, to conclude, we must be aware that this right to political participation in democratic elections is a right that presents different levels of development depending on the continent or regional area that we study. Thus, we will have regions with a perfectly consolidated *right to political participation in democratic elections*, both conventionally and by the repeated practice of the States (Western Europe and America); others, with an incipient right or in the formation phase, as well as others in which the existence of this right will be denied, because the right of political participation conventionally contained in article 25 of the ICCPR is not even properly fulfilled.

Furthermore, this process of “democratization” of the right to political participation, thanks to the “principle of free and genuine elections”, was going to be also supported by an international mechanism that would carry out continuous monitoring and assistance to the States to ensure that they adapt their electoral practice to the norms and standards for democratic elections. This context was conducive to the expansion of international electoral observation.

⁵⁵ See A. Badía Martí, *supra*, n. 22, at 34.

⁵⁶ T. Franck, ‘The emerging right to democratic governance’, 86 *The American Journal of International Law* (nº 1, 1992), 46-91.

⁵⁷ L.A. Sicilianos, *supra*, n. 8, at 121 ff.

⁵⁸ A. Jarillo Aldenueva, *supra*, n. 27, at 445.

(D) THE CONTRIBUTION OF INTERNATIONAL ELECTION OBSERVATION IN PROMOTING THE RIGHT TO
POLITICAL PARTICIPATION IN DEMOCRATIC ELECTIONS

Since 1962, the Organization of American States (OAS) has deployed more than 240 Electoral Observation Missions in 27 countries of the hemisphere⁵⁹; since 2000, over 120 European Union (EU) Election Observation Missions have been deployed to all continents⁶⁰; the Organization for Security and Cooperation in Europe (OSCE) has observed more than 400 electoral processes in Europe, North America and Central Asia⁶¹.

The relevant role played by international election observation was already adequately highlighted by Crawford⁶², who noted that International Law is progressing in a pro-democracy direction, thanks to (1) the electoral observation developed by international organizations, such as the UN or the OAS, as well as non-governmental organizations; (2) the processes of institutionalization of these election observation practices, as well as (3) the existence of various courts and committees for the protection of human rights at political level.

In this section, we will proceed to examine the contribution that international election observation is making in the field of the promotion of democracy and the principle of democratic elections; more precisely, first, we will analyse its role as a control mechanism for international electoral norms and standards; secondly, its fundamental role in promoting electoral democracy and democratic practices in the electoral field around the world as well as in creating new electoral standards; and, lastly, the singular role it plays in setting the ground for the activation of institutional reaction measures in case of non-compliance or violation of the electoral standards.

(1) The Control of the Election Observation Missions (EOMs) on Compliance of the Right to Political Participation by the States

The control responds to the interest of international society to guarantee that its legal system is respected and to prevent any breaches with the aim of achieving common objectives⁶³. After the Second World War, international control experienced a boost with the approval of various international treaties that incorporated a control mechanism in their articles; in this sense, international control is developed explicitly in a wide range of normative sectors: among them, the control that emerged in the field of protection of human rights⁶⁴.

International election observation missions constitute control mechanisms for the international norms and standards, within the field of protection of human rights, particularly political rights. The control carried out by the EOMs is of a hybrid nature; that is, although the technical nature of their activity prevails, since the parameters in use are binding norms and electoral standards; nevertheless, the political action that all electoral observation activity entails is evident. The role of control of these Election Observation Missions consists of evaluating the compliance of the international electoral

⁵⁹ See more information [here](#).

⁶⁰ See more information [here](#).

⁶¹ See more information [here](#).

⁶² J. Crawford, 'Democracy and the body of international law', in G.H. Fox and B. Roth (eds.), *Democratic governance and International Law* (Cambridge University Press, Cambridge, 2000), 103-113.

⁶³ According to Kant, the violation or non-compliance with international treaties necessarily affects each and every one of the States of the international community, since any of this non-compliance endangers and threatens the freedom and harmony that must govern relations between states. See I. Kant, *The Philosophy of Law* (Edimburg, 1887), at 223.

⁶⁴ S. Borrás Pentinat, 'Los mecanismos de control de la aplicación y del cumplimiento de los tratados internacionales multilaterales de protección del medio ambiente' (thesis on file at the University Rovira i Virgili, 2007), at 23.

norms and standards by the States, and culminates in the publication of various reports at different stages of the electoral process (preliminary reports and final report) presenting a series of *conclusions*—in which the EOM determines whether or not the observed electoral process has adhered to the international norms and standards of electoral observation—and *recommendations*, which the Mission addresses to the country's authorities, suggesting their implementation to improve the quality of the electoral process and comply more fittingly to international norms and standards. As examples of positive assessments by these EOMs, we can mention the European Union EOM in Senegal Presidential Elections (24 February 2019⁶⁵), Paraguay (22 April 2018⁶⁶), Timor Leste (2017⁶⁷), among many other elections observed by the EU, the OAS⁶⁸ and the OSCE⁶⁹.

The EOMs evaluate the electoral processes according to the electoral norms and standards set forth in mandatory international treaties, domestic laws and in international electoral non-binding or “soft law” norms. That is, obligatory electoral norms that we find in binding universal treaties such as the International Covenant on Civil and Political Rights (art. 25), or of regional scope, such as the European Convention on Human Rights (art. 3 additional protocol No. 1), the American Convention on Human Rights (art. 23), etc., which include legally binding norms for the States regarding the holding of elections.

(2) The Development of “Soft Law” Electoral Standards by International Election Observation Organizations

Along with the international electoral standards contained in the mandatory international treaties, we find a proliferation of international standards for elections in the electoral sphere that are not, in principle, sources of international law⁷⁰; these are agreements, declarations, recommendations, protocols that, in principle, would not be mandatory for the signatory States and which come to form the so-called “soft law” within the electoral domain⁷¹. This type of “soft” norms is quite frequent in

⁶⁵ “Le scrutin s’est déroulé dans le calme et de manière globalement transparente. Il s’est caractérisé par une forte participation des électeurs. Le vote a été évalué positivement par les observateurs. Les procédures ont été généralement respectées dans les bureaux de votes observés, et la compilation des résultats a été effectuée de manière efficace [...]” (Senegal Presidential Elections -24 February 2019- EU Final Report).

⁶⁶ “Voting took place in an organised and calm atmosphere with polling stations following procedures that ensured the integrity and transparency of the process. EU observers were present constantly during the aggregation at all electoral tribunals. The integrity of results forms was assessed as good or very good in 98 per cent of cases and with high levels of transparency [...]” (Paraguay general Elections -22 April 2018- Final Report).

⁶⁷ “Both election days took place in a peaceful and orderly manner. EU observers visited in the course of both presidential and legislative elections over 120 polling stations throughout the country and in most cases evaluated positively the opening, polling and closing procedures. Nonetheless, EU observers concluded that voters cast their ballot in secrecy, free of influence. The tabulation processes were evaluated in most cases as orderly, well organised and transparent [...]” (Timor Leste Presidential Elections –20 March 2017- Final Report).

⁶⁸ As an example, Mexico General Elections (1st July 2012) OAS Final Report: “Los ajustes legales y reglamentarios realizados para mejorar la calidad de la jornada electoral han demostrado su pertinencia y utilidad, mientras que el conjunto de reformas constitucionales de 2007 ha contribuido al desarrollo de campañas más equitativas e incluyentes. Ciertamente, se constataron algunas fragilidades y temas en los cuales se requerirán modificaciones adicionales, pero no empañan el balance general de las elecciones y constituyen más bien una guía para el perfeccionamiento del sistema electoral mexicano [...]” (Final Report).

⁶⁹ As an example, Georgia Parliamentary Elections (31 October 2020) OSCE Final Report. The Statement of Preliminary Findings and Conclusions issued by the EOM on 1st November concluded that “the elections were competitive and, overall, fundamental freedoms were respected”.

⁷⁰ See European Union, [Compendium of International Standards for Elections](#) (2016).

⁷¹ As examples, the 1990 OSCE Copenhagen Document or the Inter-American Democratic Charter 2001, both of great political importance.

the electoral field as they are perfectly suited to the reservations of the States to assume binding obligations in such a delicate area as that of the political rights or the political participation of their citizens.

Moreover, the international organizations promoting these standards —aware of said reluctance— will themselves promote these standards among their members or to third parties to make the States advance progressively and without interference towards compliance with these soft rules that, in the end, may lead to the adoption of the mandates contained in the binding regulations.

Even though the norms and standards contained in this type of norms are not strictly binding in principle, it is evident that at present there are numerous States that comply with and adapt the development of their electoral processes to these non-legal standards or parameters of international election observation, and have been developing a repeated and continued practice of adjusting to the principles contained in these texts. International election observation has developed numerous non-binding electoral standards to promote the holding of free and genuine elections among its member States, whose compliance is also monitored by these EOMs. Consequently, the generation by the organizations of electoral observation of these non-binding rules, which include parameters pertaining to the celebration of “genuine” or “democratic” elections, is also contributing to the democratization of electoral processes in many countries and to the improved compliance with the “principle of democratic elections”.

(3) International Election Observation as a Means of Promoting Democratic Electoral Practices

The international election observation carried out by “comprehensive” and long-term missions, in particular the OSCE, the EU, the OAS and even the African Union (AU) and the Southern African Development Community (SADC) provides an invaluable and irreplaceable empirical base on the electoral practice of the States in their many electoral processes. The preliminary and final reports of these Election Observation Missions delve into the analysis of all the elements that play part on the right to political participation, as well as those other parameters that shape the concept of “democracy”. Consequently, these reports constitute means of proof of compliance of the mandatory right of political participation; but, at the same time, election observation missions promote genuine and fair elections worldwide, mainly by the permanent and constant promotion of electoral democratic practices and norms among the observed States, and more specifically through different ways: (1) the verification of compliance with standards and parameters; (2) its follow-up work; (3) its involvement in the countries and their interest; and (4) its electoral assistance work so that the development of the electoral processes comply with said standards. All these elements contribute to boost the “observed” States to adapt their electoral practice to these democratic parameters and therefore, they can support the creation of reiterated practices by the States in accordance to the holding of “democratic elections”⁷². For it, we say that the international election observation may foster the material element of a potential custom in the field of democratic elections, I mean, a right to political participation in democratic elections through a customary way.

Therefore, in this sense, international election observation may play an essential and irreplaceable

⁷² For instance, the European Union has observed three elections in Ghana in the last years (2008, 2016, 2020). In the three elections, the Election observation mission assessments were positive, however, some shortcomings were identified. More information [here](#).

role to transform the *right to political participation* into a new *right to political participation in democratic elections*, through the promotion of constant and repeated democratic electoral practices among the States observed. Election observation missions are spreading democratic standards and norms throughout the world and are fostering these democratic practices among the States. If these practices become repeated, constant and uniform among the States, together with the *opinio iuris sive necessitatis*, the right to political participation in democratic elections might become a customary norm too.

In similar terms, this customary character has also been highlighted by Ezetah, for whom the right to democracy as an internal aspect of the right to the self-determination of peoples can also be classified as a predominantly customary norm in international law⁷³.

(4) The Reaction of International Election Observation Organizations to Non-compliance with International Electoral Norms and Standards

The sanction in response to the violation of a norm of International Law is yet another proof that the violated norm is a norm of Public International Law. In the electoral field, there are increasing cases of imposition of institutional and collective sanctions by international organizations that carry out election observation activities (EU, OAS, UA, OSCE, mainly) or, individually, by the States themselves (as in the recent cases of Myanmar 2021, Belarus 2020, Honduras 2017 or Venezuela 2018), to those countries that flagrantly stray or do not comply with international standards for democratic elections. In fact, international election observation constitutes the basis on which sanctions are imposed to some of the countries that do not carry out their electoral processes according to international standards.

Consequently, we can confirm that the international organizations that carry out election observation activities (mainly, the aforementioned EU, OSCE, OAS and AU) use the reports of their missions on the ground to adopt institutional reaction measures aimed at enforcing the application of international electoral norms and standards for democratic elections. For example, the European Union has become highly relevant in terms of institutional reaction by activating specific mechanisms, such as the “human rights and democracy” clause⁷⁴, which is included in a large part of its bilateral external relations with third countries.

Within the OSCE, the irregularities detected in the successive electoral processes in Belarus led to the adoption of retaliatory measures by some States and institutional sanctions by the Organization itself or its members. With regard to this country, based on the reports of the OSCE electoral observation missions, the European Union has been applying various legal sanctions to the Lukashenko regime for its systematic violation of human rights, the rule of law and for the lack of democratic advances⁷⁵. On the other hand, in Ukraine, the second round of the presidential elections of November 2004 was repeated after the report released by the OSCE-ODIHR Election Observation Mission⁷⁶.

⁷³ R. Ezetah, ‘The right to democracy: a qualitative inquiry’, 495 *Brooklyn Journal of International Law* (1997).

⁷⁴ See A. Úbeda De Torres, ‘La evolución de la condicionalidad política en el seno de la Unión Europea’, 32 *Revista de Derecho Comunitario Europeo* (January/April, 2009).

⁷⁵ See more information [here](#).

⁷⁶ “The second round of the Ukrainian presidential election did not meet a considerable number of OSCE commitments and Council of Europe and other European standards for democratic elections” (Text available electronically [here](#), accessed 15 May 2021).

In short, the election observation work carried out by the main specialized international organizations (primarily by the OSCE, OAS, EU and also the AU) has contributed, thanks to its functions of control, the creation of standards, its promotion of democratic electoral practices worldwide and serving as a basis for institutional reaction in case of non-compliance, to the consolidation of a *right to political participation in democratic elections* in almost all of today's international society.

(E) THE CONFIGURATION OF THE RIGHT TO POLITICAL PARTICIPATION IN DEMOCRATIC ELECTIONS IN PUBLIC INTERNATIONAL LAW

After having established that in the international legal order there is a right to political participation that has been transformed into a “right to political participation in democratic elections”, thanks to the action of the UN, the general tendency among states to hold elections to elect their political representatives and the irreplaceable work carried out by international election observation missions; in this last section we will address if at present this right to democratic elections is an individual, enforceable and subjective right in Public International Law.

(1) Firstly, to determine if it is feasible to speak of the right to political participation in democratic elections as a subjective and enforceable right of the individual, it is essential to analyse its origin in the first place, particularly, if this right is included in any binding normative instrument or if it has been established by customary way. As we have seen, the right to political participation in democratic elections is proclaimed in international treaties and it is developed and reinforced through the role of the General Comment 25, the resolutions of the UN Human Rights Committee, the UN action and the States behaviour and practice.

(2) Secondly, we must also examine whether this right has any *control mechanism* in International Law; the conventional right to political participation in democratic elections has several conventional control mechanisms, such as the UN Human Rights Committee, as well as the control carried out by election observation missions.

(3) The third parameter to examine is whether the violation of this right implies any type of *reaction* by the international community, if the State that violates this right may be subject to the imposition of sanctions, be they social sanctions or coercive measures. We have verified that the international community has reacted to various violations of the right to political participation in democratic elections. These are “*sui generis*” responses, but they do force the offender to comply with this right: they are reactions regarding the validity of elections or the illegitimacy of a government, which may lead to the non-recognition of that new government, or to the imposition of institutional and collective or unilateral sanctions. There are also reaction mechanisms against illicit breakdown of democratic systems, coups d'état or erosion of the values and principles of democratic systems⁷⁷. These reaction measures will be decentralized and each State or international organization will be responsible for establishing them, so that the degree of coercibility will vary according to each case and region.

(4) Finally, the existence of a right usually requires that that right be enforceable before jurisdictional courts; that is, *judicial control* is generally an attribute of any subjective or collective right. The right to political participation in democratic elections has received a wide support from –

⁷⁷ We can mention the recent cases of Belarus 2020 or Myanmar 2021.

in Europe- the brilliant jurisprudential activity of the European Court of Human Rights, and in the American continent, in which the Inter-American Court of Human Rights intervenes.

Consequently, we can state that the right to political participation in democratic elections is a binding right in the whole international community; the States that do not respect this right are breaching International Law and may face the reaction of the rest of the international community. This right of democratic elections is mandatory worldwide, it has a universal reach, it is in a clear process of expansion and it has a very high degree of recognition; therefore, there is a clear trend to protect this right within the international legal framework⁷⁸.

However, the recent democratic practice of States is also experiencing setbacks and it is not always respectful of the right to political participation in democratic elections⁷⁹. Roldán indicates that democratic principles and systems have been suffering a visible setback during the last decade⁸⁰. Not only there are countries that persist in their breach of the right to political participation ex Article 25 ICCPR (Cuba, China, North Korea, Turkmenistan, Saudi Arabia, United Arab Emirates, Yemen, Iran, Cameroon, Azerbaijan, Algeria, etc.). Furthermore, there are countries whose compliance with this right is deteriorating compared to previous electoral processes (Russia, Venezuela, Turkey, Uganda, Rwanda, Nicaragua, Myanmar, Jordan, Ethiopia, Democratic Republic of the Congo, etc.)⁸¹.

Some scholars do not consider this right as an *erga omnes* norm, for instance, as Fernández Liesa affirms: "It is true that in international law the right to free elections is being concretized, but there are still reluctance and opposition to make possible to develop the norm to the degree that it constitutes the basis of a general obligation"⁸²; nevertheless, we think —with Jarillo— that it is a right that is close to achieve that general obligation⁸³.

In short, it is therefore a legal obligation internationally assumed by the States that are parties to the ICCPR, "whose compliance is subject to the law of treaties and the general rules of responsibility of international law"⁸⁴ (own translation). However, we understand that, for its definition and development as a right, it cannot be required a generalized and unanimous compliance in the international community, but that said right is understood to exist due to the support of most of the States and the existence and ratification of legally binding international instruments by most of them. As in other areas of Public International Law, non-compliance with the rules is often one more proof of their obligatory nature and of their legally binding nature (see the case of International Humanitarian Law). Hence, we understand that this right to political participation in democratic elections exists as such in the current scope of the international legal system; although there are States that repeatedly fail to comply with this obligation internationally assumed. Despite it, even the defaulting States very often try to give the image that they do adequately fulfil this right to political participation in democratic elections⁸⁵; which only confirms its legally binding nature and its potential

⁷⁸ A. Mangas Martín, *supra*, n. 9, at 101.

⁷⁹ A. Jarillo Aldenueva, *supra*, n. 27, at 171.

⁸⁰ J. Roldán Barberó, 'Internal democracy and International law', *Spanish Yearbook of International Law* (2018), at 200.

⁸¹ Source: Freedom House (<https://freedomhouse.org/explore-the-map?type=fiw&year=2021>), and Election observation mission reports.

⁸² C. Fernández Liesa, *Democracia y desarrollo en el ordenamiento internacional*, in F. Mariño and C. Fernández Liesa, *El desarrollo y la cooperación internacional* (Univ. Carlos III, Madrid, 1997), at 195.

⁸³ A. Jarillo Aldenueva, *supra*, n. 27, at 177.

⁸⁴ *Ibid.*, at 169.

⁸⁵ An example is the statement made by Nicolás Maduro after the 2020 parliamentary elections: "5 years ago I went out to acknowledge defeat and now, thanks to the people, we are now celebrating a victory."

erga omnes effect.

Consequently, we can conclude that the generally accepted right to political participation (*ex art. 25 ICCPR*) has moved to a right to political participation in democratic elections, which is on the way to become an *erga omnes* norm, due to the UN action in the promotion of the principle of periodic and genuine elections, and thanks to the role developed by the election observation missions worldwide. In line with Wouters, Meester and Ryngaert, “one can assume that, if democracy is understood restrictively as a form of governance in which the people elect their administrators, it is definitely a principle of international law”⁸⁶.

(F) DOES IT EXIST A RIGHT TO DEMOCRACY IN INTERNATIONAL LAW?

After this, the final step in the process would be the transition towards a right to democracy. At this point, we understand that this right to political participation in democratic elections, its universality and normative force, is acting as a stimulus for the promotion of a right to democracy as an ideal model of a political regime. But this final change will be more complex in the current stage of the International Law.

The right to democracy is not present as such in any binding legal instrument of universal scope. Even though it seems complex to defend that an individual citizen could judicially claim their right to democracy, it is necessary to state that, in some regional areas, the development of the right to political participation in democratic elections and its derivation, the right to democracy, can be demanded—with variations— before regional or domestic courts of justice.

For the analysis of a potential right to democracy, we share with Dupuy the need to adopt a regional approach⁸⁷. The convenience of this regional analysis is motivated by the differences that exist regarding the degree of mandatory and compliance both with the right to political participation (*ex art. 25 ICCPR*), as with the right to political participation in democratic elections, as well as the hypothetical right to democracy. As an explanatory note, we must state that the general regional trends that we expose must be qualified because this does not prevent individual cases from departing from the majority trend.

(1)Europe

We can state that there are: 1) Binding norms (among others, ICCPR and European Convention on Human Rights) regarding political participation in democratic elections and the right to democracy. According to Roldán, “The legitimacy of power relies on the expression of the popular will, through free and periodic elections”⁸⁸; 2) Non-binding international regulations that acquire a certain mandatory quality by the practice of the States as a majority (see the OSCE Copenhagen Document); 3) The validity and effectiveness of the principle of free and genuine elections has transformed the right to political participation into a right to political participation in democratic elections; 4) There is an effective jurisdictional court (the European Court of Human Rights) to which citizens can resort in case of infringement of the elements that make up the right to political participation in democratic

⁸⁶ J. Wouters, B. De Meester and C. Ryngaert, ‘Democracy and International Law’, 34 *Netherlands Yearbook of International Law* (2003), at 156.

⁸⁷ R.-J., Dupuy, ‘Les droits de l’homme, valeur européenne ou valeur universelle’, in AAVV., *Pensamiento jurídico y Sociedad internacional. Libro homenaje al profesor D. Antonio Truyol Serra* (CEPC, vol. I., Madrid, 1986), 415-429.

⁸⁸ J. Roldán Barbero, *Democracia y Derecho internacional* (Ed. Civitas, Madrid, 1994), at 97.

elections and even a right to democracy⁸⁹; and 5) Existence of regional international organizations that require the “democratic” requirement to become member (European Union and Council of Europe); 6) The democratic conviction and practice of the European States is almost complete, unanimous if we refer to the member countries of the European Union⁹⁰.

Therefore, we can conclude that, among the member countries of the European Union, and to a large extent, among the countries that make up the Council of Europe, there is –in general terms- a high compliance with the conventional right to political participation in democratic elections, which has been absorbed by the binding force of a right to democracy guaranteed for citizens and fully enforceable. In other words, in Western Europe there has been a move from the initial obligatory right to political participation to a right to political participation in democratic elections that has become an indisputable right to democracy⁹¹. According to Dupuy, “The situation is different in the regional spaces of the European Union and the Council of Europe, where democracy has been recognized as a true legal principle and as part of the common constitutional heritage of the States”.

Consequently, following this author, we could state that *in Europe there is a right to democracy with binding normative force*. In the European space, the States are linked by the plurality of regional commitments acquired in recent years that have shaped the common European heritage, and democracy has acquired full significance as a legal principle that informs all the activities of the State.

(2) Latin America

In Latin America, we also can speak of the right to political participation in democratic elections and the right to democracy, since the existence of: 1) Binding norms (among others, ICCPR, American Convention on Human Rights and the American Declaration of Rights and Duties of Man) regarding political participation in democratic elections and the right to democracy⁹²; 2) Non-binding international regulations that become binding by State practice, like the Inter-American Democratic Charter⁹³; 3) The validity and effectiveness of the principle of free and genuine elections has

⁸⁹ See Council of Europe/European Court of Human Rights, “Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights. Right to free elections”, 31 dec 2020. This particular Guide analyses and sums up the case-law on Art. 3 of Protocol No. 1 to the European Convention on Human Rights: “Right to free elections”. This Guide emphasizes the importance of many ECHR judgments with regard to, among others, the right to vote (*Hirst v. the United Kingdom* (no. 2) [GC], 2005, § 62), the loss of civic rights (*Albanese v. Italy*, 2006); prisoners (*Frodl v. Austria*, 2010), Right of citizens residing abroad to vote (*Hilbe v. Liechtenstein* (dec.), 1999), the right to stand for election (*Podkolzina v. Latvia*, 2002, § 35), the organization of elections (*Russian Conservative Party of Entrepreneurs and Others v. Russia*, 2007), the election campaign (*Abdalov and Others v. Azerbaijan*, 2019), the exercise of office (*Sadak and Others v. Turkey* (no. 2), 2002), electoral disputes (*Kovach v. Ukraine*, 2008, 55 et seq); (*Riza and Others v. Bulgaria*, 2015), effective remedies (*Grosaru v. Romania*, 2010), etc. The extensive jurisprudence of the court covers numerous aspects related to the right to political participation in democratic elections, as well as even extends to the right to democracy that we maintain exists at the European level.

⁹⁰ The cases of Poland and Hungary require to call into question this respect for democratic principles; notwithstanding, the right to democratic elections in these countries is not at risk at this moment (See inter alia, A. AGH, ‘Decline of democracy in the ECE and the core-periphery divide: Rule of Law conflicts of Poland and Hungary with the EU’ (Journal of comparative politics, Vol. 11, number 2, July 2018).

⁹¹ A. Ruiz Robledo, ‘El derecho a participar en elecciones libres según la jurisprudencia del Tribunal Europeo de Derechos Humanos’, 30 *Corts: Anuario de derecho parlamentario* (2018), 275-305.

⁹² “La democracia representativa es determinante en todo el sistema del que la Convención forma parte” (OC6/86 Corte IDH 1986a, 9, párr. 34) y por ello “constituye un ‘principio’ reafirmado por los Estados Americanos en la Carta de la OEA, instrumento fundamental del Sistema Interamericano” (Castañeda, Corte IDH 2008b, 42, 141; OC 6/86, Corte IDH 1986a, 9, 34 y Yatama, Corte IDH 2005b, 88, 192).

⁹³ Article 1 of the Inter-American Democratic Charter: “The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it”.

transformed the right to political participation into a right to political participation in democratic elections and even into a right to democracy; 4) There are two effective jurisdictional bodies (the Inter-American Commission and the Interamerican Court of Human Rights) to which citizens can resort in case of infringement of the elements that make up the right to democratic elections and a right to democracy⁹⁴; 5) Existence of regional international organizations that demand the “democratic” requirement to become member (Organization of American States, among others); 6) The democratic conviction and practice of the American States, as well as the commitment to democracy and the appropriate development of electoral processes is very high.

Compliance with election observation standards is highly effective in the Americas, but it is undoubtedly the democratic commitment of the OAS and its action to stop the breakdowns of the constitutional order in these countries, which leads us to conclude that the American continent is experiencing a phase of widespread acceptance of representative democracy and other democratic variants. However, democratic development is more fragile in Latin America (see, among others, the example of Honduras in 2009 or the Venezuelan crisis of 2014-2015), which forces the OAS to maintain a coherent policy in defence of democratic principles⁹⁵.

(3) Rest of the World

In the rest of the world, the majority of States have ratified the International Covenant on Civil and Political Rights, in which the right to political participation is enshrined. As a consequence of that, we can conclude that the right to political participation in democratic elections is mandatory and enforceable in all of these States parties.

However, in Eastern Europe and former Soviet republics, there are many examples of countries that circumvent the effective fulfilment of the right to political participation and the principle of democratic elections. Therefore, although a casuistic analysis should be carried out, in this region, the general trend is not favourable even to the effectivity of the right to democratic elections in its individual aspect. The right exists and it is enshrined and accepted by these States, but the level of fulfilment is low (see, the cases of Uzbekistan, Azerbaijan, or even the case of Russia)⁹⁶.

On the other hand, Africa itself is trying to walk, with setbacks and obstacles, on the path of the development of a right to democratic elections; but it is not possible to generalise, because the situation differs greatly among countries in the continent. The right of political participation in democratic elections exists and it is enshrined and accepted by these States, but the level of accomplishment is not very high. Countries like Ghana, Tunisia, South Africa or Senegal provide

⁹⁴ According to A. R. Dalla Via, ‘Los derechos políticos en el Sistema Interamericano de Derechos Humanos’ 15 *Tribunal Electoral del Poder Judicial de la Federación* (2011), “los derechos políticos, consagrados en diversos instrumentos internacionales, propician el fortalecimiento de la democracia y el pluralismo político.” This has been upheld by the Inter-American Court of Human Rights in its main judgments on political rights, cases *Castañeda Gutman vs. Estados Unidos Mexicanos* (Corte IDH 2008b, 42, 141), *Yatama vs. Nicaragua* (Corte IDH, 2005b, 88, 192), *López Mendoza vs. Venezuela* (Corte IDH 2011c, 233, 109), etc.

⁹⁵ Inter alia, see D. Acevedo and C. Grossman, ‘The Organization of American States and the Protection of Democracy’ in T. Farer, (ed.) *Beyond Sovereignty. Collectively Defending Democracy in the Americas* (Baltimore and London: The Johns Hopkins University Press, 1996), 132-149; S. Mesa Salazar, ‘La democracia y el Sistema Interamericano: de la Carta de la OEA a la Carta Democrática Interamericana’, 16 *Agenda Internacional* (2002), 97-122; H. Olmedo Gonzáles, ‘Diez años de la Carta Democrática Interamericana: Un Régimen Internacional para la Defensa de la Democracia’, *Revista Electrónica de Estudios Internacionales* (2011), etc.

⁹⁶ For a more detailed study of this question, see J.-Y. Morin, ‘L’Etat de droit: émergence d’un principe du droit international’, 254 *RCADI* (1995), 9-462.

positive and inspiring models for the rest of the States of the continent; and elections are being developed in many other African countries in positive way (as declared by the international election observation missions deployed in these countries to observe the electoral processes)⁹⁷.

In Asia, it is not feasible today to even adduce that a right to political participation in democratic elections is in force in an emerging phase. The Asian continent remains highly fragmented and the States that comprise it are in very diverse stages of institutional development; from advanced countries in a phase of democratic and institutional consolidation, such as South Korea or Japan, to attested authoritarian systems, such as China or North Korea (in which even the right to political participation is not respected). This heterogeneity and variety prevent the emergence of supranational international organizations that extend democratic values and principles, in such a way that support for democratic phenomena materializes on rare occasions and its success depends on the will of the country's authorities and their true democratic commitment.

Finally, in Oceania, except in the cases of Australia and New Zealand, which are impregnated with Anglo-Saxon democratic values and principles, and some other isolated cases, we can only speak of respect for the right to political participation among those States that have ratified the ICCPR, but it is not possible to find the right to political participation in democratic elections generally in force.

According to this analysis, we can only share the majority opinion of the doctrine that states that in the current scope of the international legal order we cannot speak of a right to democracy (as a political system), given that the principles of sovereign equality of States, non-intervention in internal affairs, and self-determination of the peoples⁹⁸, grant freedom to the States to adopt the political, economic and social model they prefer, and currently there is no obligation to adopt a democratic model of government. However, at the same time we can say that the world is experiencing in different regions a clear democratizing trend.

Our analysis reveals a majority tendency of the States towards a greater recognition of democracy as a desirable form of government for the States. Although we started from the premise that the existing normative basis that sets a legal obligation for States to establish democracy as a form of government is not sufficient, given that at a universal level there has not yet been a process of codification from which democracy is configured within a conventional framework of positive law that generates obligations for the States parties⁹⁹; it is undeniable that there exists a majority tendency towards a greater recognition of democracy as an ideal political model. The political changes produced in Western, Central and Eastern Europe in the 90s, with the new democratic wave, resulted in a reinforcement of the concept of "democracy" as a value, even a dominant value, at the national and international level¹⁰⁰. As International IDEA report "The Global State of Democracy 2019" shows:

"The number of democracies continues to rise, despite a slowdown of the global democratic expansion since

⁹⁷ See the examples of the 2016 Presidential and Parliamentary Elections in Ghana (text available electronically [here](#)); the 2019 Senegal Presidential Elections (text available electronically [here](#)); or the 2018 Tunisia Municipal Elections (available electronically [here](#)).

⁹⁸ See H. Charlesworth, *supra*, n. 18, at 37-38, for a detailed analysis about the division of international lawyers regarding the existence or non-existence of this right.

⁹⁹ H. Thierr, 'L'état et l'organisation de la société internationale', in AA. VV: *L'état souverain à l'aube du XXI siècle* (Colloque de Nancy, Eds. A. Pedoné, 1994).

¹⁰⁰ See inter alia D. Held, *Models of democracy* (Cambridge, Mass., Polity Press, 1987); G. Duncan, *Democracy and the capitalist state* (Cambridge University Press, 1989), etc.

the mid-1990s. In fact, between 2008 and 2018 the number of democracies continued to rise, from 90 to 97¹⁰¹.

The concept of “democracy” has become a key element for most international organizations at the regional level. Increasingly in numbers, regional organizations are demanding respect for democratic principles and institutions to incorporate new members (EU, Council of Europe, OAS, OSCE, African Union, among others), which is a clear example of the commitment of these supranational entities in spreading democratic ideals and institutions. Undoubtedly, these demands are contributing to the increase in the democratization process of the international society and to the emergence of a right to democracy in some regional areas.

Wheatley observes that, although there is no uniform practice of democracy, nevertheless, the international community shows a strong normative commitment towards democratic government in a large part of the national political systems¹⁰². This has led an important part of the doctrine to uphold the universality of the values that underlie democracy as a form of political organization. And—as Charlesworth affirms—these views were not simply the result of the Western enthusiasm¹⁰³. She set the example of Amartya Sen’s praise for democracy: “Sen, the Indian Nobel prize-winning economist, has spoken of democracy as “a universal value that people anywhere may have reason to see as valuable”¹⁰⁴. In this sense, Garzón and Cardona consider democracy as one of the “modulating values of the principles of the United Nations”¹⁰⁵, that is, they conceptualize “democracy” as a value, but, at the same time, they highlight the importance of democracy by conventional means in some regional spaces.

As discussed, the UN itself began to make frequent use of the term “democracy” in resolutions approved by the General Assembly, the Security Council, its Secretary-General, and the rest of its specialized agencies. Since then, the actions of the UN have been imbued with a democratic spirit and a democratizing drive; today it is undeniable that the UN has as a desideratum of its actions, among others, the promotion of democracy at the international level.

Furthermore, another element that shows that “democracy” constitutes a guiding principle of the contemporary international community can be found in the numerous electoral processes that take place in the different countries that make up the international society. The holding of elections is a constant and repeated event in most States. And although elections are not synonymous with democracy, nevertheless, the holding of democratic elections does constitute a fundamental requirement for us to speak of a democratic system. The normative force of “democracy” in today’s international society is such that the leaders themselves often advocate the democratic nature of their elections, even if they subsequently are not democratic and if they present multiple deficiencies. In addition, we have met and continue to meet at the international level, a multitude of demands by individuals, organizations, associations and States in favour of the establishment of the democratic system in their respective countries—as it has taken place in recent years in the North of Africa, with the so-called “Arab Spring”¹⁰⁶—or further strengthening of democracy in systems previously

¹⁰¹ Available electronically [here](#), accessed 15 May 2021.

¹⁰² S. Wheatley, ‘The democratic legitimacy of International Law’, *Studies in International Law* (Hart Publishing, Oxford, 2010).

¹⁰³ H. Charlesworth, ‘Democracy and International Law’, 371 *Recueil des Cours. Collected Courses of the Hague Academy of International Law* (Brill, 2014), at 64.

¹⁰⁴ A. Sen, ‘Democracy as a Universal Value’ 10 *Journal of Democracy* (nº 3, 1999), at 3.

¹⁰⁵ G. Garzón Clariana and J. Cardona Llorens, ‘Los propósitos y los principios de las Naciones Unidas’, in M. Díez de Velasco, *Las organizaciones internacionales* (Ed. Tecnos, 16ª, 2010), at 186.

¹⁰⁶ Tunisia, Egypt or Libya are example of this despite recent setbacks.

considered democratic¹⁰⁷.

In fact, in recent years, the consensus has been growing among States and there has been a growing convergence of national legal systems towards the democratic standards contained in international legal instruments¹⁰⁸. In 1993, the great impulse that definitively linked human rights to democracy took place thanks to the holding of the 1993 World Conference on Human Rights. The Final Declaration and the Vienna Program of Action¹⁰⁹ confirmed, first of all, the right of self-determination of peoples, the interdependence of human rights and, therefore, the document declared the link between “democracy, development and respect for human rights and fundamental freedoms”.

Years later, at the 2005 World Summit, all the governments of the world reaffirmed that democracy was a universal value, recognized their interdependence with the respect for human rights, and renewed their commitment to support democracy by strengthening the countries’ capability to apply democratic principles and practices¹¹⁰. Similarly, as previously analysed, the overwhelming majorities within the United Nations General Assembly in favour of the approval of the resolutions related to “*strengthening the principle of genuine and periodic elections*” corroborate this extensive support for the democratic ideal.

According to Professor Mangas Martín in her Reception Speech as a full-time academic at the Royal Academy of Moral and Political Sciences¹¹¹,

“International law in the last quarter century proclaims democracy and the rule of law as the breeding ground in which it is possible to realize human rights and, finally, peace”

As a consequence, it is feasible that we can currently speak of “democracy” as a guiding principle of the Public International Law, as well as “democracy” as a universal value. In this vision of democracy as a universal value of today’s international society, it is essential to bring up the work of Ali Khan in which the author highlights that, in recent years, democracy has emerged as a universal value by virtue of which the peoples of the world aspire to make their governments responsible and replaceable¹¹².

On the contrary, other scholars —like prof. Crawford— emphasized the relatively thin enthusiasm for democracy in International Law and the fact that there was no legal obligation for States to be democratically elected. Moreover, the principles of territorial sovereignty and non-interference in the internal affairs of States have been and are readily invoked by non-democratic States to screen undemocratic governmental action from scrutiny. Crawford described his position as a “modified scepticism” about the role of the democratic principle in International Law¹¹³. Furthermore, paraphrasing Pastor Ridruejo, “the democratization value also encounters resistance and significant limits in certain states. In short, democratization finds only one possibility of incomplete and unsatisfactory realization in contemporary international law.”¹¹⁴ (Own translation). It is not difficult to find cases of countries that are not favourable to respect for democracy, which effusively defend the principle of sovereignty and non-intervention in order to perpetuate their undemocratic political

¹⁰⁷ As examples, 15-M Movement in Spain or Yosoy132 in México.

¹⁰⁸ A. Jarillo Aldenuéva, *supra*, n. 27, at 742 ff.

¹⁰⁹ Approved in World Conference of Human Rights, on 25 June 1993.

¹¹⁰ World Summit Final Document 2005, cit. A/RES/60/1, at 135-136.

¹¹¹ A. Mangas Martín, *supra*, n. 9, at 32.

¹¹² L. Ali Kahn, *A theory of Universal Democracy. Beyond the end of history*, (Martinus Nijhoff Publishers, 2003).

¹¹³ J. Crawford, *supra*, n. 62, at 107.

¹¹⁴ J. A. Pastor Ridruejo, ‘Le Droit international à la veille du vingt et unième siècle: normes, faits et valeurs’, 274 *RCADI* (1998), at 305.

regimes or even systems whose democratic quality is in full decline.

However, to close the above exposition, we share with Mangas Martín the difficulty of denying the “ecumenism of the democratic model as rule of law and as an international obligation of the States”¹¹⁵ in the current international society. As she continues:¹¹⁶

“Although the substantial democratic system is variable, and there is no single definition or unique model, on the contrary, the standards of freedom, equality, human rights, political and union pluralism, free elections and submission to the law and the judiciary, these constitute its universal ‘DNA’”.

Consequently, we conceive “democracy” as a general trend, a universal value, a goal and a political commitment of the majority of the States and it rises as a guiding principle of the present international society. However, in the first decades of XXI century, democracy doesn’t constitute a legally enforceable human right in most of the world, except in the cases of Western Europe and America; in the rest of the world, the principle of State sovereignty and the freedom to choose its own political, economic and social model prevail; at present, there is not a legal obligation to adopt a democratic system in International Law. Nevertheless, for its part, the right to political participation in democratic elections, despite it is not respected in some countries in the world, it is a legally enforceable human right for individuals and clearly binding for all the States that ratified the ICCPR, that are accepting the UN resolutions promoting the principle of fair and free elections and that are holding elections to elect its representatives. Finally, as a result of our study, despite the differences between the right to political participation in democratic elections and the right to democracy in legal terms, we can affirm that the right to political participation in democratic elections is contributing at different speed to the emergence of a right to democracy in various regions of the world. However, the emergence of a universal right to democracy does not seem very feasible in the next decades. The universalization of the right to democracy will continue to require a solid and constant commitment of most of States and international organizations (such as the UN and the organizations that carry out international electoral observation activities) in the promotion of democracy and electoral democracy at the national and international level.

(G) CONCLUSIONS

1. Article 25 of the ICCPR proclaims the right to political participation as universal, and constitutes a norm of general acceptance, a norm with *erga omnes* effect. The right to political participation in public affairs by the citizens is a mandatory right for States, and it is enforceable, from a subjective or individual point of view, before United Nations committees. However, in the beginning, there was no mention nor link of this right with the idea of democracy.

2. The principle of genuine and periodic elections proclaimed repeatedly by the UN General Assembly in many of its resolutions has become a basic principle of Public International Law for the promotion of the democratization of electoral processes and political systems; therefore, for the General Assembly, genuine and periodic elections and democracy were to become inextricably linked.

3. The original right to political participation of article 25 ICCPR has been transformed thanks to the work of the United Nations (and by the practice of many States) to develop and promote the “principle of free and fair elections” into a “*right to political participation in democratic elections*”.

¹¹⁵ A. Mangas Martín, *supra*, n. 9, at 109

¹¹⁶ *Ibid.*, at 110.

4. The transition process from the right to political participation to a right to political participation in democratic elections is also supported and developed by the international election observation activities. The most “comprehensive” and independent electoral observation missions (OSCE, EU and OAS) are essential in this transition process: they work as control mechanisms on the compliance of the right to political participation in democratic elections; they are developing “soft law” electoral standards; they are fostering democratic electoral practices worldwide; they are also promoting norms and standards for the holding of democratic elections; and finally, their reports are used as the basis for the adoption of reaction measures in case of non-compliance with international electoral rules.

5. In the current scope of International Law, we conclude that it exists a universal right to political participation in democratic elections as a legally enforceable human right for individuals and clearly binding for all the States that ratified the ICCPR, that accept the UN resolutions promoting the principle of fair and free elections and that are holding elections periodically to elect its representatives.

6. This right to political participation in democratic elections is acting as a stimulus for the emergence of a right to democracy in various regions of the world (mainly, in Western Europe and America).

7. Although the universal international instruments do not include “democracy” as a right of either peoples or citizens, democracy is becoming a guiding principle at the international level. The successive democratizing waves, the proliferation of electoral processes observed by international organisations, the United Nations resolutions in support of the democratization of international society and the Organization’s own daily actions irreversibly lead to the proclamation of “democracy” as one of the aims and objectives of the United Nations and, therefore, of the states of the current international community.

8. As a consequence of this evolution, today democracy has emerged as a superior value of the international legal order and a guiding principle for States, individuals and international organisations in the current international community.