DOCTORAL DISSERTATION

LOCALIZATION
AND
PARTICIPATION:
DEMOCRACY FROM BELOW

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To my father and best mate:

Charles Winton Slidders

(16 January 1946 - 31 January 2015)

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At its core this dissertation is about communities. My work on it began before the Covid-19 pandemic and continued throughout the lockdown and emergency response. My hometown of Arenys de Mar, Catalonia, exemplified the resilience and camaraderie of local communities throughout the course of the pandemic (and beyond); and demonstrated the possibilities of democratic local governance. Here, I acknowledge the value -- and inspiration -- of my local community.

Charles Slidders
Arenys de Mar
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ABSTRACT

Localization and Participation: Democracy from Below analyses the emerging normative value of local governance and participatory democracy. Democratic legitimacy has, historically, been of little relevance to state and government recognition. Referenda are becoming a precondition to state recognition. Representative democracy is emerging as a 'right'. The implementation of representative democracy is also increasingly relevant to state and government recognition. However, referenda and representative democracy are imperfect mechanisms for ascertaining the consent of the population to coercive authority -- *democratic* legitimacy. States and governments, as well as the international community, have recognized that democratic legitimacy can be enhanced by the devolution of power to local authorities and the local implementation of participatory democracy. *Localization and Participation: Democracy from Below* examines whether the growing recognition of the importance of local governance and civic participation, and their increasing implementation around the world, is leading to the development of a normative right to local governance and direct participation.

RESUM

Localization and Participation: Democracy from Below analitza el valor normatiu emergent de la governança local i la democràcia participativa. La legitimitat democràtica ha tingut, històricament, poca rellevància en el reconeixement d'Estats i governs. Els referèndums s'estan convertint en una condició prèvia per al reconeixement estatal, la democràcia representativa està emergint com un 'dret' i la implementació de la democràcia representativa també és cada cop més rellevant per al reconeixement estatal i governamental. Tanmateix, els referèndums i la democràcia representativa són mecanismes imperfectes per comprovar el consentiment de la població envers l'autoritat coercitiva -la legitimitat democràtica. Els Estats i els governs, així com la comunitat internacional, han reconegut que la legitimitat democràtica es pot millorar mitjançant la devolució del poder a les autoritats locals i la implementació local de la democràcia participativa. *Localization and Participation: Democracy from Below* examina si el reconeixement creixent de la importància de la governança local i la participació civil, així com la seva implantació creixent arreu del món, està conduint al desenvolupament d'un dret normatiu a la governança local i la participació directa.

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TABLE OF ACRONYMS/ABBREVIATIONS

ACFC	The Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities
ACHR	American Convention on Human Rights
BCE	Before the Common Era
CE	Common Era
CIS	Commonwealth of Independent States
CJEU	Court of Justice of the European Union
CLRA	Congress of Local and Regional Authorities of the Council of Europe
CoE	Council of Europe
CoM	Council of Ministers of the Council of Europe
CoR	Committee of Regions of the European Union
COVID-19	Coronavirus disease
CSCE	Conference for Security Co-operation in Europe
EC	European Community
ECEU	European Commission of the European Union
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
ELLA	Evidence and Lessons from Latin America
EU	European Union
EUI	European University Institute
Eur. Com. HR	European Commission of Human Rights
Exp. Mem.	Explanatory Memorandum
Exp. Rep.	Explanatory Report
FARC	Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*)
FCNM	Framework Convention for the Protection of National Minorities
FLN	*Front de Libération Nationale*
FRA	Fundamental Rights Agency of the European Union
FRY	Federal Republic of Yugoslavia
GA	General Assembly

GCEDS	Global Commission on Elections, Democracy and Security
GFMD	Global Forum on Migration and Development
GSDRC	Governance and Social Development Resource Centre
GTLRG	Global Taskforce of Local and Regional Governments
HCNM	High Commissioner on National Minorities
HLG	High Level Group
HRC	Human Rights Council of the United Nations
HR Comm.	Human Rights Committee of the United Nations
HRCN	Human Rights City Network
IADC	Inter-American Democratic Charter
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLEI	Local Governments for Sustainability (formerly, the International Council for Local Environmental Initiatives)
ICSID	International Centre for Settlement of Investment Disputes
ICT	Internet Communications Technology
ILC	International Law Commission
ILO	International Labor Organization
IPCC	The Intergovernmental Panel on Climate Change
IPU	Inter-Parliamentary Union
KFOR	Kosovo Force
LSE	London School of Economics and Political Science
MINURSO	United Nations Mission for the Referendum in Western Sahara
MLG	Multi-Level Governance
NATO	North Atlantic Treaty Organization
NGO	Non-governmental Organization
NRM	National Resistance Movement (Uganda)
OECD	Organization for Economic Co-operation and Development
ODIHR	OSCE Office for Democratic Institutions and Human Rights
OHCHR	Office of the High Commissioner for Human Rights

ONUVEH	United Nations Observers for Verification of Elections in Haiti
OSCE	Organization for Security Co-operation in Europe
PACE	Parliamentary Assembly of the Council of Europe
PB	Participatory Budget or Budgeting
PNG	Papua New Guinea
Res.	Resolution
RTI	Research Triangle Institute
SADC	Southern African Development Community
SC	Security Council
SFRY	Socialist Federal Republic of Yugoslavia
SRBH	Socialist Republic of Bosnia - Herzegovina
SUSM	State Union of Serbia and Montenegro
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UCLG	United Cities and Local Governments
UDHR	Universal Declaration of Human Rights
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCDF	United Nations Capital Development Fund
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNGA	United Nations General Assembly
UN Habitat	United Nations Human Settlements Programme
UNHCR	United Nations High Commissioner for Refugees
UNHCHR	United Nations High Commissioner for Human Rights
UNICEF	United Nations Children's Fund (formerly United Nations International Children's Emergency Fund)
UNMIK	United Nations Mission in Kosovo
UNMIS	United Nations Mission in Sudan
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
US	United States of America
USSR	Union of Soviet Socialist Republics
VLR	Voluntary Local Review
WACLAC	World Associations of Cities and Local Authorities Coordination
WHO	World Health Organization

INTRODUCTION

A. Legitimacy and International Law

We live in a time of crises.[1] There is a 'refugee crisis' resulting from the reluctance of western states to resettle displaced persons fleeing war, famine and persecution; the United Nations High Commissioner for Refugees estimates that more than 2 million refugees will require resettlement this year (2023).[2] There is the existential 'climate crisis' relating to rising temperatures caused by greenhouse gas emissions and the catastrophic consequences of melting polar ice caps and rising sea levels, extreme weather events, long-term droughts and irreversible damage to ecosystems.[3] There is the 'housing crisis' caused, at least in part, by the limited availability of credit following the 2008 financial crisis. According to UN Habitat, the world needs to build 96,000 new affordable homes every day, to house approximately 3 billion people, by 2030.[4] And then there is the crisis unleashed by the Covid-19 pandemic. In the World Health Organization's *Weekly Epidemiological Update on Covid-19*, it was reported that, as of 26 March 2023, the coronavirus pandemic had claimed over 6.8 million lives and infected approximately 761

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[1] For ease of reference, footnotes are renewed at the beginning of each *Chapter*. All websites cited in this dissertation were last accessed in March 2023.

[2] UNHCR, *The Refugee Brief* (24 June 2022). https://www.unhcr.org/refugee brief/latest-issues/.

[3] UN, 75/2020 and Beyond - Shaping our future together, *The Climate Crisis – A Race We Can Win* (2020) (Website). https://www.un.org/en/un75/climate-crisis-race-we-can-win.

[4] Victoria Masterson, 'What has caused the global housing crisis - and how can we fix it?*' World Economic Forum* (16 June 2022). https://www.weforum.org/agenda/2022/06/how-to-fix-global-housing-crisis/.

million people.[5] Our institutions of governance have manifested an inability to pre-empt and respond to these crises in what has been labelled a 'crisis in governance'.[6]

The crisis in governance is accompanied by, and symptomatic of, a crisis of 'legitimacy' pertaining to both states and their governments.[7] 'Legitimacy' is a contested concept.[8] The legitimacy of a state, and the exercise of its derivative authority by the government, ostensibly depends on the consent of those subject to its coercive authority.[9] The consistent compliance of a population to the exercise of political authority is purportedly a reflection of the population's consent and, therefore, its 'legitimacy'. The decisions of a supposedly legitimate political authority are obeyed because they are accepted and believed to be legitimate.[10] International law has

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[5] WHO, *Weekly epidemiological update on COVID-19* (No. 136, 30 March 2023). https://www.who.int/publications/m/item/weekly-epidemiological-update-on-covid-19---30-march-2023.

[6] *See, eg.,* UNDP and Southern Voice, *COVID-19 and the Crisis of Governance: The Impact of the Pandemic on Peace, Justice and Inclusion (SDG 16)* (2022). https://www.undp.org/policy-entre/oslo/publications/covid-19-and-crisis-governance-impact-pandemic-peace-justice-and-inclusion-sdg-16.

[7] Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford University Press, Oxford, 2004) 281. ISBN: 978-0-19-929798-6.

[8] Melissa Schwartzberg, 'Introduction', (2019) 61 *Nomos: Political Legitimacy* 1, 1. https://www.jstor.org/stable/10.2307/26786309. *See also* Anna Stilz, *Territorial Sovereignty: A Philosophical Exploration* (Oxford University Press, Oxford, 2019) 89. ISBN: 978-0-19-883353-6.

[9] Ruth C. A. Higgins, *The Moral Limits of the Law: Obedience, Respect, and Legitimacy* (Oxford University Press, Oxford, 2004) 97. ISBN: 9780199265671.

[10] From a Weberian sociological perspective, legitimacy is psychological in that it 'rests upon subjects' actual beliefs about the justification of the regime, the circumstances under which legal authority elicits voluntary consent. The basis for

traditionally adopted the notion that legitimacy is reflected in the exclusive and uncontested control of territory, and the habitual obedience of the population. Thus, effective control is reflected in the largely unchallenged ability to assert coercive authority, which could be achieved by violence, or the threat of violence, fraud, subjugation or dispossession. Effective control satisfied international law's recognition doctrines. The free and genuine manifestation of consent -- *democratic* legitimacy -- was irrelevant to recognition.

In international law, 'recognition' is a decision that a state is a 'legitimate' member of the international community.[11] Although recognition is largely a political process, it is underwritten by international law: it is a 'law-governed political process.'[12] A state

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that belief was, according to Weber's famous typology, a result of tradition (resting on a belief in the sanctity of traditional bearers of authority); a charismatic individual (a belief resting on the devotion to the legitimacy of the dictates of an individual); or rationality (a belief in the legality of the exercise of authority). Richard W. Smith, 'The Concept of Legitimacy', (1970) 35 *Theoria: A Journal of Social and Political Theory* 17, 18, 24 (citing Max Weber, *The Theory of Social and Economic Organization*, (1947) 328). https://www.jstor.org/stable/4180 1858. *See also*, Martin E. Spencer 'Weber on Legitimate Norms and Authority', (1970) 21(2) *The British Journal of Sociology* 123, 124. https://www.jstor.org/stable/588403. *See also,* Craig Matheson, 'Weber and the Classification of Forms of Legitimacy, (1987) 38(2) *The British Journal of Sociology* 199, 200. https://www.jstor.org/stable/590532.

[11] Jürgen Habermas, *Communication and the Evolution of Society* (trans. Thomas McCarthy) (Beacon Press, Boston, 1979) 178-79. ISBN: 0-8070-1513.

[12] Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing, Oxford, 2013) 10. ISBN: 978-1-84946-469-7.

may exist independent of recognition, but there is no more important element of statehood.[13]

Typically, in commencing a discussion on statehood and territorial governance one must engage with the 'great debate' as to whether the emergence of a state is a question of fact or depends on its recognition as a 'state' by other states; an intellectually salutary but largely otiose discussion of two theories: the 'constitutive theory' and the 'declaratory theory.'[14] The declaratory theory supposes that statehood depends on factual circumstances and a political entity that satisfies predetermined criteria is a state, irrespective of recognition.[15] Article 3 of the *Montevideo Convention on the Rights and Duties of States* (1933) (Montevideo Convention) specifically provides that '[t]he political existence of the State is independent of recognition by the other States' and '[e]ven before recognition the State has the right to defend its integrity and independence.'[16] In contrast, the constitutive theory deems statehood to depend on recognition by other states. Although membership of the United Nations is important, the required number of recognizing states is

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[13] Brad R Roth, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order* (Oxford University Press, Oxford, 2011) ('Roth (2011)') 169. ISBN: 978-0-19-534266-6.
[14] Vidmar, *supra* n. 12, at 43.
[15] Martin Dixon, Robert McCorquodale, and Sarah Williams, *Cases & Materials on International Law* (Oxford University Press, Oxford, 5th ed., 2011) 158. ISBN: 978-0-19-956271-8.
[16] Seventh International Conference of American States, *The Inter-American Convention on the Rights and Duties of States* (1933), No. 3802 UNTS 1761, (Montevideo Convention), Art. 3. DOI:10.18356/ade2f6c8-en-fr. ISBN: 9789210596800. *See also,* Malcolm N. Shaw, *International Law* (Cambridge University Press, Cambridge, 9th ed., 2021) 380. ISBN: 978-1-108-73305-2.

unclear, 'a great deficiency of the constitutive theory.'[17] Irrespective of whether a state exists without recognition, a political entity will not enjoy the full benefits of statehood without recognition.

The notion that the exercise of control and the population's habitual compliance reflects the legitimacy of a political authority was adopted in international law's traditional recognition doctrines, which are based on the customary law principle of effectiveness,[18] and codified by Article 1 of the Montevideo Convention.[19] Article 1 is the most 'prominent account' [20] and 'widely accepted formulation'[21] of a state. It provides that a state should have a permanent population, a defined territory and an efficacious government.[22] The principle of effectiveness or the 'effective control' doctrine provides that the primary criterion of recognition is

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[17] Vidmar, *supra* n. 12, at 43. Kosovo, as of July 2022, was recognized as a 'state' by almost 100 states but is not generally considered to be an independent state and is not admitted to the UN. *See, World Population Review* (Website). https://world populationreview.com/country-rankings/countries-that-recognize-kosovo.

[18] James Crawford, *The Creation of States in International Law* (Oxford University Press, Oxford, 2006) 97. ISBN: 9978-0-19-922842-3.

[19] David J. Harris, *Cases and Materials on International Law* (Sweet & Maxwell, London, 5th ed., 1998) 102. ISBN: 9780421534704. *See also* Timothy Meyer, 'Codifying Custom', (2012) 160(4) *University of Pennsylvania Law Review* 995, 1036 n 151. https://www. jstor.org/stable/41511299.

[20] Dominik Zaum, *The Sovereignty Paradox: The Norms and Politics of International Statebuilding* (Oxford University Press, Oxford, 2007) 33. eBook ISBN: 9780 191708671. https://doi.org/10.1093/acprof:oso/9780199207435.001. 0001.

[21] Malcolm N. Shaw, 'Peoples, Territorialism and Boundaries', (1997) 3 *European Journal of International Law* 478, 491. http://www.ejil.org/pdfs/8/3/1457.pdf.

[22] Montevideo Convention, *supra* n. 14, at Art. 1. Article 1 of the Montevideo Convention purportedly includes a fourth criterion of statehood: the 'capacity to enter into relations with other States.' This is not however a criterion of statehood, but rather a consequence. *See* Crawford, *supra* n. 18, at 61-2.

the political entity's effective control of its territory, irrespective of how that effectiveness is achieved.[23]

The recognition of a political entity enables it to exercise the sovereign powers of statehood. However, a state is an abstraction and can only act through its human agents. The government is the state's designated human agent. The recognition of a state's government enables the government to exercise the monopoly of violence, derivatively as the agent of the state, and theoretically free of external interference.[24] Like states, governments were recognized on the basis of their 'effective control of internal affairs' reflected in the 'habitual control of the population';[25] how the government attained or maintained the habitual obedience of the population or otherwise exercised the state's authority was also largely irrelevant to recognition.[26] International law's traditional recognition doctrines thus conferred 'legitimacy' irrespective of the nature of the state or government.

International norms evolve, and conceptions of legitimacy change. Following the collapse of the Berlin War and the end of the Cold

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[23] Roth (2011), *supra* n. 13, at 182.
[24] Max Weber, *Politics as a Vocation* (1919) in Max Weber, *Weber's Rationalism and Modern Society* (Tony Waters and Dagmar Waters (trans. and ed.)) (Palgrave Macmillan, New York, 2015) 129-198. ISBN: 978-1-137-36586-6. https://doi.org/10.1057/9781137365866.
[25] Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford University Press, Oxford, 2000) 2. ISBN: 9780199243013.
[26] Brad R. Roth, 'Secessions, Coups, and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine', (2010) 11 *Melbourne Journal of International Law* 393, 395. http://classic.austlii.edu.au/au/journals/MelbJIL/2010/14.html.

War, and the sudden emergence of new democracies in Eastern Europe, states and governments increasingly recognized that their legitimacy was enhanced by the free and genuine manifestation of popular consent. In the early 1990s, prominent and respected academics postulated that a 'right to democratic governance' or a 'democratic entitlement' was emerging. In 1992, in his seminal article 'The Emerging Right to Democratic Governance', Thomas Franck asserted that international law was in the process of developing, through state practice and international instruments, 'a normative entitlement to a participatory electoral process.'[27] In the same year, Gregory H. Fox, in the Yale Journal of International Law, concluded that there was a 'right to political participation in international law,' based on international human rights covenants and the role of UN election monitoring.[28] Consequently, international law's recognition doctrines also began to evolve to include elements of *democratic* legitimacy as a precondition to recognition.

This emergent 'democratic entitlement' is based on the 'right to take part' or participate in political affairs articulated in international human rights covenants together with growing state practice, international interventions to restore deposed elected governments, a plethora of international and regional instruments promoting democratic governance, as well as the increasing role of UN election

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[27] Thomas M. Franck, 'The Emerging Right to Democratic Governance', (1992) 86(1) *The American Journal of International Law* 46, 90. DOI:10.2307/2203138.
[28] Gregory H. Fox, 'The Right to Political Participation in International Law', (1992) 17 *Yale Journal of International Law* 539, 607. http://hdl.handle.net/20.500.13051/6275.

monitoring.[29] It is primarily satisfied, at its most basic level, through the implementation of mechanisms of representative democracy. Indeed, the paradigm of contemporary democratic governance is representative democracy: the election of representatives by free, genuine and periodic elections. Contemporary political scientists frequently assert that election-centric representative democracy is flawed, and elections are not a genuine reflection of the consent of the population.[30] The flaws in representative democracy are reflected in declining voter turnout, political disengagement, and increasing distrust in elected representatives and political processes. However, representative democracy is perhaps the only feasible method of enabling a modicum of participation in public affairs to citizens in a population of millions across an expansive geographical space.[31]

The primary jurisdiction of a state over the population within its territory is also paradigmatic.[32] For the most part, states established

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[29] Fox, *supra* n. 28, at 607. Franck, *supra* n. 27, at 53.
[30] *See, e.g.* David Van Reybrouck, *Against Elections: The Case for Democracy* (Liz Waters (trans.)) (Seven Stories Press, Kindle ed., New York, 2016). ISBN 9781609808112. Simon Tormey, *The End of Representative Politics* (Polity Press, Kindle ed., Cambridge, 2015). ISBN: 978-0-7456-9050-6. Hélène Landemore, *Open Democracy: Reinventing Popular Rule for the Twenty-First Century* (Princeton University Press, Princeton, 2020). ISBN: 9780691181998.
[31] *Marshall v Can. (also known as Mikmaq Tribal Society v. Canada)* (1991), Communication No. 205/86 (1991) (HR Comm.), paras 5.4-5.5. *See also*, Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Material and Commentary* (Oxford University Press, Oxford, 3rd ed., 2013) 733. ISBN: 978-0-19-873374-4.
[32] Today, with the exception of a few isolated oceanic rocks, some disputed territories and Antarctica there is no land outside the territory of a state. Steven R.

before the end of the Cold War, were recognized and their territory delineated as the consequence of effective control attained through violence, the threat of violence, fraud, subjugation, or dispossession. Before 1989, referenda were sporadically utilized to confer an element of *democratic* legitimacy on putative states.[33] The *democratic* legitimacy of states depends on the consent of the population to its coercive authority.[34] The manifestation of the 'free and genuine' will of the population in a referendum confers a *degree* of democratic legitimacy on a state, depending on the referendum's validity.[35] Referenda are, however, a defective mechanism for ascertaining the consent of the population to statehood and a plethora of indeterminate, objective and subjective variables impact referenda results. Accordingly, referenda offer only an imperfect reflection of the 'free and genuine' will of the population. In any event, the democratic legitimacy of *new* states is also becoming increasingly

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Ratner, 'Drawing a Better Line: UTI Possidetis and the Borders of New States', (1996) 90(4) *The American Journal of International Law* 590, 595. https:// www.jstor.org/stable/2203988.

[33] Theoretically, all states have a deficiency of democratic legitimacy because states are delineated by non-porous boundaries that create a territorially exclusive polity and it is impossible to democratically self-define the population. *See Infra,* Ch. 5.2.

[34] Sofia Näsström, 'The Legitimacy of the People', (2007) 35(5) *Political Theory* 624, 626. https://www.jstor.org/stable/20452587.

[35] *See*, *e.g.,* Raffaele Marchetti, *Global Democracy: For and Against; Ethical Theory, Institutional Design and Social Struggles* (Routledge, Oxford, 2008). eBook ISBN: 9780415554954. https://doi.org/10.4324/9780203928806. Archon Fung, 'The Principle of Affected Interests: An Interpretation and Defense', in Roger M. Smith and Jack H. Nagel (eds), *Representation: Elections and Beyond* (University of Pennsylvania Press, Philadelphia, 2013) 236-268. ISBN: 9780812245141. *See also*, Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of International Law* (Oxford University Press, Oxford, 2010). ISBN: 9780199228317.

relevant to international law's recognition doctrines and, since the end of the Cold War (the 'Post-Wall Era'),[36] a referendum may have emerged as a prerequisite to the recognition of a *new* state.

Over the last three decades, international law therefore appears to have evolved to include, as a prerequisite to recognition, an element of democratic legitimacy, at least in certain circumstances. The relevance of 'effective control' appears to have concomitantly declined. The postulated emergence of the 'democratic entitlement' followed governments 'recogniz[ing] that their legitimacy depend[s] on meeting a normative expectation of the community of states' and thus 'those who seek the validation of their empowerment patently govern with the *consent* of the governed.'[37]

The evolution of international norms is ongoing. Putative democracies have a 'democratic deficit' resulting from their almost exclusive reliance on elections and representation. Today, states and governments are increasingly recognizing that their legitimacy may require more than the manifestation of consent in periodic elections, and 'the main discourse on democracy today is about how to *complement* representative democracy.'[38] International and regional organizations have also recognized that 'representation can no longer

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[36] *See,* Timothy Garton Ash, 'Ukraine in Our Future', *New York Review of Books* (23 February 2023) LXX (3), 39. https://www.nybooks.com/articles/2023/02/23/ukraine-in-our-future-timothy-garton-ash/.
[37] Franck, *supra* n. 27, at 46 (emphasis added).
[38] Cristina Fraenkel-Haeberle, Sabine Kropp, Francesco Palermo and Karl-Peter Sommermann (eds), *Citizen Participation in Multi-Level Democracies* (Brill Nijhoff, Leiden/Boston, 2015) ix (emphasis added). ISBN: 9789004287938.

be the only expression of democracy'.[39] There is an increasing recognition of the importance of the 'direct' element of 'participation' in democratic governance, and that participatory and deliberative mechanisms may increase civic participation and involvement and encourage inclusion and dialogue. There is also an increasing recognition that empowering alternative levels of territorial governance may improve the *democratic* legitimacy of the state.

While the crisis unleashed by the pandemic has exposed the fluctuating competence and culpability of various levels of governance, it has precipitated a resurgence in 'community spirit' and has highlighted the importance and *legitimacy* of local governance.[40] Indeed, the Office of the High Commissioner of Human Rights has recognized that 'local government must also be part of the recovery from the pandemic to rebuild better and more resilient cities, reducing urban inequalities and mitigating the impact on those in situations of vulnerability to future shocks.'[41] Local authorities have also taken the lead in addressing the other crises of our times -- climate change, the refugee crisis and the housing

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[39] *Ibid.*

[40] *See, e.g.*, UK, Department for Digital, Culture, Media & Sport and Baroness Barran MBE, *New Government survey results underline community spirit generated during pandemic: Results from the Community Life Survey 2020/21* (30 July 2021). https://www.gov.uk/government/news/new-government-survey-results-underline-community-spirit-generated-during-pandemic.

[41] Nada Al-Nashif, Deputy High Commissioner for Human Rights, 'The Role of Local Government in Ensuring Human Rights in Post-Pandemic Recovery' (Human Rights Council, Conference: Local Government and Human Rights, 1 October 2021). https://www.ohchr.org/en/statements/2021/10/role-local-government-ensuring-human-rights-post-pandemic-recovery.

shortage. National governments have demonstrably failed to address the challenges of climate change: only eight of the 32 largest polluters have taken steps, or even adopted policies, to achieve the goal of the Paris Climate Change Accords. [42] In contrast, many local governments have been adopting practical policies to mitigate global warming and have led the way in adopting policies to confront climate change. [43] Likewise, municipal and local governments around the world have defied national governments to offer sanctuary to undocumented migrants. They have also directly confronted the challenges of the housing crisis and adopted innovative policies to provide affordable housing.

Localization and Participation: Legitimacy from Below is a critical examination of the evolution of international law's recognition doctrines. In doing so, it investigates the democratic legitimacy of states and governments both in the past and in a contemporary context, and international law's legitimizing role. It also assesses the defects of referenda and representative democracy. More importantly, the dissertation analyses the possible democratizing virtues of localization and participatory democracy. Local governance is the level of governance closest to the people and

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[42] *See*, *The Climate Action Tracker* (Website). https://climateactiontracker.org/countries/. *See also,* Amanda Erikson, 'Few countries are meeting the Paris climate goals. Here are the ones that are', *Washington Post* (11 October 2018). https://www.washingtonpost.com/world/2018/10/11/few-countries-are-meeting-paris-climate-goals-here-are-ones-that-are/?noredirect=on.

[43] Haley Soboslay, 'Local Communities Take the Lead on Addressing Environmental Issues', *Earth Law Centre* (14 August 2019). https://www.earthlawcenter.org/blog-entries/2019/8/local-communities-take-the-lead-on-addressing-environmental-issues?

potentially enables greater direct participation in governance. Mechanisms of participatory democracy also enable greater participation and involvement in government and may reduce voter apathy and political disenchantment. This dissertation questions whether the *democratic* legitimacy of states and their governments can be enhanced by adopting policies of localization -- that is decentralization to the local level -- and the local implementation of mechanisms of participatory democracy.

States and governments, as well as the international community, appear to increasingly recognize that the decentralization of political power, particularly to the local level, and facilitating direct participation in governance, enhance democratic legitimacy. *Localization and Participation: Legitimacy from Below*, in analysing the increasing implementation and endorsement of mechanisms of participatory democracy and decentralization to the local level, considers whether international legal norms are evolving in recognition of the *democratizing* value of local governance[44] and direct participation.[45]

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[44] Local governments', 'municipalities' and 'cities' are used interchangeably and are defined, in accordance with the *Global Charter-Agenda for Human Rights,* as 'a local government of any size: regions, urban agglomerations, metropolises, municipalities and other local authorities freely governed.' UCLG, *Global Charter-Agenda for Human Rights in the City* (2011). https://www.uclg-cisdp.org/sites/default/files/UCLG_Global_Charter_ Agenda_HR_City_0.pdf.

[45] Participatory democracy is also sometimes used to refer to electoral democracy -- being participation in elections. Here, 'participatory democracy' is used to refer to *direct* participation in a decision-making process, but unlike referenda and recall votes the participatory process may not necessarily decide the issue in question.

Local governments are at the coalface of human rights protection and have taken ownership of the human rights agenda. Even though international law is state-centric and local governments are not formally recognized in international law, existing or emerging norms influence international law, and this dissertation will also evaluate the impact of the local implementation of human rights on the development of international legal norms.

B. The Euro-Centric Nature of International Law, Statehood and Democratic Governance

Statehood, sovereignty and international law were European inventions and most frequently attributed to the Westphalian settlement of 1648.[46] They were 'the product of the conscious activity of the European mind' and draw their 'essence from a common source of beliefs [...] mainly of Western European origin.'[47] Classical international law adopted the dubious 'standard of civilization' doctrine to ensure that 'statehood' and sovereignty were limited to political entities developed in the Western cultural tradition -- an exclusive club.[48] The imposition of these spurious prerequisites

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[46] Alexander B. Murphy, 'The sovereign state system as political-territorial ideal: historical and contemporary considerations', in Thomas J. Biersteker and Cynthia Weber (eds), *State Sovereignty as Social Construct* (Cambridge University Press, Cambridge, 1996) 81-120, at 84. ISBN: 0-521-56599-5. *See also*, Stephen D. Krasner, 'Compromising Westphalia', (1995-1996) 20(3) *International Security* 115-151. https://www.jstor.org/stable/2539141.

[47] Jan Hendrik Willem Verzijl, *International Law in Historical Perspective, Vol I* (A.W. Sijthoff, 1968) 435-436. OCLC: 898315755.

[48] Accordingly, sovereignty and international law 'by definition did not and could not apply to uncivilised nations,' which evoked a civilization versus 'savages'

for statehood reduced the possibility of statehood and sovereignty for non-Western societies, particularly in Africa.[49] However, the development of political entities in the Global South was, in many ways, parallel with Europe's and within a similar timeframe. For instance, the states of the Maghrib were undoubtedly functional from at least the 10th Century under ruling dynasties of the Almoravids, Almohads, Habids and Fatimids. South of the Sahara, the Assante, of what is modern day Ghana, at approximately the same time as the Westphalian settlement, unified its Akan clans by the adoption of a constitution that 'set out the structure of the government [and] the divisions of labour, and the main elements of early Assante political culture.'[50] Likewise, Mali, Songkey, and Kaneoun, were 'functionally strong state formations' and 'like European states were able to enclose a vast area within its rule to extract from it both tax and tribute.'[51] Around 1500, early forms of states also crystalized in East Africa. Ufipa in Tanzania, southeast of Lake Taganyika, was home to the Fipa 'who were members of a cluster of loosely related

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dichotomy. Tanja E. Aalberts, 'Rethinking the Principle of (Sovereign) Equality as a Standard of Civilisation', (2014) 42(3) *Millennium: Journal of International Studies* 767, 778. https://doi.org/10.1177/0305829814543731. Sovereignty was thus a 'gift of civilisation.' Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law*, *1870–1960* (Cambridge University Press, Cambridge, 2001) 86, 110. eBook ISBN: 9780511494222. DOI: https://doi.org/10.1017/CBO9780511494222. *See also*, Zaum, *supra* n. 20, at 38.

[49] Amy Niang, 'Rehistoricizing the Sovereignty Principle: Stature, Decline, and Anxieties About a Foundational Norm' in M. Iñiguez de Heredia, Z. Wai (eds) *Recentering Africa in International Relations* (Palgrave Macmillan, Cham, 2018) 121-144, at 126. ISBN: 978-3-319 -67510-7. https://doi.org/ 10.1007/978-3-319-67510-7_5.

[50] Basil Davidson, *The Black Man's Burden: Africa and the Curse of the Nation State* (James Currey, London, 1992) 60. ISBN: 0-85255-700-0.

[51] *Ibid.*, at 93.

communities' that 'became a viable state by at least 1700.'[52] These 'state-like' political entities were not recognized as sovereign states, which enabled and justified colonialism.[53]

Democracy, even in its contemporary representative guise, is not necessarily an exclusively Western value nor necessarily of European origin. Democracy is purportedly a Greek invention beginning in the Athenian city-state. The English and Catalans both claim to have first instigated parliamentary governance.[54] But representative governance is not uniquely Western. In the Assante state, a representative assembly -- 'a kind of parliament' -- met at the annual yam festival.[55] Similarly multi-level governance did not emanate

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[52] *Ibid.*

[53] Statehood and the attributes of sovereignty were utilized in early international law discourse to distinguish 'civilized' and thus sovereign states from the 'other' non-civilized or 'barbaric' political entities. The origins of international law discourse may be traced to the sixteenth-century Spanish theologian and jurist, Francisco de Vitoria. Vitoria's two famous lectures, *De Indis Noviter Inventis* ('On the Indians Lately Discovered') and *De Jure Bellis Hispanorum in Barbaros* ('On the Law of War Made by the Spaniards on the Barbarians'), sometimes designated as the founding texts of international law, concerned Spain's colonial conquest of the Americas. In the texts, Vitoria utilized sovereignty to justify the forcible subjugation of Indians on the basis of their otherness. The Indian -- the other -- could never be sovereign and therefore any opposition by them to the sovereign could be met with force. '[F]or Vitoria, sovereignty doctrine emerges through his attempts to address the problem of cultural difference.' Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2005) 16. DOI:10.1017/CBO97805116142 62. ISBN: 9780511614262. *See also*, David Kennedy, 'Primitive Legal Scholarship', (1986) 27(1) *Harvard International Law Journal* 1-98. https://heinonline-org.sare.upf.edu/HOL/Page?collection=journals&handle=hein.journals/hilj27&id =10 &men_tab=srchresults.

[54] Simon Harris, *Catalonia Is Not Spain: A Historical Perspective* (4Cats Books, Kindle ed., Barcelona, 2014) 55. ISBN: 978-1502512307.

[55] T. B. Freeman, *The Western Echo*, No. 1 (March 1886), at 8 (quoted in Davidson, *supra* n. 50, at 60).

solely from Western traditions. The Huron adopted multi-level collective governance consisting at the level closest to the people, the village, then the tribal intermediate level before, ultimately, the confederacy. [56] Representative democracy -- or republican governance -- emerged as the prevalent mechanism of democratic governance only in the late 18th and early 19th Centuries.

Today, there is an ongoing debate about whether democracy has to take the form of 'liberal' democracy or whether democracy itself can be 'illiberal.'[57] Asian proponents of cultural relativism frequently 'have argued that the Western model does not work in an Asian context because Asia is grounded in a cultural context that differs hugely from that of the West.'[58] Instead, 'Asian values' were 'based on the community rather than the individual, consensus rather than opposition, and strong governments rather than political pluralism.'[59]

This dissertation is predicated on an assumption, perhaps misguided, that the values of democratic consent to coercive authority and the ability of all to participate in government are universal: as Noam Chomsky said, '[i]t's an essential feature of human nature that people should be free, should be able to participate and should be un-

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[56] David Stasavage, *The Decline and Rise of Democracy: A Global History from Antiquity to Today* (Princeton University Press, Princeton, 2020) 39. ISBN: 06911 77465.
[57] *See, e.g.,* András Sajó, *Ruling by Cheating: Governance in Illiberal Democracy* (Cambridge University Press, Cambridge, 2021) 18-55. ISBN: 9781108956314.
[58] Kunal Mukherjee, 'Is There a Distinct Style of Asian Democracy?', (2010) 45(6) *Journal of Asian and African Studies* 684, 686. https://doi.org/10.1177/0021909 610387068.
[59] *Ibid.*

coerced.'[60] At the same time, in writing this dissertation I have been conscious of the Euro-centric nature of statehood, international law and the prevailing theories of democracy and democratic governance. The references in this dissertation are primarily of European and Anglo-Saxon provenance and may be considered limited. As a white, Anglo-Saxon, English-speaking, monolingual, male, educated in the Western European tradition, I am aware of my inherent limitations. I have endeavoured to take account of other intellectual and philosophical traditions, theories and references in writing this dissertation to make it a universal account. I am, however, conscious that, despite my best endeavours, due to my own pedagogical and ontological construction I will never be able to adequately address the impact of the colonial encounter or the relevance of international law on the Global South. Thus, to some this dissertation will be unduly narrow. I am conscious of this inherent limitation.

C. On Method

The dissertation is the result of a multidisciplinary review and analysis of international and human rights law, the philosophy of law, legal history, sociological and political theory, and international relations. The methodology adopted primarily involved desktop research, and the collation, review and critical analysis of material addressing concepts of governance (in particular local governance);

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[60] Noam Chomsky interviewed by William Moyers and Betty S. Flowers 'Meaningful Democracy', in *A World of Ideas: Conversations with Thoughtful Men and Women about American Life Today and the Ideas Shaping Our Future* (Doubleday, New York, 1989) 38-58. ISBN-13: 978-0385263467.

issues related to human rights protection, social inclusion, empowerment and political alienation; regional and international law (both treaty-based and customary); and the political theory of democratic governance.

Legal questions of governance and human rights and the legal-political concept of legitimacy permeate the project. In analysing the evolution of a right to directly participate in local governance, reliance was placed on legal instruments, treatises and other scholarly sources. The material reviewed included primary reference texts, international and regional legal instruments, academic texts, and journal articles. The relevant legal instruments, directives, recommendations, comments, and policy documents of international and regional organizations were also considered (*e.g.* the United Nations, the European Union, the Council of Europe and the Congress of Local and Regional Authorities, African Union, Organization of American States, Association of South East Asian Nations, and the Arab League). This material evidenced the institutional endorsement of direct participation in local government and the potential evolution of a right to democratic governance. These texts were also relevant to the impact of the evolution of a right to democratic governance to international law's recognition doctrines.

The review and analysis of the increasing normative role of direct participation in local governance resulted from an examination of the actual adoption of mechanisms of participatory democracy at the local government level. Here, quantitative reports on the effect of the

implementation of mechanisms of participatory democracy were studied and analysed including, for example, institutional studies from the World Bank and the Organization for Economic Cooperation and Development, reports from the municipal government networks, United Cities and Local Government, the ICLEI – Local Governments for Sustainability, C40 (a network of the world's megacities committed to addressing climate change), and other associations of local and municipal governance. A range of municipal and local government websites were also reviewed in relation to the adoption of mechanisms of participatory democracy.

In addition to reviews and reports from inter-local government organizations, reports from international, regional, and national human rights bodies were also critically analysed. The reports of human rights organizations provided an understanding of the correlation between direct democracy at the local level and human rights protection. Political science literature focusing on governance issues was also important.

D. The Structure of the Dissertation

This dissertation endeavours to understand and explain state and government legitimacy and demonstrate the need for a critical reengagement with international law's recognition doctrines. In doing so, the dissertation includes a 'critical redescription' of the history of the state, territorial sovereignty and elements of

international law.[61] The history of international law has a significant normative impact on its contemporary application, no more so than in the recognition of states and governments.[62] If successful, the dissertation will provide a cogent and compelling basis for reimagining the incoherent international law doctrines concerning state and government recognition. In reimagining recognition doctrines, the dissertation asserts that international law may be evolving to acknowledge the *democratically* legitimizing impact of localization and participatory democracy.

Part I reviews and examines the creation of the modern state system and the emergence of the effective control doctrine in state recognition. *Chapter 1* demonstrates that the territory of originating states created in the shadow of Westphalia were the result of the outcome of war. The legitimacy of the early modern states was conveyed to the monarch by divine right. The effective control test or *de facto* statehood test emerged as the principal determinant of *new* state recognition with the revolutionary wars of the late 18th and early 19th Centuries and the secession of territory from pre-existing imperial states. The effective control of territory also legitimized the acquisition of territory by the victors of war -- a right of conquest. Effective control was then extrapolated to legitimize the colonial

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[61] Sundhya Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law', (2013) 1(1) *London Review of International Law* 63, 65. https://doi.org/10.1093/lril/lrt009.

[62] *See,* Damien Cueni and Matthieu Queloz, 'Theorizing the Normative Significance of Critical Histories for International Law', (2022) 1 *Journal of the History of International Law / Revue d'histoire du droit international*. https://doi.org/10.1163/15718050-12340207.

acquisition of territory. *Chapter 1* discusses how the effective control of territory legitimized colonialism and embedded the democratically illegitimate boundaries of post-colonial states through the doctrine of *uti possidetis.*

Chapter 2 explores early attempts to democratically legitimize secession and state creation by referenda. It contends that referenda were often simply a mechanism utilized to justify and reinforce existing effective control. They were also often surrounded by fraud, violence, intimidation and fear. Irrespective of the inherent flaws of referenda, the international community itself has sporadically utilized the purportedly democratic processes of plebiscites and referenda to ascertain the 'will of the people' and validate the allocation of territorial sovereignty.[63] *Chapter 2* establishes that, for the most part, these referenda determined only the status of an existing territorial unit (usually its independence or incorporation into an existing state) and not the boundaries of that unit. In very few instances have referenda been utilized to delineate territory, and then only partially. Accordingly, the democratic legitimacy conferred by pre-1990 referenda is limited and claims of democratic legitimacy arising from these referenda results, both state-run and internationally supervised, are questionable.

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[63] 'Referendum' and 'plebiscite' are often used interchangeably to mean a vote on a specific issue. However, 'plebiscite' has often referred to votes that simply validate authoritarian rule. Here, I use the term 'referendum' to refer to a direct vote of the electorate. *See,* Matt Qvortrup, *The Referendum and Other Essays on Constitutional Politics* (Bloomsbury Publishing, Kindle ed., Oxford, 2019) 42. ISBN: 978-1-50992-930-6.

Part II concerns the increasing relevance of democratic legitimacy to both state and government recognition and the concomitant decline in the effective control test. *Chapter 3* discusses the recognition of governments and the emergence of the right to democratic governance or democratic entitlement. Although the recognition of states and governments is conceptually distinct, the effective control of internal affairs, reflected in the habitual obedience of the population was also the test for the recognition of governments. Despite the suggestion that habitual obedience -- *acquiescence* -- is a reflection of popular sovereignty, like the state recognition doctrine, the methods utilized in attaining habitual control were irrelevant. *Chapter 3* then turns to the purported decline of the effective control test and the emerging relevance of an element of democratic legitimacy in government recognition. It discusses the emergence of a democratic entitlement based on a right to take part in public affairs enunciated in the *International Covenant on Civil and Political Rights*[64] and its reinforcement by UN election monitoring, and its limited enforcement through foreign intervention to restore democratically elected governments. Finally, *Chapter 3* discusses the implementation of the democratic entitlement and the right to take part *indirectly* in public affairs by the adoption of representative democracy.

Part II then continues to discuss the emerging relevance of democratic processes to the recognition of *new* states. *Chapter 4*

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[64] UN, *International Covenant on Civil and Political Rights* (16 December 1966), 999 UNTS 171. https://digitallibrary.un.org/record/660192?ln=en.

argues that the conduct of referenda is emerging as a prerequisite to the recognition of new states. This prerequisite was developed with the creation of the new states following the dissolution of Yugoslavia in the early 1990s. It was reinforced by the contemporaneous and subsequent use of referenda in the secessions and attempted secessions of a number of then substate territories, including Eritrea, South Sudan, East Timor and Scotland. *Chapter 4* also contends that, with the emergence of the democratic entitlement, it is unlikely that a new state will be recognized without implementing minimal procedural democracy, that is representative elections.

The inclusion of elements of democracy in both state and government recognition confers only a modicum of democratic legitimacy on newly recognized states and governments. *Part III* asserts that referenda in state creation and representative democracy do not manifest consent to statehood and territorial governance. *Chapter 5* considers the nature of democratic legitimacy and asserts that a referendum will confer *only* a *degree* of democratic legitimacy on territorial governance, depending on its validity and outcome. *Chapter 5* also contends that the nature of territorial sovereignty and the imposition of pre-determined borders may render any purported democratic legitimacy conferred by the outcome of a supposedly valid referendum somewhat illusory.

Part III also challenges the notion that representative democracy confers democratic legitimacy on elected governments. *Chapter 6* discusses the historical evolution of representative governance to establish that representative democracy continues to restrict

participation in governance to an 'elite' -- replacing an undemocratic appointed aristocratic or propertied elite with an elected elite. It also argues that the nature and conduct of representative elections lack veracity and do not adequately reflect popular will or the consent of the population. Accordingly, *Chapter 6* asserts that representative democracy is a flawed mechanism for ascertaining the consent of the population to coercive authority.

Despite the varying degree of democratic legitimacy of every state and the inability of representative democracy to reflect popular consent, both states and representative democracy are likely to remain the paradigms of purportedly democratic governance for the foreseeable future. *Part IV* demonstrates that the democratic legitimacy of states and representative governments can be enhanced by the decentralization of political authority to the local level and the local implementation of mechanisms of participatory democracy. *Chapter 7* establishes that local governance is the most democratically legitimate level of governance. It also contends that local governance enhances the implementation and protection of human rights norms and thereby also improves the legitimacy of states and governments. More importantly, *Chapter 7* demonstrates that the democratizing value of local governance has been recognized by states, the UN and international and regional institutions, and non-state organizations.

Chapter 8 illustrates how participatory and deliberative democracy, implemented at the local level, can also enhance the *democratic* legitimacy of both states and governments. These mechanisms can

complement representative democracy. Participatory and deliberative democracy enhances deliberation, enables greater civic participation in decision-making and involvement in public affairs, empowers communities and reduces apathy. *Chapter 8* also asserts that local participatory democracy assists human rights protection, particularly by assisting in the social inclusion and empowerment of minorities. *Chapter 8* demonstrates that international and regional organizations recognize the democratizing value of participatory democracy and endorse its implementation at the local level.

Chapter 9 is the *final* substantive chapter and concludes *Part IV*. It is a discussion of the rising normative value of both local governance and participatory democracy. It contends that the rising status of local governments, the international promotion of local governance and the plethora of instruments endorsing decentralization, is resulting in the emergence, if not of a 'right' to local governance, then a global norm of localization. *Chapter 9* also asserts that the normative value of local participatory democracy is accelerating, again, because of increasing state implementation of mechanisms of participatory democracy, and its endorsement and promotion by international and regional institutions, and inclusion in the treaty-like charters of local government representative bodies.

The *Conclusion* addresses the likely impact of the increasing normative value of local governance and participatory democracy on international law's recognition doctrines. It suggests that the democratic legitimacy of states and governments will be enhanced by the decentralisation of political power to the local level, the

implementation of tools of participatory democracy, and the localization of human rights protection. In doing so, it argues that recognition doctrines, to include more than a minimal element of democracy, will continue to evolve, albeit slowly, to include a prerequisite of local governance and participatory democracy and thereby enhance the democratic legitimacy of new states and governments.

PART I

THE DEMOCRATIC ILLEGITIMACY OF STATES

1. THE STATE AND THE TERRITORY: LEGITIMACY BY EFFECTIVE CONTROL

1.1 Introduction

Territory is the basic characteristic of a state and 'sovereignty itself, with its retinue of legal rights and duties, is founded upon the fact of territory.'[1] It is the recognition of statehood and governance over a delineated territory that confers sovereignty. The exclusive jurisdiction over a delimited territory became the cornerstone of governance with the development of the modern state.[2] It is the primary objective of this first substantive *Chapter* to demonstrate that, in international law, the *legitimate* exercise of exclusive jurisdiction depended primarily on the effective control of a defined territory and the manifested consent of the population was largely irrelevant.

Chapter 1 commences with a discussion of the birth of the modern state, which is most frequently attributed to the Westphalian settlement of 1648.[3] The Westphalian settlement was the outcome of the Thirty Years War and codified and delineated the borders of the

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[1] Malcolm N. Shaw, *International Law* (Cambridge University Press, Cambridge, 9th ed., 2021) 416-17. ISBN: 978-1-108-73305-2.

[2] Christopher J. Borgen, 'Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia's Frozen Conflicts', (2007) 9 *Oregon Review of International Law* 477, 479. https://heinonline-org.sare.upf.edu/HOL/Page?handle=hein.journals/porril9&div=18&id=&page=&collection=journals.

[3] Alexander B. Murphy, 'The sovereign state system as political-territorial ideal: historical and contemporary considerations' in Thomas J. Biersteker and Cynthia Weber (eds), *State Sovereignty as Social Construct* (Cambridge University Press, Cambridge, 1996) 81-120, at 84. ISBN: 0 521 56599 5.

first modern states.[4] Many of the states embedded or created contemporaneously with the end of the Thirty Years War form the basis of many of today's European states. Throughout the course of the 1600s, the leaders of Austria, Prussia, Denmark, France, Russia, Spain, Sweden and England 'considered that they governed sovereign states that claimed a monopoly of legitimate government authority over their territory and its residents.'[5]

For more than two centuries after the Westphalian settlement, most European states were hereditary monarchies, and their 'legitimacy' was conferred by divine right. This *Chapter* illustrates that the effective control of conquered territory enabled its 'legitimate' annexation in international law, irrespective of the divine right of hereditary monarchs. It then contends that the American revolution precipitated the demise of dynastic legitimacy and precipitated the extension of the 'effective control' or '*de facto* statehood' test to state creation. The effective control of territory resulted in the creation and *legitimacy* of new states by secession and, until the end of the First World War, secession was the most common method of creating new states.[6] This *Chapter* also asserts that 'effective control' legitimized the division of Africa and other parts of the Global South

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[4] Peter H. Wilson, *Europe's Tragedy: A New History of the Thirty Years War* (Harvard University Press, Cambridge, Mass., 2009) ('Wilson (2009)') 754, 776. ISBN: 0674036344.
[5] Peter H. Russell, *Sovereignty: The Biography of a Claim* (University of Toronto Press, Toronto, 2021) 34. ISBN: 148750909X.
[6] James Crawford, *The Creation of States in International Law* (Oxford University Press, Oxford, 2006) 375, 382. ISBN: 9978-0-19-922842-3.

into artificial administrative units, which after independence became equally artificial post-colonial states.

The effective control of territory was usually achieved by violence, the threat of violence, coercion, fraud, subjugation or dispossession; accordingly, the recognition of states and their territories were determined by 'extra-legal phenomena,'[7] with little regard for the will of the resident population.[8] After World War I, the democratically illegitimate results of effective control were entrenched by the denial of a unilateral right to secede, irrespective of effective control, and the doctrine of *uti possidetis*.

1.2 The Birth of the Modern State and Territorial Exclusivity

Any system of rule comprises dominion over a human collective that is differentiated from other human collectives.[9] The 'classic' Westphalian state differentiates human collectives by conferring exclusive jurisdiction over territory with 'well-demarcated, non-porous borders.'[10] However, governance and 'systems of rule need not be territorial at all,'[11] nor 'territorially fixed', and need not be

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[7] Joshua Foa Dienstag, 'A Storied Shooting: Liberty Valance and the Paradox of Sovereignty', (2012) 40(3) *Political Theory* 290, 291. DOI: 10.1177/0090591712439303.

[8] Anna Stilz, *Territorial Sovereignty: A Philosophical Exploration* (Oxford University Press, Oxford, 2019) 6. ISBN: 978-0-19-883353-6.

[9] John Gerard Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations', (1993) 47(1) *International Organization* 139, 148. http://www.jstor.org/stable/2706885. *See also,* Anthony Giddens, *A Contemporary Critique of Historical Materialism, Vol. 1: Power, Property and the State* (MacMillan, London, 1981) 45. ISBN: 9780333309711.

[10] Wilson (2009), *supra* n. 4, at 776-77.

[11] Ruggie, *supra* n. 9, at 150.

mutually exclusive.[12] Governance structures before the development of the modern state, although occupying a geographical space, did not follow a territorial logic: borders were porous, governance structures were complex and overlapping and there was no single or particular dominant governance hierarchy.[13] Today, however, the primary jurisdiction of a state over a population within its 'well-demarcated, non-porous borders' is paradigmatic.[14]

Although the birth of the modern state is most frequently attributed to the outcome of the Westphalian settlement in 1648, the process leading to the development of states and their conceptual foundation began before 1648 and continued long after.[15] Territorial sovereignty and modern statehood did not emerge suddenly with the end of the Thirty Years War.[16] Europe's governance structures before the Treaty of Westphalia consisted of the tenuously coexisting feudal system, free cities or city-states, city-leagues and imperial governance.

The medieval feudal system was the 'archetype of non-exclusive territorial rule.'[17] As with all political organization, 'feudal authorities occupied a geographical space'[18] but territoriality was not

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[12] *Ibid.*, at 149-50.
[13] Murphy, *supra* n. 3, at 84.
[14] Wilson (2009), *supra* n. 4, at 776-77.
[15] *Ibid. See also,* Murphy, *supra* n. 3, at 84.
[16] Stephen D. Krasner, 'Compromising Westphalia', (1995-1996) 20(3) *International Security* 115, 149. https://www.jstor.org/stable/2539141.
[17] *Ibid.*
[18] Hendrik Spruyt, *The Sovereign State and Its Competitors* (Princeton University Press, Kindle ed., Princeton, 1994) 35. eBook ISBN: 978-0-691-21305-7.

the 'defining trait' of the feudal system.[19] In the medieval feudal system, power was often exercised by an array of functionaries over any given territory, and accordingly, the 'possession and exercise of sovereignty were coextensive' [20] and thus 'many "sovereigns" coexisted on one and the same territory.'[21] The boundaries of these medieval political units were ill-defined, ambiguous and flexible[22] and political units were 'defined by centres.' [23] Territorial jurisdiction was ambiguous and tangled.[24] The territory governed by the feudal nobility 'was often not contiguous.' [25] Even the empires of medieval Europe did not claim jurisdiction over a defined territory but, instead, claimed only 'frontiers'.[26] Empires existed 'in their respective spheres of influence without having to formally agree upon borders.'[27]

The city-leagues of Europe similarly did not have a territorial logic; instead, they were 'translocal' without political authority within a

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[19] *Ibid*.
[20] Dieter Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept*, (Columbia University Press, New York, 2015) 14. ISBN: 978-0-231-16425-2.
[21] *Ibid.*
[22] Benedict Anderson, *Imagined Communities* (Verso, London, Rev. ed., 2006) 19. ISBN: 9781781683590.
[23] *Ibid.*
[24] Perry Anderson, *Lineages of the Absolutist State* (Verso, London, 1974) 37-38. ISBN: 9780860917106.
[25] Anna Stilz, *Territorial Sovereignty: A Philosophical Exploration* (Oxford University Press, Oxford, 2019) 4-5 (quoting Malcolm Anderson, *Frontiers: Territory and State Formation in the Modern World* (Polity Press, Cambridge, 1996) 17). ISBN: 978-0-19-883353-6.
[26] Friedrich Kratochwil, 'Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System', (1986) 39(1) *World Politics* 27, 33. https://doi-org.sare.upf.edu/10.2307/2010297.
[27] Spruyt, *supra* n. 18, at 16.

defined territory. Increased trade in the 13th Century precipitated the rising importance of commercial towns. These commercial towns opted to confederate to regulate trade and standardize transactions. Thus, in the 13th Century, towns unified to form city-leagues, such as the north-German Hansa, the Swabian-Rhenish League, and the Saxon League. These leagues were confederations that unified towns against the local jurisdiction of lords. The German towns were not sizable enough for self-defence and therefore needed to join together in mutual defence.[28] Like states, these city-leagues 'waged war, raised revenue, signed treaties, and regulated economic activity.'[29] Unlike states, however, the city-leagues 'lacked a clear hierarchical authority and formal territorial borders.'[30] Of the pre-state polities, only city-states were territorially defined by unambiguous borders.[31] The re-emergent city-states of Italy claimed authority over a defined territory and by the end of the 14th Century, city-states like Florence, Milan, Genoa and Venice, claimed similar status to sovereign states.[32] However, internal governance was diffuse and the smaller

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[28] Only a few towns in Germany in the 15th Century had more than 25,000 inhabitants. Indeed, the principal cities of the Hansa League, Hamburg, Bremen and Rostock, had less than 20,000 inhabitants. By comparison Italy in the 15th Century had about 30 towns with more than 25,000 inhabitants and Florence, Genoa, Venice and Milan each had a population in excess of 100,000 residents. Spruyt, *supra* n. 18, at 112, 131.
[29] *Ibid.*, at 109.
[30] *Ibid.*, at 129.
[31] Charles Tilly, 'Entanglements of European Cities and States', Charles Tilly and Wim P. Blockmans (eds), *Cities and the Rise of States in Europe, A.D. 1000 to 1800* (Westview Press, Boulder, San Francisco and Oxford, 1994) ('Tilly (1994)') 1-27, at 15. ISBN: 9780813388489.
[32] Spruyt, *supra* n. 18, at 146

towns within the purported boundaries of the city-states maintained much of their independence.[33]

Exclusive territorial governance became the cornerstone of sovereignty with the development of the modern state.[34] The development of the state was the result of the centralization of monarchical authority.[35] Increased trade and the growth of cities and towns in the late Middle Ages enabled monarchs to collect more revenue and, in doing so, increasingly centralize authority in a stronger government.[36] It was the unification of fragmented sovereignty rights into a unified public authority that resulted in the development of the modern state.[37] The exclusive jurisdiction over a defined territory became increasingly important with the centralization of power and absolute sovereignty. In centralizing authority, monarchs -- particularly the English and French -- gradually consolidated their exclusive rule over defined territories.[38] The increase in revenue enabled a monarch with centralizing tendencies to engage in territorial expansion more efficiently through violence. Indeed, most (approximately 80 per cent) of a 17th Century monarch's revenue was devoted to war.[39] Gunpowder had been used by Europeans in warfare since approximately 1450 and over the course of the next 200 years, the use of new and expensive military

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[33] *Ibid.*, at 148-49.
[34] Borgen, *supra* n. 2, at, 479.
[35] Murphy, *supra* n. 3, at 84.
[36] Spruyt, *supra* n. 18, at 86.
[37] Grimm, *supra* n. 20, at 24.
[38] Murphy, *supra* n. 3, at 85.
[39] Spruyt, *supra* n. 18, at 86.

technology became widespread.[40] Centralizing monarchs with a large revenue base could afford these new armaments, which exponentially increased the destructiveness of warfare. Contemporaneously with the development of the defined territory of the state, the importance of cities was diminishing, largely because they 'had begun to lose their predominant positions in international markets.'[41] The series of wars that engulfed Europe from the beginning of the 16th Century exposed the inability of city-states and city-leagues to attain the resources necessary for their defence from encroaching centralizing monarchs.[42] It was the outcome of war that conferred territorial sovereignty and delineated the borders of the first modern states -- the consent of the population was irrelevant.

1.3 State Legitimacy and Effective Control

The legitimacy of most of the first modern states was based on monarchical legitimism and was conferred by the supposed will of God.[43]

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[40] Charles Tilly, *Coercion, Capital, and European States, AD 990-1990* (B. Blackwell, Cambridge, Mass., 1990) 76. ISBN: 978-1-55786-368-3.
[41] Tilly (1994), *supra* n. 31, at 15.
[42] Spruyt, *supra* n. 18, at 30.
[43] Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Arthur Goldhammer (trans.)) (Princeton University Press, Princeton, 2011) 1. ISBN: 9780691149486. https://doi.org/10.23943/princeton/9780691149486.001.0001.

> ... the states system rested on kinship among European kings whose right to rule stemmed from hereditary possession of thrones originally bestowed by God.[44]

European monarchs relied on a system of collective mutual defence to protect their domestic rule from internal revolt,[45] whereby hereditary monarchs were supposedly required to provide their fellow monarchs with military support if their rule was subject to internal threats. The two great revolutions of the late 18th Century and 'the assault on the hereditary principle' led to the demise of dynastic legitimacy and the emergence of the effective control doctrine in state recognition.[46] The doctrine was precipitated by the French recognition of the independence of the American colonies following the rebel victory in America's War of Independence, in apparent contravention of the prevailing norm of dynastic legitimacy. The effective control doctrine crystalized in the 19th Century with the independence of Latin American colonies and the secession of various European territories.

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[44] M. J. Peterson, *Recognition of Governments: Legal Doctrine and State Practice 1815-1995* (MacMillan Press, London, 1997) 57. eBook ISBN: 978-0-230-37589-5. DOI: 10.1057/9780230375895. *See also* Stéphane Beaulac, 'The Social Power of Bodin's "Sovereignty" and International Law', (2003) 4 *Melbourne Journal of International Law* 1, 27. http://classic.austlii.edu.au/au/journals/Melb JIL/2003/13.html.

[45] Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States Since 1776* (Oxford University Press, Oxford, 2010) 10. eBook ISBN: 978019172 2325. DOI: 10.1093/acprof:oso/9780199564446.001.0001.

[46] *See*, Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Clarendon Press, Oxford, 1996) 180-83. ISBN: 9780198280071.

a. The Precipitation of the Effective Control Doctrine in the Americas

The thirteen American colonies declared independence from Britain on July 4, 1776, but their independence was not recognized until the rebels achieved unassailable effective control of the colonial territory to the exclusion of British authority. France recognized America's independence only when the 1777 battle of Saratoga rendered 'America triumphant' and its triumph was irreversible: 'the impossibility of being subdued by arms now being demonstrated.'[47] France's recognition was contrary to '[t]he prevalent international standard of dynastic legitimacy, which allowed a territorial or jurisdictional change only with consent of the affected monarch.'[48] Although the European monarchies attempted to reinstall the system of dynastic rule and the collective defence of hereditary monarchies, as well as a 'just equilibrium of power,' at the Vienna Congress of 1814 that followed Napoleon's defeat,[49] the American revolution was the beginning of the end of dynastic legitimacy.

The demise of dynastic legitimacy was assured by Spain's inability to retain and regain control of its American colonies. After Ferdinand VII was deposed by Napoleon's conquest of Spain, the Spanish American colonies formed *juntas* to govern independently of

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[47] Louis XVI to the King of Spain, 8 January 1778, in Francis Wharton, *Revolutionary Diplomatic Correspondence of the United States*, *Vol. 2* (US, Department of State, Washington D.C., 1886) 467. *See* also, Fabry, *supra* n. 45, at 30 n 26.
[48] *Ibid.*, at 31.
[49] Peter H. Wilson, *Heart of Europe: A History of the Holy Roman Empire* (Belknap/Harvard University Press, Cambridge, 2016) 664. ISBN: 97806742448 63. *See also* Fabry, *supra* n. 45, at 38.

Napoleon's delegate to the Spanish throne. When Ferdinand VII was restored to the Spanish throne in 1814, he ruthlessly, but counterproductively, attempted to reassert control and repress the *juntas*. Shortly thereafter a number of the Latin American colonies declared independence and civil wars broke out throughout Central and South America.[50] Recognition of these putatively independent South American states was only forthcoming when the new governments effectively controlled the claimed territory and Spain had no reasonable hope of recovering its authority.[51] Similarly, Brazil was recognized as an independent state when its new monarch, Dom Pedro I, the son of Portugal's King John VI, declared independence in 1822 and prevailed in armed clashes in 1823.[52]

Accordingly, recognition of the statehood of the colonies of the Americas followed the effective control of territory which was achieved by violence: the victory of domestic rebel movements in independence wars. These political entities were recognized as states without the explicit manifestation of the population's consent.

b. European Confirmation of the Effective Control Doctrine

The emergence of the effective control doctrine and the end of dynastic legitimacy was contemporaneously reinforced in Europe.[53]

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[50] Fabry, *supra* n. 45, at 51.
[51] Jaime Edmundo Rodríguez Ordóñez, *The Independence of Spanish America* (Cambridge University Press, Cambridge, 1998) 240. ISBN: 978052162298.
[52] Fabry, *supra* n. 45, at 69.
[53] Quincy Wright, 'Recognition and Self-Determination', (1954) 48 *American Society of International Law Proceedings* 23, 27. https://www.jstor.org/stable/25657309.

The demise of dynastic legitimacy was a natural consequence of Britain and France's professed neutrality and refusal to intervene in defence of purportedly 'legitimate' monarchs confronted by secessionist threats. Although Britain and France affirmatively 'professed belief in non-intervention in [the] internal affairs of foreign countries'[54] to avoid defending certain monarchs, both states were willing to interfere in 'the internal affairs of foreign countries' in support of secessionist movements if it was political expedient to do so. In the 19th Century, the 'effective control' of secessionist political entities was often the result of foreign intervention rather than solely, or even predominantly, domestic action.

In August 1830, riots broke out in Brussels, followed by uprisings in other cities, ostensibly against the autocratic policies of King William I of the Netherlands.[55] The Dutch then sent in troops. After some minor skirmishes a Belgian national congress was assembled, and the 'States-General' declared independence. The then 'legitimate' monarch of the Netherlands appealed for military intervention from other European monarchs, but foreign intervention was not forthcoming. [56] The 'Great Powers' recognized Belgian independence at the London Conference of December 1830. Recognition of the independent state of Belgium followed the

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[54] Fabry, *supra* n. 45, at 82.
[55] Jürgen Osterhammel, *The Transformation of the World: A Global History of the Nineteenth Century* (Princeton University Press, Princeton, 2009) 408. ISBN: 978-0-691-16980-4.
[56] Richard J. Evans, *The Pursuit of Power* (Allen Lane/Penguin Books, London, 2016) 71. ISBN-10: 0713990880.

existence of a *de facto* state.[57] The Dutch continued to oppose Belgian independence and invaded in 1831. The French responded with military support and Belgium only regained its independence and statehood because of French intervention.

In the European part of the Ottoman Empire, the effective control of territory by internal secessionist movements to the exclusion of the 'legitimate' rulers also paved the way for the recognition of the new states of Greece, Romania, Serbia and Montenegro. In Greece, a war of independence from the Ottoman empire began in 1821 and continued for well over a decade.[58] The decisive battle was fought in Navarino Bay on 20 October 1827 by a British, French and Russian naval task force without *any* Greek involvement.[59] Despite the ongoing Civil War, the Greeks declared independence in 1822, but Greece was only recognized as an independent state in 1833.[60]

Again, almost 50 years later, three other principalities of the decaying Ottoman Empire were recognized as independent states after establishing effective control of purportedly national territory -- albeit only after Russian military intervention.[61] In May 1877, Romania declared war on the Ottoman Empire and proclaimed its independence in June of that year. Fearing Russian occupation, in

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[57] Fabry, *supra* n. 45, at 82.
[58] Misha Glenny, *The Balkans: Nationalism, War and the Great Powers, 1804-2011* (Penguin Books, London, 2012) 22-39. ISBN: 9780142422564.
[59] Roderick Beaton, *Greece: Biography of a Modern Nation* (Chicago University Press, Chicago, 2019) 102. ISBN: 9780226673745.
[60] Evans, *supra* n. 56, at 59.
[61] Fabry, *supra* n. 45, at 104.

January 1878, Constantinople sued for peace and recognized the independence of Serbia, Montenegro and Romania.[62]

Like the states of the Americas, these new European states were determined by the outcome of war. However, unlike the Americas, foreign intervention was determinative of the success of the European independence movements.[63] The 19th Century formation of these European states form the basis of today's states, despite the interregnum of various Balkan and European conflicts. Again, as will be demonstrated in the next *Chapter*, despite pronouncements to the contrary, the actual consent of the population was of little relevance.

German unification was probably the most significant exercise in European state-making of the 19th Century and resulted from both conquest and internal voluntary annexation. The German Confederation was formed at the Congress of Vienna and consisted of almost 40 German speaking states of central Europe but was dominated by Prussia and Austria. The dissolution of the German Confederation and German unification and statehood began with a dispute with Denmark over the 'Elbe duchies.'[64] A short war

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[62] *Ibid*.

[63] While independence movements in the Americas did receive foreign assistance, most notably from the French in the US War of Independence, foreign intervention was not determinative of the success of the American rebel movements, unlike the foreign intervention in Belgium and the Ottoman suzerainties. *See*, David McCullogh, *1776* (Simon & Schuster, New York, 2005) 293. ISBN13: 9780743226714.

[64] Heinrich August Winkler, *Germany: The Long Road West, Vol. I, 1789-1933* (Alexander J. Sager (trans.)), (Oxford University Press, Oxford, 2006) 146-47. ISBN: 0199265976.

between Prussia and Austria over the joint administration of the Elbe Duchies resulted in the dissolution of the German Confederation and Prussia's subsequent annexation of Schleswig and Holstein. As well as annexing Schleswig-Holstein, Prussia forcibly incorporated Austrian allies Hanover, Electoral Hesse, the Duchy of Nassau and the Free City of Frankfurt. Saxony and Hesse-Darmstadt (north of the Main) entered the newly formed and Prussian-dominated North German Confederation.[65]

Prussia and the North German Confederation utilized their military strength to impose treaties and alliances on southern German states whereby the military of those southern German states would come under Prussian command in the event of war.[66] Ultimately, the opportunity for the unification of the North German Confederation and the southern German states was precipitated by the Franco-Prussian war of 1870-71; a war largely contrived by Prussian Chancellor Bismarck to induce unification.[67] War and the threat of war determined the effective control and thus recognition of the united Germany, without the manifest consent of the population.

1.4 Defining Territory by Effective Control

Territory is the cornerstone of the modern state and sovereignty is its hallmark.[68] Effective control by violence and coercion delineated the territory over which sovereignty could be exercised. The Thirty

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[65] *Ibid.*, at 175.
[66] *Ibid.*, at 159.
[67] Korman, *supra* n. 46, at 88. Winkler, *supra*, n. 64, at 185, 188.
[68] Shaw, *supra* n. 1, at 417. *See* Borgen, *supra* n. 2, at 479.

Years War and the Westphalian settlement conferred territorial sovereignty and delineated the 'well-demarcated, non-porous borders' of the first modern states.[69] The consent of the resident population was of little relevance. The boundaries of most of these inaugural states was modified over the course of the next four centuries by the violent acquisition and the consequential loss of territory -- territorial annexations recognized and therefore legitimized by international law.[70] From the Treaty of Westphalia until the end of the First World War, classical international law[71] recognized a right to legitimately acquire territory by conquest, despite its purported respect for the territorial integrity of states. The right of conquest also 'played a prominent role [...] in the history of colonial expansion' and 'was openly invoked by the European powers as the basis of title to territory in the colonial world.'[72] The 'legitimate' acquisition of territory as a consequence of the exercise of a right of conquest largely depended on attaining effective control.

a. The Right to Conquest and the 'Legitimate' Acquisition of 'Sovereign' Territory

The right of conquest provided the victor, in a war between two sovereign states,[73] with 'sovereignty over the conquered territory and

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[69] Wilson (2009), *supra* n. 4, at 776-77.
[70] Russell, *supra* n. 5, at 34.
[71] Here, the 'classical' system of international law is the prevalent system of international law from the Treaty of Westphalia in 1648 until the outbreak of the First World War in 1914. *See, e.g.*, Korman, *supra* n. 46, at 99.
[72] Korman, *supra* n. 46, at 66.
[73] *Ibid.*, at 109. The Permanent Court of International Justice noted that:

its inhabitants.'[74] The test to legitimate the acquisition of territory by conquest was effective control.

> ... by conquest is meant *effective control* of the conquered territory in such circumstances as to warrant the presumption that the control will be permanent ...[75]

Sovereignty over territory would pass to the conqueror, after the conclusion of hostilities,[76] if the conquering state had effective control over the annexed territory and there was 'no reasonable chance of the former sovereign regaining the land.'[77] It was the effective control of the conquered territory that was relevant to the 'legitimate' annexation of conquered territory and not the consent of the population.[78]

In the 18th Century, the 'outstanding' examples of the 'legitimate' annexation of territory by exercise of the right to conquest were the

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> Conquest only operates as a cause of loss of sovereignty when there is a war between two states and by reason of the defeat of one of them sovereignty over territory passes form the loser to the victorious state.

Legal Status of Eastern Greenland (Denmark v. Norway), (1933) PCIJ, sep. A/B no. 53, at 47.

[74] Korman, *supra* n. 46, at 9.

[75] Daniel Patrick O'Connell, *State Succession in Municipal Law and International Law*, *Vol. 1* (Cambridge University Press, Cambridge, 1967) 423. ISBN-13: 978-0-521-05857-5. Korman, *supra* n. 46, at 109 (emphasis added).

[76] Nazi Germany's annexation of territory after its declaration of war was declared ineffective and invalid by the Nuremberg War Crimes Tribunal because the war was ongoing. Shaw, *supra* n. 1, at 425.

[77] *Ibid. See also,* Korman, *supra* n. 46, at 7 ('As long as the Law of Nations has been in existence, the states as well as the vast majority of the writers have recognized subjugation as a mode of acquiring territory' -- a 'right of conquest'.)

[78] The right of conquest was reinforced by the rule of prescription (akin to adverse possession in property law). Prescription is the rule according to which a state acquires title to territory on the basis of long held and uninterrupted possession, regardless of the validity of the means whereby the territory was originally acquired (even that is to say, if the acquiring state originally took possession of the territory wrongfully and unlawfully). Shaw, *supra* n. 1, at 428-31.

Prussian annexation of Silesia in 1740 by Frederick the Great, which was then part of Austria,[79] and the three partitions of Poland in 1772, 1793, and 1795.[80] The 1815 Congress of Vienna, ending the Napoleonic Wars of conquest, and the Concert of Europe[81] discouraged conquest and 'raised a strong presumption against unilateral changes in the status quo.'[82] That is, a strong presumption favouring the territorial integrity of states. However, despite the 'strong presumption' against changes to the status quo, state practice 'was still dominated by an unrestricted right of war and the recognition of conquests.'[83] In exercising a right of conquest, Austria forcibly annexed the Free City of Cracow in 1846, Prussia annexed Holstein and Schleswig from Denmark in 1866 and then the German Empire annexed Alsace-Lorraine from France in 1871.[84]

The exercise of a right of conquest between sovereign states was not limited to Europe. During the War of 1812, between the United States and Britain, the British military captured Castine, a port village in Maine, and occupied it until 1815, when it was returned to the

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[79] Korman, *supra* n. 46, at 67.
[80] *Ibid.*
[81] The Concert of Europe was the attempt by the 'Great Powers' to maintain peace in Europe 'by a network of collaborative institutions.' Evans, *supra* n. 56, at 27.
[82] Korman, *supra* n. 46, at 80.
[83] Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, Oxford, 1963) 19. eBook ISBN: 9780191681332. https://doi.org/10.1093/acprof:oso/9780198251583.001.0001.
[84] The Franco-Prussian war of 1870-71, led to a newly united Germany's exercise of the right of conquest over Alsace-Lorraine. Korman, *supra* n. 46, at 88. Germany occupied and effectively controlled the territory of Alsace-Lorraine in a time of war. After the bombardment and siege of Paris, and France's ignominious defeat, a final peace agreement was signed on 10 May 1871, whereby a unified Germany annexed Alsace and part of Lorraine. Winkler, *supra*, n. 64, at 188.

United States pursuant to the Treaty of Ghent. Indeed, the United States' self-defined 'manifest destiny' is based on the exercise of a right of conquest. In 1848, the United States occupied Mexico and ultimately annexed Texas and what is now the south-west of the United States. In 1850, the U.S. Supreme Court reaffirmed that 'by the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the conquered country.'[85]

A right of conquest and the consequent legitimation of the acquisition of sovereign territory by effective control remained extant in classical international law until 1914. The borders of many, if not most European states had, as of August 1914 and the beginning of World War I, been delineated by violence under the guise of 'effective control.' The delineated and legitimized borders of many modern states, particularly European states, were thus determined by effective control attained by violence, without the manifest consent of the resident population.

b. Legitimizing Colonialism by Effective Control

The territory of many contemporary post-colonial states also depended on the exercise of the right of conquest. Western states utilized the right of conquest, together with the legal doctrines of discovery, occupation, and cession to impose effective control and

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[85] *Fleming v. Page*, 50 U.S. 603, 612 (Per Tanney J.).

'legitimately' acquire non-sovereign territory.[86] To be accorded sovereignty, a state had to meet the 'standard of civilization.' Of course, the standard was determined and imposed by sovereignty's gatekeepers, the western European 'civilized' states. Thus, sovereignty was limited only to those 'civilized', namely western European, states.[87] Accordingly, the meagre respect for territorial integrity afforded to sovereign (that is, predominantly European states) did not apply to the 'uncivilized.' Beginning with the Spanish attempts to colonize South America in the 1500s and continuing for the next five centuries of colonization, sovereignty -- or its absence -- was utilized to violently oppress those who were culturally different.[88] It was thus 'extended inexorably and imperiously with empire into darkest Africa, the inscrutable Orient, and the far reaches of the Pacific, acquiring control over these territories and peoples and transforming them into European possessions.'[89]

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[86] *Island of Palmas* case (*Netherlands v. USA*) 1928, *RIAA* 2 (1949), 829. In the *Island of Palmas* case of 1928, the Permanent Court of Arbitration at the Hague recognized that:

> Titles of acquisition of territorial sovereignty in present-day international law are either based on an act of effective apprehension, such as occupation or conquest, or, like cession, presuppose that the ceding and the cessionary Power or at least one of them, have the faculty of effectively disposing of the ceded territory.

[87] Jan Hendrik Willem Verzijl, *International Law in Historical Perspective, Vol. I* (A.W. Sijthoff, 1968) 435-436. OCLC: 898315755.

[88] Kalana Senaratne, *Internal Self-Determination in International Law: History, Theory, and Practice* (Cambridge University Press, Cambridge, 2021) 29. ISBN: 978-1-108-48440-4. DOI: 10.107/9781108695688.

[89] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2005) 37. ISBN: 9780511614262. DOI:10.1017/CBO97805116 14262.

European sovereign states utilized the right to conquest over non-civilized nations, and '[m]ost of the colonial acquisitions by European powers from the 15th to the 19th Century were effected by conquest.'[90] The Spanish claimed exclusive territorial rights over the new world by exercise of the right of conquest. Likewise, the American colonies were conquered by, or 'ceded' to, Britain. In Asia, European powers engaged in a colonial expansion 'by right of conquest of vast stretches of territory occupied by peoples who were not regarded as full members of the civilized society of states.'[91] Thus, Britain acquired India; the Dutch, Indonesia; and France, Indochina. The colonizers of Africa often engaged in extensive violence to 'conquer' and effectively occupy African territory.[92] Conquest required effective control.

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[90] Mark F. Lindley, *The acquisition and government of backward territory in international law: being a treatise on the law and practice relating to colonial expansion* (Longmans/Green, London, 1926) 26-27. ASIN B00085T27O. *See also*, Korman, *supra* n. 46, at 41.

[91] Korman, *supra* n. 46, at 74.

[92] Many African nations did not capitulate to English and German domination. In East Africa, there was fierce fighting and prolonged military efforts primarily in 1893-98 to oust the German, English and Italian colonizers. Some chiefs and tribes successfully repelled the English and Germans for a time before being subdued and conquered. In southwest Africa, for example, German military activities killed more than 10,000 Hereos and Namas. The French capture of Madagascar in 1896 and the British victory at Omdurman in 1898 and its subsequent colonization of the Sudan could also be considered an exercise of the right to conquest. Indeed, the British Privy Council found that Southern Rhodesia was acquired by force. *In re Southern Rhodesia*, 1919 A.C. 212, 212 (Privy Council July 26, 1918). *See,* Thomas Pakenham, *The Scramble For Africa 1876-1912* (Abacus, London, 1991) 539-616. ISBN: 978-0-349-10449-2. *See also*, Isabel V. Hull, *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany* (Cornell University Press, Ithaca, NY, 2005). ISBN13: 9780801467080.

The legal doctrines of discovery and occupation also legitimized the acquisition of territory and likewise depended on effective control. Discovery and a symbolic act of taking possession provided inchoate title, which had to be perfected within reasonable time by the effective control of the territory. In applying a 'Doctrine of Discovery', the Supreme Court of the United States, in *Johnson & Graham's Lessee v. McIntosh*, held that when European nations 'discovered' lands, that is lands unknown to other European nations, the discovering European nation automatically acquired sovereignty over the territory irrespective of any indigenous people possessing the land.[93] The doctrine of discovery and occupation was purportedly limited to territory that was *terra nullius* (belonging to no one).[94] It was pursuant to the doctrine of *terra nullius* that the First Nations of Australia were dispossessed of the continent.[95]

The 1884-85 Berlin Conference between the European powers to divide Africa 'transformed Africa into a conceptual *terra nullius*.'[96] The Berlin Conference largely confirmed the division of Africa that had already taken place as well as the imperial appropriation of

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[93] *Johnson & Graham's Lessee v. McIntosh*, 21 U.S. 543, 573-74, 587 (1823). *See also*, Robert J. Miller and Olivia Stitz, 'The International Law of Colonialism in East Africa: Germany, England, and the Doctrine of Discovery', (2021) 32 *Duke Journal of Comparative & International Law* 1, 6. https://scholarship.law.duke.edu/djcil/vol32/iss1/1.
[94] Shaw, *supra* n. 1, at 426-28.
[95] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
[96] Anghie, *supra* n. 89, at 91. *See also*, Miller and Stitz, *supra* n. 93, at 45-49.

colonies.[97] The Conference's *General Act*[98] articulated the prerequisites for the acquisition of territory on the African Coast and attempted to articulate the indicia of effective control.[99] Section 35 of the *General Act* formalized 'effective occupation' requiring the European colonizers to exercise sufficient sovereignty and jurisdiction so as to maintain peace and control commerce in the colony. Prior to the *General Act*, to defray administration costs, some colonizers (primarily England and Germany) engaged in indirect rule, leaving indigenous political structures intact provided that it did not interfere with the colonizer's rapacious plunder. Irrespective of the colonizers' implicit recognition, 'indigenous governance and sovereignty was afforded little respect.'[100] Instead of indirect rule, the *General Act* required colonizing powers to 'effectively occupy' and exercise actual governance, that is control, of its colonies.

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[97] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (1970), Separate Opinion, Vice President Ammoun, ICJ Rep. 1971 55, 86.

[98] *General Act of the Berlin Conference on West Africa* (26 February 1885) ('*General Act*'). https://jusmundi.com/en/document/treaty/en-general-act-of-the-berlin-conference-on-west-africa-1885-general-act-of-the-berlin-conference-on-west-africa-1885-thursday-26th-february-1885.

[99] Section 35 of the *General Act* required colonizers 'to insure the establishment of authority in the regions occupied by them on the coasts of the African continent sufficient to protect existing rights, and, as the case may be, freedom of trade and of transit under the conditions agreed upon.' It should thus be noted that pursuant to the *General Act* the recognition of the African colonial territory only required 'effective occupation' of coastal centres. Thus, another dubious legal doctrine, the Doctrine of Contiguity, enabled colonizers to assert 'effective control' and claim sovereignty over large swathes of hinterland adjoining their coastal centres. Matthew Craven, 'Between law and history: the Berlin Conference of 1884-1885 and the logic of free trade', (2015) 3(1) *London Review of International Law* 31, 32. DOI: 10.1093/lril/lrv002. *See also* Thomas Pakenham, *supra* n. 92, at 511; Shaw, *supra* n. 1, at 447.

[100] Miller and Stitz, *supra* n. 93, at 42.

> The term "effective occupation" meant that a European country had to exercise sufficient sovereignty and jurisdiction over the land, native nations, and peoples "to insure the establishment of authority in the regions occupied by them," to maintain peace, and guarantee free trade and safety.[101]

To 'effectively occupy' its African territory and with the intention of reducing armed conflict -- between the European colonizers *not* the native inhabitants -- colonizers fabricated administrative divisions with 'only slight knowledge or regard for' local ethnic, cultural, religious, political or economic practices.[102] Indeed, European colonizers had scant regard for Africa's political heritage and 'its boundaries were drawn on maps in Europe by Europeans who had never been to Africa, with no regard for existing political systems and boundaries.'[103] These administrative units ignored natural boundaries and were predominantly straight lines.[104]

The indigenous African population did not consent to the imposition of colonial administrative units nor their boundaries. Likewise, the First Nations of Australia and the Americas, as well as the population of Asian colonies, did not provide a 'free and informed' consent to the loss of the effective control of their territory, which was induced

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[101] *Ibid.*, at 19.
[102] Steven R. Ratner, 'Drawing a Better Line: UTI Possidetis and the Borders of New States', (1996) 90(4) *The American Journal of International Law* 590, 595 n34. https://www.jstor.org/ stable/2203988.
[103] Richard Dowden, *Africa: Altered States, Ordinary Miracles* (Public Affairs, New York, 2009) 52. ISBN: 978-1-58648-753-9.
[104] Ravi I. Kapil, 'On the Conflict Potential of Inherited Boundaries in Africa', (1966) 18 *World Politics* 656, 660. https://doi.org/10.2307/2009809.

by violence, the threat of violence, fraud, subjugation, and dispossession.

1.5 Embedding the Undemocratic Consequences of Effective Control

The past legitimation of the effective control of territory continues to affect the democratic legitimacy of existing states and the delineation of their territories. The administrative boundaries imposed by colonizers on their conquered territory were transmogrified to state borders with decolonization and legitimized in international law by the operation of the doctrine of *uti possidetis.* Since the end of the First World War, respect for the territorial integrity of states has emerged as the cornerstone of the international system. The reification of the territorial integrity of existing states has effectively denied any unilateral right to secede. Accordingly, the democratically illegitimate territorial boundaries of existing states -- recognized as legitimate in international law -- have been retained and entrenched.

a. The Maintenance of Illegitimately Imposed Borders

Even without colonizing territory, European powers imposed boundaries as part of their colonization drive that became the borders of many contemporary states without any regard for the indigenous population. Western powers, often acting in partnership with despotic rulers, would frequently impose borders between territories without asserting 'effective control'. The local population did not consent and had little input into the imposition of these borders. Almost all the states of the Middle East and Central Asia, 'began as

the result of colonial borders imposed from the outside that have very little to do with pre-existing ethnic boundaries (which in any case were so porous that they seldom formed much of a border).'[105] For instance, Afghanistan has long claimed that it was never colonized or otherwise ruled by foreigners, but the British with the connivance of their ally, Afghanistan's ruler, Emir Abdur Rahman (the 'Iron Emir') defined Afghanistan's border.[106] In 1893, the British imposed the 'Durand Line' delineating the boundary between Afghanistan (which it had auspiciously failed to colonize) and then British India. In doing so, the British allocated Peshawar, Quetta and other eastern territory to British India (now Pakistan). The population of Afghanistan is 40 per cent Pashtun but there are more Pashtuns in Pakistan as a consequence of the artificial delineation of the Durand Line.[107]

The peace process concluding the First World War saw the decolonization of the former Ottoman empire and a new 'scramble' by the victors, this time for the Middle East. At a meeting in San Reno, reminiscent of the Berlin Conference of 1885, France and Britain 'divided up the old Ottoman empire into several states -- thus delineating the boundaries of new states within the Middle East without the consent or input of the indigenous peoples of the

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[105] Juan R. I. Cole and Deniz Kandiyoti, 'Nationalism and the Colonial Legacy in the Middle East and Central Asia', (2002) 34 *International Journal of Middle East Studies* 189, 190. https://www.jstor.org/stable/3879823.
[106] Carter Malkasian, *The American War in Afghanistan: A History* (Oxford University Press, New York, 2021) 17. ISBN: 9780197550779.
[107] *Ibid.*, at 13.

region.'[108] Despite the apparent repudiation of a right of conquest, World War I's victors readily imposed borders on the nascent states of the Middle East, which clearly correlated with their own economic interests. In exercising their mandate over Iraq and drawing its boundaries, the British denied independence to the Kurds, resulting in an ongoing humanitarian crisis. At the same time, the British failed to correct the colonial delineation of the Kuwaiti-Iraqi borders, which has inspired generations of Iraqi nationalists, including Saddam Hussein, and provided (an invalid) justification for Iraq's invasion of the gulf state. The French created a religiously divided Lebanon by adding the Bekaa valley to Beirut and Mount Lebanon.[109] These illegitimate borders continue to define the territory of many Asian and Middle Eastern states.

b. The Doctrine of Uti Possidetis

The colonizer's 'administrative boundaries', a manifestation of their effective control, became post-independence 'state' borders because of international law's application of the principle of *uti possidetis*.[110] The International Court of Justice, in the 1986 *Burkina Faso/Mali case*, held that *uti possidetis* is a 'general principle' and 'a rule of

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[108] Mohamad G. Alkadry, 'Reciting Colonial Scripts: Colonialism, Globalization and Democracy in the Decolonized Middle East,' (2002) 24(4) *Administrative Theory & Praxis* 739, 746. https://doi.org/10.1080/10841806.2002.11029379.
[109] *Ibid.*, at 747.
[110] The principle of *uti possidetis* evolved from the early 19th Century Latin American concept 'whereby the administrative divisions of the Spanish Empire in South America were deemed to constitute the boundaries of the newly independent states.' Ratner, *supra* n. 102, at 590.

general scope' applicable in the decolonization context.[111] The ICJ stated that:

> The essence of the principle [of *uti possidetis*] lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more that delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.[112]

The ICJ also recognized that '*uti possidetis juris* is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes.'[113] As such, applied in the decolonization context, the doctrine provides that the fabricated and imposed administrative boundaries of a colony constituted the border of the newly independent states.[114] The effect

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[111] *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali*), ICJ Rep. 1986, 553.
[112] *Ibid*.
[113] *El Salvador/Honduras (Land, Island and Maritime Frontier Dispute) (Nicaragua Intervening*), ICJ Rep. 1992, 351, 388.
[114] *Uti possidetis* was not universally applied in the decolonization process. Instead, on a few occasions inhabitants were entitled to vote on their territory's future status. Britain and France split German Cameroon and the northern part, the British area, voted to merge with Nigeria and the southern French part with Cameroon. *See Northern Cameroons (Cameroon v. UK)*, ICJ Rep. 1963, 15, 21-25. The people of Kuria Muria, an island part of Aden (South Yemen) voted to become part of Muscat and Oman in 1967. Michla Pomerance, *Self-Determination in International Law and Practice: The New Doctrine in the United Nations* (Brill Nijhoff, Leiden/Boston, 1982) 21-22. ISBN: 978-90-24-72594-6. Notably Tutsi and Hutu enclaves in Rwanda and Burundi were divided at independence.

of the principle was to freeze Africa's 'irrational'[115] borders at independence.[116]

The purported purpose of applying *uti possidetis* in the decolonization process was to 'to prevent the independence and stability of new states being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administrating power.'[117] However, the administrative units and systems of governance imposed by Europeans

> were not rooted in African culture or experience and not strong enough to contain social and ethnic pressures that lay immediately beneath the surface and rose to the fore at independence.[118]

As such, despite the application of the principle of *uti possidetis*, 'fratricidal struggles' began either shortly before or contemporaneous with independence (Burundi, Zanzibar/Tanzania, the Congo/Katanga), and continued after independence (Angola, Ethiopia/Eritrea, Uganda) and reached their zenith shortly after the Cold War concluded in the 1990s and early 2000s (the Rwandan Genocide, and the African 'World War' focusing on the Great Lakes region of then Zaire, involving Zaire/Congo, Uganda, Rwanda,

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[115] Jeffrey Herbst, 'The Creation and Maintenance of National Boundaries in Africa', (1989) 43 *International Organization* 673, 678-85. https://www.cambridge.org/core/product/identifier/S0020818300034482/type/journal_article.
[116] *Burkina Faso/Mali*, *supra* n. 111, at 568. It was a 'photograph of the territorial situation.'
[117] *Ibid*., at 565. In Latin America '*uti possidetis juris* provided protection solely against external conquest.' In contrast, it was applied in the decolonization process 'to safeguard the new states also against internal fragmentation.' Fabry, *supra* n. 45, at 149.
[118] Dowden, *supra* n. 103, at 52.

Angola, Zimbabwe, Burundi, and Tanzania).[119] The maintenance of colonial borders was a self-justifying convenience and not a necessity. During the decolonization debate, the Pan-African Movement advocated drawing alternative boundaries; it denounced the 'artificial frontiers drawn by imperialist powers to divide the people of Africa' and called for 'the abolition or adjustment of such frontiers at an early date.'[120]

Outside of Africa, the doctrine also impacted the post-colonial boundaries of other new states. The boundary between the Democratic Republic of Timor-Leste and Indonesia was originally the colonial border between the Dutch-controlled western half and the Portuguese controlled eastern half. This colonial boundary was delineated by a compromise between Portugal and the Netherlands reached on 3 April 3 1913, together with a subsequent award by the Permanent Court of Arbitration dated 25 June 1914.[121] After Indonesian independence in 1949, the border continued between Indonesia and the Portuguese colony of East Timor.

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[119] *See, generally,* Gérard Prunier, *Africa's World War: Congo, The Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford University Press, New York, 2009). ISBN: 978-0-19-537420-9.

[120] Colin Legum, *Pan-Africanism: A Short Political Guide*, Resolutions adopted by the All-African People's Conference, Accra (Frederick A. Praeger, New York, 1962). ISBN10: 0837184207.

[136] *Boundaries in the Island of Timor (Portugal v. Netherlands),* (Unofficial English Translation), PCA Case No. 1913-01 (25 June 2014). https://pcacases.com /web/sendAttach/641.

1.6 The Apparent Demise of the 'Effectiveness' Test in State Recognition

It is generally conceded that there is no unilateral right to secede in contemporary international law,[122] with the possible exception of remedial secession.[123] Instead, the territorial integrity of existing states generally trumps the effective control of territory by a secessionist authority. The United Nations frequently reiterates the inviolability of 'the sovereignty and territorial integrity' of existing states. A political entity, irrespective of meeting the Montevideo criteria and satisfying the effectiveness test, will not become a state if it is confronted with a claim to territorial integrity. In today's world, with the paradigm of statehood, it is virtually impossible to make a claim to statehood without invoking a competing claim to territorial integrity, and the competing claim of territorial integrity will, pursuant to international law, trump a claim to independence. The primacy of territorial integrity necessarily denies a right to unilateral secession.[124] In denying any right to unilateral secession the international community has entrenched the illegitimate borders

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[122] As will be demonstrated in the next *Chapter*, even the manifested free and genuine will of the population, evidenced in a referendum, is not sufficient to invoke a unilateral right to secede.

[123] *Reference re Secession of Quebec* (1998) 2 SCR 217, para. 126. *See also*, Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing, Oxford, 2013) ('Vidmar (2013)') 158-169. ISBN: 978-1-84946-469-7.

[124] Jure Vidmar, 'Conceptualizing Declarations of Independence in International Law', (2012) 32(1) *Oxford Journal of Legal Studie*s ('Vidmar (2012)') 153, 154. DOI: 10.1093/0jls/gqr032. *See also*, A Orakhelashvili, 'Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo' 12 *Max Planck Yearbook United Nations Law* (2009) 1, 13. https://www.mpil.de/files/pdf2/mpunyb_01_orakhel_12.pdf.

of states imposed over the course of the last 400 years by violence, the threat of violence, coercion, subjugation and/or fraud.

Although the effective control test, or 'effectiveness', as codified in the Montevideo criteria remains facially relevant, its application is, at best, incoherent and inconsistent. In any event, effective control alone is no longer sufficient to lead to a successful secession, manifested by the international recognition of statehood. Instead, international law has evolved to entrench the consequences of previously exercised effective control -- that is the creation of states and the delineation of borders -- irrespective of their democratic legitimacy.

a. Territorial Integrity and Foreign Aggression

The primacy of territorial integrity was initially a reaction to secession precipitated by foreign intervention. Before World War I foreign involvement in establishing effective control was largely irrelevant to state recognition. As noted, the intervention of (primarily) France, Britain and Russia did not prevent the recognition of Belgium, Greece, Serbia and Romania. The post-World War I *Covenant of the League of Nations* provided that '[t]he Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.'[125] Independence became the central

[125] League of Nations, *Covenant of the League of Nations* (28 April 1919), Art. 10. https://www.refworld.org/docid/3dd8b9854.html.

criterion for statehood and effective control precipitated by foreign intervention did not justify recognition. The supremacy of territorial integrity and the prerequisite of independence came to the fore with claims for the recognition of the Japanese puppet state of Manchukuo.

In 1932, Japan invaded Manchuria and established the puppet state of Manchukuo. Japan claimed that its conquest was in self-defence. Shortly, thereafter the U.S. Secretary of State, Henry L. Stimson, united opposition to the recognition of Manchukuo. In doing so, Secretary Stimson precipitated the 'Stimson Doctrine' that provides 'that a foreign states unlawful intervention [...] cannot be allowed to yield a successful secession.'[126] Following the Stimson Doctrine, any 'unlawful' intervention that precipitates secession and a dependent or 'puppet' government should not result in the legitimation and the recognition of a new state. The Stimson Doctrine was a manifestation of the supremacy of territorial integrity over effective control and the emphasis on the putative state's *de facto* independence.[127] The League of Nations refused to recognize the *de facto* state of Manchukuo leading to '[t]he development of the doctrine of collective non-recognition of illegally created entities.'[128]

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[126] Brad R. Roth, 'Secessions, Coups, and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine', (2010) 11 *Melbourne Journal of International Law* 393, 400. http://classic.austlii.edu.au/au/journals/MelbJIL/2010/14.html.
[127] Crawford, *supra* n. 6, at 140.
[128] Vidmar (2013), *supra* n. 123, at 54.

The *Charter of the United Nations* (UN Charter), like the *Covenant of the League of Nations*, prioritised territorial integrity with a focus on foreign aggression. Article 2(4), the 'cornerstone' of the UN Charter, provides that:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[129]

In 1975, Turkey invaded Cyprus and established a *de facto* state in the northern part of the country. In 1975 and November 1983, the UN condemned the purported secession of part of Cyprus, and considered Turkey's attempt to create a new state, the Turkish Republic of Northern Cyprus, invalid.[130] Furthermore, it called 'upon all States not to recognize any Cypriot State other than the Republic of Cyprus.'[131] The international community did not recognize the putative new state.[132]

The apparent anomaly is the recognition of Bangladesh. Bangladesh was recognized by the international community even though a

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[129] UN, *Charter of the United Nations* (24 October 1945), 1 UNTS XVI, Art. 2(4). https://www.refworld.org/docid/3ae6b3930.html. Territorial integrity and the protection of borders was reinforced by the Helsinki Final Act, which provided that the parties regarded each other's frontiers 'as well as the frontiers of all States in Europe' as inviolable and committed to 'respect the territorial integrity of each of the participating States.' CSCE, *Conference on Security and Co-Operation in Europe Final Act (Final Act of Helsinki)* (Helsinki, 1 August 1975), Arts. II and III. https://www.osce.org/files/f/documents/5/c/ 39501.pdf.

[130] UNSC, *Security Council resolution 541 (1983) on Declaration by the Turkish Cypriot community of its secession from Cyprus*, SC Res. 541 (1983), UN Doc. S/Res/541 (1983, adopted 18 November 1983). https://digitallibrary.un.org/record/58970?ln=en.

[131] *Ibid.*

[132] Vidmar (2013), *supra* n. 123, at 57.

secessionist political authority, like those in Cyprus, attained effective control *only* because of foreign intervention. The Pakistan created in 1947, with the independence and partition of British India, did not consist of contiguous territory but comprised East Pakistan, now Bangladesh, and West Pakistan, now the 'rump' State of Pakistan. In the 1970 national elections, the Bengali Awami League, won an absolute majority of the National Assembly on a platform of decentralization and provincial autonomy. Shortly after the elections the government, centred on West Pakistan, suspended the National Assembly and imposed repressive martial law on East Pakistan. On 10 April 1971, the Awami League declared Bangladesh independent. However, the forces of the State of Pakistan remained in effective control. After India declared war on Pakistan in December 1971, the Bangladeshi authorities were able to exercise effective control but only with the military support of Indian troops, who continued to occupy Bangladesh for some time: 'there can be no doubt that Indian intervention was the dominant factor in the success of the independence movement.'[133] Bangladesh was 'widely and rapidly recognized as a state' despite the illegality of India's intervention and its inability to effectively control the territory of Bangladesh.[134] However, universal recognition only followed Pakistan's recognition. Bangladesh was admitted to the UN on 17 September

[133] Crawford, *supra* n. 6, at 141.
[134] *Ibid*.

1974.[135] Bangladesh is also sometimes touted as an exemplar of remedial secession.

More recently, the recognition of purported unilateral secessions of Kosovo, South Ossetia and Abkhazia manifest the supremacy of power politics over a coherent recognition practice.[136] The United States and its allies recognized the unilateral secession of Kosovo from Serbia, on 18 February 2008, but the Russian Federation refused to recognize Kosovo's independence.[137] Six months later, the Russian Federation recognized the unilateral secession of South Ossetia and of Abkhazia from Georgia but the United States refused to do so.[138] Kosovo's purported independence was precipitated by NATO and, likewise, the independence of the former Georgian territories was brought about by Russian military intervention. Kosovo's 'supervised independence' has now been recognized by

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[135] UNGA, *Admission of the People's Republic of Bangladesh to membership in the United Nations*, GA Res. 3203 (XXIX), UN Doc. A/RES/3203(XXIX) (1975, adopted 17 September 1974). https://digitallibrary.un.org /record/ 189825?ln=en.
[136] International politics has also prevailed in the case of Palestine. Palestine has been recognized by more than two-thirds of UN member states. It has also entered a number of international treaties and joined a number of international organizations. However, Palestine has not been granted membership of the UN, primarily because of pro-Israel sentiment within the Security Council and the exercise of the veto power. The General Assembly has, instead, conferred Palestine with 'non-Member Observer State' status. UNGA, *Status of Palestine in the United Nations*, GA Res. 67/19, UN Doc. A/RES/67/19 (4 December 2012, adopted on 29 November 2012). https://digitallibrary.un.org/record/739031?ln=en. *See also*, https://worldpopulationreview.com/country-rankings/countries-that-recognize-palestine. *See also,* Shaw, *supra* n. 1, at 217.
[137] Aleksandar Pavković, 'Military Intervention in Aid of Secession: Kosovo and Its Aftermath', in Martin Riegl and Bohumil Doboš (eds), *Perspectives on Secession: Theory and Case Studies* (Springer International Publishing, Kindle ed., Cham, 2020) 145-62, at 145-46. ISBN: 978-3-030-48274-9. https://doi.org/10.1007/978-3-030-48274-9.
[138] *Ibid*.

almost one-hundred states, but it has not become a member-state of the UN.[139] Similarly, the UN condemned the 'invasion' and occupation of the Kelbadjar[140] and Agdam[141] districts of the Nagorny-Karabakh Region of Azerbaijan by Armenian backed separatist forces.[142]

b. The Increasing Irrelevance of Indigenous Effective Control

The reaffirmation of 'the sovereignty' and 'territorial integrity' of existing states, and the inviolability of their borders, is a common refrain of the United Nations Security Council.[143] The *Declaration*

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[139] As of July 2022, Kosovo was recognized by ninety-nine states. Twenty other states had previously recognized Kosovo as an independent state, but these recognitions were either withdrawn, ambiguous or disputed. *See, World Population Review* (Website). https://worldpopulationreview.com/country-rankings/countries-that-recognize-kosovo. *See also*, Nina Caspersen, *Unrecognized States: The Struggle for Sovereignty in the Modern International System* (Polity Press, Kindle ed., Cambridge, 2012) 21-22. ISBN-13: 978-0-7456-6034-9.

[140] UNSC, *Security Council resolution 822 (1993) on the conflict between Armenia and Azerbaijan*, SC Res. 822, UN Doc. S/RES/822 (1993, adopted 30 April 1993). https://digitallibrary.un.org/record/165604?ln=en.

[141] UNSC, *Security Council resolution 853 (1993) on the seizure of the district of Agdam and of all other recently occupied areas of Azerbaijan*, SC Res. 853, UN Doc. S/RES/853 (1993, adopted 29 July 1993). https://digitallibrary.un.org/record/170257?ln=en.

[142] Another anomaly is the case of Taiwan. After the Chinese Civil War concluded at the end of 1949, communist forces controlled the mainland, and nationalist forces were relegated to the island of Formosa (now Taiwan). However, both the communists and the nationalists claimed to represent *all* of China. Even after recognition of the People's Republic of China and despite 'effectively controlling' the island, the Taiwanese government has not claimed separate statehood for Taiwan. Shaw, *supra* n. 1, at 211-12.

[143] *See, eg.,* UNSC, *Renewal of sanctions against Yemen imposed by Security Council resolution 2140 (2014) until 28 Feb. 2023 and extension of the mandate of the Panel of Experts until 28 Mar. 2023*, SC Res. 2624, UN S/RES/2624 (2022, adopted 28 February

on Principles of International Law (1970), in limiting the right of self-determination, states that:

> Nothing in the foregoing paragraphs [referring to the right of self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states…[144]

As noted, the primacy of territorial integrity necessarily denies a right to unilateral secession, irrespective of the absence of foreign intervention and the independence of the putative state.[145] Declarations of independence and the use of force by domestic secessionist forces are not unlawful, but are 'legally neutral' and not regulated by international law.[146] However, irrespective of the lawfulness of attempts to secede, indigenously precipitated effective control is not sufficient to create a state. The successful use of force and the maintenance of *de facto* statehood does not result in recognition and *de jure* statehood. Accordingly, effective control by a secessionist authority, resulting perhaps by military victory in a

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2022). https://digitallibrary.un.org/record/3959154?ln=en. UNSC, *Extension of the mandate of the UN Mission of Observers in Tajikistan (UNMOT)*, SC Res. 1113, UN Doc. S/RES/1113 (1997, adopted 12 June 1997). https://digitallibrary.un.org/record/234623?ln=ar. UNSC, *The use of chemical weapons in the Syrian Arab Republic*, SC Res. 2118, UN Doc. S/RES/2118 (2013, adopted 27 September 2013). https://digitallibrary.un.org/record/757830?ln=en.

[144] UN, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United* Nations, GA Res. 2625, UN Doc. A/RES/2625(XXV) (1971, adopted 24 October 1970), Annex: Principle No. 5. https://digitallibrary.un.org/record/202170?ln=en.

[145] Vidmar (2012), *supra* n. 124, at 154. Orakhelashvili, *supra* n. 124, at 13.

[146] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, *Advisory Opinion*, ICJ Rep. 2010, para. 55. *See also* Crawford, *supra* n. 6, at 390.

civil war, is insufficient to warrant recognition. For instance, both Katanga, and Biafra maintained the indicia of a state -- the facts on the ground -- for a significant period. Even Eritrea, which had well-established all the indicia of statehood after a catastrophic 'civil' war with Ethiopia, only achieved statehood when Ethiopia formally relinquished its claim to the territory.[147]

Effectiveness is not only insufficient to warrant recognition of statehood, its absence also no longer appears to result in the denial of recognition. Since World War II, 'new states were recognized without a central government ever having established effective control throughout the territory.'[148] The Democratic Republic of Congo was recognized in 1960 without the central government having any real control over the secessionist Katanga province. Angola was recognized in 1975 despite an ongoing civil war whereby neither authority could claim effective control throughout the recently decolonized state. The dissolution of Yugoslavia was followed by the recognition of Bosnia-Herzegovina despite the Serbia forces controlling large swathes of territory. At the same time, there is 'strong presumption' favouring the continuity of a state irrespective of the loss of effective control, 'provided that the original organs of the state remain formally separate and retain at least some semblance of control.'[149] Accordingly, '[m]any states have

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[147] Crawford, *supra* n. 6, at 402.
[148] Brad R Roth, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order* (Oxford University Press, Oxford, 2011) ('Roth (2011)') 175. ISBN: 978-0-19-534266-6175.
[149] Crawford, *supra* n. 6, at 701.

continued to be recognized as undivided political units notwithstanding the failure of the central government to maintain effective control over substantial parts of the national territory.'[150] Thus, once a state is recognized by the international community, its effective control is of limited relevance.

States continue to pay lip service to the relevance of the effective control doctrine in state recognition. For instance, in 1976, the United States Department of State noted that in recognizing states,

> the United States has traditionally looked to the establishment of certain facts. These facts include effective control over a clearly defined territory and population; an organized governmental administration of that territory and a capacity to act effectively to conduct foreign relations.[151]

In 1986, the British Government also emphasised the importance of the effective control of territory in the recognition of statehood:

> The normal criteria which the government apply for recognition as a state are that it should have, and seem likely to continue to have, a clearly defined territory with a population, a government who are able to exercise effective control of the territory, and independence in their external relations.[152]

However, despite stipulating that the 'traditional' and 'normal criteria' of recognizing statehood continued to apply, the application of the effective control test to state creation is increasingly irrelevant.

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[150] Roth (2011), *supra* n. 148, at 175.
[151] *Digest of United States Practice in International Law* (1976), 19-20, in Shaw, *supra* n. 1, at 383.
[152] *House of Commons Debates*, Vol. 102, Col. 977, Written Answer, 23 October 1986, in Shaw, *supra* n. 1, at 383.

1.7 Conclusion

The recognition of statehood and the allocation and delineation of territory has traditionally depended on 'effective control', irrespective of the methods utilized to attain it. Indeed, effective control has often been attained by violence, the threat of violence, coercion, fraud, subjugation and dispossession. The consent of the population to the exercise of political authority over a territory -- *democratic* legitimacy -- was largely irrelevant to state recognition. Many of today's states were first recognized as a consequence of violence. The states formed contemporaneously with the end of the Thirty Years War and the delineation of territory governed by the Treaty of Westphalia form the basis of many of today's European states. The effective control of rebel movements following victory in independence wars led to the recognition of a plethora of seceding states in the Americas, including the United States. Foreign military intervention in support of independence movements also precipitated the effective control of domestic political authorities to the exclusion of imperial powers and lead to the recognition of Belgium, Greece, Serbia, Montenegro and Romania in the 19th Century.

The territory of states was also legitimately delineated by violence, the threat of violence, coercion, fraud, subjugation and dispossession. The right of conquest enabled 'sovereign' (that is, 'western civilized') states to 'legitimately' acquire territory. The effective control of territory legitimated the annexation of territory following wars between European states. Imperial states also utilized the right of conquest and the legal doctrines of discovery, occupation, and

cession to impose 'effective control' and colonize much of the Global South. Throughout the colonizing process, imperial states fabricated and imposed administrative boundaries that had no relationship to local political conditions or indigenous cultural heritage. These *democratically* illegitimate borders imposed in Europe's colonization drive were transmogrified into state borders by operation of *uti possidetis*. The delineation of territory and the imposition of international borders was therefore predominantly the result of the exercise of effective control induced by violence and coercion. The manifest consent of the population was largely irrelevant.

In prioritizing the territorial integrity of states, the *Covenant of the League of Nations* and the *Charter of the United Nations* has reverted to a system of collective security not dissimilar to the pre-Concert of Europe system that protected the territory of hereditary monarchs from internal secession. Once a state is recognized -- and thereby *legitimized* -- by the international community, the effective control test is largely irrelevant. The results of past patterns of effective control induced by violence, coercion, fraud, subjugation and dispossession are thereby entrenched by international law. The increasing irrelevance of the effective control doctrine has rendered international law's state recognition doctrine incoherent and its application inconsistent, at best.

2. REFERENDA AND THE DEMOCRATIC LEGITIMACY OF STATES

2.1 Introduction

The population's consent to statehood and its territory is relevant to its democratic legitimacy. Indeed, the early theorists of sovereignty justified statehood on the basis of a 'fictional' consent.[1] *Chapter 1* established that states and their territory, in accordance with international law's recognition doctrine, were determined primarily by violence and coercion, and the consent of the resident population was of little relevance. On occasion referenda were utilized to establish the consent of the population to statehood and territorial sovereignty. Indeed, votes to determine the allocation of sovereignty 'were far from uncommon' even before the Westphalia settlement.[2] Referenda have been utilized for centuries by political entities in control of territory to justify and purportedly legitimize their sovereignty. The international community has also sporadically employed the purportedly democratic processes of referenda to ascertain the 'will of the people' and provide a semblance of legitimacy to the allocation of territorial sovereignty.

The objective of this *Chapter 2* is to demonstrate that independence and secession referenda conducted before the end of the Cold War did little more than reinforce and validate existing effective control

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[1] *See, infra,* Ch. 4.2.
[2] Matt Qvortrup, 'The History of Ethno-National Referendums 1791–2011', (2012) 18(1) *Nationalism and Ethnic Politics* 129, 131. https://doi.org/10.1080/13537113.2012.654081.

and were otherwise often an invalid reflection of consent because they were surrounded by violence and conducted in an atmosphere of fear and intimidation; frequently subject to fraud, manipulation and bias; and sometimes boycotted by large segments of the population. Furthermore, for the most part, these referenda determined only the status of an existing territorial unit (usually its independence or incorporation into an existing state) and not the boundaries of that unit. On only a very few occasions have referenda been utilized to, partially, delineate territory. Referenda conducted before the end of the Cold War did little to confer democratic legitimacy on the subject states and their territory.

2.2 Pre-WWI Referenda and the Validation of Effective Control

Beginning in the late 18th Century and continuing throughout the 19th Century several referenda were conducted to purportedly legitimize the creation of states and the annexation of territory. However, these referenda did little more than validate existing effective control. These referenda also demonstrated that the choice of political community entitled to vote can be decisive and potentially invalidate the outcome of a referendum. Accordingly, these referenda did little to confer democratic legitimacy on the applicable emergent states.

a. Validating Effective Control

Votes to determine the allocation of sovereignty preceded the Westphalian settlement. The first attempt to ascertain the will of the populous to the allocation of territory *after* the development of the modern state probably occurred in revolutionary France. The

constitution of Revolutionary France renounced conquest and provided that territorial annexation was invalid without the consent of the affected population. Accordingly, in 1791 and 1792 referenda were conducted in Avignon and the surrounding territory of Comtat Venessin, formerly belonging to the Holy See.[3] In 1792, referenda were also conducted in Savoy and Nice. In all three pre-defined and delineated territories the population voted in favour of annexation with France. However, the vote in favour of annexation in Savoy and Nice followed French occupation and effective control of the region: votes were 'often conducted under the partisan eyes of French occupation troops.'[4] Only a year later it adopted an even more coercive approach and forced the populations of Mainz and parts of Belgium to vote in favour of annexation.[5] It has been said that these referenda 'were only valid if the vote was pro-French.'[6] Thus, 'in these territories [referenda] were used to "legitimize" a *fait accompli*.'[7]

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[3] Jean A. Laponce, 'National self-determination and referendums: The case for territorial revisionism', (2001) 7(2) *Nationalism and Ethnic Politics* 33, 38. DOI: 10.1080/13537110108428627.

[4] Lawrence T. Farley, *Referenda and Sovereignty: The Crisis of Political Illegitimacy* (Routledge, Kindle ed., New York, 1986) 31. ISBN: 0-8133-7217-8.

[5] Volker Prott, *The Politics of Self-Determination: Remaking Territories and National Identities in Europe, 1917–1923* (Oxford University Press, Oxford, 2016) 23. eBook ISBN: 9780191823312. DOI: https://doi.org/10.1093/acprof: oso/9780198777847.001.0001.

[6] Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge, 1995) 12. ISBN: 0521481872.

[7] Visuvanathan Rudrakumaran, 'The "Requirement" Of Referendum Territorial Rapprochement', (1989) 12(23) *Houston Journal of International Law* 25. http://www.hjil.org/articles/hjil-12-1-rudrakumaran.pdf

The purported consent of the populous to territorial sovereignty became increasingly important after the two great revolutions of the late 18th Century. Throughout the course of the 19th Century, flawed referenda often gave the illusion of popular consent but were again used to reinforce effective control. In almost all of the 19th Century referenda, effective control -- effective control by violence and coercion -- was a precursor to the administration of a referendum. The effective control of a putatively new authority enabled the creation of circumstances prejudicial to the conduct of any referenda. The illusion of popular consent manifested by a referendum outcome was also utilized to justify occupation to foreign powers and thereby induce recognition.

It was with the unification of Italy that, according to Philip Goodhart, 'self-determination referendums had their finest hour.'[8] However, the effective control of Italy's ancient regimes had collapsed, and the Kingdom of Sardinia exerted control. Beginning in 1848, with Lombardy, referenda were utilized in an attempt to legitimize regional unification, first with the Kingdom of Sardinia and then later with the Italian state.[9]

> In 1848, 551,000 of the 661,000 qualified voters in Lombardy voted for immediate union with the Kingdom of Sardinia; in 1870, 68,466 Romans voted for inclusion in modern Italy. Between these two polls, referendums were held in Tuscany, Emilia, Sicily, Naples, Umbria and Venetia. It is fair to say that the modern Italian state was built by a series of

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[8] Philip Goodhart, "Referendums and Separatism," in Austin Ranney (ed.), *The Referendum Device* (AEI Press, Cambridge, Mass., 1981) 137-42, at 139. ISBN-13: 978-0844721958.
[9] Rudrakumaran, *supra* n. 7, at 26.

> referendums in which overwhelming majorities turned out to vote for the unification of their country.[10]

It was the Kingdom of Sardinia, after asserting effective control by military force, that oversaw the referenda and the results reflected Sardinia's 'effective control.'[11] Despite their questionable legitimacy, the referenda results were an important factor in encouraging the great powers to accept the unification of Italy, thereby legitimizing the effective control of the Kingdom of Sardinia.[12]

Contemporaneously with the recognition of the Italian state, electoral procedures were utilized to ascertain the will of the populous in the new putative states emerging from the slowly disintegrating Ottoman empire. Romania was formed following the fusion, in diluted form, of the principalities of Moldavia and Valachia/Wallachia. The will of the populace was ascertained by repeatedly flawed electoral processes, beginning with 'clearly fraudulent' elections in 1857.[13] Subsequent elections in the years of 1858 and 1859 were equally flawed, where '[i]ntimidations and arrests were not infrequent' and

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[10] Goodhart, *supra* n. 8, at 139.
[11] Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States Since 1776* (Oxford University Press, Oxford, 2010) 91. eBook ISBN: 978019172 2325. DOI: 10.1093/acprof:oso/9780199564446.001.0001.
[12] Matt Qvortrup, *The Referendum and Other Essays on Constitutional Politics* (Bloomsbury Publishing, Kindle ed., Oxford, 2019) ('Qvortrup (2019)') 6, 42. ISBN: 978-1-50992-930-6.
[13] Charles and Barbara Jelavich, *The Establishment of the Balkan National States, 1804-1920* (University of Washington Press, Seattle, 1986) 115. ISBN: 9780295 954448.

'nine-tenth [*sic*] of the population were denied the right to vote.'[14] The result of the referendum favoured fusion, and despite the opposition of the Ottoman Empire, fusion proceeded.[15]

These referenda were generally utilized to legitimize existing facts -- that is effective control -- and were typically flawed. The referenda were usually administered by the party in effective control and the conduct of a referendum by the controlling authority is not independent and can present, or at least appear to present, a *fait accompli*.

b. The Determination of the Political Community

The choice of the political community that will participate in any referendum is potentially decisive and demonstrative of the near impossibility of democratically determining territorial sovereignty.[16] A referendum was proposed to resolve issues between Prussia and Denmark after the first Schleswig War in 1848–51 but was rejected by the then militarily stronger Denmark.[17] Again, 15 years later, tensions erupted between Denmark and Prussia and Austria over the Elbe Duchies. A stronger Prussia manifested a desire to conduct a referendum to determine the issue, but the parties could not agree on the political community, that is the populations of Schleswig and

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[14] Johannes Mattern, *The Employment of the Referendum in the Determination of Sovereignty* (Johns Hopkins Press, Baltimore, 1920) 104. https://ia600902.us.archive.org/27/items/employmentofpleb00matt/employmentofpleb00matt_bw.pdf.
[15] *Ibid.*, at 105. *See also*, Rudrakumaran, *supra* n. 7, at 26.
[16] *See infra,* Ch. 5.2.
[17] Qvortrup (2019), *supra* n. 12, at 37.

Holstein or Denmark as a whole, to participate in the referendum. The Danes argued that as Schleswig and Holstein were part of the national political community all Danes should be entitled to participate. The Prussians asserted that only the population of the territories in question should be entitled to vote. Obviously, each sides' position reflected the political realities of the situation: Schleswig and Holstein had a clear majority of German speakers and were perceived as likely to support annexation with Prussia, whereas the bulk of the Danish population desired maintenance of the status quo.

The truism that a referendum 'can be won or lost depending on who picks the area of the plebiscite, and who determines who can vote'[18] was also reflected in the circumstances surrounding the proposed referendum to resolve a dispute between Chile and Peru over Tacna and Arica. Chile had annexed the territory during the 'War of the Pacific' or the 'Saltpeter War' (the war was largely a dispute over nitrate resources). The war was between Chile and allies Bolivia and Peru and began in 1879.[19] A referendum was proposed as early as 1883. For fifty years after annexing the territory, Chile engaged

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[18] Paulina Ochoa Espejo, *On Borders* (Oxford University Press, New York, 2020) 76. ISBN: 9780190074203.

[19] Chile commenced the war to secure the nitrate of southernmost Peru. Bolivia ultimately lost its access to the sea. Jorge I. Domínguez with David Mares, Manuel Orozco, David Scott Palmer, Francisco Rojas Aravena, and Andrés Serbin 'Boundary Disputes in Latin America' (United States Institute of Peace, Peaceworks No. 50, 2013). https://www.usip.org/publications/2003/08/boundary-disputes -latin-america.

in the 'Chileanization' of the region -- disproportionately increasing the Chilean population.[20]

> Chile had wrongfully occupied the territory, packed the former Peruvian provinces with Chilean settlers, forced Chilean civic culture on the population, expelled Peruvian priests and teachers, and compelled the catholic church to change the local parishes' dependence from Lima to Santiago. Peru could not accept a democratic decision in the area because Chilean control had coercively molded the people who were to decide.[21]

Peru thus cancelled a proposed 1926 referendum. The dispute was finally resolved in 1929 through negotiation whereby Arica was annexed by Chile and Tacna by Peru.

2.3 The WWI Peace Process, Self-Determination and Democracy

The importance of independently ascertained popular consent to statehood, purportedly irrespective of effective control, has increased in parallel with the development of the principle and, ultimately, the right of self-determination. At its core self-determination 'is a principle concerned with the right to be a state.'[22] It has been a political principle since the French Revolution and developed conceptually throughout the 19th Century.[23] The principle came to the fore towards the end of the First World War and developed as a

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[20] Rudrakumaran, *supra* n. 7, at 27.
[21] Ochoa, *supra* n. 18, at 76.
[22] James Crawford, *The Creation of States in International Law* (Oxford University Press, Oxford, 2006) 107. ISBN: 9978-0-19-922842-3.
[23] *Ibid.*, at 115.

somewhat limited positive legal right with the decolonization process following the Second World War.

During the First World War, the Russian Bolshevik revolutionary leader Vladimir Lenin and United States President Woodrow Wilson promoted the principle of self-determination.[24] In 1918, Woodrow Wilson's fourteen-point plan and the end of the First World War and subsequent peace process asserted that the population's consent to territorial sovereignty was determinative.[25] Wilson defined self-determination as government by consent,[26] and that included consent to territorial sovereignty: '[p]eoples may now be dominated and governed only by their own consent.'[27] It was in this context that self-determination developed as a synonym for democracy.[28]

Prior to Wilson's 14-point plan, in 1916, Lenin explicitly promoted the use of referenda in determining national questions.[29] In the

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[24] *Ibid.*

[25] President Woodrow Wilson, *Address to Congress on International Order* (11 February 1918). https://www.presidency.ucsb.edu/documents/address-congress-international-order.

[26] The British Prime Minister, Lloyd George, also promoted territorial sovereignty by consent, stressing that 'government with the consent of the governed must be the basis of any territorial settlement in this war.' Lloyd George, 'Statement of British War Aims by Prime Minister Lloyd George' (5 January 1918), in James Brown Scott, *Official Statements of War Aims and Peace Proposals, December 1916 to November 1918* (Carnegie Endowment for International Peace, Division of International Law, 1921) 228-29. https://hdl.handle.net/2027/uc1.3210601517 4201.

[27] President Wilson, *supra* n. 25.

[28] Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing, Oxford, 2013) 139. ISBN: 978-1-84946-469-7139.

[29] Vladimir Lenin, 'The Socialist Revolution and the Right of Nations to Self-Determination', *Lenin Collected Works* [1916], 143-156. https://www.marxists.org/archive/lenin/works/1916/jan/x01.htm.

Leninist context, self-determination was a synonym for secession.[30] Although Wilson was silent as to the conduct of referenda to address territorial questions in his 14-point plan 'it is clear from the context that [he] wanted the decisions regarding the national borders to be taken by the peoples concerned through referenda.'[31] Despite implicitly endorsing referenda, Wilson recognized 'that sometimes one had to consider "other principles" -- strategic, economic and logistic -- that could "clash with the requirements of self-determination."'[32] Indeed, for the most part these 'other principles' prevailed and despite the rhetoric of democracy and consent of the governed, referenda were not utilized to determine the status of existing territories and the test for statehood remained effective control. It was only in a small minority of situations that referenda were utilized to determine boundary issues: '[w]ith a few exceptions in the less sensitive frontier regions, no referenda or referenda were held to determine the wishes of the people affected by Versailles map-making.'[33]

a. Recognizing New States in the WWI Peace Process

Unlike the 19th Century, where foreign forces often overtly supported independence movements in Europe, it was the military collapse of

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[30] Vidmar, *supra* n. 28, at 141.
[31] Qvortrup (2019), *supra* n. 12, at 41.
[32] Thomas M. Franck, 'The Emerging Right to Democratic Governance', (1992) 86(1) *The American Journal of International Law* 46, 53. DOI:10.2307/2203138.
[33] Hurst Hannam, 'Rethinking Self-Determination', (1993) 34(1) *Virginia Journal of International Law* 1, 5. https://heinonline-org.sare.upf.edu/HOL/Page? handle= hein.journals/vajint34&id=13&collection=journals&index=.

the old empires of the Austro-Hungarian empire, Germany and Tsarist Russia that created a vacuum that was readily filled by nationalist forces after World War I. 'Recognition by the Allied countries was eventually extended to all the communities that maintained themselves *de facto* and outlasted the incursions of their neighbors.'[34] After the collapse of the Central Powers, Polish, Czechoslovakian and Yugoslavian independence movements rapidly established provisional authorities laying the groundwork for recognition, again by effectively controlling territory. Poland, Czechoslovakia and Yugoslavia 'had their boundaries and related issues settled by an international conference and understood that acceptance of the settlement was a necessary condition of their recognition.'[35] The manifestation of consent to statehood was not a factor in their recognition.

The statehood of the former territories of the Romanov Russian empire was more complicated, first by Russian capitulation pursuant to the Treaty of Brest-Litovsk and then the renunciation of the Treaty. On 3 March 1918, the Treaty of Brest-Litovsk was signed ending the war between Russia and the Central Powers. Shortly before the signing of the Treaty, on 24 February 1918, Estonia declared its independence. However, pursuant to the Treaty, Estonia and Livonia 'were to be policed by Germany pending the formation of local organs of self-government.'[36] Furthermore, Russia was to

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[34] Fabry, *supra* n. 11, at 133.
[35] *Ibid.*, at 131.
[36] Olavi Arens, 'The Estonian Question at Brest-Litovsk', (1994) 25(4) *Journal of Baltic Studies* 305, 320. https://www.jstor.org/stable/43211920.

abandon the Baltic; the treaty also called for the creation of an independent Ukraine.[37] Subsequent treaties between Russia and Germany (in August 1918) required Russia permanently cede any claim to Estonia and Livonia.[38] From late 1918, Latvia, Estonia and Lithuania were *de facto* states but were only recognized as sovereign states in 1921 after signing a peace treaty with the Soviet Union, and, in Lithuania's case, with Poland. The independence and statehood of the Baltic states was recognized without consulting the population, but their independence was interrupted by the Second World War and Soviet annexation.

In any event, with the armistice of 11 November 1918, the Treaty of Brest-Litovsk was renounced and the new Russian government under Vladimir Lenin and the Red Army, under the leadership of Leon Trotsky, attempted to re-capture the old Russian territory. The dependence on the defunct Treaty of Brest-Litovsk enabled Russia to reclaim the unrecognized *de facto* states of the Ukrainian People's Republic, the Republic of Azerbaijan, the White Russian Republic, the Kuban Republic, and the Republic of North Caucasus.[39] Soviet Russia also reclaimed Armenia and Georgia; unlike the aforementioned *de facto* states, Armenia and Georgia were both recognized as states by the allies in 1920 and early 1921, respectively. Armenia's recognized independence lasted less than 12 months and

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[37] Heinrich August Winkler, *The Age of Catastrophe: A History of the West, 1914-45* (Stewart Spencer (trans.)) (Yale University Press, New Haven, 2015) 49. ISBN: 978 0 300 20489 6.
[38] *Ibid.*
[39] Fabry, *supra* n. 11, at 134.

Georgia's less than three months.[40] Once more, the consent of the population of the former Romanov Empire, evidenced by referenda, was not a prerequisite to the recognition of the emergent Eastern European and Central Asian states.

b. Referenda and the Delineation of Territory

Although the effective control test continued to determine the recognition of states in the peace negotiations after World War I, '[t]he real issue as far as the new states were concerned was to determine their international boundaries.'[41] It was thus notable that referenda were 'intended not only to transfer sovereignty but also to divide the contested ground.'[42] Referenda were held, however, only in very limited circumstances and mostly concerning the borders arising from the victors' treaties with the vanquished Germany and Austria.[43] Despite sporadically embracing referenda, for the most part, it was exclusively for the Peace Conference, with the advice of experts, to determine boundaries.

For centuries Schleswig and Holstein had been territories of contestation between Denmark, Prussia and Austria. Since the 19th Century the German population of Schleswig had been increasing in comparison to the Danish population and at the end of World War I Schleswig was held by Germany. In 1919, Denmark requested a referendum to determine the future status of the region. The Peace

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[40] *Ibid.*
[41] *Ibid.*, at 126.
[42] Laponce, *supra* n. 3, at 40.
[43] *Ibid.*, at 35.

Conference, adopting a Danish proposal, divided the area into 2 zones: one adjoining Denmark (Zone 1) and one further to the south (Zone 2). As expected, an overwhelming majority of Zone 1 (74 per cent) voted to become part of Denmark and an even greater majority of Zone 2 (80 per cent) voted to remain part of Germany.[44]

Upper Silesia had been part of Germany since the 14th Century but Polish before that, and the pre-War population of approximately 2 million was predominantly Polish by a factor of almost 2 to 1.[45] However, identities were 'extremely fluid'.[46] A vote was taken and 60 per cent of the population voted for remaining with Germany and 40 percent for annexation by Poland. The votes were counted locally so that the wishes of the specific resident population most proximate to any potential new border could be taken into account. The League of Nations asked a committee to draw the boundary and allocated 57 per cent of the population and 75 per cent of the territory to Germany. However, the most economically important region, the densely populated 'industrial triangle', where previously 25 per cent of German coal was extracted, was allocated to Poland.[47] Violence marred the referendum process both before and after the vote. Before Allied administration of the region began in 1920, an attempt by

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[44] *Ibid.*, at 44-46.
[45] *Ibid.*, at 41.
[46] Prott, *supra* n. 5, at 129, 132. *See also*, Timothy Wilson, *Frontiers of Violence: Conflict and Identity in Ulster and Upper Silesia, 1918–1922* (Oxford University Press, Oxford, 2010). ISBN10: 0199583714. *See also,* Tomasz Kamusella, 'Nation-Building and the Linguistic Situation in Upper Silesia', (2002) 9 (1) *European Review of History* 37–62. https://doi.org/10.1080/13507480120116191.
[47] Laponce, *supra* n. 3, at 43.

Polish insurgents to take over the eastern triangle was crushed by Germany. After the referendum, but before boundaries were demarcated, Polish and German forces again engaged in a violent confrontation that took Allied forces months to contain. The Upper Silesian referendum was therefore marred by violence and its validity must be questioned.

As was clear from the referendum in Upper Silesia, ethnic identity was not always decisive in determining the outcome of referenda. In the East Prussian referenda in Allenstein and Marienwerder most ethnic Poles voted for annexation with Germany.[48] Indeed, in 1921, in Klagenfurt in Carinthia, the Slovenian population voted for annexation with Austria even in areas under Yugoslav administration.[49] In the same year, another referendum was undertaken in Burgenland/Sopron, the disputed border territory between Hungary and Austria. Like the referendum in Upper Silesia, the Burgenland/Sopron area referendum was preceded by extensive violence.

In July 1919, Burgenland was awarded to Austria, including its Magyar dominated communes around Sopron.[50] In response, Hungarian militias engaged in dispersed and sporadic violence, including organized reprisal killings and sabotage operations. Over

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[48] *Ibid*., at 42.
[49] *Ibid*., at 51.
[50] Joseph Imre, 'Burgenland and the Austria-Hungary Border Dispute in International Perspective, 1918-22', (2015) 4(2) *Region: Regional Studies of Russia, Eastern Europe, and Central Asia (Special Edition: The Great War and Eastern Europe)* 219, 237. https://www.jstor.org/stable/43737573.

the course of the next two years, internecine violence continued to wreak havoc among the population. The violence destroyed the once peaceful ethnic relations between Magyars and German speakers.[51] The disintegration of ethnic relations and the fear of open warfare between Austria and Hungary led to the *Venice Protocol* of October 1921. The Venice Protocol called for a referendum in Sopron and its eight surrounding communes. The referendum took place on 14-16 December 1921 '[a]mid considerable controversy over the accuracy of voting lists and Hungarian militias in de facto control of Burgenland during the vote.'[52] Although Hungary won the vote, it has been noted that 'as proper safeguards for a free and fair plebiscite were lacking, the vote is not convincing one way or the other.'[53] Equally disconcerting was the discrepancy between the voting in Sopron and in the surrounding villages. While 73 per cent of the Magyar-dominated population of Sopron voted in favour of annexation with Hungary, the German-speaking majority of five of the surrounding villages voted for annexation with Austria.[54] The delineation of the Sopron territory and its allocation to Hungary as a

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[51] *Ibid*., at 243.
[52] *Ibid.*, 244 (emphasis added).
[53] Sarah Wambaugh, *Plebiscites since the world war: With a collection of official documents, Vol. I* (Carnegie endowment for international peace, 1933). https://babel.hathitrust.org/cgi/pt?id=mdp.39015057996640&view=1up&seq=13. *See also,* Imre, *supra* n. 50, at 238-244.
[54] Imre, *supra* n. 50, at 244. It should also be noted that a 1921 referendum independently organised in the Tyrol region was ignored in the peace settlement process despite the fact that more than 90 per cent voted for union with Germany. Fernando Mendez and Micha Germann, 'Contested Sovereignty: Mapping Referendums on Sovereignty over Time and Space', (2016) 48 *British Journal of Political Science* 141–165. DOI:10.1017/S0007123415000563. *See also* Qvortrup, (2018), *supra* n. 12, at 51.

consequence of the flawed referendum process cannot be described as democratically legitimate.

The 'other principles' that countermanded the requirements of self-determination, primarily economic and security issues, were evident in a number of instances where referenda were not conducted. Port cities, such as Fiume and Danzig, were 'declared essential to the economic life of a state'[55] and they were both declared 'Free Cities'. In the case of Fiume, the Italian and Yugoslavian governments could not decide on the demarcation of Fiume's political community: the Italians favoured restricting the vote to the city itself where a majority of Italian speakers resided, whereas the Yugoslavian authorities wanted to include the suburb of Porto Barros/Susak and surrounding villages where a majority of Croatians lived. Fiume was another example of the near impossibility of democratically determining territorial sovereignty.[56] The inability to conduct a free and fair referendum in Fiume led, albeit indirectly, to the revolutionary poet Gabrielle D'Annunzio and his followers demonstratively 'marching' from Monfalcone to Fiume in September 1919 (D'Annunzio drove his car). D'Annunzio and his followers occupied the city for more than a year. The response of D'Annunzio and other Italian nationalists to the internationalization of Fiume influenced the subsequent rise of fascism and Mussolini.[57] Likewise, the

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[55] Andrew F. Burghardt, 'The Bases of Territorial Claims', (1973) 63(2) *Geographical Review* 225, 237. https://www.jstor.org/stable/213412.
[56] Fabry, *supra* n. 11, at 127.
[57] R. J. B. Bosworth, *Mussolini's Italy: Life under the Dictatorship 1915-1945* (Allen Lane, London, 2005) 110-114. 9780713996975.

internationalization of Danzig (now Gdansk) and the decision to provide Czechoslovakia 'with defensible boundaries',[58] instead of enabling the 'self-determination' of the Sudetenland German minority, were both 'the subject of revisionist claims by the Nazis in the 1930s' [59] and utilized to justify the Nazi invasions of both Czechoslovakia and Poland.[60]

2.4 Self-Determination, Decolonization and Democratic Legitimacy

In addressing colonies and decolonization, the international community has consistently adopted the condescending 19th Century justification for colonization: that the backward people of the colonies were incapable of self-government and needed the guiding hand of civilized Europeans. First, the *Covenant of the League of Nations* perpetuated the civilized versus savages dichotomy of the 19th Century by installing a system of mandates over the colonies of

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[58] Franck, *supra* n. 32, at 53 n 28.

[59] Vernon Bogdanor, 'Referendums and Separatism II' in Austin Ranney (ed.), *The Referendum Device* (AEI Press, Cambridge, Mass., 1981) 143, 145. ISBN-13: 978-0844721958. *See also* Qvortrup (2019), *supra* n. 12, at 41-42, 53.

[60] The dubious legitimizing qualities of referenda are perhaps also evidenced by Nazi Germany's adoption of a referendum to validate Anschluss -- Nazi Germany's annexation of Austria. In February 1938, Hitler had personally demanded that the Austrian Chancellor, Kurt von Schuschnigg, lay the groundwork for annexation. The Austrian Chancellor completed Hitler's preliminary demands but then called a referendum in the hopes of forestalling annexation and maintaining at least some independence. Hitler then demanded that the referendum be abandoned, and the Chancellor resign and be replaced with a compliant Nazi. Hitler's demands were again met and Arthur Seyβ-Inquart became Austrian Chancellor. Shortly after Austria's political capitulation the German military invaded. On 10 April 1938, after Germany exercised effective control, a referendum concerning annexation was conducted in both Germany and Austria and Anschluss was overwhelmingly approved in both. Winkler, *supra* n. 37, at 578, 638-39.

the defeated World War I powers, predicated on the inability of colonial territories to govern themselves. Article 22 of the Covenant provided that the peoples of these colonies were 'not yet able to stand by themselves under the strenuous application of the modern world,' and thus the 'tutelage of such peoples should be entrusted to advanced nations.'[61] Thus '[t]he mandate system was based on the idea that the world consisted of "civilized" powers and "backward" peoples, and that it was the duty of the former to ensure the gradual and upward progress of the latter.'[62] After World War II and the foundation of the United Nations, the international community continued to assume that the oppressed inhabitants of colonies were incapable of self-government. Accordingly, decolonization was to be undertaken pursuant to Chapter XI of the *Charter of the United Nations*, which provides that members of the United Nations -- that is, existing states -- 'accept as a sacred trust the obligation' to 'ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement,'[63] and to 'develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions.'[64]

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[61] League of Nations, *Covenant of the League of Nations*, 28 April 1919, Art. 22. https://www.refworld.org/docid/3dd8b9854.html.
[62] Kalana Senaratne, *Internal Self-Determination in International Law: History, Theory, and Practice* (Cambridge University Press, Cambridge, 2021) 29. DOI: 10.107/9781108695688. ISBN: 978-1-108-48440-4.
[63] UN, *Charter of the United Nations* (1945), 1 UNTS XVI, Art. 73(a). https:// www.refworld.org/docid/3ae6b3930.html.
[64] *Ibid.*, at Art. 73(b).

Accordingly, the international community promoted the self-government of existing colonies after 'tutelage' by their imperial overlords and consequent 'political, economic, social, and educational advancement' of the local population. To provide a veneer of democratic respectability to the decolonization process, the international community adopted the principle and, later, the positive right of self-determination.[65] The implementation of the principle of self-determination is supposedly a reflection of the 'freely expressed will of peoples.'[66] Between 1955 and 1965, almost fifty former colonial territories joined the United Nations.[67] Referenda were not, however, universally utilized to manifest the 'freely expressed will of people' and legitimize the independence of colonial units; indeed, the application of referenda in the decolonization process was never consistent.[68] Instead, violence rather than the freely expressed will of the people was the primary determinant inducing independence. Accordingly, the democratic legitimacy of post-colonial states is also questionable.

a. The Legitimization of Violence in the Decolonization Process

As meritorious as decolonization may be, with the paternalizing and patronizing attitude of the international community it is no surprise

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[65] *See, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion,* ICJ Rep. 2019, 95.
[66] *Western Sahara Advisory Opinion*, ICJ Rep. 1975, 12, 31-33.
[67] Jan Eckel, 'Human Rights and Decolonization: New Perspectives and Open Questions,' (2010) 1(1) *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 111, 119. http://resolver.scholarsportal.info/resolve/21514364/v01i0001/111_hradnpaoq.xml.
[68] Senaratne, *supra* n. 62, at 21.

that the independence of colonial states was frequently precipitated by violence. Frantz Fanon recognized that colonialism 'is violence in its natural state, and it will only yield when confronted with greater violence' and thus 'decolonization is always a violent phenomenon.'[69] The international community appeared to legitimize the violence adopted by liberation struggles, at least if the violent resistance was successful, irrespective of the explicit manifestation of popular consent.[70]

In the decolonization context, the UN recognized and even endorsed the use of violence to attain statehood. The UN:

> Reaffirm[ed] its recognition of the legitimacy of the colonial peoples and peoples under alien domination to exercise their right to self-determination and independence *by all necessary means* at their disposal …
>
> […]
>
> [and urged all states] to provide moral and material assistance to all peoples struggling for their freedom and independence in the colonial territories and those living under alien domination -- in particular the national liberation movements of the territories in Africa.[71]

Where a secessionist authority was successful in attaining effective control, by military force or otherwise, its legitimacy was recognized without recourse to a referendum and the consent of the population

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[69] Frantz Fanon, *The Wretched of the Earth* (trans. Constance Farrington) (Grove Press, New York, 2004 [1967]) 34, 61. ISBN: 9780802141323.
[70] Eckel, *supra* n. 67, at 130.
[71] UNGA, *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 2908(XXVII), UN Doc. A/RES/2908 (XXVII) (1973, adopted 2 November 1972), paras. 6, 8 (emphasis added). https://digitallibrary.un.org/record/191413?ln=en.

was irrelevant. Instead of ascertaining the 'freely expressed will of peoples' the European colonial powers often 'simply negotiated with the local elites and the leaders of liberation movements (often one and the same) without ascertaining the free will of the populous.'[72]

The earliest successful UN Charter-era decolonization struggles were precipitated through violent conflict and the ultimate success of internal secessionist forces. For example, shortly after Japan's surrender in World War II, Indonesia's indigenous authorities declared independence from the Netherlands on 17 August 1945 and declared a Republic over the whole archipelago.[73] However, at that time very little of the archipelago was controlled by the Republic. Shortly thereafter fighting broke out between Republican forces and British and Dutch troops and Dutch civil authorities attempted to reimpose colonial rule.[74] On 27 December 1949, the Netherlands finally relinquished sovereignty to the Republic of Indonesia and widespread *de jure* recognition only then followed.

Even if not successful in attaining effective control, the recognition of the independent status of many post-colonial states was often either the direct result of, or accelerated by, violent liberation

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[72] Drew De Silver, 'In its peaceful nature and uncertain outcome, Scotland's independence vote stands out', *Pew Research Center* (15 September 2014). https://www.pewresearch.org/fact-tank/2014/09/15/in-its-peaceful-nature-and-uncertain- outcome-scotlands-independence-vote-stands-out/.

[73] Ali Sastroamidjojo and Robert Delson, 'The Status of the Republic of Indonesia in International Law', (1949) 49(3) *Columbia Law Review* 344, 344. https://doi.org/10.2307/1118080. *See also*, Charles Cheney Hyde, 'The Status of the Republic of Indonesia in International Law', (1949) 49(7) *Columbia Law Review* 955-966. https://doi.org/10.2307/1118950.

[74] Sastroamidjojo and Delson, *supra* n. 73, at 345.

struggles, such as the bloody Mau-Mau rebellion in Kenya,[75] anti-European rioting in the Congo,[76] and the war in Algeria.[77] When colonizers, most notably, Portugal, refused to grant independence to its colonies, the international community recognized statehood before the formal waiver of sovereignty. For instance, from 1963 liberation fighters from Guinea-Bissau (formerly Cape Verde) engaged in a long-running civil war with their Portuguese colonizers. By 1970, the liberation movement controlled a large portion of territory but did not exercise 'effective control' throughout the territory. Despite its inability to satisfy the traditional criteria of statehood and without Portugal relinquishing sovereignty, Guinea-Bissau's statehood was recognized by 84 states.[78] More importantly, the United Nations General Assembly condemned Portugal for '[i]llegal occupation by Portuguese military forces of certain sectors of the Republic of Guinea-Bissau and acts of aggression committed by them against the people of the Republic.'[79]

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[75] Eckel, *supra* n. 67, at 130.
[76] Leopoldville from January to June, 1959. Herbert Weiss, *Political Protest in the Congo: The Parti Solidaire Africain During the Independence Struggle* (Princeton University Press, Princeton, 1967) 17-22. ISBN: 9780691198644. https://doi.org/10.1515/9780691198644-006.
[77] Alistair Horne, *A Savage War of Peace: Algeria 1954-1962* (Macmillan, London, 1977). ISBN: 9780333155158.
[78] *See* Basil Davidson, *No Fist Is Big Enough to Hide the Sky: The Liberation of Guinea-Bissau and Cape Verde, 1963–74* (Zed Books, Kindle ed., London, 1981). eBook ISBN: 978-1-78360-999-4.
[79] UNGA, *Resolution on the Illegal occupation by Portuguese military forces of certain sectors of the Republic of Guinea-Bissau and acts of aggression committed by them against the people of the Republic*, GA Res. 3061 (XXVIII), UN Doc. A/RES/3061(XXVIII) (1974, adopted 2 November 1973). https://digitallibrary.un.org/record/190987?ln=en. *See also,* Crawford, *supra* n. 22, at 137.

b. The Façade of Legitimacy -- Independence Referenda in the Decolonization Process

There had been decolonization and decolonization referenda before the Second World War, such as the 1935 referendum in the Philippines, which approved a new constitution and independence from the United States.[80] The development of the positive right to self-determination as part of the decolonization process accelerated the use of referenda. However, referenda were only sporadically and inconsistently utilized and were predominantly employed to determine issues of independence and status, and not to delineate boundaries. The International Court of Justice in the *Western Sahara Advisory Opinion* endorsed the UN's sporadic and inconsistent approach to popular consultation by referenda:

> The validity of the principle of self-determination defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a 'people' entitled to self-determination on or the conviction that a consultation was totally unnecessary, in view of special circumstances.[81]

Where an independence movement was successful in attaining the effective control of a colonially administered territory -- by violence -- a referendum was often deemed unnecessary to statehood. And

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[80] Mendez and Germann, *supra* n. 54, at 141–165; Matt Qvortrup, 'Voting on Independence and National Issues: A Historical and Comparative Study of Referendums on Self-Determination and Secession', (2015) XX(2) *Revue Française de Civilisation Britannique* 1, 3. http://journals.openedition.org/rfcb/366.

[81] *Western Sahara Advisory Opinion*, *supra* n. 66, at 31-33.

when the Colonizers did consent to an independence referendum, it was often in response to the violence surrounding nascent independence movements. In regard to the status -- independent or otherwise -- of a colony, instead, of ascertaining the 'freely expressed will of peoples', the European colonial powers often simply relinquished sovereignty to the leaders of liberation movements and members of the political elite, regardless of the consent of the population.[82] Irrespective of the reasons for holding a referendum, the few referenda that were undertaken were nearly always conducted in apprehension of violence and surrounded by fear.

Most referenda in the decolonization process were undertaken in the French colonies. In 1958, under the resurrected President Charles De Gaulle, the French conducted referenda in 18 of their then-colonies. The choice provided to the populations of the French colonies was between immediate independence or autonomy, short of independence, within a French Commonwealth -- the '*Communauté française*.'[83]

> Thus, the referendum provided a choice between 'Yes'? meaning autonomy within a Community still dominated by the metropole -- and 'No', entailing immediate independence, but also a rupture with the overarching French framework and an end to economic aid.[84]

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[82] De Silver, *supra* n. 72.
[83] Klaas van Walraven, 'Decolonization by Referendum: The Anomaly of Niger and the Fall of Sawaba, 1958-1959', (2009) 50 *Journal of African History* 269, 270. DOI: IO:IOI7/Soo2i853709990053.
[84] *Ibid*.

With the exception of French Guinea, under President Sekou Touré, all of the French colonies opted for membership of the *Communauté*.[85]

Like previous territorial ballots, these referenda were far from 'free and fair' and were marred by violence. Supporters of immediate independence -- 'No' campaigners -- were frequently harassed and sidelined and their organizations destroyed by the local ruling elites acting in collaboration with the French. Votes were tampered with. The ruling elites, sponsored by colonial authorities, were able to utilize the benefits of incumbency to promote a 'yes' vote. For instance, 'Senegal's leadership inserted [the] referendum into a hegemonic atmosphere of festivities confirming dominance of the "Yes" camp.'[86] In Niger, 'in an intimidating show of strength', campaigners and voters were harassed and intimidated, paratroopers were flown in from Algeria and traversed the country in motorized columns, and planes dropping leaflets over villages reinforced the message that power was on the side of France and the *Communauté française*.[87] The French also made clear that future aid was dependent on joining the *Communauté*. Indeed, Guinea's 'No' vote was promptly followed by the suspension of French aid.[88]

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[85] Matt Qvortrup, 'The History of Ethno-National Referendums 1791–2019', in Matt Qvortrup (ed.), *Nationalism, Referendums and Democracy*: *Voting on Ethnic Issues and Independence* (Routledge, London, 2nd ed., 2020) ('Qvortrup (2020)') 8-30, at 25. ISBN: 9781000044935. DOI: 10.4324/9780429277382.
[86] Van Walraven, *supra* n. 83, at 271.
[87] *Ibid.*, at 274.
[88] Matt Qvortrup, 'Referendums on Independence, 1860–2011', (2014) 85(1) *The Political Quarterly* 57, 58. https://doi.org/10.1111/j.1467-923X.2014.12070x.

Despite the overwhelming vote in favour of retaining ties with France in nearly all of France-Afrique, many of the members left the *Communauté française* within two years of the referendum. Niger, Burkina Faso (formerly Upper Volta), Côte d'Ivoire, Chad, the Central African Republic, the Republic of Congo and Gabon became independent states, without conducting a referendum or otherwise submitting the putative state's status to voters.[89] Algeria too, after increasing bloodshed, attained its independence in 1962. The Évian Accords were a negotiated agreement between the French government and the primary Algerian liberation movement, the *Front de Libération Nationale* (FLN).[90] The agreement was put to a vote and approved in both France (91 per cent) and Algeria (99 per cent).[91]

As noted, the doctrine of *uti possidetis* operated to 'freeze' the irrational administrative boundaries of colonial units at independence and upgrade them to international frontiers. There were only a few referenda that determined international border issues, and those were within pre-determined internal boundaries. In 1959, the territory of the British Cameroons was divided into two -- a Muslim majority northern section and a southern section with a majority Christian population. The southern section was given the option of attaining 'independence' by joining either the Republic of the Cameroons (formerly French Cameroun) or Nigeria. More than seventy percent

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[89] *Ibid*.
[90] Horne, *supra* n. 77, at 98.
[91] Qvortrup (2020), *supra* n. 85, at 25.

voted to join the Republic of the Cameroons and thus the southern portion of the British Cameroons was annexed to the Republic.[92] The population of the northern segment was first given the option to join an independent Nigeria or defer the decision, and sixty-two percent of those voting opted to defer the decision.[93] Two years later, in 1961, the northern section was also given the option of attaining 'independence' by joining either the Republic of the Cameroons or Nigeria. Nearly sixty percent voted for Nigeria and the northern section of the formerly British Cameroons was duly annexed to the Nigerian Federation.[94] Notably, 'independence' itself was not on the ballot.

A referendum was conducted in the British colony of the Gilbert and Ellice Islands on the question of separation, which was approved, and the islands became independent as the Republic of Kiribati and Tuvalu, respectively. Jamaica voted unilaterally to secede from the West-Indian Federation, and Malta voted in two attempts to sever its ties with the United Kingdom.[95] The once separate kingdoms of Ruanda and Urundi were jointly administered as one territorial unit and the United Nations General Assembly recommended that they be granted independence as one unit. However, violence between the Tutsi and Hutu communities, foreshadowing the violence of 1969

[92] Farley, *supra* n. 4, at 41.
[93] *Ibid.*
[94] *Ibid.*
[95] Qvortrup (2020), *supra* n. 85, at 25.

and ultimately the genocide of 1994, resulted in the decision to split the territory into Rwanda and Burundi, without a referendum.[96]

2.5 Conclusion

Referenda have been utilized by states and putative states, and international organizations, for centuries to purportedly ascertain the consent of the population to state-creation or the allocation of territorial sovereignty. In doing so, the positive results of referenda supposedly conferred democratic legitimacy on the relevant political entity and its territory. Referenda are a flawed mechanism for ascertaining the will of the population and confer only limited democratic legitimacy. Often referenda were undertaken in apprehension of violence and surrounded by circumstances likely to give rise to fear and intimidation, and were also subject to fraud, manipulation and boycotts by segments of the population. Frequently, referenda were utilized to validate effective control. The entity in effective control asserted supremacy and conducted the referendum in the atmosphere of dominance: the outcome was a *fait accompli* and conferred little democratic legitimacy on the new state.

Even those referenda conducted under the auspices of the League of Nations after World War I, or the United Nations as part of the decolonization process, were for the most part undertaken in apprehension of violence and surrounded by circumstances likely to give rise to fear and intimidation, and were also subject to fraud,

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[96] Fabry, *supra* n. 11, at 161 n 62.

manipulation and boycotts. In such circumstances, the outcome of referenda is not a fair reflection of the will and consent of the population. In any event, after World War I the recognition of states continued to depend on effective control and only in rare instances were referenda utilized to partly-determine borders. In nearly all of these instances, extensive violence surrounded the referenda.

Likewise, the few referenda utilized to determine the status of colonies in the decolonization process were subject to violence and voting was often undertaken in fear. And again, voting was often subject to fraud, manipulation and boycotts. The recognitional legitimacy of many post-colonial states was thus largely precipitated by violence and the freely expressed will of the populace was largely irrelevant. More importantly, the territory of nearly all post-colonial states was pre-determined by past colonial practices manifesting effective control. The democratic legitimacy of post-colonial states is questionable.

The will and consent of the population is fundamental to the democratic legitimacy of statehood and territorial sovereignty. However, the utilization of referenda to reflect popular consent is flawed. Referenda did little to alleviate the democratic illegitimacy of states created prior to 1990.

PART II

DEMOCRACY AND RECOGNITION

3. THE EMERGENCE OF A DEMOCRATIC ENTITLEMENT

3.1 Introduction

The recognition of a political entity as a 'state' enabled its government to act as its agent and exercise its monopoly of violence.[1] Until the mid-nineteenth century, states and governments were a unitary source of authority and 'both types of change [change of state and change of government] were assimilated, and the problems they raised were uniformly solved.'[2] The conceptual distinction between the recognition of states and the recognition of governments was a post-Hegelian development.[3] It was only '[w]ith the abstraction of the concept of sovereignty' that 'a conceptual chasm was opened between change of sovereignty and change of government.'[4] In contemporary discourse, many preeminent scholars of international law go to great lengths to distinguish between the recognition of states and the recognition of governments. For instance, Brad R. Roth notes that 'the doctrinal schemes for recognizing states and governments are distinct and complex'[5] and Malcolm N. Shaw

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[1] Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford University Press, Oxford, 2000) ('Roth (2000)') 27. ISBN: 9780199243013.
[2] Daniel Patrick O'Connell, *State Succession in Municipal Law and International Law, Vol. I* (Cambridge University Press, Cambridge, 1967) 423. ISBN-13: 978-0-521-05857-5.
[3] James Crawford, *The Creation of States in International Law* (Oxford University Press, Oxford, 2006) 34. ISBN: 9978-0-19-922842-3.
[4] O'Connell, *supra* n. 2, at 5-6.
[5] Roth (2000), *supra* n. 1, at 2. *See also*, Brad R. Roth, 'Secessions, Coups, and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine', (2010) 11 *Melbourne Journal of International Law* ('Roth (2010)') 393, 395. https://digitalcommons.wayne.edu/lawfrp/242.

postulates that the '[t]he recognition of a new government is quite different from the recognition of a new state.'[6] Although the conferral of recognitional legitimacy on states and governments is conceptually very different, in practice it is the same: both depended on violence, the threat of violence or coercion.

The objective of this *Chapter 3* is, first, to confirm that the 'traditional common thread' that has permeated the recognition of both states and governments is 'effective control.'[7] The habitual obedience of the population or the effective control of internal affairs was the principal determinant of government recognition. This *Chapter* then contends that international law's government recognition doctrine is evolving to include an element of democratic legitimacy. This modicum of democratic legitimacy follows the emergence of a 'democratic entitlement' based on 'the right to take part' in public affairs in international human rights covenants, the role of United Nations election monitoring, international intervention to restore deposed democratically elected governments, and a plethora of other international instruments.

Finally, it is also an objective of this *Chapter 3* to demonstrate that the democratic entitlement is satisfied by the implementation of representative democracy. Indeed, governance in accordance with representative democracy is overwhelmingly accepted as the primary

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[6] Malcolm N. Shaw, *International Law* (Cambridge University Press, Cambridge, 9th ed., 2021) 385. ISBN: 978-1-108-73305-2.
[7] Roth (2010), *supra* n. 5, at 395.

method of democratic governance and is the international norm for satisfying the democratic entitlement.[8]

3.2 Popular Sovereignty, Effective Control and Government Recognition

The international community has adopted 'popular sovereignty' as the legitimizing construct of governance. The concept of 'popular sovereignty' suggests that the legitimacy of a government depends on the 'consent of the people in the territory in which a government purported to exercise power.'[9] Despite the international community endorsing 'popular sovereignty', the recognition of governments, like states, traditionally depended on the 'effective control of internal affairs.'[10] The effective control of internal affairs was purportedly manifested by the habitual obedience of the population, and the habitual obedience of the population was supposedly a reflection of popular sovereignty. The conflation of effective control and popular sovereignty is misplaced. *Democratic* legitimacy depends on consent that is manifested by more than mere obedience. However,

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[8] Francesco Palermo, 'Participation, Federalism and Pluralism: Challenges to Decision Making and Responses by Constitutionalism', in Cristina Fraenkel-Haeberle, Sabine Kropp, Francesco Palermo and Karl-Peter Sommermann (eds), *Citizen Participation in Multi-Level Democracies* (Brill Nijhoff, Leiden/Boston, 2015) 31-47, at 33. ISBN: 9789004287938.

[9] W. Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law', (1990) 84(4) *The American Journal of International Law* 866, 867. https://doi.org/10.2307/2202838.

[10] Roth (2010), *supra* n. 5, at 395; Shaw, *supra* n. 6, at 386-87; *See also Tinoco Claims Arbitration (Great Britain v. Costa Rica),* 1 U.N. Rep. Int'l Arb. Awards 369 (1923) (International Arbitration).

the democratic legitimacy of a government, until at least the end of the Cold War, had little relevance to recognition.

a. The Conceptual Development of Popular Sovereignty

Popular sovereignty is traditionally understood to mean 'rule by the people,'[11] and that the government is dependent on the will of the population. Popular sovereignty recognizes the 'people as the source of public authority'[12] and it is closely identified with democratic self-rule.[13] The democratic legitimacy of a government is theoretically related to its popular sovereignty, in that consent is the requisite foundation of a *democratically* legitimate government.

The concept of 'popular sovereignty' came to the fore with the French and American revolutions of the 18th Century. The 1776 American *Declaration of Independence* emphasized 'the idea that the government derived its powers from the consent of the governed.'[14] More importantly, the United States *Constitution* (1787) opens with the words '[w]e the people' inaugurating the concept of the popular will as the source of political authority.[15] In the French Revolution,

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[11] Bernard Yack, 'Popular Sovereignty and Nationalism', (2001) 29(4) *Political Theory* 517, 519. https://www.jstor.org/stable/3072522.
[12] Dieter Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept*, (Columbia University Press, New York, 2015) 74. ISBN: 978-0-231-16425-2.
[13] Genevieve Nootens, *Popular Sovereignty in the West: Polities, Contention and Ideas* (Routledge, London, 2013) 73. ISBN: 97804156435 73.
[14] Kalana Senaratne, *Internal Self-Determination in International Law: History, Theory, and Practice* (Cambridge University Press, Cambridge, 2021) 14. DOI: 10.107/9781108695688. ISBN: 978-1-108-48440-4.
[15] US, *Constitution* (17 September 1787), Preamble. https://www.archives.gov/milestone-documents/constitution.

the people also expressed their desire for democratic governance and the French *Declaration of Rights of Man* (1789) also provided for popular sovereignty, 'the principle of all sovereignty resides essentially in the nation'[16] and converted the French populace from subjects to citizens; in doing so, France conferred the sovereignty of the state upon its citizens collectively. After these revolutions, it appeared that political authority was to be based on the consent of the population.[17]

Popular sovereignty as the 'will of the people' was later adopted in international instruments. The first words of the *Charter of the United Nations* (UN Charter) emulate those of the US *Constitution*, '[w]e the Peoples of the United Nations' and thus endorse popular sovereignty.[18] The *Universal Declaration of Human Rights* (UDHR) specifically provides for popular sovereignty by specifying that '[t]he will of the people shall be the basis of the authority of government.'[19] These international instruments endorse the concept of popular sovereignty as government with the consent of the population. However, even though popular sovereignty requires rule by the people and the exercise of political power with the consent of the

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[16] France, *Declaration of the Rights of Man 1789* (Approved by the National Assembly of France, August 26, 1789), Art. 3. https://avalon.law.yale.edu/18th_century/rightsof.asp.
[17] Reisman, *supra* n. 9, at 867.
[18] UN, *Charter of the United Nations* (24 October 1945), 1 UNTS XVI, at Preamble. https://www.refworld.org/docid/3ae6b3930.html. *See also*, Hans Kelsen, 'The Preamble of the Charter--A Critical Analysis', (1946) 8(2) *The Journal of Politics* 134-159. https://doi.org/10.2307/ 2125893.
[19] UN, *Universal Declaration of Human Rights* (10 December 1948), 217 A (III) ('UDHR'), Art. 21. https://digitallibrary.un.org/record/666853?ln=en.

governed, the recognition of governments in international law has traditionally depended on a political authority's exercise of effective control reflected in the habitual obedience of the population.

b. Recognitional Legitimacy: Conflating Effective Control with Popular Sovereignty

Traditionally, a government that maintains the habitual obedience of the bulk of its population within a defined territory is recognized as the legitimate government of a state.[20] As Hersch Lauterpacht stated, an 'essential requirement of statehood is a sufficient degree of internal stability as expressed through a government enjoying the habitual obedience of the population.'[21] A political authority that maintains the habitual obedience of the population or the effective control of the state's internal affairs, was considered the most reliable guide to the recognition of governments. The effective control of the government purportedly 'implied a certain degree of acquiescence on the part of the civilian population, in the sense that it refrained from attempts to overthrow the government.'[22] This interpretation posits that 'it is not the new regime's ability to apply force but the populace's reaction to the regime that determines the regime's efficacy.' [23] Legitimation on this basis was justified by the

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[20] Roth (2010), *supra* n. 5, at 395.
[21] Hersch Lauterpacht, 'Recognition of States in International Law', (1944) 53(3) *The Yale law Journal* 385, 410. https://doi.org/10.2307/792830.
[22] Erika de Wet, 'From Free Town to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition,' (2014) 108 *AJIL Unbound* 201–07 ('de Wet (2014)'). DOI:10.1017/S2398772300002178.
[23] Roth (2000), *supra* n. 1, at 138.

assumption that habitual obedience is a reflection of the will of the population -- and therefore a manifestation of popular sovereignty.[24]

The international community, however, assumed that popular sovereignty was reflected in effective control irrespective of how that effective control was established; thus, the method's utilized by the government to obtain -- and maintain -- the habitual obedience of the population was largely irrelevant. The use of violence or threats of violence to attain effective control -- obedience -- did not, for the most part, defeat recognition. Thus, 'the fact that a particular government came into power through a military coup, popular uprising, or civil war was irrelevant for the purpose of recognition.'[25] Effective control and habitual obedience induced by violence, or the threat of violence, is of limited probative value as evidence of popular support. There is a plethora of states under the rule of authoritarian

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[24] An effective government, in Thomas Jefferson's words, reflects 'the will of the nation substantially declared.' According to legal theorist Hans Kelsen a new government is legitimate if 'the individuals whose behavior the new order regulates actually behave, by and large, in conformity with the new order.' The Pakistani Supreme Court has interpreted Kelson to mean that '[i]t is not the success of the revolution, therefore, that gives it legal vitality but the effectiveness it acquires by habitual submission to it from the citizens.' *Asma Jilani v. The Government of Punjab*, 1972 PLD SC 139, 179–80 (1972) (Supreme Court of Pakistan, Hamoodur Rahman, C.J.). Hans Kelsen, *General Theory of Law and State*, (Anders Wedberg trans.) (Russell & Russell, New York, 1961) 118. ISBN: 9780846202158. Thomas Jefferson, *The Writings of Thomas Jefferson, Vol. 3 (of 9), Being His Autobiography, Correspondence, Reports, Messages, Addresses, and Other Writings, Official and Private [1784-1826]*, (Washington, H. A., ed.) (Project Gutenberg, Kindle ed., Washington D.C., 2016) Loc. 8339. https://www.gutenberg.org/ebooks/52878.

[25] de Wet (2014), *supra* n. 22, at 202-203.

governments that enjoy the habitual obedience of the population and invoke popular sovereignty to legitimize their rule.[26]

Accordingly, the manifest consent of the governed is traditionally irrelevant to government recognition; the habitual obedience of the population -- acquiescence -- does not equate to democratic consent nor does it amount to popular sovereignty. Instead, effective control has traditionally determined recognition. In determining that the 'sentiments of the people' are reflected in their submission to force, the will of the populous is reduced to 'the strongest and most influential body of nationals of that State.'[27] The effective control doctrine is thus based on the 'fiction' that obedience or acquiescence is a reflection of popular consent.[28]

3.3 The Emergence of the Democratic Entitlement

The post-Cold War emergence of the democratic entitlement thesis or a right to democratic governance was predicated on a 'substantial new majority of states actually practicing a reasonably credible version of electoral democracy', and stipulations in human rights treaties for a right to genuine periodic elections that begin 'to approximate prevailing practice.'[29] Accordingly, the proponents of

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[26] Yack, *supra* n. 11, at 518.
[27] Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', (1985) 56(4) *British Yearbook of International Law* 189, 193-94. https://doi.org/10.1093/BYBIL%2F56.1.189. *See also*, Roth (2000), *supra* n. 1, at 139.
[28] de Wet (2014), *supra* n. 22, at 202-203.
[29] Thomas M. Franck, 'The Emerging Right to Democratic Governance', (1992) 86(1) *The American Journal of International Law* 46, 64. DOI:10.2307/2203138.

the democratic entitlement thesis asserted that a right to democratic governance was 'becoming a customary legal norm applicable to all.'[30] In the 1990s, the number of representative democracies had been growing exponentially with the 'Third Wave of Democratization'[31] beginning with the 1974 Carnation revolution in Portugal, which was followed by Spain's transition to democracy in the late 1970s, and, in the 1980s, the democratization of countries in Latin American (Argentina, Bolivia, Brazil, Chile, Nicaragua, Paraguay and Peru) and the Asia-Pacific (Philippines, South Korea and Taiwan). The number of electoral democracies continued to grow reaching a crescendo in 2012.[32] Despite the democratic 'backsliding' of the last decade, a 'right to democratic governance' or 'democratic entitlement' continues to emerge.

The right to democratic governance or a 'democratic entitlement' is instrumentally established as a right 'to take part in public affairs.'[33] Article 25 of the *International Covenant on Civil and Political Rights* (ICCPR) provides for political participation and 'lies at the core of

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[30] *Ibid.* *See also*, Susan Marks, 'What has Become of the Emerging Right to Democratic Governance?' (2011) 22(2) *European Journal of International Law* 507, 509. DOI:10.1093/ejil/chr023.

[31] Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, Norman, Okla., 1991). ISBN: 9780806125 169.

[32] V-Dem (Varieties of Democracy) Institute, 'Autocratization Changing Nature?' (University of Gothenburg, Democracy Report, 2022). https://v-dem.net/media/publications/dr_2022.pdf.

[33] UN, *International Covenant on Civil and Political Rights* (16 December 1966), 999 UNTS 171 ('ICCPR'), Art. 25. https://digitallibrary.un.org/record/660192?ln=en.

democratic government based on the consent of the people.'[34] The UN Secretary-General has described democratic governance as an established norm.[35] The core element of the right is the entitlement to vote in representative elections. The participation of international and regional organizations in the monitoring and design of state government elections validate the entitlement to vote. Indeed, 'results of [UN monitored] elections serve as evidence of popular sovereignty and become the basis for international endorsement of elected government.'[36] Notably, the ICCPR does not specify nor impose a particular electoral system. It is thus unclear what basic attributes an electoral system must have to satisfy the right to representative -- *indirect* -- democracy. There is even doubt as to whether multi-party elections are necessary to satisfy the right to political participation, either pursuant to Article 25 of the ICCPR or under customary international law.[37]

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[34] HR Comm., *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* (General Comment No. 25, Article 25), UN. Doc. CCPR/C/21/Rev.1/Add.7 (27 August 1996, adopted by the HR Comm. 12 July 1996) ('General Comment No. 25'), paras 6, 8. https://digitallibrary.un.org/record/221930?ln=en.

[35] Alix van Sickle, with Wayne Sandholtz, 'The Emerging Right to Democracy', in Wayne Sandholtz and Kendall Stiles (eds), *International Norms and Cycles of Change* (Oxford University Press, New York, 2008) 289-321. ISBN: 9780195380088.

[36] Reisman, *supra* n. 9, at 868-69.

[37] Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing, Oxford, 2013) 158. ISBN: 978-1-84946-469-7158.

a. The Right to Participate Through Freely Chosen Representatives

The democratic entitlement or the right to democratic governance is reflected in international instruments as a right to 'take part' -- to *participate* -- in public affairs.[38] Popular sovereignty is the basis and justification for this right to participate in government.[39] The UDHR provides that '[e]veryone has the right to take part in the government of his [or her] country, directly *or* through freely chosen representatives.'[40] Likewise, Article 25 of the ICCPR recognizes the right '[t]o take part in the conduct of public affairs, directly *or* through freely chosen representatives ...'.[41] Accordingly, the right to participate is a right to *directly* or *indirectly* take part in public affairs.[42]

The 'freely chosen representatives' are to be democratically elected. The UDHR and the ICCPR emphasise 'the role of periodic and genuine elections in ensuring that everyone is able to participate in the public affairs of his or her country.'[43] Article 25(b) of the ICCPR,

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[38] General Comment No. 25, *supra* n. 34, at para. 5; *see also*, Annelies Verstichel, *Participation, Representation and Identity: The Right of Persons Belonging to Minorities to Effective Participation in Public Affairs: Content, Justification and Limits* (Intersentia, Antwerp/Oxford/Portland, 2009) 128. ISBN: 978-90-5095-840-0.

[39] Gregory H. Fox, 'The Right to Political Participation in International Law', (1992) 17 *Yale Journal of International Law* 539, 551. http://hdl.handle.net/20.500.13051/6275.

[40] UDHR, *supra* n. 19, at Art. 21(1).

[41] ICCPR, *supra* n. 33, at Art. 25(a).

[42] UDHR, *supra* n. 19, at Art. 21(1); ICCPR, *supra* n. 33, at Art. 25(a).

[43] HRC, 'Draft guidelines for States on the effective implementation of the right to participate in public affairs' (Report of the Office of the UNHCHR, UN. Doc. A/HRC/39/28, 20 July 2018) ('HRC Guidelines on Participation'), at para. 25.

like Article 21(3) of the UDHR,[44] provides that 'every citizen shall have the right and the opportunity [...] [t]o vote and to be elected at genuine periodic elections.' The only specifications on the nature of the elections are provided by Article 25(b) of the ICCPR,[45] which requires the elections be 'genuine', 'periodic', 'by universal and equal suffrage,' and by 'secret ballot.'[46] The ICCPR does not specify or impose a mode of elections or any particular electoral system, or any other mode of participation.

The UDHR is a declaration and UN General Assembly declarations alone are merely recommendations, hortatory and aspirational,[47] and are not, alone, legally enforceable instruments.[48] However, rules of customary international law are precipitated through 'general practice accepted as law'[49] and 'broadly supported arguments have developed for viewing all or parts of this Declaration as legally binding, either as a matter of customary international law or as an authoritative interpretation of the UN Charter.'[50] Irrespective of its legal status, the UDHR is relevant to norm formation and state behaviour.[51] Unlike the UDHR, the ICCPR is a multilateral treaty

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[44] The UDHR provides that '[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.' UDHR, *supra* n. 19, at Art. 21(3).
[45] General Comment No. 25, *supra* n. 34, at para. 21.
[46] Fox, *supra* n. 39, at 555.
[47] Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press, Oxford, 2013) 254. ISBN: 9780199578726.
[48] Shaw, *supra* n. 6, at 254.
[49] UN, *Statute of the International Court of Justice* (18 April 1946), Art. 38. https://www.refworld.org/docid/3deb4b9c0.html.
[50] Alston and Goodman, *supra* n. 47, at 158; Shaw, *supra* n. 6, at 254-55.
[51] Alston and Goodman, *supra* n. 47, at 158.

and 'binds the state parties in accordance with its terms and with international law', subject to reservations.[52] Almost 90 per cent of states have ratified the ICCPR, which is also indicative of state practice and is relevant for determining the existence of a rule of customary international law.[53]

A multitude of regional instruments also provide an almost identical right to participate in public affairs directly or through elected representatives. The Organization of American States's *Declaration of the Rights of Man* (1948) and the *American Convention on Human Rights* (1969) both include a 'Right to Participate in Government' that provides a right to 'to take part' in the conduct of public affairs, 'directly' *or* through 'representatives.'[54] The *Charter of Organization of African Unity* (1963)[55] and the 1981 *African Charter on Human and Peoples' Rights* (Banjul Charter) also provide that '[e]very citizen shall have the right to participate freely in the government of his country, either directly *or* through freely chosen

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[52] *Ibid.*

[53] There are 173 state parties and 6 signatories to the ICCPR; and 18 states have taken 'no action.' North Korea and Viet Nam are state parties. China signed the ICCPR in 1998 and Cuba in 2008 but neither has ratified it. Saudi Arabia has taken no action. OHCHR, *Status of Ratification Interactive Dashboard* (updated as of 21 February 2023). http://indicators.ohchr. org/.

[54] OAS, *American Declaration of the Rights and Duties of Man* (Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948), Art. XX. https://www.refworld.org/docid/3ae6b3710.html. *American Convention on Human Rights*, *'Pact of San Jose'* (Costa Rica, 22 November 1969), Art. 23. https://www.refworld.org/docid/3ae6b 36510. html.

[55] OAU, *Charter of the Organization of African Unity* (25 May 1963), Art. 13. https://www.refworld.org/docid/3ae6b36024.html.

representatives *in accordance with the provisions of the law*.'[56] The Association of Southeast Asian Nations (ASEAN) *Human Rights Declaration* (2012) reaffirmed ASEAN members states' adherence to the principles of democracy, and, like the ICCPR, provides that '[e]very person who is a citizen of his or her country has the right to participate in the government of his or her country, either directly *or* indirectly through democratically elected representatives, *in accordance with national law*.'[57] The League of Arab States *Arab Charter on Human Rights* (2004) provides the right '[t]o take part in the conduct of public affairs, directly or through freely chosen representatives.'[58]

Although the Preamble to the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) (ECHR) provides that the 'fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy' the ECHR did

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[56] AU, *African Charter on Human and Peoples' Rights* (27 June 1981), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) ('Banjul Charter'), Art.25(1) (emphasis added). https://www. refworld.org/docid/3ae6b3630.html.

[57] ASEAN, *ASEAN Human Rights Declaration* (18 November 2012), Preamble para. 2. https://www.refworld.org/docid/ 50c9fea82.html. It should be noted that the African and ASEAN charters provide that the right is 'in accordance with the provisions of the law,' and 'in accordance with national law' respectively. In subjecting the right to national law, governments have limited the right and enable clawback. These clawback clauses 'permit a state, in its almost unbounded discretion, to restrict its treaty obligations or the rights guaranteed ...'. Vincent Obisienunwo Orlu Nmehielle, *The African Human Rights System: Its Laws, Practice, and Institutions* (Martinus Nijhoff Publishers, Lieden, 2001) 165-66. ISBN: 9041117318.

[58] League of Arab States, *Arab Charter on Human Rights* (22 May 2004, reprinted in 2005), 12 *International Human Rights Reports* 893 (entered into force March 15, 2008), Art. 24(2). https://www.refworld.org/docid/3ae6b38540.html.

not initially provide a right to participation.[59] It was only in the first protocol to the ECHR that a reference to elections is made; and, at the same time, unlike other international and regional instruments, it made no reference to a 'right to take part' or 'participate' in public affairs.[60] The right in the ECHR's first protocol is thus limited to *indirect* participation through elected representatives. Again, in Europe, the *Copenhagen Meeting of the Conference on the Human Dimension of the Conference of Security and Cooperation in Europe 1990* declared that 'free elections […] held at reasonable intervals' to elect a 'government that is representative in character' are 'inalienable rights of all human beings.'[61]

b. The Implementation of the Democratic Entitlement

The right '[t]o take part in the conduct of public affairs' is a right to take part 'directly *or* through freely chosen representatives ...'.[62] However, the right to direct participation has been largely ignored and instead, the democratic entitlement focuses on participation in free and fair elections: '[t]he lowest common denominator' of democracy 'in the politically and culturally diverse world.'[63] The

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[59] CoE, *Convention for the Protection of Human Rights and Fundamental Freedoms* (as amended) (4 November 1950), ETS 5 ('ECHR'), Art. 2(1). https://www. refworld.org/docid/3ae6b3b04.html.
[60] CoE, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (20 March 1952), ETS 9 ('ECHR Protocol No. 1'), Art. 3. https://rm.coe.int/168006377c.
[61] CSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (29 June 1990), Art. 5. https://www.osce.org/odihr/elections/14304.
[62] ICCPR, *supra* n. 33, at Art. 25(a).
[63] Vidmar, *supra* n. 37, at 23.

democratic entitlement is thus primarily satisfied by mechanisms of representative democracy. Representative democracy is considered the most appropriate, indeed the only, mechanism that enables participation in state governance. It is generally considered that '[d]ue to complexity of modern government, it is virtually impossible for any contemporary State Party to govern solely or even substantially via direct input from citizens.'[64] Governance in accordance with representative democracy is overwhelmingly accepted as the primary method of democratic governance and is the international norm for satisfying the democratic entitlement.[65]

The international instruments referred to *infra* suggest the 'guarantee [of] the right to political participation' is satisfied 'primarily by requiring signatories to hold fair elections at regular intervals.'[66] The UDHR and the ICCPR anticipate that the right to democratic governance will be by way of representative democracy.[67] Regional instruments also endorse representative elections as a mechanism for legitimating governance. The OAS requires its member states to 'respect the essential elements of a *representative* democracy, as well as promote conditions necessary for the exercise and protection of a

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[64] *Marshall v Can. (also known as Mikmaq Tribal Society v. Canada),* Communication No. 205/86 (1991) (HR Comm.), paras. 5.4-5.5; *see also* Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Material and Commentary* (Oxford University Press, Oxford, 3rd ed., 2013) 733. ISBN: 978-0-19-873374-4.
[65] Palermo, *supra* n. 8, at 33.
[66] Fox, *supra* n. 39, at 552.
[67] UDHR, *supra* n. 19, at Art. 21(1); ICCPR, *supra* n. 33, at Art. 25(a).

representative form of government'.[68] The 1948 *Charter of the Organization of American States* (OAS Charter) 'recognizes 'that one of the purposes of the OAS is to promote and consolidate *representative* democracy.'[69] The OAS Juridical Committee recognized that 'the right of every State to choose its political, economic and social system [...] is limited by the commitment to respect the essential elements of *representative* democracy'.[70] The African Union has endorsed electoral democracy in the 2007 *African Charter on Democracy, Elections and Governance* (African Charter on Democracy). The objectives of the African Charter on Democracy include '[p]romot[ing] the holding of regular free and fair elections to institutionalize *legitimate* authority of representative government.'[71] The African Charter on Democracy 'is aimed at establishing liberal democracies with a representative form of government.'[72]

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[68] Stacy-Ann Elvy, 'Towards a New Democratic Africa: The African Charter On Democracy, Elections And Governance', (2013) 27 *Emory International Law Review* 41, 51. https://scholarlycommons.law.emory.edu/eilr/vol27/iss1/4.

[69] OAS, *Charter of the Organization of American States* (30 April 1948), Art. 2 (emphasis added). https://www.refworld.org/docid/3ae6b3624.html.

[70] OAS, Inter-American Juridical Committee, *The Essential and Fundamental Elements of Representative Democracy and Their Relation to Collective Action Within the Framework of The Inter-American Democratic Charter* (12 August 2009), CJI/RES. 159 (LXXV-O/09), Art. 2. https://www.jstor.org/stable/20695946.

[71] AU, *African Charter on Democracy, Elections and Governance* (30 January 2007), Art. 2(3) (emphasis added) ('African Charter on Democracy'). https://www.refworld.org/docid/493fe2332.html.

[72] Elvy, *supra* n. 68, at 48. The African Charter on Democracy is legally binding and, as of 17 February 2023, it had been ratified by thirty-eight of the fifty-five member states of the AU. https://au.int/en/treaties/african-charter-democracy-elections-and-governance.

Article 3 of the First Protocol to the ECHR obliges state parties 'to undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'[73] In doing so, this Article 'presupposes the existence of a representative legislature, elected at reasonable intervals as the basis of a democratic society.'[74] Accordingly, the ECHR only recognizes a right to a 'specific modus of democracy', namely elections.[75] In choosing the modus of elections, the state is only limited to the requirement that they reflect the 'free expression of the opinion of the people.'[76]

The 'right to democratic governance' or the 'democratic entitlement' is thus manifested in a right to elect members to a representative legislature. It is representative democracy that is the normative right equating to the democratic entitlement. In doing so, the international community has adopted representative democracy as the principal expression of the will of the people and the manifestation of consent.[77] A citizen's *right* to participate thus appears to be restricted

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[73] ECHR Protocol No. 1, *supra* n. 60, at Art. 3.
[74] *The Greek Case* (*Denmark v. Greece*), No. 3321/67 (Eur. Com. HR) (1967), 157 para. 319. The regime of the Greek Colonels, which cancelled parliamentary elections without rescheduling them, was in violation of Article 3 of the ECHR Protocol No. 1 according to the European Commission of Human Rights.
[75] Verstichel, *supra* n. 38, at 137.
[76] *Mathieu-Mohin and Clerfayt v. Belgium*, ECtHR, No. 9267/81 (2 March 1987), para. 54.
[77] *See, e.g.* OAS*, The Santiago Commitment to Democracy and the Renewal of the Inter-American System*, AG/RES. 1080 (XXI-O/91) (June 4, 1991). https://www.oas.org/en/sla/docs/ag03805E01.pdf.

to participation in periodic elections: a right to *indirectly* participate in public affairs.

c. Reinforcing the Democratic Entitlement with Election Monitoring

The international community has endeavoured to embed a right to participate in governance by monitoring elections. In doing so, the normative value of democratic representative governance has been enhanced. Elections are the quintessential element of representative democracy. The UDHR and the ICCPR, as well as regional instruments, emphasise 'the role of periodic and genuine elections in ensuring that everyone is able to participate in the public affairs of his or her country.'[78] Although, international organizations have been engaged in election monitoring since the end of the First World War with the implementation of Versailles peace treaty, and the UN oversaw decolonization referendums, the end of the Cold War precipitated a new dawn of election monitoring. This new dawn of election monitoring by the UN and regional organizations began in Nicaragua and Namibia in 1989 and Haiti in 1990, where the UN and other organizations monitored elections in an attempt to ensure that the 'free will' of the electors was expressed and recognized.

In 1987, Haiti's elections were cancelled because of ongoing violence and voter intimidation, and a military backed government came to power. In June 1990, the President of Haiti requested UN assistance to observe the elections and provide 'independent

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[78] HRC Guidelines on Participation, *supra* n. 43, at para. 25.

verification of the outcome of the vote.'[79] The UN established the Observer Group for the Verification of the Elections in Haiti (ONUVEH) to report on the conduct of the elections for both President and the legislature.

> In normative terms, Haiti may be understood as the first instance in which the United Nations, acting at the request of a national government, intervened in the electoral process solely to validate the legitimacy of the outcome.[80]

The OAS also provided an observer team working in conjunction with ONUVEH.[81] Jean-Bertrande Aristide received more than two-thirds of the vote (with the runner-up receiving only 14 per cent of the vote) and the margins in parliamentary elections were also wide.[82] According to ONUVEH, although there were some irregularities, the large majorities were sufficient to overcome any concerns. President Aristide was inaugurated on 7 February 1991.[83]

Since 1991 and the Haiti mission, the UN has reinforced the importance of elections by engaging in electoral assistance missions to more than 100 countries.[84] Although monitoring only proceeds at the request of the subject state, 'all member states have at some point

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[79] Permanent Representatives of the Bahamas, Columbia, and Haiti, to the UN, *Letter Addressed to the President of the General Assembly Dated 17 July 1990*, 44 GAOR, Annexes, UN Doc. A/44/965/Add. 1 (1990) quoted in Fox, *supra* n. 39, at 584.
[80] Franck, *supra* n. 29, at 72-73.
[81] Fox, *supra* n. 39, at 584-86.
[82] Roth (2000), *supra* n. 1, at 367.
[83] UN, *Special Economic and Disaster Relief Assistance - Electoral Assistance to Haiti* (Final Report of the UN Observer Group for the Verification of Elections in Haiti), UN. Doc. A/45/870/Add, l (22 February 1991) Annex, second report, at 22-23. https://digitallibrary.un.org/record/109304?ln=fr.
[84] UN, *Political and Peacebuilding Affairs* (Website). https://dppa.un.org/en/elections.

participated in the formulation of [election] standards.'[85] The OAS, AU, and the EU, as well as the OSCE and other regional and sub-regional organizations have also all participated in election monitoring. The EU has engaged in over 160 'Election Observation Missions' in more than 60 countries since 2000.[86] In 1990, the then CSCE established the Office of Free Elections to facilitate election observation.[87] The OSCE, through its Office for Democratic Institutions and Human Rights (ODIHR), has observed more than 400 elections in the 57 states of the OSCE region since 1996.[88] The OAS has been engaging in election monitoring since 1962 and in the 50 years since has engaged in more than 240 Electoral Observation Missions in 27 countries.[89] In 2006, the OAS created the Department for Electoral Cooperation and Observation and began drafting a standardized methodology for election observance.

Sub-regional organizations, including ASEAN, the Economic Community of West African States (ECOWAS), and the South Asian Association for Regional Cooperation have also participated in election monitoring. The ECOWAS *Protocol on Democracy and*

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[85] Fox, *supra* n. 39, at 590.
[86] EU, *EU Election Observation Missions* (Website) (27 August 2021). https://www.eeas. europa.eu/eeas/eu-election-observation-missions-1en.
[87] Ana Rusu, 'Over 30 Years of Election Observation' (OSCE, 27 December 2022). https://www.osce.org/odihr/535182.
[88] OSCE (ODIHR), *400 Missions to Help Promote Democratic Elections across the OSCE Region* (15 September 2021) OSCE. https://www.osce.org/odihr/elections/497934.
[89] OAS (Secretariat for Strengthening Democracy), *Observing Elections in the Americas* (Website). https://www.oas.org/es/sap/deco/.

Good Governance [90] and the Southern African Development Community's *Principles and Guidelines Governing Democratic Elections*[91] also provide an organizational mandate for conducting, overseeing, and observing elections within their member states. The League of Arab States has also participated in election observation missions, most notably in Lebanon, Palestine, Algeria, Iraq[92] and Tunisia.[93]

Election monitoring was utilized by the international community to legitimate elected governments: the verified elections provided the elected governments with legitimacy and supposedly were a manifestation of popular sovereignty. In engaging in election monitoring the international community has endorsed the notion that popular sovereignty and the consent of the population is reflected in elections and representative democracy. The verification of the election results in Haiti and Nicaragua by the UN legitimized the elected governments of those two countries. Election monitoring provides a forum for reviewing the credibility of elections and '[o]nly

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[90] ECOWAS, Management, Resolution, Peacekeeping and Security Executive Secretariat, *Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention*, Dakar (December 2001), Art. 12. https://ihrda.uwazi.io/en/entity/gnhvkzf0aw9et1dhcq96n7b9.

[91] SADC, *Principles and Guidelines Governing Democratic Elections* (Pretoria, 20 July 2015), Art. 3. https://www. eisa.org/pdf/sadc2015principles.pdf.

[92] Aboul Gheit, 'Arab League will monitor elections in Lebanon as it did in Iraq, Algeria, Palestine', *Arab News* (14 March 2022). https://www.arabnews. com/node/ 2042576/middle-east.

[93] Sarah Sunn Bush and Lauren Prather, 'Who's There? Election Observer Identity and the Local Credibility of Elections', (2018) 72(3) *International Organization* 659-692. DOI:10.1017/S0020818318000140.

when elections are credible can they legitimize governments.'[94] As such, the results of internationally monitored elections 'serve as evidence of popular sovereignty and become the basis for international endorsement of the elected government.'[95] Indeed, in 2001, the OAS adopted the *Inter-American Democratic Charter* (IADC) and endorsed 'periodic, free, and fair elections based on secret balloting and universal suffrage as an *expression of the sovereignty* of the people.'[96]

3.4 The Enforcement of the Democratic Entitlement

The emergence of the democratic entitlement is parallel to the presumptive declining relevance of the effective control test in government recognition. This began soon after the Cold War with the international community becoming increasingly reluctant to recognize *new* political authorities afforded the habitual obedience of the population primarily as a result of the use or threat of force and physical coercion. The decline of the effective control test was primarily manifested in the response of the international community to the removal of purportedly democratically elected governments by coups and their replacement by military *juntas.* Even though the *juntas* effectively controlled the internal affairs of the state, international and regional organs refused to recognize, and therefore

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[94] Vidar Helgesen, 'Preface', in Raul Cordenillo and Andrew Ellis (eds.), *The Integrity of Elections: The Role of Regional Organizations* (International Institute for Democracy and Electoral Assistance, Stockholm, 2012) 5-6, at 5. ISBN: 978-91-86565-63-3. https://www.idea.int/ sites/default/files/publications/integrity-of-elections.pdf.
[95] Reisman, *supra* n. 9 at 866, 868-69.
[96] *Ibid.*, at Art. 3 (emphasis added).

legitimize, their political authority. In a few cases, the international community even intervened militarily to *reinstate* the democratically elected, and hence 'legitimate', government.

a. Foreign Intervention to Restore Elected Governments

The purported decline of the effective control test began to crystallize in the 1990s. As noted, in 1990, Haiti conducted UN monitored elections and Jean-Bertrand Aristide was the clear winner with more than two-thirds of the vote.[97] In January 1991, before his inauguration, a coup against President-elect Aristide was attempted but quickly quashed. Later that year, in September 1991, Haiti's military succeeded in deposing the president and installed a military *junta*. International condemnation was swift. The OAS, in a meeting of foreign ministers of member states denied recognition of the *junta* and instead resolved to recognize the Aristide government 'as the only *legitimate* representatives of the government of Haiti' and to undertake whatever action necessary to reinstate President Aristide 'to the exercise of his *legitimate* authority.'[98] More concretely, a subsequent meeting of OAS foreign ministers called on member

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[97] Roth (2000), *supra n*. 1, at 367.

[98] OAS, Ad-hoc Meeting of Ministers of Foreign Affairs, *Support to the Democratic Government of Haiti*, MRE/RES. 1/91 (3 October 1991) (emphasis added) (Annexed to *Letter dated 3 October 1991 from the Secretary-General of the Organization of American States addressed to the Secretary-General*, UN Doc. S/23131 (9 October 1991). https://digitallibrary.un.org/record/129940?ln=en).

states to 'freeze the assets of the Haitian State and to impose a trade embargo on Haiti.'[99]

The UN followed the OAS lead and passed resolutions strongly condemning the 'attempted *illegal* replacement' of President Aristide and demanded 'the immediate restoration of the *legitimate* government.'[100] Throughout 1992 the OAS tightened its embargo, and on 16 June 1992 the UN Security Council 'unanimously imposed mandatory worldwide sanctions on Haiti'[101] because it deplored 'the fact that [...] the legitimate government of President Jean-Bertrand Aristide has not been reinstated.'[102] The sanctions were unsuccessful and ultimately, almost 3 years after the coup, the UN authorized military force to facilitate 'the prompt return of the *legitimately* elected President and the restoration of the *legitimate* authorities of the Government of Haiti.'[103] A US led military force invaded the country and was successful in reinstating the deposed president. New

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[99] OAS, Ad-hoc Meeting of Ministers of Foreign Affairs, *Support for Democracy in Haiti*, MRE/RES. 2/91 (8 October 1991) (Annexed to *Letter dated 8 October 1991 from the Secretary-General of the Organization of American States addressed to the Secretary-General*, UN Doc. S/23132 (9 October 1991). https://digital library.un.org/record/131159?ln=en).

[100] UNGA, *The situation of democracy and human rights in Haiti*, GA Res. 46/7, UN Doc. A/RES/46/7 (20 December 1991, adopted 11 October 1991) (emphasis added). https://digitallibrary.un.org/record/133636?ln=en.

[101] Roth (2000), *supra* n. 1, at 378.

[102] UNSC, *Security Council resolution 841 (1993) on sanctions against Haiti*, SC Res. 841, UN Doc. S/RES/841 (1993, adopted 16 June 1993). https://digital library.un.org/record/168120?ln=en.

[103] UNSC, *Security Council resolution 940 (1994) on authorization to form a multinational force under unified command and control to restore the legitimately elected President and authorities of the Government of Haiti and extension of the mandate of the UN Mission in Haiti*, SC Res. 940, UN Doc. S/RES/940 (1994, adopted 31 July 1994). https://digitallibrary.un.org/record/191651?ln=en.

elections were announced, and these UN supervised elections were again won by Aristide.

Another example of military intervention to restore a democratically elected government occurred in Sierra Leone in 1997. President Kabbah had received 60 per cent of the vote in the 1996 elections. On 25 May 1997, the elected government of Sierra Leone was overthrown by a military *junta* led by Major Johnny Paul Koroma.[104] A week after the coup, in the 'Harare Decision', the OAU unanimously condemned the overthrow of the Kabbah government and authorized military intervention by ECOWAS to reinstate the President and his government (ECOWAS peacekeeping forces were already present in Sierra Leone).[105] The Harare Decision 'strongly and unequivocally' condemned the coup and called on 'all African countries, and the International Community at large, *to refrain from recognizing the new regime* and lending support in any form whatsoever to the perpetrators of the coup d'état.'[106] The UN Security Council later endorsed ECOWAS intervention and expressly authorised it to take action to 'restore the democratically

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[104] Peter A. Dumbuya, 'ECOWAS Military Intervention in Sierra Leone: Anglophone-Francophone Bipolarity Or Multipolarity?', (2008) 25(2) *Journal of Third World Studies: Third World Political, Economic, and Social Developments in Historical Perspective* 83, 83. http://www.jstor.org/stable/ 45194480.
[105] OAU, Council of Ministers, *Sierra Leone*, CM/Dec.356 (LXVI), Sixty Sixth Ordinary Session, Harare, Zimbabwe (28-31 May 1997). https://au.int/sites/default/files/decisions/9622-council_en_28_31_may_1997_council_ministers_sixty_sixth_ordinary_session.pdf.
[106] *Ibid.* (emphasis added).

elected government.'[107] The primarily Nigerian ECOWAS forces eventually defeated the military *junta*, nine months after the coup, when it captured Freetown in February 1998.[108] President Kabbah returned and was reinstated to power on 10 March 1998.[109]

The third frequently cited military intervention in support of the decline of the effective control test occurred in Côte d'Ivoire in 2010 and 2011. In November 2010, UN monitored elections were conducted and the incumbent, Laurent Ggabbo, lost the elections to Alassane Ouattara by 54 to 46 per cent. However, Ggabbo refused to yield governmental power.[110] On December 4, both putative presidents took an oath of office, and both claimed to lead the legitimate government of the country. The AU immediately condemned Ggagbo's usurpation of power and declared its 'total rejection of any attempt to create a *fait accompli* to undermine the electoral process and the will of the people.'[111] And within a week the AU suspended Côte d'Ivoire from the organization. Contemporaneously with AU condemnation, ECOWAS threatened military force. The 'democratically' legitimate president, Ouattara organized military forces and quickly took control of most of the

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[107] UNSC, *Security Council resolution 1132 (1997) on oil and arms embargo against Sierra Leone/Oil and arms embargo against the military junta in Sierra Leone*, SC Res. 1132, UN Doc. S/RES/1132 (1997, adopted 8 October 1997). https://digitallibrary.un.org/record/244598?ln=en.
[108] Dumbuya, *supra* n. 104, at 83.
[109] *Ibid.*
[110] Thomas J. Bassett and Scott Straus, 'Defending Democracy in Côte d'Ivoire: Africa Takes a Stand', (2011) 90(4) *Foreign Affairs* 130-140. https://www.foreignaffairs.com/articles/cote-dlvoire/2011-06-16/defending-democracy-cote-divoire.
[111] *Ibid.*, at 135.

country. By the time France and UN forces finally intervened, bombarding Ggagbo's bunker in the presidential palace, Outtara was in control of 90 per cent of the country and on the verge of entering the capital Abidjan.[112] After four months holed up in the presidential palace, Outtarra's forces arrested the former president.

In both Haiti and Sierra Leone 'the democratic legitimacy of the government carried more weight for the purpose of recognition than did actual effective control.'[113] In the same year as the Sierra Leonean intervention, 1997, the UN Secretary General stated the view that 'military coups against democratically elected governments by self-appointed juntas are not acceptable' as 'an established norm.'[114] And in 2000 Professor Roth described the pro-democratic intervention in Sierra Leone as:

> the best evidence yet of a fundamental change in international norms pertaining to pro-democratic intervention, [and] [t]he argument can be made, with at least a modicum of plausibility, that coups against elected governments are now, per se violations of international law, and regional organizations are now licensed to use force to reverse such coups in member states.[115]

In each of the three cases referred to, the stated purpose of foreign intervention was to *restore* an elected government and therefore maintain *pre-existing* democratic governance. Intervention to restore

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[112] *Ibid.*
[113] de Wet (2014), *supra* n. 22, at 203.
[114] UNGA, *Annual Report of the Secretary General on the Work of the Organization*, UN Doc. A/52/1, para 37 (3 September 1997). ISSN 0082-8173. https://digitallibrary.un.org/record/243130?ln=en.
[115] Roth (2000), *supra* n. 1, at 405.

pre-existing democratic governance has been reinforced by a plethora of international and regional instruments condemning coups and sanctioning the coup instigators.

b. Sanctioning the Removal of Elected Governments

Although the UN has consistently, expressed 'serious concern about the unconstitutional or unlawful disruption of representative governance and democratic institutions and the unlawful removal of any democratically elected officials,'[116] the 'most highly developed "democracy protection" regimes have emerged not at the UN or in Europe, but within intergovernmental organizations in Africa and Latin America.'[117] The Haitian and Sierra Leonean coups led to the two regional organizations perhaps most beleaguered by the unconstitutional removal of democratically elected governments, the OAS and AU, to adopt specific instruments addressing and proscribing coups d'état.

In 1991, the OAS adopted Resolution 1080, which required immediate action 'in the event of any occurrences giving rise to the sudden or irregular *interruption* of the democratic political institutional process or of the legitimate exercise of power by the *democratically elected government* in any of the Organization's

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[116] UNGA, *Strengthening the role of the United Nations in enhancing periodic and genuine elections and the promotion of* democratization, GA Res. 74/158, UN Doc. A/74/399/Add.2(2019) (17 January 2020, adopted 18 December 2019). https://digitallibrary.un.org/record/3847788?ln=en.

[117] Gregory H. Fox and Brad R. Roth, 'The Dual Lives of "The Emerging Right to Democratic Governance"', (2018) 112 *AJIL Unbound* 67, 71. https://www.jstor.org/ stable/10.2307/27003809.

member states.'[118] This Resolution was reinforced the following year by the OAS *Protocol of Washington*, which amended the OAS Charter, whereby a new article was inserted that provided for the suspension of a member state in the event of a coup.[119] These measures proved at least partially effective in preventing a complete authoritarian takeover by compelling Peru's President Albert Fujimori to convene legislative elections.[120] It also pressured President Jorge Serrano to abandon his self-coup in Guatemala and General Lino Oviedo to refrain from attempting a coup in Paraguay.[121]

The OAS anti-coup initiatives culminated in the Inter-American Democratic Charter on 11 September 2001.[122] The IADC specifies a number of diplomatic initiatives culminating in the potential suspension of membership of a member state following 'an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously

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[118] OAS, *Representative Democracy*, AG/RES. 1080 (XXI-O/91) (adopted June 5, 1991), Art. 1. https://www.oas.org/sap/peacefund/VirtualLibrary/KeyPeaceInstruments/SantiagoCommitment/SantiagoCommitment.pdf

[119] OAS, *Protocol of Amendments to the Charter of the Organization of American States* ('Protocol of Washington') (1992), Art. 1. https://www.refworld.org/docid/3de4a1f84.html.

[120] Craig Arceneaux and David Pion-Berlin, 'Issues, Threats, and Institutions: Explaining OAS Responses to Democratic Dilemmas in Latin America', (2007) 49(2) *Latin American Politics and Society* 1, 5. doi:10.1111/j.1548-2456.2007.tb00405.x.

[121] *Ibid.*

[122] OAS, *Inter-American Democratic Charter* (11 September 2001). https://www.oas.org/dil/2001_Inter-American_Democratic _Charter.pdf.

impairs the democratic order' in that member state.[123] The only member of the OAS to be suspended pursuant to the IADC was Honduras in 2009. In Honduras, the elected President Manuel Zelaya was ousted by the Honduran military 'with the overwhelming support of the legislature and the unanimous support of the Supreme Court,' but contrary to provisions of the country's constitution.[124] The OAS 'condemn[ed] vehemently the coup d'état staged against the constitutionally established Government of Honduras [...], which has produced an unconstitutional alteration of the democratic order.'[125] It also 'declare[d] that no government arising from this unconstitutional interruption will be recognized' and 'reaffirm[ed] that the representatives designated by the constitutional and legitimate government of President José Manuel Zelaya Rosales are the representatives of the Honduran State to the Organization of American States.'[126]

The OAS's reaction to coups and unconstitutional changes of government has, however, been somewhat inconsistent. The April 2005 unconstitutional parliamentary coup overthrowing Ecuador's President Lucio Gutierrez[127] was not condemned by the OAS; but it instead encouraged 'all political, social, and economic sectors to

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[123] *Ibid.*, at Art. 19 (emphasis added), *see also, ibid.*, Arts. 17-22. *See also*, Arceneaux and Pion-Berlin, *supra* n. 120, at 3-5.
[124] Roth (2010), *supra* n. 5, at 435.
[125] OAS, *Resolution on The Political Crisis in Honduras*, AG/RES. 1 (XXXVII-E/09) (1 July 2009), para. 1. https://www.oas.org/consejo/general_assembly/37sga.asp#docs.
[126] *Ibid.*, at para. 3.
[127] Erika de Wet, *Military Assistance on Request and The Use of Force* (Oxford University Press, Oxford, 2020) ('de Wet (2020)') 43. ISBN: 9780198784401.

maintain a wide-ranging dialogue to strengthen measures conducive to overcoming difficulties and consolidating democracy.'[128] The OAS's inconsistency with regard to applying the IADC is further manifested in its approach to Venezuelan governance. Venezuela has been plagued by attempted coups and apparently 'illegitimate' elections since the inception of the IADC. Indeed, '[t]he responses within the OAS to attempted coups, self-coups, and unfree and unfair elections in Venezuela since 2002 poignantly illustrates the sustained reluctance with the organization to sanction member states whose governments lack legitimacy.'[129] The OAS's divergent responses to the removal of democratically elected governments can perhaps be attributed to the use of both constitutional and illegal strategies to remove recognized governments.

The OAS's somewhat incoherent responses to democratic crises has again been evident in its response to the crisis engulfing Peru. In October 2022, the Peruvian President Pedro Castillo invoked the IADC after asserting that a coup against him was in preparation and that Peru's democratic stability was threatened.[130] The OAS, in response, established a 'High-Level Group' (HLG) to analyse Peru's political situation and 'to express its solidarity and support for the

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[128] OAS, *Support to The Republic of Ecuador by The Organization of American States*, Cp/Res. 883 (1484/05) (20 May 2005). http://www.oas.org/council/resolutions/res883.asp.
[129] de Wet (2020), *supra* n. 127, at 43.
[130] OAS Permanent Council, *Supporting the Preservation of the Democratic System and Representative Democracy in Peru*, CP/RES. 1208 (2400/22) (20 October 2022), para. 4. https://scm.oas.org/doc_public/english/hist_22/cp46721e03.docx.

democratically elected Government of the Republic of Peru, as well as for preservation of the democratic political institutional process.'[131] After concluding its visit to Peru, the HLG issued a statement calling for 'a process of inclusive dialogue in order to preserve democratic institutions, representative democracy and social peace for the benefit of the Peruvian people.'[132] On 1 December 2022, the HLG submitted its preliminary report and recommended convening 'a formal unrestricted dialogue process.'[133] Within a week of its Preliminary Report, President Castillo, threatened by an impeachment vote, announced the dissolution of Congress and the installation of an emergency government.[134] Before the day was over, President Castillo was ousted from power and arrested, and Vice-President Dina Boluarte, was sworn in as president.[135] Since then, thousands of President Castillo's supporters have taken to the streets[136] in protest and more than 50 people have

[131] *Ibid.*, at para. 1.
[132] OAS, *Statement from the High-Level Group of the OAS Permanent Council to Analyze the Situation in Peru* E-072/22 (25 November 2022). https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-072/22.
[133] OAS, *Preliminary Report Visit by the High-Level Group of the Permanent Council of the OAS to the Republic of Peru from November 20 to 23, 2022* CP/doc.5833/22 (1 December 2022), 9. https://www.oas.org/en/media_center/press_release.asp?sCodigo=S-028/22.
[134] Mitra Taj, 'Peru's President Tried to Dissolve Congress. By Day's End, He Was Arrested', *New York Times* (7 December 2022). https://www.nytimes.com/2022/12/07/world/americas/peru-pedro-castillo-coup.html?searchResultPosition=20.
[135] *Ibid.*
[136] Julie Turkewitz and Mitra Taj, 'Protesters in Peru Demand Justice for Ousted President Pedro Castillo' *New York Times* (15 December 2022). https://www.nytimes.com/2022/12/15/world/americas/peru-protests-pedro-castillo.html.

been killed.[137] The new government of President Boluarte has responded by calling a state of emergency.[138] After 'express[ing] its solidarity and support for the democratically elected government' and calling for ongoing dialogue, the OAS's response to what has been described as a 'referendum on democracy' is to again undertake an analysis of the situation.[139] The OAS has not otherwise invoked the IADC.

The AU's predecessor, the OAU, was at its inception primarily concerned with the eliminating colonial subjugation of its member states and maintaining their independence.[140] The principle of non-interference was invoked to preclude the OAU from interfering in the domestic suppression of elections. Gradually, however, initially through a number of non-binding declarations and decisions, the OAU began to support democratic governance by overtly condemning the unconstitutional removal of democratic governments. As noted, in the Harare Decision, the OAU condemned the coup in Sierra Leone. Subsequently, in response to coups in the Comoros, Congo, Brazzaville, Guinea Bissau and Niger, the OAU adopted the *Algiers Decision* in 1999. In the Algiers Decision, the

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[137] Julie Turkewitz, 'With 50 Dead in Peru, a Referendum on Democracy', *New York Times* (17 January 2023). https://www.nytimes.com/2023/01/17/world/americas/peru-protests-democracy.html?searchResultPosition=2.
[138] Mitra Taj and Julie Turkewitz, 'Amid Deadly Protests, Peru Declares a National State of Emergency', *New York Times* (14 December 2022). https://www.nytimes.com/2022/12/14/world/americas/peru-state-of-emergency-protests.html?searchresultposition=15.
[139] OAS, *OAS Permanent Council to Analyze the Situation in Peru* (13 January 2023). https://www.oas.org/en/media_center/press_release.asp?sCodigo=AVI-002/23.
[140] Elvy, *supra* n. 68, at 59.

OAU explicitly expressed its opposition to unconstitutional changes of government.[141] One year later, the OAU adopted the *Declaration on the Framework for an OAU Response to Unconstitutional Changes in Government* (the 'Lomé Declaration'), which explicitly addressed the impact of coups on democracy and provided for 'measures and actions that the OAU would progressively take to respond to an Unconstitutional Change of Government' and 'an implementation Mechanism.'[142]

In establishing the AU, the *Constitutive Act of the African Union* (2000) provides that it shall function in accordance with the principle, amongst others, of 'condemnation and rejection of unconstitutional changes of governments.'[143] In 2007, the AU adopted the African Charter on Democracy. Article 25 provides for the immediate suspension of a state party following the 'unconstitutional change of government' and the failure of diplomatic initiatives. It may also impose sanctions.[144] Furthermore, Article 25 provides an extensive array of consequences that may be imposed on the instigators --

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[141] Eki Yemisi Omorogbe, 'A Club of Incumbents? The African Union and Coups d'État', (2011) 44 *Vanderbilt Journal of Transnational Law* 123, 127. https:// scholarship. law. vanderbilt.edu/vjtl/vol44/iss1/3.
[142] AU, *Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government*, AHG/Decl.5 (XXXVI) (Lomé, Togo, 12 July 2000). https://au.int/sites/default/files/decisions/9545-2000_ahg_dec_143-159_xxxvi_e.pdf.
[143] AU, *Constitutive Act of the African Union 2000* (Lome, Togo, 11 July 2000), Art. 4(p). https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf.
[144] de Wet (2014), *supra* n. 22, at 204.

'perpetrators'-- of the coup.[145] It has been on the basis of these applicable instruments then in force that the AU has condemned successful coups and suspended the membership of states.

The AU has suspended membership of the Central African Republic (2003 and 2013), Togo (2005), Mauritania (2005), Guinea (2008), Madagascar (2009), the Comoros (2008) and Niger (2010) following coups.[146] The 2013 coup in the Central African Republic, resulting in the ouster of then President Bozize by the Seleka rebels, led to the imposition by the AU of sanctions, travel restrictions and an asset freeze on the coup leaders, in addition to suspension of AU membership.[147] Although the AU has condemned and rejected 'unconstitutional changes of governments', suspended membership and sanctioned the coup perpetrators, anti-democratic coups continue to plague the continent. Indeed, there has been a recent surge in coup activity in Africa since 2020 with coups in four countries (Burkina

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[145] African Charter on Democracy, *supra* n. 71, at Art. 25.

> […]
> 4. The perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State.
> 5. Perpetrators of unconstitutional change of government may also be tried before the competent court of the Union.
> [...]
> 7. The Assembly may decide to apply other forms of sanctions on perpetrators of unconstitutional change of government including punitive economic measures.
> 8. State Parties shall not harbour or give sanctuary to perpetrators of unconstitutional changes of government.
> 9. State Parties shall bring to justice the perpetrators of unconstitutional changes of government or take necessary steps to effect their extradition…

[146] Bassett and Straus, *supra* n. 110 at 136; de Wet (2014), *supra* n. 22, at 204.
[147] de Wet (2014), *supra* n. 22, at 205.

Faso, Guinea, Mali, and Sudan), and an attempted coup (Niger). After the coups the AU suspended the memberships of Burkina Faso, Guinea, Mali, and Sudan.[148]

Despite a clear evolution towards the condemnation and non-recognition of political authorities acquiring power by force, the response of the AU, and, indeed, the international community, to unconstitutional changes of government has, like the OAS, been anything but consistent. After the 2012 coup in Mali, despite the provisions against coup instigators in the African Charter on Democracy, the perpetrators were included in a transitional government. The coup regimes of Burkina Faso, Central African Republic, Equatorial Guinea, The Gambia, and Guinea were able to address the UN General Assembly *without* objection from the AU.[149] In April 2021, Chad's longstanding President Déby died. A family member General Mahmut Idriss, bypassed the constitution's succession methodology and installed himself as the head of a military council. The AU did not suspend Chad purportedly because

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[148] US, '"An Epidemic of Coups" in Africa?', *Issues for Congress*, (Congressional Research Service, 11 February 2022). https://crsreports.congress.gov/product/pdf/IN/IN11854. *See also*, AU, 'African Union suspends Mali from participation in all activities of the African Union and decides to constitute an evaluation mission to engage with all concerned stakeholders', *News* (16 June 2021). https://au.int/en/articles/african-union-suspends-mali-participation-all-activities.

[149] Patrick Goodenough, 'Regimes Arising from Coups Should Be Barred from UN Institutions, African Official Says', *CNSNews.com* (online) (29 September 2009). http://www.cnsnews.com/news/ print/54694.

the AU Commission Chairperson Moussa Faki[150] was previously Chad's foreign minister.[151]

The response of the international community, and in particular, the OAS and AU, to military coups against elected governments has been inconsistent. The invocation of the UN Charter's Chapter IV mechanisms has been 'miniscule' compared with 'the frequency of democratic crises and instances of democratic decline.'[152] However, a pro-democratic normative response to the ouster of democratically elected governments is evolving. The condemnation of coups and the co-ordinated response by international and regional organizations has demonstrated the reduced relevance of effective control to government recognition. The actions of the OAS and AU, and their Member States, is indicative of the progressive evolution of a norm countermanding coups and thereby reinforcing an entitlement to the continuity of democratic governance.

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[150] Congressional Research Service, *supra* n. 148.

[151] Africa and Latin America are not alone in continuing to incur coups and unconstitutional changes of government. The Taliban succeeded in ousting the partially democratic elected government in Afghanistan in August 2021 and the military junta in Myanmar returned Daw Aung Suu Kyi to house arrest and took control of the country in February 2021. The governments of Afghanistan and Myanmar have attempted to appoint new ambassadors to the UN. However, the UN has refused to replace the envoys appointed by the deposed democratically elected governments.

[152] Jorge Heine and Brigitte Weiffen, *21st Century Democracy Promotion in the Americas: Standing Up to the Polity* (Routledge, London, 2014) 96. ISBN: 9780415626378.

3.5 Conclusion

The habitual obedience of the population, which was supposedly a reflection of consent and thus a manifestation of popular sovereignty, was typically the primary determinant of government recognition. Today, states increasingly have a duty to develop towards democratic governance by the implementation of elections and representative democracy.[153] Since 1990, international law has been evolving on the basis of a 'right to take part' or participate in political affairs articulated in international human rights covenants together with growing state practice, international interventions to restore deposed elected governments, the increasing role of UN election monitoring, as well as a plethora of international and regional instruments promoting democratic governance.[154] The rise of the right to democratic governance 'suggest[s] criteria of governmental legitimacy at odds with the "effective control" doctrine that had long prevailed in the recognition practices of most states and intergovernmental organizations.'[155]

The emerging right to democratic governance is primarily satisfied by the implementation of mechanisms and institutions of

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[153] Niels Petersen, The Principal of Democratic Teleology in International Law, (2008) 34(1) *Brooklyn Journal of International Law* 33, 84. https://brooklyn works.brooklaw.edu/bjil/vol34/iss1/2.
[154] Fox, *supra* n. 39, at 607.
[155] Gregory H. Fox and Brad R. Roth 'Introduction: the spread of liberal democracy and its implications for international law', in Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law* (2000). (Cambridge University Press, Cambridge, 2000) 1-22, at 2. eBook ISBN: 978051152 2307. https://doi.org/10.1017/CBO9780511522307.

representative democracy. The central feature of representative democracy involves the free, genuine and periodic elections of representatives. Pursuant to the democratic entitlement, governance is legitimated by the consent of the governed but *only* as evidenced in free and fair elections.[156] Accordingly, states have a duty to progressively implement institutions of representative democracy and 'international law contains a principle of democratic teleology, namely, a right to the emergence of democratic governance.'[157]

While a democratic entitlement may be emerging, the international community has only imposed representative democracy and elections to reinstate pre-existing democratically elected governments, and then only sporadically. The declining relevance of the effective control test has been exemplified by intervention, militarily and otherwise, to restore democratically elected governments. The decline of the doctrine has been reinforced by a plethora of international and regional instruments condemning coups. Despite the inconsistent approach of the international community and regional organizations, a norm proscribing the unconstitutional removal of elected governments is crystallizing. The norm reduces the applicability of the effective control test to the recognition of governments coming to power by way of a coup, despite the habitual obedience of the population. However, effective control continues to apply to existing non-democratic governments and '[t]his indicates

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[156] Thomas M. Franck, Democracy as a Human Right, (1994) 26 *Studies in Transnational Legal Policy* 73, 74-75. https://heinonline-org.sare.upf.edu/HOL/Page?handle=hein.journals/stdtlp26&id=95&collection=journals&index=.
[157] Petersen, *supra* n. 153, at 84.

that the universal perception of governmental legitimacy has not entirely shifted away from the requirement of effective control over territory.'[158]

The international community does not impose representative democracy on existing authoritarian governments and 'does not deny legitimacy to non-democratic governments in general.'[159] The international community has not intervened militarily to impose a democratic system of government where none existed. Accordingly, the enforcement of this emerging right appears to be, at present, limited to the continuity of democratic governance rather the imposition of democracy. It has arisen in parallel with the condemnation of the usurpation of political authority from democratic governments. It is reflected in the recognition or *non*-recognition, and thus legitimation, of governments in a pre-existing democracy depending on their democratic pedigree.

[158] Vidmar, *supra* n. 37, at 37.
[159] *Ibid.*, at 38.

4. DEMOCRACY AND STATE CREATION

4.1 Introduction

The democratic entitlement described in *Chapter 3* suggests that international law's recognition doctrines are evolving to include an element of democratic legitimacy. The democratic legitimacy of a state depends on the consent of those subject to the exercise of its coercive authority, exercised by its agent -- the government.[1] The first objective of this *Chapter 4* is to demonstrate the importance of consent to the democratic legitimacy of a state. The original theorists of statehood acknowledged the importance of consent, albeit fictional, to the justified conveyance of political authority to the abstraction of the state.

It is another aim of this *Chapter* to establish that, contemporaneously with the emergence of a democratic prerequisite to government recognition, an element of democratic legitimacy -- the manifestation of consent -- became more important to state recognition. Accordingly, referenda are increasingly relevant to claims of statehood by seceding political entities. The democratic legitimacy of state creation -- popular consent manifested in a referendum --

[1] Ruth C. A. Higgins, *The Moral Limits of the Law: Obedience, Respect, and Legitimacy* (Oxford University Press, Oxford, 2004) 97. ISBN: 9780199265671.

appears to have emerged as a pre-condition to statehood and is part of international law's state recognition doctrine.[2]

The emergence of the democratic entitlement described in *Chapter 3* perhaps implies that the recognition of new states would also depend on the implementation of institutions of representative democracy. However, the nature of the government or political system was traditionally not relevant to the recognition states,[3] and the international community has repeatedly emphasised that a state's political system is a matter for the state. This *Chapter 4* also asserts that the emerging democratic entitlement and the prerequisite of referenda to state recognition has not resulted in a parallel requirement to adopt institutions of representative democracy. However, recognition is a 'law-governed political process'[4] and the adoption of democratic institutions are becoming, at least politically, necessary for recognition, and it appears likely that any new state that does *not* adopt institutions of representative democracy will *not* be recognized as a state.

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[2] James Crawford, *The Creation of States in International Law* (Oxford University Press, Oxford, 2006) 150-155. ISBN: 9978-0-19-922842-3. *See also*, Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing, Oxford, 2013) ('Vidmar (2013)') 65. ISBN: 978-1-84946-469-7.
[3] Vidmar (2013), *supra* n. 2, at 41.
[4] *Ibid*., at 10.

4.2 Consent and the State

Democratic theory provides that, to be a legitimate political authority, voluntary, submission of those subject to its actual or potential coercion is required.

> The need for consent to authority derives from the natural condition of freedom. Only those restrictions on individual freedom that are voluntarily assumed can be justified. Voluntary consent gives moral significance to obedience; justifying it by means relevant to the individual and not to the state. A strong liberal legitimacy thesis therefore claims that the polity is not legitimate unless founded on the consent of the citizenry.[5]

Contemporary political theories of the state often discard the relevance of consent. For instance, Margaret Moore justifies a state as 'necessary to secure everyone's independence, and since we have a basic or fundamental duty to respect each other's independence, we do not have to consent to be bound to it.'[6] Allen Buchanan similarly asserts that a state is legitimate if it upholds human rights: 'the chief moral purpose of endowing an entity with political power is to achieve justice' and 'the protection of basic human rights is the core of justice.'[7] However, *democratic* legitimacy demands the consensual and voluntary submission of the population to coercive authority.

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[5] Higgins, *supra* n. 1, at 95.

[6] Margaret Moore, *A Political Theory of Territory* (Oxford University Press, New York, 2015) 96. ISBN: 9780190222246. DOI: 10.1093/acprof:oso/9780190222246.001.0001.

[7] Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford University Press, Oxford, 2004) 247. ISBN: 978-0-19-929798-6.

The legitimating consent of the population, albeit fictional, was particularly relevant in the foundation of the modern state. The great theorists of sovereignty from the 16th and 17th Centuries, namely Jean Bodin, Thomas Hobbes and John Locke, all attempted to justify and *legitimize* the existence of a state on the basis of the consent of the populous. These philosophers of the 'contractualist tradition' hypothesised the existence of an inaugurating consent whereby a community of individuals collectively agreed to bind itself together and convey authority to a sovereign power in exchange for security and protection. Jean Bodin, the French philosopher writing almost three-quarters of a century before the Treaty of Westphalia, in 1576, provided that 'sovereignty is that absolute and perpetual power vested in a commonwealth,'[8] being vested by the people at some point in history -- a consensual but irrevocable conveyance of power.

Likewise, Thomas Hobbes, writing in the middle of the seventeenth century, postulated that the populace covenanted with each other to form a state and, at the same time, asserted that the populace consented to vesting sovereignty in the ruler, whereby 'in the social contract individuals surrendered all natural rights to the ruler and thus provided him [or her] with complete sovereignty.'[9] As the population's consent was important to the theoretical justification of

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[8] Jean Bodin, *Six Books of the Commonwealth* (M. J. Tooley (trans. and selected)) (Blackwell, Oxford, (1956)). OCLC No. 1068283536. *See also*, Peter H. Russell, *Sovereignty: The Biography of a Claim* (University of Toronto Press, Toronto, 2021) 31. ISBN: 148750909X.

[9] Dieter Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (Columbia University Press, New York, 2015) 29. ISBN: 978-0-231-16425-2.

territorial sovereignty, to Hobbes 'democracy must have been the first form of government when the multitude of individuals assembled to agree on a ruler.'[10] 'The person to whom the rights of individuals are transferred is not directly the natural person of the ruler but [the] artificial legal person of the state.'[11] To Hobbes, territorial sovereignty and statehood were legitimate not only because they were consensual but also because they resulted, at least theoretically, in order and peace. According to Hobbes, individuals consensually transfer authority to the sovereign -- *Leviathan* -- which imposes rules and maintains order, without which life would be 'nasty, brutish and short.'[12]

John Locke adopted a conflation of both private property theories and contract theories whereby 'the state emerges from the combination of individual properties, which were obtained by appropriating land originally held in common by all humankind by the first taker.'[13] Like Hobbes, according to Locke individuals transferred their freedom:

> ... perpetually and indispensably obliged to be, and remain unalterably a subject to [the commonweal], and can never be again in the liberty of the state of Nature, unless by any

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[10] Russell, *supra* n. 8, at 32.
[11] Grimm, *supra* n. 9, at 29.
[12] Henry Sidgwick, *Elements of Politics* (Cosimo Classics, New York, 2005) 227. ISBN: 9781596052239.
[13] Paulina Ochoa Espejo, *On Borders* (Oxford University Press, New York, 2020) 40 (citing John Locke *Second Treatise* (§ 120)). ISBN: 9780190074203.

> calamity the government he was under, comes to be dissolved.[14]

The Lockean version of the state is that it is made up of individual property owners.[15] Those individuals who come together and create a common government on the basis of consent also create common land and agree to establish boundaries with their neighbours (similar collectives) by treaties.[16] Thus, to Locke, an individual who acquired land was an 'express consenter.'[17] Law thus follows the contract between property holders. Property rights according to Locke were a natural right that preceded the state.[18]

Immanuel Kant too defined sovereign authority in terms of contract but reversed the Lockean view that property preceded statehood. To Kant '[l]egal rights descend from the state' and '[r]ightful private property can only exist once the people in a unified territory give themselves a civic state.'[19] This civic state is necessary and required by justice to ensure the reciprocal rights and freedoms of the population are protected.[20]

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[14] John Locke, 'An Essay Concerning the True Original, Extent and End of Civil Government' ('Second Treatise'), in Locke, *Two Treatises of Government* (W. S Carpenter (ed.)) (M Dent / E P Dutton & Co, London/New York, 1924 (Rep. 1982)) 178 (ch. VIII, para. 121). ISBN: 9780460017510.
[15] Moore, *supra* n. 6, at 16.
[16] Ochoa, *supra* n. 13, at 40, citing John Locke *Second Treatise* (§§ 38, 45). *See also*, Bas Van Der Vosen, 'Locke on Territorial Rights,' 61(3) *Political Studies* 713-28. https://doi.org/10.1111/1467-9248.12106.
[17] Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford University Press, Oxford, 2000) 247. ISBN: 9780199243013.
[18] Moore, *supra* n. 6, at 93.
[19] Ochoa, *supra* n. 13, at 44-45.
[20] Moore, *supra* n. 6, at 93.

Even though 'consent' is a legitimating fiction, some theorists, including Locke, have asserted that retaining residence within a state -- that is *not* emigrating -- amounts to implicit consent.[21]

> The idea would be that if citizens are free to leave a state in the event of its proving objectionable -- in particular, to leave it for a state that was not similarly objectionable -- it follows that when they stay, they stay consensually. They effectively consent, if not to every law and policy, at least to the general arrangement for making law and policy.[22]

However, '[a]s Hume observed, for many people in many states the costs of exit are so high or the prospects of a better situation elsewhere so dim, that remaining in place cannot count as consent.'[23] Furthermore, while it may be possible, generally, to leave a state without restriction, there is no guarantee of entry into another state and, since there are almost no stateless territories,[24] the capacity to exit a state is illusory. This is what Michael Walzer described as the asymmetry of immigration and emigration.[25] Indeed, exiting your

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[21] Buchanan, *supra* n. 7, at 244.
[22] Philip Pettit, 'The Control Theory of Legitimacy', in Wojciech Sadurski, Michael Sevel, and Kevin Walton (eds), *Legitimacy: The State and Beyond* (Oxford University Press, Oxford, 2019) 7-31, at 22. ISBN: 9780198825265.
[23] Buchanan, *supra* n. 7, at 244.
[24] Petit, *supra* n. 22, at 23.
[25] *See*, Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, New York, 1983) 40. ISBN 0-465-08189-4. *See also,* Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press, Princeton, 2002) 171-75. https://doi.org/10.2307/j.ctv346pnd. eBook ISBN: 978-0-691-18654-2.

state of citizenship entails very real risks of statelessness and the attendant deprivation of human rights.[26]

The *quid pro quo* for the populace's purported consent to the transfer of freedom and power to the state via the 'social contract' was security and protection. The populace's inability to manifest consent to the law-making power of the sovereign was justified on the basis that 'free human beings enter into a social contract binding themselves to obey the sovereign, either individually or institutionally, in exchange for security'.[27] Political freedom is purportedly transferred pursuant to this theory for 'the purpose of self-preservation'[28] whereby the sovereign's 'legitimacy depended on its capacity to secure the life, liberty and property of its citizens.'[29] Thus, it has been said that the act of state-making is the 'quintessential protection racket.'[30]

Even considering the extortionate nature of the social contract, and that the social contract is nothing more than a legitimizing fiction, the

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[26] Hannah Arendt, 'The Decline of the Nation-State and the End of the Rights of Man,' in *The Origins of Totalitarianism* (World Publishing Company, Cleveland/New York, 1962) 267. OCLC: 2156660. Sofia Näsström, 'The Legitimacy of the People', (2007) 35(5) *Political Theory* 624, 648. https://www.jstor.org/stable/20452587.

[27] Benjamin R. Barber, *Cool Cities: Urban Sovereignty and the Fix for Global Warming* (Yale University Press, New Haven, 2017) 14. ISBN: 9780300224207.

[28] Russell, *supra* n. 8, at 32.

[29] Geoffrey Parker, *Sovereign City: The City-State Through History* (Reaktion Books, London, 2004) 18. ISBN: 1-86189-219-5.

[30] Charles Tilly, 'War Making and State Making as Organized Crime', in Peter Evans, Dietrich Rueschemeyer, and Theda Skocpol (eds), *Bringing the State Back In* (Cambridge University Press, Cambridge, 1985) 169–191, at 169. eBook ISBN: 9780511628283. DOI: https:// doi.org/10.1017/CBO9780511628283.

consent of the population to the exercise of coercive authority is conceptually important to legitimacy. International law is evolving to incorporate consent, and therefore an element of democratic legitimacy, in the recognition of governments and new states.

4.3 Referenda and State Recognition

International law has evolved so that the consent of the populous, reflected in a purportedly genuine, free and fair referendum, appears to have emerged as a precondition to state recognition.[31] Since 1990, referenda have been utilized to validate the creation of many, but not all, of the post-communist states of Eastern Europe. Referenda were also utilized to validate the secessions of Eritrea from Ethiopia (1993), East Timor from Indonesia (1999), and South Sudan from the Sudan (2011). While popular approval in a free and fair referenda may now be a prerequisite to state creation following a purported secession,[32] it is not alone sufficient to ensure state recognition.

The territorial integrity of a state continues to defeat secessionist claims irrespective of the outcome of a referendum. A referendum is *legally* relevant only if it is undertaken with the consent of the parent

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[31] Anne Peters, 'Statehood after 1989: "Effectivés" between Legality and Virtuality', in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law* (Hart Publishing, London, 2012) ('Peters (2012)') 171-184, at 171. ISBN: 978-1-4725-6580-8. http://dx.doi.org/10.5040/9781472565808.

[32] As states are the global paradigm, it is impossible to envisage the creation of a new state that does not emerge from the territory of an existing state. Steven R. Ratner, 'Drawing a Better Line: UTI Possidetis and the Borders of New States', (1996) 90(4) *The American Journal of International Law* 590, 595. https:// www.jstor.org/stable/2203988.

state and acknowledged to be binding or is otherwise conducted in accordance with the parent state's domestic constitution. Thus, there continues to be no unilateral right to secede (with the possible exception of remedial secession), and the parent state's consent is necessary to the recognition of a newly created state. 'The ultimate success of secession [is] dependent on recognition by the international community'[33] and recognition depends on approval in a referendum *and* consent of the parent state.

a. Referenda and the Independence of Post-Communist States

In the UN Charter-era and before the end of the Cold-War, and with the exception of Bangladesh referred to previously, the only successful secessions involved the dissolution by mutual agreement of federated states. Senegal and the Soudan (the French Sudan), two of the colonial units that in the 1958 referendum voted to continue their association with France, formed the 'Mali Federation' as a precursor to independence.[34] France granted independence to the Mali Federation on 20 June 1960. Within two months Senegal declared independence and unilaterally seceded from the Federation.[35] In September 1960, the dissolution of the Federation was accepted by Soudan and France recognized the statehood of both

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[33] *Reference re Secession of Quebec* (1998) 2 SCR 217, 223.
[34] Donn M. Kurtz, 'Political Integration in Africa: The Mali Federation', (1970) 8(3) *The Journal of Modern African Studies* 405, 406. https://www.jstor.org/stable/158851.
[35] Guy Arnold, *Africa: A Modern History* (Atlantic Books, London, 2006) 121. ISBN: 1-84354-176-9.

Senegal and the Mali Republic (formerly, Soudan).[36] Like Senegal, Singapore, together with Malaya, Sabah, and Sarawak, was part of the federal state of Malaysia when it was granted independence from the British.[37] Within two years Singapore had seceded from the federation and became 'an independent and sovereign state and nation separate from and independent of Malaysia and so recognised by the Government of Malaysia.'[38] In neither of these cases was support for *de*-federation manifested in a referendum.

After the Cold War, more than 20 new states were recognized as a consequence of the dissolution of the federal states of the Soviet Union and Yugoslavia, as well as the Eastern bloc state of Czechoslovakia. The European Council explicitly 'affirmed' that the European Community was:

> read[y] to recognize, subject to the normal standards of international practice and the political realities in each case, those new States which, following the historic changes in the region, *have constituted themselves on a democratic basis* ...[39]

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[36] Crawford, *supra* n. 2, at 392.
[37] John C. H. Oh, 'The Federation of Malaysia: An Experiment in Nation-Building', (1967) 26(4) *The American Journal of Economics and Sociology* 425-437. http://www.jstor.org/stable/3485078.
[38] Singapore and Malaysia, *Agreement relating to the separation of Singapore from Malaysia as an independent and sovereign State* (7 August 1965), 563 UNTS 89. https://treaties.un.org/doc/publication/unts/volume_563/volume-563-i-8206-english.pdf.
[39] EC, *Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*' (Council of Ministers, 16 December 1991) ('EC Guidelines'), 31 ILM 1486 (1992) (emphasis added). https://www.dipublico.org/100636/declaration-on-the-guidelines-on-the-recognition-of-new-states-in-eastern-europe-and-in-the-soviet-union-16-december-1991/.

Here, referenda were utilized to determine whether putative states had 'constituted themselves on a democratic basis,' and became in many instances an important precursor to recognition.[40] Thirty-five referendums were held between 1989 and 1993 as a direct consequence of the collapse of communism.[41] Thus, '[o]f the new states that were to emerge in the 1990s [...] most held plebiscites or national polls by way of authorization.'[42] Most of these new states were the continuation of republics within the dissolving Soviet Union and Socialist Federation of Yugoslavia.

The Union of Soviet Socialist Republics (USSR) consisted of fifteen republics: Russia, Ukraine, Georgia, Belorussia, Uzbekistan, Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Tajikistan, Latvia, Lithuania and Estonia. A new Soviet electoral law was adopted in 1988 and by early 1990 the first relatively free elections were conducted in the USSR's constituent republics.[43] These elections resulted in the replacement of Soviet

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[40] *Ibid*.

[41] Matt Qvortrup, *Independence Referendums: History, Practice and Outcomes*, (The National Research Institute, PNG, 2018), Appendix A. https://pngnri.org/images/Publications/Independence-Referendums2.pdf.

[42] Matthew Craven, 'Statehood, Self-Determination and Recognition', in Malcolm D. Evans (ed.), *International Law* (Oxford University Press, Oxford, 4th ed., 2014), 201–47, at 230. ISBN: 978019956566. *See also*, Matt Qvortrup, 'The History of Ethno-National Referendums 1791–2019', in Matt Qvortrup (ed.), *Nationalism, Referendums and Democracy*: *Voting on Ethnic Issues and Independence* (Routledge, London, 2nd ed., 2020) ('Qvortrup (2020A)') 8-30, at 26. ISBN: 9781000044935. DOI: 10.4324/97804292 77382.

[43] Henry E. Hale, 'The Double-Edged Sword of Ethnofederalism: Ukraine and the USSR in Comparative Perspective', (2008) 40(3) *Comparative Politics* 293, 298-99. https://www.jstor.org/stable/204340833.

apparatchiks with decentralizing nationalist leaders.[44] The first states to secede from the Soviet Union were the Baltic republics.

The Baltic Republics of Lithuania, Latvia and Estonia unilaterally declared independence from the USSR and conducted independence referenda in early 1991. The results of each referendum demonstrated significant majority support for independence: 90.47 per cent in Lithuania, 77.83 per cent in Estonia and 73.68 per cent in Latvia.[45] The then operative Soviet constitution did not provide for independence referenda and thus Mikhail Gorbachev 'was well within his right' to claim that the referenda were illegal.[46] In any event, on 6 September 1991, the USSR recognized the independence of the Baltic states, and, in doing so, consented to the recognition of the Baltic states by the international community. It was only *after* the Soviet Union had agreed to recognize the Baltic states that the UN considered their application for membership; and Estonia, Latvia and Lithuania were admitted to the UN on 17 September 1991.[47] The

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[44] Ronald J. Hill and Stephen White, 'Referendums in Russia, the Former Soviet Union and Eastern Europe' in Matt Qvortrup, *Referendums Around the World* (Palgrave Macmillan, Cham, 2014) 37, 41. ISBN: 978-3-319-57798-2.
[45] Crawford, *supra* n. 2, at 394.
[46] Matt Qvortrup, 'Breaking up is hard to do: The Neil Sedaka theory of independence referendums', (2020) 41(5) *International Political Science Review* (Qvortrup (2020B)) 638, 644. https://doi.org/10.1177/0192512120903818.
[47] UNGA, *Admission of the Republic of Estonia to membership of the United Nations,* GA Res. 46/4, UN Doc. A/RES/46/4 (20 December 1991, adopted 17 September 1991). https://digitallibrary.un.org/record/135676?ln=en. UNGA, *Admission of the Republic of Latvia to membership of the United Nations*, GA Res. 46/5, UN Doc. A/RES/46/5 (20 December 1991, adopted 17 September 1991). https://digitallibrary.un.org/record/135676?ln=en. UNGA, *Admission of the Republic of Lithuania to membership of the United Nations*, GA Res. 46/6, UN Doc. A/RES/46/6 (20 December 1991, adopted 17 September 1991). https://digital library.un.org/record/135676?ln=en.

recognition of the independence of the Baltic States by the USSR was a significant pre-condition to UN membership and the President of the Security Council emphasised that the independence of the Baltic States accorded 'with the consent of the parties concerned' as well as 'with the wishes and aspirations of the three peoples.'[48]

After an attempted coup against President Gorbachev failed, Ukraine's *Rada*, declared independence and scheduled a referendum. On 1 December 1991, with 84.3 per cent turnout, 90.3 per cent of voters supported Ukrainian independence.[49] Within a month the Soviet Union dissolved. In addition, the Ukraine, Georgia, Kuril Islands, Turkmenistan, Karabagh and Uzbekistan conducted referenda which resulted in overwhelming support for independence.[50] The Kazakhstan population had previously supported remaining part of the Soviet Union by a vast majority: 94.2 per cent of voters endorsed preserving the USSR (88.2 per cent of the electorate voted). However, Kazakhstan, like Belarus and Russia, did not conduct an independence referendum.

The Russian Federation ultimately supported the dissolution of the Soviet Union and accepted the independence of its constituent republics and supported their applications for UN membership.[51]

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[48] UNSC, *Report of the Committee on the Admission of New Members Concerning the Application of the Republic of Estonia, the Republic of Latvia and the Republic of Lithuania,* UN Doc. SCOR, S/PV/3007 (12 September 1991). https://digital library.un.org/record/126864?ln=en.
[49] Hill and White, *supra* n. 44, at 44.
[50] Qvortrup (2020A), *supra* n. 42, at 27.
[51] Crawford, *supra* n. 2, at 396.

The dissolution of the USSR thus enabled the recognition of its 15 constituent republics.[52] The Soviet Union's and then Russian Federation's consent to the independence of the former republics was vital to the conferral of recognition.

Like the constituent republics of the Soviet Union, the constituent entities of Yugoslavia were recognized as independent states after the collapse of the federation and the conduct of referenda. Unlike the independence of the former Soviet Republics, the dissolution of Yugoslavia and the independence of its successor states was surrounded by extensive violence and issues surrounding recognition continue to this day. Yugoslavia consisted of the republics of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia. Serbia also included the two autonomous provinces of Vojvodina and the Albanian-majority province of Kosovo. Tension began following Serbia's attempts to centralize authority, which was strenuously opposed by proponents of decentralization, most vociferously by Croatia and Slovenia.[53] On 23 December 1990, more than 88 per cent of the Slovenian electorate voted for a sovereign and independent state. On 19 May 1991, Croatia conducted a referendum and 93.24 per cent supported independence.

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[52] Despite support for independence, Kuril Islands and Karabagh were not recognized as independent states unlike the other former Soviet republics that had voted in favour of independence.

[53] Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States Since 1776* (Oxford University Press, Oxford, 2010) 190. eBook ISBN: 978019172 2325. DOI: 10.1093/acprof:oso/9780199564446.001.0001.

On 25 June 1991, both Slovenia and Croatia unilaterally declared independence. Civil war almost immediately followed.[54]

The European Community (EC) convened a peace conference, and, at the same time, created the 'Conference on Yugoslavia Arbitration Commission' chaired by Robert Badinter (the 'Badinter Commission').[55] The Badinter Commission was endorsed by the US and the Soviet Union (as it then was). Subsequently, the Council of Ministers of the EC, on the 16th of December 1991, issued the *Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union* (EC Guidelines).[56] One of the EC Guidelines was that to be recognized as a state, the prospective new state must 'have constituted themselves on a democratic basis.'[57] This prerequisite required a 'demand for independence to be declared following a popular consultation at which a free and fair expression of the will of the people would be guaranteed.'[58]

The referenda conducted by Slovenia, Croatia, and Macedonia implicitly satisfied the Badinter Commission and they were each

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[54] *Ibid.*
[55] *Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia*, [January 11 and July 1992], 31 I.L.M., 1488 (1992) ('Badinter Commission'). *See also,* Alain Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples', (1992) 3 *European Journal of International Law* 178. http://www.ejil.org/pdfs/3/1/1175.pdf.
[56] EC Guidelines, *supra* n. 39, at para 3.
[57] *Ibid.*
[58] Vidmar (2013), *supra* n. 2, at 83.

considered to be 'constituted on a democratic basis.'[59] Initially, Bosnia and Herzegovina relied on a 'sovereignty resolution' adopted by its Parliament on 14 October 1991.[60] The Commission was not satisfied with the resolution and was of the opinion that it was not sufficient to fully reflect 'that the will of the peoples of Bosnia Herzegovina to constitute the SRBH [Socialist Republic of Bosnia Herzegovina] as a sovereign and independent state.'[61] The Commission then advised that '[t]his assessment could be reviewed if appropriate guarantees were provided by the Republic for recognition, *possibly by means of a referendum* of the citizens of SRBH without distinction carried out under international supervision.'[62] The SRBH then conducted a referendum and the Commission noted that 'a large majority of the population voted in favour of the Republic's independence.'[63] Despite the Commission's confidence in the outcome, which was described as flawed but fair, most Serbs boycotted the referendum.

> Although independence was supported at the referendum held prior to the international recognition of Bosnia-Herzegovina, in light of the boycott of one of its constitutive peoples, the quality of popular consent remains questionable.[64]

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[59] Badinter Commission, Opinion No. 1, 11 January 1992, *supra* n. 55, at 1496.
[60] *Ibid.*.
[61] *Ibid.*, Opinion No. 4, 11 January 1992, *supra* n. 55, at 1503.
[62] *Ibid.*
[63] *Ibid.*, Opinion No. 8, 4 July 1992, *supra* n. 55, at 1523.
[64] Vidmar (2013), *supra* n. 2, at 98.

Only 64.3 per cent of the population voted and of those 99.4 per cent supported independence.[65]

Following the dissolution of the Socialist Republic of Yugoslavia, Serbia and Montenegro formed the Federal Republic of Yugoslavia (FRY). During the last few years of the millennium and Milosevic's tyrannical reign over the FRY, the Montenegrin population increasingly favoured independence. The EU, fearing further bloodshed, negotiated a compromise whereby a new constitution was adopted in February 2003 renaming the FRY as the State Union of Serbia and Montenegro (SUSM). More importantly, Article 60 of the new constitution provided that '[t]he decision on secession from the State Union of Serbia and Montenegro shall be taken at referendum.'[66] The anticipated referendum was conducted on 21 May 2006 and was supported by 55.53 per cent of those who voted in a turnout of 86.49 per cent -- not the overwhelming majority seen elsewhere.[67] The Montenegrin parliament, following the constitutional procedure, declared independence and was admitted to the UN on 30 June 2006.[68] The constitution provided for the waiver

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[65] Canada: Immigration and Refugee Board of Canada, 'Chronology of Events: September 1991 - July 1992' (1 July 1992). https://www.refworld.org/docid/3ae6a 81114.html.

[66] Serbia and Montenegro, *Constitutional Charter of the State Union of Serbia and Montenegro* (2003), Art. 60. https:// www.worldstatesmen.org/SerbMont_Const_2003.pdf.

[67] Vidmar (2013), *supra* n. 2, at 110.

[68] UNGA, *Admission of the Republic of Montenegro to membership in the United Nations*, GA Res. 60/264, UN Doc. A/RES/60/264 (12 July 2006, adopted 28 June 2006). https://digitallibrary.un.org/record/577784?ln=en.

of the parent state's territorial integrity and secession was thus not unilateral.[69]

In contrast, Czechoslovakia was divided into its two constituent republics without a referendum. In 1992, the federal president of Czechoslovakia, Vaclav Hável, called for a referendum to determine whether the state should be divided into two separate republics. Polls for both constituent republics indicated popular *opposition* to separation from the unified state. However, party leaders of the separate republics, recently elected in the first post-communist multi-party elections, wanted to divide the state.[70] These political elites made the decision to divide the state without recourse to the population[71] and 'it was unclear whether the people of either federal unit supported the creation of separate Czech and Slovak states.'[72] Even though the consent of the people to the creation of the new states was not unequivocally given and was not otherwise manifested in a referendum, the Czech and Slovak Republics were both recognized as states and admitted to the UN on 19 January 1993.[73]

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[69] Vidmar (2013), *supra* n. 2, at 111.
[70] Hill and White, *supra* n. 44, at 50.
[71] *Ibid*.
[72] Vidmar (2013), *supra* n. 2, at 71.
[73] UNGA, *Admission of the Czech Republic to membership in the United Nations*, GA Res. 47/221, UN Doc. A/RES/47/221 (7 April. 1993, adopted 19 January 1993). https://digitallibrary.un.org/record/166465?ln=en. UNGA, *Admission of the Slovak Republic to membership in the United Nations*, GA Res. 47/222, UN Doc. A/RES/47/222 (7 April 1993, adopted 19 January 1993). https://digital library.un.org/record/166569?ln=en.

b. Independence Referenda as a Precondition to Statehood

Following the Badinter Commission's endorsement, popular consent to statehood, manifested in a referendum, appears to have emerged as a necessary predicate to independence. This prerequisite was reinforced by the conduct of independence referenda to determine 'the will of the people' in a number of states beyond the communist bloc of eastern Europe. However, in each case independence, even if approved by the population in a referendum, was only forthcoming with the consent of the parent state.

Independence referenda were conducted in Eritrea in 1993, East Timor in 1999, South Sudan in 2011, and Bougainville in 2019, and in each of these cases the overwhelming majority supported independence.[74] An independence referendum was conducted in Scotland in 2014, with the consent of the United Kingdom, but a small majority of the population opposed independence. These referenda, and in particular the situation in Bougainville, are exemplars of the legal status of referenda and secession. Each of the referenda conducted in Eritrea, South Sudan, Scotland, and Bougainville were undertaken with the consent of the parent state (albeit on occasion under military and/or international political pressure) or in accordance with the parent state's existing constitution. Eritrea, South Sudan and East Timor voted overwhelming in support of independence and are now independent

[74] Malcolm N. Shaw, *International Law* (Cambridge University Press, Cambridge, 9th ed., 2021) 402. ISBN: 978-1-108-73305-2.

states with the concurrence of Ethiopia, Sudan, and Indonesia respectively.

In 1952, Eritrea became part of a federation with Ethiopia. Just a decade later the federation was unilaterally dissolved by Ethiopia and a unitary state was imposed. In 1991, after a lengthy and tragic civil war, Ethiopia's military regime was overthrown by a combination of Ethiopian revolutionaries (the Ethiopian People's Revolutionary Democratic Front) and Eritrean secessionists (the Eritrean People's Liberation Front). A peace agreement was then brokered and a referendum for independence scheduled. The 1993 referendum, monitored by the UN, manifested an overwhelmingly desire by Eritreans (99.8 percent) for independence.[75] The transitional government of Ethiopia accepted the referendum results and Eritrea became a member of the UN on 28 May 1993.[76] '[I]t is notable that Eritrea only became independent once the consent of the parent state was given' and 'once it was given the central government waived its claim to territorial integrity.'[77]

Indonesia and Portugal agreed to a referendum on East Timor's independence. Indonesia's agreement to the referendum and likely secession of East Timor was a result of ongoing international pressure. Portugal maintained that East Timor had never been

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[75] Qvortrup (2020A), *supra* n. 42, at 27.
[76] UNGA, *Admission of Eritrea to membership in the United Nations*, GA Res. 47/230, UN Doc. A/RES/47/230 (16 July 1993, adopted 28 May 1993). https://digitallibrary.un.org/record/197307?ln=en.
[77] Vidmar (2013), *supra* n. 2, at 73-74.

decolonized and was thus still a colony of Portugal.[78] On 30 August 1999, in a referendum, supervised by the UN, the East Timor population overwhelming supported independence and rejected an autonomy arrangement with Indonesia.[79]

Likewise, South Sudan became independent only with the consent of Sudan after voting in a referendum. On 9 January 2005, Sudan and South Sudan's dominant secessionist movements signed the 'Comprehensive Peace Agreement' that provided that South Sudan shall determine their future status at a referendum.[80] The UN, in a Security Council resolution, established the United Nations Mission in Sudan (UNMIS), partly, to assist in the conduct of the referendum. [81] In the same resolution, however, the UNSC '[r]eaffirm[ed] its commitment to the sovereignty, unity, independence and territorial integrity of Sudan.'[82] In any event, the provision for a referendum was specifically adopted in the Sudan's interim constitution, thereby creating a constitutional right to secession. Again, independence was supported by an overwhelming majority of voters (97.58 per cent) and Sudan respected the referendum's results. Sudan recognized the new state of South Sudan

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[78] *Ibid.*, at 114-15.
[79] Qvortrup (2020A), *supra* n. 42, at 27.
[80] Sudan (Republic of), *The Comprehensive Peace Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army* (9 January 2005) ('Comprehensive Peace Agreement'). https://peacemaker.un.org/sites/peacemaker.un.org/files/ SD_ 060000_The_Comprehensive_Peace_Agreement.pdf.
[81] UNSC, *Security Council resolution 1590 (2005) on establishment of the UN Mission in Sudan (UNMIS)*, GA Res. 1590 (2005), UN Doc. S/RES/1590 (adopted 24 March 2005), para. X. https://digitallibrary.un.org/record/544317?ln=en.
[82] *Ibid.*, at Preamble.

on 8 July 2011, and, on 14 July 2011, South Sudan became a member of the UN.[83]

Bougainville is part of Papua New Guinea (PNG). It consists of two main islands and a number of smaller islands and atolls to the north of the Solomon Islands. Bougainville has long sort independence or incorporation into the Solomon Islands, beginning in 1968 when PNG was administered by Australia. Its present independence drive began over 30 years ago and focused on Panguna copper mine, one of the world's largest, estimated to be worth $US60 billion.[84] The local population was frustrated by the foreign exploitation of the territory's resources and the environmental damage caused by the mine's operations. In 1989, local residents sabotaged the mine threatening its operations. The PNG government sent military forces to reopen the mine and assert control, but in doing so ignited a much broader insurrection, inspired another declaration of independence, and precipitated civil war. The civil war lasted for more than 10 years and cost 20,000 Bougainvilleans (10 percent of the population) their lives. [85] Ultimately the civil war ended in 2001 with the 'Bougainville Peace Agreement'. The Bougainville Peace Agreement required an independence referendum be held by 2020

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[83] UNGA, *Admission of the Republic of South Sudan to membership in the United Nations*, GA Res. 65/308(2011), UN Doc. A/RES/65/308 (25 August 2011, adopted 14 July 2011). https://digitallibrary.un.org/record/710041?ln=en.
[84] Brian Harding, Camilla Pohle-Anderson 'The Next Five Years Are Crucial for Bougainville's Independence Bid: Bougainville wants full sovereignty, while Papua New Guinea is unlikely to let it secede. Is compromise possible? *United States Institute of Peace* (12 August 2022). https://www.usip.org/publications/2022/08/next-five-years-are-crucial-bougainvilles-independence-bidArch.
[85] *Ibid.*

followed by 'consultations', irrespective of the result. The referendum was held in 2019 and 97.7 per cent of the voters, with 87.4 percent turnout, favoured independence.[86] Consultations began and imposed a deadline of 2027 for the outcome of negotiations. However, Bougainville will only become an independent state in 2027 if, first, an agreement between the governments of Bougainville and PNG is reached, and then the agreement providing for Bougainville's independence is ratified by the PNG parliament.[87] There is no legal obligation on PNG to respect the wishes of the Bougainville population because 'there is no unilateral right to secede based merely on a majority vote of the population of a given sub-division or territory.'[88]

Independence referenda are evidently relevant to claims of statehood for seceding political authorities and appear to have emerged as a prerequisite to international recognition to statehood. However, consistent with the denial of a unilateral right of secession, independence referenda are only *legally* relevant if the parent state consents to the conduct and binding nature of the referendum or the referendum is undertaken in accordance with the parent state's domestic constitution; unless there is no parent state as was deemed

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[86] *Ibid.* *See also*, Matt Qvortrup, 'The Good the Bad, and the Ugly: Independence Referendums in a Comparative Perspective', *Idees* (12 February 2021). https://revistaidees.cat/en/the-good-the-bad-and-the-ugly-independence-referendums-in-comparative-perspective/.
[87] Harding and Pohle-Anderson, *supra* n. 84.
[88] Crawford, *supra* n. 2, at 417.

(spuriously) to be the case in then Yugoslavia.[89] Thus, secession can only occur with the parent state's consent.[90] Without a parent state's consent putative states will not be formally recognized and admitted to the UN and their status will be uncertain and ambiguous. The consent of the parent state is thus the primary prerequisite to the recognition of statehood. Abkhazia, Chechnya, Nagorno Karabakh, Somaliland, South Ossetia, Tamil Eelam, and Transnistria have not received their parent state's consent to secession, and thus are not recognized as states: their status is uncertain.[91]

The ambiguous status of Kosovo is demonstrative of international law's state recognition doctrines subordination to international power politics. Kosovo was an Albanian majority autonomous province of Serbia within the Socialist Federal Republic of Yugoslavia. Kosovo was not a federal unit and following the dissolution of Yugoslavia it remained part of Serbia. After the 1995 Dayton Accords purportedly resolved the bloody Balkan Wars, violence erupted in Kosovo between the secessionist Kosovo Liberation Army and the Serbian military. In an attempt to end the violence, the international community encouraged negotiations between FRY and the Kosovar Albanians and, on 23 February 1999, prepared the *Interim Agreement*

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[89] Peter Radan, *The Break-up of Yugoslavia and International Law* (Routledge, London/New York, 2002) 219. ISBN: 9780415253529.
[90] Cornelia Navari, 'Territoriality, self-determination and Crimea after Badinter', (2014) 90(6) *International Affairs* 1299, 1302, 1308. https://www.jstor.org/stable/24538667.
[91] Nina Caspersen, *Unrecognized States: The Struggle for Sovereignty in the Modern International System* (Polity Press, Kindle ed., Cambridge, 2012) 40. ISBN-13: 978-0-7456-6034-9.

for Peace and Self-Government in Kosovo (the "Rambouillet Accords").[92] The Kosovar Albanians signed the Rambouillet Accords, on 18 March 1999; Serbia and FRY did not.[93] Soon after, NATO started a military campaign against FRY without UN Security Council authorization and in breach of Article 2(4) of the UN Charter prohibiting the use of force.[94] After NATO's extensive bombing campaign, the Serbian and FRY military agreed to withdraw pursuant to the 'Military Technical Agreement' signed at Kumanovo, Macedonia on 9 June 1999.[95] The Agreement also provided for the deployment of an international security force (KFOR) under UN auspices.

The UN Security Council endorsed the Agreement and, in *Security Council Resolution 1244*, established the United Nations Interim Mission in Kosovo (UNMIK) to provide an interim administration for Kosovo supposedly until the province had developed 'provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.'[96] UNMIK

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[92] *Interim Agreement for Peace and Self-Government in Kosovo*, 23 February 1999 (the 'Rambouillet Accords'). *See also*, Brad R. Roth, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order* (Oxford University Press, Oxford, 2011) 194. ISBN: 978-0-19-534266-6.
[93] Vidmar (2013), *supra* n. 2, at 121.
[94] Navari, *supra* n. 90, at 1311.
[95] NATO, *Military Technical Agreement between the International Security Force ('KFOR') and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia* (9 June 1999). https://www.nato.int/kosovo/docu/a990609a.htm.
[96] UNSC, *Security Council resolution 1244 (1999) on the deployment of international civil and security presences in Kosovo*, SC Res. 1244, UN Doc. S/RES/1244 (adopted 10 June 1999). https://digitallibrary.un.org/record/274488?ln=en.

was conferred with broad legislative and executive authority by regulation promulgated by the Special Representative to the Secretary-General.[97] Despite the 'effective control' of Kosovo by UNMIK, to the exclusion of Serbian and the FRY forces, the UN Security Council reaffirmed 'the commitment of all Member States to the sovereignty to the Federal Republic of Yugoslavia.'[98]

In 2008, Kosovo declared independence from Serbia without conducting an official referendum.[99] It also lacked an effective independent government and was being administered by UNMIK. Moreover, the territory of Mitrovica in northern Kosovo remained under Serbian control. The International Court of Justice held that although the declaration of independence alone was not contrary to international law, it did not amount to secession.[100] Serbia has not consented to Kosovo's secession. Despite Serbia's refusal to waive its claim to territorial integrity, Kosovo has been recognized as a state by almost 100 other states.[101] It has not however been admitted to the UN and its status as a state in international law is highly questionable.

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[97] UNMIK, *On the Authority of the Interim Administration of Kosovo*, UNMIK/REG/1999/1 (25 July 1999), sec. 1.
[98] UNSC, Res. 1244, *supra* n. 96, at Preamble, para. 10.
[99] In September 1991, an unofficial referendum conducted in secret apparently demonstrated overwhelming support for independence (99.87 per cent voted in favour of the 87 per cent of eligible voters). Vidmar (2013), *supra* n. 2, at 119.
[100] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, Advisory Opinion, ICJ Rep. 2010, para. 81.
[101] *See, World Population Review* (Website). https://worldpopulationreview.com/country-rankings/countries-that-recognize-kosovo.

4.4 The Democratic Entitlement and State Recognition

In developing the democratic entitlement, the international community condemned the undemocratic removal of pre-existing democratic governments, and on occasion even intervened to restore ousted elected governments. The international community has not, however, imposed democratic governance on states and has repeatedly emphasised that the domestic political system is a matter for the state and democratic governance is not a criterion of statehood.[102] However, international instruments pertaining to the Post-Wall Era emergence of *new* states have suggested that the implementation of democratic institutions is perhaps emerging as a prerequisite to recognition. The potential emergence of a prerequisite of representative democracy to state recognition is supported by the international community's conduct in internationally administered territories. The UN authorities have implemented democratic institutions in preparation for the transition to self-governance while administering East Timor, South Sudan and Kosovo.

a. The Choice of (Undemocratic) Government

The nature of the government or political system was traditionally not relevant to recognition[103] and international law has not imposed any political system, democratic or otherwise, on states, even though it imposes a right to political participation.[104] As the International

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[102] Crawford, *supra* n. 2, at 150-155; *see also*, Vidmar (2013), *supra* n. 2, at 65.
[103] Vidmar (2013), *supra* n. 2, at 41.
[104] *Ibid.*, at 32.

Court of Justice stated in *Nicaragua v. United States of America* (1986):

> ... adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.[105]

Satisfaction of the Montevideo criteria and the effective control doctrine was sufficient to warrant recognition of statehood.

The United Nations has repeated *ad nauseum*, in international instruments and UN resolutions, that it does not impose a particular electoral system and that each state is free to choose its own political system despite the emergence of a democratic entitlement. Even in the General Assembly Resolution *Enhancing the effectiveness of the principle of periodic and genuine elections*, the UN emphasized that:

> … the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State's sovereign right freely to choose and develop its political social, economic, and cultural systems, whether or not they conform to the preferences of other States.[106]

Instead, in what would appear to be a concession to cultural relativism, the United Nations has:

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[105] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States Of America*), ICJ Rep. 1986, 14, para. 263.
[106] UNGA, *Enhancing the effectiveness of the principle of periodic and genuine elections*, GA Res. 45/150, UN Doc. A/RES/45/150 (21 February 1991, adopted 18 December 1990), para. 4 (129 in favour, 8 against, and 9 abstaining). https://digitallibrary.un.org/record/105628?ln=en.

> recogniz[ed] that there is no single political system or single model for electoral processes equally suited to all nations and their peoples, and that political systems and electoral processes are subject to historical, political, cultural and religious factors.[107]

Although the conduct of elections is developing as a global norm, the UN and international instruments have consistently asserted that the choice of political system is for the state.

While a plethora of UN General Assembly resolutions endorse elections,[108] they do not specify or endorse any particular election process. It is thus unclear, what basic attributes an electoral system must have to satisfy the right to *indirect* democracy. There is even doubt as to whether multi-party elections are necessary to satisfy the right to political participation[109] and it is arguable that authoritarian one-party states and communist single-party 'people's democracies' may well conform to the democratic entitlement by simply holding elections.[110] North Korea and Vietnam were both recognized as

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[107] UNGA, *Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes*, GA Res. 45/151, UN Doc. A/RES/45/151 (22 February 1991, adopted 18 December 1990). https://digital library.un.org/record/105628?ln=en.

[108] *See, for e.g.*, UNGA Res. 45/150, *supra* n. 106. UNGA, *Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies*, GA Res. 60/253, UN Doc. A/RES/60/253 (24 May 2006, adopted on 2 May 2006). https://digitallibrary.un.org/record/607673?ln=en. UNGA, *Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies*, GA Res. 61/226, UN Doc. A/RES/61/226 (14 March 2007, adopted 22 December 2006). https://digital library.un.org/record/607671?ln=en. *See also,* Vidmar (2013), *supra* n. 2, at 29-32

[109] *Ibid.*, at 158.

[110] Jure Vidmar, 'Judicial Interpretations of Democracy in Human Rights Treaties', (2014) 3(2) *Cambridge Journal of International and Comparative Law* 532, 533. DOI: 10.7574/cjicl.03.02.150.

states during the UN-Charter era and the authoritarian nature of their systems did not prevent recognition. The continued denial of any semblance of 'democratically legitimate' governance in, for example, North Korea and Viet Nam -- state parties to the ICCPR -- has not affected the international standing of these states nor resulted in their de-recognition. The political entity's continuing effective control over territory is sufficient to warrant the continuing recognition of their statehood. In the period before the end of the Cold War 'the nature of an entity's political system did not play any role in the process of the emergence of new states,' with one exception.[111]

The one pre-1990 exception concerned Rhodesia: the international community refused to recognize the statehood of the egregiously undemocratic Southern Rhodesia. Southern Rhodesia (officially), or simply Rhodesia, was a British self-governing colony. The predominantly black population was excluded from political participation. The UN Security Council called on Britain to refuse decolonization and called on other states to withhold recognition.[112] On 11 November 1965, the white minority government unilaterally

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[111] Vidmar (2013), *supra* n. 2, at 65.

[112] UNSC, *Requesting the United Kingdom to take all necessary action to prevent a unilateral declaration of independence for Southern Rhodesia by the minority Government*, SC Res. 202, UN Doc. S/RES/202 (1967, adopted 6 May 1965), para. 5 ('Requests the United Kingdom Government not to transfer under any circumstances to its colony of Southern Rhodesia, as at present governed, any of the powers or attributes of sovereignty, but to promote the country's attainment of independence by a democratic system of government in accordance with the aspirations of the majority of the population'). https://digitallibrary.un.org/record/90482?ln=en.

declared independence from Britain. Both the UN General Assembly and Security Council condemned the declaration of independence.[113] Later, the UN Security Council described the Rhodesian government as illegal and condemned 'the usurpation of power by a racist settler minority in Southern Rhodesia and regards the declaration of independence by it as having no legal validity.'[114] The General Assembly called on all states not to recognize Rhodesia because, at least in part, 'any government in Southern Rhodesia [...] is not representative of the majority of the people.'[115] Despite meeting the effectiveness test, Rhodesia was not recognized as a state by any other state; even apartheid South Africa refused to recognize Rhodesia as an independent state.[116] However, with the exception of an egregiously racist political system, there was no obligation on states emerging before the end of the Cold War to adopt a particular political system.[117]

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[113] UNGA, *Question of Southern Rhodesia*, GA Res. 2024 (XX), UN Doc. A/RES. 2024 (XX) (1966, adopted on 11 November 1965). https://digitallibrary.un.org/ record/203556?ln=en. UNSC, *Security Council resolution 216 (1965) calling on all States not to recognize the minority régime in Southern Rhodesia*, SC Res. 216, UN Doc. S/RES/216 (1967, adopted 12 November 1965). https://digital library.un.org/record/90483?ln =en. *See also*, Myres S. McDougal and W. Michael Reisman, 'Rhodesia and the United Nations: The Lawfulness of International Concern', (1968) 62(1) *The American Journal of International Law* 1-19. https://www.jstor.org/stable/ 2197519.

[114] UNSC, *The proclamation of independence by the minority régime in Southern Rhodesia,* SC Res. 217, UN Doc. S/RES/217 (1967, adopted 20 November 1965), para. 3. https://digitallibrary.un.org/record/ 90484? ln=en.

[115] UNGA, *Question of Southern Rhodesia*, GA Res. 2022 (XX), UN Doc. A/RES. 2022 (XX) (1966, adopted 5 November 1965). https://digitallibrary.un.org/record/ 203554?ln=en.

[116] Vidmar (2013), *supra* n. 2, at 58.

[117] *Ibid.*, at 65.

Immediately after the Cold War and the emergence of the democratic entitlement, the nature of a putative state's political system continued to have only limited relevance to its recognition. Upon the dissolution of the Soviet Union, 11 of the 12 remaining Republics (excluding Georgia) signed the *Minsk Agreement* (8 December 1991) and the *Alma-Ata Declaration* (21 December 1991), stating that the parties were '[d]esirous of setting up lawfully constituted democratic States.' [118] Despite the Minsk Agreement and the Alma-Ata Declaration alluding to the democratic governance of the emergent states, 'the democratic standards in the former Soviet Republics were not internationally scrutinized and had no implications for their statehood.' [119] Indeed, the democratic nature of the governing institutions of a number of former Soviet Republics was, at the time of recognition (and continues to be), highly doubtful. For instance, since independence a number of former Soviet states including Belarus, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan have utilized referenda 'to extend the terms of presidents and to push through constitutional proposals of dubious democratic legitimacy.' [120] Likewise, the democratic standards of the new states of the Czech Republic and Slovakia were not a factor in

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[118] CIS, *Agreements establishing the Commonwealth of Independent States* [Minsk, December 8,1991, and Alma-Ata, December 21,1991], 31 I.L.M. 138 (1992). https://www.venice.coe.int/webforms/documents/?pdf=CDL(1994)054-e.
[119] Vidmar (2013), *supra* n. 2, at 71.
[120] Sarah Birch, 'Post-Soviet Electoral Practices in Comparative Perspective', (2011) 63(4) *Europe-Asia Studies, (Russia's Authoritarian Elections)* 703, 721. https://www.jstor.org/stable/27975573.

recognition, even though the standard of democracy in post-communist Slovakia was questionable.[121]

b. The Evolution of a Pre-Requisite to Democratic Governance

Although the United Nations has reiterated that the choice of a democratic political system is not a precondition for statehood, states created in the Post-Wall Era have been increasingly 'induced' to adopt democratic institutions and develop representative democracy. The Minsk Agreement and Alma-Ata Declaration paid lip service to the adoption of democratic institutions in post-Soviet states, but the actual implementation of democracy did not impede recognition. However, the EC Guidelines did:

> adopt a common position on the process of recognition of these new States, which requires [...] respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, *democracy* and human rights.[122]

The CSCE's *Charter of Paris for a New Europe* (1990) provides that the parties 'undertake to build, consolidate and strengthen democracy as the only system of government of our nations' and '[d]emocratic government is based on the will of the people, expressed regularly through free and fair elections.'[123] Accordingly, the EC Guidelines, incorporating the Charter of Paris, theoretically required the

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[121] Vidmar (2013), *supra* n. 2, at 72.
[122] EC Guidelines, *supra* n. 39 (emphasis added).
[123] CSCE, *Charter of Paris for a New Europe* (Paris, 19 - 21 November 1990) 3. https://www.osce.org/files/f/documents/0/6/39516.pdf.

implementation of an election-centric model of democracy before recognizing the emerging states.

On 31 December 1991, the European Community quickly recognized the former Soviet republics of Armenia, Azerbaijan, Belarus, Kazakhstan, Moldova, Turkmenistan, Ukraine, and Uzbekistan, after they each pledged to comply with the requirements of the EC Guidelines.[124] As noted, their actual compliance with democratic norms was not debated. Compliance with the EC Guidelines and the implementation of democratic institutions was slightly more important in the recognition of the former republics of Yugoslavia. The Badinter Commission considered the democratic nature of the governments of Slovenia and Macedonia before stating that they had satisfied the conditions for recognition. It reflected on Slovenia's democracy at some length but the Commission 'did not go beyond the observation that democratic elections had been held and the next democratic elections were scheduled.'[125] The Commission also noted that 'the Assembly of the Republic of Macedonia adopted a constitution embodying the democratic structures and the guarantees for human rights which are in operation in Europe.'[126]

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[124] EUI, 'Statement concerning the recognition of former Soviet Republics' (7 European Political Cooperation Documentation Bulletin, No. 91/472, 31 December 1991) 773. ISBN: 92-826-8003-7. http://aei.pitt.edu/36871/1/A2880.pdf
[125] Vidmar (2013), *supra* n. 2, at 93.
[126] Badinter Commission, Opinion No. 6, 11 January 1992, *supra* n. 55, at 1507, 1510 para. 3.

However, in Croatia and Bosnia-Herzegovina democracy 'virtually played no role' in the Commission's opinions.[127] In the case of Croatia, the Commission did not even invoke its democratic elections or refer to its democracy before finding that Croatia had met the conditions for recognition,[128] 'despite some unanswered questions over […] [President] Tudjman's methods of governance.'[129] Likewise, Bosnia was recognized 'with doubts lingering over whether [its] nascent institutions would function democratically.'[130] Thus, the Badinter Commission gave only sporadic and limited consideration to the democratic nature of the emergent states after the dissolution of Yugoslavia.

The prerequisite of democratic governance in state recognition has subsequently come to the fore in territories administered by the United Nations preceding independent statehood. In South Sudan and East Timor, and in Kosovo, the United Nations administrations imposed democratic institutions on the putative states. In East Timor, after the referendum outcome resulted in Indonesian instigated violence, the UN Security Council established a multi-national force, the United Nations Transitional Administration in East Timor (UNTAET). UNTAET was to administer East Timor in its transition to independence. In preparing East Timor for independence, UNTAET oversaw the creation and implementation of democratic

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[127] Vidmar (2013), *supra* n. 2, at 107.
[128] *Ibid.*, at 96.
[129] Thomas D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Praegar, Westport, Conn., 1999) 95. ISBN: 0-275-96350-0.
[130] *Ibid.*, at 195.

institutions, and, in August 2001, the UN oversaw elections to its constituent Assembly. The elected Assembly then expressed support for direct presidential elections, which were scheduled for 14 April 2002. Prior to the presidential elections a broad cross-section of East Timorese society endorsed a new constitution that came into effect on the day East Timor declared independence, 20 May 2002. East Timor was admitted to the UN on 27 September 2002.[131] The new constitution specifically provided that the new state was to be organized in accordance with election-centric democracy and specifically guaranteed 'political democracy and participation of the people in the resolution of national problems.'[132]

The ongoing civil war in South Sudan was (supposedly) resolved by the Comprehensive Peace Agreement signed on 9 January 2005. The Comprehensive Peace Agreement envisaged a democratic system of governance'[133] and elections with universal suffrage.[134] Part of UNMIS's role 'was provide guidance and technical assistance to the parties to the Comprehensive Peace Agreement, […] *to support the preparations for and conduct of elections* and referenda provided for

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[131] UNGA, *Admission of the Democratic Republic of Timor-Leste to membership in the United Nations*, GA Res. 57/3, UN Doc. A/RES/57/3 (2 October 2002, adopted 27 September 2002). https://digitallibrary.un.org/record/474805?ln=zh_CN.

[132] East Timor (Timor-Leste) (Democratic Republic of), *Constitution of the Democratic Republic of East Timor* (20 May 2002), 6(c). http://timor-leste.gov.tl/wp-content/uploads/2010/ 03/Constitution_RDTL_ENG.pdf. *See also*, Vidmar (2013), *supra* n. 2, at 114-15.

[133] Comprehensive Peace Agreement, *supra* n. 80, at 1.5.1.

[134] *Ibid.*, at 1.8.

by the Comprehensive Peace Agreement.'[135] Contemporaneous with independence, in 2011, South Sudan adopted a constitution expressing a commitment 'to establishing a decentralized democratic multi-party system.'[136] The Constitution provides that '[s]overeignty is vested in the people and shall be exercised by the State through its democratic and representative institutions established by this Constitution and the law.'[137] The system of government adopted is election-centric and provides for the direct election of a president and the election of representatives to the national assembly. Article 26 of the constitution replicates, almost verbatim, the ICCPR's right to take part in public affairs. Accordingly, the emergent state of South Sudan, with the guidance and assistance of the UN through UNMIS, adopted a system of representative democracy.[138]

In Kosovo, the proposed Rambouillet Accords provided for the withdrawal of the Serbian military, NATO peacekeeping and 'meaningful self-government for Kosovo based on democratic principles.'[139]

> Citizens in Kosovo shall have the right to democratic self-government through legislative, executive, judicial, and other institutions established in accordance with this Agreement. They shall have the opportunity to be

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[135] UNSC, *Security Council resolution 1590 (2005) on establishment of the UN Mission in Sudan (UNMIS)*, SC Res. 1590, UN Doc. S/RES/1590 (adopted 24 March 2005), para. X (emphasis added). https://digitallibrary.un.org/record/544317?ln=en.
[136] South Sudan (Republic of), *The Transitional Constitution of the Republic of South Sudan* (2011), Preamble. https://www.refworld.org/pdfid/5d3034b97.pdf.
[137] *Ibid*., at Art. 2.
[138] Vidmar (2013), *supra* n. 2, at 77.
[139] *Ibid*., at 121.

> represented in all institutions in Kosovo. The right to democratic self-government shall include the right to participate in free and fair elections.[140]

The Rambouillet Accords also included a constitution providing for direct elections to an assembly with reserved seats for national minorities.[141] The Assembly was to elect a President.[142] UNMIK's main responsibilities included '[o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections.'[143] The Special Representative promulgated the *Constitutional Framework for Provisional Self-Government*, 'a legal instrument which implemented democratic institutions.'[144] After declaring independence on 17 February 2008, Kosovo's parliament adopted a constitution on 9 April 2008 proclaiming the state of Kosovo to be 'democratic'[145] and its sovereignty exercised through elected representatives.[146]

4.5 Conclusion

A putatively democratic process to constitute a state[147] -- an element of democratic legitimacy -- appears to be a precondition to

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[140] Rambouillet Accords, *supra* n. 92, at Art. 1(4).
[141] *Ibid.*, at Chapter 1, Art. 2.
[142] *Ibid.*, at Chapter 1, Art. 3.
[143] UNSC, Res. 1244, *supra* n. 96, at 11 (c).
[144] Vidmar (2013), *supra* n. 2, at 124.
[145] Kosovo (Republic of), *Constitution of the Republic of Kosovo [Serbia]* (June 2008), Art. 1. https://www.refworld.org/docid/5b43009f4.html.
[146] *Ibid.*, at Art 2.
[147] Anne Peters, 'Does Kosovo Lie in the Lotus-Land of Freedom?', (2011) 24 *Leiden Journal of International Law* 95, 107. DOI:10.1017/S0922156510000 622.

recognition.[148] Independence referenda are thus relevant to claims of statehood for seceding political authorities.[149] However, an independence referendum is only legally relevant if it is undertaken with the support or at least acquiescence of the parent state. Accordingly, there remains 'no unilateral right to secede based merely on a majority vote of the population of a given sub-division or territory.'[150] The outcome of 'unofficial' referenda and subsequent unilateral declarations of independence have no effect in international law[151] and may be 'manifestly illegal' pursuant to domestic law.[152] Indeed, an independence referendum conducted by the provincial government of Catalonia in 2017, contrary to the wishes of the Spanish central government, resulted in the imprisonment and warrants for the arrest of a number of leaders of the autonomous province, who were also proponents of the independence referendum.[153]

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[148] David Raič, *Statehood and the Law of Self-determination* (Kluwer Law International, The Hague, 2002) 436. ISBN: 90–411–1890–X2002.
[149] Qvortrup (2020B), *supra* n. 46, at 643 ('Referendums have played a pivotal – and often controversial role – in the declarations of independence, and the 'will of the people' is often used as a political trump card that overrides other concerns and even constitutional positions.').
[150] Crawford, *supra* n. 2, at 417.
[151] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, Advisory Opinion, ICJ Rep. 2010, para. 55.
[152] *See Bertrand v. Québec* [1953] 1 SCR 503 (Canadian Supreme Court).
[153] Sam Jones, 'The key figures in the push for Catalan independence', *The Guardian* (14 October 2019). https://www.theguardian.com/world/2019/feb/10/catalan-independence-key-figures. *See also*, Owen Bowcott and Sam Jones, 'Catalan independence leaders to appeal to UN over "unlawful imprisonment"', *The Guardian* (1 February 2018). https://www.theguardian.com/world/2018/feb/01/catalan-independence-leaders-unlawfully-imprisoned-say-lawyers.

The incapacity of a putative state to secede, outside of the decolonization context, was confirmed recently in the United Kingdom's rejection of a Scottish proposal to conduct an independence 'consultative vote'.[154] Furthermore, the UK Supreme Court rejected Scotland's ability to unilaterally conduct a vote because a referendum 'possess[es] the authority […] of a democratic expression of the view of the Scottish electorate' and would 'either strengthen or weaken the *democratic legitimacy* of the union.'[155] The British court adopted the Canadian Supreme Court's decision in the *Quebec Case* and confirmed that 'international law favours the territorial integrity of States' and '[o]utside the context of self-determination, normally limited to situations of colonial type or those involving foreign occupation, it does not confer any "right to secede."'[156]

Despite the emergence of the democratic entitlement in government recognition and the emergence of a democratic process as a prerequisite to state recognition, the implementation of democratic institutions is not yet a prerequisite for state recognition. However, the international community has endorsed the implementation of

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[154] Rory Scothorne, 'Why this supreme court ruling presents an opportunity for Scottish nationalists', *The Guardian* (24 November 2022). https://www.theguardian.com/commentisfree/2022/nov/24/supreme-court-scottish-nationalists-judgment.

[155] *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998* (the 'Scottish Reference') [2022] UKSC 31, para. 81 (emphasis added).

[156] *Ibid*., at para. 89 (Adopting the United Kingdom's submission to the International Court of Justice in the case of Kosovo: Written Proceedings in relation to UNGA Res. 63/3, UN Doc. A/RES/63/3 (8 October 2008)). *See also*, Scottish Reference, *supra* n. 156, at paras 84-91.

democratic institutions as a precursor to recognition. It has also been forcefully argued that a territorial entity 'which does not seek to establish democratic government structures would not qualify as a state.'[157] Although the adoption of democratic institutions may not as yet be a prerequisite for the recognition of new states, it is emerging as a normative requirement. These putatively democratic institutions are election-centric.

[157] Peters (2012), *supra* n. 31, at 171.

PART III

THE DEMOCRATIC ILLEGITIMACY OF THE DEMOCRATIC ENTITLEMENT

5. THE INHERENT DEMOCRATIC ILLEGITIMACY OF STATES

5.1 Introduction

The democratic legitimacy of a state depends on the voluntary submission of its citizens to the authority of the state and '[t]he state is legitimate in proportion to its approximation to the ideal.'[1] As discussed previously, most contemporary states and the demarcation of their territory were a result of violence, the threat of violence, subjugation, dispossession, and fraud. Borders were imposed on the population without their manifest consent. These borders have been maintained by international law's spurious denial of a unilateral right to secede and the application of the doctrine of *uti possidetis.*

It is the objective of this *Chapter 5* to demonstrate that states with territory delineated by theoretically impermeable borders, the hallmark of the modern state, are inherently democratically *illegitimate*. An element of democratic legitimacy can be conferred on a state by a referendum; however, it is only a *degree* of democratic legitimacy. The degree of democratic legitimacy conferred on a state depends on the extent to which the referendum result is a valid reflection of the genuine, free and informed consent of the populace. However, referenda are an imperfect mechanism for ascertaining the consent of the population to territorial sovereignty. This *Chapter* contends that modern secession referenda, even those conducted

[1] Ruth C. A. Higgins, *The Moral Limits of the Law: Obedience, Respect, and Legitimacy* (Oxford University Press, Oxford, 2004) 95. ISBN: 9780199265671.

under international supervision, are, like their predecessors, inherently flawed. The inherent flaws of referenda in conferring democratic legitimacy are exacerbated by the requirement that a putative state's territory reflects pre-existing internal boundaries, irrespective of the consent of the population. This *Chapter 5* will show that the imposition of pre-existing boundaries undermines the limited democratic legitimacy conferred by referenda.

5.2 Borders are Inherently Illegitimate

The 'distinctive feature' of modern states is that they are differentiated 'into territorially defined, fixed and mutually exclusive enclaves of legitimate dominion.'[2] The exclusive jurisdiction over a delimited territory became the cornerstone of governance with the development of the modern state.[3] The 'classic' Westphalian state possesses 'well-demarcated, non-porous borders.'[4] Today, the primary jurisdiction of a state over a population within its 'well-demarcated, non-porous borders' is paradigmatic. It is these theoretically impermeable and coercive borders and their delineation that restricts the democratic legitimacy of states.

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[2] John Gerard Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations', (1993) 47(1) *International Organization* 139, 151. http://www.jstor.org/stable/2706885.

[3] Christopher J. Borgen, 'Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia's Frozen Conflicts', (2007) 9 *Oregon Review of International Law* 477, 479. https://heinonline-org.sare.upf.edu/HOL/Page?handle=hein.journals/porril9&div=18&id=&page=&collection=journals.

[4] Peter H. Wilson, *Europe's Tragedy: A New History of the Thirty Years War* (Harvard University Press, Cambridge, Mass., 2009) ('Wilson (2009)') 776-77. ISBN: 0674036344.

a. The Undemocratic Imposition of Borders

State borders define the political entity on a territorially exclusive basis. Delineating the boundary between political units is inherently undemocratic. Political theorists often assert that all territorially exclusive polities are illegitimate because '[i]t is impossible to arrive at a self-constituted people.'[5] In order for a political entity to be based on consent, and therefore be democratically legitimate, rule must apply to some discrete community. But '[w]ithout a rule of membership, an initial vote cannot be taken; but without a vote the rule of membership cannot be democratic.'[6] Accordingly,

> [t]he persons who are supposed to confer legitimacy upon the people are trapped in an infinite circle of self-definition. They cannot themselves decide on their own composition.[7]

States evolved using pre-democratic institutions to purportedly advance popular sovereignty. This is paradoxical. 'Choosing boundaries democratically is necessary for border legitimacy, but it is impossible because the people cannot democratically decide who the people are.'[8] Thus, the biggest conundrum confronting democratic theorists is the democratic legitimation of political communities[9] and political communities defined by territories and

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[5] Sofia Näsström, 'The Legitimacy of the People', (2007) 35(5) *Political Theory* 624, 626. https://www.jstor.org/stable/20452587.
[6] Joshua Foa Dienstag, 'A Storied Shooting: Liberty Valance and the Paradox of Sovereignty', (2012) 40(3) *Political Theory* 290, 291. DOI: 10.1177/00905917124 39303.
[7] Näsström, *supra* n. 5, at 625.
[8] Paulina Ochoa Espejo, *On Borders* (Oxford University Press, New York, NY, 2020) 77. ISBN: 9780190074203.
[9] Robert Dahl, *After the Revolution? Authority in a Good Society* (Yale University Press, New Haven, 1970) 60. ISBN: 815618863.

boundaries are a particularly insoluble problem for democratic legitimization.[10]

While borders are never perfectly democratically legitimate, there are degrees of democratic legitimacy. The democratic legitimacy of a state is proportional to the manifested consent of its population. International law has recognized that to confer an element of democratic legitimacy on states the manifestation of the consent of the territory's population is necessary. The evolving doctrine of *new* state recognition requires the manifestation of consent to statehood in a referendum.[11] However, the emergent recognition doctrine does not provide for the consensual alteration of international boundaries; instead, the doctrine of *uti possidetis* has been extended beyond the colonial context. Accordingly, the population is delineated in accordance with pre-existing and imposed borders thereby limiting the democratic legitimacy conferred by a referendum.

The dissolution of the federal states of the former Soviet Union and Yugoslavia, and the validating referenda, were conducted in

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[10] Frederick G. Whelan, 'Prologue: Democratic Theory and the Boundary Problem', in James Roland Pennock and James W. Chapman (eds), *Liberal Democracy Nomos XXV* (New York University Press, New York, 1983) 13-47. 9780814765845.

[11] Antonello Tancredi, 'A Normative "Due Process" in the Creation of States through Secession', in Marcelo G. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge University Press, Cambridge, 2006) 171-207, at 189. ISBN: 10 0-511-16103-4. http://www.cambridge.org/9780521849289. *See also*, Nina Caspersen, *Unrecognized States: The Struggle for Sovereignty in the Modern International System* (Polity Press, Kindle ed., Cambridge, 2012) 21-22 ('legitimacy has traditionally been demonstrated through independence referenda, rather than through actual democratic elections.'). ISBN-13: 978-0-7456-6034-9.

accordance with the existing administrative borders of the internal, pre-existing and imposed federal units. The Badinter Commission determined that, 'except where otherwise agreed, the former boundaries become frontiers protected by international law.'[12] The Badinter Commission specifically applied *uti possidetis* 'as a general principle, applicable to all cases where the independence of a territorial entity was being claimed.'[13] This approach was subsequently endorsed by the eminent jurists Thomas M. Franck, Rosalyn Higgins, Alain Pellet, Malcolm N. Shaw and Christian Tomuschat, in a report to the National Assembly of Quebec to consider the territorial status of Quebec in the event of its separation from Canada. The jurists stated:

> When secession occurs within the framework of a well-defined territorial district, the former boundaries of this district become the borders of the new State (principle of *uti possidetis juris*). Recent international practice leaves no doubt as to this fact where the predecessor State is a federation, and reflects the existence of a generalized opinio *juris* along these lines.[14]

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[12] *Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia*, [January 11 and July 1992], 31 I.L.M., 1488 (1992), ('Badinter Commission'), Opinion 3.

[13] Cornelia Navari, 'Territoriality, self-determination and Crimea after Badinter', (2014) 90(6) *International Affairs* 1299, 1302. https://www.jstor.org/ stable/2453 8667.

[14] Thomas M. Franck, Rosalyn Higgins, Alain Pellet, Malcolm N. Shaw and Christian Tomuschat, 'The territorial integrity of Quebec in the event of the attainment of sovereignty', in Quebec, Assemblée Nationale, Exposés et études, 1992, vol. 1, 377—461, para. 3.14; in Anna Bayefsky (ed. and trans.), *Self-determination in international law: Quebec and lessons learned* (The Hague: Kluwer, 2000). ISBN: 9789041111548.

The operation of the principle of *uti possidetis* appears likely to be further extended beyond federal states 'to lesser territorial units.'[15] As previously mentioned, Kosovo was an autonomous region with a special constitutional status within the Republic of Serbia. In 1991 it unilaterally declared its independence precipitating a brutal civil war that was followed by NATO intervention. Kosovo is now an autonomous territory, under international administration, in accordance with its pre-existing provincial boundaries.[16] Despite widespread recognition, the status of Kosovo as a sovereign state remains open, and the delineated territory of its putative statehood reflects the previously imposed provincial borders.[17]

The borders of new states, in reflecting internal administrative boundaries, are 'historically realised lines delimiting self-determination units' and, like the pre-existing state borders, do not reflect the will of the populous and are *democratically* illegitimate.[18] It appears that the recognition of any putative new state will be limited to those political entities that reflect the pre-defined territory of the federal or quasi-federal parent state. Yugoslavia and the Soviet Union were federations that consisted of defined territorial units. The units were internally administered in accordance with these borders.

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[15] James Crawford, *The Creation of States in International Law* (Oxford University Press, Oxford, 2006) 407. ISBN: 9978-0-19-922842-3.
[16] *Ibid.*, at 408.
[17] Malcolm N. Shaw, *International Law* (Cambridge University Press, Cambridge, 9th ed., 2021) 215. ISBN: 978-1-108-73305-2.
[18] Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing, Oxford, 2013) ('Vidmar (2013)') 234. ISBN: 978-1-84946-469-7.

Likewise, Quebec is a province in the Canadian federation with clearly defined internal territories. Even Spain, which is a quasi-federation, includes autonomous provinces, such as Catalonia, with readily identifiable internal borders. These units are readily identifiable, and their recognition does not require amendment of existing international borders beyond their frontiers. However, these internal borders have not been ratified by the consent of *any* population.

b. The Externalities of Borders

It is generally accepted that territorial exclusivity -- the right to control entry and exit to a state -- is a legitimate exercise of state power on behalf of the existing population. Non-porous borders exclude those who may want to live in a certain territory. In doing so, states limit individuals' 'freedom to live their life as they choose,' where they choose, and with whom they choose.[19] More importantly, state 'borders are one of the most important ways that political power is coercively exercised over human beings.' [20] Democratic legitimacy justifies the exercise of political power *only* over people who have consented to submit to the political entity's authority.[21] States however, exercise coercive power over both citizens and foreigners. Even presuming citizens have consented to submit to the state's political authority and the exercise of its power over them is

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[19] Anna Stilz, *Territorial Sovereignty: A Philosophical Exploration* (Oxford University Press, Oxford, 2019) 6. ISBN: 978-0-19-883353-6.
[20] Arash Abizadeh, 'Democratic Theory and Border Coercion,' (2008) 36(1) *Political Theory* 46. http://www.jstor.org/stable/20452610.
[21] *Ibid.*, at 45-46.

legitimate, the state's coercive power also affects foreigners -- by restricting entry and controlling the state's borders -- without the manifest consent of those potential entrants.

It is not only in border control that a state's exercise of political power affects those outside the demos: 'state decisions have significant cross border externalities.'[22] For instance, climate change impacts the globe and ignores borders. The impact on the world's climate by the manufacturing and production practices of industrialized countries is well-known, scientifically established and only questioned by delusional right-wing pundits and politicians. The impact of climate change is felt well-beyond the industrialized world and, thus, the climate policies of industrialized states have 'significant cross border externalities.' Among the plethora of examples, one suffices: the *2022 Report of the Intergovernmental Panel on Climate Change* estimates a 0.9 metre increase in global sea levels by 2100 will result in the disappearance of the states of Tuvalu, the Maldives, Kiribati and the Federated States of Micronesia.[23] Rising sea levels are primarily the result of the conduct of industrially developed states; the contribution of Tuvalu, the Maldives, Kiribati and the Federated States of Micronesia to climate change is

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[22] Stilz, *supra* n. 19, at 6.

[23] IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (Sixth Assessment Report, 2022), Ch.15 'Small Islands'. https://www.ipcc.ch/report/ar6/wg2/. *See also*, UN World Meterological Organization, *Provisional State of the Global Climate* (2022). https://library.wmo.int/doc_num.php?explnum_id=11359. *See also,* UN Environment Programme, *Too Little, Too Slow: Climate adaptation failure puts world at risk* (Adaptation Gap Report, 2022). https://www.unep.org/resources/adaptation-gap-report-2022.

negligible. International law has long recognized the existence of cross-border externalities and customary international law [24] purportedly imposes a duty on states to mitigate the effect of their policies on other states.[25] However, at least in regard to climate change, its effect in changing state policies to mitigate global warming, and its external impact, has been almost non-existent. Again, the populations of Tuvalu, the Maldives, Kiribati and the Federated States of Micronesia did not consent to the impact of 'cross border externalities' caused by developed industrial nations.

Democracy implies that all individuals are bearers of fundamental rights.[26] The first article of the Universal Declaration of Human Rights opens with the affirmation that '[a]ll human beings are born free and *equal* in dignity and rights.'[27] Borders arbitrarily assign territory at birth and thus consign much of the world's population to live in abject poverty with only minimal respect for their human

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[24] Franz Xaver Perrez, 'The Relationship Between "Permanent Sovereignty" and the Obligation Not to Cause Transboundary Environmental Damage', (1996) 26(4) *Environmental Law* 1187, 1200. https://www.jstor.org/stable/4326 7547.
[25] *See*, *Trail Smelter (U.S. v. Can.),* 3 U.N. Rep. Int'l Arb. Awards 1911, 1965 (1941) (International Arbitration). *See also*, 'Stockholm Declaration', *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14 (1972), revised by U.N. Doc. A/CONF.48/14/Corr. 1 (1973), Principle 21.
[26] Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Arthur Goldhammer (trans.)) (Princeton University Press, Princeton, 2011) 18. ISBN: 9780691149486. https://doi.org/10.23943/princeton/9780691149486. 001. 0001.
[27] UNGA, *Universal Declaration of Human Rights* (10 December 1948), 217 A (III), Art. 1 (emphasis added). https://digitallibrary.un.org/record/666853?ln=en.

rights.[28] There are massive resource inequalities between the globe's territories and the exclusive allocation of their resources necessarily embeds inequality.[29] Accordingly, 'the state [an individual] is born into has a major impact on one's life prospects.'[30] Thus, '[s]tate boundaries effectively assign people to an international class hierarchy preventing them from achieving better lives.'[31] This 'international class hierarchy' is imposed without consent, and particularly without the consent of those at its lowest echelons.

Frederick Whelan argues that democracy itself 'practically requires the division of humanity into distinct, civically bounded groups that function as more or less independent political units [...] democracy

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[28] While assigning statehood at birth affects an individual's life opportunities, state citizenship is fundamental to the exercise of rights. To be denied citizenship of any state and the resultant statelessness deprives those of any human rights protection. The rise of ethno-nationalism around the world has resulted in 'an escalation' of the 'legal disenfranchisement of citizens' 'turning people into migrants in their own places of birth.' In the north-eastern Indian state of Assam, adopting the anti-Muslim attitude of Primed Minister Narendra Modi and the ruling BJP, have disenfranchised Muslim Indians of Bengali origin deeming them non-citizens despite multi-generational residency. Likewise, Muslim Rohingya in Myanmar have been stripped of their citizenship rights despite Muslims having lived in the region since the fifteenth century. Harsha Walia, *Border & Rule: Global Migration, Capitalism and the Rise of Racist Nationalism* (Haymarket Books, Chicago, 2021) 171, 191. ISBN: 978-1-64259-269-6. Hannah Arendt, 'The Decline of the Nation-State and the End of the Rights of Man,' in *The Origins of Totalitarianism* (World Publishing Company, Cleveland/New York, 1962) 267. OCLC: 2156660. Eric D. Weitz*, A World Divided: The Global Struggle for Human Rights in the Age of Nation-States* (Princeton University Press, Princeton/Oxford, 2019) 427. ISBN: 978-0-691-18 555-2. *See also*, Näsström, *supra* n. 5, at 648.

[29] *See*, Walia, *supra* n. 28, at 61-77

[30] Stilz, *supra* n. 19, at 6.

[31] *Ibid*.

requires that *people* be divided into *peoples.*'[32] Carl Schmitt emphasised that '[d]emocracy requires [...] first homogeneity, and second -- if the need arises -- elimination or eradication of heterogeneity.'[33] Chantal Mouffe, from an opposing perspective, asserts that equality in the democratic conception 'requires the possibility of distinguishing who belongs to the demos and who is exterior to it; for that reason it cannot exist *without the necessary correlate of inequality*.'[34] Homogeneity, as opposed to diversity, and social, financial and racial inequality purportedly necessitated in a 'democracy', and created by impermeable borders, is the antithesis of modern conceptions of democratic legitimacy.

States, the foundation of the international legal system, defeat freedom and impose inequality. It is the imposition of borders to distinguish who belongs to the *demos* and the correlating inequality, even if the governance of that *demos* is purportedly democratic, that results in borders lacking democratic legitimacy. Formally impermeable state borders are inherently *democratically* illegitimate.[35]

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[32] Frederick G. Whelan, 'Citizenship and Freedom of Movement', in Mark Gibney, *Open Borders? Closed Societies* (Greenwood Press, New York, 1988) 3-39, at 28. ISBN: 0313255784.
[33] Carl Schmitt, *The Crisis of Parliamentary Democracy* (trans. Ellan Kenendy) (MIT Press, Cambridge, Mass.,1985) 9. ISBN: 9780262192408.
[34] Chantal Mouffe, *The Democratic Paradox* (Verso, London/New York, 2000) 39. ISBN-13: 978-1-84467-355-1.
[35] At the same time, the permeability of a border may be reflective of a degree of democratic legitimacy. While the ability to leave a state may be largely illusory,

5.3 The Questionable Validity of Referenda Results

A referendum is becoming part of the 'normative "due process"' which is a prerequisite to secession because a new state 'must be founded on the consent of the majority of the population, democratically expressed through plebiscites or referenda.' [36] However, the validity of referenda as a reflection of consent is questionable and variable. In *Chapter 2*, it was established that referenda have been utilized for centuries to provide at least a façade of democratic legitimacy to state creation. However, in most of those instances, referenda were simply utilized to reinforce a political entity's effective control of territory and were often undertaken in apprehension of violence and surrounded by circumstances likely to give rise to fear and intimidation. They were also often subject to fraud, manipulation and boycotts by segments of the population. In such circumstances, the outcome of any referendum is not a fair reflection of the will and consent of the population. Furthermore, referenda were only rarely used to determine territory; instead, they were predominantly utilized to determine the legal status (an independent state or incorporation or association with another state, or retention of the status quo) of a previously defined territorial unit.

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see infra, Ch. 4.2, states without formal exit restrictions are likely more democratically legitimate than those that broadly prohibit emigration (such as North Korea).

[36] *Ibid.*, at 189-90. The holding of a referendum has evolved 'to the status of a basic requirement for the legitimation of secession'. Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge, 1995) 272. ISBN: 0521481872.

Although internationally supervised referenda, conducted since the end of the Cold War, are certainly a fairer reflection of the will of the population, referenda remain inherently flawed. Proponents and opponents of a territory's statehood can manipulate voting outcomes by engaging in a 'demographic strategy' to alter the voting population by 'encouraging' either emigration from the territory or immigration to it. Accordingly, controversy surrounds questions of voter eligibility -- questions that are largely irresolvable.

Doubts about the ambiguity of the referendum questions and the majority necessary to reflect the 'freely expressed will of peoples' have also arisen. In the *Quebec Case*, the Supreme Court of Canada, while confirming that there is no unilateral right to secession, noted that a 'clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative.'[37] To do so, the referendum 'must be free of ambiguity both in terms of the question asked and in terms of the support it achieves' and, accordingly, the approval of secession must be by 'a "clear" majority as a qualitative evaluation.'[38] However, the Court left it 'for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken.'[39] The ambiguous nature of referenda questions and the quantitative majority, both in terms of number of votes and the participation of those eligible to vote, have

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[37] *Reference re Secession of Quebec* (1998) 2 SCR 217 (the '*Quebec Case*'), para. 153.
[38] *Ibid*., at para. 87.
[39] *Ibid*, at para. 153.

marred the secessionist referenda conducted since 1990, and continue to reflect the inherently flawed nature of referendum votes.

a. The Voters

Universal suffrage means in principle that all human beings have the right to vote and suggests that at least all *resident* citizens of a certain age should be able to vote.[40] The issue of residency has particular salience in independence referenda. The most extreme 'blood' nationalists argue that existing residency is irrelevant. Instead, these blood nationalists would enfranchise only those who can trace their 'origins back to the founding national group', and only those should be able to vote on secession, 'even if he [or she] has not resided on the territory for years, indeed even if his [or her] parents or grandparents had not done so.'[41] Accordingly, those who cannot trace their origins back to the founding national group, despite multigenerational residency, would be disenfranchised.

In contrast, enfranchising all immigrants to the territory of a putative state may result in the disenfranchisement of the indigenous

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[40] COE, European Commission For Democracy Through Law (Venice Commission), *Revised Guidelines on the Holding Of Referendums*, CDL-AD(2020)031-e (Strasbourg, 8 October 2020) ('Venice Commission Revised Guidelines (2020)'), 1.1. https://www.venice.coe.int/ webforms/documents/ default.aspx?pdffile=CDL-AD(2020)031-e.

[41] Daniel Weinstock, 'In a secession referendum the franchise should depend on what you do, not what you are', in Ruvi Ziegler, Jo Shaw and Rainer Bauböck (eds), *Independence Referendums: Who Should Vote and Who Should be Offered Citizenship?* (EUI Working Paper, RSCAS 2014/90, 2014) 49-51. www.eui.eu/ RSCAS/Publications/.

population.[42] As noted previously, Chile engaged in a process of 'Chileanization', disproportionately increasing the Chilean population of the contested Tacna and Arica regions in anticipation of a referendum. More recently, in the Ukraine, the Russian military campaign resulted in more than half the population reportedly fleeing the contested regions (the vast majority presumably favoured retaining the status quo) before Russia conducted spurious referenda.[43] The decolonization of Western Sahara (formerly Spanish Morocco) has been delayed by almost fifty years largely because of controversy surrounding the eligibility of Moroccan-sponsored immigrants to vote in a planned independence referendum.

In 1974, Spain foreshadowed an independence referendum to precipitate the decolonization of the Western Sahara.[44] Both Mauritania and Morocco objected to the territory's independence and, in 1975, militarily occupied the territory.[45] Spain abandoned the

[42] Hugh Lovatt and Jacob Mundy, 'Free to choose: A new plan for peace in Western Sahara' (European Council on Foreign Relations, Policy Brief, ECFR/396, May 2021), 7. https://ecfr.eu/publication/free-to-choose-a-new-plan-for-peace-in-western-sahara/.
[43] Marc Santora, 'Russia-Ukraine War: Russia Begins Orchestrating Staged Voting in Occupied Territories', *New York Times* (23 September 2009). https://www.nytimes.com/live/2022/09/23/world/russia-ukraine-putin-news.
[44] Lovatt and Mundy, *supra* n. 42, at 3.
[45] In 1975, the ICJ, in the *Western Sahara Advisory Opinion*, stated that any legal claim by Mauritania and Morocco to the territory did not diminish the application of 'the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory.' *Western Sahara Advisory Opinion*, ICJ Rep. 1975, 12, para. 162. However, Morocco and Mauritania ignored the Advisory Opinion.

proposed referendum and withdrew.[46] A civil war followed between Morocco and Mauritania[47] and the Sahrawi independence movement -- *Frente Popular para la Liberación de Saguia el-Hamra y de Río de Oro* ('Frente Polisario').[48] The military occupation resulted in 40 per cent of the native Sahrawi population fleeing to southern Algeria.[49] Morocco, as well as occupying a large segment of the territory, engaged in a policy of 'Moroccanisation' and sponsored immigration to the Western Sahara by providing financial incentives to its own residents to migrate.[50] In its 'Green March' of late 1975, 350,000 Moroccan civilians relocated to Western Sahara.[51]

In 1991, as part of a ceasefire agreement, a referendum was again proposed.[52] The UN Security Council established the United Nations Mission for the Referendum in Western Sahara (MINURSO) to, in part, 'identify and register qualified voters' and oversee the

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[46] Soon after withdrawing, Spain recognized Morocco's claim to the Western Sahara. Earlier this year (2023), Spain reiterated its support for the Western Sahara to become part of the Moroccan state pursuant to Morocco's 'autonomy plan'. Lluis Bou, 'Joint declaration by Morocco and Spain treats Western Sahara as belonging to Rabat'. *El Nacional* (3 February 2023). https://www.elnacional.cat/en/world/joint-declaration-morocco-spain-western-sahara-autonomous-not-independent_963576_102.html.

[47] Mauritania withdrew from the territory in 1979. Maribeth Hunsinger, 'Self-determination in Western Sahara: A Case of Competing Sovereignties?' *Berkeley Journal of International Law* (21 February 2017) (Web Post). https://www.berkeleyjournalofinternationallaw.com/post/self-determination-in-western-sahara-a-case-of-competing-sovereignties.

[48] Lovatt and Mundy, *supra* n. 42, at 7.

[49] *Ibid.*, at 4.

[50] Charles Dunbar and Kathleen Malley-Morrison, 'The Western Sahara Dispute', (2009) 5(1) *Journal of Peacebuilding & Development* 22, 28-34. https://www.jstor.org/stable/10.2307/48603010.

[51] Hunsinger, *supra* n. 47, at 3. *See also* Dunbar and Malley-Morrison, *supra* n. 50, at 24.

[52] Hunsinger, *supra* n. 47, at 3.

referendum.[53] As a result of the large proportion of Sahrawi fleeing to Algeria, where many remain,[54] and Morocco's policy of Moroccanisation, it appears that about half of the current population of Western Sahara are Moroccan settlers, and presumably the vast majority of those oppose independence.[55] Frente Polisario repeatedly objected to the inclusion of Moroccan settlers in voting lists. As part of the referendum process, in 1974 Spain conducted a census to ascertain eligible voters,[56] and in 1999, MINURSO finalized a provisional voting list of 86,386 voters based on those Sahrawis counted in the Spanish census and their direct descendants.[57] However, over 135,000 Moroccan-sponsored settlers appealed their exclusion from the voting list.[58] The ongoing disputes over eligibility criteria delayed the independence referendum and postponed Western Sahara's decolonization. In 2020, the impasse

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[53] UNSC, *Security Council resolution 690 (1991) on establishment of the UN Mission for the Referendum in Western Sahara*, SC Res. 690, UN Doc. S/RES/690 (adopted 29 April 1991). https://digitallibrary.un.org/record/112199? ln=en. *See also,* MINURSO, *Background* (Website). https://minurso.unmissions.org/background. *See also,* MINURSO, *Mandate* (Website). https://minurso.unmissions.org/mandate.

[54] Over 173,000 refugees from the Western Sahara are estimated to live in camps near Tindouf in Algeria. However, because of political dispute between Morocco and the Sahrawi authorities on the number of eligible voters for the referendum, the figure of 90,000 is utilized for humanitarian relief planning. *See*, UNHCR, *Fact Sheet Algeria* (February 2022). https://reporting.unhcr.org/document/1845. *See also*, ACAPS, 'Algeria: Sahrawi refugees in Tindouf' (Briefing Note, 19 January 2022). https://reliefweb.int/report/algeria/acaps-briefing-note-algeria-sahrawi-refugees-tindouf-19-january-2022. *See also*, UNHCR, *Operational Update Algeria* (May-October 2022). https://reliefweb.int/report/algeria/unhcr-algeria-operational-update-may-october-2022.

[55] Lovatt and Mundy, *supra* n. 42, at 7.

[56] *Ibid.*

[57] *Ibid.*, at 7-8.

[58] *Ibid.*

led Frente Polisario to resume armed conflict -- almost 50 years after it began.[59]

Even absent rapid demographic changes precipitated by the opponents or proponents of a territory's statehood, voter eligibility on the basis of residency is a controversial issue that can lead to lingering questions over the validity of referenda results. [60] Enfranchising or excluding voters on the basis of residency has been both inconsistent and controversial and continues to raise a number of questions.

First, the question of whether nationals residing outside of the state can vote is a question confronting all national elections, however, it seems to be particularly controversial in regard to secession referenda. The justification for enabling expatriates to vote is that their emigration is often a result of the conflict that precipitated the independence referendum. [61] In the Eritrea and East Timor referendums expatriates were allowed to vote. However, in the Scottish referendum, those living in England and Wales were denied the right to participate in the referendum. Likewise, in the

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[59] UNSC, *Situation concerning Western Sahara: Report of the Secretary-General*, UN Doc. S/2022/733 (3 October 2022). https://digitallibrary.un.org/record/3990531?ln=en.

[60] Vincent Laborderie, 'Who can vote on a referendum and who can be granted nationality of new states? Theory, practice and interests', in Ruvi Ziegler, Jo Shaw and Rainer Bauböck (eds), *Independence Referendums: Who Should Vote and Who Should be Offered Citizenship?* (EUI Working Paper RSCAS 2014/90, 2014) 45-48, at 48. www.eui.eu/RSCAS/Publications/.

[61] Matt Qvortrup, 'Voting on Independence and National Issues: A Historical and Comparative Study of Referendums on Self-Determination and Secession', (2015) XX-2 *French Journal of British Studies* para. 40. https://doi.org/10.4000/rfcb.366.

Montenegrin referendum, Montenegrins living in Serbia were not allowed to vote.

> Before the Montenegro independence referendum (2006), Serbia presented to the Venice Commission a list of 260,000 "Montenegrin citizens" living in Serbia. The majority of them would have probably voted against independence. Since only 460,000 voters were recorded in Montenegro, participation of these "Serbian-Montenegrins" could have had a decisive effect.[62]

The exclusion of Montenegrins living in Serbia may have impacted the referendum outcome, since only 55.53 per cent of voters supported independence.[63]

The second question is whether those habitually resident in the seceding territory but are not citizens of the parent state should be able to vote in the independence referenda.[64] Again, there are arguments both in favour and against enfranchising resident non-citizens in an independence referendum. And again, their inclusion or exclusion may affect the outcome of the independence referendum. In the 1995 Quebec independence referendum, conducted by the provincial government, the franchise was limited to Canadian citizens. The Quebec provincial government assumed that foreigners would vote against independence. Indeed, the Canadian government allegedly accelerated the nationalization of an

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[62] Laborderie, *supra* n. 60, at 46.
[63] Vidmar (2013), *supra* n. 18, at 110.
[64] The Venice Commission has suggested that any 'requisite period of residence should be reasonable and, as a rule, should not exceed six months.' Venice Commission Revised Guidelines (2020), *supra* n. 40, at 1.1 c. iii.

'unusually' large number of foreigners residing in Quebec to enable them to vote in the referendum.[65]

In independence referenda, it has generally been accepted that only those with a connection to the secessionist territory should be able to vote. However, citizens and residents of the parent state are also stakeholders in the outcome of the referendum. Presumably, if the territory secedes the host state would be radically changed and the rights of the citizens of the parent state will also be impacted.[66] As the Canadian Supreme Court pointed out, any successful independence referendum in Quebec requires:

> the reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be.[67]

Thus, the citizens and residents of the host-state are also affected by the outcome of a referendum and, accordingly, it has been cogently argued that all citizens of the parent state should be enfranchised to vote in an independence referendum.[68] However, to do so may give

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[65] Laborderie, *supra* n. 60, at 47 n.2.
[66] Rainer Bauböck, 'Regional citizenship and self-determination' in Ruvi Ziegler, Jo Shaw and Rainer Bauböck (eds), *Independence Referendums: Who Should Vote and Who Should be Offered Citizenship?* (EUI Working Paper, RSCAS 2014/90, 2014), 9-11, at 9. www.eui.eu/RSCAS/Publications/.
[67] *Quebec Case, supra* n. 37, at para 93.
[68] David Owen, 'Resident aliens, non-resident Citizens and voting Rights', in Gideon Calder, Phillip Cole, and Jonathan Seglow (eds), *Citizenship Acquisition and National Belonging* (Palgrave Macmillan, New York, 2010) 52-73. ISBN: 9780230203198. All residents of France voted on the Évian Accords, which culminated in Algeria's independence. Alistair Horne, *A Savage War of Peace: Algeria 1954-1962* (Macmillan, London, 1977) 98. ISBN: 9780333155158. The

the state an 'effective veto' over independence and entrench the dissatisfaction with the parent state that likely 'triggered the desire for secession into the decision-making process itself.'[69]

The flawed nature of independence referenda is thus reflected in the virtual impossibility of determining the democratically appropriate residency requirements to regulate the franchise. 'Voting results can be distorted if the concept of the people is either too exclusive or too inclusive,'[70] and the scope of the franchise can determine the outcome of the referendum.[71]

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question of who can vote is also relevant to the potential future decolonization of the Chagos Archipelago following the ICJ's advisory opinion. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion,* ICJ Rep. 2019, 95. The Chagos Archipelago was administered by the British as part of its colony of Mauritius. In 1967, before agreeing to the independence of Mauritius, the British 'detached' the Chagos Archipelago, which includes the Island of Diego Garcia and a joint US/UK naval base. The ICJ stated that the UK is obliged to 'enabl[e] Mauritius to complete the decolonization of its territory in a manner consistent with the right of peoples to self-determination.' *Ibid.,* at para. 178. Self-determination must reflect the free and genuine will of the people concerned and '[t]he Court considers that the peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to their territory as a whole [that is Mauritius].' *Ibid*., at para. 160. Accordingly, it is an open to conjecture whether the future of the Chagos Archipelago may be determined by all Mauritians or only 'the Chagossians who were expelled by the administering Power and of their descendants.' *Ibid.*, Separate Opinion of Judge Gaja, at para. 6.

[69] Weinstock, *supra* n. 41, at 49.

[70] Jure Vidmar, 'Scotland's independence referendum, citizenship and residence rights: Identifying 'the people' and some implications of *Kurić v Slovenia*', in Ruvi Ziegler, Jo Shaw and Rainer Bauböck (eds), *Independence Referendums: Who Should Vote and Who Should be Offered Citizenship?* (EUI Working Paper, RSCAS 2014/90, 2014) 27-29, at 27. www.eui.eu/RSCAS/Publications/.

[71] Laborderie, *supra* n. 60, at 45.

b. The Clear Question

The International Court of Justice in the *Western Sahara Advisory Opinion* suggested that independence referendum results should reflect the 'free and genuine expressions of the will of people.'[72] The Canadian Supreme Court, in regard to Quebec's 1995 independence referendum, stated that '[t]he referendum result, if it is taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it receives.'[73] Ambiguous, unclear or misleading referenda questions cannot determine the 'free and genuine expressions of the will of the people.'[74] A clear and unambiguous question on independence would appear to be a straightforward requirement and readily achievable. However, the questions in secession referendum have often been anything but clear.

Following the Supreme Court of Canada opinion in the *Quebec Case*, the Canadian legislature attempted to articulate referendum questions that would *not* amount to 'a clear expression of the will of the people.' In '[*a]n Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*' *2000* (the 'Clarity Act'),[75] the Canadian legislature determined that:

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[72] *Western Sahara Advisory Opinion,* ICJ Rep. 1975*,* 12 at 31-33.
[73] *Quebec Case*, *supra* n. 37, at para. 153.
[74] Vidmar (2013), *supra* n. 18, at 175.
[75] '*An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*' ('Clarity Act') (S.C. 2000, c. 26), Assented to 2000-06-29s. https://laws-lois.justice.gc.ca/eng/acts/c-31.8/page-1.html.

> a clear expression of the will of the population of a province that the province cease to be part of Canada could not result from
>
> (a) a referendum question that merely focuses on a mandate to negotiate without soliciting a direct expression of the will of the population of that province on whether the province should cease to be part of Canada; or
>
> (b) a referendum question that envisages other possibilities in addition to the secession of the province from Canada, such as economic or political arrangements with Canada, that obscure a direct expression of the will of the population of that province on whether the province should cease to be part of Canada.[76]

The Clarity Act was in direct response to the Canadian Supreme Court's opinion regarding the Quebec referendum question that asked:

> Do you agree that Quebec should become sovereign after having made a formal offer to Canada for a new economic and political partnership, within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?[77]

The question did not solicit a direct expression of the will of the population for independence.[78] Other issues regarding the ambiguity

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[76] *Ibid.*, at sec. 4.

[77] Paul Globus, 'Questioning the Question: The Quebec Referendum', (1996) 53(2) *ETC: A Review of General Semantics* 148, 148. https://www.jstor.org/stable/42579746.

[78] Canada's Clarity Act was recently endorsed by the Catalan president, when, in September 2022, President Aragonès suggested to the Catalan Parliament that they endorse a proposed 'clarity agreement' with the Spanish government to 'creat[e] clear rules for the aspirations of Catalonia to achieve independence from Spain.' The Spanish government almost immediately rejected the 'clarity agreement' as 'maximalist pretensions that we [the Spanish Government] do not share.' Marta Lasalas, 'Aragonès proposes Clarity Agreement to guide a "definitive referendum"

of this question abound: What is the formal offer? Is it negotiable and what is being offered and by whom? What is the new economic and political partnership compared with the old?[79] Moreover, sovereignty is a vague and ambiguous term and an enigmatic and paradoxical concept. According to some, '[t]he word "sovereignty" should be stricken from our vocabulary' because '[i]t evokes the anachronistic idea of the total independence and autonomy of the state, and has no real meaning today.'[80]

The potential ambiguity of referenda questions was manifested in the referenda conducted following the breakup of the Soviet Union and the dissolution of Yugoslavia. In March 1991, following the independence referenda in the Baltic States, the USSR attempted to preserve its existence by conducting an 'All-Union' referendum on the preservation of the USSR. The main question was '[d]o you consider necessary the preservation of the Union of Soviet Socialist Republics as a renewed federation of equal sovereign republics, in which the rights and freedoms of an individual of any nationality will be fully guaranteed?'[81] The referendum was seriously flawed. The

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in Catalonia', *ElNacional.cat* (27 September 2022). https://www.elnacional.cat/en/politics/aragones-seeks-accord-definitive-referendum-catalonia_890919_102.html. Jaume Vich, 'Spanish government rejects Aragonès's plan for a Clarity Agreement as "maximalist"', quoting Isabel Rodríguez, Minister and Spanish Government spokesperson, *ElNacional.cat* (27 September 2022). elnacional.cat/en/politics/spanish-government-rejects-catalan-idea-for-clarity-agreement-as-maximalist_ 891003_102.html.

[79] Globus, *supra* n. 77, at 149.

[80] Crawford, *supra* n. 15, at 32 (quoting Jonathan I. Charney, 'Review of International Law Decisions in National Courts by Thomas M. Franck and Gregory M. Fox', (1997) 91(2) *The American Journal of International Law* 394, 395).

[81] D. Andrew Austin, 'The Price of Nationalism: Evidence from the Soviet Union', (1996) 87(1/2) *Public Choice* 1, 3. https://www.jstor.org/stable/30027357.

question itself raised more questions than it answered. For instance, 'what was the meaning of 'sovereignty': would the 'renewed federation' exercise sovereignty? If so, what would be the nature of the 'sovereignty' of the constituent republics?' [82] Some of the constituent republics changed the question and some added additional questions. [83] More importantly, the regional administrations of the Baltic Republics and Georgia, Armenia and Moldavia did not support the referendum and its was left to central authorities to administer a vote. In any event, a substantial proportion of the population (70 per cent of eligible voters) supported the All-Union treaty and a plurality of the other 9 republics, including the Ukraine, supported the All-Union treaty. [84] Irrespective of the referendum's flaws, Soviet President Gorbachev claimed its result as a mandate to continue negotiations towards an 'All-Union' Treaty. [85]

The referenda questions on Croatian independence were similarly ambiguous and would have failed Canada's clarity requirement. The 19 May 1991 referendum consisted of two questions on different coloured ballots (blue and red). The first question, on the blue ballot, read:

> Are you in favor of the Republic of Croatia, as a sovereign and independent state, which guarantees cultural autonomy

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[82] Ronald J. Hill and Stephen White, 'Referendums in Russia, the Former Soviet Union and Eastern Europe' in Matt Qvortrup, *Referendums Around the World* (Palgrave Macmillan, Cham, 2014) 37, 42. ISBN: 978-3-319-57798-2.
[83] Austin, *supra* n. 81, at 3 n.3.
[84] *Ibid.*, at 5.
[85] Henry E. Hale, 'The Double-Edged Sword of Ethnofederalism: Ukraine and the USSR in Comparative Perspective', (2008) 40(3) *Comparative Politics* 293, 302. https://www.jstor.org/stable/ 20434083.

> and all civil rights to Serbs and members of other nationalities in Croatia, free to form an association of sovereign states with other former Yugoslav republics (according to the proposal of the Republic of Croatia and the Republic of Slovenia for resolving the state crisis of the SFRY).[86]

The second question, on the red ballot, read:

> Are you in favor of the Republic of Croatia remaining in Yugoslavia as a single federal state (according to the proposal of the Republic of Serbia and the Socialist Republic of Montenegro for resolving the state crisis in SFRY)?[87]

Like the Soviet referendum on the All-Union Treaty, it was not clear what was meant by the proposal to 'enter into an association of sovereign states.' In contrast, the referendum questions in Slovenia ('[s]hall the republic of Slovenia become a sovereign and independent state') and Bosnia-Herzegovina ('[d]o you support sovereign and independent Bosnia-Herzegovina, a state of equal citizens, peoples of Bosnia-Herzegovina - Muslims, Serbs, Croats and people of other nationalities who live in Bosnia-Herzegovina') were comparatively straightforward (although retaining the reference to a 'sovereign' state).[88]

Although referenda questions may be becoming progressively less ambiguous, they continue to raise doubts. For instance, in what would appear to be an attempt to dissuade voters from supporting independence, referenda questions have sometimes alluded to the

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[86] Croatian Parliament, *19 May – Croatian Independence Referendum* (Website). https://www.sabor.hr/en/about-parliament/history/important-dates/19-may-croatian-independence-referendum.
[87] *Ibid*.
[88] Vidmar (2013), *supra* n. 18, at 177, 181.

provision of undefined autonomy within the existing state. The referendum questions in the UN-administered East Timor vote and the referendum in Bougainville both provided, as an alternative to independence, the option of an unspecified and conditional greater autonomy. In the East Timor referendum the question was:

> Do you accept the proposed special autonomy for East Timor within the unitary state of the Republic of Indonesia? or, Do you reject the proposed special autonomy for East Timor, leading to East Timor's separation from Indonesia?[89]

In Bougainville, the referendum question was simply 'Do you agree for Bougainville to have: Greater Autonomy; or Independence?'[90] The referenda question itself provided no explanation of what the 'greater autonomy' would entail. Furthermore, both of these potential autonomy arrangements in East Timor and Bougainville were subject to parliamentary approval of the parent states, Indonesia and Papua New Guinea, respectively. In any event, the point is moot because independence was overwhelming endorsed, and autonomy rejected, in both territories.

Although voters generally understand what territory is subject to the referendum question, the question itself can create ambiguities about

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[89] James Dobbins, Laurel E. Miller, Stephanie Pezard, Christopher S. Chivvis, Julie E. Taylor, Keith Crane, Calin Trenkov-Wermuth and Tewodaj Mengistu, 'East Timor', *Overcoming Obstacles to Peace: Local Factors in Nation-Building* (Rand Corporation, Santa Monica, CA, 2013) 131 n 20. https://www.jstor.org/stable/10.7249/j.ctt3fgzrv.14. eBook ISBN: 978-0-8330-7861-1. To assist voters, the ballots had symbols: an Indonesian flag representing acceptance and the flag of the pro-independence National Council for Timorese Resistance representing rejection. CNN, *About the East Timor referendum* (30 August 1999). http://edition.cnn.com/WORLD/asiapcf/9908/30/etimor.referendum/.

[90] *Bougainville Referendum Commission* (Website). https://bougainville-referendum.org/what-is-the -referendum/index.html.

the seceding territory. In South Sudan, the *Referendum Act* provided two options:

(i) Confirmation of the unity of the Sudan by sustaining the form of government established by the Comprehensive Peace Agreement and the Constitution, or

(ii) Secession.

Although it was undoubtedly clear to voters that the referendum concerned the secession of South Sudan, secession by whom and from what is perhaps ambiguous and 'it would have been preferable for 'option ii' to state 'secession of South Sudan.'[91] Likewise, in the 'unofficial' 2017 independence referendum conducted by Iraq's Kurdistan Regional Government, voters were asked: 'Do you want the Kurdistan Region and the Kurdistani areas outside the region's administration to become an independent state?'[92] The question itself is facially unclear as to what territory was included in the 'Kurdistani areas outside the region's administration.'

The aforementioned ambiguities have not affected the outcome of the referenda because, as will be further discussed below, independence referenda have generally been supported by an overwhelming majority of voters. However, in referendum with small margins, ambiguities could affect the outcome and impact the validity of the

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[91] Democracy Reporting International, 'Assessment of the Southern Sudan Referendum Act' (Berlin, July 2010) 7. https://aceproject.org/ero-en/regions/africa/SS/south-sudan-report-assessment-of-the-southern/view.

[92] Nicole Scicluna, *The Politics of International Law* (Oxford University Press, Oxford, 2021) 195. ISBN: 978-0-19-879120-1.

vote. For instance, even facially unambiguous wording can present issues and perhaps impact referendum results, as was the case with a proposed question for the Scottish independence referendum.

The Scottish first minister Alex Salmond initially proposed the question: 'Do you agree that Scotland should be an independent country?'[93] But after a torrent of criticism that the question was leading and biased, he referred the question to the United Kingdom's Electoral Commission 'to provide advice and assistance by considering the wording and intelligibility of the proposed question for the referendum on independence for Scotland.'[94] The Electoral Commission agreed that, although the question was clear and intelligible, it was leading and weighted in favour of a yes vote because of the predicate 'do you agree ….'. The Commission's research indicated that 'it is easier to agree with something than to disagree', 'it suggests that Scotland being an independent country is a "good thing" because people are being invited to agree to it', 'the tone is quite forceful and encourages agreement with someone else's view -- "are you with us?"' and 'it implies that a decision has already been made and that independence is inevitable.'[95] In accordance with the Electoral Commission's advice, the referendum question

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[93] Severin Carrell, 'Alex Salmond's first challenge: the referendum question', *The Guardian* (27 January 2012). https://www.theguardian.com/uk/scotland-blog/2012/jan/27/alex-salmond-s-first-challenge.

[94] UK Electoral Commission, *Referendum on independence for Scotland: Advice of the Electoral Commission on the proposed referendum question* (January 2013), 1. https://www.electoralcommission.org.uk/sites/default/files/pdf_file/Referendum-on-independence-for-Scotland-our-advice-on-referendum-question.pdf.

[95] *Ibid.*, at 31.

was changed to 'Should Scotland be an independent country?' The result of the referendum was 1,617,989 (44.7 per cent) voting in favour of independence against 2,001,926 (55.3 per cent) opposed (with a turnout of 84.6 per cent). It is not difficult to imagine that the original question, beginning with 'do you favour …', could have influenced the vote and reversed the result.

Obviously, the wording of a referendum question is important in reflecting the 'free and genuine expressions of the will of people.' However, the view that facially unambiguous wording may be biased or leading or favourable to one or other answer is difficult to ascertain and often subjective. This will usually not affect the democratic legitimacy conferred by overwhelming majorities but may be of greater concern in a narrower outcome. Indeed, the question of what amounts to a 'clear majority' is equally problematic.

c. The Clear Majority

Of the thirty-five 'successful'[96] post-Cold War independence referenda, more than two-thirds were approved by greater than 80 per cent of voters and, of those, more than half were approved by more than 90 per cent of voters.[97] Support for independence in these referenda could be described as 'overwhelming.' Moreover, the turnout of registered voters in almost two thirds of these referenda

[96] 'Successful' as in approving independence. *See*, *Quebec Case*, *supra* n. 37, at 223.
[97] Matt Qvortrup, 'Independence Referendums: History, Practice and Outcomes', (The National Research Institute, PNG, 2018), Appendix A. https://pngnri.org/images/Publications/Independence-Referendums2.pdf.

exceeded 90 per cent.[98] The quantitative majority of the outcome in these referenda is clear. However, referendum results are not always definitive, and questions remain as to what majority amounts to a 'clear majority.' Majoritarian democracy generally relies on rule by a 'bare majority' -- 50 per cent plus one.[99] However, the original conception of democratic legitimacy required consensus and the unanimity of the populace. 'There are no existing political entities that enjoy the unanimous consent of the population' and 'no existing states [...] have developed mechanisms for even trying to obtain consent of all their citizens.'[100] The principle of majority rule was adopted as a procedural necessity because unanimity was considered impractical and a utopian fantasy.[101] The requirement of a 'clear majority' is likewise a procedural necessity to confer a degree of democratic legitimacy.

It has been suggested that in referenda potentially determining statehood and secession, something more than a 'bare' majority should be required. Independence referenda are decisive and largely irreversible and although sometimes repeated are not periodic.[102] The 'all or nothing character' of independence referenda ostensibly require a higher and therefore clearer majority than other referenda

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[98] *Ibid.*
[99] Leah Trueblood and Matt Qvortrup, 'The Case for Supermajority Requirements in Referendums', *International Journal of Constitutional Law* (Forthcoming), (Date Written: April 19, 2022) 1, 12. https://ssrn.com/abstract=4087243.
[100] Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford University Press, Oxford, 2004) 244. ISBN: 978-0-19-929798-6.
[101] Rosanvallon, *supra* n. 26, at 17.
[102] Trueblood and Qvortrup, *supra* n. 99, at 12.

and elections.[103] As a Canadian government minister (and Quebecois himself) noted: '[y]ou don't break up a country with support of 50 per cent plus one. That's just never happened.'[104] The Canadian Supreme Court suggested that a mere 50 per cent plus one was not sufficient to amount to a clear majority but left it for parliament to determine what constitutes 'a clear majority.'[105] However, there is no consistent or satisfactory answer as to what majority is sufficient to amount to a 'clear majority.'[106] A 'supermajority' requirement could be any percentage between 50 and 100 per cent and, as such, is indeterminate.[107]

Of equal importance in ascertaining the will of the majority is voter turnout -- low voter turnout can distort referenda results and be an inaccurate reflection of the will of the majority. Low voter turnout is sometimes the result of boycotts by ethno-nationalist minorities who perceive themselves to be disadvantaged by the referendum, which

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[103] *Ibid*., at 10.
[104] Stephane Dion, Canadian Minister of Intergovernmental Affairs (25 January 1996 – 11 December 2003), quoted in Matt Qvortrup, 'The Israeli Referendum: A Politico-legal Assessment of Qualified Majority Requirements' (The Initiative and Referendum Institute, 1998) ('Qvortrup (1998)') 2-3. http://www.iandrinstitute .org/docs/Qvortrup-The-Israeli-Refer endum-IRI.pdf.
[105] *Quebec Case*, *supra* n. 37, at para. 153.
[106] For example, the constitution of Saint Kitts and Nevis explicitly provides for secession if a referendum vote achieves a qualified 'super' majority: more than a two-thirds majority. Alexis Heraclides, 'Self-determination and Secession: The Normative Discourse Yesterday and Today', in Martin Riegl and Bohumil Doboš (eds), *Perspectives on Secession: Theory and Case Studies* (Springer International Publishing, Kindle ed., Cham, 2020) 19-62, at 34. ISBN: 978-3-030-48274-9. https://doi.org/10.1007/978-3-030-48274-9.
[107] Melissa Schwartzberg, *Counting the Many: The Origins and Limits of Supermajority Rule* (Cambridge University Press, Cambridge, 2013) 146-204. ISBN: 9780521198233.

they may view as a tool of the majority. As noted, most Serbs boycotted the Bosnian referendum resulting in only a 64.3 per cent turnout and questions surround the validity of that referendum.[108] Serbs, 12 per cent of the population, also boycotted the Croatian referendum. New Caledonia has recently conducted three independence referendums. The first, in 2018, rejected independence by 56.4 per cent (voting to remain part of France) to 43.6 per cent, with turnout of 81 per cent of registered voters.[109] A second referendum, conducted in 2020 had a similar result with 53.26 per cent opposing independence with 85.69 per cent turnout of eligible voters. A third and final referendum was conducted in 2021 with purportedly definitive results: voters overwhelmingly rejected independence, with 96.5 per cent voting against independence and 3.50 per cent for independence.[110] However, turnout was approximately only half of the preceding two referenda, estimated at 43.87 per cent of the electorate.[111] The referendum was conducted in the midst of the Covid-19 pandemic and went ahead despite requests for its deferral from representatives of the pro-independence

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[108] Vidmar (2013), *supra* n. 18, at 98.
[109] BBC, 'New Caledonia: French Pacific territory rejects independence', *BBC News* (4 November 2018). https://www.bbc.com/news/world-asia-46087053.
[110] France 24, '"Tonight France is more beautiful": Macron hails New Caledonia's rejection of independence', *France 24* (12 December 2021). https://www.france 24.com/en/live-news/20211212-new-caledonia-rejects-independence- from-france -in-referendum-boycotted-by-separatist-camp-partial-results.
[111] Michel Rose and Colin Packham, 'New Caledonia rejects independence in final vote amid boycott', *Reuters* (12 December 2021). https://www.reuters.com/world/ europe/new-caledonia-begins-voting-independence-referendum-2021-12-12/.

indigenous Kanak population. Accordingly, the Kanak population boycotted the election thereby distorting the results.

Two mechanisms have been utilized to reduce the impact of low voter turnout: a 'turn-out quorum' whereby a minimum percentage of registered voters must vote before the results are validated, and 'an approval quorum' whereby approval by a minimum percentage of registered voters is necessary.[112] In the 2006 Montenegro referendum to validate secession from the SUSM both a minimum voter turnout and a qualified 'super' majority were utilized.

> The decision in favour of independence shall be considered as valid, if 55% of the valid votes are cast for the option "yes", provided that the majority of the total number of registered voters has voted on the referendum.[113]

The South Sudan *Referendum Act* required voting by at least 60 per cent of registered voters, which was readily met with 97.58 per cent of registered voters participating in the 2011 referendum.[114]

The Venice Commission, in its 'Revised Guidelines on the Holding of Referendums' (2020), stated that both approval and turnout

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[112] CoE, European Commission For Democracy Through Law (Venice Commission), *Code of Good Practice on Referendums* (Study No. 371/2006, CDL-AD(2007)008rev-cor., 16-17 March 2007) ('Venice Commission Guidelines (2007)'), III.7. *See also*, Pierre Garrone, 'The Code of Good Practice on Referendums', in Daniel Moeckli, Anna Forgács, and Henri Ibi (eds), *The Legal Limits of Direct Democracy* (Edward Elgar, Cheltenham, UK, 2021) 11-18, at 16. eBook ISBN: 978180037 2801. DOI: https://doi.org/10.4337/ 97818 00372801.

[113] Republic of Montenegro, *Law on the Referendum on State-Legal Status of the Republic of Montenegro*, Official Gazette of the Republic of Montenegro, No. 12/06 (2 March 2006), Art. 6. https://www.parlament.cat/document/intrade/13990.

[114] Vidmar (2013), *supra* n. 18, at 196.

quorums were acceptable in independence referenda,[115] although it had previously identified concerns with both mechanisms.[116] The Venice Commission has discouraged adopting a 'turnout quorum' because it 'assimilates voters who abstain with those who vote no'[117] and 'means that it is in the interests of a proposal's opponents to abstain rather than to vote against it.[118] Accordingly, turnout quorums can encourage 'disengagement campaigns.'[119] The Venice Commission has also disapproved of the use of 'approval quorums' because they may result in an inconclusive outcome and increase the risk of 'a difficult political situation if the draft is adopted by a simple majority lower than the necessary threshold.'[120] That is, more than 50 per cent approve of independence, but that vote is less than the

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[115] Venice Commission Revised Guidelines (2020), *supra* n. 40, at Art. 7:

> […]
>
> b. An approval quorum or a specific majority requirement is acceptable for referendums on matters of fundamental constitutional significance,
>
> c. [t]he requirement of a multiple majority (the majority of voters taking part in the referendum plus the majority in a specified number of entities) is acceptable in federal and regional states, in particular for constitutional revisions.

[116] Venice Commission Guidelines (2007), *supra* n. 112, at Exp. Mem., paras 50-53.

[117] *Ibid*. at Art. 7.a. *See also,* Trueblood and Qvortrup, *supra* n. 99, at 5.

[118] Venice Commission Guidelines (2007), *supra* n. 112, at Exp. Mem., para. 51. ('For example, if 48% of electors are in favour of a proposal, 5% are against it and 47% intend to abstain, the 5% of opponents need only desert the ballot box in order to impose their viewpoint, even though they are very much in the minority.').

[119] PACE, *Updating guidelines to ensure fair referendums in Council of Europe member States*, Res. 2251 (22 January 2019), adopting *Report of the Committee on Political Affairs and Democracy*, Doc. 14791 (7 January 2019) (The Report noted '[T]he damaging impact that turnout thresholds can have by encouraging disengagement campaigns has frequently been observed in referendums.' at para. 76.). https://pace.coe.int/en/files/25325.

[120] Trueblood and Qvortrup, *supra* n. 99, at 5.

quorum required, and the status quo is thus retained.[121] For example, the Welsh and Scottish devolution referenda of the late 1970s required *both* a majority of voters and at least 40 per cent of those registered to vote. In Scotland, 51.6 per cent of those voting approved of devolution but only 63.6 per cent of those eligible to vote did so. Thus, the 'yes' represented only 32.9 per cent of the electorate[122] and devolution was not approved.[123]

5.4 Conclusion

The democratic legitimacy of a state depends on consent. However, the democratic determination of impermeable borders is inherently impossible because it requires the consent of both the putative state's population and all foreigners, that is everyone, or at least those affected by the imposition of the border. However, there are *degrees*

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[121] Venice Commission Guidelines (2007), *supra* n. 112, at Exp. Mem., para. 52.

> An approval quorum ... may also be inconclusive. It may be so high as to make change excessively difficult. If a text is approved -- even by a substantial margin -- by a majority of voters without the quorum being reached, the political situation becomes extremely awkward, as the majority will feel that they have been deprived of victory without an adequate reason; the risk of the turn-out rate being falsified is the same as for a turn-out quorum.

[122] Qvortrup (1998), *supra* n. 104, at 4.

[123] It was recently reported that the renewed push for Scottish independence would require 60 per cent support for another referendum before the referendum was actually conducted. The Scottish government have proposed holding their own referendum in October 2023, but the UK government under former Prime Minister Boris Johnson, stated that they would ignore a second referendum. The UK Supreme Court recently held that Scotland could not conduct a referendum without the Westminster government's approval. *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC. Severin Carrell, 'Supreme court urged to throw out Scottish independence poll case', *The Guardian* (11 October 2022). https://www.the guard ian.com/politics/2022/oct/11/supreme-court-urged-to-authorise-fresh-scottish-independence-referendum.

of democratic legitimacy. A referendum can confer *some* democratic legitimacy depending on, and in proportion to, its valid reflection of the voters' will. Thus, international law requires *new* states to have at least some democratic legitimacy before affording recognition. It imposes a prerequisite for statehood: statehood must accord with the majority consent of the population manifested in a referendum. International law has thereby introduced an element of democratic legitimacy into its state recognition doctrine.

Referenda are frequently flawed and offer a somewhat questionable reflection of voters' 'free and genuine' will. The results of past referenda have often been questioned because they were conducted in an atmosphere of violence, fear, and intimidation. The nationalist, ethnic and cultural factors surrounding independence referenda have often led to boycotts by the perceived minority, distorting referenda results. Indeed, low voter turnouts, whatever the reason, distort referendum results and sometimes prevent the manifestation of a clear majority outcome. Referenda also sometimes include unclear and ambiguous questions compounding any reticence to accept the outcome of a close referendum.

An apprehensive atmosphere, low voter turnout, and ambiguous questions reduce the democratic legitimacy conferred by the outcome of a referendum, but these issues are surmountable and can be limited. However, referenda are inherently flawed because it is impossible to define and restrict the populous eligible to participate, even accepting that only those connected to the seceding territory can confer democratic legitimacy. Should *only* residents vote? Should

former residents be able to participate? Should voting be limited to citizens of the parent state? The referendum will also fundamentally alter the parent state and affect the rights of all its citizens, so should the citizens (or indeed, residents) of the parent state be eligible to vote? Irrespective of the eligibility criteria adopted by the referendum regulators, the answer to each of these questions will impact the democratic legitimacy conferred by the referendum outcome. It is also impossible to determine what majority constitutes a 'clear' majority that can validate a referendum result and confer democratic legitimacy on a new state. The prerequisite of a clear majority is far from clear.

Finally, here, the degree of democratic legitimacy conferred by a referendum result is necessarily limited because it is undertaken in accordance with an undemocratically pre-defined and delineated territory imposed on the population without their consent.

6. THE ILLEGITIMACY OF REPRESENTATIVE DEMOCRACY

6.1 Introduction

The *democratic* legitimacy of a political authority, the government, like that of a state, depends on the consent of those subject to its coercive authority. Today, participation in governance -- and *equal* participation -- is a core element of the manifestation of consent and the *democratic* legitimacy of a political authority.[1] Robert Dahl's minimalist definition of democracy is based on two essential elements: political participation and public contestation.[2] Effective and equal participation in public affairs is the quintessential element of even the narrowest conception of modern democracy.[3] Hence, the right to democratic governance is instrumentally articulated as a right 'to take part' -- to participate -- in public affairs. International law is evolving to endorse representative democracy and recognize elected governments as a manifestation of popular consent.

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[1] Ronald Dworkin, *Justice for Hedgehogs* (Belknap/Harvard University Press, Cambridge, Mass., 2011) 392-95. ISBN: 978-0-674-07225-1.

[2] Robert A. Dahl, *Polyarchy. Participation and Opposition* (Yale University Press, New Haven, 1971) 4. ISBN: 03000156581971. *See also*, Jens Borchert, 'Political Professionalism and Representative Democracy: Common History, Irresolvable Linkage, and Inherent Tensions' in Kari Palonen, Tuija Pulkkinen, Jose Maria Rosales (eds), *The Ashgate Research Companion to the Politics of Democratization in Europe* (Ashgate, European Science Foundation, Farnham, 2008) 267-283, at 278. ISBN: 9780754672500.

[3] Robert A. Dahl, *On Democracy* (Yale University Press, New Haven, Kindle ed., 2nd ed., 2015) ('Dahl (2015)') Loc. 791. ISBN: 9780300194463. *See also* David Held, *Models of Democracy* (Polity Press, Cambridge, 3rd ed., 2006) 271. ISBN: 9780745631479.

As demonstrated in *Chapter 3*, despite democratic backsliding over the last decade, a 'right to democratic governance' or 'democratic entitlement' is emerging, albeit glacially. The democratic entitlement is reflected in international law's recognition doctrine: in limited circumstances an elected government is a prerequisite to recognition. Thus, the legitimation, of *new* governments is increasingly dependent on their democratic pedigree. Pursuant to the democratic entitlement, governance is legitimated by the consent of the governed as evidenced in free and fair elections, [4] and governments based on elections should be recognized as legitimate.[5] Indeed, elections are now synonymous with democracy. In *Chapter 4,* it was established that the recognition of *new* states is similarly likely to require the adoption of institutions of representative democracy by the putative state. Although the existing 'right to democratic governance' has limited application, a democratic entitlement is teleologically emerging as a universal right; that is, states increasingly have a duty to progressively adopt democratic institutions.[6]

The democratic entitlement is, at its most basic level, satisfied by the implementation of tools of representative democracy and focuses on participation in free and fair elections: '[t]he lowest common

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[4] Thomas Franck, 'Democracy as a Human Right,' (1994) 26 *Studies in Transnational Legal Policy* 73, 75. https://heinonline-org.sare.upf.edu/HOL/P?h=hein.journals/stdtlp26&i=95.
[5] *Ibid*.
[6] Niels Petersen, 'The Principal of Democratic Teleology in International Law', (2008) 34 *Brooklyn Journal of International Law* (2008) 33, 82. https://brooklynworks.brooklaw.edu/bjil/vol34/iss1/2.

denominator' of democracy.'[7] The objective of this *Chapter 6* is to demonstrate that democracy is quintessentially participatory and contemporary representative democracy, even with universal suffrage, is inherently flawed. Representative democracy developed from institutions designed to *restrict* participation. Initially, only the elite were able to participate in governance. Over centuries purportedly representative institutions progressively enabled an increasing portion of the populous to vote. This *Chapter* will show that, even with the adoption of universal suffrage, representative governance in the guise of representative democracy remains inherently elitist and contemporary representative democracy has simply replaced one decision-making elite with another. The ability of ordinary citizens to take part in public affairs in a representative democracy is largely limited to voting on election day -- every two to five years.

This *Chapter 6* will also demonstrate that contemporary representative democracy, irrespective of its inherent restrictions on participation, is a defective mechanism for ascertaining the consent of those subject to the coercive authority of the government and state. Not only does representative democracy lead to the election of an elite, election processes are themselves far from perfect, resulting in the election of representatives who are increasingly perceived as

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[7] Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing, Oxford, 2013) 23. ISBN: 978-1-84946-469-7.

'unrepresentative'. Thus, this *Chapter 6* will establish that reliance on representative democracy as a reflection of consent is misplaced.

6.2 Participation and Representation in a Democracy

Participation is the basic component of democratic self-governance, and the original conception of democracy is that of 'participatory democracy'. Representative democracy, instead, necessarily reduces participation by imposing intermediaries between the citizen and governance. Indeed, many would consider 'representative democracy' to be an oxymoron, because, according to Jean-Jacques Rousseau, 'democracy must be direct, not representative: all members of the community must engage in articulating the general will.'[8] James Madison, who played a crucial role in establishing the system of representative governance in the United States, likewise distinguished between a democracy involving the direct participation of the citizenry and republican or representative governments.[9] Participation is a core element of *any* democracy and representative democracy *inhibits* direct participation.

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[8] Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings*, (Victor Gourevitch (ed.) (Cambridge University Press, Cambridge, 1997) 115. ISBN: 9780521413824.

[9] According to Madison:

> The two great points of difference, between a democracy and a republic, are, first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

James Madison, 'Federalist Papers, No. 10' (1787), in Alexander Hamilton, John Jay, and James Madison, *The Federalist* (George W. Carey and James McClellan (eds)) (Liberty Fund, Indianapolis, 2001) 42-49, at 46. ISBN: 0-86597-289-3.

a. Limiting Participation by Representation

The right to democratic governance reflected in representative democracy is a right to *indirect* democracy.

> Citizens […] are twice removed from legislation. First, they do not deliberate and vote directly on legislation. Rather they elect assemblies that enact such legislation in their stead. Second, […] citizens do not vote directly for assemblies. Rather they vote for individual candidates, with the candidates receiving the most votes elected.[10]

The indirect democracy reflected in representative governance facilitates only limited participation by the populous and singular representation. Individual participation in governance has been subsumed by representative democracy and is limited to dialogue with representatives and voting in periodic, cyclical elections. Individuals delegate their political influence to intermediaries as representatives, and, in doing so, 'citizens often delegate enormous discretionary authority over decisions of extraordinary importance.'[11]

The influence of political associations further reduces a citizen's ability to directly participate in governance. Political parties add a further intermediate layer interposed between the citizen and participation in public affairs and further removes citizens from participation in public affairs.[12] Political parties decide elections and

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[10] Jean-Pierre Benoit & Lewis A. Kornhauser, 'Social Choice in a Representative Democracy', (1994) 88 *American Political Science Review* 185, 185 (emphasis omitted).
[11] Dahl (2015), *supra* n. 3, at Loc. 1779.
[12] Hélène Landemore, *Open Democracy: Reinventing Popular Rule for the Twenty-First Century* (Princeton University Press, Princeton, 2020) 39. ISBN: 9780691181998.

other key political questions. Elected representatives are not free to vote according to her or his judgement or conscience but 'is bound by the party to which [she or] he owes [her or] his election.'[13] As such, a representative of the citizen, satisfying the citizen's right to participate, is simply a delegate of her or his party.[14]

Today, representatives are chosen by election. There is no doubt that taking part in public affairs by voting in elections or being a member of a political party or a candidate for public office, are central elements of participation. According to the US Supreme Court, 'no right is more precious in a free country than that of having a voice in the election of those who govern the citizens, and that other rights, even the most basic, are illusory if the right to vote is undermined.'[15] The right to vote is fundamental to the democratic entitlement. However, participating in cyclical elections is only a small part of political participation; participation in public affairs is an ongoing process. Much of the criticism of representative government is that it fails to enable and encourage greater *direct* civic participation.

b. 'Democracy' is Direct Participation

The common Western understanding of democracy is that it began with the city-states of ancient Greece: the English word 'democracy' was adopted from the French *démocratie*,[16] and democracy or

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[13] Bernard Manin, *The Principles of Representative Government* (Cambridge University Press, Cambridge, 1997) 211. ISBN: 9780521458917.
[14] *Ibid.*
[15] *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).
[16] Held, *supra* n. 3, at 1.

'*demokratia*' is derived from the ancient Greek words '*demos*' - the people, and '*kratos*' - to rule,[17] and 'the basic principle of *demokratia* [is] the people ought to have power.'[18] Athenian democracy, of around 500 BCE, was participatory in nature. Indeed, it is frequently considered 'a prime example of citizen participation or, as some would say, participatory democracy.'[19] Despite the Western promotion of the city-state of Athens as the birthplace of democracy, participatory collective decision-making practices had existed for millennia before the foundation of Athenian democracy.

Early hunter gatherer societies exercised what has been described as a 'primitive' form of democracy and people living in tribal societies engaged in participatory collective decision-making.[20] In these small-scale settings members of a community were able to attend, and participate in, gatherings that could be described as councils or assemblies. The Basarwa of the Kalahari Desert bordering present-day Namibia and Botswana and the Hadza of Tanzania's Great Rift Valley had 'egalitarian consensus based societ[ies] in which leadership was non-coercive.'[21] Even after tribal societies adopted a settled agricultural lifestyle, a form of participatory democracy was often the primary mechanism utilized in collective decision-making.

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[17] Dahl (2015), *supra* n. 3, at Loc. 464.
[18] David Stasavage, *The Decline and Rise of Democracy: A Global History from Antiquity to Today* (Princeton University Press, Princeton, 2020) 25. ISBN: 06911 77465.
[19] Dahl (2015), *supra* n. 3, at Loc. 476.
[20] Stasavage, *supra* n. 18, at 34.
[21] Kent Flannery and Joyce Marcus, *The Creation of Inequality: How Our Prehistoric Ancestors Set the Stage for Monarchy, Slavery, and Empire* (Harvard University Press, Cambridge, Mass., 2012) 36-37. ISBN: 9780674064690.

For instance, the Igbo 'Republics' of Nigeria and the Acholi in Uganda did not have kings or chiefs and decisions were taken after debate at meetings of the male elders. Between 3000 and 2000 BCE, the ancient Kingdom of Mari in Mesopotamia (on the Iraqi/Syrian border) was governed by assemblies and local participatory councils. Village governance in India in the Sixth and Seventh Century BCE involved, at least in part, 'an assembly of all householders.' [22] Likewise, elements of participatory democracy were practised sporadically in settled agricultural communities in the Americas before Western conquest.

In any event, Athenian democracy is most often cited as the foundation of Western democracy and its locus was a participatory 'People's Assembly' consisting of Athenian citizens. [23] It was an open assembly, and all citizens were entitled to attend assembly meetings. [24] The other commonly referenced predecessor of contemporary democratic governance is the Republic of Rome from 509 BCE until 27 BCE. The Roman republic also adopted participatory mechanisms and citizen assemblies were at the heart of Roman participatory governance.[25] Like the city-state of Athens, Rome was predominantly a 'face-to-face' society with an 'oral

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[22] Stasavage, *supra* n. 18, at 37.
[23] Dahl (2015), *supra* n. 3, at Chapter 2.
[24] Morgens Herman Hansen, *The Athenian Democracy in the Age of Demosthenes: Structures, Principles and Ideology* (John Anthony Crook (trans.)), (Blackwell, Oxford, 1991) 130-32. ISBN: 0631138226. *See also,* Landemore, *supra* n. 12, at 68.
[25] Dahl (2015), *supra* n. 3, at Loc. 478.

culture',[26] and, at least initially, included elements of participatory decision-making with little centralized bureaucratic control.[27]

It is not uncommon for historians to give early participatory democracy a glowing reference.[28] Despite suggestions that in a 'state of nature' humans were fundamentally equal, collective decision-making in 'primitive democracies' rapidly devolved to the elite members of the tribe, primarily determined by gender and age, who would participate directly in making all the decisions of the tribe.[29] Council governance in early tribal hunter gatherer societies were elite affairs.[30] For the most part women were excluded from participating in the collective decision making of early communities.[31] In the Athenian city-state, 'the many' -- the *demos* -- consisted exclusively of free males of Athenian descent.[32] Women and slaves (who made up more than 50 per cent of the population) were not considered citizens.[33] In the Roman Republic participation was also initially restricted to the elite but was ultimately extended to male commoners

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[26] Held, *supra* n. 3, at 28.
[27] *Ibid.*
[28] *See, e.g.,* Donald Kagan, *Pericles of Athens and the Birth of Democracy* (Simon & Schuster, New York, 1991) 143. ISBN: 0671749269. *See, also*, Donald Kagan, *The Peloponnesian War* (Viking, New York, 2003) 74. ISBN: 9780670032112. *See also*, Held, *supra* n. 3, at 13.
[29] Charles Tilly, *Democracy* (Columbia University Press, Kindle ed., New York, 2007) 29. eBook ISBN: 9780511804922. DOI: https://doi.org/10.1017/CBO9780511804922 2007.
[30] Stasavage, *supra* n. 18, at 35.
[31] One partial exception is the Huron of North America. The Huron (who call themselves Wendats) at the village level had a chief, an inherited position subject to the community's veto -- it was a matrilineal community and women had the final say. *Ibid.*, at 37-41.
[32] Held, *supra* n. 3, at 13.
[33] *Ibid*., at 19.

(plebians). However, even though plebians were entitled to participate, the citizenry of Rome was classified into a hierarchy according to their property holdings and although the poorest citizens could vote in the assemblies their vote carried much less weight than the wealthy.[34] Again, women were excluded.

Early participatory democracy came to an abrupt interregnum in the Athenian city- states, with the Peloponnesian Wars, and in the Roman Republic, when its expansion made direct participation meaningless. However, in the second millennium, city-states re-emerged throughout Europe, primarily in Northern Italy after about 1250 CE; and these city-states adopted elements of participatory democracy.[35] The demise of participatory democracy in these city-states of medieval Europe followed the demise of the city-states themselves, which fell to the expansionist tendencies of the emergent modern states. As noted, centralizing monarchs with a large revenue base could afford then-modern armaments, which exponentially increased the destructiveness of warfare, and the city-states did not, alone, have the resources to defend themselves against the territorial ambitions of nascent states.[36] The series of wars that engulfed Europe from the beginning of the 16th Century exposed the inability of city-states to attain the resources necessary for their defence from encroaching

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[34] Manin, *supra* n. 13, at 46.
[35] Robert A. Dahl, 'A Democratic Dilemma: System Effectiveness versus Citizen Participation', (1994) 109(1) *Political Science Quarterly* 23, 25. https://www.jstor.org/stable/2151659.
[36] *See, infra.,* at Ch. 1.2.

centralizing monarchs.[37] Not only did these wars bring an end to city-states and pre-modern modes of participatory democracy, but the outcome of the wars also conferred territorial sovereignty on, and delineated the borders of, the first modern states.

6.3 The Limited Democracy of Representative Democracy

Democracy is participatory and representative democracy inhibits participation. Representative democracy not only restricts the participation of ordinary citizens, but it is also inherently elitist. The elitist nature of representative democracy is not surprising since it is the progeny of overtly undemocratic institutions. In early purportedly representative institutions only wealthy white men were entitled to vote. Progressively widening suffrage enabled an increasing portion of the populous to putatively participate in public affairs: by voting for representatives to parliaments and legislative assemblies. However, even with universal suffrage representative democracy remains inherently elitist and limits participation. Contemporary representative democracy has simply replaced one decision-making elite with another.

a. Restricting Democracy in the Development of Representative Democracy

Representative democracy evolved from the purportedly 'representative' assemblies of the early-modern era. Representative

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[37] Hendrik Spruyt, *The Sovereign State and Its Competitors* (Princeton University Press, Kindle ed., Princeton, 1994) 30. eBook ISBN: 978-0-691-21305-7.

democracy 'has its origins in a system of institutions [...] that was in no way initially perceived as a form of democracy or of government by the people.'[38] Indeed, 'representative government was conceived in explicit opposition to government of the people.'[39] The election of representatives was intended to restrict political power to the elite -- it was not intended as a mechanism for conferring political power on the masses.[40] The 'chosen body of citizens' reflects both the election of the body and that the chosen citizens are an elite of 'distinguished and eminent individuals.'[41]

The primary purpose of these early 'elected' assemblies was to provide consent to and legitimize taxation. Representative government 'originated not as a democratic practice but as a device by which nondemocratic governments --monarchs, mainly -- could lay their hands on precious revenues and other resources they wanted, particularly for fighting wars.'[42] The increasing revenue of central monarchs enabled them to increase their power by engaging in 'state-building': reinforcing their exclusive jurisdiction over territory.[43]

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[38] Manin, *supra* n. 13, at 1.
[39] *Ibid.*, at 232.
[40] Madison articulated the intended elitist effect of representation being:

> to refine and enlarge the public view by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.

Madison, Federalist 10, *supra* n. 9, at 82.
[41] Manin, *supra* n. 13, at 2 n. 3.
[42] Dahl (2015), *supra* n. 3, at Loc. 1648.
[43] John Gerard Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations', (1993) 47(1) *International Organization* 139, 161. http://www.jstor.org/stable/2706885.

The members of these assemblies were generally the elite members of society who had the means to contribute to funding the sovereign's expenditure and thus, initially, only members of the aristocracy were able to participate. Restricting suffrage to white men holding substantial property was a reflection of the desire of the sovereign power to obtain their consent -- *and only their consent* -- to taxation and thereby governance. Only those 'free' men capable of furnishing the government with revenue were eligible to participate in governance, first by participating directly in town assemblies and later by voting for elected representatives. For instance, in England a statute of 1430 restricted voting for the House of Commons to adult men with a freehold land producing annual revenue of forty shillings per year in rent or produce -- a 'substantial sum'.[44] 'As late as 1832 in Great Britain the right to vote for the house of "commons" extended to only 5 percent of the population over age twenty.'[45] Indeed, it is notable that the battle cry of the American revolutionaries was 'no taxation without representation.' Even the two great 18th Century bourgeois revolutions did not end property restrictions.

The implementation of representative governance therefore began as a mechanism to retain control of government affairs with the elite of society, and the 'consent of the governed' was not conceived as empowering the populace. Representative government was not

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[44] Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (W.W. Norton & Company, New York/London, 1988) 42. ISBN: 978-0-393-30623-1.
[45] Dahl (2015), *supra* n. 3, at Loc. 635.

democratic, instead, 'it was a nondemocratic institution later grafted on to democratic theory and practice.'[46] In early election-centric representative 'democracy', participation of the people was severely restricted and limited 'predominantly to wealthy men of a specific societal status determined by birth and education, the democratic method was confined to a small elite which ruled on behalf of the majority, itself excluded from the power to rule.'[47] It was the extension of the right to vote, progressively implemented over the course of the 19th and 20th centuries, and culminating in the universal franchise, that led to representation purportedly reflecting popular government.

b. The Election of the 'Elite' in Contemporary Representative Democracy

Progressively widening suffrage enabled an increasing portion of the populous to vote for representatives and apparently participate in public affairs. Universal franchise thus meant that the '[f]ree election of representatives by all adult citizens came indeed to be almost completely identified with democracy.'[48] Despite the implementation of the universal franchise, the election of representatives did not eliminate the elitist nature of representative governance. Indeed, contemporary representative 'democracy' continues to be inherently elitist.

> Representative government remains what it has been since its foundation, namely a governance of elites distinguished

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[46] *Ibid.*, at Loc. 1648.
[47] Vidmar, *supra* n. 7, at 15.
[48] Manin, *supra* n. 13, at 132.

> from the bulk of citizens by social standing, way of life, and education. What we are witnessing today is nothing more that *the rise of new elite and the decline of the another.*[49]

Representation 'is necessarily founded on a relationship of unequal power of political decision making,' and the election of representatives embeds the elitist nature of representative government.[50] In a contemporary representative democracy, participation by ordinary citizens is limited and instead, 'the democratic credentials of public decisions still come principally from there having been made by elected elites.'[51]

The election of representatives itself is inherently elitist. Indeed, 'election' has the same etymology as 'elite'.[52] To 'elect' is to 'choose' and 'the element of choice is inherent in the concept of election in modern representative systems.'[53] Representative democracy presupposes an identification and similarity between elected representatives and represented,[54] however, in choosing between candidates, voters need to discern -- and discriminate -- between candidates.[55] Instead of choosing 'ordinary' candidates who are similar to and reflect their own identity, voters tend to

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[49] *Ibid*, at 232 (emphasis added).
[50] Michael Hardt and Antonio Negri, *Assembly* (Oxford University Press, Oxford, 2017) 27. ISBN: 9780190677961.
[51] Landemore, *supra* n. 12, at 5.
[52] Manin, *supra* n. 13, at 139.
[53] *Ibid.*
[54] Nadia Urbanati, *Representative Democracy: Principles and Genealogy* (University of Chicago Press, Chicago, 2008) 4. ISBN: 9780226842790. *See also*, Landemore, *supra* n. 12, at 35.
[55] Manin, *supra* n. 13, at 139.

discriminate towards those who appear superior even though they do not identify with them.

> Thus, an elective system leads to the self-selection of candidates who are deemed superior, one dimension or another, to the rest of the population, and hence to voters [...] The situation of choice constrains voters to elect candidates possessing uncommon and positively valued characteristics, regardless of their specific preferences.[56]

Thus, elections select the extraordinary rather than ordinary individuals thereby separating a ruling elite from ordinary citizens.

More importantly, the increasing franchise and the 'advent of citizenship'[57] has 'ineluctably' led to the spread and dominance of political parties.[58] To attain influence in a modern representative democracy, potential legislators must aim to politically mobilize the masses.[59] In mobilizing the masses to achieve electoral success, potential representatives must organize groups, coordinate and rationalize policies, and select leaders.[60] In doing so, the modern political party develops a bureaucracy devoted to achieving electoral success.[61] Within the party bureaucracies politics unavoidably

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[56] *Ibid.*, at 140 (emphasis added).
[57] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg (trans.)) (MIT Press, Cambridge, Mass., 1998). ISBN: 9780262581622. *See also*, Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Thomas Burger (trans.)) (Polity Press, Cambridge, 1989). ISBN: 978-0-77456-1077-1.
[58] Held, *supra* n. 3, at 135.
[59] *Ibid.*
[60] Frank Bealey, 'Democratic Elitism and the Autonomy of Elites', (1996) *International Political Science Review / Revue internationale de science politique* (Traditions in Pluralist Thought/Traditions de la pensée pluraliste) 319, 320.
[61] Held, *supra* n. 3, at 135.

becomes a career.[62] Participation in representative democracies is thus limited to career politicians, the elite of contemporary representative democracy.[63] Political professionals are not a reflection of the population at large but are 'a more or less coherent professional group with certain common attributes as to educational background and social class.'[64] Accordingly, '[t]he number of highly educated people in our parliaments is so out of proportion that we would be right to speak of a "diploma democracy"'.[65] Moreover, the inaccessible and elitist nature of representative governance is self-perpetuating: career politicians are more likely to be followed in their career by relatives.[66] Thus, the dominance of representative government by political parties does not result in the disappearance of the 'elitist character' of representative government but 'rather a new type of elite arises.'[67] While democracy requires participation, the professionalisation of representatives results in social exclusion.

Representative democracy is therefore what Schumpeter describes as 'that constitutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a

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[62] Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, London/ New York, 2003 [1943]) 285. eBook ISBN: 0-203-20205-8.
[63] *Ibid.*, at 284.
[64] Borchert, *supra* n. 2, at 278.
[65] David Van Reybrouck, *Against Elections: The Case for Democracy* (Liz Waters (trans.)) (Seven Stories Press, Kindle ed., New York, 2016) 156. ISBN 9781609808112.
[66] Ernesto Dal Bó, Pedro Dal Bó and Jason Snyder, 'Political Dynasties', (2009) 76(1) *The Review of Economic Studies* 115, 115. https://www.jstor.org/stable/ 20185086. *See also* Landemore, *supra* n. 12, at 2.
[67] Manin, *supra* n. 13, at 208.

competitive struggle for the people's vote.'[68] It is therefore not surprising that representative democracy has been described as 'competitive elitism.'[69] The elitist nature of representative democracies led a prominent political scientist, Bernard Manin, to describe representative democracy as a mix between oligarchy and democracy. The preeminent political scientist, Dahl, described existing 'democracies' as 'polyarchies' -- 'in reference to the multiplicity of actors that have power in it as opposed to just "the people."'[70] In his 'iron law of oligarchy', Robert Michels theorized that any purportedly democratic political authority 'end[s] up inevitably being ruled by a small clique.'[71] Thus, '[a]ll politicians, political parties and political structures -- equally on the left and the right -- are despite their claims to representation, controlled by elites.'[72]

Women and other minorities are inherently under-represented in representative democracy. Although the election of women has been increasing, the global average of women in parliaments is still only 26.5 per cent.[73] Women are underrepresented because of 'discriminatory attitudes and practices' and 'unequal power

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[68] Schumpeter, *supra* n. 62, at 269.
[69] *See* Held, *supra* n. 3, at 125-158.
[70] Landemore, *supra* n. 12, at 33.
[71] Hardt and Negri, *supra* n. 50, at 30.
[72] *Ibid.*, at 31.
[73] IPU Parline, *Global and regional averages of women in national parliaments* (1 February 2023) (Website). https://data.ipu.org/women-averages?month=2&year=2023&op=Show+averages&form_build_id=form-B9l1Dg6KyoZlzZcRJktAy2As0pTJb TxDHQcFRu0cLCk&form_id=ipu__women_averages_filter_form.

relation[s]'.[74] The 'traditional working patterns of many political parties and government structures continue to be barriers to women's participation in public life.'[75] Political parties continue to be male dominated and women are less likely to be selected as candidates.[76] Furthermore, those few women parliamentarians continue to be 'required to play by the rules of the established order, which are biased in favor of men, and thus weaken their ability to press for change.'[77]

6.4 The Democratic Illegitimacy of Elections

Today, irrespective of its participatory pedigree, 'democracy' is almost synonymous with 'elections.'[78] Even though 'democracy' was initially participatory, it did evolve to incorporate elements of representation, however, for the most part representatives were chosen randomly rather than elected. Sortition was perceived as democratic whereas elections were considered to be aristocratic in nature. Contemporary elections also result in rule by a political elite and are an ambiguous and flawed selection process. Indeed, 'elections may legitimately be seen as preventing rather than

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[74] Drude Dahlerup, 'Engendering representative democracy' in Sonia Alonso, John Keane, and Wolfgang Merkel (eds), *The Future of Representative Democracy* (Cambridge University Press, Cambridge, 2011) 144-168, at 153. ISBN: 978-1-107-00356-9.
[75] UN Fourth World Conference on Women, *Beijing declaration and platform for action* (1995), Art. 182 and 185.
[76] ACE Electoral Knowledge Network, *Electoral Systems*. https://aceproject.org/main/english/es/esd01b.htm.
[77] Zohreh Khoban, 'Politics of Emancipation: A Feminist Defense of Randomly Selected Political Representatives', (2022) *Critical Policy Studies* 1, 3-4. DOI: 10.1080/19460171.2022.2154235.
[78] Van Reybrouck, *supra* n. 65, at 42.

facilitating genuine rule by the people.'[79] Additionally, the integrity of elections is often questioned leading to doubt about election outcomes, further reducing the conferral of any *democratic* legitimacy on elected governments.

a. Representation without Elections

While pre-modern democracies have been described as participatory, they incorporated elements of representative governance. However, representatives were, for the most part, *not* elected; elections only came to be the dominant mechanism of selecting representatives in the late 18th Century.[80] Instead, in most political systems enabling the exercise of power by the populous, governing representatives were randomly selected from a pool of *elite men*.[81] The drawing of 'lots' was perceived as a mechanism for conferring power in a non-hereditary way.[82]

Even though the governance of the Greek city-states is often considered to be quintessentially participatory -- at least for the elite -- the Assembly delegated authority and adopted mechanisms for the selection of decision makers. Any of the functions not performed by the Assembly was delegated to functionaries, including nearly all of the magistrates, by the drawing of lots.[83] The Courts consisted of hundreds of randomly selected citizens 'in charge of deciding on

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[79] Landemore, *supra* n. 12, at 43.
[80] Manin, *supra* n. 13, at 42.
[81] *Ibid.*
[82] *Ibid.*, at 43.
[83] Held, *supra* n. 3, at 18. Landemore, *supra* n. 12, at 67. Manin, *supra* n. 13, at 11.

public and private judicial issues.'[84] As such, it has been said 'that the fundamental legislative institutions of Classical Athens had a democratic representative character in that a subset of the polity was acting on behalf of the larger demos with the de facto authorization of the latter.'[85] Participatory democracy in the Roman Republic became meaningless when the Republic conquered so much of Europe that 'an increasing and ultimately overwhelming number of citizens were, as a practical matter, denied the opportunity to participate in the citizen assemblies at the center of the Roman system of government.'[86] Thus, in the Roman Republic magistrates were later chosen by election but their electors were chosen by lot: the *centuriated* assemblies.[87] The Italian communes of the Middle Ages used lots to select magistrates. The ruling councils in the re-emergent republics of Northern Italy, known as *podestà*, were frequently chosen from a pool of candidates selected from a larger ruling council by lots.[88]

Lots were considered superior to elections because they eliminated the division between citizens resulting from competitive elections and removed personal and direct interests from influencing the outcome.[89] Montesquieu suggested that 'selection by lot is in the nature of democracy, selection by choice is in the nature of

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[84] Landemore, *supra* n. 12, at 67.
[85] *Ibid.*, at 66.
[86] Dahl (2015), *supra* n. 3, at Loc. 500.
[87] Manin, *supra* n. 13, at 47.
[88] Held, *supra* n. 3, at 33.
[89] Manin, *supra* n. 13, at 52-54.

aristocracy.'[90] Rousseau also endorsed selection by lot for a democracy 'because it allocates magistracies without the intervention of a particular will.'[91]

Importantly, as well as adopting sortition, these pre-modern democracies ensured the rotation of office holders. In ancient Athens, a council or *boule* of 500 randomly selected citizens was 'a linchpin institution that was given control of the vital agenda-setting functions'[92] and its members would serve for a term of one month on a rotational basis. A subset of fifty members of the council, the *nomethetai*, again appointed by lot, reviewed and revised existing laws at the direction of the Assembly; and its president would hold office for only one day.[93] Likewise, in Medieval Florence, the city-republic adopted provisions requiring rotation in office -- 'the *divieti*'.[94] Rotation prevented the same person or family from successively exercising authority and the principle of rotation was perceived to be 'a key feature of democratic culture.'[95] Even though drawing lots and rotating assembly membership was considered less

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[90] Montesquieu, *Spirit of the Laws* [1748], Book II, ch. 2, in Manin, *supra* n. 13, at 70-71.
[91] Manin, *supra* n. 13, at 77.
[92] Josiah Ober, *Democracy and Knowledge: Innovation and Learning in Classical Athens* (Princeton University Press, Princeton, 2008) 142. ISBN: 9780691133478. *See also*, Landemore, *supra* n. 12, at 67.
[93] *See, generally*, Held, *supra* n. 3, at 18, 19. The principle of rotation was perceived to be 'a key feature of democratic culture.' Manin, *supra* n. 13, at 28 n 51.
[94] Manin, *supra* n. 13, at 55.
[95] *Ibid.*, at 28.

aristocratic and more egalitarian than voting in elections, it should be noted that only elite males were eligible for selection.

In any event, the use of lots suddenly and precipitously declined in the 17th Century, particularly after the French and American revolutions. In both America and France, election was unhesitatingly adopted as the preferred method of selection, even though it was long associated with the aristocratic tendencies of government. The adoption of elections to select representatives with the development of representative democracy embedded the inherently elitist nature of representative governance.

b. Imperfect Election Mechanisms

While elections ineluctably lead to the creation of elites, the *democratic* illegitimacy of elected governments is compounded by the nature of modern election mechanisms. There are abundant electoral mechanisms utilized in implementing 'representative democracy,' including first past-the-post voting, proportional representation, block voting, alternative preferential voting, a run-off system, party proportional systems, and single transferable and single non-transferable voting.[96] In a first past-the-post or a plurality voting system, each voter in a constituency gets a single vote and whomever gets the most votes wins (a plurality but not necessarily a majority).

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[96] *See, generally*, European Commission for Democracy Through Law (Venice Commission), *Report on Electoral Systems: Overview of Available Solutions and Selection Criteria* (Study no. 250/2003, CDL-AD(2004)003, 12-13 December 2003). https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2004)003-e.

With proportional representation, the proportion of winning representatives reflects the proportion of votes received. In block voting, each voter has as many votes as there are candidates and the candidates with the most votes win. With alternative preferential voting, voters rank candidates in order of preference, and if no candidate achieves an absolute majority of first-preferences, votes are reallocated from other candidates beginning with the candidate with the lowest number of first preferences until one candidate has more than over 50 per cent of the votes. In a run-off system, if no candidate wins more than 50 per cent of the vote a second election is held between the first and second vote winners. With party proportional systems, voters vote for a party and the parties receive seats in proportion to their overall share of the vote. In single transferable voting, voters rank candidates in order of preference in multi-member constituencies and candidates must exceed a 'quota' of first-preference votes and, as in alternative voting, the votes of those who do not reach the quota are distributed in order of preference until other candidates reach the quota and all the seats are filled. Finally, with single non-transferable voting, in electing candidates in a multi-member constituency, voters have only one vote and the candidates with the highest vote tallies take the seats, as in first-past-the-post voting.[97]

There is considerable debate about which electoral system is fairest and satisfies 'democratic' ideals.[98] All voting systems, except for

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[97] *Ibid.*
[98] Dahl (2015), *supra* n. 3, at Loc. 1537.

elections based on 'pure' proportional representation, distort the actual voting outcome.[99] The United States, India, Canada and the United Kingdom adopt what is arguably the *least* fair, but *most* effective, election method: first-past-the-post or plurality elections. First-past-the post systems embed the two-party system, concentrating seats in the hands of the two major parties, enabling the consistent formation of stable governments. At the same time, plurality voting excludes minor parties from 'fair' representation, and thus does not reflect voting outcomes. For instance, in the 2019 British general election, the Green Party, Liberal Democrats and Brexit Party received 16 per cent (5.2 million) of votes between them, yet they shared just 2 per cent of seats, and the liberal party lost a seat despite increasing their vote by 4 per cent.[100] The representation of women and minorities is also diminished in plurality voting systems. Almost twice as many women are elected in proportional representation systems than in first-past-the post systems.[101] Although proportional representation 'tends towards a more faithful representation of the various political forces,'[102] it is frequently criticised for resulting in the fragmentation of representative parties and often makes it near-impossible to form stable parliamentary majorities.[103] In any event, almost every electoral mechanism

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[99] Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Material and Commentary* (Oxford University Press, Oxford, 3rd ed., 2013) 742. ISBN: 978-0-19-873374-4.
[100] Make Votes Matter, *First Past the Post* (Website). https://www.makevotesmatter.org.uk/first-past-the-post.
[101] ACE Electoral Knowledge Network, *supra* n. 76.
[102] *Ibid*, at para. 17.
[103] *Ibid.*, at para. 15.

potentially utilized to select representatives is imperfect and the 'representativeness' of the elected candidates is likely limited.[104] The imperfect nature of electoral systems detract from the minimal democratic legitimacy conferred by representative democracy.

c. Election Integrity

Not only are election processes flawed but the integrity of elections is often challenged, and their credibility questioned.[105] An election without integrity can only provide a 'veneer of democratic legitimacy'[106] and only elections with integrity can confer a degree of *democratic* legitimacy. Elections, like referenda, 'are complex processes' and irregularities and manipulation can occur across the electoral cycle from the implementation of electoral regulations, voter registration, campaigning, early and absentee processes and conduct, actual election day voting, the vote count and the legal review of complaints concerning the conduct of the election.[107] Election manipulation can result from voter and candidate intimidation, repression of opposition parties, pre- and post-election violence, low turnout, barriers to voting, misinformation and fake news, vote buying, and the corruption of purportedly independent

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[104] *Ibid.* *See also*, Dahl (2015), *supra* n. 3, at Loc. 2054.
[105] GCEDS/Kofi Annan Foundation, 'Deepening Democracy: A Strategy for Improving the Integrity of Elections Worldwide' (Report of the Global Commission on Elections, Democracy and Security, 26 November 2012) 20. https://www.idea. int/sites/default/files/publications/deepening-democracy.pdf.
[106] *Ibid.*, at 12.
[107] Carolien van Ham and Staffan I. Lindberg, 'From Sticks to Carrots: Electoral Manipulation in Africa, 1986–2012', (2015) 50(3) *Government and Opposition*, 521, 525. DOI: 10.1017/gov.2015.6.

election authorities.[108] Perceptions that elections lack integrity and credibility or are otherwise rigged, manipulated or unfair, [109] irrespective of the validity of those perceptions, reduces public trust in representative democracy and the electoral process, and 'cannot provide the winners with legitimacy, the losers with security and the public with confidence in their leaders and institutions.'[110]

An election with integrity is 'any election that is based on the democratic principles of universal suffrage and political equality.'[111] One of the fundamental threats to election integrity is the political inequality resulting from 'uncontrolled, undisclosed and opaque political finance.' [112] The opportunity for ordinary citizens to participate in representative democracy and to influence decision-making is largely dependent on their ability to mobilize resources; primarily financial resources. Political participation in a representative democracy depends largely on the dissemination of information, which is expensive. The growing professionalization of politics referred to previously,

> … has been accompanied by an astronomical increase in the cost of getting elected [and candidates] need more and different resources to occupy their positions [and candidates]

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[108] Holly Ann Garnett, Toby S. James and Madison MacGregor, 'Electoral Integrity Global Report 2019-2021' (The Electoral Integrity Project, May 2022) 4. https://www.electoralintegrityproject.com/globalreport2019-2021. *See also*, van Ham and Lindberg, *supra* n. 107, at 525.
[109] Pippa Norris, Holly Ann Garnett and Max Grömping, 'The paranoid style of American elections: explaining perceptions of electoral integrity in an age of populism', (2020) 30(1) *Journal of Elections, Public Opinion and Parties* 105, 121. DOI: 10.1080/17457289.2019.1593181.
[110] Kofi Annan, 'Foreword', in Van Reybrouck, *supra* n. 65, at 9.
[111] GCEDS/Kofi Annan Foundation, *supra* n. at 105, 12.
[112] *Ibid.*, at 12.

> find it difficult to resist the temptation of obtaining these resources by shifting to public funding and/or involuntary contributions (not to mention corruption), thereby depriving ordinary citizens of one of their most elementary sanctioning capacities.[113]

Growing wealth inequality, together with campaign financing laws that inherently favour the wealthy, enables only a small economic elite to participate in representative democracy.[114] Publicly financed campaigns and the regulation of election expenditure reduces the advantages of wealth in elections, however such regulation has been confronted with many challenges[115] and are largely ineffectual.[116] In a market-capitalist economy 'citizens who are economically unequal are unlikely to be politically equal' and, instead, 'full political equality is impossible to achieve.'[117] Indeed, the growing professionalism of election campaigns has led to them being described as 'media-corporate spectacles'[118] and 'a beauty contest for ugly people.'[119] This increased cynicism further reduces the credibility of elections and their perceived integrity.

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[113] Philippe Schmitter, 'Diagnosing and designing democracy in Europe', in Sonia Alonso, John Keane, and Wolfgang Merkel (eds), *The Future of Representative Democracy* (Cambridge University Press, Cambridge, 2011) 191-211, at 194. ISBN: 978-1-107-00356-92011.
[114] *See, generally,* Thomas Piketty, *Capital in the Twenty-First Century* (Arthur Goldhammer (trans.)) (Belknap/Harvard University Press, Cambridge, Mass., 2014). ISBN: 9780674430006.
[115] *See Buckley v. Valeo*, 424 U.S. 1 (1976), and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
[116] Manin, *supra* n. 13, at 145.
[117] Dahl (2015), *supra* n. 3, at Loc. 2349.
[118] Lars Mensel, 'Dissatisfaction makes me hopeful', interview with Michael Hardt, *The European* (15 April 2013) (quoted in Van Reybrouck, *supra* n. 65, at 53-54).
[119] Van Reybrouck, *supra* n. 65, at 53-54.

The modern nature of elections in representative democracy has been described as 'post-democracy':

> Under this model, while elections certainly exist and can change governments, public electoral debate is a tightly controlled spectacle, managed by rival teams of professionals expert in the techniques of persuasion, and considering a small range of issues selected by those teams. The mass of citizens plays a passive, quiescent, even apathetic part, responding only to the signals given them. Behind the spectacle of the electoral game, politics is really shaped in private by interaction between elected governments and elites that overwhelmingly represent business interests.[120]

The spectacle of modern election campaigns reduces the integrity of elections and the conferral of democratic legitimacy in a contemporary representative democracy.

Finally, here, elections favour incumbent governments. Incumbent governments have a particular advantage in controlling and potentially manipulating elections: since they control the apparatus of the state and state finances, they can utilize state resources for their own benefit.[121] Incumbent governments often also control the election process itself enabling manipulation. For instance, single-member voting districts, prevalent in the largest democracies, are readily susceptible to boundary manipulation by incumbent governments. 'Gerrymandering' delineates electorates to result in significant and unfair disparities in size thereby discounting the value

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[120] Colin Crouch, *Post-Democracy* (Polity Press, Cambridge, 2004) 4. ISBN: 978-0-745-63315-2.
[121] GCEDS/Kofi Annan Foundation, *supra* n. 105, at 37.

of votes in certain districts and inflating others, irrespective of the election method.[122]

6.5 The 'Crisis' in Representative Democracy

The limitations on participation by ordinary citizens necessarily imposed in a representative democracy, the elite capture of political authority, and the imperfect nature of representative elections have precipitated a crisis in representative democracy. The 'crisis in representation'[123] and concomitant 'crisis in democracy'[124] is reflected in political disengagement and apathy, distrust in political institutions and the alienation of a large segment of the population.

Voter turnout, the principal indicator of political participation and the most direct measure of political engagement in a representative democracy,[125] has been progressively declining for decades.[126] In Western states, with the exception of the United States (which already had a low turnout),[127] voter turnout has declined from approximately 90 per cent to 60 per cent over the last 50 years.[128] This decline in participation reflects 'political disenchantment' and

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[122] Held, *supra* n. 3, at Loc. 2054.
[123] PACE, *Democracy in Europe: crisis and perspectives*, Res. 1746 (23 June 2010), paras 1, 2.5. https://pace.coe.int/en/files/17882.
[124] Landemore, *supra* n. 12, at (viii); PACE, Res. 1746, *supra* n. 123, at paras 1, 2.5.
[125] Simon Tormey, *The End of Representative Politics* (Polity Press, Kindle ed., Cambridge, 2015) 17. ISBN: 978-0-7456-9050-6.
[126] Dietlind Stolle and Marc Hooghe, 'Inaccurate, Exceptional, One-Sided or Irrelevant? The Debate about the Alleged Decline of Civic Engagement and Social Capital in Western Societies', (2004) 35 *British Journal of Political Science* 149, 157. DOI:10.1017/S0007123405000074.
[127] Landemore, *supra* n. 12, at 27 n2.
[128] Tormey, *supra* n. 125, at 17.

an 'indifference to political affairs.'[129] Political parties as vehicles of mass participation are also in decline reflecting citizens abandonment of political participation.[130] Party membership is in 'freefall'[131] having fallen from around 25 to 30 per cent of the electorate to less than 2 to 3 per cent in many European countries and approximately 1 per cent in Australia.[132] The decline in membership of political parties is symptomatic of disengagement with representative politics[133] and has led to a vicious cycle of disengagement: declining membership leads to a less responsive party thereby reducing the policy choices between parties leading to a further decline in membership.[134]

The distrust of politicians and political institutions, indeed an active and vehement dislike of the political class, is another indicator of the crisis in representative democracy. Politicians are now regarded as 'figure[s] of contempt.'[135] Research suggests that politicians are one of the least trusted segments of society.[136] Sixty-nine per cent of Americans have a negative view of their congressional representatives.[137] Consequently, trust in national governments is

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[129] Karl-Peter Sommermann, 'Citizen Participation in Multi-Level Democracies: An Introduction', in Cristina Fraenkel-Haeberle, Sabine Kropp, Francesco Palermo and Karl-Peter Sommermann (eds), *Citizen Participation in Multi-Level Democracies* (Brill Nijhoff, Leiden/Boston, 2015) 1-14, at 5. ISBN: 97890042879 38.
[130] Landemore, *supra* n. 12, at 27.
[131] Tormey, *supra* n. 125, at 18.
[132] *Ibid*., at 19.
[133] *Ibid*., at 27.
[134] Landemore, *supra* n. 12, at 20.
[135] Tormey, *supra* n. 125, at 22-23.
[136] *Ibid*., at 20.
[137] Van Reybrouck, *supra* n. 65, at 9.

also low, with 70 per cent of Europeans tending not to trust their national government.[138] And it is even lower in the United States with less than 20 per cent of Americans trusting the federal government to 'do the right thing most of the time' (it was 75 per cent in 1958).[139] Political parties are likewise perceived as untrustworthy with more than 80 per cent of Europeans distrusting political parties.[140] A significant segment of the population feel that their purported 'representatives' are not representative and political processes do not work for them. The crisis has led to prognostications about the end of representative democracy and hypotheses of 'post-representative democracy.'[141]

The limited opportunity for citizens to participate in decision making, the capture of law-making assemblies by an elite and negative perceptions pertaining to the credibility of election outcomes has led to a significant segment of society feeling alienated from mainstream society and excluded from political processes.[142] '[P]eople divorced from community, occupation and association, are first and foremost among the supporters of extremism.'[143] Alienation, powerlessness and frustration, and a poorly functioning political system, result in

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[138] Mary Kaldor, Sabine Selchow, Sean Deel, and Tamsin Murray-Leach, 'The 'bubbling up' of subterranean politics in Europe' (Civil Society and Human Security Research Unit, LSE, London, 2012) 24. http://eprints.lse.ac.uk/44873.
[139] Van Reybrouck, *supra* n. 65, at 9.
[140] Kaldor, Selchow, and Deel, *supra* n. 138, at 24.
[141] Tormey, *supra* n. 125, at 140; *see also* Crouch, *supra* n. 120, at 4.
[142] *Ibid.*
[143] William Kornhauser, *The Politics of Mass Society* (Routledge, New York, 2017 [1959]) 73. eBook ISBN: 9781315133980. *See also*, Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster, New York, 2000) 338. ISBN: 9780684832838.

social exclusion. Political alienation has contributed to the rise of populism and the popularity of 'far-right' parties in Europe.

The integrity of US elections has been increasingly questioned since President Trump's election in 2016 (despite losing the popular vote) and reinforced by the evident and growing dissatisfaction with the 2020 US election promoted by the losing President's false narratives, and outright lies and deceit repeated *ad nauseum* by his underlings, media lackeys and supporters. Even though the results of the 2020 election have been independently validated, President Trump's false narrative that the election was rigged has been at least partly responsible for reducing American's trust in their democracy and election process -- a symptom of the crisis in representative democracy. Indeed, the reduced trust in representative democracy has led to increasing and self-perpetuating populism. Increasing populism is at least partly a consequence of a disillusionment with elections.[144] At the same time, populists 'are drivers of a belief in unfair elections' thereby exacerbating a distrust of elections and further increasing populist support.[145]

The dependence on representative democracy to democratically legitimize governance has contributed to 'democratic backsliding'

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[144] Claudia Chwalisz, *The Populist Signal: Why Politics and Democracy Need to Change* (Rowman & Littlefield International, Kindle ed., London, 2015) 15-31. ISBN: 978-1-78348-543-7.
[145] Norris, Garnett and Grömping, *supra* n. 109, at 121.

and the 'third-wave of autocratization'[146] of the last decade.[147] This 'backsliding' is related to the growth of populism, and disenchantment and disillusionment with elected representatives. It is exemplified by populist leaders such as Prime Minister Viktor Orban of Hungary, India's Prime Minister Narendra Modi and El Salvador's President Nayib Bukele. These putative autocrats were elected but once in power utilized their incumbency to manipulate the political environment to ensure future election victories. Their election victories conferred an element of democratic legitimacy but undermined democratic norms.[148]

6.6 Conclusion

The right to democratic governance reflected in representative democracy is a right to *indirect* democracy. The indirect democracy reflected in representative governance facilitates only limited participation by the populous and singular representation; and the constitutional and electoral mechanisms utilized to select representatives are far from perfect. Much of the criticism of representative government is that it fails to enable greater *direct* civic participation. In a contemporary representative democracy, participation by ordinary citizens is limited and instead 'the democratic credentials of public decisions still come principally from

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[146] Spencer Bokat-Lindell, 'Is Liberal Democracy Dying?' *New York Times* (28 September 2022). https://www.nytimes.com/2022/09/28/opinion/italy-meloni-democracy-authoritarianism.html.
[147] *Ibid.*
[148] *Ibid.*

there having been made by elected elites.'[149] Citizens frequently feel excluded from the decision-making processes of representative governance while 'political personnel form an elite separate from them.'[150] Political decision-making is restricted to career politicians influence by the elite segment of society. Only the moneyed elite has the opportunity to influence the political agenda. Thus, elected representatives are often far from 'representative.'

The narrow opportunity for citizens to participate, the delegation of political authority to an elite and the negative perceptions pertaining to the credibility of election outcomes has led to the political alienation of a significant segment of society.[151] This political alienation has precipitated a crisis in representative democracy and the democratic legitimacy conferred by representative democracy. The crisis in representative democracy is manifested in the decreasing participation in politics and declining trust in politicians and political institutions. Declining participation and a distrust in political institutions means representative democracy and elections are a poor manifestation of the consent of those subject to coercive authority. Accordingly, the conferral of *democratic* legitimacy on elected governments in a representative democracy is limited.

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[149] Landemore, *supra* n. 12, at 5.
[150] *Ibid.*, at 2.
[151] Held, *supra* n. 3, at Loc. 2054.

PART IV

THE FUTURE IS NOW: DECENTRALIZATION, PARTICIPATION & HUMAN RIGHTS

7. LEGITIMACY BY LOCALIZATION

7.1 Introduction

The evolution of international law has resulted in the emergence of the democratic entitlement and the inclusion of an element of democratic legitimacy in state and government recognition doctrines. A putatively democratic process to ascertain the population's consent to a change of territorial status is a prerequisite to state recognition but is not itself sufficient; the parent state's consent remains definitive. In any event, the democratic legitimacy conferred by the outcome of referenda is limited: the results are often questionable and generally only concern the status of territory, not its delineation. Furthermore, the evolving state recognition doctrine applies only to *new* seceding states. As mentioned several times before, nearly all existing states and their exclusive jurisdiction over a territory were recognized and legitimated in international law as a result of the effective control of territory attained by violence, fraud, subjugation and dispossession. The democratic legitimacy of existing states is limited. Likewise, the democratic legitimacy conferred by representative democracy on putatively democratic governments is far from perfect.

This *Chapter 7* contends that, although imperfect, local authorities are potentially the most democratically legitimate form of territorial

governance.[1] Local governance is the level of political authority closest to the people and encourages active political participation and involvement, a fundamental element of democratic governance. The degree of self-government enjoyed by local authorities can be regarded as a key element of genuine democracy. This *Chapter* will also establish that state governments have recognized the legitimizing virtues of local government and have increasingly implemented policies of political decentralization. Political decentralization is essential for localizing democracy[2] and this *Chapter* will also demonstrate that international organizations have endorsed and promoted local governance to 'deepen' democracy.[3] Finally, this *Chapter* will confirm that localization improves the protection and implementation of human rights norms thereby further enhancing state and government legitimacy.

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[1] As noted, 'local authorities', like 'local governments', 'municipalities' and 'cities' are defined in accordance with the *Global Charter Agenda for Human Rights,* as 'a local government of any size: regions, urban agglomerations, metropolises, municipalities and other local authorities freely governed.' UCLG, *Global Charter-Agenda for Human Rights in the City* (Florence, Italy, 11 December 2011) ('Global Charter-Agenda'). https://www.uclg-cisdp.org/sites/default/files/UCLG_Global_Charter_Agenda_HR_City_0.pdf.

[2] HRC, 'Role of Local Government in the Promotion and Protection of Human Rights' (Final Report of the Human Rights Council Advisory Committee, UN Doc. A/HRC/30/49, 7 August 2015). https://digitallibrary.un.org/ record/848739?ln=en.

[3] Derick W. Brinkerhoff and Omar Azfar, 'Decentralization and Community Empowerment: Does Community Empowerment Deepen Democracy and Improve Service Delivery?' (RTI International, Paper for US Agency for International Development, Office of Democracy and Governance, Washington, D.C., October 2006). https://pdf.usaid.gov/pdf_docs/PNAD H325.pdf.

7.2 The Democratic Legitimacy of Local Government

The democratic legitimacy of a political entity depends on the consent of the populous.[4] As discussed in *Chapter 5*, the often-questionable results of referenda are frequently not a fair reflection of the will and consent of the population and, generally, only concern the status of pre-existing and imposed territory. More importantly, the theoretically impermeable and coercive borders and their delineation make the democratic legitimacy of states inherently flawed. Local governments, like states, are generally territorially delineated but, unlike states, citizens are for the most part *formally* free to both exit and enter local government jurisdictions and therefore their consent to a local political authority is more readily ascertainable. Political decentralization to the local level will provide the populous with greater choice in selecting their governing political authority and, at the same time, enable greater access to governance. Just as importantly, local government facilitates greater participation and involvement. It also emphasizes the important role of place and its connection to people.

a. The Democratic Virtues of Localization

Local governments have the 'singular political potential' to 'turn globalization from a top-down governance project into a radically

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[4] Arash Abizadeh, 'Democratic Theory and Border Coercion,' (2008) 36(1) *Political Theory* 37, 45-46. http://www.jstor.org/stable/20452610. *See also*, Arash Abizadeh, On the Demos and its Kin: Democracy, Nationality and the Boundary Problem,' (2012) 106(4) *American Political Science Review* 867–82. DOI: 10.1017/S0003055412000421.

democratic project.'[5] In doing so, local governance can *democratically* legitimize the state. Indeed, local government is the 'institutional embodiment of local democracy.'[6] Local governance can alleviate the inherently undemocratic nature of state governance, that is largely the result of exclusive territorial sovereignty delineated by fixed, 'non-porous' borders. Although local governments are generally territorially delineated, and it may be 'impossible to arrive at a self-constituted people,'[7] an individual has a greater ability to freely consent to the exercise of power by a local authority.

Citizens are for the most part formally free to both exit and enter local government jurisdictions and consent to the governing institutions. Local government thus 'offer[s] more realistic options for voting with one's feet.'[8] While this freedom to choose to submit to a particular local government authority is restricted by socio-economic factors and choice is limited by affordability, all else being equal, local government has the potential to better reflect individual preferences. Decentralization to the local level enables citizens to 'define interests and form identities on the basis of local concerns, and organisations such as parties and social movements operate

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[5] Yishai Blank, The City and the World', (2006) 3 *Columbia Journal of Transnational Law* 868, 928 ('Blank (2006)'). https://ssrn.com/abstract=1020141.
[6] Lawrence Pratchett, 'Local autonomy, local democracy and the "New Localism"', (2004) 52 *Political Studies* 358-375. https://doi.org/10.1111/j.1467-9248.2004.00484.x.
[7] Sofia Näsström, 'The Legitimacy of the People', (2007) 35(5) *Political Theory* 624, 626. https://www.jstor.org/stable/20452587.
[8] Heather K. Gerken, 'Foreword: Federalism All The Way Down', (2010) 124(1) *Harvard Law Review* 4, 23. https://harvardlawreview.org/2010/11/federalism-all-the-way-down/.

locally and compete over local issues.' [9] Local government jurisdictions can therefore replicate 'communities of interest.' [10] Equally important, local government boundaries are relatively flexible and comparatively easy to redraw.[11]

Local governance is not perfect, and like other levels of government, it may be subject to elite capture and thus controlled by self-serving interests and dominated by bureaucrats. [12] However, local governments are more broadly democratic than state or regional jurisdictions because local governments are the political authorities closest to the people, and thus, provide citizens with greater proximity and therefore access to governance.[13]

> Smaller jurisdictions are often said to foster and reflect a greater sense of community among its citizens than do larger jurisdictions [...] smaller jurisdictions increase the quality of democratic interaction and incline individuals more

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[9] Aaron Schneider, 'Who gets what from whom? The impact of decentralisation on tax capacity and social spending', (2006) 44(3) *Commonwealth and Comparative Politics* 344, 350. DOI: 10.1080/14662040600997122. *See also*, Roberta Ryan and Ronald Woods, 'Decentralisation and subsidiarity: Concepts and frameworks for emerging economies' (The Forum of Federations, Occasional Paper Series No. 15, 2015) 10. https://www.uts.edu.au/sites/ default/files/decentralisation_subsidiarity.pdf.

[10] *Ibid.*

[11] Yishai Blank, 'International legal personality/subjectivity of cities', in Helmut Philipp Aust and Janne E. Nijman (eds), *Research Handbook on International Law and Cities* (Edward Elgar Publishing, Cheltenham, UK/Northampton, Mass., 2022) ('Blank (2022)') 103-120, at 106. ISBN: 978 1 0353 0994 8. http://dx.doi.org/10.4337/9781788973281.

[12] *Ibid.*, at 114.

[13] Daniel Halberstam, 'Federalism: Theory, Policy, Law,' in Michael Rosenfeld and Andras Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012) 576-608, at 590. ISBN: 978-0-19-957861-0. http: //dx.doi.org/10.2139/ssrn.1924939.

> charitably toward their fellow citizens and to public engagement.[14]

Because the territory is smaller, local governance increases citizens voice and facilitates more active involvement in policy formulation and implementation.[15] Local democracy encourages more people to get involved in politics, enhancing participation[16] and increasing political competition.[17] The democratic virtues of local government and increased participation have been acknowledged for centuries. John Stuart Mill and Alexis de Tocqueville both recognized local jurisdictions as a training ground for democracy with an important role in educating future social activists.[18]

Local governance also improves accountability, transparency and responsiveness, and reduces abuse of power and corruption.[19] Increased accountability instils a 'greater sense of ownership among the citizenry and therefore make[s] projects more sustainable'.[20] Local governance also enables a diffusion of political authority within society[21] and 'disrupt[s] the monopoly often enjoyed by

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[14] *Ibid.*
[15] Soumyadip Chattopadhyay, 'Decentralised provision of public services in developing countries: A review of theoretical discourses and empirical evidence', (2013) 43(3) *Social Change* 421, 426. https://doi.org/10.1177/0049085713494300.
[16] John Gaventa and Gregory Barrett, 'Mapping the Outcomes of Citizen Engagement', (2012) 40(12) *World Development* 2399-2410. ISSN 0305-750X. https://doi.org/10.1016/j.worlddev.2012.05.014.
[17] Jean-Paul Faguet, 'Decentralization and Governance', (2014) 53 *World Development* 2-13. https://doi.org/10.1016/j.worlddev.2013.01.002.
[18] Jim Chandler, 'A Rationale for Local Government', (2010) 36(1) *Local Government Studies* 5, 6-7. DOI: 10.1080/03003930903445657.
[19] *Ibid.*
[20] Chattopadhyay, *supra* n. 15, at 426.
[21] Ryan and Woods, *supra* n. 9, at 10.

central governments over crucial public affairs.'[22] In doing so, local authorities restrain central power and provide additional protection against any authoritarian tendencies of the state.[23] UN Habitat has emphasised the importance of local democracy in combating radicalism and terrorism, as well as authoritarianism.[24] Indeed, '[a] devolved world of local democracies is preferable to a world of large pseudo-democracies.'[25]

There are contrasting opinions as to whether local governance is best placed to protect minority interests and '[t]he debate whether localities better protect minorities […] or leaves them at the mercy of local majorities is going on in earnest, with empirical and historical data pointing to contradictory conclusions.'[26] There is no doubt the potential in a local jurisdiction for a local majority to oppress the minority. However, autonomous local governments best reflect the heterogeneity and plurality of the people[27] and subsidiarity can mitigate cultural, national and ethnic tensions.[28] Importantly, local

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[22] Yishai Blank, 'Urban Legal Autonomy and (de)Globalization', (2020) 79(3) *Raisons politiques* ('Blank (2020)') 57, para. 29. https://doi.org/10.3917/rai.079.0057.
[23] Cheryl Saunders, 'Constitutional Design: Options for Decentralizing Power' (Constitutional Transformation Network, University of Melbourne, Policy Paper No. 2, March 2018) 8. https://law.unimelb.edu.au/__data/assets/pdf_file/0006/2698854/CTN-Policy-Paper-2-Decentralisation-Approaches-Feb-18.pdf.
[24] Blank (2006), *supra* n. 5, at 903.
[25] Parag Khanna, *Connectography: Mapping the Global Network Revolution* (Hachette, London, 2016) 68. ISBN: 1474604269.
[26] *Ibid.,* at 115-16.
[27] Blank (2006), *supra* n. 5, at 889.
[28] Yishai Blank, 'Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance', (2010) 37 *Fordham Urban Law Journal* ('Blank (2010)') 509, 546. https://ir.lawnet.fordham.edu/ulj/vol37/iss2/1.

governance has 'the potential to counter the dominance of national majorities.'[29] Local democracy supports diversity and difference[30] and enables greater control of resources to subnational minorities with limited power over issues that affect them directly.[31]

> Selfgoverning political sub-national units, […] can allow various groups -- religious, ethnic, racial, cultural, and linguistic -- to pursue their own goals and advance their particular values and interests, while still enabling them to be a part of a larger polity.

National minorities may be local majorities and they can exercise local power themselves and 'amplify the voices of marginalized communities and engender national and global conversations.'[32]

b. Localities Reflects the Importance of Place and Identity

Even though it has been suggested that 'globalisation' erodes 'self-contained spatial communities' and signifies the demise of local government,[33] territoriality remains 'highly significant and unique for the purposes of community building.'[34] With Globalization and increasing urbanization, identification with the state is declining and, today, people are exhibiting a stronger identification with their city or locality.[35] Local governments create, build and maintain communities and in doing so they, like states, reflect our identity and

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[29] *Ibid.,* at 116.
[30] Ryan and Woods, *supra* n. 9, at 10.
[31] Faguet, *supra* n. 17, at 2.
[32] Blank (2020), *supra* n. 22, at para. 29.
[33] Chandler, *supra* n. 18, at 10.
[34] Blank (2010), *supra* n. 28, at 554.
[35] *Ibid.*, at 514-15.

'construct it, enhance it, and maintain it.'[36] A common identification and a sense of belonging to a city, locality or place enhances democratic legitimacy because the populous is more likely to actively participate in their own community's governance.

Where an individual lives and works is important and is directly relevant to an individual's life choices.[37] It is at the local level that people reside, work, form social connections, interact with the geography of place, and establish a people-to-place connection.

> Local governments may be identified with a community in the sense of a community being a group of people who share an attitude of *Gemeinschaft* towards each other and a common loyalty to a place.[38]

People have an interest in the spatial environment where they live and work and the need for common services.

Over the last decade there has been an increasing interest in territorial governance and a multitude of published monographs promoting an alternative basis for the legitimation of territorial governance. The most prominent are Margaret Moore's *A Political Theory of Territory* (2015), Anna Stilz's *Territorial Sovereignty: A Philosophical Exploration* (2019), and Paulina Ochoa Espejo's *On Borders* (2020). Each book promotes various aspects of territorial governance and a variety of alternative mechanisms to legitimize territorial governance. While the authors all have a different view of territory

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[36] *Ibid.*, at 539.
[37] Chandler, *supra* n. 18, at 10.
[38] *Ibid.*

and territorial governance, the importance of residency, place and their social connection to people is a common theme.

Moore emphasises the 'moral importance' 'that individuals have control over the collective conditions of their lives, and control in the relationships that give meaning to their lives, including their relationships with each other and with place.'[39] Moore argues that 'people acquire moral residency rights through living in a place and having relationships, commitments, and attachments which are connected to residing there.' [40] Like Moore, Stilz's 'right of occupancy' recognizes the importance of place.

> They are where social relationships develop; they are also created and maintained by those social relationships. [...] Places are socialized spaces and all socialized human beings will have developed their character and capacities within places.[41]

While Stilz provides a qualified justification for the existing state-centric model, she argues that the 'first core value' that is served by 'self-governing territorial units' is the *right of occupancy* to protect an individual's life plans and projects.[42]

> Occupancy is a right to reside permanently in a particular geographical space and to make use of that area for social, cultural, and economic practices. [...] occupancy rights are

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[39] Margaret Moore, *A Political Theory of Territory* (Oxford University Press, New York, 2015) 6. ISBN: 9780190222246. DOI: 10.1093/acprof:oso/9780190222246.001.0001.
[40] *Ibid*., at 37.
[41] Clare Heyward, 'Territory, Self Determination and Climate Change: Reflections on Anna Stilz's "Territorial sovereignty: A Philosophical Exploration", (2021) 52 *Journal of Social Philosophy* 24, 25. https://doi.org/10.1111/josp.12378.
[42] Anna Stilz, 'Territorial sovereignty: A brief introduction', (2021) 52 *Journal of Social Philosophy* 6, 6. https://doi.org/10.1111/josp.12404.

> grounded in the role that geographical places play in individuals' central life plans and in their interest in controlling and revising their commitments to these plans.[43]

These occupancy rights are based on an individual's interest in inhabiting the localities where they have built their lives.[44] The territory subject to the right of occupancy 'center on her primary place of residence and extend out to those places where she has important projects, associations, and connections' -- the local area.[45]

Place is also an important focus of Ochoa Espejo's *On Borders.* Ochoa Espejo has developed her 'watershed model' in which 'borders are justified when they sustain place specific duties.'[46] These place specific duties 'are a special obligation arising from a person-to-place relation'[47] and they are grounded in 'proximity in a place.'[48] Ochoa Espejo emphasises the importance of the local in providing the following example of place specific duties:

> Imagine a concrete place: a suburban street. Picture now the last three houses in a narrow cul de sac. My house faces Kim's, and Rose's house is perpendicular to ours, topping the street's dead end. After a winter storm, the snow accumulates in our driveways; if either Kim or I push the snow from our driveways toward the street, Rose cannot open her gate, which opens to the outside. So to let Rose out, both Kim and I have to make sure to shovel the snow away from the curve. Fulfilling this duty, moreover, requires

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[43] *Ibid.*
[44] Anna Stilz, *Territorial Sovereignty: A Philosophical Exploration* (Oxford University Press, Oxford, 2019) 55. ISBN: 978-0-19-883353-6.
[45] *Ibid.*
[46] Paulina Ochoa Espejo, *On Borders* (Oxford University Press, New York, NY, 2020) 295. ISBN: 9780190074203.
[47] *Ibid.,* at 234.
[48] *Ibid.,* at 235.

> coordination. When there is a lot of snow, I cannot push the snow in the right direction unless Kim clears out his driveway before I clear mine. So I need Kim to do his duty if I want to discharge my obligation. As in this simplified example, most concrete places generate networks of overlapping duties due to a combination of topography, climate, flora, fauna, and human relations, and these duties require coordinated action to be discharged. This is what grounds place-specific duties: proximity in a place.

Thus, 'place-specific duties' are based on 'proximity in a place' and can be satisfied by local cooperation schemes: local government.[49] Territorial governance in the watershed model focusses on the interaction between the environment, built places and infrastructure, and human relations.[50] Accordingly, 'the model demands that we foster *legitimate democratic local politics*, such that everyone can have protections, wherever they happen to be.'[51]

Moore, Stilz and Ochoa Espejo focus on the importance of social relationships between people and that association to place, its environment and infrastructure. Individuals consider themselves members of a group attached to a place. This focus on a place to live evolved from a Hobbesian idea originating in *The Leviathan* that while conferring authority on the sovereign individuals retained the right to a 'place to live in'.[52] The concept was encapsulated by Walzer in *In Spheres of Justice* as a locational right to a place where

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[49] *Ibid.*
[50] Paulina Ochoa Espejo, 'Response to Gillian Brock's Review of On Borders: Territories, Legitimacy, and the Rights of Place', (2021) 19(2) *Perspectives on Politics* 581, 581. DOI:10.1017/S153759 272100102X.
[51] *Ibid.* (emphasis added).
[52] Moore, *supra* n. 39, at 37-38.

one lives and has made a life.[53] We live and form interpersonal relationships, a connection to place and develop life plans in the neighbourhood centred on our primary place of residence. Physical proximity and random interactions and connections have a significant effect on people.[54] 'Humans need a place in the world to be safe, be part of a community, and make plans.'[55] The territorial logic of governance is at its most legitimate when it is centred on our home.

7.3 State Implementation of Decentralization to Enhance Democratic Legitimacy

Since the 1970s there has been a rapid increase in decentralization and the devolution of political authority to local and sub-state governments, escalating after the Cold War.[56] Decentralization results, in varying degrees, in the transfer of power from a central government to regional or local units.[57] Today, local governance is

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[53] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, New York, 1983) 43. ISBN: 0-465-08189-4.
[54] Blank (2010), *supra* n. 28, at 554.
[55] Anna Jurkevics, 'Land Grabbing and the Perplexities of Territorial Sovereignty', (2022) 50(1) *Political Theory* 32–46. https://doi.org/10.1177/009059172110085 91.
[56] Pranab Bardhan and Dilip Mookherjee, 'The Rise of Local Governments: An Overview', in Pranab Bardhan and Dilip Mookherjee (eds), *Decentralization and Local Governance in Developing Countries: A Comparative Perspective* (The MIT Press, Kindle ed., Cambridge, Mass., 2005) 1-52, at 1-2. ISBN-13: 978-0-262-524 54-4.
[57] The focus here is on 'political decentralisation,' where 'political activities in a territorial state are conducted at the local as opposed to the national level' and 'political actors and issues are significant at the local level and at least partially independent from those at the national level.' The decentralization of political authority to the local level may be implemented in a number of ways and local autonomy may be entrenched in policy, statute or a national constitution. Schneider, *supra* n. 9, at 349-50. *See also*, Jonathan Fox and Josefina Aranda,

a global norm: '[l]ocal and Regional Governments form part of the state in all but four UN Member States (Nauru, Saint Kitts and Nevis, St. Lucia, Saint Vincent and the Grenadines and Singapore).'[58] The powers exercised by these local governments is diverse and varies greatly between countries and even within states.[59] Irrespective of the array of powers and competences transferred, decentralization provides government 'closer' to the people.[60]

The global rise of democratisation in the Post-Wall Era reflected the increased realization that citizens were the source of legitimate state authority.[61] States and governments increasingly recognized that decentralization to the local level enhances democracy and the democratic legitimacy of both the state and the government, and many states have implemented policies of local decentralization for the express purpose of deepening democracy. Decentralization has

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Decentralisation and Rural Development in Mexico: Community Participation in Oaxaca's Municipal Funds Program (Center for US-Mexican Studies, University of California, San Diego, 1996). ISBN 1-878-367-33-1. https://escholarship.org/content/qt5jk3b9gt/qt5jk3b9gt.pdf?t=lnrxy5.

[58] UCLG/GTLRG, *Local and Regional Governments: An Organized Constituency, Ready To Contribute* (2016), 8. https://www.uclg.org/sites/default/files/gtf-habitat_iii-an_organized_ constituency_ready_to_contribute.pdf.

[59] Marta Galceran Vercher, *City Networks in Global Governance: Practices, Discourses and Roles*, [Unpublished doctoral dissertation] University Pompeu Fabra (2022) 305.

[60] Mohammad Agus Yusoff, Athambawa Sarjoon and Mat Ali Hassan, 'Decentralization as a Tool for Ethnic Diversity Accommodation: A Conceptual Analysis', (2016) 9(1) *Journal of Politics and Law* 55, 58. https://doi.org/10.5539/jpl.v9n1. *See also*, Brinkerhoff and Azfar, *supra* n. 3, at 1. *See also,* Bardhan and Mookherjee, *supra* n. 56, at Loc. 28-31.

[61] Sumedh Rao, Zoe Scott, and M. Munawwar Alam, 'Decentralisation and Local Government: Topic Guide' (GSDRC, Birmingham, 3rd ed., 2014). DOI: 10.131 40/RG.2.1.4337.7364.

been 'one of the most important reforms of the last generation'[62] and 'is being implemented essentially everywhere.'[63] Accordingly, states and governments have progressively delegated more and more duties and authorities downwards[64] resulting in cities and local governments having an increasing role in governance.[65]

For instance, in South America, Bolivia's much vaunted *Marco de Autonomías y Descentralización 2010* (Framework Law of Autonomies and Decentralization) has the stated purpose of deepening democracy through decentralization.[66] Likewise, the Peruvian government implemented decentralization as a mechanism to improve participation in government.[67] In Brazil, decentralization was implemented contemporaneously with the transition to democracy and was embedded in the 1988 Constitution.[68] The constitution 'enhance[d] local autonomy and enshrine[d] popular

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[62] Faguet, *supra* n. 17, at 2.
[63] *Ibid.*
[64] Blank (2022), *supra* n. 11, at 109.
[65] Barbara Oomen, 'Cities of Refuge: Rights, Culture and the Creation of Cosmopolitan Cityzenship' in Rosemarie Buikema, Antoine Buyse, and Antonius C. G. M. Robben (eds), *Cultures, Citizenship and Human Rights* (Routledge, London, 2019) 121-136, at 123. eBook ISBN: 9780429198588. https://doi.org/10.4324/9780429198588.
[66] Bolivia (Plurinational State of), *Marco de Autonomías y Descentralización* 'Andrés Ibáñez', Law No. 030 (19 July 2010). https://en.unesco.org/sites/default/files/bo_ley31_10_spaorof.pdf.
[67] Peru (Republic of), '*Defensoría del Pueblo del Perú*' (Decentralization and Good Governance Program, Fourth Report of the Supervision of the Portals of Transparency of Regional Governments and of the Provincial Municipalities located in capitals of department, Lima, 2011). http://www.defensoria.gob.pe/programa-gob.php.
[68] Brazil (Federative Republic of), *Constitution of the Federative Republic of Brazil* (5 October 1988). https://www.oas.org/es/sla/ddi/docs/acceso_informacion_base_dc_leyes_pais_b_1_en.pdf.

participation.'[69] Municipalities were placed on the same footing as states and local authorities were given more autonomy in implementing participatory mechanisms in local governance. Indeed, '[t]he 1988 constitution established legal provisos for participatory mechanisms calling for the input of popular councils in the development of social programs.'[70]

Indonesia and South Africa, like Brazil, also decentralized power and enhanced local governance in their transitions to democracy, recognizing that the decentralization of power to the local level reduces the likelihood of totalitarian and minority central governance re-emerging. The end of apartheid in South Africa left its oppressed residents clamouring for the opportunity to participate in their own governance. The 1996 Constitution provides a mandate to local authorities 'to provide democratic and accountable government for local communities.'[71] Subsequent legislation extended democracy to the 'disempowered communities.'[72] Indonesia's decentralization followed the May 1998 collapse of President Suharto's centralist and

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[69] Benjamin Goldfrank, *Deepening Local Democracy in Latin America: Participation, Decentralization, and the Left* (Pennsylvania State University Press, Kindle ed., University Park, Pennsylvania, 2011) 54. ISBN: 978-0-271-03794-3.
[70] *Ibid*., at 58.
[71] South Africa (Republic of), *The Constitution of the Republic of South Africa* (10 December 1996), Chapter 7. https://www.gov.za/documents/constitution-republic-south-africa-1996.
[72] Ralph Mathekga, 'Participatory Government and the Challenge of Inclusion: The Case of Local Government Structures in Post Apartheid South Africa', (2006) 63 *Colombia Internacional* 88, 95. http://www.scielo.org.co/scielo.php?script=sci_rttext&pid=S0121-56122006000100005&lng=en& nrm = iso. ISSN 0121-5612.

authoritarian regime.[73] The 2001 decentralization diverted power from the centre to more than 400 local governments (*kabupaten* and *kota*) with elected local parliaments.[74]

Cambodia, a country with an incredibly violent late 20th Century history, also promoted decentralized governance to the local level to 'strengthen and expand democracy' by driving it down to the local level.[75] Cambodia's rationale for instituting decentralization reform was to strengthen the presence and *legitimacy* of the Cambodian State through elections at the local level.[76] Uganda is another country with a particularly brutal recent history. In 1986, the National Resistance Movement (NRM) claimed victory in the Ugandan civil war and formed a government under the leadership of President Museveni. The NRM was forged by local resistance councils and in 1987 the

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[73] Indonesia (Republic of), *Constitution of Republic of Indonesia (Undang-Undang Dasar) 1945* (as amended), Art. 18. https://jdih.bapeten.go.id/unggah/dokumen/peraturan/116-full.pdf. *See also*, Indonesia (Republic of), *Law No. 22 of 1999 on Local Government* (7 May 1999). http://www.flevin.com/id/lgso/translations/JICA_Mirror/english/12.22.1999.eng.qc.html. *See also*, Inna Junaenah, 'Model of Local Government in Indonesia: What Does the 1945 Constitution Intend?' (2021) 6(1) *Petita: Jurnal Kajian Ilmu Hukum dan Syariah* 13-26. DOI:https:// doi.org/10.22373/petita.v6i1.107.

[74] Bardhan and Mookherjee, *supra* n. 56, at Loc. 1025-1029.

[75] Cambodia (Kingdom of), Royal Government of Cambodia, 'Strategic Framework for Decentralization and De-Concentration Reforms' (17 June 2005). https://ncdd.gov.kh/images/NCDD/About_NCDD/026_2005%20Strategic%20Framework%20for%20Decentralization%20and%20Deconcentration%20Reforms(Eng).pdf. *See also*, Netra Eng and Sophal Ear, Decentralization Reforms in Cambodia, (2019) 33(2) *Journal of Southeast Asian* Economies 209-223. https://www.jstor. org/stable/44132302.

[76] Faguet, *supra* n. 17, at 3. *See also* Leonardo G. Romeo and Luc Spyckerelle, 'Decentralization reforms and commune-level services delivery in Cambodia' (Unpublished case study, submitted at the Workshop on Local Government Pro-Poor Service Delivery, Manila, 9-13 February 2004). https://www.academia.edu/82755884/United_Nations_Capital_Development_Fund.

central government decentralized significant power to the local level under the leadership of the resistance councils.[77] In 1995, Uganda's constitution consolidated and extended the decentralization process with the purpose of giving people a greater chance to participate in decision-making.[78]

In the largest representative democracy on earth, India, constitutional amendments made in 1992 recognized local governments for the first time and called on (but did not explicitly require) states to devolve powers and resources to local authorities.[79] Importantly, the constitution devolved power to rural local bodies (*panchayats*) and enabled them to function as self-governing institutions. The constitutional amendments 'envisioned a more direct channel through which citizens could exercise "voice" and participate in local governance.'[80]

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[77] Heidi Tavakoli, 'Unblocking Results: Case Study Supporting the development of local government in Uganda' (Centre for Aid and Public Expenditure, Overseas Development Institute, London, July 2013) 9 (citing *Resistance Council Statute 1987, Local Government Statute of 1993, and Local Government Act 1997*). http://cdn-odi-production.s3-website-eu-west-1.amazonaws.com/media/documents/8524.pdf.

[78] Uganda (Republic of) (Jamhuri ya Uganda), *Constitution of Uganda* (1995). https://www.parliament.go.ug/documents/1240/constitution. *See also,* International Fund for Agricultural Development, 'Performance and Impact in Decentralizing Environments: Experiences from Ethiopia, Tanzania and Uganda' (1 July 2005). https://www.ifad.org/en/web/ioe/w/ifad-s-performance-and-impact-in-decentralizing-environments-experiences-from-ethiopia-tanzania-and-uganda.

[79] India (Republic of), *Constitution (73rd Amendment) Act 1992* (20 April 1993). https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-seventy-third- amendment-act-1992. India (Republic of), *Constitution (74th Amendment) Act 1992* (20 April 1993). https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-seventy-fourth-amendment-act-1992.

[80] Bardhan and Mookherjee, *supra* n. 56, at Loc. 1937-1938.

Even the United Kingdom, a unitary state and the putative birthplace of parliamentary democracy, is currently decentralizing power to municipal authorities to, at least partly, enhance public participation and democracy. Britain's policies of decentralization began in 1999 with the devolution of power to the UK's substate nations of Scotland and Wales. More recently, England began a process of devolving governance to its local and municipal governments beginning with Greater Manchester in November 2014. Decentralization continued after the passage of the *Cities and Local Government Devolution Act 2016* and between 2015 and 2021 power was devolved to a number of municipalities including the Liverpool City Region, the Sheffield City Region, Bristol/West England, Suffolk and Cornwall.[81] One of the specific purposes of England's devolution policies is 'the promotion of engagement and participation as part of a healthy democracy, and being closer to the decision makers.'[82]

> [T]he driving force behind the decentralisation agenda is the belief that societies will ultimately be governed more democratically and effectively if decisions can be taken at the closest possible level to the communities that they impact.[83]

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[81] UK, *Cities and Local Government Devolution Act* (28 January 2016). https:// www.legislation.gov.uk/ukpga/2016/1/contents/enacted. *See also,* Mark Sandford, *Briefing Paper: Devolution to local government in England* (UK, House of Commons Library, 16 January 2023) 9. https://researchbriefings.files. parliament.uk/documents/SN0702 9/SN07029.pdf.
[82] *Ibid.*, at 16.
[83] UK, 'Evaluation of Devolved Institutions' (Department for Business, Energy and Industrial Strategy,Final Report, Research paper No. 2021/0242021), para 2.4. https://dera.ioe.ac.uk/37948/1/evaluation-devolved-institutions. pdf.

The British Government published the *Levelling Up White Paper* on 2 February 2022 and stated that it would continue decentralization apace and 'usher in a revolution in local democracy.'[84]

7.4 The International Endorsement of Localization

Localization, as will discussed below, is a core element of the UN's *Sustainable Development Goals* and *New Urban Agenda*.[85] Furthermore, the democratizing value of local governance, has been recognized by the United Nations (UN), and other international organizations, including the World Bank, as well as regional organizations, such as the European Union (EU), African Union (AU) and Organization of American States (OAS). These international and regional organizations have promoted decentralization for the purpose of deepening democracy, as well as for enhancing the functional efficiency of local governments.[86] Accordingly, 'there is an ongoing push on many countries to internally "decentralize" themselves at the global governance level.'[87]

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[84] UK, *Levelling Up the United Kingdom* (Department for Levelling Up, Housing and Communities, 2022), IX. ISBN: 978-1-5286-3017-7. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1052706/Levelling_Up_WP_HRES.pdf.

[85] UNGA, *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res. 70/1, UN Doc. A/RES/70/1 (21 October 2015, adopted on 25 September 2015), SDG 11. https://digitallibrary.un.org/record/3923923?ln=en. UNGA, *New Urban Agenda*, GA Res. 71/256, UN Doc. A/71/256 (25 January 2017, adopted 23 December 2016). https://digitallibrary.un.org/record/858344?ln=es.

[86] Blank (2006), *supra* n. 5, at 900.

[87] Blank (2022), *supra* n. 11, at 107.

a. Endorsing the Democratizing Virtues of Decentralization

The UN has promoted decentralization as a means of 'deepening' democracy. There is a plethora of UN resolutions and recommendations endorsing the democratizing virtues of decentralization to the local level.[88] Indeed, the UN's Human Rights Council (HRC) stated:

> The degree of self-government enjoyed by local authorities can be regarded as a key element of genuine democracy. In this regard, political, fiscal and administrative decentralization is essential for localizing democracy and human rights.[89]

Perhaps the most important endorsement by the UN of the democratically legitimizing virtues of local governance has been its implementation in conflict resolution and post-conflict reconstruction.

Local government can play a key role in conflict management and develop non-violent conflict resolution mechanisms such as community forums and debating platforms that build trust between feuding groups.[90] Local governments can also mitigate the risk of ongoing conflict by accommodating feuding factions.

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[88] *See, e.g.* UN Habitat, Governing Council of the UN Human Settlements Programme, *Guidelines on Decentralization and Strengthening of Local Authorities*, Res. 21/3, UN Habitat Doc. HSP/GC/21/3 (adopted 20 April 2007).
[89] HRC Advisory Committee, *supra* n. 2.
[90] Paul Jackson and Zoe Scott, 'Local Government in Post-Conflict Environments' (Research Paper for UNDP Workshop, 'Local Government in Post-Conflict Situations: Challenges for Improving Local Decision Making and Service Delivery Capacities', Oslo, Norway, 28-29 November 2007) 4. https:// gsdrc.org/document-library/local-government-in-post-conflict-environments/.

> [T]he strengthening of good governance through adequate representation, participation and recognition of all identity (minority) groups at the local level can be seen as an important entry point for the resolution of ethnic tensions, and this in turn will also support the national political process of reconciliation.[91]

Intra-state conflicts are often the result of 'the inability to integrate regions and minorities into larger polities,' which frequently results in 'state fragility, failure and conflict.'[92] Enabling minority participation at the local level prevents social exclusion. It is also particularly important to focus on the local in conflict management because peace is likely to evolve sporadically in certain communities before taking hold elsewhere: local peace initiatives can establish a precedent for the rest of the country.[93]

In Colombia, local government was vital in ending the 50 years of warfare that had led to an estimated 220,000 deaths and displaced over 5.6 million people. The peace process and negotiations between *Fuerzas Armadas Revolucionarias de Colombia*[94] (FARC) and the government to end 50 years of warfare was 'fed by an unprecedented mobilization at the local level in which people are [...] expressing

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[91] *Ibid.*, at 5 (quoting Bigdon, C. and Hettige, S., 'Local Governance and Conflict Management', South Asia Institute, (2003), 16).
[92] Derick W. Brinkerhoff, 'Rebuilding Governance in Failed States and Post-Conflict Societies: Core Concepts and Cross-Cutting Themes', (2005) 25 *Public Administration and Development* 3, 11. https://doi.org/10.1002/ pad.352.
[93] Dirk Salomons, 'Local Governance Approach to Social Reintegration and Economic Recovery in Post-Conflict Countries: Programming Options for UNDP/UNCDF Assistance' (Discussion paper for the workshop 'A Local Governance Approach to Post-Conflict Recovery', 2002), 6. https://gsdrc.org/ document-library/local-government-in-post-conflict-environments/.
[94] Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia).

their vision for peace and discussing the issues at the heart of the negotiation process.'[95] The UNDP 'supported local governments to develop territorial development strategies with the participation of groups traditionally excluded from local governance' after undertaking 'a comprehensive study of local conflict dynamics and the potential for peace and community visioning were conducted.'[96] In 2014, the *Territorial Partnership for Peace* fostered peacebuilding at the local level.[97]

Local government is also vitally important for post-conflict reconstruction efforts. The UN has specifically recognized that:

> ... the local level remains the natural place for engineering the recovery of societies deeply affected by violence and conflict, and for building the resilience of communities through inclusive governance arrangements that build legitimacy. Inclusive and accountable local governance can help restore social cohesion in divided communities, facilitate participation in public life, distribute resources and opportunities equitably, safeguard minority rights, and test new forms of decision making that blends formal and informal processes of representation and participation.[98]

Effective local government broadens popular participation, demilitarizing politics, and reflects a functioning state, re-establishing its presence, thereby enhancing state legitimacy. [99]

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[95] UNDP, 'Local governance in fragile and conflict-affected settings: Building a resilient foundation for peace and development' (New York, 14 April 2016) ('UNDP (2016)'), 38. https://www.undp.org/sites/g/files/zskgke326/files/publications/Guide_Local_Governance_in_Fragile_and_Conflict_Settings.pdf.
[96] *Ibid*.
[97] *Ibid*.
[98] UNDP (2016), *supra* n. 95.
[99] Jackson and Scott, *supra* n. 90, at 5.

UNDP reconstruction assistance in crisis-affected countries is increasingly focused on local governance [100] because local governments 'have better access to information on local conditions and needs, a greater ability to interact with communities and traditional authorities, a mandate for economic development and service delivery and the potential to realise "allocative and operational efficiency in the use of scarce public resources.'"[101]

One of the few successes of the 2003 US-led invasion of Iraq was the revitalization of local governance. In the first two years after the invasion over 1,000 local councils were established in the 18 regional provinces.[102] Although religious and ethnic differences and deep factional divisions were reflected in provincial and local governments, most have been able to overcome these differences. 'The provincial councils' performance is remarkable in comparison to the weak record of the national government in writing and approving key legislation.'[103] Indicative of the success of local governance has been its ability to achieve the allocation of funding for capital investments from a variety of sources. The proactive and harmonious approach to provincial and local governance also

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[100] UNDP (2016), *supra* n. 95, at III.
[101] Jackson and Scott, *supra* n. 90, at 4 (quoting Leonardo G. Romeo, *Local Governance Approach to Social Reintegration and Economic Recovery in Post-Conflict Countries: Towards a Definition and a Rationale* (Discussion paper for the Workshop A Local Governance Approach to Post-Conflict Recovery, New York, 8 October 2002), 5).
[102] Derick W. Brinkerhoff and Ronald W. Johnson, 'Decentralized local governance in fragile states: learning from Iraq', (2009) 75(4) *International Review of Administrative Sciences* 585, 598.
[103] *Ibid.*

precipitated the formation of a national local government association with the purpose of identifying common issues.[104] Participatory planning processes were also implemented at the local level to arrive at majority decisions while respecting differences of opinion and without punishing the minority.[105]

Local governance was also vital to post-conflict reconstruction in both Timor-Leste (East Timor) and Kosovo. The UN, in administering both territories, promoted local self-government. The UN's *Constitutional Framework for Provisional Self-Government 2001* [106] and the subsequent Kosovo constitution of 2008 both specifically recognized that '[m]unicipalities are the basic territorial unit of local self-governance in the Republic of Kosovo.'[107] In East Timor, UNTAET created 13 administrative 'districts,' which were further divided into local subdistricts.[108]

The misery of living in the ongoing tragedy of Somalia has been alleviated, at least to some extent, by the increasing role of local governance. The state of Somalia exists in a *de jure* capacity only and its government has little control or even influence over much of the country and faces internal competition from Somaliland and

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[104] *Ibid*., at 596.
[105] *Ibid*., at 597.
[106] UNMIK, *Constitutional Framework for Provisional Self-Government*, Regulation No. 2001/9 (2001), Art. 1.3. https://www.esiweb.org/pdf/bridges/kosovo/12/1.pdf.
[107] Kosovo (Republic of), *Constitution of the Republic of Kosovo [Serbia]* (June 2008), Arts. 12, 124. https://www.refworld.org/docid/5b43009f4.html.
[108] Tanja Hohe, 'Local Governance After Conflict', (2004) 1(3) *Journal of Peacebuilding & Development* 45-56. https://www.jstor.org/stable/10.2307/48602959.

Puntland. In 2008, five UN agencies (ILO, UNDP, UNCDF, UN-Habitat and UNICEF) initiated the Joint Programme on Local Governance.

> Working from the bottom-up, the programme's strategy was to increase sector outputs (local level economic and social infrastructure and services), build local institutions and provide policy inputs into the development of a conducive decentralization framework.[109]

Since 2010, the Joint Programme has enabled local governments to improve access to health care, education, sanitation services and transport in a more participatory and inclusive manner. The Joint Programme also established institutional relationships between the state and local communities through local participatory governance at a time of very low trust in government.[110]

The World Bank also endorses decentralization to the local level. The World Bank promotes decentralization primarily to enhance efficiency in the provision of government services, but it also acknowledges that decentralization to the local level increases the political independence of local governments and encourages citizen engagement and participation.[111]

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[109] UNDP (2016), *supra* n. 95, at 59.
[110] *Ibid.*
[111] *See, e.g.* Andrew Parker and Rodrigo Serrano-Berthet, 'Promoting good local governance through social funds and decentralization' (World Bank Group, 2000). http://documents.worldbank.org/curated/en/647311468742474072/promoting-good-local-governance-through-social-funds-and-decentralization.

b. The Regional Endorsement of Decentralization and Subsidiarity

Like the UN, regional organizations have also recognized the legitimizing value of decentralization to the local government level. The AU has endorsed local governments and local authorities as 'key cornerstones of any democratic governance system' [112] and has 'promoted the values and principles of decentralisation, local governance and local development in Africa as a means for improving the livelihood of all peoples on the continent.' [113] Likewise, ECOWAS has endorsed decentralization.[114] The OAS's *Declaration of La Paz on Decentralization and on Strengthening Regional and Municipal Administrations and Participation of Civil Society 2008* [115] provides that decentralization is a 'genuine instrument[]' for effectuating

> state modernization, the struggle against poverty, productive development, *strengthening of democracy*, citizen security, education, health, *citizen inclusion and participation*, infrastructure, disaster management, the fight against

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[112] AU, *African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development* (27 June 2014), Preamble, para. 1. https://au.int/en/treaties/african-charter-values-and-principles-decentralisation-local-governance-and-local.

[113] *Ibid.*

[114] ECOWAS, *Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security* ('Protocol on Democracy and Good Governance') (Dakar, December 2001), Art. 1(d). https://ihrda.uwazi.io/en/entity/gnhvkzf0aw9et1dhcq96n7b9.

[115] OAS, *Declaration of La Paz on Decentralization and on Strengthening Regional and Municipal Administrations and Participation of Civil Society* (La Paz, Bolivia, 4 June 2002), AG/RES. 1901 (XXXII-O/02). http://www.oas.org/juridico/english/ga02/ agres_1901.htm.

> corruption, environmental management and access to technology.[116]

Decentralization is also endorsed by both the EU and the Council of Europe (CoE). The EU has recognized the democratizing value of decentralization and has adopted the principle of subsidiarity to address its crisis of legitimacy. The EU's crisis in political legitimacy results from its 'democratic deficit': the perceived 'lack of citizen political engagement in, let alone impact on, EU decision making.'[117] The EU's democratic deficit, like the crisis in representative democracy generally, is manifested in citizen disaffection and a lack of trust in its institutions. Accordingly, the *Treaty of the European Union 1992* (TEU) provides that '[d]ecisions shall be taken as openly and *as closely as possible to the citizen*.'[118] The TEU also provides that the EU 'shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and *local* level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'[119] In 2007, the TEU reinforced the role of the Committee of Regions[120] and before proposing legislation, the European Commission is to engage in

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[116] *Ibid.*

[117] Vivian Schmidt, *Europe's Crisis of Legitimacy* (Oxford University Press, Oxford, 2020) 7. ISBN: 978-0-19-879706-72020.

[118] EU, *Consolidated Version of the Treaty on European Union* (2008/C 115, 13 December 2007) ('TEU'), Art. 10(3) (emphasis added). https://eur-lex.europa.eu/resource.html?.

[119] *Ibid.*, at Art. 5(3).

[120] Edward Best, Maja Augustyn and Frank Lambermont, *Direct and Participatory Democracy at Grassroots Level: Levers for forging EU citizenship and identity?* (European Institute of Public Administration, Maastricht, 2011) 2. ISBN: 978-92-895-0641-0. DOI: 10.2863/63437.

wide-ranging consultations and 'take into account the regional and local dimension of the action envisaged.'[121]

The Preamble to the CoE's *European Charter of Local Self-Government* (1985) acknowledged that it was '[a]ware that the safeguarding and reinforcement of local self-government in the different European countries is an important contribution to the construction of a Europe based on the principles of democracy and the decentralisation of power.'[122] According to the Explanatory Report to the Charter, one 'of the basic premises underlying the Charter' is 'the vital contribution of local self-government to democracy, effective administration and the decentralization of power.'[123]

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[121] EU, *Protocol (No 2) on the application of the principles of subsidiarity and proportionality* (9 May 2008), Official Journal 115, P. 0206 - 0209. https://eur-lex.europa.eu/legal-content/EN/.
[122] CoE, *European Charter of Local Self-Government and Explanatory Report 1985*, ETS No. 122, at Preamble. https://rm.coe.int/european-charter-of-local-self-government-eng/1680a87cc3.
[123] *Ibid.*, at Exp. Rep., 48.

7.5 The Importance of Localizing Human Rights

Another element of state and government legitimacy is the implementation of human rights norms.[124] Local governments are best placed to implement a state's human rights obligations and are 'the substantive guarantors of the international law of human rights.'[125] More than 60 years ago, Eleanor Roosevelt, former Chair of the UN Commission on Human Rights and a key participant in the drafting of the *Universal Declaration of Human Rights* (UDHR), recognized the importance of the local community to human rights protection.[126] The HRC continues to acknowledge the role of local government in human rights protection. The Advisory Committee to the HRC, in its 'Role of local government in the promotion and

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[124] According to Allen Buchanan, 'the chief moral purpose of endowing an entity with political power is to achieve justice' and 'the protection of basic human rights is the core of justice.' A political authority is legitimate:

> if and only if it (1) does a credible job of protecting at least the most basic human rights of all those over whom it wields power and (2) provides the protection through processes, policies, and actions what themselves respect the most basic human rights.

Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford University Press, Oxford, 2004) 247. ISBN: 978-0-19-929798-6.

[125] Antonio Papisca, 'Relevance of human rights in the global space of politics: how to enlarge democratic practice beyond state boundaries and build up a peaceful world order', in Koen De Feyter, Stephan Parmentier, Christiane Timmerman, and George Ulrich (eds), *The Local Relevance of Human Rights* (Cambridge University Press, Cambridge, 2011) 82-109, at 85. ISBN: 978-1-107-00956-1.

[126] Eleanor Roosevelt, 'The Great Question,' remarks delivered at the UN in New York on March 27, 1958, in Brett Scharffs and Ewelina Ochab, *Dignity and International Human Rights Law: An Introduction to the Punta del Este Declaration on Human Dignity for Everyone Everywhere* (Routledge, London, 2021) 82. eBook ISBN: 9781003207030. https://doi.org/10.4324/9781003207030.

protection of human rights', [127] recognized the role of local government in the protection of human rights:

> Local authorities are close to citizens' everyday needs and they deal with human right issues on an everyday basis. Therefore, there exists a clear and strong connection between human rights and local government. When performing their functions, local authorities take decisions relating in particular to education, housing, health, the environment, and law and order, which are directly connected with the implementation of human rights and which may enforce or weaken the possibilities of its inhabitants to enjoy their human rights.

In October 2022, the HRC reiterated the importance of the 'role of local government in the promotion and protection of human rights.'[128]

Local government is indispensable to human rights protection and '[b]oth the credibility and the effectiveness of the global human rights system rest with its local relevance.'[129] More importantly, the international community has recognized that '[h]uman rights crises emerge at the local level, it is the local level that abuses occur, and where a first line of defence needs to be developed, first and foremost

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[127] HRC Advisory Committee, *supra* n. 2, at para. 26.

[128] HRC, *Local government and human rights*, HRC Res. 51/12, UN Doc. A/HRC/RES /51/12 (13 October 2022, adopted 6 October 2022). https://digital library.un.org/record/3991869?ln=en.

[129] Felipe Gómez Isa, 'Freedom from want revisited from a local perspective evolution and challenges ahead', in Koen De Feyter, Stephan Parmentier, Christiane Timmerman, and George Ulrich (eds), *The Local Relevance of Human Rights* (Cambridge University Press, Cambridge, 2011) 40-81, at 74. ISBN: 978-1-107-00956-1).

by those that are threatened.'[130] Much of the criticism of international human rights law focuses on the cultural relativist versus universalist debate. Human rights resonate at the local level because the voices of 'the different' can be heard and understood within smaller communities.[131] Local governments can localize human rights and thereby 'bridge the gap between the universality and cultural relativism poles.'[132]

a. Human Rights Cities, City Networks and Human Rights Charters

A number of local and municipal governments have declared a commitment to advancing human rights. Rosario, Argentina, became the world's first human rights city in 1997.[133] Since then, a number of other cities have adopted 'human rights charters' such as the *Charter of Rights and Responsibilities of Montréal* (2006), the *Mexico City Charter for the Right to the City* (2010), the *Bandung Charter of a Human Rights City* (2015), and the *Amsterdam Human Rights Agenda* (2016).[134] The Human Rights Cities Network

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[130] *See* Koen De Feyter, 'Localizing Human Rights' in Wolfgang Benedek, Koen De Feyter, Fabrizio Marrella, (eds), *Economic Globalization and Human Rights* (Cambridge University Press, Cambridge, 2007) 67-92, at 75-76. ISBN: 1139465236.

[131] Gómez Isa, *supra* n. 129, at 57.

[132] Elif Durmuş, 'A typology of local governments' engagement with human rights: Legal pluralist contributions to international law and human rights', (2020) 38(1) *Netherlands Quarterly of Human Rights* 30, 37. DOI: 10.1177/09240519209032 41.

[133] HRCN, *Who we are?* (Website). https//:humanrightscities.net/who-we are.

[134] Birgit Van Hout, 'Human Rights Cities: Theoretical and Practical Overview' (FRA, Paper for Expert meeting, 'Human Rights Cities', Brussels, 28 November 2019). https://europe.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?News ID =2579&LangID=E.

(HRCN) is a network of European 'human rights cities', which 'aims to help make human rights a reality for every citizen – and in every city – within the European Union' as well as fostering 'participatory democracy and social justice, by leaving no one behind.'[135] 'A Human Rights City may be defined as a municipality that has adopted human rights principles and laws, as guiding norms of governance.'[136] To proclaim itself a 'Human Rights City' within the HRCN, a city authority must commit itself to '[i]mprov[ing] the quality of life of residents through the implementation of a more inclusive and participatory approach.'[137] At present there are seven European HRCN cities: Graz and Vienna in Austria; York in the UK; Barcelona in Spain; Utrecht and Middelburg in the Netherlands; and Lund in Sweden.[138] As a Human Rights City, the City of Graz has established a 'Human Rights Advisory Council,' which as the name suggests, advises the municipal government, on the development and implementation of human rights in the City.[139]

A prominent human rights city is South Korea's, Gwangju, which has hosted the annual World Human Rights Cities Forum since 2011. Gwangju is an appropriate venue for the forum as Gwangju was at the centre of South Korea's pro-democracy movement's

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[135] HRCN, *Who we are?* (Website). https://humanrights cities.net/ who-we-are/.
[136] *Ibid.*
[137] HRCN, *What we do?* (Website). https://humanrightscities.net/what-we-do/.
[138] *Ibid.*
[139] City of Graz Human Rights Advisory Council, 'Graz-First Human Rights City of Europe'. https://www.graz.at/cms/dokumente/10284058_7771447/2975d1a7/HRC-Folder-eng-web.pdf.

confrontation with the then authoritarian government.[140] The *Gwangju Declaration on Human Rights City* was adopted at the first World Human Rights Cities Forum in 2011. It defined a 'Human rights city' as 'both a local community and a socio-political process in a local context where human rights play a key role as fundamental values and guiding principles.'[141] The 2014 *Gwangju Guiding Principles for a Human Rights City* recognized 'that all levels of governments national, regional and local, has an obligation to protect, respect and fulfill all human rights in their own mandate and competence.'[142] The Gwangju Guiding Principles include social inclusion, participatory democracy, social justice, and sustainability.

The local and municipal government member-organization United Cities and Local Government (UCLG) has also been at the forefront of promoting human rights protection. This network has encouraged their local and municipal government members to adopt and implement policies addressing human rights. The UCLG has promoted, endorsed and facilitated a number of treaty-like instruments between municipalities including the *Global Charter-Agenda for Human Rights in the City* (2011)[143] and the *European*

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[140] In Sup Han, 'Kwangju and beyond: Coping with past State Atrocities in South Korea', (2005) 27(3) *Human Rights Quarterly* 998, 1001-1003. http://www.jstor.com/stable/ 20069818.

[141] World Human Rights Cities Forum 2011, *Gwangju Declaration on Human Rights City*, para. 3. https://www.uclg-cisdp.org/sites/default/files/Gwangju_Declaration_on_HR_City_final_edited_version_110524.pdf.

[142] World Human Rights Cities Forum 2014, *Gwangju Guiding Principles for a Human Rights City*, para. 2. https://www.uclg-cisdp.org/sites/default/files/Gwangju_Guiding_Principles_for_Human_Rights_City_adopted_on_2017_May_202014.pdf

[143] Global Charter-Agenda, *supra* n. 1.

Charter for the Safeguarding of Human Rights in the City (2000),[144] which both aim to promote and strengthen the human rights of all inhabitants of the cities.[145] The Global Charter-Agenda 'aims to promote and strengthen the human rights of all the inhabitants of all cities in the world', and 'cities' includes all local government areas of any size.[146] The principle 'right' of the Global Charter-Agenda is the 'right to the city' whereby '[a]ll city inhabitants have the right to a city constituted as a local political community that ensures adequate living conditions for all the people, and provides good coexistence among all its inhabitants, and between them and the local authority.'[147]

b. The Local Implementation of Human Rights

As well as declaring a commitment to human rights protection, local governments can implement human rights in a variety of ways. Local government action on human rights has historically placed an important focus on awareness-raising and education programmes.[148] In Seoul and Barcelona, the local governments have targeted public

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[144] UCLG, *European Charter for the Safeguarding of Human Rights in the City* (St Denis, France, 18 May 2000) ('European Charter'). https://www.uclg-cisdp.org/en/european-charter-safeguarding-human-rights-city-0.

[145] The principal difference between the Global Charter-Agenda and the European Charter, apart from their different geographic scope, is each right articulated in the Global Charter-Agenda is accompanied by a 'suggested action plan' to assist in the implementation of each right.

[146] Global Charter-Agenda, *supra* n. 1, at 'B. Scope of Application', para. 4.

[147] *Ibid.*, at Art. 1(a).

[148] UCLG, 'Contribution to the OHCHR Report on 'Local Governments and Human Rights' (2019). https://www.ohchr.org/sites/default/files/Documents/issues/LocalGvt/NGOs/20190219UCLG.pdf.

workers for human rights education.[149] Other cities have educated their citizens through human rights awareness campaigns, such as Grenoble (France), Goicoechea (Costa Rica) and Nador (Morocco).[150]

Guaranteeing human rights by empowering local ombudspersons and anti-discrimination offices are also a means for implementing and protecting human rights.

> Local ombudspersons, anti-discrimination offices, or simply enacting local policies and legislation with reference to (international) human rights law, are all different forms in which implementation can take place.[151]

Barcelona, Nuremberg and Venice have established offices for non-discrimination.[152] Gwangju, in South Korea, has empowered various ombudspersons to investigate gender equality; Bogotá has established the *'Veeduría distrital*' responsible for promoting transparency, accountable government and participation as human rights'.[153] The implementation of the *Montréal Charter of Rights and Responsibilities* (2006) is supervised by the City's ombudsperson.[154] Dandenong, proudly 'the most culturally diverse community in Australia,' has an 'Asylum Seeker and Refugee

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[149] *Ibid*., at para. 1.
[150] *Ibid*.
[151] Durmuş, *supra* n. 132, at 44.
[152] UCLG (Contribution to the OHCHR Report), supra n. 148, at para. 2.
[153] *Ibid*., at para. 3.
[154] Benoît Frate, 'Human rights at a local level -- The Montréal experience' in Barbara Oomen, Martha F. Davis and Michele Grigolo (eds) *Global Urban Justice: The Rise of Human Rights Cities* (Cambridge University Press, Cambridge, 2016) 64-80, at 64. eBook ISBN: 9781316544792. DOI: https://doi.org/10.1017/CBO 9781316544792.

Advisory Committee' to 'celebrate and raise awareness of the achievements of asylum seekers and refugees.'[155]

The 'Right to Housing' has received a lot of attention as a result of the global housing crisis. The UCLG has facilitated the *Municipalist Declaration of Local Governments or the Right to Housing and the Right to the City* (2018), which endorses the human right to adequate housing.[156] Local governments have attempted to alleviate the global housing crisis by emphasising the right to housing. Montreal, Canada, has engaged in social housing and urban renewal programmes. Montevideo, Uruguay, through the housing cooperatives movement, has devised specific plans for the most excluded.[157] Many Spanish cities including Terrassa, Barcelona and Cadiz have established 'specific offices aimed at mediating with banks or trying to put an end to evictions through different strategies.'[158]

Local governments have also implemented policies protecting the human rights of refugees, often in contravention of state laws and policies. In Spain, Italy and the Netherlands, a number of local governments contravened state laws and regulations to enable undocumented migrants to access municipal services. In the United States and elsewhere a number of cities have adopted the monikers

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[155] Oomen, *supra* n. 64, at 127.
[156] UCLG, *Municipalist Declaration of Local Governments or the Right to Housing and the Right to the City* (2018). https://citiesforhousing.org/theshift/.
[157] UCLG (Contribution to the OHCHR Report), *supra* n. 148, at para. 8.
[158] *Ibid.,* at para. 8.

of a Sanctuary City, Solidarity City, City of Refuge, Integrating City, or Fearless City manifesting their intention to welcome undocumented migrants and protect their human rights against state violations.[159]

c. Local Government, Human Rights and the Pandemic

The pandemonium wrought by the Covid-19 pandemic continues to have devastating consequences for the lives and livelihoods of people around the world. The socio-economic consequences of the pandemic do not affect everyone equally and has worsened pre-existing inequalities. Within a year of the declared crisis, the Covid-19 pandemic pushed 100 million people into extreme poverty.[160] The pandemic has otherwise had 'a negative impact on a wide range of human rights.'[161] The national response to the pandemic all too frequently relied on the exercise of emergency powers. The exercise of emergency powers often restricts political rights and civil liberties,[162] and can therefore weaken democracy and compromise

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[159] *See infra*, Ch. 9.4.

[160] The World Bank Group, *Responding to The Covid-19 Pandemic and Rebuilding Better* (2021). https://thedocs.worldbank.org/en/doc/bb1b191f6b1bd1f932d0ddc5492987ec-0090012021/original/WBG-Responding-to-the-COVID-19-Pandemic-and-Rebuilding-Better.pdf.

[161] Nada Al-Nashif, Deputy High Commissioner for Human Rights, 'The Role of Local Government in Ensuring Human Rights in Post-Pandemic Recovery' (Conference: Local Government and Human Rights, Human Rights Council, 1 October 2021). https://www.ohchr.org/en/statements/2021/10/role-local-government-ensuring-human-rights-post-pandemic-recovery.

[162] UCLG, *Democracy and Representation for Emergency Action: Emergency Governance for Cities and Regions* (Policy Brief No. 6, July 2022). https://gold.uclg.org/sites/default/files/field-document/pb06_en_edited.pdf.

human rights.[163] In responding to the crisis, local governments assumed a role in maintaining trust in democracy and protecting human rights. The HRC 'acknowledge[ed] the essential role of local governments in ensuring a human rights compliant response to the Covid-19 pandemic at the local level.'[164]

In responding to the current crisis, many local governments have been at the forefront of providing support to those most affected by Covid-19 and have demonstrated their 'resilience and adaptability.'[165] For example, in Barcelona, the city government has imposed a 'moratorium on the collection of rent for publicly-owned residential and commercial properties and for mortgages on affordable housing'[166] and 'reached a deal to mobilise 200 unused tourist apartments to house people in need of emergency housing, including those unable to self-isolate in their own homes and women escaping abusive partners.'[167] The City Council has also allocated an extra one million euros to reinforce various food projects for vulnerable people, and special subsidies have 'also been awarded to

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[163] Anna Luehrmann and Bryan Rooney, 'Autocratization by Decree: States of Emergency and Democratic Decline', (2021) 53(4) *Comparative Politics* 617-635, 1-14. https://www.jstor.org /stable/ 10.2307/27090047.
[164] HRC, RES/51/12, *supra* n. 128.
[165] Kathryn Arndt, 'Closest to the People: Local Government Democracy and Decision-making in Disaster' (Governing During Crises, Policy Brief No. 6, University of Melbourne, 15 September 2020). https://government.unimelb.edu.au/data/assets/pdf_file/0007/3492124/GDC-Policy-Brief-6_Closest-to-the-People final.pdf.
[166] Ajuntament de Barcelona, *Urgent measures to deal with Covid-19 in the field of housing* (Website). https://www.habitatge.barcelona/es/servicios-ayudas/medidas-urgentes-para-hacer-frente-la-covid-19-en-el-ambito-de-la-vivienda.
[167] Kate Shea Baird, *Barcelona's Radical Response to Covid-19*, (1 September 2020). https://barcelonaencomu.cat/ca/post/barcelonas-radical-response-covid-19.

57 small social entities and community support networks running special food operations to respond to the Covid-19 crisis.' [168] Elsewhere, the local government in York (UK) established community support centres and a Covid-19 helpline to support the vulnerable.[169] In Valencia (Spain) the local government recognized that the affordable housing crisis was exacerbated by Covid-19 and is adopting new measures seeking to develop more affordable housing and prioritizing access for residents at risk of vulnerability.[170] The pandemic resulted in increases in domestic violence and local governments adopted more accessible policies for victims. For instance, the Pichincha province of Ecuador developed programs for victims of gender-based violence, including the creation of hotlines and support centres.

7.6 Conclusion

Local governance is not perfect, but localization does have the potential to enhance the democratic legitimacy of states from the bottom up. Local governance builds communities and acknowledges connections between people and place. In a globalized world an individual's identity is increasingly influenced by the place where they live, work and form social connections. The local government's territory reflects the place where people, live, work, and identify with

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[168] Ajuntament de Barcelona, *supra* n. 166.
[169] Al-Nashif, *supra* n. 161.
[170] UCLG, 'Valencia joins Cities for Adequate Housing: Strengthening affordable, adequate housing provision' (3 December 2012). https://www.uclg-cisdp.org/en/news/latest-news/valencia-joins-cities-adequate-housing-strengthening-affordable-adequate-housing.

a community. Identification with a community encourages participation in public life -- a fundamental aspect of democratic governance.

As the level closest to the people, citizens are more likely to engage in politics and become involved in the exercise of political authority, another important facet of democracy. Local governance also disperses authority, thereby limiting the power of the central state. Political theory also suggests that local governance is the most democratically legitimate level of territorial governance because its citizens are formally free to exit and, more importantly, enter its jurisdiction.

The capacity for local governments to democratically legitimize states, especially fragile states, has been recognized and endorsed by state and international and regional organizations alike. States have increasingly decentralized governance to the local level and implemented policies of subsidiarity, with the express purpose of enhancing its own democratic legitimacy. The legitimizing virtues of local governance has also been recognized and endorsed by the UN and its agencies, as well as the EU, CoE, AU, and OAS. The important role of local government in the protection and implementation of human rights is another legitimizing aspect of decentralization.

8. LEGITIMACY BY PARTICIPATION AND DELIBERATION

8.1 Introduction

Representative democracy is in crisis and is an imperfect mechanism for ascertaining the consent of the population to the exercise of coercive authority. However, representative democracy is perhaps the only feasible method of providing a modicum of participation in public affairs to citizens in a population of millions across an expansive geographical space.[1] As such, 'the main discourse on democracy today is about how to *complement* representative democracy with more citizen involvement in political decision making.'[2] Representative democracy may be complemented by the implementation of mechanisms of participatory and deliberative democracy at the local level. This *Chapter* asserts that local participatory and deliberative democracy enhance citizen involvement in public affairs, reduce apathy and strengthen

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[1] *Marshall v Can. (also known as Mikmaq Tribal Society v. Canada),* Communication No. 205/86 (1991) (HR Comm.), paras 5.4-5.5; *see also* Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Material and Commentary* (Oxford University Press, Oxford, 3rd ed., 2013) 733. ISBN: 978-0-19-873374-4.

[2] Cristina Fraenkel-Haeberle, Sabine Kropp, Francesco Palermo and Karl-Peter Sommermann (eds), *Citizen Participation in Multi-Level Democracies* (Brill Nijhoff, Leiden/Boston, 2015) (ix) (emphasis added). ISBN: 9789004287938.

community bonds. The ability to engage in 'discursive participation in the public sphere is a requirement of democratic legitimacy.'[3]

Participatory and deliberative democracy are closely related.[4] Participatory democracy -- collective decision making without the intervention or mediation of representatives -- is the earliest form of democracy and was exercised in various guises since the earliest times. It is 'a system of decision-making about public affairs in which citizens are directly involved.'[5] In its contemporary manifestation, participatory democracy has been implemented by mechanisms such as participatory budgeting, citizen conferences, town-hall meetings and 'e-democracy'.[6] Whereas participatory democracy envisages the potential involvement, of the entire population of a jurisdiction, in deliberative democracy only a

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[3] Anna Jurkevics, 'Land Grabbing and the Perplexities of Territorial Sovereignty', (2022) 50(1) *Political Theory* 32, 45. https://doi.org/10.1177/0090591721100 8591.

[4] Henrike Knappe, *Doing Democracy Differently: Political Practices and Transnational Civil Society* (Verlag Barbara Budrich/Budrich UniPress, Berlin, 2017) 45. eBook ISBN: 978-3-863 88-312-6. https://doi.org/10.2307/j.ctvbkk4 1f.2021.

[5] David Held, *Models of Democracy* (Polity Press, Cambridge, 3rd ed., 2006) 4. ISBN: 9780745631479.

[6] CoE, 'Guidelines for civil participation in political decision making' (CM(2017)83-final, 27 September 2017) ('Guidelines for Civil Participation'), 31. https://rm.coe.int/guidelines-for-civil-participation-in-political-decision-making-en/16807626cf. *See also,* Wolfgang Benedek, Gerd Oberleitner, and Klaus Starl, 'Global Obligations -- Local Action: How to Develop the Local Level to Strengthen Human Rights', in Patricia Hladschik and Fiona Steinert (eds), *Making Human Rights Work, Festschrift for Manfred Nowak and Hannes Tretter* (NWV, Vienna/Graz, 2019) 127-151, at 138. ISBN: 978-3-7083-1255-2.

relatively small but representative group of people -- a 'microcosm'[7] -- of the affected populous participate in citizen panels, juries, councils or the like, generally only making recommendations before a collective decision is made.[8] Political scientists have endorsed the random selection of a subset of a constituency to empower ordinary citizens and encourage representative and reflective small-group deliberation.

This *Chapter* demonstrates that mechanisms of participatory and deliberative democracy are being increasingly implemented around the world, often following a process of democratization and/or decentralization. International and regional organizations have recognized the democratizing effect of tools of participatory and deliberative democracy and have endorsed their implementation. It is the objective of this *Chapter* to establish that participatory and deliberative democracy, implemented at the local level, can complement representative democracy and thereby enhance the democratic legitimacy of the state and its government. Finally, this *Chapter* also asserts that local participatory democracy improves human rights protection and encourages the social inclusion of minorities.

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[7] James S. Fishkin, 'Random Assemblies for Lawmaking? Prospects and Limits', (2018) 46(3) *Politics & Society* 359, 369.
[8] Tina Nabatchi and Matt Leighninger, *Public Participation for 21st Century Democracy* (John Wiley & Sons, Hoboken, NJ, 2015). ISBN: 978-1-118-68840-3.

8.2 The Democratic Legitimacy of Direct Participation

Participation in and of itself has intrinsic value and is a vital element of democratic governance.[9]

> [P]articipation is considered an inherent value of democracy that "enables individuals to rise above their private existence and become emancipated citizens, hopefully, more knowledgeable, more attentive to the interests of others, and more probing of their own interests."[10]

The deliberative process preceding collective decision-making is also a fundamental prerequisite to democratic governance.[11] The direct participation in public affairs facilitated by participatory and deliberative processes is recognized as inherently valuable to both the citizen and governance. Research suggests that participatory democracy increases civic participation and participants generally 'feel empowered, support democracy, view the government as more effective, and better understand budget and government processes.'[12] All of the models falling within the umbrella of participatory

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[9] CoE, *Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority*, CETS No. 207 (16 November 2009) ('Additional Protocol'), 21. https://rm.coe.int/168008482a.

[10] Victor Cuesta Lopez, 'The Lisbon Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy', (2010) 16(1) *European Public Law* 123, 124 (quoting B. Kohler-Koch and B. Rittberger (eds), 'Charting Crowded Territory: Debating the Democratic Legitimacy of the European Union', in *Debating the Democratic Legitimacy of the European Union* (2007) 16).

[11] Knappe, *supra* n. 4, at 58.

[12] Brian Wampler, Stephanie McNulty, and Michael Touchton, 'Participatory Budgeting: Does Evidence Match Enthusiasm?' (Open Government Partnership, 2017) ('Wampler, McNulty and Touchton (2017)'), 2. https://www. opengov partnership.org/stories/participatory-budgeting-does-evidence-match-enthusiasm.

democracy aim to increase the number of actors participating in the decision-making process. Importantly, from the perspective of state government legitimacy, there is evidence that greater direct participation at the local level, particularly in participatory budgeting, increases voter turnout in regular elections and 'there is an even greater increase among individuals from groups that historically vote at lower levels, including those who are younger, poorer, Black, and Latino.'[13] Participatory budgeting thus 'generates a spillover effect where its emphasis on social inclusion helps to bring individuals from traditionally marginalized groups into formal participation spaces, which then leads these same individuals to turn out to vote.'[14]

The implementation of mechanisms of participatory democracy also changes the attitude and behaviour of citizen participants, elected officials, and civil servants. The attitudinal change of citizens potentially includes personal empowerment and support for democracy.[15] Participants can also change their views of government and become more involved in the community.[16] Politicians and civil servants, at the same time, obtain an improved

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[13] Brian Wampler, Stephanie McNulty, and Michael Touchton, *Participatory Budgeting in Global Perspective* (Oxford University Press, Oxford, 2021) ('Wampler, McNulty and Touchton (2021)') 141. ISBN: 9780192652447.
[14] *Ibid*.
[15] Wampler, McNulty and Touchton (2017), *supra* n. 12, at 1 ('Early research focused on the attitudes of citizens who participate in PB [participatory budgeting], and found that PB participants feel empowered, support democracy, view the government as more effective, and better understand budget and government processes after participating.').
[16] *Ibid.*

understanding of the needs of the community and may implement new and/or different projects as a result of that better understanding.[17] Politicians, by simply participating in mechanisms of participatory democracy, will become more accessible to citizens, and civil servants will work more closely with them.[18]

Participatory democracy generally requires interaction directly with and between the population -- it encourages dialogue. Likewise, participatory deliberative processes preceding collective decision-making also encourage dialogue. Deliberative processes empower citizens, increase trust in governance, and enhance community cohesion. 'Participation and other forms of deliberation are in fact key elements of pluralism, as the latter clearly requires broad inclusion of the various segments of society far beyond the mere electoral or democratic rights.'[19] People aspire to participate in governance by methods other than voting in periodic elections, particularly at the local level.[20]

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[17] *Ibid.*, at 2-3.
[18] *Ibid.*
[19] Francesco Palermo, 'Participation, Federalism and Pluralism: Challenges to Decision Making and Responses by Constitutionalism', in Cristina Fraenkel-Haeberle, Sabine Kropp, Francesco Palermo and Karl-Peter Sommermann (eds), *Citizen Participation in Multi-Level Democracies* (Brill Nijhoff, Leiden/Boston, 2015) 31-47, at 46. ISBN: 9789004287938. *See also,* Sabine Kropp, 'Federalism, People's Legislation and Associative Democracy,' in Cristina Fraenkel-Haeberle, Sabine Kropp, Francesco Palermo and Karl-Peter Sommermann (eds), *Citizen Participation in Multi-Level Democracies* (Brill Nijhoff, Leiden/Boston, 2015) 48-66, at 61. ISBN: 9789004287938.
[20] Kropp, *supra* n. 19, at 49.

8.3 Recognizing the Virtues of Participatory Democracy

The developing awareness of the importance of direct participation in governance and its legitimizing effect has led to states and governments progressively implementing these mechanisms to increase *participation* and *deliberation* in local governance and thereby enhance their own legitimacy. There is a disparate array of participatory mechanisms that complement representative democracy, including participatory budgeting, consultation procedures, and town-hall meetings. [21] These participatory mechanisms provide an opportunity for all the citizens of a locality to participate in decision-making. Likewise, there are a number of mechanisms specifically intended to enhance deliberation by the random selection of a subset of citizens including citizen juries and citizen conferences. Participatory and deliberative democracy is particularly suited to implementation at the local level.

a. The Implementation of Mechanisms of Participatory Democracy

There are a multitude of participatory mechanisms that have been implemented to enhance local democratic governance and enhance the democratic legitimacy of the state. Indeed, mechanisms of participatory democracy have been implemented at the local level soon after democratization to legitimize the state and its governance.

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[21] CoE Guidelines for Civil Participation, *supra* n. 6, at 31. *See also,* Benedek, Oberleitner, and Starl, *supra* n. 6, at 138.

For instance, the implementation of local participatory democracy followed the democratization and the implementation of policies of decentralization in Brazil, Indonesia, and El Salvador.[22] The adoption of policies of decentralization resulted in the implementation of participatory democracy throughout sub-Saharan Africa, the Philippines and South Korea.[23]

One of the most practised, and promoted, tools of participatory democracy is participatory budgeting. Participatory budgeting (or 'PB') involves citizens developing spending and saving proposals and ultimately determining, or at least influencing, the governmental authority's budget or part of it.[24] '[T]he essence of PB lies in collective deliberation and decision making on the allocation of a portion of a public budget,'[25] and potentially serves to deepen local democracy.[26] Adopting participatory budgeting is seen as a

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[22] Wampler, McNulty and Touchton (2021), *supra* n. 13, at 105, 161.
[23] *Ibid.*
[24] Mario Martini and Saskia Fritzsche, 'E-Participation in Germany: New Forms of Citizen Involvement between Vision and Reality', in Cristina Fraenkel-Haeberle, Sabine Kropp, Francesco Palermo and Karl-Peter Sommermann (eds), *Citizen Participation in Multi-Level Democracies* (Brill Nijhoff, Leiden/Boston, 2015) 121-60, at 139. ISBN: 9789004287938.
[25] Karl Kössler, 'Laboratories of Democratic Innovation? Direct, Participatory and Deliberative Democracy in Canadian Provinces and Municipalities', in Cristina Fraenkel-Haeberle, Sabine Kropp, Francesco Palermo and Karl-Peter Sommermann (eds), *Citizen Participation in Multi-Level Democracies* (Brill Nijhoff, Leiden/Boston, 2015) 286-308, at 302. ISBN: 9789004287938.
[26] Sara Parolari and Jens Woelk, 'The Referendum in the United Kingdom: Instrument for Greater Constitutional Legitimacy, Tool of Political Convenience, or First Step to Revitalize Democracy', in Cristina Fraenkel-Haeberle, Sabine Kropp, Francesco Palermo and Karl-Peter Sommermann (eds), *Citizen Participation in Multi-Level Democracies* (Brill Nijhoff, Leiden/Boston, 2015) 265-285, at 280. ISBN: 9789004287938.

mechanism to reduce corruption, enhance transparency and accountability, and most importantly, reduce poverty and social exclusion and enhance human rights protection.[27] Indeed, the 'five core principles' of participatory budgeting have been described as 'voice, vote, social inclusion, social justice, and oversight.'[28] The local use of participatory budgeting is today a global phenomenon.

The oft-cited founding model of participatory budgeting is that of the Porto Alegre, Brazil. In 1989, the city of Porto Alegre adopted a participatory mechanism for determining the city's budget, which involved neighbourhood meetings followed by a meeting of assembly delegates.[29] Other municipalities in Brazil quickly adopted the practice and were followed by municipalities in Peru, Nicaragua and Bolivia. In Peru, the national government mandated the use of participatory budgeting by subnational governments.[30] Now, almost every Latin American country utilizes participatory budgeting including Argentina, Brazil, Colombia, Costa Rica, Guatemala,

[27] Anwar Shah, 'Overview', in Anwar Shah (ed.), *Public Sector Governance and Accountability Series, Participatory Budgeting* (World Bank, Washington, D.C., 2007) 1-18, at 1. eBook ISBN-10: 0-8213-6924-5. https://openknowledge.worldbank.org/handle/10986/6640.
[28] Wampler, McNulty and Touchton (2021), *supra* n. 13, at 28.
[29] Kössler, *supra* n. 25, at 302.
[30] Wampler, McNulty, Touchton (2021), *supra* n. 13, at 113.

Mexico, Panama, Peru, and Venezuela.[31] There are more than 3,000 South American cities utilizing participatory budgeting.[32]

Contemporaneous with the implementation of participatory budgeting in Brazil, Kerala in India adopted a participatory process for establishing its budget.[33] It was followed rapidly by other Asian countries. South Korea implemented its first participatory budgeting process in the human rights city of Gwangju, in 2002. Twenty years later almost all local governments in South Korea have adopted participatory budgeting, and, since 2011, national legislation has mandated its implementation.[34] Participatory planning and budgeting is also mandated at city and local government level in Indonesia resulting in its implementation by 490 cities and 74,000 villages.[35] After the election of President Aquino in 2010, the Philippines' national government has also implemented participatory

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[31] Nelson Dias, Sahsil Enríquez and Simone Júlio, *Participatory Budgeting World Atlas* (Epopeia and Oficina, Portugal, 2019) 83-118 ISBN: 9 78-989-54167-3-8. http://www.oficina. org.pt/atlas.
[32] *Ibid.*, at 23.
[33] Harry Blair, 'Accountability Through Participatory Budgeting in India: Only in Kerala?' in Shabbir Cheema (ed.), *Governance for Urban Services: Access, Participation, Accountability, and Transparency* (Springer Nature, Singapore, 2020) 57-76. eBook ISBN: 978-981-15-2973-3. https://doi. org/10.1007/978-981-15-2973-3. *See also*, Yves Sintomer, Carsten Herzberg and Anja Röcke, 'Transnational Models of Citizen Participation: The Case of Participatory Budgeting', in Nelson Dias (ed.), *Hope for Democracy: 25 Years of Participatory Budgeting Worldwide* (In Loco Association, São Brás de Alportel, Portugal, 2014) 28-46, at 37. ISBN: 978-972-8262-09-9. http://portugalparticipa.pt/library/book/788f65ac-95b7-4e1b-b649-9d52111641c8.
[34] Wampler, McNulty, Touchton (2021), *supra* n. 13, at 113.
[35] *Ibid.*, at 116.

budgeting in thousands of localities.[36] Even China, an authoritarian regime, has enabled some limited forms of participatory budgeting albeit imposed and controlled from the top down. Participatory budgeting in China, although not impacting the formal power structures, has 'promoted a degree of transparency and fairness, provided opportunities for deputies and citizens to examine, discuss and monitor budgets, and improved the communication between government and citizens.'[37] Although participation is generally weighted in favour of the Chinese elite,[38] it has contributed to expanding participation in the decision-making,[39] and has 'allow[ed] citizens to provide input in the distribution of local budgets.'[40]

In the early 2000s, cities in sub-Saharan Africa also adopted participatory budgeting and a plethora of sub-Saharan African countries have now adopted and used participatory budgeting, including Angola, Benin, Burkina Faso, Cameroon, the Republic of Congo, the Democratic Republic of the Congo, Ethiopia, Kenya,

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[36] *Ibid.*, at 107.
[37] Baogang He, 'Civic engagement through Participatory Budgeting in China: three different logics at work', in Nelson Dias (ed.), *Hope for Democracy: 25 Years of Participatory Budgeting Worldwide* (In Loco Association, São Brás de Alportel, Portugal 2014) 255-268, at 266. ISBN: 978-972-8262-09-9. http://portugal participa.pt/library/book/788f65ac-95b7-4e1b-b649-9d52111641c8.
[38] Emilie Frenkiel, 'Participatory budgeting and political representation in China, (2021) 6(1) *Journal of Chinese Governance* 58-80. DOI: 10.1080/23812346.2020. 1731944.
[39] *Ibid.*
[40] Yuan Li, Yanjun Zhu and Catherine Owen, 'Participatory budgeting and the party: Generating "citizens orderly participation" through party-building', (2023) 8(1) *Journal of Chinese Governance* 56, 59. https://doi.org/10.1080/23812346. 2022.2035487.

Madagascar, Mali, Mauritania, Mozambique, Niger, Senegal, South Africa, Tanzania, Togo, Uganda, Zambia, and Zimbabwe.[41] There are now more than 800 participatory budgeting programs adopted, in some shape or form, by African local authorities.[42] In North Africa, participatory budgeting has been implemented in Egypt, Morocco and Tunisia.[43]

Western countries have also recognized the democratizing value of direct participation in local governance. In the United States, participatory budgeting was launched in Chicago in 2009 and in New York City in 2010 at the district and ward level.[44] It has now been utilized in 39 large American cities including San Jose, Boston, Phoenix, Seattle and San Antonio, as well as Chicago and New York.[45] It is also commonly utilized in smaller local authorities in the US and Canada. In North American, participatory budgeting has also been introduced by public housing authorities and schools.[46] Likewise, cities and local government authorities in the United

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[41] Wampler, McNulty, Touchton (2021), *supra* n. 13, at 159.
[42] *Ibid*., at 158.
[43] Dias, Enríquez and Júlio, *supra* n. 31, at 17-18.
[44] Benjamin Goldfrank and Katherine Landes, 'Participatory Budgeting in Canada and the United States', in Nelson Dias (ed.), *Hope for Democracy: 30 Years of Participatory Budgeting Worldwide* (Oficina, Faro, Portugal, 2018) 161-176, at 164. ISBN: 78-989-54167-0-7. https://www.oficina.org.pt/hopefordemocracy.html.
[45] Dias, Enríquez and Júlio, *supra* n. 31, at 130.
[46] Wampler, McNulty, Touchton (2021), *supra* n. 13, at 135.

Kingdom, Australia and New Zealand have adopted participatory budgeting.

European local governments have also implemented mechanisms of participatory budgeting. In Europe, the variants range from direct participation in decision-making regarding projects to 'selective listening' or 'proximity participation,' which is 'purely consultative' and focuses on the provision of financial information and ensuring the budgetary process is transparent.[47] Three of Europe's premier cities, Paris, Madrid and Barcelona, have adopted participatory budgeting utilizing digital platforms. In Flanders, Belgium, several municipalities have engaged in the practice of delegating at least part of the municipal budget to area committees.[48] In Germany, at the municipal level, purely consultative mechanisms have been adopted in regard to participatory budgeting, which focus on the provision of information, transparency and accountability.[49] After national legislation mandated its implementation, almost 1,500 Polish towns and villages have adopted participatory budgeting.[50]

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[47] Edward Best, Maja Augustyn and Frank Lambermont, *Direct and Participatory Democracy at Grassroots Level: Levers for forging EU citizenship and identity?* (European Institute of Public Administration, Maastricht, 2011) 87. ISBN: 978-92-895-0641-0. DOI: 10.2863/63437.

[48] *Ibid.*, at 24.

[49] Helmut Klages, 'Perspectives on the Institutionalization of Citizen Participation at the Municipal Level: A First Hand Report', in Cristina Fraenkel-Haeberle, Sabine Kropp, Francesco Palermo and Karl-Peter Sommermann (eds), *Citizen Participation in Multi-Level Democracies* (Brill Nijhoff, Leiden/Boston, 2015) 114-20, at 115. ISBN: 9789004287938.

[50] Wampler, McNulty, Touchton (2021), *supra* n. 13, at 153.

In addition to participatory budgeting, procedures enabling direct decision-making, are being increasingly adopted by local, municipal and regional authorities. Citizens' councils, assemblies and panels, advisory bodies and neighbourhood councils all have the potential to enable the community to directly decide on issues. They also enable direct consultation between citizens and local authorities. Consultative processes are a mechanism for enhancing participation.[51] Consultation may be carried out through various means and tools, such as meetings, public hearings, focus groups, surveys, questionnaires and digital tools.[52] Consultation procedures:

> promote more general perceptions of citizenship -- feelings of common identity, recognition of duties and rights, a sense of belonging -- which can help assure democratic legitimacy.[53]

Consultation procedures thus enhance social inclusion. The mechanisms are open to participation by the entire affected population. Many local and municipal authorities formally facilitate participatory citizens' assemblies, advisory councils and neighbourhood councils, where residents are invited to meet, discuss and deliberate on public issues.

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[51] Anna Gamper, 'Forms of Democratic Participation in Multi-Level Systems', in Cristina Fraenkel-Haeberle, Sabine Kropp, Francesco Palermo and Karl-Peter Sommermann (eds), *Citizen Participation in Multi-Level Democracies* (Brill Nijhoff, Leiden/Boston, 2015) 67-86, at 69. ISBN: 9789004287938.
[52] CoE Guidelines for Civil Participation, *supra* n. 6, at l.
[53] Best, Augustyn and Lambermont, *supra* n. 47, at 2.

Bulgaria has introduced binding citizens' assemblies in municipalities with populations of up to 10,000 people.[54] The assembly can be initiated by the local authority or by citizens if the initiative is supported by 2 percent of the municipalities' population.[55] Decisions of these citizens' assemblies are binding when at least 25 per cent of the population eligible to vote participates.[56] In South Africa mechanisms of participatory democracy were utilized to address 'the "democratic deficit" in post-apartheid local governance,'[57] and local governments must facilitate community wide consultations, as well as consultations 'with locally recognized community organizations, and where appropriate with traditional authorities.'[58] In Tanzania, an open forum enables

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[54] Bulgaria (Republic of), *Direct Citizen Participation in State and Local Government Act 2009*, Promulgated, SG No. 44 (12 June 2009, effective 21 December 2010), Art. 55(1). https://legislationline.org/sites/default/files/documents/d9/Bulgaria_Act_direct_participation_state_local_government_2009_am2015_en.

[55] *Ibid.*, at Art. 57(1)(3).

[56] *Ibid.*, at Art. 60(1).

[57] Christine Dube, Lukhana Mnguni, and Alain Tschudin, 'Peacebuilding through Public Participation Mechanisms in Local Government: The Case Study of Mbizana Local Municipality, South Africa', (2021) 2(2) *Journal of Illicit Economies and Development* 242, 245. DOI: http://doi.org/10.31389/jied. *See also*, South Africa (Republic of), *Local Government: Municipal Systems Act 2000*, Act 32 of 2000 (Published 20 November 2000, assented to 14 November 2000). https://www.gov.za/documents/local-government-municipal-systems-act.

[58] Ntsikelelo Breakfast, Itumeleng Mekoa, and Nondumiso Maphazi, 'Participatory Democracy in Theory and Practice: A Case Study of Local Government in South Africa', (2015) *Africa's Public Service Delivery and Performance Review* 31, 39-41. DOI:10.4102/apsdpr.v3i3.8.

citizens to participate in in-person meetings and decide on relevant issues.[59]

Formalised neighbourhood councils can also suggest projects to local authorities on issues like traffic control, the local environment, playgrounds, and public lighting. For example, local '[n]on-binding, open-access, advisory mechanisms' are utilized at local level in Germany as a 'way to seek popular consensus and contribution to local governance and spatial planning problems.'[60] In particular, '[t]hey are regularly used in Bavaria for establishing citizens' priorities and preferences in public policy.'[61] These mechanisms are open to all those who wish to participate. Each of these procedures increase the number of citizens involved in the decision-making process and facilitates dialogue, discussion and debate. They also require active participation. In doing so, they empower members of the community and enable social inclusion.

Internet and communications technology (ICT) can also 'increase citizen participation [...] and strengthen democracy.'[62] ICT is now commonly used to facilitate participatory democracy ('e-democracy') on a national and even supra-national scale. For

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[59] Bariki Gwalugano Mwasaga, 'The Relationship between Participatory Democracy and Digital Transformation in Tanzania', (2020) 3(3) *Journal of Social and Political Sciences* 664-675. ISSN: 2615-3718. DOI: 10.31014/aior.1991.03.03.200.

[60] Breakfast, Ntsikelelo and Mekoa, *supra* n. 58, at 42.

[61] *Ibid*.

[62] CLRA, *eDemocracy* (Website). https://www.coe.int/en/web/congress/e-democracy.

instance, the European Union has adopted a number of online participatory mechanisms itself, with the aim of increasing participation.[63] The European Commission has implemented a platform enabling public consultations where citizens of Member States 'can express [their] views on the scope, priorities and added value of EU action for new initiatives, or evaluations of existing policies and laws.'[64] From April 2021 to May 2022, the EU hosted the 'Conference on the Future of Europe.'[65] The Conference was a citizen-led series of online debates and discussions that 'enabled people from across Europe to share their ideas and help shape our common future.'[66] The Conference was conducted via a 'Multilingual Digital Platform' and had 700,000 participants and more than 5 million unique visitors.[67] The EU has also added a hybrid in-person and online approach, 'Citizen Dialogues,' to its citizen consultations.[68]

More importantly, here, e-democracy can also facilitate participation at the local or municipal level. 'The various digital apps available

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[63] ECEU, *About the European Commission* (Website). https://ec.europa.eu/info/about-european-commission/service-standards-and-principles/transparency/consultations_en.
[64] ECEU, *Consultations* (Website). https://ec.europa.eu/info/consultations.
[65] ECEU, *Conference of the Future of Europe* (Website). https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/conference-future-europe_en.
[66] *Ibid.*
[67] *Ibid.*
[68] EU, 'Citizen Dialogues' are meetings between European Commission representatives and citizens on the 'Future of Europe', and other public issues. https://ec.europa.eu/info/events/citizens-dialogues_en.

also enable members of the community to participate in the decision-making process and to monitor government in their local authority in real time.'[69] The digital transformation can facilitate citizen's participation in policy and decision-making at the local level.[70]

While online participatory procedures cannot substitute for in-person participation, online platforms are providing a vast array of mechanisms that enable direct participation in decision-making,[71] and 'open[s] a new space for political communication and participation.'[72] As noted, the city governments of Paris, Barcelona and Madrid have utilized digital platforms for participatory budgeting. They also utilize these online platforms to facilitate comment on public issues, submit proposals, vote in surveys and opinion polls, lodge e-petitions, engage in virtual discussions and debate, and participate in decision-making.[73]

It is not just large cities that can successfully utilize digital tools to enhance citizen participation. Small town local governance can also benefit from implementing digital democracy. In Arenys de Mar, a

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[69] CoR, 'Strengthening local governance and representative democracy via new digital technology instruments' (Opinion, CIVEX-VII/002, 10 December 2020), para. 9. https://cor.europa.eu/EN/our-work/Pages/OpinionTimeline.aspx?opId=CDR-830-2020.
[70] *Ibid.*, at para 11.
[71] *See, e.g.,* CLRA, eDemocracy, *supra* n. 62.
[72] Francisca Tejedo-Romero, Joaquim Filipe Ferraz Esteves Araujo, Ángel Tejada, and Yolanda Ramírez, 'E-government mechanisms to enhance the participation of citizens and society: Exploratory analysis through the dimension of municipalities', (2022) 70(1) *Technology in Society* 1, 1.
[73] *See,* UK Parliament, *DirectGov* (Website). https://petition.parliament.uk/.

Catalan village 41 kilometres from the city of Barcelona, the local council employs digital tools as part of its commitment to participatory democracy. It uses a digital platform for participatory budgeting and 'meetings', 'debates' and 'proposals.' [74] Local governments in the United Kingdom and Slovenia also utilize e-democracy tools such as e-forums, e-consultations, e-petitions and information portals. [75] There are various online discussion sites available at national and local level for citizens to participate in decision-making in the Netherlands.[76] In Italy's region of Emilia-Romagna a website is utilized to coordinate and promote active participation.[77] Local governments are also utilizing e-democracy in

[74] Ajuntament d'Arenys de Mar, *Online Participation Platform* (Website). https://participa 311-arenysparticipacio.diba.cat/?locale=ca.
[75] Best, Augustyn and Lambermont, *supra* n. 47, at 73.
[76] Gerrit Rooks, Uwe Matzat and Bert Sadowski, 'An empirical test of stage models of e-government development: Evidence from Dutch municipalities', (2017) 33(4) *The Information Society* 215-225. DOI: 10.1080/01972243.2017.1318194.
[77] Best, Augustyn and Lambermont, *supra* n. 47, at 52.

Finland,[78] Estonia,[79] Uruguay[80], Denmark[81], the United States,[82] and Tanzania.[83] The use of digital technology by local governments to promote participation is emerging as a global phenomenon.

b. Deliberation and Sortition

Deliberative processes enhance citizen participation, require 'fair and reasonable discussion among citizens,' and 'strengthens citizens voices' in governance.[84] Complex issues may require extensive discussion, dialogue and deliberation before a collective decision can be made and it may not be feasible for the entire local population to obtain the information and knowledge necessary to properly

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[78] Ari-Veikko Anttiroiko, 'Towards citizen-centered local e-government: the case of the city of Tampere', (2004) 6 *Annals of Cases on Information Technology* (2004) 370–386.

[79] Ingrid Pappel, Valentyna Tsap, and Dirk Draheim, 'The e-LocGov model for introducing e-governance into local governments: an Estonian case study' (2021) 9 *IEEE Transactions on Emerging Topics in Computing* 597–611. DOI: 10.1109/ TETC.2019.2910199.

[80] Fernando Rosenblatt, Germán Bidegain, Felipe Monestier, and Rafael Piñeiro Rodríguez, 'A Natural Experiment in Political Decentralization: Local Institutions and Citizens' Political Engagement in Uruguay', (2015) 57(2) *Latin American Politics and Society* 91–110. DOI: 10.1111/j.1548-2456.2015.00268.x.

[81] Jeremy Rose and John Stouby Persson, 'E-government value priorities of Danish local authority managers', in Jeremy Rose, Pernille Kræmmergaard and Peter Axel Nielsen (eds), *IT Management in Local Government: the DISIMIT Project* (Software Innovation, Aalborg University, Aalborg, 2012) 27–56. eBook ISBN: 978-87-992586-1-1.

[82] Kasymova Jyldyz, 'Analyzing recent citizen participation trends in Western New York: Comparing citizen engagement promoted by local governments and nonprofit organizations', (2014) 5 *Canadian Journal of Nonprofit and Social Economy Research* 47–64.

[83] Mwasaga, *supra* n. 59, at 664-675.

[84] OECD, 'Innovative Citizen Participation and New Democratic Institutions: Catching the Deliberative Wave, Highlights 2020' (10 June 2020) ('OECD (2020 Highlights)'), 4. https://www.oecd-ilibrary.org/deliver/339306da-en.pdf?item Id=/content/publication/339306da-en&mimeType=pdf.

participate in deliberations. In such instances, participatory forums enable a representative subset of the population to advise and make a recommendation to the population before a collective decision is made. Deliberative forums include citizen juries, panels and advisory councils. According to the OECD, there has been a 'deliberative wave' beginning in 1979 and gaining momentum since 2010, whereby the use of deliberative forums has been increasing exponentially.[85] Although these deliberative forums have been utilized at all levels of government, they have been predominantly utilized at the local level (65 per cent).[86] Citizen juries are the most often used deliberative forum.[87] A 'citizens' jury' is '[a] means for obtaining informed citizen input into policy decisions.' A citizens' jury is usually composed of a small number (10-15) of citizens whose opinion and views purportedly reflect the views and opinions of the populace.[88] Advisory councils also involve citizens in dialogue, deliberation and debate on a specific topic or topics; and are intended to produce recommendations for municipal authorities. The forums can be policy specific and ad hoc and have been utilized primarily to address separate policy issues, such as infrastructure, health, urban

[85] OECD, 'Innovative Citizen Participation and New Democratic Institutions: Catching the Deliberative Wave Database Update 2021' (2021), 4. https://www.oecd.org/gov/open-government/oecd-deliberative-wave-database-update.pdf.
[86] *Ibid.*, at 7.
[87] OECD (2020 Highlights), *supra* n. 84, at 21.
[88] Tom Wakeford, 'Citizens Juries: a radical alternative for social research', (2002) 37 *Social Research Update: Citizens Juries* 2.

planning, and the environment, or, more rarely, operate on a broader and more permanent basis.[89]

The deliberative process 'involves weighing carefully different options' after careful review of accurate, relevant and diverse information, and 'participants finding common ground to reach a group decision.'[90] Participants are required to spend 'significant time learning and collaborating through facilitated deliberation to develop informed collective recommendations for public authorities.'[91] Deliberative forums:

> are carefully organized to enable citizen deliberators to weigh competing arguments, have access to competing experts, engage in mutually respectful and moderated small-group discussions, and carefully work through an agenda of choices ensuring that the pros and cons of each choice have gotten a hearing.[92]

For instance, a representative sample of 40 residents of Auckland, New Zealand, gathered over four Saturdays in July and August 2022 to deliberate over the question 'What should be the next source (or sources) of water for Auckland?'[93] The participants were provided with written material addressing the complex issue as well as the

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[89] OECD (2020 Highlights), *supra* n. 84, at 13.
[90] *Ibid.*, at 5.
[91] *Ibid*., at 3.
[92] Fishkin, *supra* n. 7, at 366.
[93] Complex Conversations, *We collaborated with Watercare to run a citizens' assembly over four weekends from late July to early September 2022* (Website). https://www.complexconversations. nz/citizens-assembly/. *See also,* GovInsider, *Can citizens' assemblies solve policy gridlocks?* (Website). https://govinsider.asia/ citizen-engagement/can-citizens-assemblies-solve-policy-gridlocks/.

water source alternatives. They were also presented with information by a variety of experts and stakeholders, some of whom were selected by the participants.[94]

Like the mechanisms of participatory democracy, deliberative processes preceding collective decision-making empower citizens, increase trust in governance, [95] and strengthen integrity by reducing corruption (by ensuring that 'money and power cannot have undue influence on a public decision').[96] Deliberative processes encourage 'active listening' and 'critical thinking'.[97] They can also address long-term policy questions that require implementation beyond a single electoral cycle.[98] Additionally, engaging in a deliberative process before making recommendations and adopting a decision leads to better policy outcomes because deliberation develops informed recommendations that result in considered public judgements rather than simply reflect public opinion.[99] Importantly, deliberative policies can also counteract disinformation.[100]

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[94] *Ibid.*
[95] PACE has specifically recognized that 'promoting citizens' participation in democratic deliberation […] can address voters' lack of trust in and feeling of disconnection from decision-making processes.' PACE, *Updating guidelines to ensure fair referendums in Council of Europe member States*, Res. 2251 (adopted 22 January 2019). https://pace.coe.int/en/files/25325.
[96] OECD (2020 Highlights), *supra* n. 84, at 6.
[97] *Ibid.*, at 7.
[98] *Ibid*.
[99] *Ibid.*, at 6.
[100] *Ibid.*, at 7.

The representative sample selected for these deliberative mechanisms is frequently randomly selected. As noted, prior to the 'triumph' of elections, office holders were often selected by lot. The random selection of participants on the basis of sortition theoretically ensures equality within the populous: '[e]veryone has the same chance to be in and be replaced equally by anyone else.'[101] A process of sortition is being progressively utilized at all levels of government and is increasingly endorsed in political science discourse.[102] In randomly selected deliberative panels, the participants are intended to reflect the community -- a 'microcosm of society' -- and are usually chosen in relation to where the decision is to be implemented.[103] To ensure that the forum is a reflection of society, the participants are sometimes selected on the basis of 'demographic selection criteria that matches the general makeup of the wider population.'[104] The random selection of representatives produces a forum 'with a greater diversity of experiences and social profiles,

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[101] Knappe, *supra* n. 4, at 65.

[102] A number of books by preeminent political scientists have been published endorsing sortition as a mechanism to enhance democratic governance. *See*, *eg.,* David Van Reybrouck, *Against Elections: The Case for Democracy* (Liz Waters (trans.)) (Seven Stories Press, Kindle ed., New York, 2016). ISBN: 9781609808112. Hélène Landemore, *Open Democracy: Reinventing Popular Rule for the Twenty-First Century* (Princeton University Press, Princeton 2020). ISBN: 9780691181998 ('Landemore (2020)').

[103] Dimitri Courant, 'Sortition and Democratic Principles: A Comparative Analysis', in John Gastil and Erik Olin Wright (eds), *Legislature by Lot: Transformative Designs for Deliberative Governance* (Verso, New York/London, 2019) ('Courant (2019)') 229-248, at 234. eBook ISBN: 9781788736114. https://www.versobooks.com/books/2969-legislature-by-lot.

[104] OECD (2020 Highlights), *supra* n. 84, at 26.

which creates a stronger collective intelligence capable of tackling issues elected legislatures fail to address adequately.'[105] Thus, the 'cognitive diversity' precipitated by sortition is an 'epistemically superior mode of selection of representatives.'[106] Indeed, the majority of deliberative-democracy experiments, such as deliberative polls and citizens' juries, demonstrate that citizens 'learn fast and become more competent than elected officials on complex issues.'[107]

Sortition has been increasingly utilized at all levels of government to improve democratic decision-making. For instance, in 2004 British Columbia, Canada, decided to entrust reform of its electoral law to a random sample of 160 citizens.[108] A few years later, Iceland adopted sortition as part of its constitution making process by establishing a National Forum consisting of 1,500 people, most randomly selected, that gathered on a single day to articulate a vision for renewed Icelandic governance.[109] The G1000 in Belgium was adopted to provide a deliberative forum to complement Belgium's consociational representative system and deal with Belgium's increasingly ineffective system of governance and the 2011 'democratic crisis.'[110] The Irish Constitutional Convention, which

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[105] Courant (2019), *supra* n. 103, at 233.
[106] Hélène Landemore, 'Deliberation, Cognitive Diversity, and Democratic Inclusiveness', (2013) 190(7) *Synthese* 1209–31. http://www.jstor.org/stable/41931805.
[107] Courant (2019), *supra* n. 103, at 233.
[108] Van Reybrouck, *supra* n. 102, at 106.
[109] Landemore (2020), *supra* n. 102, at 158.
[110] Van Reybrouck, *supra* n. 102, at 144. *See also, CASE G1000 (Belgium)* (Website). https://participedia.net/case/485.

proposed changes (including legalizing same-sex marriage) to be put to a referendum, involved 66 'ordinary' citizens and 33 members of parliament.[111] Sortition has also been utilized at the supranational and, informally, at the global level. The European Union engaged in random sampling as part of a large-scale deliberative process. The EU utilized citizens' juries in considering their potential involvement in EU decision-making and '[r]andomly selected citizens, representative of the national population.'[112] World Wide Views is a global citizen consultation initiative for the world and its 'World Wide Views on Climate and Energy' was a deliberative forum that considered the views of '10,000 citizens in 76 countries' for the Paris COP21.[113]

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[111] Dimitri Courant, 'Deliberative Democracy, Legitimacy, and Institutionalisation: The Irish Citizens' Assemblies' (72 IEPHI Working Paper Series, 2018) 1. https://www.researchgate.net/publication/335566017_Deliberative_DemocracyLegitimacy_and_Institutionalisation_The_Irish_Citizens'_Assemblies.

[112] EUEC, 'How the participatory democracy toolbox can make the European Union less remote from citizens' (European Citizens' Panel, Final Report, 26 February 2010), 5. https://www.scribd.com/document/32473022/European-Citizens-Panel-Final-Report-How-the-participatory-democracy-toolbox-can-make-the-European-Union-less-remote-from-citizens.

[113] World Wide Views on Climate and Energy, 'From The World's Citizens to the Climate and Energy Policymakers and Stakeholders' (Results Report, Danish Board of Technology Foundation/Missions Publiques and the French National Commission for Public Debate, September 2015), 6. ISBN: 978-87-91614-04-0. http://climateandenergy.wwviews.org/wp-content/uploads/2015/09/WWviews-Result-Report_english_low.pdf.

c. Participatory Democracy is Not a Panacea for the Democratic Deficit

Mechanisms of participatory democracy may be a means of *alleviating* the democratic deficit of modern representative governance, but they are not perfect and are not a panacea for the 'crisis in democracy'. As discussed above, the core objectives of participatory democracy are the increase in participation in governance and the facilitation of equal and inclusive deliberation. Studies undertaken to determine the effectiveness of mechanisms of participatory and deliberative democracy are somewhat inconclusive. The impact of participatory democracy is difficult to determine largely because of the wide variety of mechanisms utilized, which inhibits objective research. In any event, the effectiveness of mechanisms of both participatory and deliberative democracy have been the subject of criticism.[114]

Perhaps the primary goal of participatory democracy is to increase the participation of individuals in governance. However, it appears that the proportion of the voting public that actually participate in mechanisms of participatory democracy is very small. For instance, contemporary studies have suggested that participation in participatory budgeting processes is likely to be 'strikingly low' at

[114] Phil Parvin, 'The Participatory Paradox: An Egalitarian Critique of Participatory Democracy', (2021) 57(2) *Representation: Journal of Representative Democracy* 263, 268. DOI: 10.1080/00344893.2020.1823461.

between 2 and 7 per cent,[115] or even less than 1 per cent.[116] These low rates of participation are not only contrary to the purpose of participatory democracy but exacerbate the perception of the high cost associated with implementing participatory mechanisms.[117]

The level of citizen participation in participatory processes depends on a variety of factors that are within the control of the administering authority; accordingly, their approach will affect the level of participation. The promotion of the participatory mechanism and the dissemination of information about the process by multiple and varied information mediums impacts the number of those participating.[118] That is, participation is encouraged by the 'effective marketing' of the process 'to ensure everyone is aware of what is happening, how they can be involved and the impact that can be made.'[119] The ease of participation and the adoption of a variety of means of participation such as procedures that combine public

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[115] Francesca Manes-Rossi, Isabel Brusca, Rebecca Levy Orelli, Peter C. Lorson and Ellen Haustein 'Features and drivers of citizen participation: Insights from participatory budgeting in three European cities', (2023) 25(2) *Public Management Review* 201, 218. DOI: 10.1080/14719037.2021.1963821.

[116] In 2009, less than half a percent of the voters of Hamburg partipated in the city's participatory budgeting process. Kai Masser, 'Participatory Budgeting As Its Critics See It' (John Cochrane (trans.)) (Netzwerk Bürgerhaushalt, The Federal Agency for Civic Education, Germany, 30 April 2013), 3. https://www.bpb.de/themen/stadt-land/buergerhaushalt/513409/participatory-budgeting-as-its-critics-see-it/.

[117] *Ibid.*, at 5.

[118] Manes-Rossi, Brusca, Orelli, Lorson and Haustein, *supra* n. 115, at 214.

[119] Emyr Williams, Emily St. Denny and Dan Bristow, 'Participatory Budgeting: An Evidence Review' (Public Policy Institute for Wales, 2017) 15. https://www.oidp.net/docs/repo/doc215.pdf.

meetings, online platforms and representative bodies also encourage participation.[120]

In regard to participatory budgeting, the amount of funds directly allocated by citizens, 'the primacy of participatory forums in the decision-making process' and 'the degree of power allocated to PB' -- that is, 'whether authorities retain discretion in implementing the projects', also affects participation.[121] Likewise, participation processes that only enable citizen 'input' without that input having any impact on the decision-making process also discourage participation.[122] To increase participation 'it is paramount that the process result in tangible outcomes to prove that people's engagement has had an impact.'[123] The ability of citizens to participate in the entirety of the process from project inception to planning and implementation is also a factor.[124] Restrictions on the size or practicality of proposals -- 'speculative proposals' -- discourages participation.[125] The administering authority likely has the capacity and competence to address each of these factors and increase participation.

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[120] Masser, *supra* n. 116, at 5.
[121] Sergiu Gherghina, Paul Tap, and Sorina Soare, 'Participatory budgeting and the perception of collective empowerment: institutional design and limited political interference', (2022) *Acta Politica* 1. https://doi.org/10.1057/s41269-022-00273-4.
[122] Wampler, McNulty, Touchton (2021), *supra* n. 13, at 35.
[123] Williams, St. Denny and Bristow, *supra* n. 119, at 15.
[124] Manes-Rossi, Brusca, Orelli, Lorson and Haustein, *supra* n. 115, at 214.
[125] *Ibid.* at 216.

It should also be noted that participatory processes appear to 'work best in the initial years, when scale is still limited and citizens are galvanized by its novel approach.'[126] The rapid implementation of mechanisms of participatory budgeting, beginning thirty years ago, initially resulted in citizen enthusiasm and resultant participation, but the number of participants has gradually declined after the initial novelty phase wore off.[127] Over the mid to long-term 'participation fatigue' may set in resulting in a decrease in participation.[128] Indeed, participatory budgeting may also be a victim of its own success:

> Over the longer term, successful PB processes engage more people that propose more ideas that require more resources, eventually hitting a sort of 'glass ceiling', a situation in which ideas processing slows down, more and more proposals are not implemented, and the positive reinforcing feedback loop typical of the first years of a PB process breaks down.

Unrealistic expectations, which are sometimes the result of the nature of the participatory process itself thus may lead to a decline in participation. Mechanisms of participatory democracy are best suited to very small groups and 'the possibility of direct democracy breaks down as soon as the group expands beyond a few hundred

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[126] Paolo de Renzio, Paolo Spada and Brian Wampler, 'Paradise Lost? The crisis of participatory budgeting in its own birthplace' (International Budget Partnership, 2019), 6. https://internationalbudget.org/2019/11/paradise-lost-the-crisis-of-participatory-budgeting-is-its-own-birthplace/.
[127] *Ibid.*
[128] *Ibid. See also*, Masser *supra* n. 116, at 10.

people.'[129] Accordingly, larger forums tend towards a smaller proportion of overall participation.

As well as increasing participation across the community, the implementation of mechanisms of participatory democracy is intended to reduce the power of political elites. Not only is low participation an apparent feature of participatory democracy, but it also appears that those participating are members of the community's elite. Indeed, it appears that participation is dominated by better educated, middle aged, employed men with higher incomes.[130] Similarly, well organized -- and hence financed -- participant groups are also able to dominate participatory processes. Participatory mechanisms thereby provide an additional forum for elite segments of society 'who are in any case particularly politically active, with additional opportunities to get involved and influence things' and 'to gain disproportionate and basically undemocratic influence.'[131] Thus, it has been asserted that mechanisms of participatory democracy are 'susceptible to elite capture, whereby traditional local powerbrokers will dominate the process and exclude marginalized groups.'[132]

The potential dominance of political power brokers 'limits the role of women, youths, and other marginalized groups' in participatory

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[129] Landemore (2020), *supra* n. 102, at 66.
[130] Masser, *supra* n. 116, at 5.
[131] *Ibid.*
[132] Wampler, McNulty, Touchton (2021), *supra* n. 13, at 159.

processes and 'may reinforce social power dynamics within a community rather than confront them.'[133] Consensus based mechanisms are particularly susceptible to elite capture because 'entrenched community leaders' dominate meetings and pressure more vulnerable participates. An intermediate role of government experts and/or a secret ballot at the end of the process can alleviate the risk of elite capture.[134]

The potential domination of participatory mechanisms by elite members of society is also inherent in representative democracy and is a reflection of society itself.[135] The unequal distribution of resources, financial and educational, impact participation; and it is clear that '[t]hose who are not affluent and well educated -- that is, those of low socioeconomic status -- are less likely to take part politically'.[136] Furthermore, 'the more socially and economically unequal a society is, the less politically engaged its citizen body will be.'[137] The risk of elite capture of mechanisms of participatory democracy will be significantly reduced if there is a recalibration of the social, political, and economic stratum of society as a whole, so

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[133] *Ibid.*, at 164.
[134] *Ibid.*, at 139.
[135] *See infra.*, Ch. 6.3 and 6.4.
[136] Kay Lehman Schlozman, Henry E. Brady, and Sidney Verba, *Unequal and Unrepresented: Political Equality and People's Voice in the New Gilded Age* (Princeton University Press, Princeton, 2018) 5. ISBN: 9780691180557.
[137] Parvin, *supra* n. 114, at 114, 268.

that all members of society have an equal opportunity and ability to participate.[138]

Deliberative assemblies chosen by sortition are also intended to provide equal representation of all segments of society through the random selection of participants. However, the selection of citizens is unlikely to be 'purely' random and, like participatory democracy more generally, favours the existing elite. Participation in deliberative forums is voluntary and therefore depends on the capacity and resolve to participate, 'consequently, the selected group is not a completely random cross-section of the population, and it tends to be more politically active and better educated than the general population.'[139] Citizens with a lower economic status and members of disadvantaged groups are less likely to have the capacity to voluntarily participate.[140] The selection process also depends on accurate registration lists; it is members of the lower economic segment of society who are more likely, for a variety of reasons, to be absent from registration lists.

In an attempt to counteract the bias of 'random' selection, stratified sampling is sometimes utilized whereby the selection of participants is engineered to reflect the demographic characteristics of the

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[138] *Ibid.*, at 266, 275.
[139] Adela Gąsiorowska, 'Sortition and its Principles: Evaluation of the Selection Processes of Citizens' Assemblies', (2023) 19(1) *Journal of Deliberative Democracy*, 1, 3. DOI: https://doi.org/10.16997/ jdd.1310.
[140] *Ibid.*, at 4.

population.[141] A disadvantage of stratified sampling is that, to reflect the population's demography, the personal circumstances of potential participants must be honestly and accurately disclosed. Also, 'oversampling' of minority groups is sometimes conducted in an attempt to ensure the proportional representation of minorities.[142] Both stratified sampling and the oversampling of minority groups reduces the inherent equality of a random selection process. Accordingly, even though sortition purports to provide every citizen with an equal chance of being selected, 'due to societal inequalities, the equality of outcomes can be distorted during the selection process.'[143]

8.4 The International Endorsement of Participatory Democracy

International and regional organizations have recognized that 'representation can no longer be the only expression of democracy.'[144] Instead, there is an increased awareness that representative democracy must be supplemented with 'more sustained forms of interaction between citizens and the authorities.'[145] The increasing implementation of participatory democracy at the local level has been accompanied by the growing

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[141] *Ibid.*
[142] Landemore (2020), *supra* n. 102, at 1220.
[143] Gąsiorowska, *supra* n. 139, at 4.
[144] PACE, *Democracy in Europe: crisis and perspectives*, Res. 1746 (23 June 2010), para. 2. https://pace.coe.int/en/files/17882.
[145] *Ibid.*, at para. 2.1.

recognition of its democratizing value by international and regional organizations. Indeed, the UN's Human Rights Council has recognized that 'resilient democracies require meaningful participation.'[146] The UN and regional organizations, particularly European organizations, have endorsed the implementation of mechanisms of participatory democracy to strengthen democracy.

The UN's increasing focus on participatory democracy is evident in the *New Urban Agenda* and the *Sustainable Development Goals* (SDGs). The UN's SDG 11 is to '[m]ake cities and human settlements inclusive, safe, resilient and sustainable' and its SDG Target 16.7 is to '[e]nsure responsive, inclusive, participatory and representative decision-making at all levels.'[147] UN Habitat III's *New Urban Agenda* also endorses participatory decision-making and envisages cities and human settlements that:

> Are participatory, promote civic engagement, engender a sense of belonging and ownership among all their inhabitants, prioritize safe, inclusive, accessible, green and quality public spaces that are friendly for families, enhance social and intergenerational interactions, cultural expressions and political participation, as appropriate, and foster social cohesion, inclusion and safety in peaceful and pluralistic societies, where the needs of all inhabitants are met,

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[146] HRC, 'Summary of the discussions held during the Expert Workshop on the Right to Participate in Public Affairs' (Report of the Office of the UNHCHR, UN Doc. A/HRC/33/25, 15 July 2016), para. 33. https://digitallibrary.un.org/record/845271?ln=en.

[147] UNGA, *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res. 70/1 (2015), UN Doc. A/RES/70/1 (21 October 2015, adopted on 25 September 2015), SDG 11. https://digitallibrary.un.org/record/3923923?ln= en.

> recognizing the specific needs of those in vulnerable situations ... [148]

Likewise, in 'The City We Need 2.0: Towards a New Urban Paradigm', UN Habitat endorsed participatory local governance because '[i]t promotes effective partnerships and active engagement by *all* members of society.'[149]

Regional organizations and their subsidiary bodies have also recognized the democratizing value of direct participation and have endorsed participatory democracy. The OAS, in the *Inter-American Democratic Charter*, recognized that '[r]epresentative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry.'[150] The IADC also provides that participation is 'a necessary condition for the full and effective exercise of democracy' and '[p]romoting and fostering diverse forms of participation strengthens democracy.'[151] The *American Convention on Human Rights* (1969) and the IADC 'underscore the

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[148] UNGA, *New Urban Agenda*, GA Res. 71/256 (2016), UN Doc. A/RES/71/256 (25 January 2017, adopted 23 December 2016). https://digitallibrary.un.org/ record/ 85 8344?ln=es.
[149] UN Habitat, 'The City We Need 2.0: Towards a New Urban Paradigm' (World Urban Campaign, Prague, 16 March 2016). https://fidic.org/sites/ default/files/ the_city_we_need_tcwn_2.0adopted.pdf.
[150] OAS, *Inter-American Democratic Charter 2001* (Lima, 11 September 2001), Art. 2. https://www.oas.org/dil/2001_Inter-American_Democratic_Charter.pdf.
[151] *Ibid.,* at Art.6.

importance of the complementarity of and striking a balance between representative democracy and participatory democracy.'[152]

The African Union's *Agenda 2063* goal is that '[a]ll the citizens of Africa will be actively involved in decision making in all aspects.'[153] The AU has recognized the importance of participation in the *African Charter on Democracy, Elections and Governance* (2007), which provides that state parties 'shall foster popular participation and partnership with civil society organizations.'[154] In the *African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development* (2014), the AU reaffirmed its intention to 'deepen participatory democracy, citizens and community empowerment' and a core value is '[c]ommunity - based participation and inclusiveness.'[155] It also provides that local democratic governance 'shall take a participatory *and* representative form'[156] and '[l]ocal governments or local authorities shall make

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[152] OAS, 'Observing Direct Democracy Mechanisms: A Manual for OAS Electoral Observation Missions' (OAS, Secretariat for Strengthening Democracy, Department of Electoral Cooperation and Observation, 2022), 15. ISBN: 978-0-8270-7470-5. https://www.oas.org/es/sap/deco/Pubs/Manuales/observing-direct-democracy-mechanisms.pdf.

[153] AU, *Agenda 2063: The Africa We Want* (September 2015), para. 47. https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular version_en.pdf.

[154] AU, *African Charter on Democracy, Elections and Governance (*(30 January 2007), Art. 27(2). https://www.refworld.org/docid/493fe2332.html.

[155] AU, *African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development* (27 June 2014), Art. 4(a). https://au.int/en/treaties/african-charter-values-and-principles-decentralisation-local-governance-and-local.

[156] *Ibid.*, Art. 12(2) (emphasis added).

provision for the meaningful participation of communities, civil society and other actors in local governance and development.'[157]

In Europe, participatory democracy is endorsed by the EU, CoE and OSCE. Indeed, the EU has recognized that its democratic legitimacy derives, in part, from the implementation of 'participatory democracy.'[158] The EU's Fundamental Rights Agency (FRA), together with its Committee of Regions (CoR), has recognized the importance of participation to the implementation of fundamental rights and have promoted participation in local government as an important element of democracy.[159] The CoR, in its advisory role to the European Parliament, the European Council and the European Commission,[160] 'encourages participation at all levels, from regional and local authorities to individual citizens.'[161] In 2009, the CoR issued a 'White Paper on Multi-Level Governance' that

[157] *Ibid.*, at Art. 12(5).
[158] Alberto Alemanno, 'Towards a permanent citizens' participatory mechanism in the EU' (European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, PE 735.927, September 2022) 13. https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)735927.
[159] CoR/FRA, 'Making rights real: A guide for local and regional authorities' (EU, Brussels, 28 November 2014), 13-14. https://fra.europa.eu/sites/default/files/fra-cor-making_rights_real-booklet_en.pdf.
[160] EU, *Consolidated version of the Treaty of the Functioning on the European Union* (OJ L. 326/47-326/390, 26 October 2012) ('TFEU'), Art. 300(3). https://eur-lex. europa.eu/legal-content/EN/.
[161] EU, *About the EU* (Website). https://europa.eu/european-union/about-eu/institutions-bodies/ european-committee-regions_en.

recommended 'establishing appropriate tools to support participatory democracy.'[162]

The CoE's *Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority 2009* (Additional Protocol on Participation) articulates a right to participate in public affairs at the local level.[163] According to its Explanatory Report:

> *All countries*, in different ways and to differing degrees, have come to recognise the fundamental importance of citizens being engaged and involved in public life. Democratic institutions should not be designed and cannot be sustained without taking on board the fundamental role and place of citizen participation.[164]

The methods of implementation of the right to participate in local government are articulated in Article 2 of the Additional Protocol on Participation and include 'procedures for involving people which may include consultative processes, local referendums and petitions.' According to the CoE, its member states, to enhance civic participation, should utilize:

> more deliberative forms of decision-making, that is, involving the exchange of information and opinions (for example public meetings, citizens' assemblies and juries or various types of citizens forums, groups, panels and public

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[162] CoR, 'The Committee of the Regions' White Paper on Multi-Level Governance' (CdR 89/2009, Brussels, 17-18 June 2009), 17. https://www.europarl.europa.eu/meetdocs/2009_2014/documents/.
[163] COE, Additional Protocol, *supra* n. 9, at Art. 1(1), Exp. Rep., at 3.
[164] *Ibid.*, Exp. Rep., at 3 (emphasis added).

> committees whose function is to advise or make proposals, or round tables, opinion polls and user surveys).[165]

The EU and CoE have established a 'Partnership for Good Governance' with the intention of strengthening the capacity of Armenia, Azerbaijan, Belarus, Georgia, the Republic of Moldova, and Ukraine to implement standards of the Council of Europe and the European Union in the fields of human rights, democracy and the rule of law.[166] In doing so, the CoE and EU as part of their 'capacity building' function related to '[s]trengthening institutional frameworks for local governance' have produced 'Handbook[s] on Transparency and Citizen Participation' for Armenia, Georgia, Moldova and the Ukraine, each of which encourage 'public

[165] CoE, Council of Ministers, *Recommendation of the CoM to Member States on the participation of citizens in local public life 2018* CM/Rec(2018)4, App. B.III.3.ii (Adopted on 21 March 2018). https://rm.coe.int/ 16807954c3.
[166] EU/CoE, *Joint Programme: Partnership for Good Governance* (Website). https://pjp-eu.coe.int/en/web/pgg2/home.

involvement in important decisions' through public consultation[167] and endorse participatory budgeting.[168]

A number of transnational networks and associations also support participation at the local government level. The UCLG has established the *Global Charter-Agenda for Human Rights in the City* [169] and Article II articulates a 'Right To Participatory Democracy' whereby all city inhabitants have the right to participate in political and city management processes.[170] To effectuate this right, the Global Charter-Agenda suggests local authorities should '[e]stablish a consultation process for the preparation of the budget', '[e]stablish a system of citizen participation for the drafting of local projects, programs and policies,' and '[o]rganize consultations open to all city inhabitants.'[171] Likewise, Article VIII of the *European*

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[167] *See,* CoE/EU, *Armenia Handbook on Transparency and Citizen Participation* (Partnership for Good Governance, 2017) ('Armenia Handbook), 37. https:// rm.coe.int/handbook-on-transparency-and-citizen-participation-in-armenia-eng/168078b550. CoE/EU, *Georgia Handbook on Transparency and Citizen Participation* (Partnership for Good Governance, 2017) ('Georgia Handbook'), 39. https://rm.coe.int/georgia-handbook-on-transparency-and-citizen-participation-en/16807838d. CoE/EU, *Republic of Moldova Handbook on Transparency and Citizen Participation* (Partnership for Good Governance, 2017) ('Moldova Handbook'), 41. https://rm.coe.int/moldova-handbook-on-transparency-and-citizen-participation-en/16807893c1. CoE/EU, *Ukraine Handbook on Transparency and Citizen Participation* (Partnership for Good Governance, 2017) ('Ukraine Handbook'), 41. https://rm.coe.int/ukraine-handbook-on-transparency-and-citizen-participation-en/16807893c3.

[168] *See, Ibid.,* Armenia Handbook, at 35; Georgia Handbook, at 37; Moldova Handbook, at 39; Ukraine Handbook, at 41.

[169] UCLG, *Global Charter-Agenda for Human Rights in the City* (Florence, Italy, 11 December 2011). ('Global Charter-Agenda'). https://www.uclg-cisdp.org/sites/default/files/UCLG_Global_Charter_Agenda_HR_City_0.pdf.

[170] *Ibid.*, at Art. II.

[171] *Ibid.*, at, at Art. II. (Suggested Action Plan).

Charter for the Safeguarding of Human Rights in the City provides that:

> Democratic participation is generally encouraged beyond the times of those periodic elections necessary for the election of municipal governments. To this end, citizens and their organisations can access public debates, direct enquiries to the municipal authorities over issues concerning the regional and local authority, and express their opinion either through a 'municipal referendum' or through public action and meetings.[172]

More than four hundred cities have signed the European Charter, which is indicative of the growing endorsement and practice of participatory democracy in Europe.[173]

Likewise, the Human Rights Cities Network (HRCN) 'fosters participatory democracy and social justice, by leaving no one behind.'[174] To proclaim itself a 'Human Rights City,' a city authority must commit to implementing 'greater direct citizen participation' and '[i]mprov[ing] the quality of life of residents through the implementation of a more inclusive and participatory approach.'[175] As a Human Rights City, the City of Graz has developed 'Guidelines for Citizen Participation in Projects of the City of Graz', which were established on the basis of 'dialogue between citizens, administration

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[172] UCLG, *European Charter for the Safeguarding of Human Rights in the City* (St Denis, France, 18 May 2000), Art. VIII. https://www.uclg-cisdp.org/en/european-charter-safeguarding-human-rights-city-0.
[173] *Ibid.*
[174] HRCN, *Who we are?* (Website). https://humanrightscities.net/who-we-are/.
[175] HRCN, *What we do?* (Website). https://humanrightscities.net/what-we-do/.

and politics.'[176] Graz has also established the Department for Citizen Participation that is responsible for the 'preparation and implementation of participation processes.'[177] The priority given to participatory processes by Human Rights Cities like Graz emphasize the value of participatory democracy.

8.5 Direct Participation in Local Governance Further Protects Human Rights

The implementation and protection of human rights enhances state and government legitimacy. It is clear that local governance is indispensable to the protection of human rights. Direct participation in local governance protects human rights even more. Civic participation empowers communities[178] and participatory democracy at the local government level improves 'social inclusion, poverty reduction, and empowerment.'[179] Participatory budgeting processes, particularly those that include explicit social justice goals, improves

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[176] City of Graz, *Guidelines for Citizen Participation for projects of the city of Graz* (Website). https://www.graz.at/cms/beitrag/10244969/7755171/Leitlinien_fuer_BuergerInnenbeteiligung.html.

[177] City of Graz, *Department of Citizen Participation* (Website). https://www.graz.at/cms/beitrag/10029087/8335146/ReferatfuerBuergerInnenbeteiligung.html.

[178] Shah, *supra* n. 27, at 1. *See also,* Caroline Patsias, 'Participatory Democracy, Decentralization and Local Governance. The Montreal Participatory Budget in the Light of "Empowered Participatory Governance"', (2013) 6 *International Journal of Urban and Regional Research* 2214, 2221.

[179] Benjamin Goldfrank, 'The World Bank and the Globalization of Participatory Budgeting,' (2012) 8(2) *Journal of Public Deliberation*, Art. 7, 5 (quoting, World Bank, 'Participatory Budgeting Toolkit for Local Governments in Albania' (Social Development Team, Europe and Central Asia Region, Washington, D.C., 1 December 2006). https://doi. org/10.16997/jdd.143.

the lives and wellbeing of the marginalised members of a community.[180] The value of participatory democracy at the local level to human rights protection is illustrated in the field of minority rights where local participation has demonstrably enhanced social inclusion.

a. Participatory Democracy and Human Rights Protection

In localities as varied as Porto Alegre and Belo Horizonte in Brazil; Quito, Ecuador; the Arzgir District villages in Stavropol Region, Russia; Seville, Spain; Seoul, South Korea; and Rosario, Argentina, participatory budgeting has resulted in increased public spending in poor and disadvantaged areas. Indeed, in Ilo, Peru, the local government spent twice as much in the poorer neighbourhoods that it did in the wealthier ones.[181] It is not just poorer neighbourhoods in smaller cities where participatory budgeting has increased public spending and improved social justice. In Paris, a third of the annual funds dedicated to participatory budgeting are earmarked for low-

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[180] Carolin Hagelskamp, Rebecca Silliman, Erin B. Godfrey and David Schleifer, 'Shifting Priorities: Participatory Budgeting in New York City is Associated with Increased Investments in Schools, Street and Traffic Improvements, and Public Housing', (2020) *New Political Science* 193-96. DOI:10.1080/07393148.2020.1773689.

[181] ELLA (Evidence and Lessons from Latin America), 'Participatory Budgeting: Citizen Participation for Better Public Policies' (Policy Brief, 2012) 3. http://ella.practicalaction.org/wp-content/uploads/files/111111_GOV_BudPubPol_BRIEF4_0.pdf.

income neighbourhoods.[182] In New York City, participatory budgeting resulted in the proportional redirection of funds from higher-to-lower income neighbourhoods (but not to the lowest income neighbourhoods).[183] The World Bank, perhaps surprisingly, supports participatory budgeting because it empowers communities and provides forums for interaction, which has the potential to reduce exclusion and alienation. According to the World Bank Social Development Team:

> The traditional budgeting process can often contribute to social exclusion and poverty due to elite capture, lobbies, and powerful interests. *By increasing the voice of ordinary citizens and the most vulnerable groups, PB can potentially re-direct public investments towards basic services in poor neighborhoods*. The social learning and civic mobilization mechanisms embedded in *PB helps empower vulnerable groups to increase their voice in budget decisions*.[184]

Participatory budgeting in local government jurisdictions has manifestly redirected public funding to poorer and more disadvantaged neighbourhoods, increasing social justice.

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[182] Estela Brahimllari, *Multi-Layered Participatory Budgeting: The Case of Low-Income Neighbourhoods in Paris* (Franco Angeli, Milan, 2020) 135. ISBN: 978-88-351-1184-9. http://www.francoangeli.it/come_pubblicare/pubblicare_19. asp.

[183] Iuliia Shybalkina and Robert Bifulco, 'Does Participatory Budgeting Change the Share of Public Funding to Low Income Neighborhoods?' (Spring 2019) *Public Budgeting & Finance* 45. https://doi.org/10.1111/pbaf.12212.

[184] World Bank Group, 'Participatory Budgeting Toolkit for Local Governments in Albania' (Social Development Team, Europe and Central Asia Region Washington, D.C., 1 December 2006), 3 (emphasis added). http://documents. worldbank.org/curated/en/11314146819375 9381/Participatory-budgeting-toolkit-for-local-governments-in-Albania.

Equally important, participatory budgeting demonstratively prioritises socially beneficial projects and results in increased spending on health care, sanitation, social housing and education.[185] For instance, in Peru, Uruguay, Brazil, Senegal, and the Philippines, participatory budgeting projects increased health and sanitation spending.[186] In Brazil, the increased spending on healthcare and sanitation resulted in lower infant mortality.[187] Participatory budgeting projects in Kenya emphasise education projects.[188] In New York City, participatory budgeting is associated with more funding for schools and increased funding for public-housing projects.[189] Increased funding for these socially beneficial projects leads to more equitable distribution of public spending to traditionally marginalized communities.

Since participatory budgeting was introduced in Paris, specific projects addressing the plight of the homeless and those living precariously have consistently received funding. In 2016, a project intended 'to strengthen the access of homeless people' and provide 'new forms of individual or collective accommodation' for the homeless was allocated €5,000,000.[190] In 2019, €2.5m was allocated

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[185] Wampler, McNulty and Touchton (2021), *supra* n. 13, at 90.
[186] *Ibid*., at 72.
[187] *Ibid*., at 90.
[188] *Ibid*.
[189] Hagelskamp, Silliman, Godfrey and Schleifer, *supra* n. 180, at 24.
[190] City of Paris, *Shelters for homeless people,* Participatory Budget 2016 (Website). https://budgetparticipatif.paris.fr/bp/jsp/site/Portal.jsp?document_id= 2719&port let_id =158.

to assisting homeless women find shelter.[191] A winning project in 2018 from the 14th Arrondissement proposed developing luggage storage services for the homeless and had a budget of €500,000.[192] In 2022, one of the winning projects was a project in the 10th District to help 'improve the living conditions of people in precariousness,' with a budget of €310,000 for '[t]he installation of devices for the distribution of biological intimate protection and condoms in places welcoming people in precarious street situations.'[193] It is not just projects with a budget exceeding a €100,000 that can improve social justice. In the 2021 participatory budget, the 16th Arrondissement voted to allocate €10,000 to the installation of a telephone charging station for 'people in great precariousness.'[194]

Even the quintessential outsiders -- migrant workers and refugees -- can be involved in participatory budgeting. In 2017, the City of Taoyuan, in Taiwan, earmarked funds for the benefit of traditionally marginalized migrant workers from South-East Asia. The funds were

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[191] City of Paris, *Helping the most vulnerable people get out of exclusion.* Participatory Budget 2019 (Website). https://budgetparticipatif.paris.fr/bp/jsp/ site /Portal.jsp?document_id=8890&portlet_id=158.

[192] City of Paris (14th Arrondissement), *Luggage storage for the homeless*, Participatory Budget 2018 (Website). https://budgetparticipatif.paris.fr/bp/jsp/ site/Portal.jsp? document_id =6036&portlet _id= 158.

[193] City of Paris (10th Arrondissement), *Helping the homeless and fighting menstrual poverty*, Participatory Budget 2022 (Website). https://budget participatif.paris.fr/bp/jsp/site/Portal.jsp?page=solrProjectSearch&view=consult _project&document _id=9853&portlet_id=158.

[194] City of Paris (16th Arrondissement), *Enable homeless people to recharge their phones*, Participatory Budget 2021 (Website). https://budgetparticipatif.paris.fr/ bp/jsp/site/Portal.jsp?page=solrProjectSearch&view=consult_project&document _id=9853&portletid=158.

for projects selected by a participatory budgeting process, which directly incorporated the migrant workers in the selection of the projects.[195]

> In a short timeframe, it yielded extremely positive tangible and intangible effects, such as changes in attitude and perception among the Taiwanese population and Taoyuan civil servants; better understanding between migrants, the municipality, and Taiwanese nationals; recognition of the value of different cultures; and a reduction in discrimination.[196]

Seville, New York and Penang have also 'been giving a specific PB focus to the inclusion of migrants, refugees, or ethnic minorities.'[197] Parisians have also expressed solidarity with migrants and are concerned about *their exclusion*; accordingly, one successful project with a budget of €5million was the construction of a refugee centre.[198]

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[195] Kai Ling Luo, *Case study on Taoyuan* (2018), in Yves Cabannes, 'The contribution of participatory budgeting to the achievement of the Sustainable Development Goals: lessons for policy in Commonwealth countries', (2019) 21 *Commonwealth Journal of Local Governance* 1-19. https://epress.lib.uts.edu.au/journals/index.php/cjlg.

[196] *Ibid.*

[197] *Ibid.*

[198] City of Paris, *VilleRefuge - Facilities for migrants and the homeless*, Participatory Budget 2017 (Website). https://budgetparticipatif.paris.fr/bp/jsp/site/Portal.jsp?document_id=3765&portlet_id=158.

b. Minority Social Inclusion by Local Participation

The minority rights agenda purportedly includes 'democratization and boosting participation of minorities in public life.'[199] The effective participation of minorities in public life is an important aspect of social inclusion and human rights protection.[200] '[I]t is undeniable that effective participation is essentially linked to the level of government where it is implemented,'[201] and accordingly requires multilevel implementation, including at the local level. In attempting to enable effective participation by minorities, national governments, particularly in Europe, have predominantly relied on potentially flawed representative mechanisms, which alone provide only limited participation.

There is no doubt that '[r]epresentation of minorities in elected bodies at national and sub-national levels is an essential element of

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[199] David J. Smith, 'NTA as Political Strategy in Central and Eastern Europe', in Tove H. Malloy and Francesco Palermo (eds), *Minority Accommodation through Territorial and Non-Territorial Autonomy (Minorities & Non-Territorial Autonomy)* (Oxford University Press, Kindle ed., Oxford, 2015) Loc. 4620-5121, at Loc. 4635.

[200] EU/FRA, 'Together in the EU: Promoting the participation of migrants and their descendants recognized importance of participation to integration', (EU, Luxembourg, 2017), Common Basic Principle No. 9. ISBN 978-92-9491-440-8. DOI: 10.2811/132410. https://fra.europa.eu/sites/default/files/fra_uploads/ fra-2017-together-in-the-eu_en.pdf.

[201] Matteo Daicampi, 'Effective Participation of Minorities in Public Affairs in the Local Government: Towards a Subsidiarity in Diversity Accommodation? The Case of Law No. 6/2008 of the Province of Trento', (2018) 2(1) *Peace Human Rights Governance* 97, 104. DOI: 10.14658/pupj-phrg-2018-1-5.

participation in public life.'[202] A range of special mechanisms have been adopted in an attempt to ensure minority participation in elected assemblies, such as reserved seats, quotas, qualified majorities, dual voting or 'veto' rights.[203] Consociational systems, 'based on proportional representation of groups, veto powers, and segmental autonomy of cultural groupings,'[204] have also been utilized in efforts to ensure minority participation. These specific mechanisms that enable minority representation in elected assemblies are imperfect, and do not, without more, provide minorities with 'effective' participation. Indeed, the reliance on representative politics is often counterproductive to the policy aims of social inclusion and integration.

Minority representatives do not represent the diversity of a minority community. Minority communities are not homogenous and are themselves diverse. The various shades of socio-economic status, ideology or even cultural interests beyond ethnicity are not

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[202] Joseph Marko and Sergiu Constantin, 'Against Marginalization: The right to effective participation', in Joseph Marko and Sergiu Constantin (eds), *Human and Minority Rights Protection by Multiple Diversity Governance: History, Law, Ideology and Politics in European Perspective* (Routledge, Oxford, 2019) 340-395, at 343. ISBN:978-1-138-68309-9.

[203] ACFC, 'The Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs' (Thematic Commentary No. 2, Strasbourg, 27 February 2008), para. 72. https://rm.coe.int/16800bc7e8.

[204] Marko and Constantin, *supra* note 202, at 373.

represented by reliance solely on 'minority representatives.'[205] To ensure the election of a minority 'representative', the minority electorate often needs to direct their votes to a single candidate or party, encouraging the formation of minority 'ethnic' parties or the merger of diverse intra-minority parties into a single party.[206] In these situations 'communal parties' may be the only avenue for *any* representation.[207] As such, the electoral system encourages the creation of political parties based on ethnic identification. Likewise, the necessity to attain, and maintain, a majority in a single territorial unit may encourage ghettoization, where minority populations remain or relocate to electoral districts where they are the majority on the basis, at least in part, that they will be represented.[208] Mono-dimensional representation does not amount to 'effective' participation.

The states of Belgium, Switzerland and Bosnia-Herzegovina and regions of South Tyrol and Northern Ireland have adopted

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[205] 'Although a minority might be united by common characteristics of a linguistic, cultural or historical nature, it is still composed of individuals who have difference political and ideological perceptions.' Emma Lantschner and Marko Kmezić, 'Political Participation of Minorities in Central Europe: Is it Effective or Just Window-Dressing?' in Emma Lantschner, Sergiu Constantin and Joseph Marko (eds), *Practice of Minority Protection in Central Europe* (Nomos, Baden-Baden, 2012) 223, 227. ISBN: 9783832960254.

[206] *Ibid.*

[207] HCNM, 'The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note' (Lund, September 1999) 24 ('Lund Recommendations'). ISBN: 978–90–75989–05–2. https://www.osce.org/files/f/documents/0/9/32240.pdf.

[208] Lantschner and Kmezić, *supra* n. 205, at 225.

consociational systems in an effort to protect their minority communities.[209] The very nature of consociational systems segment society into 'fixed and pre-determined' ethnic groups thereby entrenching ethnic division. In Belgium, the constitutional system has recognized *and* entrenched the division between the French and Flemish populations of Wallonia and Flanders. Bosnia-Herzegovina also adopted a consociational system by way of the Dayton accords as a means to end the bloody conflict that resulted from the dissolution of the Former Soviet Republic of Yugoslavia (SFRY). Bosnia-Herzegovina's constitution provides for an 'inclusive grand coalition government, mutual veto power on vital interest issues, proportional representation and [a] *high degree of segmental autonomy for each group*.' [210] This segmental autonomy perpetuates the country's ethnic divisions. [211] Furthermore, consociational democracy also tends to ignore the rights of the numerically inferior minorities. In Bosnia-Herzegovina representation is divided between numerically superior Bosnian, Serbian and Croatian communities, to

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[209] Sammy Smooha, 'The Model of Ethnic Democracy' (European Centre For Minority Issues (ECMI), Working Paper No. 13, October 2001), 6. https://www.ecmi.de/publications/ecmi-research-papers/13-the-model-of-ethnic-democracy.
[210] Lilla Balázs, 'Bosnia and Herzegovina: 'Transition, Times Two', (2008) 349-50 (3-4) *L'Europe en Formation* 99-118 (6/23). https://doi.org/10.3917/eufor.349.0099.
[211] *Ibid*.

the exclusion of the Albanians, Ruthenians, Roma, Romanians and Jews, all of whom form significant minority communities.[212]

Supplementing minority representation with localized participatory democracy, has demonstratively enhanced the social inclusion of minorities and improved the effectiveness of their participation, and otherwise limited the negative aspects of imperfect electoral and constitutional mechanisms of minority protection.[213] The OSCE has recognized that '[e]xamples of means and instruments that facilitate effective participation include electoral arrangements, specialized governmental bodies, *consultative mechanisms, participatory decision-making procedures and awareness-raising campaigns*.'[214] Tools of participatory democracy are under-utilized in facilitating the effective participation of minorities, but where they have been adopted at the local level, they have enhanced social inclusion and the empowerment of minorities. For instance, autonomous bodies sometimes manage and operate minority schools and cultural institutions (such as theatres and museums) as well as promote minority languages. These autonomous bodies are often constituted

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[212] *See*, Case U-5/98, in *Sl˘uzbeni glasnik* (official gazette) No. 23/2000, 14 September 2000 (Constitutional Court of Bosnia and Herzegovina). www.ustavnisud.ba/english/default.htm. *See also,* Francesco Palermo and Jens Woelk, 'No representation without recognition: The right to political participation of (National) minorities', (2003) 25(3) *Journal of European Integration* 225, 239. https://doi.org/10.1080/ 0703633032000133574.

[213] Lund Recommendations, *supra* n. 207, at 19.

[214] HCNM, 'The Ljubljana Guidelines on Integration of Diverse Societies and Explanatory Note' (Ljubljana, November 2012), 25 (emphasis added). ISBN: 978-90-75989-14-4. https://www.osce.org/files/f/documents/0/9/96883.pdf.

in parallel to government authorities at the local, regional and national level. The body will likely enact governance plans, appoint a principal and adopt a budget. All of these decisions, made at least annually, could be made on the basis of one or more minority 'town hall' meetings or assemblies, involving the participation of members of the minority community. A number of states already facilitate cultural minority organizations at the local level.

In Estonia, pursuant to the *National Minorities Cultural Autonomy Act 1993*, 'national minorities with a population of over 3000 may establish cultural autonomy bodies' and these minority cultural councils 'may establish county or town cultural councils of the national minority, or [to] appoint local cultural councillors.'[215] The Serbian *Law on National Councils of National Minorities 2009* enables national minority councils to 'found associations, funds, institutions of education and upbringing (art. 11), culture (art. 16), media (art. 19), the public use of languages and alphabets (art. 10),' at the local level.[216] Local consultative cultural organizations can also enhance participation. In Italy's Province of Trento, local

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[215] Estonia (Republic of), *National Minorities Cultural Autonomy Act 1993* (26 October 1993, RT I 1993, 71, 1001), Art. 2(2), 11(2). https://www.riigiteataja.ee/en/eli/504042019005/consolide.

[216] Serbia (Republic of), *Law on National Councils of National Minorities 2009*. (Official Gazette of RS, no 72/09, 20/14, 3 September 2009). http://arhiva.rik.parlament.gov.rs/doc/dokumenta/zakoni/eng/ZoNSNM-1-eng.pdf. *See also*, Leonas Tolvaišis, 'Ethnic Minority Policies as an Ethnic Cleavage Dimension Within Post-Communist Party Systems: Case Studies of Vojvodina Hungarians and Estonian Russians', (2016) 13(1) *Serbian Political Thought* 29, 38. https://www.ips.ac.rs/wp-content/uploads/2018/03/SPT-13-1_2016-3.pdf.

minority 'Cultural Institutes' provide the provincial administration with opinions, advice and proposals.[217]

In Brazil, a pioneer of participatory democracy, there are a plethora of national conferences on a variety of policy issues, including specific conferences for individual minorities. Although these conferences are national, the issues the subject of the conferences are precipitated at the local level and the 'national conferences are but the culmination of a process that begins in municipalities,' where citizens meet and elect delegates from an open poll of participants.[218] These participatory mechanisms 'enhance the political inclusion of minority groups, advancing their preferred policies, fostering their rights and consolidating their identity.'[219] In the diverse municipality of Cotacachi, Ecuador, the specific inclusion of indigenous women in the participatory budgeting process 'foment[ed] a sense of ownership and identification among them as well as positive perceptions in their social circles.' [220] The participatory budget improved the living conditions of women in the city and importantly, a municipal literacy program adopted as part of the participatory budgeting process, has significantly improved the women's literacy

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[217] Daicampi, *supra* n. 201, at 111.
[218] Thamy Pogrebinschi, 'Participatory Democracy and the Representation of Minority Groups in Brazil' (Conference Paper, American Political Science Association, January 2011), 2. https://www.researchgate.net/publication/228296624.
[219] *Ibid*., at 4.
[220] Ernesto López, 'The Inclusion of Indigenous Women In A Local Participatory Budgeting Process' (UCLG Inclusive Cities Observatory, 2007). https://uclg-cisdp. org/sites/default/files/observatory/files/2021-06/Cotacachi_EN.pdf.

rate, which was one of the lowest in Ecuador.[221] These participatory mechanisms supplement representative democracy and enable minorities to overcome some of its flaws by influencing government from the bottom-up.[222]

With more than 10 million people, the Roma represent the largest -- and the most socially excluded -- minority in Europe.[223] The Congress of Local and Regional Authorities of the CoE recognized that 'as the public authorities closest to citizens, local and regional elected officials are best placed for devising policies to facilitate Roma access to rights.'[224] Direct participation in these local advisory bodies enhances the social inclusion of the most excluded minority in Europe. For instance, the Gostivar municipality of North Macedonia[225] and the Italian Region of Lombardy[226] have both established committees directly involving Roma and addressing pertinent issues of housing, education, and employment. The direct

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[221] *Ibid.*
[222] *Ibid.*, at 5.
[223] CLRA, *The situation of Roma in Europe: a challenge for local and regional authorities*, Res. 333, Document CG(21)8 (19 October 2011), Exp. Mem., para. 1. https://rm.coe.int/the-situation-of-roma-in-europe-a-challenge-for-local-and-regional-aut/1680719e6e
[224] *Ibid.*, at para. 8.
[225] OSCE, 'Implementing Citizens Participation in Decision Making at Local Level—Toolkit' (5 April 2016), 23. https://www.osce.org/files/f/documents/7/8/231356.pdf.
[226] Francesco Marcaletti and Veronica Riniolo, 'A Participatory Governance Model Towards the Inclusion of Ethnic Minorities. An Action Research Experience in Italy', (2015) 53 *Revue Interventions économiques* [Online], paras. 2, 3, 43, 49. http://journals.openedition.org/interventions economiques/2609.

involvement of the Roma community in these committees increased their participation in public life and enhanced their social inclusion.

8.6 Conclusion

Mechanisms of participatory and deliberative democracy facilitate dialogue, deliberation and debate, and increase participation. They increase participation in public discourse and governance. Direct participation in governance empowers individuals and communities, reduces social and political alienation, enhances trust in government and increases civic participation.[227] Participation thereby increases the democratic legitimacy of governance. States have recognized the legitimizing virtues of participation and are increasingly implementing mechanisms of participatory democracy, particularly participatory budgeting, at the local level. Indeed, participatory democracy, particularly participatory budgeting, is emerging as a global norm. International and regional organizations have also recognized the democratizing value of participatory democracy and are encouraging its implementation across the globe.

The mechanisms of participatory democracy are best implemented at the local level. While deliberative forums have been utilized at all levels of government, they have been most popular at the local level, where it is best suited, with more than half of the randomly selected

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[227] OECD, 'Building an open and innovative government for better policies and service delivery' (Paper for expert meeting, 8-9 June 2010), 5. http://www.oecd.org/gov/46560128.pdf.

deliberative forums utilized at the local level.[228] The random selection of participants in deliberative processes, through a process of sortition, reduces the negative effects of elections in local decision making. Participatory democracy at the local level is a valuable *addition* to representative democracy.

> [P]articipatory democracy [...] respects and recognises the role of all actors [and], can *contribute to and complement representative and direct democracy*, rendering democratic institutions more responsive, hence contributing to inclusive and stable societies.[229]

The *democratic* legitimacy of elected representative governments will be improved by the adoption of participatory and deliberative mechanisms at the local level.

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[228] OECD (2020 Highlights), *supra* n. 84, at 4.
[229] *Ibid.* (emphasis added).

9. INTERNATIONAL LAW, LOCALIZATION AND PARTICIPATORY DEMOCRACY

9.1 Introduction

All states are to varying degrees democratically illegitimate. Even recently created states, formed after supposedly determining the consent of the population by referenda, are to a degree democratically illegitimate. Referenda are a flawed mechanism for ascertaining the consent of a resident population to statehood. The most legitimate form of territorial governance is local government. States and the international community have increasingly recognized the legitimizing value of local governance.

Representative democracy confers a modicum of democratic legitimacy on elected governments. However, like referenda, representative democracy is an imperfect mechanism for ascertaining the population's consent to coercive authority. The legitimacy conferred on elected representative governments will be enhanced by adoption of mechanisms of participatory and deliberative democracy implemented at the local level as a supplement to representative democracy.

It is the objective of this *final* substantive *Chapter* to demonstrate that the legitimizing virtues of local governance and participatory democracy are being progressively recognized and adopted in international law; and are slowly emerging as global 'legal' norms. This *Chapter 9* contends that the increasing state implementation of

policies of decentralization, the increasing promotion and endorsement of local governance by international institutions and instruments, the recognition of local governments in international law and their emerging role in the development of international law are suggestive of an emerging, but non-binding, norm of localization. Another objective of this *Chapter* is to illustrate that participatory democracy, also because of state practice, its promotion by international and regional instruments, and UN endorsement, is similarly increasing in normative value. Finally, this *Chapter 9* asserts that the norms of local governance and direct participation have the potential to further evolve and ultimately impose duties on states to progressively implement policies of decentralisation and participatory democracy at the local level.

9.2 Making Contemporary International Law

Traditionally, international law was the law governing the relations between states and states were the only subjects of international law.[1] It is predicated on the 'sovereign equality' of all states, whereby all states 'have equal rights and duties and are equal members of the international community.'[2] Today states are not the only subjects of

[1] Malcolm N. Shaw, *International Law* (Cambridge University Press, Cambridge, 9th ed., 2021) 181. ISBN: 978-1-108-73305-2.
[2] UNGA, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA Res. 2625, UN Doc. A/RES/2625(XXV) (1971, adopted 24 October 1970), ('The principle of sovereign equality of states'). https://digital library. un.org/record/202170?ln=en.

international law. Although states undoubtedly remain the primary subjects of international law, other subjects of international law include:

> any entity that international law treats as a person, that is, something that can affect and be affected by international law and can enforce international law by bringing at least some international claims ... [3]

Accordingly, international organizations, transnational corporations and international public companies, depending on their specific circumstances, are increasingly recognized as subjects of international law.[4] Local governments are also emerging as subjects of international law. The increasing status of local governments in international law and within global and regional institutions reflects the emerging normative value of decentralization.

Pursuant to Article 38 of the *Statute of the International Court of Justice*, the traditional sources of international law are treaties, custom, and general principles of law. These traditional sources are state made.[5] Rules of customary international law are precipitated through 'general practice accepted as law.'[6]

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[3] *Reparation for Injuries Suffered in the Service of the United Nations, (Advisory Opinion)*, ICJ Rep. 1949, 174, 179.

[4] Yishai Blank, 'International legal personality/subjectivity of cities', in Helmut Philipp Aust and Janne E. Nijman (eds), *Research Handbook on International Law and Cities* (Edward Elgar Publishing, Cheltenham, UK/Northampton, Mass., 2022) ('Blank (2022)') 103-120, at 103. ISBN: 978 1 0353 0994 8. http://dx.doi. org/10. 4337/9781788973281.

[5] UN, *Statute of the International Court of Justice* (18 April 1946), Art. 38. https:// www.refworld.org/docid/3deb4b9c0.html.

[6] *Ibid.*

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. [...] The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.[7]

The two elements, general practice and the belief that the practice is obligatory -- *opinio juris* -- are closely related.[8] That is, evidence should establish that in implementing the pertinent practice there is 'a general recognition that a rule of law or legal obligation is involved.'[9] International instruments, irrespective of their formally binding nature, can amount to *opinio juris* and can include general assembly declarations and resolutions, which may have normative value depending on their content and character, and the circumstances of their adoption.[10]

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[7] *North Sea Continental Shelf*, *Judgment*, ICJ Rep. 1969, 3 para. 77 ('*North Sea Judgment*').

[8] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *Advisory Opinion*, ICJ Rep. 2019, 95 para. 149 ('*Chagos Advisory Opinion*').

[9] *North Sea Judgment*, *supra* n. 7, at 43.

[10] *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, ICJ Rep. 1996 (I), 226, at 254-255, para. 70 ('*Nuclear Weapons Advisory Opinion*'). *See also*, *Chagos Advisory Opinion*, *supra* n. 8, at para. 153.

> General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio *juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an opinio *juris* exists as to its normative character.

The creation of contemporary international law is not, however, limited to these traditional sources. Instead, contemporary international legal norms consist of an 'assemblage' of rules emanating from a plurality of interacting legal regimes.[11] International institutions, states and non-state organizations influence each other and create shared rules.[12] International law's normative power is 'constantly constructed among various norm-generating communities.'[13] These norms may emanate and evolve from the interaction of international organizations, states and non-state actors -- *norm-generating communities* -- including, but not limited to, the UN General Assembly, UN Habitat, the OECD, the IMF, the World Bank, the Human Rights Council, the International Labor Organization, Greenpeace, Amnesty International, and Human Rights Watch.[14]

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[11] Jeffrey Dunoff, 'A New Approach to Regime Interaction', in Margaret A. Young (ed.) *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, Cambridge, 2015) 136-174. ISBN: 978-1-107-01048-2. *See also*, Miha Marcenko, 'International assemblage of the security of tenure and the interaction of city politics with the international normative discourse', (2019) 51(2) *The Journal of Legal Pluralism and Unofficial Law* 151, 154. DOI: 10.1080/07329113.2019.1639318.

[12] Paul Schiff Berman, 'A Pluralist Approach to International Law', (2007) 32 *Yale Journal of International Law* 301, 302; Harold Hongju Koh, 'Is There a "New" New Haven School of International Law?', (2007) 32 *The Yale Journal of International Law* 559.

[13] Elif Durmuş, 'A typology of local governments' engagement with human rights: Legal pluralist contributions to international law and human rights', (2020) 38(1) *Netherlands Quarterly of Human Rights* 30, 34. DOI: 10.1177/09240519209032 41.

[14] Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (Oxford University Press, Oxford, 2018) 52. ISBN: 978019255 1801.

This assemblage of rules, 'soft law', influence state behaviour by exercising a compliance or normative pull. 'Soft-law' is 'those nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct'[15] and 'the content of international legal obligations flows from states' expectations about what constitutes compliant conduct with legal rules.'[16] States internalize norms, appearing elsewhere in the international system, so that norms cascade from international institutions to states and then between states.[17] The cumulative effect of many states adopting a norm is akin to tacit 'peer pressure' on other states to adopt the same norm.[18] States 'get socialized into certain practices; they therefore know where they stand and what is expected of them, and their beliefs about right or wrong derive from the shared understandings of [international] society.'[19] States, in a self-perpetuating cycle, are thus socialized into internalizing dominant norms.[20] It is the socialization of norms that induces compliance and makes them effective.[21]

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[15] Andrew T. Guzman and Timothy Meyer, 'International Soft Law', (2011) 2(1) *The Journal of Legal Analysis* 171, 174. http://dx.doi.org/10.2139/ssrn.1353444.
[16] *Ibid.*, at 220-21.
[17] Kai Alderson, 'Making Sense of State Socialization', (2011) 27(3) *Review of International Studies* 415, 417. http://www.jstor.com/stable/20097743.
[18] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', (1998) 52(4) *International Organization* 887, 903. https://www.jstor.org/stable/2601361.
[19] Zürn, *supra* n. 14, at 44.
[20] Alderson, *supra* n. 17, at 417.
[21] Zürn, *supra* n. 14, at 262.

The state practice of implementing policies of decentralization and encouraging participation, together with the international and regional endorsement of those policies, reflect the increasing normative value of localization and participation. Local governments, together with their representative bodies, are part of a 'norm-making community' that influences the development of international law. The increasing role of local governments in international law is a manifestation of the progressive development of the normative value of localization. A putative right to participatory democracy is also increasing in its normative value largely because of the increasing status of local governance and the instruments adopted by local government representative bodies.

9.3 A Right to Local Governance?

In 1998, the United Nations Centre for Human Settlements (UN Habitat) and the World Association of Cities and Local Authorities Coordination (WACLAC) included a 'right' to local government in its initial draft of a *World Charter of Local Self-Government* (Draft Charter).[22] The Draft Charter provides that '[t]he principle of local self-government shall be recognised in national legislation, and where practicable guaranteed in the constitution' and:

> Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and

[22] UN Centre for Human Settlements (UN Habitat) and World Associations of Cities and Local Authorities Coordination (WACLAC), *Towards a World Charter of Local Self-Government* (25 May 1998), at Part C. https://www.gdrc.org/uem/mea/ local-charter/charter.html.

> manage a substantial share of public affairs under their own responsibility and in the interests of the local population.[23]

The Draft Charter did not eventuate as an official UN convention as originally intended. And there is currently no UN convention providing a right to local governance. But there is a European 'right' to local governance.

The Council of Europe has adopted a right to local governance in almost identical language to the Draft Charter.[24] The 1985 *European Charter of Local Self-Government* recognizes a right to local government.[25] The Charter has been ratified by all 46 member States of the CoE.[26] It is monitored by the Congress of Local and Regional Authorities of the Council of Europe.[27] In establishing a monitoring body, the European Charter of Local Self-Government 'foresees a continuing, growing body of law made by means of the interpretation and application of its provisions by an expert, independent, quasi-judicial body.'[28] In monitoring the Charter, the determinacy of the

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[23] *Ibid.,* at Art. 3(1).
[24] *Ibid.,* at Art. 2.
[25] CoE, *European Charter of Local Self-Government*, ETS 122, Art. 3. https://rm.coe.int/european-charter-of-local-self-government-eng/1680a87cc3.
[26] CoE, 'Chart of signatures and ratifications of Treaty 122' (Status as of 17/03/2023). https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=122.
[27] CoE, Committee of Ministers, Statutory Resolution CM/Res. (2011) 2, *Relating to the Congress of Local and Regional Authorities of the Council of Europe and the Revised Charter Appended Thereto* (19 January 2011), Art. 1(3). https://www.cvce.eu/content/publication/2012/8/14/8080845c-8866-4a89-a799-8f3eff88eff6/publishable_en.pdf.
[28] Thomas M. Franck, 'The Emerging Right to Democratic Governance', (1992) 86(1) *The American Journal of International Law* 46, 59 (in reference to the Human Rights Committee's monitoring role of the ICCPR). DOI: 10.2307/2203138.

right is increased. Monitoring bodies are also viable enforcement mechanisms. Increased determinacy and viable enforcement enhance the prescriptive value of the right to local governance in Europe.

Although there is no treaty-based right to local government in international law, it has been suggested that 'a case can be made for such a customary right' of local governance.[29] Indeed, it is arguable that, akin to the democratic entitlement in 1992,[30] a right to local governance is emerging. As noted, rules of customary international law are precipitated through 'general practice accepted as law'.[31] Just about every state has a level of local governance in one form or another.[32] Policies of decentralization to the local level have been implemented everywhere and it is the most important reform of the last generation.[33] Decentralization to the local level is emerging as a consistent state practice. However, for state practice to amount to customary rule it must be 'in accordance with a constant and uniform

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[29] Blank (2022), *supra* n. 4, at 103.
[30] *See,* Franck, *supra* n. 28. *See also*, Gregory H. Fox, 'The Right to Political Participation in International Law', (1992) 17 *Yale Journal of International Law* 539.
[31] UN, *Statute of the International Court of Justice*, *supra* n. 5, Art. 38.
[32] All but four of UN member states (Nauru, Saint Kitts and Nevis, St. Lucia, Saint Vincent and the Grenadines, and Singapore) have local or regional government of some description. UCLG/GTLRG, *Local and Regional Governments: An Organized Constituency, Ready to Contribute (The road towards sustainable development and Habitat III)* (2016), 8. https://www.uclg.org/sites/default/files/gtf-habitat_iii-an_organized_ constituency_ready_to_contribute.pdf.
[33] Jean-Paul Faguet, 'Decentralization and Governance', (2014) 53 *World Development*, 2, 2. https://doi.org/10.1016/j.worlddev.2013.01.002.

usage',[34] or, in other words, be 'both extensive and virtually uniform.'[35] While decentralization to the local level may be extensive, the actual powers and authorities conferred on local governments is of insufficient uniformity to amount to a consistent state practice.

The second element, *opinio juris*, is psychological: 'the belief by a state that behaved in a certain way that it was under a legal obligation […] to act in that way.'[36] General Assembly declarations and resolutions can evidence *opinio juris* and have normative value.[37] The Sustainable Development Goals (SDGs) and the New Urban Agenda (NUA) are incorporated in General Assembly resolutions and require localization and a degree of decentralization. The SDGs and the NUA were adopted and endorsed, respectively, by General Assembly resolutions. The SDGs were adopted by the General Assembly Resolution *Transforming our world: the 2030 Agenda for Sustainable Development*, on 25 September 2015. The SDGs, together with preamble and explanatory material was the 'outcome document of the United Nations summit for the adoption of the post-2015 development agenda' and was adopted in the text of the Resolution. The Resolution specifically recognizes the role of local

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[34] *Colombian-Peruvian Asylum Case*, ICJ Rep. 1950, 266, 277 ('*Columbian-Peruvian Asylum Case*'). *See also,* Shaw, *supra* n. 1, at 64-65.
[35] *North Sea Judgment*, *supra* n. 7, at 43.
[36] Shaw, *supra* n. 1, at 63.
[37] *Nuclear Weapons Advisory Opinion*, *supra* n. 10, at 254-255, para. 70. *See also*, *Chagos Advisory Opinion*, *supra* n. 8, at para. 153.

government in the implementation of the SDGs. SDG 11 is to 'make cities and human settlements inclusive, safe, resilient and sustainable.'[38] Notably, SDG 11 'is the only actor-specific goal among the SDGs' and 'bridges global and local levels of government.'[39] It 'demonstrates how local governance is recognized as an autonomous yet interrelated part of the global pursuit of sustainable development.'[40] However, the SDGs do not articulate a 'right to local governance' or otherwise suggest that decentralization is mandatory or in any way a legal requirement. More importantly, the Sustainable Development *Goals*, by definition, are aspirational only.

Likewise, the *New Urban Agenda* (NUA) also lacks the normative character to suggest the emergence of a binding rule of customary international law. First, the NUA was endorsed by the UN General assembly rather than adopted and it was annexed to the resolution rather than incorporated in it.[41] The NUA does however, utilize language of a normative character: the 'right' to the city. The NUA acknowledges efforts to implement 'a right to the city' by national

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[38] UNGA, *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res. 70/1, UN Doc. A/RES/70/1 (21 October 2015, adopted on 25 September 2015), SDG 11. https://digitallibrary.un.org/record/3923 923?ln=en.
[39] Helmut Philipp Aust and Anél Du Plessis, 'Introduction' in Helmut Philipp Aust and Anél Du Plessis, *The Globalisation of Urban Governance: Legal Perspective on Sustainable Development Goal 11* (Routledge, New York/London, 2019) 3-16, at 4. ISBN13: 978-0-367-66382-7.
[40] *Ibid.*, at 5.
[41] UNGA, *New Urban Agenda*, GA Res. 71/256, UN Doc. A/RES/71/256 (25 January 2017, adopted 23 December 2016) ('NUA'). https://digitallibrary.un.org/record/3923923?ln=en.

and local governments. The 'Right to the City' has been described 'as a new concept in international law: a collective right that considers cities as commons for the realisation of all human rights including environmental rights.'[42] It is envisaged that this 'right' can be exercised in any local administrative unit.[43] A resolution's wording can determine the instrument's normative character and the suggestion of a right implies that the NUA has significant normative value.[44] However, the NUA describes this 'right' as 'a *vision* of cities ...'[45] As a 'vision' the right to the city is aspirational only.

The 'normative character' of these international instruments is insufficient to evidence *opinio juris* and precipitate a binding 'right to local governance' in international law. State practice -- the increasing implementation of local governance -- is indicative of the

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[42] Elif Durmuş and Barbara Oomen, 'Transnational city networks and their contributions to norm-generation in international law: the case of migration', (2021) 48(6) *Local Government Studies* 1048, 1055. DOI: 10.1080/03003930.2021.1932478.

[43] UN Habitat III, 'The Right to the City and Cities for All' (Conference on Housing and Sustainable Urban Development, Policy Paper No. 1, New York, 2017). ISBN: Volume: 978-92-1-132746-5. https://habitat3.org/wp-content/uploads/Habitat_III_Policy_Paper_1.pdf.

[44] *See, e.g., Chagos Advisory Opinion*, *supra* n. 8, at para. 153.

> The wording used in resolution 1514 (XV) [*Declaration on the Granting of Independence to Colonial Countries and Peoples 1960*] has a normative character, in so far as it affirms that "[a]ll peoples have the right to self-determination". Its preamble proclaims "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations" and its first paragraph states that "[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights [and] is contrary to the Charter of the United Nations".

[45] NUA, *supra* n. 41.

development of a global norm and is consistent with the emergence of a right to local governance. However, states likely implemented policies of decentralization without any 'recognition that a rule of law or legal obligation is involved.' Accordingly, *opinio juris* -- that is, evidence that states implement decentralization with the belief that it is obligatory -- is thus probably insufficient to render a right to local governance a rule of customary international law. As such, the necessary element of a 'general practice accepted as law' is absent and a right to local governance is not a rule of customary international law.

Irrespective of whether a right to local governance is a 'binding' rule of customary international law, international texts exercise a 'compliance pull' and create expectations about state conduct thereby encouraging the implementation of local governance. United Nations texts have promoted and endorsed decentralization to the local level and a 'right' to local governance is receiving increasing credence in international legal discourse.[46] International organizations are increasingly promoting the empowerment and autonomy of local authorities, free of 'overly constrictive central supervision and intervention',[47] by entrenching their role in state constitutions, preferably, and legislation.

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[46] Yishai Blank, 'Urban Legal Autonomy and (de)Globalization', (2020) 79(3) *Raisons politiques* ('Blank (2020)') 57, para. 17. https://doi.org/10.3917/rai.079.0057.
[47] *Ibid.*, at para. 13.

Localization is fundamental to the implementation of the SDGs as a whole, and not just SDG 11.

> The implementation of the New Urban Agenda contributes to the implementation and localization of the 2030 Agenda for Sustainable Development in an integrated manner, and to the achievement of the Sustainable Development Goals and targets, including Goal 11 of making cities and human settlements inclusive, safe, resilient and sustainable.[48]

Local governments are not only recognized as key elements implementing SDG 11, but UN Habitat's policy documents also encourage states to adopt decentralization to the local level to promote the implementation of *all* the SDGs.[49] The UN Secretary-General has similarly recognized that SDG localization is an essential area of action. In October 2022, the UN Human Rights Council (HRC) again recognised 'the significant contribution that local governments make to the implementation of the Sustainable Development Goals and their targets' and are 'key actors in localizing the commitments set out in the 2030 Agenda'.[50]

The Global Taskforce of Local and Regional Governments (GTLRG), UNDP and UN Habitat have jointly endorsed decentralization as a pre-requisite to the implementation of the SDGs, stating that the implementation of its SDGs required a 'level of decentralization' because decentralization is '[t]he cornerstone of

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[48] NUA, *supra* n. 41, at para. 9.
[49] Blank (2020), *supra* n. 46, at para. 13.
[50] HRC, *Local government and human rights*, Res. 51/12, UN Doc. A/HRC/RES/51/12 (13 October 2022, adopted 6 October 2022). https://digitallibrary.un.org/record/3991869?ln=en.

effective multi-level governance.'[51] The implementation of the SDGs and NUA require action by local governments, and to do so, necessitate the decentralization of powers and authorities to local governments sufficient to enable them to implement the goals. The NUA provides that its signatories will ensure 'appropriate fiscal, political and administrative decentralization based on the principle of subsidiarity.'[52] In UN Habitat's *World Cities Report 2020*, a 'policy point' is 'National governments should *strengthen local governments' involvement* in the definition, implementation and monitoring of national urban policies and the SDGs.'[53] It is clear that the implementation of the SDGs require a degree of decentralization to enable local governments to implement the goals. The 'compliance pull' of the SDGs and the NUA encourage state decentralization and localization.

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[51] Mohammad Agus Yusoff, Athambawa Sarjoon and Mat Ali Hassan, 'Decentralization as a Tool for Ethnic Diversity Accommodation: A Conceptual Analysis', (2016) 9(1) *Journal of Politics and Law* 55, 58. *See also*, Derick W. Brinkerhoff and Omar Azfar, 'Decentralization and Community Empowerment: Does Community Empowerment Deepen Democracy and Improve Service Delivery?' (RTI International, Paper for US Agency for International Development, Office of Democracy and Governance, Washington, D.C., October 2006) 1. https://pdf.usaid.gov/pdf_docs/PNAD H325.pdf. *See also,* Pranab Bardhan and Dilip Mookherjee, 'The Rise of Local Governments: An Overview', in Pranab Bardhan and Dilip Mookherjee (eds), *Decentralization and Local Governance in Developing Countries: A Comparative Perspective* (The MIT Press, Kindle ed., Cambridge, Mass., 2005) 1-52, at 1-2. ISBN-13: 978-0-262-52454-4.

[52] NUA, *supra* n. 41, at para. 89.

[53] UN Habitat, *World Cities Report 2020: The Value of Sustainable Urbanization* (UN Habitat, Nairobi, Kenya, 2020) 208. eBook ISBN: 978-92-1-0054386. HS Number: HS/045/20E. https://unhabitat.org/sites/default/files/2020/10/wcr_2020_report.pdf.

9.4 Local Governments and 'International Law'

The status of local governments in international law is rising. Local governments are increasingly attaining a status in international law independent of the state,[54] such that local governments have been described as 'international legal authorities'.[55] The increasing importance of local governance and the emergence of localization as a global norm is exemplified by their emerging role in creating international law. Local governments, together with their representative bodies, are part of a 'norm-making community' that influences the development of international law. Indeed, it has been suggested that the action of some local governments in contravening state regulation has resulted in the local authorities attaining '*quasi*-sovereignty'. The increasing status of local governments, evident in their role in the development of international law and claims of international legal personality has normative value itself. It encourages the further implementation of decentralization policies through the internalization of the norm and a process of socialization.[56]

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[54] Yishai Blank, 'The City and the World', (2006) 3 *Columbia Journal of Transnational Law* 868, 872 ('Blank (2006)'). https://ssrn.com/abstract=1020141.
[55] Helmut Aust, 'Cities as International Legal Authorities - Remarks on Recent Developments and Possible Future Trends of Research,' (2020) 4(1) *Journal of Comparative Urban Law and Policy* 82-88. https://readingroom.law.gsu.edu/jculp/vol4/iss1/13Aust.
[56] Durmuş and Oomen, *supra* n. 42, at 1051-53.

a. Local Governments as Subjects of International Law

Formally, local governments have no legal personality in international law.[57] Local governments can only exercise authority within the legal framework created by national governments, or sub-national governments in a federation; they are state organs.[58] International law has traditional treated cities as a matter solely within the internal affairs of the state and the state alone has legal personality and is 'the core actor in international law is the sovereign state.'[59] Local governments, as sub-state actors, are state agents and have an obligation to comply with those duties imposed on the state by international law[60] and violations committed by local governments[61] are attributed to the state; it is the state that has to provide any reparation.[62] However, international law is increasingly imposing duties and obligations directly on local governments even though they have no legal personality, and the role of local governments is being recognized in international instruments. Thus,

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[57] Blank (2006), *supra* n. 54, at 884.
[58] Gerald E. Frug and David J. Barron, 'International Local Government Law', (2006) 38(1) *The Urban Lawyer* 1, 11. https://www.jstor.org/stable/27895606.
[59] *Ibid.*, at 14.
[60] UNGA, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, GA Res. 53/144, UN Doc. A/RES/53/144 (8 March 1999, adopted 9 December 1998), Annex., Art. 18 (1). https://digital library.un.org/record/265855?ln=en.
[61] UNGA, *Articles on the Responsibility of States for Internationally Wrongful Acts*, GA Res. 56/83, UN Doc. A/RES/56/83 (28 January 2002, adopted on 12 December 2001), Annex, Art. 4. https://digitallibrary.un.org/ record/454412?ln =en. *See also*, Frug and Barron, *supra* n. 58, at 8.
[62] Aust and Du Plessis, *supra* n. 39, at 3.

international law is recognizing the duties and obligations of local governments, and in doing so is redefining their legal status.[63]

The HRC has noted that local governments have duties under international human rights law and that 'any failure to comply with these responsibilities will entail their liability under national law as well as international responsibility of the State as a whole.'[64] The CoE has also recognized that that 'local and regional authorities, in their fields of competence, must comply with the human rights obligations which stem from the international commitments of the member States'[65] and '[p]rotecting and promoting human rights is a responsibility shared by *all the different tiers of authority* within each Council of Europe member state.'[66] Local governments, particularly cities, have increasing rights and obligations under international law and since, 'theoretically, any entity given rights and obligations under international law can be given international legal personality,' local government authorities are emerging as subjects of international law.[67]

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[63] Frug and Barron, at *supra* n. 58, at 21.
[64] HRC, 'Role of Local Government in the Promotion and Protection of Human Rights' (Final Report of the Human Rights Council Advisory Committee, UN Doc. A/HRC/30/49, 7 August 2015), para. 25. https://digitallibrary.un.org/record/848739?ln= en.
[65] CLRA*, Recommendation 280 (2010) Revised Role of local and regional authorities in the implementation of human* rights (adopted 19 October 2011), para. 2. https://rm.coe.int/the-role-of-local-and-regional-authorities-in-the-implementation-of-hu/1680718e80.
[66] *Ibid.*, at para. 3 (emphasis added).
[67] Blank (2022), *supra* n. 4, at 103.

Local governments are also becoming 'formally involved' in international trade dispute settlement procedures albeit with the consent of their parent state.[68] Article 25 of the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965* includes in its arbitration jurisdiction 'any legal dispute out of an investment, between a contracting state (*or any constituent subdivision of agency* of a contracting state designated to the Centre by that state).'[69] Local governments also have standing before the European Court of Justice, since 'all organs of the administration, including decentralized authorities such as municipalities are obliged to apply those provisions [of an EU directive].'[70]

The role of local governments in articulating and implementing the SDGs and Agenda 2030 was specifically recognized in the first paragraph of the NUA -- and thereby endorsed by the UN. Local governments also acquired accreditation to UN Habitat III and contributed to the codification of the right to housing.[71] States traditionally report on goal implementation to the UN. New York

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[68] Moritz Baumgärtel, 'Dispute Settlement' in Helmut Philipp Aust and Janne E. Nijman (eds), *Research Handbook on International Law and Cities* (Edward Elgar Publishing, Cheltenham, UK/Northampton, Mass., 2022), 147-157, at 152. ISBN: 978 1 0353 0994 8. http://dx.doi.org/10.4337/9781788973281.

[69] ICSID, *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (1965) 575 UNTS 159, Art. 25 (emphasis added). https://icsid.worldbank.org/sites/default/files/ICSID_Convention_English. pdf.

[70] Case 103/88, *Fratelli Costanzo SpA v Comunde di Milatno* [1989] ECR 1839 [31] (CJEU). *See also* Case C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias and others* [2012] ECLI:EU:C:2012:560 (CJEU (Grand Chamber)).

[71] Durmuş and Oomen, *supra* n. 42, at 1052.

City is committed to implementing the SDGs and, in 2018, became the first city to directly report to the UN on its implementation of the goals. Shortly after, New York City launched the Voluntary Local Review (VLR) Declaration, with the aim of creating a 'global movement of cities' that 'would foster more direct engagement between local authorities and the UN.'[72] The parties to the VLR Declaration are committed to 'identify[ing] how existing strategies, programs, data, and targets align with the Sustainable Development Goals' and 'submit[ting] a Voluntary Local Review to the United Nations during the United Nations High-Level Political Forum.'[73] More than 330 local and sub-national governments are now parties to the VLR Declaration.[74]

Local governments are also appearing more 'state-like' by engaging in foreign relations, establishing international and regional networks, and entering international and regional 'treaty-like' agreements.[75] Local authorities have established and joined international city networks similar to state-based international and regional organizations. These networks are emerging as 'an important part of

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[72] UN Habitat, SDG Knowledge Hub, *New York City Report on VLR Movement* (3 February 2022). https://sdg.iisd.org/news/un-habitat-new-york-city-report-on-vlr-movement/.
[73] New York City, *VLR Declaration*, 25 September 2019. https://www1.nyc.gov/site/international/programs/voluntary-local-review-declaration.page.
[74] New York City, *Leading Locally: The Origins and Impact of the Voluntary Local Review* (2021), 25. https://www1.nyc.gov/assets/international/downloads/pdf/Leading-Locally-The-Origins-and-Impact-of-the-Voluntary-Local-Review.pdf.
[75] Durmuş, *supra* n. 13, at 31.

the international legal order.'[76] United Cities and Local Government (UCLG) reports to the UN on the implementation of the SDGs. Other local government networks include C40 Cities, the Human Rights Network, Cities of Refuge, *Merco Ciaudades* (a South American network of 364 cities in 10 countries), *AIMF* (the International Association of African Mayors), and the ICLEI (local governments for sustainability).[77] These international and regional networks have established the Global Taskforce of Local and Regional Governments.

Finally, here, local governments are directly negotiating and entering agreements with international aid agencies for the provision of funding and, in doing so, bypassing the state. The World Bank and the UNDP negotiate directly with city governments for development aid agreements.[78] For instance, in 2010, the World Bank provided a loan of US$1billion directly to the municipal government of Rio de Janeiro, Brazil, whereby the city committed to a reform programme, that, as well as pension cuts, included upgrades to health and education service of low income neighourhoods. The loan agreement

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[76] Frug and Barron, at *supra* n. 58, at 23.
[77] GTLRG, *We Amplify the Voice of Local and Regional Governments* (2016) (Website). https://www.global-taskforce.org/sites/default/files/2017-06/bfe783a7ee7eacc46f46498e7efa0f1898 5207.pdf.
[78] Michael Riegner, 'International Institutions and the City: Towards a Comparative Law of Glocal Governance' in Helmut Philipp Aust and Anél Du Plessis, *The Globalisation of Urban Governance: Legal Perspective on Sustainable Development Goal 11* (Routledge, New York/London, 2019) 38-64, at 41. ISBN13: 978-0-367-66382-7.

established a direct legal relationship between the World Bank and a local government.[79]

b. The Role of Local Governments in Making International Law

The rising status of local governance is also evident in their role in the development of international law. As state organs, the conduct of local governments may amount to 'state practice' and be relevant to the development of customary international law. Local governments are sub-state organs, and although not all elements of state practice are of equal value (depending 'upon its nature and provenance'[80]), local authorities, as sub-state organs, also contribute to state practice in their implementation of international law.[81]

> The development of customary international law and the interpretation of treaty obligations are both dialectic processes in which the implementation (in a certain way) or non-implementation of a norm can *ex post facto* be considered an alteration of that norm or the crystallisation of another.[82]

The implementation of international legal norms by local authorities necessarily involves interpreting and developing that norm for local purposes. In doing so, local governments develop the content of customary international law.

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[79] *Ibid.*, at 38.
[80] Shaw, *supra* n. 1, at 70.
[81] *Ibid.*, at 69.
[82] Durmuş, *supra* n. 13, at 44.

Local governments have also been directly involved in drafting and developing international normative instruments.

> Local governments' engagement in the process leading to the adoption of Agenda 2030 and their rigorous and successful lobbying for the inclusion of SDG 11 on safe, inclusive and sustainable communities provide examples of processes of generating non-binding but nevertheless highly meaningful norms.[83]

Local governments interpret, develop and generate norms through their umbrella organizations. The law's normative power is 'constantly constructed among various norm-generating communities,' and local governments are a part of a 'norm-generating' community.[84] Local and municipal governments have, together with local government networks, drafted, signed and ratified 'treaty-like' instruments even though they do not have formal legal standing in international law.[85] Local governments, as noted in *Chapter 7*, have assumed ownership of the human rights agenda. In drafting, interpreting, implementing and contesting national and international human rights norms, local governments 'may well subvert or transform them and the resulting transformation is sure to seep back "up" so that, over time, the "international" norm is transformed as well.'[86]

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[83] Durmuş and Oomen, *supra* n. 42, at 1052.
[84] Berman, *supra* n. 12, at 302.
[85] Durmuş, *supra* n. 13, at 50.
[86] Berman, *supra* n. 12, at 311.

These 'treaty-like' instruments include the *European Charter for Safeguarding Human Rights in the City* (2000),[87] the *Global Charter-Agenda for Human Rights in the City* (2011),[88] the *Cities for Adequate Housing: A Municipalist Declaration on the Right to Housing and the Right to the City* (2018),[89] and the *Marrakech Mayors Declaration: Cities Working Together for Migrants and Refugees* (2018).[90] These networks:

> enable local governments and their associations to connect, discuss, inspire, but also to formulate documents which sometimes hold normative statements and commitments as well as foreseeing follow-up and implementation mechanisms -- in short, all that which concerns norm-generation.[91]

The adoption of these instruments 'imitat[e] a form of inter-State law-making.'[92] In drafting these instruments, local governments and umbrella networks have appropriated the style and structure of human rights treaties and adopted the form and language of international law. While these instruments resemble international

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[87] UCLG, *European Charter for the Safeguarding of Human Rights in the City* (St Denis, France, 18 May 2000). https://uclg-cisdp.org/en/news/european-charter-safeguarding-human-rights-city.
[88] UCLG, *Global Charter-Agenda for Human Rights in the City* (Florence, Italy, 11 December 2011) ('Global Charter-Agenda'). https://www.uclg-cisdp.org/sites/default/files/UCLG_Global_Charter_Agenda_HR_City_0.pdf.
[89] UCLG, *Cities for Adequate Housing: A Municipalist Declaration on the Right to Housing and the Right to the City* (New York, 16 July 2018). https://www.uclg.org/sites/default/files/cities_por_adequate_housing.pdf.
[90] GFMD/Mayors Mechanism (MM), *Marrakech Mayors Declaration: Cities Working Together for Migrants and Refugees* (2018). https://migration4development.org/en/resources/marrakech-mayors-declaration-cities-working-together-migrants-and-refugees.
[91] Durmuş and Oomen, *supra* n. 42, at 1049.
[92] Durmuş *supra* n. 13, at 50

human rights treaties, they are not simply verbatim copies but 'include some level of contestation and intention to progressively develop the rights and their protection mechanisms for all who live in the city.' [93] In drafting these documents local governments necessarily engage in a process of interpretation and alliteration that develops human rights norms and 'generates new human rights norms and alternative contestations of existing ones.'[94] Irrespective of the formal status of local governments, local governments play a role in the 'assembly' of international human rights, which 'are assembled from a plurality of local and international approaches.'[95] In generating norms -- engaging in a 'normo-generative'[96] role, the status of local governance is enhanced and the normative value of local governance is increased.

Local government networks have also engaged in establishing 'best practices' and standard setting with international agencies thereby exercising a *quasi*-legislative function. For example, C40, the ICLEI and the UCLG established the UN City Mayors Compact which established 'best practices' for greenhouse gas emissions. Pursuant to the compact, cities commit to reduce greenhouse gas emissions and engage in 'consistent and transparent public reporting of

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[93] Durmuş and Oomen, *supra* n. 42, at 12.
[94] Durmuş *supra* n. 13, at 50.
[95] Marcenko, *supra* n. 11, at 155.
[96] The term 'normo-generative' was suggested by my supervisor, Dr. Josep Ibáñez, to Dr. Marta Galceran Vercher and was utilized in her PhD dissertation *City Networks in Global Governance: Practices, Discourses and Roles* (2022) 100, n.110. [Unpublished doctoral dissertation] Pompeu Fabra University.

greenhouse gas data.'[97] C40 and the World Bank have partnered together to develop a common standard for measuring greenhouse gas emissions. Cities need to comply with these standards if they are to access World Bank funding.[98] Likewise, the European Development Bank provides 'privileged' access to funding for cities that comply with 'Sustainable Energy Action Plans' established by the EU's 'Covenant of Mayors.'[99] While these best practices and standards may not be binding, they shape behaviour.[100]

c. The 'De facto-Sovereignty' of Local Governments?

The enhanced status of local governments in international law is also evident in cities and municipalities implementing international legal norms in defiance of national governments. In doing so, local governments are subverting state sovereignty and enhancing their own status in international law. Local governments challenge state compliance with their international obligations and address the failure of state governments to implement international law, sometimes in contravention of state law and policy. Local governments have overtly acted in contravention of state law and policy most directly in international human rights law. Furthermore,

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[97] UN (The Compact of Mayors Initiative), *The Compact of Mayors - Catalysing City Climate Actions Across the Globe* (1 September 2015). https://unfccc.int/news/the-compact-of-mayors-catalysing-city-climate-actions-across-the-globe.
[98] Helmut Philipp Aust, 'Shining Cities on the Hill? The Global City, Climate Change, and International Law', (2015) 26(1) *European Journal of International Law* 255, 263. DOI: 10.1093/ejil/chv011.
[99] *Ibid.*
[100] *Ibid.,* at 272.

local communities have taken the lead in addressing the crisis of our times: climate change.

National governments have demonstrably failed to address the challenges of climate change: only eight of the 32 largest polluters have taken steps, or even adopted policies, to achieve the goal of the Paris Climate Change Accords. In contrast, cities and local governments have confronted the challenge of climate change directly and, on occasion, unilaterally implemented international treaty obligations intended to mitigate the effects of climate change. San Francisco and New York, in the US, have supported the implementation of the Kyoto Protocol even though the federal government has refused ratification.[101] In 2016, the United States withdrew from the Paris Climate Agreement, against the opposition of the United States Conference of Mayors. Mayors of the United States, utilizing the Conference, vowed to continue to reduce greenhouse gas emissions to mitigate the impact of global warming despite the US withdrawal from the Paris Agreement.[102] Indeed, cities and local governments are best placed to address climate change and implement sustainability policies.[103]

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[101] Durmuş, *supra* n. 13, at 38.
[102] Sara Durr (The United States Conference of Mayors), *Mayors Strongly Oppose Withdrawal from Paris Climate Accord* (1 June 2017). https://www.usmayors.org/2017/06/01/mayors-strongly-oppose-withdrawal-from-paris-climate-accord/.
[103] Ileana M. Porras, 'The City and International Law: In Pursuit of Sustainable Development', (2009) 36(3) *Fordham Urban Law Journal* 538, 575. https://ir.lawnet.fordham.edu/ulj/vol36/iss3/7.

Probably the best example of local government defiance of state policies concerns the 'refugee crisis' that followed the increasing number of undocumented migrants arriving in Europe, beginning in 2015, and the hyperbolic response to undocumented migrants crossing the southern border of the US around the same time. National governments have demonstrated conspicuous hostility to the arrival of these undocumented immigrants. In contrast, local governments have generally exhibited a more welcoming approach reflective of international human rights norms.[104] For instance, when then Italian Minister of the Interior, Matteo Salvini, refused to allow the migrant rescue ships to dock, the southern Italian port cities of Palermo, Naples, Messina and Reggio Calabria took a defiant stand. The port cities were 'ready to disobey Salvini's order' and allow the rescue ship to dock and enable its rescued passengers to disembark.[105] The Mayor of Palermo stated that the port city had 'always welcomed rescue boats and vessels who saved lives at sea. We will not stop now [and] Salvini is violating the international law.'[106] In 2018, Naples and Palermo also wilfully contravened an

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[104] Barbara Oomen, 'Cities of Refuge: Rights, Culture and the Creation of Cosmopolitan Cityzenship' in Rosemarie Buikema, Antoine Buyse, and Antonius C. G. M. Robben (eds), *Cultures, Citizenship and Human Rights* (Routledge, London, 2019) 121-136, at 121. eBook ISBN: 9780429198588. https://doi.org/10.4324/9780429198588.

[105] Durmuş, *supra* n. 13, at 45-46.

[106] Patrick Wintour, Lorenzo Tondo and Stephanie Kirchgaessner, 'Southern Mayors Defy Italian Coalition to Offer Safe Ports to Migrants', *The Guardian* (11 June 2018). https://www.theguardian. com/world/2018/jun/10/italy-shutsports-to-rescue-boat-with-629-migrants-on-board.

Italian national security decree[107] prohibiting local registration of undocumented migrants; local registration was a precondition for accessing municipal services.[108]

In Spain, the national government similarly sought to mandate the registration of undocumented migrants before allowing access to health services. However, 12 of 17 autonomous regions passed specific laws and regulations enabling undocumented migrants to continue to access healthcare.[109] The national government and Constitutional Court attempted to outlaw such efforts on the basis that the provision of universal health care was 'accelerated' in certain localities and not nationally consistent.[110] Likewise, in 2012 the Dutch government prohibited local and municipal governments from providing services to undocumented migrants.[111] Municipal governments of Dutch cities such as Amsterdam, Utrecht and Groningen objected to the national policy and 'have explicitly

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[107] Italy (Republic of), *Decree-Law 2018*, n. 113 (18G00140) (GU General Series n.231, 4 October 2018). https://www.gazzettaufficiale.it/eli/id/2018/10/04/18G00140/sg.

[108] Oomen, *supra* n. 104, at 124.

[109] Barbara Oomen, Moritz Baumgärtel and Elif Durmuş, 'Accelerating Cities, Constitutional Brakes? Local Authorities Between Global Challenges and Domestic Law' in Hirsch Ballin, Gerhard van der Schyff, Maarten Stremler, and Maartje De Visser (eds), *European Yearbook of Constitutional Law 2020: The City in Constitutional Law, Vol. II* (T.M.C. Asser Press, The Hague, 2021) 249-272, at 259-60. ISBN: 978-94-6265-431-0. https://link.springer.com/content/pdf/bfm%3A978-94-6265-431-0%2F1.

[110] Durmuş, *supra* n. 13, at 50.

[111] Sara Miellet, 'Human rights encounters in small places: the contestation of human rights responsibilities in three Dutch municipalities', (2019) 51(2) *The Journal of Legal Pluralism and Unofficial Law* 213, 218-19. DOI: 10.1080/07329113.2019.1625699.

diverged from national asylum policies by offering support to rejected asylum seekers in the form of shelter, basic (health) care and more recently also legal counselling.'[112] In doing so, municipalities have frequently invoked international human rights norms to justify their approach of 'cushioning, bypassing, resisting and counteracting various aspects of exclusionary asylum policies.'[113] In the United States, a number of cities objected to President Trump's clampdown on undocumented migrants and in these 'Sanctuary Cities' the 'local enforcement agencies refuse to cooperate with the federal government in locating and detaining undocumented migrants.'[114] The federal government responded with court action and threats of defunding.[115]

In openly contesting, indeed subverting, national sovereignty, local authorities have strengthened and developed local sovereignty.[116] 'Local authorities, increasingly and in many different ways, claimed *de facto* and at times even *de jure* sovereignty over refugee reception

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[112] Oomen, Baumgärtel and Durmuş, *supra* n. 109, at 264-65.
[113] Sanne Kos, Marcel Maussen and Jeroen Doomernik, 'Policies of Exclusion and Practices of Inclusion: How Municipal Governments Negotiate Asylum Policies in The Netherlands', (2016) 4(3) *Territory, Politics, Governance* 354–374. DOI: 10.1080/21622671.2015.1024719.
[114] Oomen, *supra* n. 104, at 124.
[115] In the United States, the federal government's refusal to ratify the *Convention for the Elimination of Discrimination Against Women 1979* (CEDAW) has also led to a number of municipalities, beginning with San Francisco in 1998, to adopt its terms. *See generally,* Susan Hagood Lee, 'Thinking Globally, Acting Locally: CEDAW and Women's Human Rights in San Francisco.' (2019) 13(1) *Societies Without Borders* 1-22. https://scholarlycommons.law.case.edu/swb/vol13/iss1/6.
[116] Oomen, *supra* n. 104, at 122.

and integration.'[117] In doing so, these so-called Sanctuary Cities, Solidarity Cities, Cities of Refuge, Integrating Cities, and Fearless Cities have claimed *de facto* sovereignty over state action.[118] In defying the state these local authorities 'provide a territorial legal entity at a different scale at which sovereignty is articulated'[119] and exemplify 'sovereignty from below.'[120]

Local governments have also acted autonomously in adopting their own foreign policies, sometimes contradicting the state's foreign policies. For instance, to express solidarity with the Palestinian's struggle, local governments in Ireland, Norway, Spain, Sweden, France, the UK, Italy, Belgium and Australia have adopted policies supporting the Boycott, Divest, Sanction (BDS) movement.[121] The BDS movement hopes to pressure Israel into ceasing its occupation of the West Bank and granting equal rights and a right of return to all Palestinians. Perhaps unsurprisingly, some national governments

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[117] *Ibid.*, at 124.
[118] *Ibid.*
[119] Harald Bauder, 'Sanctuary Cities: Policies and Practices in International Perspective', (2017) 55(2) *International Migration* 174, 182. DOI: 10.1111/ imig.12308. *See also*, Vojislava Filipcevic Cordes, 'City Sovereignty: Urban Resistance and Rebel Cities Reconsidered', (2017) 1(3) *Urban Science* 1-22. DOI:10.3390/urbansci1030022.
[120] Randy Lippert, 'Sanctuary Practices, Rationalities and Sovereignties', (2004) 29 *Alternatives* 535–555.
[121] Benjamin Mueller, 'U.K. Plans to Pass Anti-B.D.S. Law', *New York Times* (16 December 2019). https://www.nytimes.com/2019/12/16/world/europe/britain-bds -boycott-israel.html

have attempted to ban local governments from boycotting Israel, with only limited success.[122]

9.5 A 'Right' to Direct Participation in Public Affairs?

Localization is emerging as a global norm. Participatory democracy is best suited to implementation at the local level. The democratic legitimacy of representative democracies will be enhanced by the implementation of mechanisms of participatory democracy at the local level. States are increasingly providing an enabling environment to facilitate participatory democracy, and mechanisms of participatory democracy are being increasingly utilized around the world. International organizations endorse the implementation of mechanisms of participatory democracy. Local governments, through their representative bodies, have also articulated a right to direct participation in public affairs. The OAS, the AU, and the EU and CoE have all endorsed the implementation of participatory democracy. Indeed, the CoE has adopted a legal right to participatory democracy and a right to direct participation in governance at the local level may be emerging as a Europe-wide regional norm of

[122] Palestinian BDS National Committee, 'Israel's anti-BDS lawfare dealt major blow by UK Supreme Court' (30 April 2020). https://bdsmovement.net/news/israels-anti-bds-lawfare-dealt-major-blow-by-uk-supreme-court. *See also,* Rowena Mason, 'Liz Truss accused of offensive remarks about Jewish people and civil service', *The Guardian* (12 August 2022). https://www.theguardian.com/politics/2022/aug/12/liz-truss-protect-british-jews-antisemitism-woke-culture.

customary international law.[123] Local participatory democracy is emerging as a global norm.

a. The Right to Direct Participation in International Law

International instruments recognize a right to 'take part' -- to participate -- in public affairs. As discussed in *Chapter 3*, Article 21(1) of the UDHR and Article 25(a) of the ICCPR provide a 'right' to either *direct* participation in public affairs or *indirect* participation 'through freely chosen representatives.'[124] The *direct* means of taking part in public affairs includes all of the mechanisms of participatory democracy described in *Chapter 8.* However, the reference to 'directly' taking part in public affairs has been accorded only a limited application, and the prevailing interpretation and application of international human rights conventions have suggested that the 'guarantee [of] the right to political participation' is satisfied 'primarily by requiring signatories to hold fair elections at regular intervals.'[125] Representative democracy is overwhelmingly accepted

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[123] *Columbian-Peruvian Asylum Case*, *supra* n. 34, at 277. *See also Case concerning Right of Passage over Indian Territory (Merits)*, ICJ Rep. 1960, p. 6, at 37 ('*Right of Passage Case*'). In the *Right of Passage Case*, the ICJ held that mutual obligations and rights between two states may arise as a result of ongoing, consistent and continued practice ('the day-to-day exercise of the right to passage.'). *Ibid.*

[124] UNGA, *Universal Declaration of Human Rights 1948*, GA Res. 217(III)[A)], UN Doc. A/RES/217(III)[A], (1949, adopted 10 December 1948), Art. 21(1). https://digitallibrary.un.org/record/666853?ln=en. UN, *International Covenant on Civil and Political Rights* (1966), 999 UNTS 171 (Adopted and opened for signature, ratification and accession by Res. 2200 A (XXI) of 16 Dec. 1966), Art. 25(a). https://digitallibrary.un.org/record/660192?ln= en.

[125] Fox, *supra* n. 30, at 552.

as the primary method of democratic governance and is the international norm.[126]

General Assembly declarations alone are merely recommendations but they can also be evidence of existing or emerging norms in international law,[127] depending on 'its content and the conditions of its adoption.'[128] In 1999, the UN General Assembly adopted the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*.[129] The Declaration provides that 'everyone has the right [...] to participation in government', including 'the right […] to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals.'[130] The right to make submissions to public bodies is an element, albeit a minimal one, of participatory democracy. The content of the Declaration is of normative value

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[126] Francesco Palermo, 'Participation, Federalism and Pluralism: Challenges to Decision Making and Responses by Constitutionalism', in Fraenkel-Haeberle, Kropp, Palermo and Sommermann (eds), *Citizen Participation in Multi-Level Democracies* (Brill Nijhoff, Leiden/Boston, 2015) 31-47, at 33. ISBN: 9789004287938.
[127] *Chagos Advisory Opinion*, *supra* n. 8, at para. 151.
[128] *Nuclear Weapons, Advisory Opinion*, *supra* n. 10, at 226, para. 76.
[129] UNGA, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, GA Res. 53/144, UN Doc. A/RES/53/144 (8 March 1999, adopted 9 December 1998). https://digitallibrary.un.org/record/265855?ln=en.
[130] *Ibid.*, at Art. 8 (2).

because it refers to 'the right' to directly participate in government.[131] The conditions of the Declaration's adoption may also increase its normative value: the Declaration was adopted without a vote, and no state objected to it.[132] However, its probative value is perhaps reduced by the nature of the vote: it was adopted in unison with 48 other resolutions.[133] In any event, it is 'evidence important to establishing the existence of a rule or the emergence of an *opinio juris*.'[134] '[A] series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.'[135]

UN bodies, apart from the General Assembly, are also potentially relevant to the emergence or existence of a customary rule of international law. In a series of comments, recommendations and reports, UN bodies have recognized the importance of alternative means of civic participation in decision-making and policy development. In 1996, the Human Rights Committee, in its General Comment No. 25, 'The Rights to participate in public affairs, voting rights and the right of equal access to public service', noted that

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[131] The ICJ, in the *Chagos Advisory Opinion*, stated that the *Declaration on the Granting of Independence to Colonial Countries and Peoples 1960* is of a 'normative character' in that 'it affirms that "[a]ll peoples have the right to the self-determination."' *Chagos Advisory Opinion*, *supra* n. 8, at para. 153.
[132] UN (Press Release), *General Assembly Reaffirms Importance Of Right To Development As Integral Part Of Fundamental Human Rights*, UN Doc. GA/9532 (9 December 1998). https://www.un.org/press/en/1998/19981209.ga9532.html.
[133] *Ibid.*
[134] *Nuclear Weapons Advisory Opinion*, *supra* n. 10, at para. 70; approved in *Chagos Advisory Opinion*, *supra* n. 8, at para. 151.
[135] *Nuclear Weapons Advisory Opinion*, *supra* n. 10, at para. 70.

alternative methods of civic participation are included in the right to take part in public affairs. [136]

> Citizens may participate directly by taking part in *popular assemblies* which have the power to make decisions about *local issues* or about the affairs of a particular community and in bodies established to represent citizens in consultation with government.[137]

The Office of the High Commissioner for Human Rights (OHCHR) has more recently engaged in a broad-ranging review of the right to participate in public affairs.[138] It also recognized that participation in public life is vital to social inclusion and recommended that '[f]ormal permanent structures should be developed to ensure that participation in decision-making processes is widely understood, accepted and routinely realized by both public authorities and rights holders.'[139] Indeed, the OHCHR has even submitted to the HRC 'Draft guidelines for States on the effective implementation of the right to participate in public affairs.'[140] The OHCHR recognized that a right to participate is not solely satisfied by participating in periodic cyclical elections but instead 'should be recognized as a continuum that requires open and honest interaction between public authorities

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[136] HR Comm., General Comment No. 25, Article 25, *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, UN. Doc. CCPR/C/21/Rev.1/Add.7 (27 August 1996, adopted by the HR Comm. 12 July 1996), paras 6, 8. https://digitallibrary.un.org/record/221930?ln=en.
[137] *Ibid.* (emphasis added).
[138] HRC, 'Draft guidelines for States on the effective implementation of the right to participate in public affairs' (Report of the OHCHR, UN Doc. A/HRC/39/28, 20 July 2018), para. 3. https://digitallibrary.un.org/record/1640583?ln=en.
[139] *Ibid.,* at para. 56.
[140] *Ibid.*

and all members of society [...] and should be facilitated continuously.'[141] The HRC endorsed the Draft Guidelines 'as a set of orientations for States' and encouraged governments 'to give due consideration to the guidelines in the formulation and implementation of their policies and measures concerning equal participation in political and public affairs.'[142]

The increasing implementation of participatory democracy, like localization, does not amount to a sufficiently 'settled practice' to satisfy the requirements of customary international law; primarily because states, while adopting mechanisms of participatory democracy, do not believe that they are legally obliged to do so or that it is 'a duty incumbent on them.'[143] Accordingly, a rule of customary international law providing an individual right to *directly participate* in public affairs has not yet crystallized.[144] However, its normative value in international law is increasing.

The *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (Aarhus Convention), could be a model for any future right to direct

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[141] *Ibid.,* at para. 19(h).
[142] HRC, *Equal participation in political and public affairs*, HRC Res. 39/11, UN Doc. A/HRC/RES/39/11 (5 October 2018, adopted 28 September 2018). https://digitallibrary.un.org/record/1648618?ln=en.
[143] *Columbian-Peruvian Asylum Case*, *supra* n. 34, at 277.
[144] *Chagos Advisory Opinion*, *supra* n. 8, at para. 148.

participation. [145] The EU and the UN Economic Commission for Europe (UNECE) jointly facilitated the Aarhus Convention, which has been ratified by all of the EU's Members States and the EU itself is a signatory. The Convention provides an individual *right* to participate in decisions relating to environmental matters. Pursuant to the Aarhus Convention, the signatories recognize that individuals have a duty 'to protect and improve the environment for the benefit of present and future generations' and to do so are 'entitled to participate in decision-making [...] in environmental matters.' [146] Accordingly, the Aarhus Convention provides that 'each Party shall guarantee the rights of [...] public participation in decision-making,' [147] and adopt '[p]rocedures for public participation [that] shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.' [148] More importantly, the Convention provides that '[e]ach Party shall ensure that in the decision *due account* is taken of the outcome of the public participation,' [149] which has been

[145] EU/UNECE, *The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998* (Aarhus, Denmark, 25 June 1998), 2161 UNTS 447 (the 'Aarhus Convention'). http://www.unece. org/fileadmin/DAM/env/pp/documents/cep43e.pdf.
[146] *Ibid.*, at Preamble.
[147] *Ibid.*, at Art. 1.
[148] *Ibid.*, at Art. 6(7).
[149] *Ibid.*, at Art. 6(8) (emphasis added).

interpreted to require the relevant authorities to 'seriously consider' all public submissions.[150]

b. Regional Rights to Participatory Democracy?

The normative value and 'compliance pull' of participatory democracy is also increasing by virtue of its endorsement by regional organizations. Regional instruments precipitate norms. The *Inter-American Democratic Charter* (2001) provides that:

> It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy.[151]

The IADC, together with the *American Convention on Human Rights* (1969), 'underscore the importance of the complementarity of and striking a balance between representative democracy and participatory democracy.'[152] The Inter-American Court of Human Rights has recognized that:

> [p]olitical participation can include widespread and varied activities that people perform individually or within an

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[150] *See* UNECE, 'Findings and recommendations with regard to Communication ACCC/C/2008/24 concerning compliance by Spain', ECE/MP.PP/C.1/2009/8/ Add.1 (8 February 2011), paras 99-101. https://unece.org/DAM/env/pp/ compliance/C2008-24/DFR/ece.mp.pp.c.1.2009.8. add.1_as_resubmitted.pdf.

[151] OAS, *Inter-American Democratic Charter* (Lima, 11 September 2001), Art. 6. https://www.oas.org/dil/2001_Inter-American_Democratic_Charter. pdf.

[152] OAS, 'Observing Direct Democracy Mechanisms: A Manual for OAS Electoral Observation Missions' (OAS, Secretariat for Strengthening Democracy, Department of Electoral Cooperation and Observation, 2022), 15. ISBN: 978-0-8270-7470-5. https://www.oas.org/es/sap/deco/Pubs/Manuales/observing-direct-democracy-mechanisms.pdf.

> organization in order to intervene in the appointment of those who will govern a State or who will be responsible for conducting public affairs, as well as to influence the development of State policy *using direct participation mechanisms*.[153]

In Latin America, both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have confirmed that the right to take part in public affairs in Article 23 of the *American Convention on Human Rights* includes mechanisms of participatory democracy.[154] The Inter-American Court of Human Rights has expressly recognized that '[c]itizens have the right to play an active role in the conduct of public affairs directly through referenda, plebiscites or consultations *or* through freely elected representatives.'[155]

The African Union has also recognized the importance of participation in the *African Charter on Democracy*, *Elections and Governance* (2007), which provides that state parties 'shall foster popular participation and partnership with civil society organizations.'[156] The *African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development* (2014) provides that local democratic governance 'shall take a

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[153] Inter-American Court of Human Rights, *Case of Castañeda Gutman v. México* Judgment of August 6, 2008 (Preliminary objections, merits, reparations and costs) (*Gutman v. Mexico*), para. 146 (emphasis added).
[154] OAS, Observing Direct Democracy Mechanisms, *supra* n. 152, at 15.
[155] *Gutman v. México*, *supra* n. 153, at para. 147 (emphasis added).
[156] AU, *African Charter on Democracy, Elections and Governance* (30 January 2007), Art. 27(2). https://www.refworld.org/docid/493fe2332.html.

participatory and representative form'[157] and '[l]ocal governments or local authorities shall make provision for the meaningful participation of communities, civil society and other actors in local governance and development.'[158]

The European Union has recognized the importance of citizen participation in its public affairs, and it has endorsed the value of participation in local governance. Indeed, the EU has recognized that its democratic legitimacy derives, in part, from the implementation of 'participatory democracy.'[159] In an effort to overcome, or at least reduce, the EU's 'democratic deficit,' it recognized the importance of civic participation and has embraced the concept of participatory democracy.[160] Article 11 of the *Treaty of the European Union* specifically adopts participatory democracy providing '*citizens* and representative associations *the opportunity to make known and publicly exchange their views*,' the EU 'shall maintain an open, transparent and regular *dialogue* with representative associations and

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[157] AU, *African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development* (27 June 2014), Art. 12(2). https://au.int/en/treaties/african-charter-values-and-principles-decentralisation-local-governance-and-local.
[158] *Ibid.*, at 12(5).
[159] Alberto Alemanno, 'Towards a permanent citizens' participatory mechanism in the EU' (European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, PE 735.927, September 2022) 13. https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)735927.
[160] Raphaël Kies and Patrizia Nanz, 'Introduction', in Raphaël Kies and Patrizia Nanz (eds), *Is Europe Listening to Us? Successes and Failures of EU Citizen Consultations* (Routledge, New York/London, 2013), 1-16, at 14. ISBN: 9781409 454359.

civil society' and 'the European Commission shall carry out *broad consultations* with parties concerned in order to ensure that the Union's actions are coherent and transparent.'[161] Accordingly, '[s]ince the Lisbon Treaty, the Union derives its democratic legitimacy not only from representative democracy -- which remains its founding democratic principle -- but also from participatory democracy.'[162]

The EU's Fundamental Rights Agency (FRA) has promoted participation in local government as an important element of democracy. It has recognized that '[p]articipation of the community and individuals concerned is a cornerstone of a joined-up strategy for fundamental rights implementation.'[163] The EU's Committee of Regions (CoR), in its advisory role to the European Commission[164], 'encourages participation at all levels, from regional and local authorities to individual citizens.'[165] The CoR's 2009 'White Paper on Multi-Level Governance' recommended 'establishing appropriate

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[161] EU, *Consolidated Version of the Treaty on European Union* (2008/C 115, 13 December 2007), Art. 11(1)-(3) (emphasis added). https://eur-lex.europa.eu/resource.html?.

[162] Alemanno, *supra* n. 159, at 13.

[163] FRA, *Joining Up Fundamental Rights, Toolkit for Local, Regional and National Public Officials* (Website). https://fra.europa.eu/en/joinedup/tools/participation-and-civil-society/facilitating-participation.

[164] The CoR was established as an advisory body to assist the European Parliament, the Council and the EC. EU, *Consolidated version of the Treaty of the Functioning on the European Union* (OJ L. 326/47-326/390, 26 October 2012) ('TFEU'), Art. 300(3). https://eur-lex. europa.eu/legal-content/EN.

[165] EU, *About the EU* (Website). https://europa.eu/european-union/about-eu/institutions-bodies/european-committee-regions_en.

tools to support participatory democracy.'[166] In 2014, the CoR adopted the *Charter for Multi-Level Governance in Europe* (MLG Charter).[167] The parties to the MLG Charter 'commit [them]selves to making multilevel governance a reality in day-to-day policy-making and delivery, including through innovative and digital solutions' and '[t]o this end' they will 'promote citizen participation in the policy cycle.'[168] Further enhancing the normative value of the right to participate in local government is the conduct of the EU and the CoE with other states. As noted, the EU and CoE have established a '*Partnership for Good Governance*' and endorses 'public involvement in important decisions' through public consultation and endorses participatory budgeting.[169]

c. A European Right to Participatory Democracy at the Local Level?

The Council of Europe has attempted to mandate the implementation of mechanisms of participatory democracy at the local level through the *Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local*

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[166] CoR, 'The Committee of the Regions' White Paper on Multi-Level Governance' (CdR 89/2009, Brussels, 17-18 June 2009), 17. https://www.europarl.europa.eu/meetdocs/2009_2014/documents/.
[167] CoR, *Resolution of the Committee of the Regions on the Charter for Multilevel Governance in Europe* (2014/C 174/01, 3 April 2014), Annex. https://eur-lex.europa.eu/legal-content/EN/.
[168] *Ibid.*, at Preamble, Title II: Implementation and Delivery.
[169] *See,* EU/CoE, *Joint Programme: Partnership for Good Governance* (Website). https://pjp-eu.coe.int/en/web/pgg2/home.

authority (2009).[170] The Additional Protocol on Participation provides an individual with the legal right to participate in public affairs at the local level.[171] The Preamble to the Additional Protocol provides that the State Parties considered it 'appropriate to supplement the Charter with provisions guaranteeing the right to participate in the affairs of a local authority.'[172] Article 1 establishes an individual right to participate in the affairs of a local authority.[173] 'The right to participate in the affairs of a local authority denotes *the right to seek to determine or to influence the exercise of a local authority's powers and responsibilities*.'[174] According to the Explanatory Report:

> The establishment of an *individual right to participate* in the affairs of a local authority reflects a long-term societal development in European States. *All countries*, in different ways and to differing degrees, have come to recognise the fundamental importance of citizens being engaged and involved in public life. Democratic institutions should not be designed and cannot be sustained without taking on board the fundamental role and place of citizen participation.[175]

The methods of implementation of the right to participate in local government are articulated in Article 2 of the Additional Protocol on

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[170] CoE, *Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority*, CETS No. 207 (16 November 2009) (Additional Protocol on Participation), Art. 1(1). https://rm.coe.int/168008482a. *See also*, Explanatory Report to the Additional Protocol on Participation, *ibid.*, at 3.
[171] *Ibid.*, at Art. 1(1), Exp. Rep., at 3.
[172] *Ibid.* (emphasis added).
[173] *Ibid.*
[174] *Ibid.* at Art. 1(2) (emphasis added).
[175] *Ibid.*, at Exp. Rep. 3 (emphasis added).

Participation and include 'procedures for involving people which may include consultative processes, local referendums and petitions.'[176] Participatory budgeting, consultation processes (such as citizens' assemblies), and e-Democracy 'enable, promote and facilitate the exercise of the right to participate' in local government.[177] Presently the Additional Protocol has been ratified by 21 Member States of the CoE (with three additional signatories that have not yet ratified).[178]

The right articulated in the Additional Protocol on Participation may also be emerging as a European-wide[179] regional right to local participatory democracy.[180] To establish a regional norm of customary international law, like global norms, state practice and *opinio juris* must be present.[181] Thus, the rule must be 'in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of right appertaining to the State [...] and a duty incumbent on the territorial state.'[182] CoE Member

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[176] *Ibid.*, at Art. 2.
[177] *Ibid.*, at Art. 2(i).
[178] CoE, Chart of signatures and ratifications of Treaty 207. https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty &treatynum=207 (as of 18 February 2023).
[179] Or at least amongst member states of the CoE.
[180] *Columbian-Peruvian Asylum Case*, *supra* n. 34, at 277. *See also, Right of Passage Case*, *supra* n. 123, at 37. In the *Right of Passage Case*, the ICJ held that mutual obligations and rights between two states may arise as a result of ongoing, consistent and continued practice ('the day-to-day exercise of the right to passage.'). *Ibid.*
[181] *Columbian-Peruvian Asylum Case, supra* n. 34, at 277.
[182] *Ibid.*

States -- and *not* just the twenty-one State Parties to the Additional Protocol on Participation -- are increasingly facilitating direct participation in local governance in accordance with both the Additional Protocol and the CoE 'Guidelines for Civil Participation in Political Decision Making.'

The CoE Guidelines for Civil Participation specify that the provision of information, consultation, dialogue and active citizen involvement should be facilitated to enable the right to 'participatory democracy.'[183] The Guidelines also enunciate 'Principles' and 'Fundamentals' of civil participation, and outline 'Implementing Measures'.[184] European state practice increasingly conforms to the right articulated in the Additional Protocol and accords with the minimal level of direct participation specified in the CoE Guidelines. It is thus arguable that the implementation of a minimal level of participation is becoming reasonably constant and satisfies the state practice element of customary international law. However, the means of implementing a minimal level of participation is not uniform, and there is no single model of participatory democracy that has been adopted. Accordingly, the reasonably constant implementation of a minimal level of participation is unlikely to amount to a sufficiently settled state practice.

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[183] CoE Guidelines for Civil Participation, *supra* n. 182, at Preamble.
[184] *Ibid.*, at paras 4-18, 30-34.

At the same time, there is an array of additional material evidencing at least the emergence of *opinio juris*. For instance, the Parliamentary Assembly of the Council of Europe (PACE) has called for the inclusion of a right to participate in the European Convention of Human Rights:

> The Assembly stresses that the right to participate in the conduct of public affairs, be it at local, regional, national or European levels, is a *human right* and a fundamental political freedom, which should thus be embodied as such in the European Convention on Human Rights.[185]

PACE has thus endorsed direct participation in governance as a human right, thereby increasing the normative value of participative democracy. Pursuant to a Council of Ministers Recommendation, Member States of the CoE, to enhance civic participation, should utilize:

> more deliberative forms of decision-making, that is, involving the exchange of information and opinions (for example public meetings, citizens' assemblies and juries or various types of citizens forums, groups, panels and public committees whose function is to advise or make proposals, or round tables, opinion polls and user surveys).[186]

These texts have normative value. European states are perhaps also more likely to believe they are duty bound to implement a right to participate in local government in accordance with the Guidelines for

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[185] *Ibid*., at para. 3 (emphasis added).
[186] CoE, Council of Ministers, *Recommendation of the CoM to Member States on the participation of citizens in local public life 2018* CM/Rec(2018)4, App. B.III.3.ii (Adopted on 21 March 2018). https://rm.coe.int/ 16807954c3.

Civil Participation, and its other resolutions and recommendations, because the CoE has recognized the right as a 'human right.'[187]

The increasing facilitation of participatory democracy at the local level by CoE Member States and its endorsement by the CoE (and the EU) in a range of documents, perhaps suggests that a European right to directly participate in local governance may be emerging as a regional rule of customary international law. However, for a regional rule of customary international law to exist it must satisfy two additional requirements. First, there must be at least a 'tacit agreement' between *all* parties as to the existence of a customary rule.[188]

> While in the case of a general customary rule the process of consensus is at work so that a majority or a substantial minority of interested states can be sufficient to create a new custom, a local custom needs the positive acceptance of both (or all) parties to the rule.[189]

To exist the regional rule must be 'established in such a manner that it has become binding on the other party.'[190] Second, the existence of the regional rule must be proved by the state that invokes it.[191] That is, if the state invoking a regional rule of customary international law fails to meet its burden, then the existence of the rule is denied.

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[187] CoE, 'Guidelines for civil participation in political decision making' (CM(2017)83-final, 27 September 2017), 31. https://rm.coe.int/guidelines-for-civil-participation-in-political-decision-making-en/16807626cf.
[188] *Right of Passage Case*, *supra* n. 123, at 37.
[189] Shaw, *supra* n. 1, at 78.
[190] *Columbian-Peruvian Asylum Case*, *supra* n. 34, at 277.
[191] *Ibid.*

This is a stricter burden than that imposed for establishing general rules of customary international law, 'where it is for the international court itself to satisfy itself that a rule has not evolved.'[192] As such, there is a presumption against the existence of regional rules of customary international law.[193]

The CoE Guidelines for Civil Participation are recommendations only, but they do recognize a 'right' to direct participation in local governance. There appears to be an emerging tacit acceptance of a right to participate in local governance across Europe, beyond the 21 State Parties to the Additional Protocol on Participation. It is therefore arguable that the adoption of the Guidelines for Civil Participation, at least in the states that approved the Guidelines, amounts to the 'acceptance' of a right. In establishing general customary international law silence amounts to acceptance, but in creating regional norms it appears that states must explicitly acknowledge that they are subject to the regional norm and silence amounts to an 'objection' to the establishment of a regional rule.[194] As such, a European regional rule of customary international law that provides a right to directly participate in local governance will not crystallize without the explicit acceptance of a legal duty to

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[192] Antonio Cassese, *International Law* (Oxford University Press, Oxford, 2nd ed., 2005) 164. ISBN: 9780199259397.
[193] Laurence R. Helfer and Ingrid B. Wuerth, 'Customary International Law: An Instrument Choice Perspective', (2016) 37 *Michigan Journal of International Law* 563, 572.
[194] *Ibid.*, at 572.

implement the right by all Member States of the CoE, or at least the vast majority of them. [195]

9.6 Local Participatory Democracy as an Emerging Global Norm.

Irrespective of the binding nature of any international or regional right to direct participation, it is emerging as a global norm and exercises compliance pull on states and governments. Even though the plethora of instruments endorsing local participatory democracy are primarily aspirational and declaratory, and do not have any coercive force, they generate norms. These instruments exercise a 'normative pull' by encouraging state compliance and 'socialising' states into implementing mechanisms of participatory democracy. States are progressively implementing instruments of participatory democracy at the local level in accordance with these instruments. The increasing state implementation of participatory democracy is indicative of the normative effect of these instruments. Participatory

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[195] In *Columbian-Peruvian Asylum Case,* Columbia asserted that, even though Peru had not ratified the Convention (1933), its relevant provisions were applicable because the 'Convention has merely codified principles which were already recognized by Latin-American custom, and that it is valid against Peru as a proof of customary law.' The Court however, held that even if the Montevideo Convention was a codification of regional international customary law it could not be invoked because Peru had not ratified the Convention. Here, only 21 Member States of the CoE have ratified the Additional Protocol on Participation and in accordance with the ICJ's judgment in the *Columbian-Peruvian Asylum Case* the right to participation in local government as provided by the Charter would not apply to the other states of the CoE. *Columbian-Peruvian Asylum Case*, *supra* n. 34, at 277.

democracy at the local level is emerging as a norm in international law.

Participatory democracy has been an increasing focus of the UN in the Post-Wall Era. It has now been prioritized with the NUA and the SDGs. The UN has recognized the importance of complementary direct participation in the SDGs: target 16.7 is to 'ensure responsive, inclusive, *participatory and representative* decision-making at all levels.'[196] UN Habitat III's NUA endorses participatory decision-making and envisages cities and human settlements that '[a]re participatory, promote civic engagement, engender a sense of belonging and ownership among all their inhabitants.'[197] Likewise, in 'The City We Need 2.0: Towards a New Urban Paradigm', UN Habitat again endorsed participatory local governance in providing that:

> [t]he City We Need is participatory. It promotes effective partnerships and active engagement by all members of society and partners (public, private and civil society). It safeguards local democracy by encouraging participation, transparency and accountability.[198]

These declarations endorse participatory democracy and, although aspirational, have normative value and exercise a compliance pull on states.

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[196] SDGs, *supra* n. 38, at SDG 16.7 (emphasis added).
[197] NUA, *supra* n. 41, at 13(b).
[198] UN Habitat, 'The City We Need 2.0: Towards a New Urban Paradigm' (World Urban Campaign, Prague, 16 March 2016), Principle 4. https://fidic.org/sites/default/files/the_city_we_need_tcwn_2.0adopted.pdf.

Local governments also generate norms through their umbrella organizations and the creation of 'treaty-like' instruments[199] such as the *Global Charter-Agenda for Human Rights in the City*. Article II of the Global Charter-Agenda provides a specific 'Right to Participatory Democracy' whereby:

> All city inhabitants have the right to participate in political and city management processes, in particular:
>
> a) To participate in the decision-making processes of local public policies;
>
> b) To question local authorities regarding their public policies, and to assess them;
>
> c) To live in a city that guarantees public transparency and accountability.

Importantly, the Global Charter-Agenda specifically includes reference to mechanisms of participatory democracy. The 'Suggested Action Plan' associated with Article II's 'Right to Participatory Democracy' includes establishing 'a consultation process for the preparation of the budget' and 'a system of citizen participation for the drafting of local projects, programs and policies'; organizing 'consultations open to all city inhabitants' and adopting 'a system to petition the local authorities':[200] mechanisms of participatory democracy. The Global Charter-Agenda's Right to Participatory Democracy also reflects and influences the development of a global norm.

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[199] Durmuş, *supra* n. 13, at 50.
[200] Global Charter-Agenda, *supra* n. 88, at Art. II, 'Suggested Action Plan'.

9.7 Conclusion

There are no international legally binding conventions enunciating a right to local governance or participatory democracy and it is unlikely that either a right to local governance or participatory democracy is emerging in customary international law. The European Charter of Local Self-Government recognizes a right to local government and its Additional Protocol on Participation provides an individual legal right to participate in public affairs at the local level in its ratifying states.[201] Despite the absence of binding 'hard-law' rights to participatory democracy and local governance in international law, the normative value of both participatory democracy and localization is accelerating.

The increasing normative value of localization is a result of the state implementation of decentralization policies, the rising status of local governments in international law and their developing role in law making, and the international endorsement and promotion of local governance. Likewise, local participatory democracy, particularly participatory budgeting, is an emerging global norm. International regional organizations have endorsed participatory democracy. The treaty-like instruments of local government representative organizations articulate a right to participatory democracy. The articulation and endorsement of the rights to participatory democracy

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[201] European Charter of Local Self-Government, *supra* n. 25, at Art. 3; Additional Protocol on Participation, *supra* n. 170, Art. 1(1).

and local governance in international and regional instruments and the accelerating implementation of decentralization and mechanisms of local participatory democracy by states encourage their further implementation: the normative value of these rights is that they exercise a ‘compliance pull’ on states and their governments without being legal binding.

CONCLUSION

Democratic legitimacy depends on the manifest consent of the population to the exercise of coercive authority. Legitimacy also depends on the protection and implementation of human rights norms. Local authorities are the most democratically legitimate form of territorial governance. Democracy is quintessentially participatory, and the 'direct' element of 'participation' is vital to democratically legitimate governance. And mechanisms of participatory democracy are best suited to local implementation. Global and transnational institutions, and many states, have recognized the democratizing virtues of decentralization to the local level and direct participation in public affairs. So much so, that both localization and participatory democracy are emerging as global norms.

International law's traditional recognition doctrines legitimated states and governments with little regard for their *democratic* legitimacy. However, an element of democratic legitimacy is emerging as a prerequisite to recognition of both states and governments. International law's evolving recognition doctrines rely on referenda and representative democracy to reflect the population's consent to coercive authority. Both referenda and representative democracy are flawed mechanisms for ascertaining popular consent. Decentralization to the local level and direct participation in local governance enhances the democratic legitimacy of both existing

states and their elected governments. In accordance with their rising normative value, international law's recognition doctrines should be reimagined to incorporate localization and participation. In doing so, the legitimation conferred by recognition will more substantively reflect democratic legitimacy.

Traditionally, international law recognized and validated the coercive and undemocratic creation of states through the 'effective control' test. Accordingly, many contemporary states were recognized and defined as a consequence of the application of the effective control test; effective control often obtained through the exercise of violence and the outcome of war, as well as from fraud, subjugation and dispossession. Likewise, international law recognized and endorsed governments on the basis of the effective control of internal affairs manifested by the habitual obedience of the population, irrespective of how that obedience was achieved. International law thus adopted the notion that habitual obedience reflected consent. However, acquiescence does not equate to consent.

International law's recognition doctrines are evolving to include elements of democratic legitimacy. A 'democratic entitlement' is emerging in international law, whereby legitimate governance depends upon the progressive implementation of representative democracy. International law now also appears to at least preclude the recognition of governments that have forcibly usurped power from an elected government. It is also likely that *new* states will *not* be recognized without adopting representative democracy as its

system of government. Contemporary international law also requires a putative state be constituted by 'democratic' means, namely popular consent manifested in a referendum. Thus, a referendum reflecting the will of the majority of the population to statehood is a prerequisite to recognition. As such, international law requires *new* states to have at least *some* democratic legitimacy before conferring recognition.

A state with exclusive territory and impermeable borders can never be perfectly democratically legitimate. Democratic legitimacy requires the consent of the putative state's population *and* everyone else affected by the imposition of a formally impervious border. The manifestation of consent by a territory's population will confer a degree of democratic legitimacy on the new state. Thus, the outcome of a referenda will confer *some* democratic legitimacy on a new state. The degree of democratic legitimacy will depend on, and is in proportion to, the extent to which any referendum outcome is a valid reflection of the consent of the population.

Referenda have been occasionally and infrequently utilized to at least provide an aura of democratic legitimacy to state creation and territorial sovereignty. These referenda have been primarily restricted to pre-determined and imposed international frontiers. The degree of democratic legitimacy of states delineated by these imposed borders, regardless of a referendum result, is necessarily limited. In any event, referenda are a flawed mechanism for ascertaining the consent of the population to statehood. Referenda

results have been questioned because voting has been conducted in apprehension of violence and surrounded by circumstances likely to give rise to fear and intimidation, and were sometimes subject to fraud, manipulation and boycotts. There is also an increasing realization that the referendum process itself may be inappropriate for ascertaining consent to territorial sovereignty. Referendum questions are often unclear and ambiguous, thereby compounding any reticence to accept the outcome, particularly if the margin is narrow. More importantly, there is controversy over what majority constitutes a 'clear' majority sufficient to confer democratic legitimacy on a new state: is 50 per cent plus one of those voting sufficient to fundamentally alter an existing and potentially longstanding state? Referenda results can also be engineered by rapid demographic changes precipitated by the opponents or proponents of a territory's statehood -- sponsored immigration or 'encouraged' emigration. Even absent demographic manipulation, a plethora of contested questions over voter eligibility can never be resolved to all parties' satisfaction, and, obviously, the criteria imposed may affect the outcome. An independence referendum will also fundamentally alter the parent state and affect the rights of all its citizens, so should the citizens (or residents) of the parent state be eligible to vote, thereby effectively vetoing independence? The parent state already has a veto over a secession referendum -- an independence referendum is only legally relevant if the parent state consents (by way of the state constitution or otherwise) to its conduct and binding nature.

Representative democracy is an imperfect reflection of the consent of the population to a government's exercise of coercive authority. Participation in public affairs in a contemporary representative democracy is limited to participation in periodic elections. In a multi-party representative democracy, elections are dominated by political parties, and to achieve success, modern political parties have evolved into bureaucracies devoted to winning elections. Party bureaucracies are staffed by career politicians, or those aspiring to a career in politics. The growing professionalism of political parties and modern campaigns has been accompanied by an astronomical increase in the cost of getting elected. The opportunity for ordinary citizens to fully participate in a representative democracy, and to influence decision-making, is largely illusory. Political parties continue to be male dominated, and women are less likely to be selected as candidates; women and other minorities are inherently under-represented in representative democracies. Thus, the ability to effectively participate in elections is restricted to (mostly male) career politicians -- the elite of contemporary representative democracy -- and the inordinately wealthy. Furthermore, irrespective of the nature of contemporary elections, the electoral mechanisms adopted to select representatives, almost without exception, distort voter preferences.

Democracy requires ongoing direct participation. Representative democracy -- by imposing an intermediary between governance and the citizen -- necessarily inhibits participation. Individual participation in governance in a representative democracy is limited to dialogue with representatives and voting in periodic, cyclical

elections. Individuals delegate their political influence to intermediaries as representatives, and, in doing so, delegate discretionary authority over important decisions. The narrow opportunity for citizens to participate, the delegation of political authority to an elite and the negative perceptions pertaining to the credibility of election outcomes has led to the political alienation of a significant segment of society. The political alienation flowing from contemporary representative democracy is demonstrated by declining voter turnout, political disengagement, and increasing distrust in elected representatives and political processes. Representative democracy is, however, probably the only feasible mechanism to enable *some* political participation to ordinary citizens across a large population and territory.

The international community has recognized that representative democracy is a less than perfect mechanism for ascertaining the consent of the population to governance, and that democracy demands more that periodic participation on election day. There is thus an increasing recognition of the importance of the 'direct' element of 'participation' in democratic governance. To enhance democracy, participatory democracy can *complement* representative democracy with more citizen involvement in local political decision making. The local implementation of participatory mechanisms such as participatory budgeting, consultation procedures, and town-hall meetings can complement both state and sub-state representative democracy. Where local issues are complex and require extensive discussion and dialogue before a collective decision can be made, and

it is not feasible to involve the entire constituency in deliberations, a randomly selected subset of the community can be engaged in deliberative processes, reducing the negative effects of elections in local decision making.

Local governments are the most democratically legitimate form of territorial governance. They are the level of governance closest to the people and provide citizens with greater proximity and therefore access to governance. As the local government territory is smaller, it amplifies the voice of citizens and facilitates more active involvement in policy formulation and implementation. The local government's territory reflects the place where people, live, work, and identify with a community, and an individual's identity is increasingly influenced by the place where they live, work and form social connections. Identification with a community encourages more people to participate in local affairs. Increased participation in local governance enhances transparency and accountability.

Local governments are vital to human rights protection. Cities have adopted policies to mitigate the impact of the global housing crisis. Cities have also been vocal in protecting the human rights of undocumented migrants, sometimes in direct contravention of national regulations, thereby subverting state sovereignty. Direct participation in local governance further protects human rights by empowering communities, reducing poverty and improving social inclusion. Participatory budgeting processes evidently improves the lives and wellbeing of the marginalised members of a community; in

localities in the Global South it has prioritized spending on health care, sanitation, social housing and education. Local governments and their representative networks have also been at the forefront of adopting policies to mitigate the impact of climate change.

The international community has increasingly recognized the democratic legitimacy of local governments. States are increasingly devolving competencies and power to local authorities in recognition of their democratic legitimacy. Localization is emerging as a global norm. Participatory democracy, particularly participatory budgeting, is increasingly implemented around the world and is also emerging as a global norm. These emergent global norms exercise a 'compliance pull' on states, and through a process of socialisation, encourage the further devolution of power to the local level and the increased implementation of mechanisms of participatory democracy. The 'compliance pull' of these norms is largely a reflection of the increasing status of local governments and the role city networks play within international institutions and in developing the 'assemblage' of global norms.[1] Local governments and city

[1] Jeffrey Dunoff, 'A New Approach to Regime Interaction', in Margaret A. Young (ed.) *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, Cambridge, 2015) 136-174. ISBN: 978-1-107-01048-2. *See also*, Miha Marcenko, 'International assemblage of the security of tenure and the interaction of city politics with the international normative discourse', (2019) 51(2) *The Journal of Legal Pluralism and Unofficial Law* 151, 154. DOI: 10.1080/07329113.2019.1639318.

networks are ‘norm-generating communities’ and the law’s normative power is constructed by norm-generating communities.

The normative value of the assemblage of rules resulting from the interaction of a plurality of legal regimes, including local governments and their representative organizations, is an avenue of further study. The interrelationship between local and global governance has been an increasing focus of research, which has only accelerated with the adoption of the SDGs, in particular SDG 11. Despite an increasing interest in local governance, further studies on localization, particularly on the legal status of local governments in international law, their role in global governance, and their part in constructing contemporary international law should be subject to further study. This research should move beyond existing transnational and state-based structures, such as global city-networks and international and regional institutions and consider alternative mechanisms of local and global governance that are not restricted by a territorial logic.

While decentralization to the local level may be extensive, the actual powers and authorities conferred on local governments is of insufficient uniformity to amount to a consistent state practice. Thus, another important area of potential future research is the actual common or minimum level of political authority conferred on local governments by states and sub-state governments. This research should ascertain whether increasing devolution to the local level has resulted in the same or similar underlying powers being conferred on

comparable local authorities. The common competencies of local authorities may form the base of any 'right to local governance.' The existence or emergence of any potential right to local governance should also be subject to future legal analysis. An aspirational right to local governance should be considered, articulated and defined by legal scholars, particularly those with expertise in human rights. Likewise, the common attributes of those mechanisms of participatory democracy implemented around the world should also be determined and analysed. These common features could be utilized in defining a global right to participate in local governance.

The democratizing impact of both participatory democracy and localization should be the subject of research by legal academics, political scientists and sociologists. At the very minimum, questions concerning the effect of participation and localization on the social inclusion (or exclusion) of minorities and the prevalence of populism should be extensively researched. From a practical perspective, suggestions to increase participation in participatory democracy is necessary to give meaning to 'legitimacy from the bottom-up'.

The *democratic* legitimacy of states and their governments can be enhanced by adopting policies of localization -- that is decentralization to the local level -- and by implementing, at the local level, mechanisms of participatory democracy. The emergence of the 'democratic entitlement', thirty-years ago, followed governments 'recogniz[ing] that their legitimacy depend[ed] on meeting a normative expectation of the community of states' and thus 'those

who seek the validation of their empowerment patently govern with the consent of the governed.'[2] Today, governments are slowly recognizing that their legitimacy depends on the implementation of policies of decentralization and enabling and encouraging mechanisms of participatory democracy.

With the increasing recognition that legitimacy increasingly depends on localization and local participation, state and government recognition doctrines are likely to evolve to include more than the modicum of democratic legitimacy conveyed by referenda and representative democracy. Thus, international law's government recognition doctrine should develop to require the progressive decentralization of significant competencies and authority to local governments and the adoption of participatory democracy at the local level. International law's state recognition doctrine should also evolve to require constitutionally protected local governance and participatory democracy at the local level. The evolution of international law's recognition doctrines to include local governance and participatory democracy will enhance the democratic legitimacy of states and governments.

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[2] Thomas M. Franck, 'The Emerging Right to Democratic Governance, 86 *The American Journal of International Law* No. 1. (1992) 46, 46. DOI:10.2307/2203138.

Annexure I

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Annexure II

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