

**THE ROLE OF ELECTIONS IN THE REALISATION OF THE RIGHT TO  
DEMOCRATIC GOVERNANCE IN AFRICA: A CASE STUDY OF GHANA AND  
THE DEMOCRATIC REPUBLIC OF CONGO**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE  
REQUIREMENTS OF THE DEGREE LLM (HUMAN RIGHTS AND  
DEMOCRATISATION IN AFRICA)**

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## Plagiarism Declaration

I AKONKWA NTABAZA PRISCA do hereby declare that the dissertation '**The role of elections in the realisation of the right to democratic governance: A case study of the Republic of Ghana and the Democratic Republic of Congo**' is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

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## **Dedication**

To Chantal and Anicet Ntabaza.

To us, African citizens, I believe in more empowerment, I believe in a bright future.  
Our struggle is ending soon.

## Acknowledgement

Chantal and Anicet Ntabaza I am blessed and highly favored to be one of yours. You are exceptional.

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## Acronyms

Unless otherwise indicated, these abbreviations mean:

ACDEG	African Charter on Democracy Elections and Governance
ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
AUC	African Union Commission
AU EOM	African Union Elections Observation Mission
COMESA	Common Market for Eastern and Southern Africa
DRC	Democratic Republic of Congo
EISA	Electoral institute for Sustainable Democracy in Africa
EU EOM	European Union Elections Observation Mission
ICCPR	International Covenant on Civil and Political Rights
MOE UE	Mission d'Observation des Elections de l'Union Européenne
NGO	Non-Governmental Organisation
OAU	Organisation of African Unity
SADC	Southern African development Community
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme

## Contents

Chapter 1: Introduction .....	1
1.1 Background .....	1
1.2 Problem statement .....	3
1.3 Research questions and objective of the study .....	4
1.4 Research methodology .....	4
1.5 Significance of the study.....	5
1.6 Limitations of the study .....	5
1.7 Literature review .....	5
1.8 Chapter overview.....	6
Chapter 2: Assertion and importance of a right to democratic governance in Africa.....	7
2.1 Conceptual clarifications.....	7
2.1.1 Democracy.....	7
2.1.2 Governance.....	9
2.2 Is democratic governance a right? .....	9
2.2.1 Democratic governance in international law.....	9
2.2.2 Right to democratic governance in Africa .....	11
2.3 Conclusion.....	15
Chapter 3: Elections and their contribution to the right to democratic governance in Africa ..	16
3.1 The concept of elections.....	16
3.1.1 Criteria for good elections .....	16
3.1.2 Role of elections in the realisation of the right to democratic governance .....	18
3.2 Elections in the African context.....	20
3.3 Potential of elections in enhancing the right to democratic governance .....	22
3.3.1 Participation.....	23
3.3.2 Legitimacy.....	23
3.3.3 Competition.....	24
3.4 Conclusion .....	25
Chapter 4: Assessment of the role of elections: case study.....	26
4.1 Introduction .....	26
4.2 The Republic of Ghana: The success story.....	26
4.2.1 Brief political overview .....	26
4.2.2 Legal framework for elections in Ghana .....	27
4.2.3 Assessment of the 2008 and 2012 elections in Ghana .....	28
4.3 The Democratic Republic of Congo: The shadow story .....	35

4.3.1 Brief political overview .....	35
4.3.2 Legal framework for elections in the DRC .....	36
4.3.3 Assessment of the 2006 and 2011 elections in the DRC.....	37
4.4 Conclusion .....	46
Chapter five: Conclusion and recommendations.....	48
5.1 Conclusion .....	48
5.2 Recommendations.....	49

# Chapter 1

## Introduction

### 1.1 Background

After independence, African countries became the repository of arbitrary and personally motivated actions of leaders.<sup>1</sup> Dictatorship became the norm and leaders became enemies of citizens. Leaders rejected multiparty systems and opposition mostly on selfish grounds. Some of them used theological basis to reject opposition as it was the case in Malawi where it was stated that ‘there is no opposition in heaven. God himself does not want opposition that is why he chased Satan away. Why should Kamuzu have opposition?’<sup>2</sup> Citizens were subject of gross human rights violations under military and autocratic regimes and under the OAU (Organisation of the African Unity) whose charter provided for the non-interference principle and therefore could not take constraining measures on states to respect peoples’ rights.<sup>3</sup>

Since the 1990s, as elections were held in many African countries, ‘the ballot was increasingly replacing the bullet as a means of attaining political power, maintaining legitimacy’ and increasing citizen participation.<sup>4</sup> Almost all over the continent, awareness has replaced silence in matters of governance and citizens are more conscious that they must play a role.<sup>5</sup>

In 1992, democratic governance moved from a principle to a right. T Franck, considered as the pioneer of this right, wrote an article entitled ‘the emerging right to democratic governance’ where he asked whether the world was on the process of making an ‘international rule system that defines the minimal requisites of a democratic process capable

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<sup>1</sup> J Elster ‘Rationality, economy and society’ (2000) 23 <http://catdir.loc.gov/catdir/samples/cam032/99015846.pdf> (accessed 11 September 2013).

<sup>2</sup> J Kpundeh *Democratization in Africa: African voices, African views* (1992) 12.

<sup>3</sup> Article III(2) of the 1963 OAU Charter [http://www.africa-union.org/root/au/Documents/Treaties/text/OAU\\_Charter\\_1963.pdf](http://www.africa-union.org/root/au/Documents/Treaties/text/OAU_Charter_1963.pdf) (accessed 11 September 2013); see also F Viljoen *International human rights law in Africa* (2012)156, who explains that human rights were not explicitly included in the mandate of the OAU and states that ‘bolstered by the principle of non-interference the OAU turned a blind eye to allegations of human rights in members states’.

<sup>4</sup> D Ayine ‘Ballots as bullets? Compliance with rules and norms providing for the right to democratic governance: An African perspective (1998) 10 *African Journal of International and Comparative Law* 709.

<sup>5</sup> This can probably explain the Arab spring where the uprising is mainly motivated by the long exclusion of citizens in matters of governance.



of validating the exercise of power'; and shows how democratic governance is evolving into a right.<sup>6</sup>

After that period, many scholars attempted definitions and different answers to that question, some of them suggested that indeed such right, although not clearly written in legal instruments, has emerged as a human right.<sup>7</sup>

Although there is no settled definition of the right to democratic governance, scholars cited above would agree on its common features.

Thus it may be understood as:

the subjective capacity of individuals and peoples to demand of their rulers a political regime based on the rule of law and separation of powers, in which citizens can periodically elect their leaders and representatives in free and fair elections, on the basis of the interaction between a number of political parties, full respect for the exercise of the freedoms of expression, the press and association and the effective enjoyment of human rights.<sup>8</sup>

While they are not by themselves considered as the end of democratisation, free and fair election is an essential element in that process.<sup>9</sup> Knippers stated that 'in the absence of more reliable means of recording choice in complex societies, it has become difficult to speak convincingly of democracy without reference to elections'.<sup>10</sup>

Elections have therefore become the most visible aspects of democratic governance and provide political legitimacy to elected leaders.

Although it is not written as such in legal instruments, African countries have accepted the elements of democratic governance as their system of governance.<sup>11</sup>

Thus, through several declarations and in their domestic constitutions, African countries recognised the importance of democratic governance and the role of multiparty elections as means to access power.<sup>12</sup> They further adopted the African Charter on Democracy, Elections and Governance (ACDEG) as a sign of strong commitment to enhance the right in question and to fight 'illegal means of accessing or maintaining power' that were frequent on the

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<sup>6</sup> T Franck 'The emerging right to democratic governance' (1992) 86 *The American Journal of International Law* 49; T Franck is considered as a pioneer of this right by scholars such as J D'Aspremont 'The rise and fall of democracy governance in international law: A reply to Susan Marks' (2011) 22 *The European Journal of International Law* 549.

<sup>7</sup> See N Udombana 'Articulating the right to democratic governance in Africa' (2003) 24 *Michigan Journal of International Law* 1209 and J D'Aspremont 'The rise and fall of democracy governance in international law: A Reply to Susan Marks' (2011) 22 *The European Journal of International Law* 549.

<sup>8</sup> Udombana (n 7 above) 11.

<sup>9</sup> J Elklitt & P Svensson 'What makes elections free and fair (1997) 3 *Journal of democracy* 33.

<sup>10</sup> J Knippers 'What kind of democracy does the "democratic entitlement" entail?' in G Fox & R Roth (eds) *Democratic Governance and International law* (2000) 517.

<sup>11</sup> Udombana (n 7 above) 16.

<sup>12</sup> See for instance, the Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking place in the World known as the Addis Ababa Declaration, the Declaration on the framework for an OAU response to unconstitutional changes of government, the Declaration on the Principles Governing Democratic Elections in Africa.

continent.<sup>13</sup> This ACDEG can be considered as unique in that it seems to establish democracy and citizen participation as a right. It translates the principle of democratic governance stated in instruments above into a right recognised to African citizens. Hence, states that do not guarantee this right to their citizens should be held accountable. Moreover, following the replacement of the OAU by the African Union (AU), the principle of non-interference was replaced by the responsibility to protect African citizens against human rights abuses of military regimes.<sup>14</sup> This allows the AU to intervene and impose sanctions on members states who do not realise citizens' rights.

## 1.2 Problem statement

Elections as instruments that allow people to participate in matters of governance and to choose their representatives are held on almost a regular basis on the continent. The number of coups has fallen sharply since the 1990s, whereas the numbers of elections have increased.<sup>15</sup> According to the Economist who distinguishes between 'full democracy, flawed democracy, hybrid regimes and authoritarian regimes', only Mauritius in Africa is a full democracy.<sup>16</sup> The largest number of African states is authoritarian. Therefore, the direct consequence is that, although elections are a necessary way toward the realisation of democracy, a country can hold elections without enhancing the right to democratic governance.<sup>17</sup> In fact, they have failed to guarantee respect of rule of law and basic human rights.<sup>18</sup> This means that holding elections does not guarantee the realisation of the right to democratic governance. Hence, the increase of elections, do not translate in the realisation of the right to democratic governance.<sup>19</sup> Elements including participation, competition and legitimacy are crucial, if elections are to realise this right.<sup>20</sup>

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<sup>13</sup> Article 23 of the ACDEG

<http://www.africa-union.org/root/au/Documents/Treaties/text/Charter%20on%20Democracy.pdf> (accessed 9 July 2013).

<sup>14</sup> Article 4(h) of the AU Constitutive Act [http://www.africa-union.org/root/au/AboutAu/Constitutive\\_Act\\_en.htm](http://www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm) (accessed 9 July 2013).

<sup>15</sup> See generally W Teshome 'Democracy and elections in Africa: Critical analysis' (2008) *International Journal of Human Science* 5.

<sup>16</sup> The Economist Intelligence Unit 'Democracy index 2012: Democracy at a standstill' (2013)

<http://pages.eiu.com/rs/eiu2/images/Democracy-Index-2012.pdf> (accessed 10 September 2013); the indicators used by the economist to rank countries include pluralism of electoral process, functioning of government, the level of political participation and civil liberties. In Africa, Mauritius is also ranked as the first country in Africa by the 2012 Mo Ibrahim governance index. See Mo Ibrahim foundation '2012 Ibrahim index of African governance' (2012) 3 <http://www.moibrahimfoundation.org/downloads/2012-IIAG-summary-report.pdf> (accessed 8 October 2013).

<sup>17</sup> S Lindberg 'The power of elections revisited' (2007) 9 paper presented at the conference, *elections and political identities in new democracies* at Yale University <http://www.yale.edu/macmillan/newdemocracies/lindberg.pdf> (accessed 10 September 2013).

<sup>18</sup> See generally A Aidoo 'Africa: Democracy without human rights' (1993) 15 *Human Rights Quarterly* 703; see also F Viljoen *International human right law in Africa* (2012) 464; the author is supporting the view that although African states are holding elections it does not translate into the institutions of democracy.

<sup>19</sup> Teshome (n 15 above) 9.

<sup>20</sup> Udombana (n 7 above) 6.

### 1.3 Research questions and objective of the study

The objective of this work is two folds. First it draws attention to the fact that the right to democratic governance is articulated in the ACDEG. Secondly it explores why irrespective of the increase of elections in Africa; they have not contributed to the right to democratic governance. The study also provides recommendations on how to move forward the process of democratisation in Africa.

This study will attempt to answer to the following questions:

- What is the right to democratic governance?
- Why is the right to democratic governance important for Africa?
- What is the link between elections and the rights to democratic governance?
- What elements enhance the potential of elections in the realisation of the right to democratic governance in Africa?

### 1.4 Research methodology

This work adopts comparative research approach and relies primarily on desktop research and case studies. The justification for this is to provide a picture of different trends in electoral processes in Africa. In doing so, this work will use the case of the DRC (Democratic Republic of Congo) and the Republic of Ghana. In Africa, researches have proved that the quality of elections declined from the first to the second electoral process<sup>21</sup> and often they fail the test of 'peaceful regime change'.<sup>22</sup> This assertion seems to be verified in the case of the DRC but not in the case of Ghana where after several electoral process, not only the quality of elections has increased but also in elections seem to deepen the culture of democracy.<sup>23</sup> Additionally, the comparative study will be based on an assessment of the two latest elections in the two countries including the 2008 and 2012 general elections in Ghana and the 2006 and the 2011 general elections in the DRC. This study will then build on the reasons of the decrease and increase of the quality of elections in the two countries to discuss some of the reasons why elections are not contributing to the right to democratic governance.

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<sup>21</sup> M Bratton & D Posner 'A first look at second elections in Africa with illustration from Zambia' in R Joseph (Ed.) *State, Conflict and Democracy in Africa* (1999) 377.

<sup>22</sup> L Rakner & L Svasand 'Stuck in transition: Electoral process in Zambia 1991- 2001' (2005) 12 *Democratization* 85.

<sup>23</sup> See G Lynch & G Crawford 'Democratisation in Africa 1990–2010: An assessment' (2011) 18 *Democratization* 276; according the authors, Ghana has passed the 'test of democratic consolidation'; the peacefulness that followed the outcome of the recent elections petitions in Ghana is an indicator of the depth of democracy in Ghana; furthermore, though Ghana is ranked 7<sup>th</sup> according to the Mo Ibrahim index of governance, some of the countries ranked before Ghana have experienced some bad performance including Kenya or South Africa; see Mo Ibrahim foundation (n 16 above) 2.

## 1.5 Significance of the study

This study contributes to the debate on the role of elections in enhancing the right to democratic governance in Africa because they appear to play a major role in the process of democratisation in Africa.<sup>24</sup>

It is thus significant in at least two ways: first it articulates the right to democratic governance in the ACDEG and examines some of the reasons why elections are not contributing to that right and secondly contribute to the debate in providing recommendations on how elections can enhance the right to democratic governance.

## 1.6 Limitations of the study

This work will cover the role of elections in enhancing the right to democratic governance in the African context with a particular focus on the DRC and Ghana. This study does not intend to make a contribution on the debate on divergent discourses on the concept of democracy. It does not intend to extensively cover all issues around the topic or to provide established definitions of contested terms such as democracy and election. It is making a case for an entitlement, the right to democratic governance in Africa. It will discuss some of the factors that influence elections in enhancing or deepening this right.

## 1.7 Literature review

An extensive work that will inform this study has been carried out on several aspects including elections and democratic governance.

To make a case for the existence of the right to democratic governance in Africa in the ACDEG Regarding this study build on the invaluable writings of: Thomas Franck<sup>25</sup> who is considered as the pioneer of the right to democratic governance in international law and Nsongurua Udombana who articulated the right to democratic governance in Africa.<sup>26</sup>

Long after the emergence of the right to democratic governance, scholars such as Susan Marks<sup>27</sup>, Jean D'Aspremont<sup>28</sup>, Gregory H. Fox and Brad R. Roth<sup>29</sup>, Edward Kofi Quashigah and Obiora Chinedu Okafor<sup>30</sup>, presented several views on the place of the right to democratic governance in international law and international relations that will inform this study.

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<sup>24</sup> T Young 'Elections and electoral politics in Africa' (1993) 63 *Africa* 299.

<sup>25</sup> Franck (n 6 above).

<sup>26</sup> Udombana (n 7 above).

<sup>27</sup> S Marks 'What has become of the emerging right to democratic governance' (2011) 22 *The European Journal of International Law* 507.

<sup>28</sup> D'Aspremont (n 7 above).

<sup>29</sup> See generally G Fox & B Roth (eds) *Democratic governance and international law* (2000).

<sup>30</sup> See generally E Quashigah & O Okafor (eds) *Legitimate governance in Africa: International and legal perspectives* (1999).

However, the articulation of this right in the ACDEG is not covered by those writing. This study will contextualise the above within the ACDEG.

On the discourse related to the role of elections in the realisation of this right in a multiparty democracy, the previous researches of Alan Jeeves,<sup>31</sup> Jure Vidmar,<sup>32</sup> Shaheen Mozaffar<sup>33</sup>, Staffan Lindberg,<sup>34</sup> Andreas Schedler<sup>35</sup> and other scholars will inform this study.

Other instruments such as the ACDEG, several UN (United Nations) and AU declarations and the International Covenant on Civil and Political Rights (ICCPR) will form a legal basis for this study.

This scholarship builds on the studies above to articulate the existence of the right to democratic governance in the ACDEG and to do a comparative study in order to establish some of the reasons why elections are not contributing to the right to democratic governance.

## 1.8 Chapter overview

This study comprises five chapters.

**Chapter one** gives an overview of the structure of this study.

**Chapter two** provides conceptual clarification and discusses democratic governance and its evolution into a right.

**Chapter three** establishes the link between elections and the right to democratic governance, and deals with the criteria of a good election. It also exposes the factors that influence the potential of elections in enhancing or weakening the right to democratic governance and will serve as a basis for the case study chapter.

**Chapter four** attempts a critical examination of the role of elections in Africa with reference to the Republic of Ghana and the DRC.

**Chapter five** concludes and gives recommendations.

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<sup>31</sup> A Jeeves 'Assessing a decade of democracy in Southern Africa' (2004) 38 *Canadian Journal of African Studies* 505.

<sup>32</sup> J Vidmar 'Multiparty democracy: international and European human rights law perspectives' (2010) 23 *Leiden Journal of International Law* 549.

<sup>33</sup> S Mozaffar 'Patterns of electoral governance in Africa's emerging democracies' (2002) 23 *International Political Science Review* 85.

<sup>34</sup> See generally S Lindberg *Democracy and elections in Africa* (2006).

<sup>35</sup> A Schedler 'The nested game of democratisation by elections' (2002) 23 *International Political Science Review* 103.

## Chapter 2

# Assertion and importance of a right to democratic governance in Africa

The recognition of democratic governance is an essential aspect of international law and constitutional law. Although international and regional human rights instruments do not clearly assert democratic governance as a right, they contain all its constitutive elements. It can be observed also that on national level, almost all countries in Africa recognise democratic governance as a right through their constitutions or several acts.<sup>36</sup> This chapter will provide conceptual clarification on democracy and governance that will serve as a basis for a consideration of the recognition of democratic governance as a right.

### 2.1 Conceptual clarifications

#### 2.1.1 Democracy

There is nothing mysterious about the foundations of a healthy and strong democracy. The basic things expected by our people of their political and economic systems are simple. They are: equality of opportunity for youth and for others; jobs for those who can work; security for those who need it; the ending of special privilege for the few; the preservation of civil liberties for all; the enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living.<sup>37</sup>

Democracy has become a familiar concept and one of the most used words in the every-day life of our society. But what is democracy?

Democracy was defined by Danziger as 'a government by political leaders whose qualifications to rule stem from a limited mandate given by an electorate with basic rights to participation (in the political process) and opposition (against the ruling party/grouping)'.<sup>38</sup>

Abraham Lincoln considered democracy as 'government of the people, by the people and for the people'.<sup>39</sup> Democracy can be considered as the antithesis of an authoritarian government, the direct opposite of dictatorship. Therefore democracy implies on the one hand the involvement of the people, the achievement of equality before the law, the right to participate in the political process and the respect of basic human rights such as freedom of

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<sup>36</sup> For instance, almost all countries in Africa recognise the importance of citizen empowerment through participation in all matters of governance; thus they have recognised that elections is the only mean of accessing power, adopted political parties acts, created electoral management bodies and so on.

<sup>37</sup> F Roosevelt, quoted by Aidoo (n 18 above) 703.

<sup>38</sup> See generally J Danziger *Understanding the political world: An introduction to political science* (1991).

<sup>39</sup> A Christopher 'Democracy and the crisis of leadership in Africa' (2006) 31 *The Journal of Social Political and Economic Studies* 255.

speech, right to information or freedom of religion. On another hand it implies the consideration of the claims of the people by those who govern the people.

Democracy is also considered as a process or a journey in which political and socio-economic rights are not separated. It means that all citizens must be empowered 'to participate in the decision-making process' and this is where socio-economic rights are necessary.<sup>40</sup>

Some scholars have made a distinction between the procedural and substantive definition of democracy. Thus Schumpeter considers that democracy is an 'institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote'.<sup>41</sup> This procedural understanding seems to suggest that democracy means periodic elections. But the 'institutional arrangement' may go beyond the mere electoral arrangement and point the link between rights, the rule of law, and democracy.<sup>42</sup> In effect, elections entail freedoms which will enable citizen to make choices or to participate directly in the process.<sup>43</sup> The freedoms required here refer to civil and political rights rather than socio-economic rights.

In contrast, the substantive understanding of democracy is based on its underlying principles. The defining principles of democracy according to Beetham are 'that all citizens are entitled to a say in public affairs, both through the associations of civil society and through participation in government'.<sup>44</sup> In this understanding, socio-economic rights and civil and political rights are part of democracy.

Although there is no common definition of democracy, most scholars would agree that 'the fundamental features of a democracy include government based on majority rule and the consent of the governed, the existence of free and fair elections, the protection of minority rights and respect for basic human rights'.<sup>45</sup>

In its resolution 55/96 on Promotion and Consolidating Democracy, the General Assembly of the UN agreed on the basis of democracy, although there is no universal definition and model of democracy. In the terms of the Resolution, the elements of democracy include:

the development and maintenance of an electoral system that provides for the free and fair expression of the people's will through genuine and periodic elections, strengthened rule of law promotion, protection and respect of all human rights, including the right to development,

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<sup>40</sup> Vidmar (n 32 above) 213.

<sup>41</sup> Schumpeter *Capitalism, socialism and democracy* (1942) 269.

<sup>42</sup> Marks *The riddle of all constitutions* (2000) 51.

<sup>43</sup> Schumpeter (n 41 above) 271.

<sup>44</sup> Beetham *Democracy and human rights* (1999) 90.

<sup>45</sup> The Economist Intelligence Unit of Democracy 'Democracy Index 2001: Democracy under stress' (2011) 27 [http://www.sida.se/Global/About%20Sida/S%C3%A5%20arbetar%20vi/EIU\\_Democracy\\_Index\\_Dec2011.pdf](http://www.sida.se/Global/About%20Sida/S%C3%A5%20arbetar%20vi/EIU_Democracy_Index_Dec2011.pdf) (accessed 8 July 2013).

and fundamental freedoms, creation and improvement of the legal framework and necessary mechanisms for enabling the wide participation of all members of civil society.<sup>46</sup>

### 2.1.2 Governance

Although the term governance can be used in many contexts, this study does not intend to discuss about different debates around that concept.

For the purpose of this study, governance can be understood as a process in which public affairs are managed. It has been defined as the 'aspect of politics that aims to formulate and manage the rules of the political arena in which state and civil society actors operate and interact to make authoritative decisions'.<sup>47</sup>

Governance can therefore be seen as techniques of effective and transparent management of resources. It would also mean the capacity of human societies to develop their system of representation and institutions to manage themselves in order to be able to adapt to new situations.<sup>48</sup> In sum, governance refers to 'the way power and authority are exercised, the management of a country's affairs and how interests are articulated and rights exercised'.<sup>49</sup>

## 2.2 Is democratic governance a right?

Rarely has democracy been so acclaimed yet so breached, so promoted yet so disrespected, so important yet so disappointing.<sup>50</sup>

Democratic governance has been subjected to much criticism. Yet although not written as such, its elements or features are already embedded in legal instruments part of soft or hard law. That explains why scholars such as T Franck or Anne-Marie Slaughter recommended that it should be considered by international law as a right. The following points will consider democratic governance as right in international law in general and in the ACDEG specifically.

### 2.2.1 Democratic governance in international law

Susan Marks suggests that democratic governance as a right is being embraced by international law. That entails, first that international processes should be the judge of legitimacy of governments and secondly that legitimacy will be recognised only for

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<sup>46</sup> *General Assembly Resolution Promotion and Consolidating Democracy* of February 28 2001 (GA/Res. 55/96) [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.55.96.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.55.96.En) (accessed on 17 August 2013).

<sup>47</sup> G Hydén 'Governance and the reconstruction of political order' in R Joseph (ed) *State, conflict and democracy in Africa* (1999) 187.

<sup>48</sup> P Calame & A Talmant *L'Etat au coeur, le mécano de la gouvernance* (1997) 19.

<sup>49</sup> T Weiss 'Governance, good governance and global governance: Conceptual and actual challenges' (2000) 21 *Third world quarterly* quoted by B Smith *Good governance and development* (2007) 5.

<sup>50</sup> Human Rights Watch 'World report' (2008) 1 [http://www.hrw.org/sites/default/files/reports/wr2k8\\_web.pdf](http://www.hrw.org/sites/default/files/reports/wr2k8_web.pdf) (accessed on 10 August 2013).



democratic governments and thirdly that democracy as a recognised and guaranteed right shall justify international procedures of enforcement and monitoring.<sup>51</sup>

But to reach that conclusion, it is important to show the process through which democratic governance emerged. Thomas Franck offers 3 phases that he calls 'building stones'.<sup>52</sup> The first is related to the right of self-determination which merged at the end of the First World War. This concept was further applied to the decolonisation process. The second phase is related to the legal establishment of human rights after the Second World War. During this phase, states' obligations were elaborated and the scope of rights defined by Universal Declaration on Human Rights (UDHR) and the establishment of the UN. The last process is the establishment of the right to free and fair elections and its recognition in international human rights instruments. Thus, he defines this right as the right to be 'consulted and to participate in the process by which political values are reconciled and choices made'.<sup>53</sup>

Since that time those features have been entrenched in several human rights instruments of the UN whether soft law or hard law. The UN' Charter in its article 1(2) asserts the right to self-determination. The UDHR proclaims the supremacy of the will of the people which is to be expressed by genuine and periodic elections in its article 21(3). This obligation has been crystallised by the International Covenant on Civil and Political Rights (ICCPR) which in addition to the right to participate in public life underlies and guarantees free and fair elections.<sup>54</sup> Thus for instance, the ICCPR provides for the right to freedom of expression, association and assembly.<sup>55</sup>

When Franck wrote his article on the emergence of the right to democratic governance, he stated that the world had not yet reached this stage, but he could see the light of a world where citizens would rely on international law to guarantee participation in decisions and access to power.<sup>56</sup> It can be asserted today that in fact citizens have started to rely on international law to guarantee their right to participate in all matters of governance affecting their lives.<sup>57</sup>

The only concern that can arise therefore is the enforcement in cases where violations of the right occur.<sup>58</sup> Scholars have suggested different solutions. Franck and Fox proposed that

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<sup>51</sup> S Marks 'International law, democracy, and the end of the story' in G Fox & B Roth (eds) *Democratic governance and international law* (2000) 546.

<sup>52</sup> T Franck 'Democracy as a human right' in L Henkin & J Hargrove (eds) *Human rights: an agenda for the next century* (1994) 73.

<sup>53</sup> T Franck 'Legitimacy and the democratic entitlement' in G Fox & B Roth (eds) *Democratic governance and international law* (2000) 25.

<sup>54</sup> Art 25(1) of the ICCPR <http://www.hrweb.org/legal/cpr.html> (accessed 10 August 2013).

<sup>55</sup> Art 19, 21 & 22 of the ICCPR.

<sup>56</sup> Franck (n 53 above) 29.

<sup>57</sup> Udombana (n 7 above) 25.

<sup>58</sup> Marks (n 27 above) 509.

respect of democratic governance should be a precondition to international economic relations.<sup>59</sup> Teson goes as far as proposing the denial of diplomatic status to states representatives in case of breaches.<sup>60</sup>

It can accordingly be asserted that democratic governance has emerged as right in international law, despite the fact that this right is not expressly asserted in international human rights instruments. Then the question will not be whether it has emerged but whether the world is ready to move in a new era in which 'only democracy and the rule of law' will validate governance.<sup>61</sup>

## 2.2.2 Right to democratic governance in Africa

Democracy should be on the agenda, not because of its instrumental, developmental impact, but because it is the recognition of the legitimate right of the African people to democratically map the destinies of their countries.<sup>62</sup>

In Africa, the features of democratic governance have been entrenched through many declarations and instruments.

As a starting point, in 1981 African states adopted the African Charter on Human Peoples' Rights (ACHPR) which recognises the right to participate in government through chosen representatives or directly.<sup>63</sup> In addition to that, article 20(1) of the ACHPR reads that:

All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

In the spirit of article 20, it may seem that, it was directed to colonial or apartheid regimes but it has also been interpreted by the African Commission on Human and Peoples' Rights as the right to freely choose representatives. In the communication *Jawara v Gambia*, the African Commission found that 'the military *coup d'état* was a grave violation' of article 20(1) in that it constituted a violation of the right of the Gambia people to freely determine who should represent them.<sup>64</sup>

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<sup>59</sup> Marks (n 51 above) 552.

<sup>60</sup> F Teson 'The Kantian theory of international law' (1992) 92 *Columbia Law Review* 100.

<sup>61</sup> Franck (n 53 above) 28.

<sup>62</sup> Aïido (n 18 above) 704.

<sup>63</sup> Art 13 of the ACHPR Adopted 27 June 1981 OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) and entered into force 21 October 1986.

<sup>64</sup> *Jawara v Gambia* (2000) AHRLR 107 (ACHPR) 2000 para 73.

In 1990, the OAU adopted a Declaration on the Political and Socio Economic Situation in Africa and the Fundamental Changes taking place in the world in 1990. The declaration acknowledged among other things, that the promotion of citizen's participation in the democratisation process would facilitate the integration of the continent. African states committed themselves to the democratisation process and to the consolidation of democratic institutions.<sup>65</sup> In 1999, the OAU adopted the Algiers Declaration, where they stated that the 'expansion of the spaces of freedom and the establishment of democratic institutions that are representative of our peoples and receiving their active participation, would further contribute to the consolidation of modern African states'.<sup>66</sup> In the Lomé Declaration adopted in 2000, African states recognised *inter alia* that democracy is an 'essential prerequisite for the establishment and maintenance of peace and security in Africa' and reiterated their commitment to the promotion of democracy among others.<sup>67</sup> In the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, African states condemned *coups d'état* that were taking place by setting out 'common values and principles for democratic governance'.<sup>68</sup>

As it has been demonstrated above, at the African level, the AU has provided for this right in under the declarations. To move from soft law to more binding instruments, African countries have first adopted the ACHPR and after the ACDEG as an express commitment to the advancement of the right to democratic governance.

### ***The African Charter on Democracy, Elections and Governance***

The AU adopted an ACDEG in 2007 as a commitment to the success of the democratisation process. Its represents a commitment to the promotion of democratic principles through the entrenchment of a political culture based on the holding of multiparty elections.<sup>69</sup> As its title suggests, the ACDEG has three pillars: democracy, elections and governance. Under each of them, it shows a strong commitment to the promotion of the right to democratic governance.

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<sup>65</sup> Declaration of the Assembly of Heads of State and Government of the OAU on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World AHG/Decl.1 (XXVI) adopted in Addis Ababa on 11 July 1990 <http://www.africa-union.org/root/au/Documents/Decisions/hog/zHoGAssembly1990.pdf> (accessed 17 August 2013).

<sup>66</sup> Algiers Declaration OAU Assembly of Heads of States and Governments 35<sup>th</sup> ordinary session Res AHG/DEC.1 (XXXV) OAU Doc. DOC/OS (XXV)INF.17a (1999) para 18 [http://www.africa-union.org/official\\_documents/Heads%20of%20State%20Summits/hog/9HoGAssembly1999.pdf](http://www.africa-union.org/official_documents/Heads%20of%20State%20Summits/hog/9HoGAssembly1999.pdf) (accessed 17 August 2013).

<sup>67</sup> Lomé Declaration OAU Doc. AHG/Decl.2 (XXXV) July 12 2000 para 13 [http://www.africa-union.org/Special\\_Programs/CSSDCA/cssdca-solemndeclaration.pdf](http://www.africa-union.org/Special_Programs/CSSDCA/cssdca-solemndeclaration.pdf) (accessed 17 August 2013).

<sup>68</sup> Declaration on the Framework for an OAU Response to Unconstitutional Changes of government OAU Doc. AHG/Decl.5 (XXXVI)(2000) [http://www.afrimap.org/english/images/treaty/OAU-Decl\\_Framework\\_Unconst\\_change\\_govt.pdf](http://www.afrimap.org/english/images/treaty/OAU-Decl_Framework_Unconst_change_govt.pdf) (accessed 17 August 2013).

<sup>69</sup> Para 5 & 7 of the preamble of the ACDEG and article 32(6).

Under the democracy rubric, in addition to recognition of public participation as a right,<sup>70</sup> the ACDEG enjoins States parties to create democratic institutions<sup>71</sup> and to create programmes designed to promote democratic principles.<sup>72</sup> Further, it recognizes the indivisibility of right and interdependence of rights that States shall guarantee to all citizens without any discrimination.<sup>73</sup>

Under elections, the ACDEG sets out the criteria for elections and stresses the importance of electoral management bodies in the electoral processes.<sup>74</sup> It further addresses one of the most crucial threats to democracy and peace in Africa namely unconstitutional changes of government. It provide for states' obligations and for sanctions to fight illegal means of accessing power in Africa. It is innovative in that it expressly provides that a perpetrator of unconstitutional change of governments 'shall not participate in elections held to restore democratic order'.<sup>75</sup>

The governance section covers states' obligations in respect of citizen participation in promoting economic political and social governance.<sup>76</sup> It further stresses the importance of a partnership between governments, private actor and civil society as another aspect of citizen participation.<sup>77</sup> The ACDEG addresses also the problem of bad governance and accountability of leaders through, among other things, the establishment of an independent judiciary, effective parliaments, and the establishment of an accountable public administration.<sup>78</sup> It enjoins states parties to institutionalise good economic governance through, among others, the promotion of transparency in public management, alleviation of poverty, fight against corruption, equitable allocation of natural resources and the promotion of tax policies that would encourage investment.<sup>79</sup>

Regarding implementation, the ACDEG provides that the commitments shall be implemented at the states party level and that the monitoring process will take place at the continental and regional levels.<sup>80</sup> After this brief overview of its content it can be said that the ACDEG is a

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<sup>70</sup> Art 4(2) of the ACDEG.

<sup>71</sup> Art 14 of the ACDEG.

<sup>72</sup> Art 12 of the ACDEG.

<sup>73</sup> Art 6 & 8 of the ACDEG suggest that in the understanding of the ACDEG elected representatives shall guarantee civil liberties as well as socio-economic rights.

<sup>74</sup> Art 17 of the ACDEG.

<sup>75</sup> Art 25(5) of the ACDEG will play a major role in addressing the lack of legitimacy that often occurs when such perpetrators win elections; it outlines the elements of what constitute unconstitutional changes of government in a manner that captures the African context.

<sup>76</sup> Art 27 of the ACDEG.

<sup>77</sup> Art 28 of the ACDEG; additionally, it stresses the 'need to promote participation of social groups with special needs in the governance process' in art 31 of the ACDEG.

<sup>78</sup> Art 32 of the ACDEG.

<sup>79</sup> Art 32 of the ACDEG.

<sup>80</sup> Art 44 of the ACDEG. There are two kinds of mechanisms for application: one, which is more coercive, addressing specifically unconstitutional changes of government and another more flexible for the implementation of other commitments.

consolidation of earlier commitments by African states to assert democratic governance as a right. We shall now proceed to the examination of this legal unusual approach.

### ***The implied right to democratic governance in the ACDEG***

The uniqueness of the ACDEG lies in the translation of principles into inalienable rights.<sup>81</sup> While other legal instruments assert democratic governance as a principle and a system of governance, the ACDEG adopts an unusual approach in that it seems to assert democratic governance as a right.

In fact, article 4 of the ACDEG reads:

1. States parties shall commit themselves to promote democracy, the principle of the rule of law and human rights
2. States parties shall recognise popular participation through universal suffrage as the inalienable right of the people.

From a combined reading of the two sections of article 4 above, it can be understood by 'popular participation' a recognition of elections as a fundamental right and as one of the key element of democracy. This explains why the ACDEG obliged states to recognise it as a fundamental right. If election, as the most tangible part of democracy, is a right, it can be inferred that democracy is in itself a right. Perhaps, this explains why states parties have a duty to promote democracy.<sup>82</sup>

Furthermore, all the elements of the right to democratic governance as articulated by Udombana in his definition are entrenched in the ACDEG.<sup>83</sup> These elements are: a political regime based on the respect for the rule of law<sup>84</sup> and separation of powers,<sup>85</sup> free and fair elections,<sup>86</sup> multiparty systems,<sup>87</sup> respect for civil liberties and enjoyment of human rights.<sup>88</sup>

Further, as one of the mechanisms for application of the ACDEG, article 44(2)(A)(b) reads that the African Union Commission (AUC) 'shall promote the creation of favourable conditions for democratic governance in Africa.' It is therefore clear that the ACDEG

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<sup>81</sup> Although this study reaches the same conclusion on the existence of the right to democratic governance in Africa in the ACDEG with the article 'African Charter on Democracy, Elections and Governance: A critical analysis' published by N Ngarhodjim, the procedure is different. In fact, in her publication, the author asserts that democracy is a right in the wording of article 4 of the ACDEG; this work on the contrary asserts and demonstrates that the ACDEG translates democracy from a principle into a right in an implied manner.

<sup>82</sup> Art 4(1) of the ACDEG.

<sup>83</sup> Udombana (n 8 above) 11.

<sup>84</sup> Art 2(2) & 4(1) of the ACDEG.

<sup>85</sup> Art 3(5) of the ACDEG.

<sup>86</sup> Art 2(3), 3.4 & 17 of the ACDEG.

<sup>87</sup> Art 32(6) of the ACDEG; this contrasts with article 25 of the ICCPR and article 21 of the UDHR which do not require specifically multiparty elections.

<sup>88</sup> Art 2(1) & 6 of the ACDEG.

recognises the right to democratic governance as a right that African citizens are entitled to and that African states should promote.

Regarding possible sanctions in case of violations, the formulation of article 46 of the ACDEG is as wide as possible to allow the AU Peace and Security Council to take all forms of appropriate sanctions depending on the context.<sup>89</sup> Though they are wide, specific categories of sanctions could have strengthened the assertion of this right and complete this unusual approach.

## 2.3 Conclusion

The right to democratic governance has emerged as a right in international law and in Africa. All the definitional elements of this right are embedded in international and regional instruments. There is a directed correlation between the realisation of the right to democratic governance and peace, security and development in Africa.

The implied right to democratic governance empowers African citizens in their desperate call for a second independence. This time what they seek is independence from the alienation and marginalisation of the people by selfish and manipulative leaders, for whom electoral processes are less a commitment to democracy, than a strategy for power.<sup>90</sup> There is therefore a need to strengthen sanctions for restoration of peoples' rights in a continent where democratic governance is a 'strategy for power, not a vehicle for popular empowerment'.<sup>91</sup> The ACDEG provides a good basis for this struggle. The next chapter will discuss elections as one of the most visible aspects of the right to democratic governance and how they contribute to democratic governance.

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<sup>89</sup> Art 46 of the ACDEG reads that 'the Assembly and the Peace and Security Council shall determine the appropriate measures to be imposed on any State Party that violates this Charter'.

<sup>90</sup> See generally C Ake 'The unique case of African democracy' (1993) 69 *International Affairs* 239.

<sup>91</sup> Ake (n 90 above) 3.

## Chapter 3

### **Elections and their contribution to the right to democratic governance in Africa**

Democracy supposes that citizens have the possibility to elect their representatives. That will allow selected representatives to act with legitimacy, consent of the peoples and responsibility.<sup>92</sup> Thus elections constitute the core element of the democratisation process.

Elections have been defined as the expression of the will of the people in a 'constitutionally stipulated period'.<sup>93</sup> Thus they constitute a ground for contestation and participation in recruiting leaders.<sup>94</sup>

This chapter asserts that elections are not foreign to Africa and discusses the criteria for good elections. It also focuses on factors that influence the contribution of elections in the realisation of the right to democratic governance.

#### **3.1 The concept of elections**

##### **3.1.1 Criteria for good elections**

The ICCPR states that elections 'shall be held in secret ballot'.<sup>95</sup> In Africa, the ACDEG affirms that transparent, free and fair elections are the key characteristics of elections.<sup>96</sup>

Furthermore, the establishment of criteria for elections was the objective of the Declaration on Criteria for Free and Fair elections adopted by the inter-parliamentary council in 1994.<sup>97</sup> Article 1 of that Declaration set out the first criterion which is freeness and fairness in the following terms:

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<sup>92</sup> A Aubynn 'Behind the transparent ballot box: The significance of the 1990s elections in Ghana' in M Cowen & L Laakso (eds) *Multi-party elections in Africa* (2007) 77.

<sup>93</sup> Aubynn (n 92 above) 77.

<sup>94</sup> Aubynn (n 92 above) 77.

<sup>95</sup> Art 25(b) of the ICCPR.

<sup>96</sup> Art 17 of the ACDEG.

<sup>97</sup> The Inter-Parliamentary Council is an organ of the Inter-Parliamentary Union which is an international organization of Parliaments established in 1889; it is considered as a focal point for parliamentary dialogue on peace among peoples and representative democracy.

In any State the authority of the government can only derive from the will of the people as expressed in genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage.<sup>98</sup>

The UDHR sets out the criteria for elections and states that the will of the people is to be expressed 'in periodic and genuine elections'.<sup>99</sup>

Literally, it would mean that such elections are conducted in a manner that is conducive for equity and in the absence of pressure on the decision to be taken by the voters. Periodic elections are to be understood as the requirement to prescribe by legislation a period for elections. The secrecy required is to be interpreted as the guarantee that the vote is done without any influence. The term genuine refers on one hand to the respect of different relevant civil liberties that are necessary to have democratic elections.<sup>100</sup>

Furthermore, the freedom criteria should be monitored by assessing the capacity of the government to abstain from actions infringing on fundamental rights, the right to be elected and the right to vote, freedom of association and expression and the freedom to campaign.<sup>101</sup>

The assessment of fairness of elections should include more than the absence of fraud. It refers also to the availability of equality of opportunities for different contestants including the grant of subsidies and access to media.<sup>102</sup>

The extent to which the process can be declared free and fair in accordance to international and regional standards is crucial to measure the level of democracy in a country. Those standards are applied by election observers in their missions.

To be able to assess the fairness and freeness nature of elections, elections observers should assess more than the elections day, procedures before and after elections are to be taken into account. Before elections, attention should be paid to several elements including, electoral laws and regulation of political parties, neutrality of the electoral commission, registration of candidates and political parties, the allocation of subsidies to political parties, and the extent to which the media is free and guarantee of secrecy of the vote.<sup>103</sup> After elections, several elements should be considered including the process of counting and announcing the results, continued protection of civil liberties and complaints procedures.<sup>104</sup>

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<sup>98</sup> Art 1 of the Declaration on Criteria for Free and Fair Elections adopted by the Inter-Parliamentary Council 154<sup>th</sup> session (Paris, 26 March 1994) available at <http://aceproject.org/ero-en/topics/election-integrity/inter-parliamentary-union-declaration-on-criteria-for-free-and-fair-elections-1994> (accessed 17 August 2013).

<sup>99</sup> Art 21(3) of the UDHR <http://www.un.org/en/documents/udhr/> (accessed 17 August 2013).

<sup>100</sup> European Commission 'Compendium of international standards of elections' second edition [http://eeas.europa.eu/human\\_rights/election\\_observation/docs/compendium\\_en.pdf](http://eeas.europa.eu/human_rights/election_observation/docs/compendium_en.pdf) (accessed 17 August 2013).

<sup>101</sup> O Cranenburgh 'Democratisation in Africa: The role of election observation' in J Abbink & G Hesselting (eds) *Election observation and democratisation in Africa* (2000) 33.

<sup>102</sup> Cranenburgh (n 101 above) 32.

<sup>103</sup> Cranenburgh (n 101 above) 33.

<sup>104</sup> Cranenburgh (n 101 above) 33.



In addition to The OAU/AU Declaration on the Principles Governing Democratic Elections in Africa<sup>105</sup> (2002), African countries through the ACDEG committed themselves to meet those standards through: the establishment of independent national electoral bodies<sup>106</sup>, mechanism to address electoral disputes<sup>107</sup>, equal access to media for parties and candidates<sup>108</sup> and the existence of a binding code of conduct of different actors prior, during and after elections.<sup>109</sup> The AU has established an elections observations unit within the department of political affairs, which has among other mandates the mandate of enhancing the capacities of elections management bodies of member states in order to promote free and fair elections in Africa.<sup>110</sup> This is to show the importance given to elections in Africa as one of the most fundamental elements of the right to democratic governance. Recommendations made in various elections observations reports are used by the AUC to support states to carry institutional or legal reforms in order to ensure that elections fulfill the necessary criteria to enhance the right to democratic governance. We shall now discuss the role of elections in the realisation of this right.

### **3.1.2 Role of elections in the realisation of the right to democratic governance**

There are several functions that elections can play in the realisation of that right depending on particular context of places where they are taking place. The overall function of elections is the realisation of citizen participation. They constitute therefore, one of the most fundamental ways that enable citizens to participate in societal decisions and to foster accountability of elected representatives.<sup>111</sup>

In the process of democracy, elections are decisive in that they confer legitimacy to governance.<sup>112</sup> As Franck explains

Democracy, as used in international parlance, is intended to connote the kind of governance that is legitimated by the consent of the governed. Essential to the legitimacy of governance is evidence of consent to the process by which a populace is consulted by its government.<sup>113</sup>

Although democratic governance requires more than periodic elections, they are 'an essential first step'.<sup>114</sup> They are one of the essential pillars of democracy. Elections are the

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<sup>105</sup> OAU/AU Declaration on the Principles Governing Democratic Elections in Africa - ahg/decl. 1 (xxxviii) 2002.

<sup>106</sup> Art 17(1) of the ACDEG.

<sup>107</sup> Art 17(2) of the ACDEG.

<sup>108</sup> Art 17(3) of the ACDEG.

<sup>109</sup> Art 17(4) of the ACDEG.

<sup>110</sup> African union Commission 'Department of political affairs at a glance' 2 (on file with the author).

<sup>111</sup> Teshome (n 15 above) 5.

<sup>112</sup> See also The Declaration on the Principles Governing Democratic Elections in Africa para II(1) & para II(3) which considers elections as the 'basis of the authority of any representative government' and the 'key elements of democratisation process'.

<sup>113</sup> Franck (n 52 above) 73 .

central element of democratisation process because they allow people to enjoy the right to choose their representatives and to participate in public life. They constitute a foundation of the social contract by which leaders acquire legitimacy to govern granted by voters.<sup>115</sup> Thus, they produce a fundamental requirement of governance which is legitimacy.<sup>116</sup> Legitimacy will then produces or sustain citizen's trust in their institutions and the insurance that the government's actions will be in their interest.

Another function of elections is to allow citizens to participate in the decision making-process. It builds confidence in that they have the sense of influencing institutions especially for minorities who might feel that they are playing a role.<sup>117</sup> Elections may encourage stability in context where they are perceived to be representative and inclusive of divergent views and create a sense of ownership over the process.

In post-conflict situations, elections can play a role of accomplishing inclusive governance. As Reynolds and Sisk explain 'they are seen as critical turning point at which a society moves from open antagonist violence to a new era based on bargaining and reciprocity'.<sup>118</sup>

Accordingly, if they are to play a role, elections are supposed to reflect the following:<sup>119</sup>

- Representativeness: the opinion of the people and not just the majority need to be reflected if elections are to be legitimate.
- Accountability of elected citizens to their constituents.
- Inclusiveness and accessibility of the process which should be inclusive of minorities' views. The perception that votes make difference in elections is the key for participation of all citizens to every electoral process.
- Stability of Government: if the government is to benefit from its citizens 'support, it is important to interpret the shifts of opinions in the population and to respond adequately by enacting laws for instance.
- Development of party system: it can be said that parties that are formed based on ethnic cleavages are less enduring than those formed on values. Thus, it is necessary to ensure development of political parties that are based on specific programs.

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<sup>114</sup> G Fox 'National sovereignty revisited: Perspectives on the emerging norm of democracy in international law' (1992) 270 *American Society For international Law* 249.

<sup>115</sup> Dahl wrote that 'leaders not only claim that their government is for the good of the people but beyond that they claim to be responsive to the will of the people'; see R Dahl *Democracy and its critics* (1989) 233.

<sup>116</sup> Lindberg (n 34 above) 33.

<sup>117</sup> A Reynold & T Sisk 'Elections and electoral systems: Implications for conflict management' in A Reynold & T Sisk (eds) *Elections and conflicts management in Africa* (1998) 16.

<sup>118</sup> Reynold & Sisk (n 117 above) 17.

<sup>119</sup> Reynold & Sisk (n 117 above) 21.

-Ability to engender reconciliation especially in divided societies. It is crucial to build an environment that will be able to accommodate divergent views of political parties and to avoid any extremist views that can exacerbate conflicts.

### 3.2 Elections in the African context

The idea of elections is not foreign to post colonial Africa. Before the importation of the so called 'western procedures of participation' it was not unusual to encounter some forms of control of accessing power and of collective decision-making.<sup>120</sup> Thus, for instance, the Electoral College could elect a chief. In Ghana, for example, the Akan people, believed that power arose from the people and could only be delegated by the people.<sup>121</sup> Even in kingdom where kings supposedly possessed supernatural powers, citizens had expectations towards their kings. When they were not met, mechanisms were put in place to remove them.<sup>122</sup> The existence of such practice contradicts the thesis of a total incompatibility between African cultures and practices of citizen participation that constitutes the basis of electoral democracy.<sup>123</sup> The best way of appointing representatives remain elections and that makes the claim that elections are *unaffrican* counter-productive.<sup>124</sup>

During colonialism, elections took place in an atmosphere contradictory with the idea of competitive participation. In fact, colonialism was based on domination and authoritarianism and was thus by nature contrary to the idea of democracy. Therefore, the extent to which elections could have been considered as free and fair was questionable.

The 1950 elections in some African countries constituted an important transition to competitive electoral in that it marks the beginning of decolonization process.<sup>125</sup> This period marks the beginning of the idea of self-determination. Elections constituted one of the core demands of national struggles. It should be noted that at that time, most political elites were educated under an authoritarian order that affected post-colonial Africa.<sup>126</sup> That resulted in the institution of neo-patrimonialism logic of post-colonial Africa.

In 1960 most African countries became independent. However, during that time, following coups d'état or internal transformations, most of the new regimes in Africa prohibited or

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<sup>120</sup> P Quantin 'Les élections en Afrique: Entre rejet et institutionnalisation'(1998) 2  
<http://www.polis.sciencespobordeaux.fr/vol9ns/quantin1.pdf> (accessed 29 August 2013).

<sup>121</sup> Quantin (n 120 above) 2.

<sup>122</sup> J Wyk 'Political Leaders in Africa: Presidents, Patrons or Profiteers? (2007) 2 *Occasional Paper Series 7*  
<http://www.africafiles.org/article.asp?ID=15559&ThisURL=../afgeneral.asp&URLName=Africa+General> accessed (17 August 2013).

<sup>123</sup> Wyk (n 122 above) 2.

<sup>124</sup> See generally, A Ake 'Rethinking African democracy' (1991) 2 *Journal of democracy* 32.

<sup>125</sup> S Ellis 'Elections in Africa in historical context' in J Abbink & G Hesselting (eds) *Election observation and democratisation in Africa* (2000) 41.

<sup>126</sup> Ellis (n 125 above) 42.

paralysed competitive elections. The realities faced by Africans after independence tempered the general optimism. As Ellis rightly puts it, 'elections were affairs of mind-numbing predictability, in which diverse fathers of the nation, *présidents-fondateurs*, received 99 per cent and more of the vote'.<sup>127</sup> The one-party system started to take place and was justified by the need to promote national cohesion.<sup>128</sup> In Sierra Leone for instance, the former president, Mohammed Momoh, justified the ban of multiparty competitive elections by claiming that they lead anarchy.<sup>129</sup> Elections were used by leaders as a mean to control the citizens without any reciprocity. For instance in some countries, the police controlled the travelers' voters cards to ensure that they participated in the mandatory single party elections.<sup>130</sup> Between 1970 and 1980, most African countries shifted from authoritarianism to democracy.<sup>131</sup> But this process of democratisation was reversed. In reality, when authoritarian regimes allowed elections they limited political parties and entered the electoral arena themselves.<sup>132</sup> Elections were used to legitimise 'political choices which had already been made by other means'.<sup>133</sup>

In the 1990s, Africa experienced another wave of democratisation.<sup>134</sup> Relatively competitive multiparty elections are taking place and military regimes started to disengage from politics. Citizen participation in decision-making was becoming the centre of African politics. In effect, African states subscribed to multiparty elections as the norm for legitimacy.<sup>135</sup> But this transition to multiparty elections was much more difficult. On one hand, it was justified by the distrust in politics generated by decades of authoritarianism and on the other by the disintegration of administrative structures and state's authority. Another reason is the disillusion of citizens towards changes that elections were supposed to produce. In fact, leaders remained patriarchal and used elections to justify their 'stayism'.<sup>136</sup> The need to hold elections was motivated by the desire to control, maintain or restore authoritarian's powers. Multiparty electoral processes were characterised by electoral fraud and restrictions of civil liberties.<sup>137</sup>

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<sup>127</sup> Ellis (n 125 above) 41.

<sup>128</sup> Schedler (n 35 above) 102.

<sup>129</sup> S Adejumobi 'Elections in Africa, a fading shadow of democracy' (2000) 21 *International Political Science Review* 63.

<sup>130</sup> Quantin (n 120 above) 4.

<sup>131</sup> M Cowen & L Laasko 'Elections and election studies in Africa' in M Cowen & L Laasko (eds) *Multi-party elections in Africa* (2002) 1.

<sup>132</sup> Schedler (n 126 above) 102.

<sup>133</sup> Ellis (n 125 above) 29.

<sup>134</sup> Referred to as 'the third wave' of democratisation in G Lynch & G Crawford 'Democratisation in Africa 1990-2010: An assessment' (2011) 18 *Democratisation* 275.

<sup>135</sup> Ellis (n 125 above) 39.

<sup>136</sup> Wyk (n 122 above) 11.

<sup>137</sup> Wyk (n 122 above) 18.

However, multiparty elections did not contribute to the right to democratic governance and the democratisation process in Africa is stagnant.<sup>138</sup>

In fact, there are three phases of democratisation:<sup>139</sup>

- The first is characterised by the collapse of authoritarian regimes
- The second by the holding of first multiparty elections
- The third phase is the consolidation of democracy.

After the first elections most African countries are still stuck in the second phase and considered either as authoritarian or as hybrid system.<sup>140</sup> That has led to popular uprisings even in countries where authoritarian regimes have appeared to have consolidated their control like in Egypt, Libya or Tunisia.<sup>141</sup>

Although elections have become normal occurrence, many of them are not considered as free and fair with the exception of Ghana, Botswana, Mauritius, South Africa and Zambia.<sup>142</sup>

Multiparty elections are thus, more transitional than foundational and inaugurate 'no new democratic regime but a new phase in the struggle for democracy'.<sup>143</sup> They give the voter a choice 'between oppressors in that self-appointed military or civilian dictators are being replaced by elected dictators'.<sup>144</sup>

### 3.3 Potential of elections in enhancing the right to democratic governance

Election is supposed to be the only means to access power for members of parliament and presidents. Yet, undemocratic states hold elections as well.<sup>145</sup> This point analyses some of the main factors that influence the potential of elections in enhancing or weakening the right to democratic governance.

The aim here is not to study the legal regulations of elections in countries but rather to provide elements to measures the 'degree to which rights are realised' during elections.<sup>146</sup> It is only through the translation of formal requirements into substantive rights that elections can enhance the right to democratic governance. Therefore 3 elements will be explored including, participation to the process, legitimacy of the process and competition during the process of elections.

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<sup>138</sup> C Ake supports the view that 'multiparty elections failed to produce democracy'; see A Ake *'Is Africa democratising'* (2006) 6 cited by Ellis (n 125 above) 39.

<sup>139</sup> Teshome (n 18 above) 4.

<sup>140</sup> Teshome (n 18 above) 4.

<sup>141</sup> The Economist 'Democracy Index 2011: Democracy under stress' (2012) 17

[http://www.sida.se/Global/About%20Sida/S%C3%A5%20arbetar%20vi/EIU\\_Democracy\\_Index\\_Dec2011.pdf](http://www.sida.se/Global/About%20Sida/S%C3%A5%20arbetar%20vi/EIU_Democracy_Index_Dec2011.pdf) (accessed 17 September 2013).

<sup>142</sup> The Economist (n 141 above) 27.

<sup>143</sup> Schedler (n 35 above) 103.

<sup>144</sup> Ake (n 124 above) 6.

<sup>145</sup> Lindberg (n 17 above) 9.

<sup>146</sup> Linberg 'The democratic qualities of competitive elections: Participation, competition and legitimacy in Africa' (2004) 42 *Commonwealth & Comparative Politics* 61.

### 3.3.1 Participation

Participation is a key aspect which empowers the people. The logical necessity of the rule by the people involves participation whether directly or through voting.<sup>147</sup>

Voter registration is important in measuring the extent to which citizens participate and also their adherence to the electoral process.<sup>148</sup>

Another way of citizen participation is through political parties. This element is very crucial especially in the African context, where, all means are used to prevent opposition parties to participate in electoral processes. It is one of the guarantees of alternation in power. The participation of opposition parties to legislatures or presidential elections is important to measure of equality in participation.<sup>149</sup> Equality in participation here refers to equality in terms of the law and in terms of suffrage.

This requirement is met through the protection and realisation of basic rights such as freedom of expression and assembly.<sup>150</sup> The aim here is to increase the opportunity to participate in the decision making process than the mere approval of decision.<sup>151</sup>

The issue in Africa is the sudden transformation of authoritarian leaders into democratic leaders. This can constitute serious threats to democracy in that authoritarian leaders may hide behind a façade of democracy.<sup>152</sup> The concern is that, participation of non democratic leaders in electoral process may have a negative impact because in order to build democracy, contestants should have democratic values. The fact is that, they act in terms of opportunities provided by institutions than in terms of values. Therefore, they will be tempted to act on pressure to maintain power.<sup>153</sup>

### 3.3.2 Legitimacy

Legitimacy is measured by the consent of involved actors rather than respect of procedures. The indicator of legitimacy is thus the behavior of not only of voters but also of different contestants. The measure of voters or contestants behavior is the acceptance of elections outcome.<sup>154</sup> Most electoral conflicts are the result of the denial of elections outcomes.<sup>155</sup>

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<sup>147</sup> Linberg (n 146 above) 65.

<sup>148</sup> Lijphart, 'Unequal participation: Democracy's unresolved dilemma' (1997) 9 *American Political Science Review* 111.

<sup>149</sup> Linberg (n 34 above) 38; the Author adds that the fact that opposition parties participate in electoral processes should not be equated with fairness and freedom of elections; but he notes that whether or not elections stand the chance of being legitimate, free and fair.

<sup>150</sup> Lindberg (n 34 above) 108; the author summarised participation in the protection of the 'right of assembly, to form and join civil society organisations and of open public discussions'.

<sup>151</sup> Ake (n 92 above) 242.

<sup>152</sup> On further discussion on this topic see Wyk (n 122 above).

<sup>153</sup> Linberg (n 34 above) 39.

<sup>154</sup> Linberg (n 34 above) 43.

<sup>155</sup> Linberg (n 34 above) 43.

Therefore there are two main revealers of legitimacy: acceptance of elections outcomes and peacefulness.<sup>156</sup>

As regards acceptance, it is crucial for losers to accept elections result. As Linberg puts it rightly 'in normal free and fair elections, it is expected from democratic-minded elites to accept defeat graciously and to assume the position of a constructive opposition'.<sup>157</sup> Even in cases where elections are not totally free and fair, losers may accept the outcome in cases where it does not impact on the result of elections. Another alternative for losers is to accept the result of elections to preserve stability in the case that there has been improvement in the quality of elections or if futures elections offer prospect of success. In all cases, 'losers' acceptance is the critical test of the system's legitimacy'.<sup>158</sup>

The criterion of peacefulness of elections refers to the absence of electoral violence.<sup>159</sup> Put in another way, the presence of electoral violence undermines the quality of elections.<sup>160</sup>

### 3.3.3 Competition

The degree of competitiveness represents a necessary component of the effectiveness of elections in enhancing the right to democratic governance. It creates the choice of voters without which it is difficult to talk about accountability of representatives.<sup>161</sup> This can be realised only when citizens have different choices.<sup>162</sup> Therefore, this factor should be secured by legal provisions that allow representation and competition of different groups in the society. Put in another way, competition can be realised by 'personal autonomy and economic rights, freedom from excessive dependence, and gender educational and professional equality'.<sup>163</sup>

Some of the indicators of competition include the share of the votes and the seats among political parties and alternation in power.<sup>164</sup>

Regarding presidential elections, many African countries require an absolute majority and two round electoral system.<sup>165</sup> Thus, the degree of competitiveness can be measured by the closeness of results between the two successful parties.<sup>166</sup>

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<sup>156</sup> Linberg (n 34 above) 44.

<sup>157</sup> Linberg (n 34 above) 43; this does not mean that losers of elections should not challenge electoral results. In cases where there are concerns about certain aspects, they can use judicial means in conformity with the ACDEG which provides in Art 17(2) for the establishment and strengthening of mechanisms to address electoral disputes.

<sup>158</sup> Linberg (n 146 above) 69.

<sup>159</sup> Before elections, during campaigns, on the day of elections, and after the announcement of elections outcomes.

<sup>160</sup> Linberg (n 146 above) 70 in those violence can be characterised by killings or intimidation of opposition parties or intimidation of voters.

<sup>161</sup> Linberg (n 34 above) 31.

<sup>162</sup> This is probably why the ACDEG requires multiparty political systems.

<sup>163</sup> Linberg (n 34 above) 101; in this line, art 31 & 33 of the ACDEG provides for empowerment through 'comprehensive civic education' of different groups without any discrimination and for good economic governance.

<sup>164</sup> Linberg (n 39 above) 101.

<sup>165</sup> Linberg (n 34 above) 41.

<sup>166</sup> Linberg (n 34 above) 41.

As regards parliamentary elections, the indicators of the quality of elections are the share of the seats between the winning party and between opposition parties.<sup>167</sup>

The alternation in power constitutes the ultimate indicator of competitiveness. It does not mean that every electoral process should bring alternation in power since 'elections can be competitive without turnovers'.<sup>168</sup> Rather, what is meant here is that, when there is a legal protection of competitiveness, turnovers are more likely to occur.

In addition to participation, legitimacy and competition, the continuation of electoral is the most important quality if elections are to efficiently contribute to the right to democratic governance.<sup>169</sup> Unconstitutional changes of government, which often lead civil wars in Africa, are the most prominent elements that are hindering the survival of electoral cycles. This has been effectively addressed by chapter 8 of the ACDEG which provides for rather severe sanctions in case of such occurrence.

### 3.4 Conclusion

There is a link between elections and the right to democratic governance because elections enable citizen to participate in societal decisions and confer legitimacy of leaders. If elections are to realise the right to democratic governance the following have to be reflected: representativeness, accountability of elected citizens to their constituents, inclusiveness of all citizens, the perception that votes will make changes in their lives and the development of a party system.

To appreciate the extent to which the right to democratic governance during electoral processes, elements such as participation, competition and legitimacy are necessary. These elements will provide a basis for comparison between the DRC and the Republic of Ghana.

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<sup>167</sup> Linberg (n 34 above) 43.

<sup>168</sup> Linberg (n 34 above) 42.

<sup>169</sup> Linberg (n 34 above) 45.



## Chapter 4

### Assessment of the role of elections: case study

#### 4.1 Introduction

Elections will mean so little to citizen when they do not offer any prospect of change and become a routine. As it has been said earlier, most African states have failed to pass the test of democratic consolidation except countries like Ghana.<sup>170</sup> In fact, not only the electoral process has been institutionalised in the country, but also elections have contributed to the right to democratic governance, in that they offer prospect of change in a peaceful manner and increase citizen participation.<sup>171</sup> On a contrast note, the euphoria of the first democratic elections in the DRC, like in most African countries, has been quickly replaced by disillusion and exclusion of citizen from the public and politic sphere.<sup>172</sup> This chapter will use the two examples to analyse the trend of elections in Africa based on the factors analysed in the chapter three.

#### 4.2 The Republic of Ghana: The success story

##### 4.2.1 Brief political overview

Although it is considered as the 'beacon of democracy', Ghana also had troubling moments between the one-party system and the non-party system.<sup>173</sup> The country has vacillated between military rule and elected rulers.<sup>174</sup>

Ghana obtained its independence from Great Britain in 1957 and became a Republic in 1960 with Kwame Nkrumah as its president. In 1964, Ghana became a de jure one party regime with the Convention People's Party (CPP) as the only legal party.<sup>175</sup> That resulted in the decreasing of fundamental freedoms such as the rights to freedom of association to form political parties. After Two years, J Rawlings conducted a coup d'état that led him to power. A new constitution transferring the power from a military regime to a civilian regime was

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<sup>170</sup> Lynch & Crawford (n 23 above) 276.

<sup>171</sup> See A Bekerie 'Democratic governance in Africa: Ghana as a beacon of hope and success' <http://www.tadias.com/04/21/2009/democratic-governance-in-africa-ghana-as-a-beacon-of-hope-and-success/> (accessed 19 September 2013); the author shares the view that Ghana is setting an example of elections that can enhance the right to democratic governance.

<sup>172</sup> T Trefon *Congo masquerade: The political culture of aid inefficiency and reform failure* (2011) 27.

<sup>173</sup> Bekerie (n 171 above).

<sup>174</sup> Aubynn (n 92 above) 79.

<sup>175</sup> EISA 'Ghana political overview' [www.eisa.org.za/wep/ghaoverview.htm](http://www.eisa.org.za/wep/ghaoverview.htm) (accessed 19 September 2013).

adopted in 1969 and resulted in the coming into power of K Busia. But in 1972, J Rawlings conducted another revolution that led him to power until 1992.<sup>176</sup>

1992 marks the return to multiparty system in Ghana with the election of J Rawlings this time as a civilian and the adoption of a new constitution.<sup>177</sup>

Since that time, Ghana has maintained a good trend in the development of a multiparty regime and in strengthening fundamental rights.<sup>178</sup> In 1996, J Rawlings was re-elected as president. During the 2000 elections, there was a successful transfer of power between the National Democratic Congress (NDC) of J Rawlings and the New Patriotic Party (NPP) that led J Kufuor in power.<sup>179</sup> The period that followed the 2000 elections marks the shift from a fragile to a more mature democracy in Ghana.

#### **4.2.2 Legal framework for elections in Ghana**

Ghana is a Republic with a unicameral parliament of 231 members elected for the term of four years. The president is directly elected by the people for four years renewable once. To be elected a candidate must receive 50 per cent of votes. In cases where candidates fail to receive the required number of votes, a second round of elections is organised between the two candidates who received the highest number of vote.

On the international level, Ghana has ratified regional and international treaties that provide standards for elections including the ICCPR, the Convention on the Elimination of all Forms of Discrimination against Women, the International Convention on the Elimination of all Forms of Racial Discrimination, the International Convention on the Protection of the Rights of All Migrant Workers and the Convention on the Political rights of Women. Ghana has also ratified the ACHPR, the Protocol on Democracy and Good Governance and signed the ACDEG.<sup>180</sup>

On a national level, the Constitution of the Republic of Ghana 1992 (1992 Constitution) is the primary instrument that provide for the legal framework for elections. It constitutes a basis for citizen participation in politics through elections or the establishment of political parties and provide for fundamental human rights and political parties.<sup>181</sup>

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<sup>176</sup> EISA (n 175 above).

<sup>177</sup> AU EOM 'Report of the African Union Elections Observations Mission to the 7 December 2012 general elections in the Republic of Ghana'(2012) 5 <http://www.au-elections.org/> (accessed on 19 September 2013).

<sup>178</sup> EISA (n 175 above).

<sup>179</sup> EISA (n 175 above).

<sup>180</sup> AU EOM (n 177 above) 4.

<sup>181</sup> Chapter Seven of the 1992 Constitution <http://ddata.over-blog.com/xxxxxyy/1/35/48/78/Constitution-Ghana.pdf> (accessed 19 September 2013).

It establishes the Electoral Commission of Ghana (ECG) and provide for criteria for contesting for parliamentary or presidential elections.<sup>182</sup>

Key institutions that play critical role in the electoral process such as the ECG and the political parties also have their foundation in the Constitution. To ensure the independence of the ECG, the 1992 Constitution guarantees its administrative, functional and financial autonomy in order to avoid undue interference.<sup>183</sup>

Other relevant frameworks detailing the procedure for elections are the public elections regulations, Citizenship Act, the electoral commission Act, the political parties Acts, political parties code of conduct act, national media commission 2008 "Guidelines for Fair and Equitable Coverage of Political Parties by the State-Owned Media", and the presidential and parliamentary elections law, the Public Order Act, 1994 (Act 493), Representation of the People Law, 1992 (PNDCL 284).<sup>184</sup>

#### **4.2.3 Assessment of the 2008 and 2012 elections in Ghana**

The 2008 parliamentary and presidential elections in Ghana were considered as a triumph for Africa. In fact, the peaceful transfer of power between the defeated ruling party and the opposition in elections considered credible, free and fair by elections observers was a demonstration of the maturity of democracy.<sup>185</sup> Elements including participation, competition and legitimacy of the electoral process will serve as a basis for assessment.

##### ***Participation***

Several elements will be taken into account to measure the extent to which Ghanaians citizens participated in the 2008 and 2012 elections including voter registration, voter education, participation of political parties and individuals in the electoral process and elections the role of civil society and election observers.

##### ***Voters' registration***

In addition to the Constitution, the Public Elections Regulations constitute the framework for voter registration and the basis to challenge any illegal exclusion of voters.<sup>186</sup>

In 2008 the voters register underwent a revision exercise conducted by the ECG and the list was updated and displayed in order to give voters and political parties the opportunity to remove names of deceased persons, minors or double registration or to make correction of

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<sup>182</sup> Art 43 establishes the ECG and art 62 & 94 provide respectively for eligibility criteria for contesting for presidential and parliamentary elections respectively.

<sup>183</sup> Art 46 of the 1992 Constitution.

<sup>184</sup> All available at <http://laws.ghanalegal.com> (accessed 23 September 2013).

<sup>185</sup> See EU EOM 'Final report on the presidential and parliamentary elections in Ghana 2008' (2009)

[http://www.eeas.europa.eu/eueom/pdf/missions/eu\\_eom\\_final\\_report\\_ghana.pdf](http://www.eeas.europa.eu/eueom/pdf/missions/eu_eom_final_report_ghana.pdf) (accessed 19 September 2013)

<sup>186</sup> Public Elections Regulations 1996 (CI15).

names. As a result the list was reviewed from a total entry of 12 822 474 to 12 472 978, which means that 349 496 were removed from the list by the ECG.<sup>187</sup>

Although anomalies were reported in the voter register, due to financial and administrative challenges, political parties agreed that elections could continue while the process of revising the voters list was still going on as long as there was public vigilance to ensure the prevention of any attempt of double voting.<sup>188</sup>

In 2012, the voter registration process was improved by the participation of all political parties and various stakeholders and the introduction in the general process of election of biometric Voter Registration.<sup>189</sup> This addressed challenges of the 2008 registration process and ensured that the new voters list was compiled. The ECG conducted the registration process in a very inclusive and participatory process as reported by stakeholders.<sup>190</sup>

### *Participation of political parties*

The right to establish a political party has been guaranteed by the 2000 Political Parties Act which allows political parties to operate freely and places restrictions on establishing political parties based on religion, ethnic or gender in a restrictive or discriminatory manner.<sup>191</sup>

As regards political party's participation, seven political parties contested for the parliamentary and presidential elections in 2008 and 2012 including the NDC, the New Patriotic Party (NPP), CPP, peoples' national convention (PNC), the Democratic Freedom Party (DFP), Democratic People's Party (DPP) and the Reformed Patriotic Democrats (RPD).<sup>192</sup> Among the seven, two main political parties including the NDC and the NPP are the main parties in Ghana.

### *Participation of women*

Despite the fact that gender equality is guaranteed by article 27(3) of the 1992 Constitution and by relevant human rights treaty that Ghana has ratified, women remain under-represented in the decision making process. This situation can be justified by the difference in access to education between men and women and to the lack of affirmative action in order to increase women's participation in politics.<sup>193</sup> Additionally, there is no space for women's

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<sup>187</sup> EU EOM (n 185 above) 15. It has also been reported that the ECG continued to review the list of voters where anomalies were found until the last days of the electoral campaign.

<sup>188</sup> EU EOM (n 185 above) 16.

<sup>189</sup> AU EOM (n 177 above) 10.

<sup>190</sup> AU EOM (n 177 above) 11.

<sup>191</sup> Article 3 of The Political Parties Act 2000 (574) <http://aceproject.org/ero-en/regions/africa/GH/ghana-the-political-parties-law-act-574-of-2000/view> (accessed 12 October 2013).

<sup>192</sup> EU EOM (n 185 above) 17 and AU EOM (n 172 above) 14.

<sup>193</sup> EU EOM (n 185 above) 24.

participation in political parties' structures and patriarchal behaviours are still entrenched in the Ghanaian society.<sup>194</sup>

In 2008 the government developed initiatives to promote women's participation in the public sphere and to increase the number of female candidates in the parliament.<sup>195</sup> In reality, the involvement of women in public life remains marginal. As a result, women represented less than 10% in the parliamentary elections and there was no female candidate in the presidential elections.<sup>196</sup> However, a woman was nominated as a speaker of parliament for the first time in 2008.<sup>197</sup>

In 2012, despite the disqualification of two woman's candidature to contest presidential elections on technical grounds, the number of women in parliament increased.<sup>198</sup>

### *Participation of minorities and people with disabilities*

Equality and non-discrimination are guaranteed by article 12.2 of the 1992 Constitution. As a result there is no hindrance to the participation of minorities either as voters or candidates except financial constrains.<sup>199</sup>

As regards to peoples with disability, structures are put in place by the government during elections to accommodate their specific needs.<sup>200</sup>

During the 2008 and 2012 general elections, manifestos were published in brail and tactile ballots for visually impaired were designed to accommodate. In order to accommodate hearing impaired and to ensure their education, electoral debates included sign language.<sup>201</sup>

In order to ensure participation of peoples with physical disability, polling stations provided support to assist them during elections. Structures such as the election observation of the Commission for Human Rights and Administrative Justice (CHRAJ) were involved in the assistance of peoples with disability during electoral campaign and on the elections day.<sup>202</sup>

Despite those efforts challenges remain as regard to access to electives positions. This is due to the lack of affirmative action or legislations focusing on enhancing the participation of peoples with disability in political parties.<sup>203</sup>

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<sup>194</sup> AU EOM (n 177 above) 16.

<sup>195</sup> AU EOM (n 177 above) 17.

<sup>196</sup> EU EOM (n 185 above) 25.

<sup>197</sup> EU EOM (n 185 above) 25.

<sup>198</sup> AU EOM (n 177 above) 16.

<sup>199</sup> EU EOM (n 187 above) 26.

<sup>200</sup> EU EOM (n 185 above) 26; it is reported that peoples with disability are estimated between 7 and 10%.

<sup>201</sup> EU EOM (n 185 above) 26.

<sup>202</sup> EU EOM (n 185 above) 26.

<sup>203</sup> AU EOM (n 177 above) 16.

### *Participation of election observers and civil society*

The Ghanaian civil society plays key role in electoral processes and is reputed to be vibrant.<sup>204</sup> Their participation in elections observations and voter tabulation increase transparency in the electoral process.

In the 2008 and 2012 elections, the participation of several civil society organisations including the Civil Forum Initiative, the Coalition of Domestic Observers in deploying the largest group of elections observers and supporting the ECG increased the transparency of the electoral process.<sup>205</sup> In addition to that, several international observers including the AU observers the Economic Community of West African States' observers, EISA's observers were also involved in the process in the process and concerns raised by observers were addressed by the polling staff.<sup>206</sup>

### *Voters' education*

In order to ensure a meaningful participation, voters' education is a crucial element.

In Ghana, the 1992 Constitution constitutes a legal basis for the establishment of civic education.<sup>207</sup> Thus, a National Commission for Civic Education (NCCE) was established with the function of raising awareness on the constitutional provisions and on civic responsibilities and rights of citizens.<sup>208</sup>

In 2008, despite structures in place, it was noted a challenge in the procedural understanding on the part of voters that increased the number of invalid ballots because voters were not properly informed on how to properly mark a ballot.<sup>209</sup> During the second round of elections, political parties played a major role in a door-to-door voter education to address that challenge.<sup>210</sup>

In the 2012 elections, the ECG, Non-Governmental Organisations and the Ghanaian civil society supported the NCCE in educating voters especially on how and how they should vote.<sup>211</sup>

### *General participation in the 2008 and 2012 electoral processes on the elections day*

In general, during electoral processes in 2008 and 2012 participation of voters was made in satisfactory manner. Clarity and assistance were provided by the polling staffs when required.<sup>212</sup>

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<sup>204</sup> J Ayee *Deepening democracy in Ghana : Politics of the 2000 elections* (2001) 88.

<sup>205</sup> EU EOM (n 185 above) 25 & AU EOM (n 172 above) 17.

<sup>206</sup> AU EOM (n 177 above) 17.

<sup>207</sup> Art 231 of the 1992 Constitution.

<sup>208</sup> Arti 233 of the 1992 Constitution.

<sup>209</sup> Carter Center 'Observation mission to Ghana's 2008 presidential and parliamentary elections December 2008' (2009) 5.

<sup>210</sup> Carter Center (n 209 above) 6.

<sup>211</sup> AU EOM (n 177 above) 16.

In order to ensure participation, the location of polling stations was in public spaces with easy access.<sup>213</sup> It was noted also an impressive participation in the process. In 2008 it has been reported by elections observers that the voters turnout was 69.52% and in 2012 the ECG reported that a voter turnout of 79.43%.<sup>214</sup>

### ***Competition***

As it has been stressed in the precedent chapter competition in electoral process is crucial. In Ghana this factor has been secured by the 1992 Constitution that allows everybody to be candidate under certain conditions in a non discriminatory manner.

The level of competitiveness in the 2008 and 2012 will be assessed by a number of elements including the respect for freedoms, the equality in the access to funds and media, the independence of structures in charge with elections administrations and the prospect for alternation in power.

#### *Respect for freedoms and freedom from intimidation*

Relevant fundamental freedoms including the freedom of assembly, expression, speech and expression are guaranteed by the 1992 constitution.<sup>215</sup> Intimidation of voters can preclude the people from expressing their free opinion and thus rendering elections not credible.

In 2008, the campaign period freedom of expression, speech and assembly were respected for all candidates. Observers reports that an environment conducive to the respect for freedoms has been strengthened over time.<sup>216</sup> That enabled all political parties to freely campaign across the country for the two electoral rounds. However, it has been reported isolated cases of violence due to the high competition between the two main political parties including the NPP and the NDC but in general.<sup>217</sup>

In the 2012 elections, all freedoms were guaranteed for political parties to campaign peacefully.<sup>218</sup>

#### *Access and use of public funds*

The political parties Act of 2000 does not provide for state funding for political parties but they can receive donations. But the Ghanaian government provides support to political parties. In order to prevent the use of public funds, the political parties Act provides that

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<sup>212</sup> AU EOM (n 177 above) 17 and EU EOM (n 185 above) 31.

<sup>213</sup> AU EOM (n 177 above) 17.

<sup>214</sup> EU EOM (n 185 above) 31

<sup>215</sup> Art 21(1) of the 1992 Constitution.

<sup>216</sup> EU EOM (n 185 above) 18.

<sup>217</sup> Carter center (n 209 above) 26.

<sup>218</sup> AU EOM (n 177 above) 15.

political parties should submit an account of their spending to the ECG before elections and after 6 months after elections submit a detailed state of expenditure.

It has been reported that in 2008, there was no sign of use of state resources by the ruling party.<sup>219</sup> Contestants for parliamentary elections received support from political parties but candidates had to support their campaign themselves because the amount received was not sufficient.<sup>220</sup> The government allocated vehicles to political parties according to the proportion of their representation in parliament.<sup>221</sup>

#### *Access to media by political parties*

In case submitted by the NPP against another political party, the principle of fair coverage was stressed by the Supreme Court by stating that equal time should be provided to all parties by state-owned media.<sup>222</sup> The 1992 constitution established the National Media Commission (NMC) in order to promote an independent media and to ensure that state-owned media are free from interference.<sup>223</sup>

In Ghana, the most important and widely accessible source of information is the radio.<sup>224</sup>

In 2008, equality in access to the media was guaranteed and major incidents affecting the equality of freedom of the state-owned media were not reported.<sup>225</sup> However, it has been noted that the time was shared mostly between the two main political parties.<sup>226</sup>

Private radio stations and newspapers also provided a platform for frequent discussions and debate on a wide range of electoral issues.<sup>227</sup>

In 2012, the Ghana Journalist Associations and the National Media Commission ensured that political parties were given equal time but it has been reported that the ruling party enjoyed more time than others from the state-owned media.<sup>228</sup> However, this did not constitute a major issue and did not have an impact on the elections' outcome because private media counterbalanced the perception of the bias.<sup>229</sup> Additionally, media played a major role in the ensuring peacefulness of electoral process and especially in announcing the elections' results.<sup>230</sup>

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<sup>219</sup> EU EOM (n 185 above) 20.

<sup>220</sup> EU EOM (n 185 above) 20.

<sup>221</sup> EU EOM (n 185 above) 20.

<sup>222</sup> EU EOM (n 185 above) 22.

<sup>223</sup> Art 166 of the 1992 Constitution.

<sup>224</sup> EU EOM (n 185 above) 22.

<sup>225</sup> EU EOM (n 185 above) 22.

<sup>226</sup> EU EOM (n 185 above) 22.

<sup>227</sup> EU EOM (n 185 above) 22.

<sup>228</sup> AU EOM (n 177 above) 15.

<sup>229</sup> AU EOM (n 177 above) 15.

<sup>230</sup> AU EOM (n 177 above) 15.



### *Resolution of electoral disputes*

It is crucial to ensure availability of effective remedies to resolve electoral disputes. These include clear mechanism to redress violations and their accessibility to all citizens in a fair manner. In Ghana, the judiciary is the responsible body to ensure remedies and handles appeals against the ECG' decisions. Its independence is guaranteed the 1992 Constitution.<sup>231</sup>

Representation of the People Law<sup>232</sup> and the Presidential Elections Law<sup>233</sup> provide that the validity of parliamentary elections is to be challenged within 21 days after the results' publication before the High Court and before the Supreme Court in cases of presidential disputes.<sup>234</sup>

In the 2008 electoral processes the judiciary enjoyed public confidence and was perceived to be free from undue interference.<sup>235</sup> That is reflected in its ability to handle the 2012 presidential electoral dispute and in the fact parties respected the outcome. However, the lack of a time frame in which electoral petitions can be resolved by the judiciary is still an area of concern.<sup>236</sup> In order to ensure adjudication of electoral disputes in a timely manner, the Supreme Court established special benches and working hours during week-ends.<sup>237</sup>

The publication by the Judicial Service Commission of a manual on election adjudication enhanced political parties' confidence in the judiciary.<sup>238</sup>

### *Opportunity for an alternation in power*

For elections to be an opportunity to express the desires of citizens as to who they wish to represent them, elections need to represent an opportunity for an alternation in power. There is no need to hold elections when results are predictable.

The 2008 elections in Ghana were an example for Africa in that an opposition party won the presidential elections after the second round. One elections observer stated that: "I hope that a day will come in Nigeria when an opposition party will defeat the ruling party and they respect the wish of the people enough to quit the place without trying to cause mayhem by falsifying the election results."<sup>239</sup> After the second round of elections, the candidate John Atta Mills of the opposition party NDC became the president, replacing the NPP.

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<sup>231</sup> Art 127 of the 1992 Constitution

<sup>232</sup> Representation of the People Law (PNDCL 284) 1992.

<sup>233</sup> Presidential Elections Law (PNDCL 285) 1992.

<sup>234</sup> EU EUOM (n 185 above) 26.

<sup>235</sup> EU EUOM (n 185 above) 26.

<sup>236</sup> Carter Center (n 209 above) 31.

<sup>237</sup> Carter Center (n 204 above) 31.

<sup>238</sup> EU EUOM (n 185 above) 27.

<sup>239</sup> Bekerie (n 171 above) 3.

## ***Legitimacy***

As it has been said in the precedent chapter, the behaviour of voters and political parties is the indicator of legitimacy and trust in the electoral process. The peacefulness and the acceptance of the outcome are also crucial indicators.

In 2008, the voting was conducted generally in a peaceful manner for the two electoral rounds. The main political parties agreed to conduct violence-free elections.<sup>240</sup> To complement those efforts, security forces played an importance role to ensure security of political parties' members and peacefulness of the process.<sup>241</sup> In addition, significant efforts made by civic activists and various religious groups in carrying out activities to ensure peaceful elections including concerts, workshops and sermons were crucial.<sup>242</sup> The peaceful transition from the ruling party to the opposition party represents one of the major indicators of legitimacy and was a test of the strength of Ghana's democracy.

In 2012, no major incidents of violence were reported during the campaign or after the announcement of the elections outcomes proving once again public trust in the process and acceptance of results.<sup>243</sup>

### **4.3 The Democratic Republic of Congo: The shadow story**

#### **4.3.1 Brief political overview**

The DRC became independent from Belgium on June 1960 with Joseph Kasavubu as President and Patrice Emerit Lumumba as the Prime Minister. Prior to that, the first elections were held early in May 1960 and mark the beginning of the first Republic.<sup>244</sup> In September 1960, the country underwent its first coup d'état conducted by Mobutu, who was the chief of the army and Kasavubu was overthrown.

March 1965 marks the beginning of the second Republic. New parliamentary elections were held and Mobutu proclaimed himself president in November 1965.<sup>245</sup> In 1966, the office of the Prime Minister was abolished and all the executive powers were concentrated in the hands of the president Mobutu who banned all political parties and created the Mouvement Populaire de la Révolution (MPR) as the only political party.<sup>246</sup> In 1985, elections were organised without participation of political parties.

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<sup>240</sup> Carter Center (n 209 above) 25.

<sup>241</sup> Carter Center (n 209 above) 27.

<sup>242</sup> Carter Center (n 209 above) 27.

<sup>243</sup> AU EOM (n 177 above) 17.

<sup>244</sup> EISA 'DRC political overview' <http://www.eisa.org.za/WEP/drc2.htm> (accessed 19 September 2013).

<sup>245</sup> EISA (n 244 above).

<sup>246</sup> EISA (n 244 above).

In 1990, Mobutu decide to introduce multiparty elections and marking thus the beginning of the third Republic.<sup>247</sup> A national conference was held in 1991 and Etienne Tshisekedi was appointed as a new prime minister.<sup>248</sup> A national electoral commission was created in 1995 but elections did not take place.<sup>249</sup>

In 1997, Mobutu was overthrown by Laurent Desiré Kabila who proclaimed himself president and banned all political parties.<sup>250</sup> After that, the country entered a long period of civil war. In 2001 Laurent Kabila was assassinated and replaced by his son Joseph Kabila. To resolve the crisis, many peace agreements were signed, including the Lusaka agreement and the Sun City dialogue.<sup>251</sup> Each peace agreement proved to be in vain. In 2003, J Kabila lifted the ban on political parties and an inter-congolese dialogue led to the formation of an inclusive government.<sup>252</sup> The transitional government set up in July 2003 resulted in some form of power sharing with a 1+4 formula, with J Kabila as president and 4 vice presidents.

Although, the process of the transition was hampered by a lack of political will and dissention within the transitional institutions, in 2005, the efforts of the transitional government led the country to its first multiparty elections since 1985. That process resulted in the adoption of electoral laws, the creation of the Independent Electoral Commission and the adoption of a new constitution.<sup>253</sup>

#### **4.3.2 Legal framework for elections in the DRC**

The DRC is a unitary state with a president elected by direct universal suffrage and a simple majority of votes cast for a term of five years, renewable with a bicameral parliament composed by a directly elected national assembly and a senate indirectly elected by the national assembly.<sup>254</sup>

The DRC is signatory to a number of regional and international instruments providing for elections standards including the ICCPR, the Convention on the Elimination of Racial Discrimination, the Convention on the Political Rights of Women, the ACHPR, the Protocol to

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<sup>247</sup> Carter Center 'International elections observation mission to the Democratic Republic of Congo: Presidential and legislative elections'(2006) 16

[http://www.cartercenter.org/resources/pdfs/news/peace\\_publications/election\\_reports/drc-2006-final-rpt.pdf](http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/drc-2006-final-rpt.pdf) (accessed 19 September 2013)

<sup>248</sup> EISA (n 244 above).

<sup>249</sup> EISA (n 244 above).

<sup>250</sup> EISA (n 244 above).

<sup>251</sup> EISA (n 244 above).

<sup>252</sup> EISA (n 244 above).

<sup>253</sup> EISA (n 244 above).

<sup>254</sup> Art 70 & 101 of the 2006 Constitution.

the ACHPR on the Rights of Women in Africa.<sup>255</sup> Moreover, the Constitution stipulates the superiority of ratified international or regional instruments over national laws.<sup>256</sup>

On the national level, the Constitution of the Democratic Republic of Congo of 2006 (the 2006 Constitution) constitutes the central electoral instrument. It recognises a plural political system,<sup>257</sup> the right to participate in political life,<sup>258</sup> fundamental freedoms,<sup>259</sup> and the National Independent Electoral Commission.<sup>260</sup> Other relevant laws include the law 04/002 of 15 March 2004 on political parties, the law 04/024 of 12 November 2004 on nationality, and the law 06/006 of 9 March 2006 on the organisation of presidential, legislative and provincial election (the electoral law).<sup>261</sup> The framework governing elections is generally satisfactory.<sup>262</sup>

### **4.3.3 Assessment of the 2006 and 2011 elections in the DRC**

The 2006 elections were the first free and transparent elections since the independence of the DRC in 1960 and represented a milestone in the Congolese history. They put an end to a long civil war in the country and gave a light of hope for the Congolese population. After that electoral cycle, the 2011 general elections were supposed to constitute progress on the consolidation of the Congolese democracy. The following paragraphs analyse the decline in the quality of elections in assessing participation, competitiveness and legitimacy of both electoral processes

#### ***Participation***

Elections in the DRC offered an opportunity to depart from a long period of crisis and an opportunity to freely choose representatives. This part will use elements including voter registration, participations of political parties, participation of women and minorities, participation of civil society and voter education to analyse participation of citizens in the two electoral processes.

#### ***Voters' registration***

The voters' registration process include among others the establishment of a current and accurate list is important in the realisation of the right to vote and in building voters'

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<sup>255</sup> Carter Center 'Presidential and legislative elections in the Democratic Republic of Congo' (2011)12 [http://www.cartercenter.org/resources/pdfs/news/peace\\_publications/election\\_reports/drc-112811-elections-final-rpt.pdf](http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/drc-112811-elections-final-rpt.pdf) (accessed 19 September 2013).

<sup>256</sup> Art 215 of the 2006 Constitution.

<sup>257</sup> Art 6, 7 & 8 of the 2006 Constitution.

<sup>258</sup> Art 6 of the 2006 Constitution.

<sup>259</sup> Art 7 to 37 of the 2006 Constitution.

<sup>260</sup> Art 211 of the 2006 Constitution .

<sup>261</sup> The electoral law has been modified in 2011 prior to the general elections and the process of its modifications has been criticised by the Congolese civil society and political parties due to the lack of transparency; see T Vircoulon 'Elections en Afrique : voie des urnes, voies de la paix ? :RDC élections 2011(2011) 1 <http://www.congoforum.be/upldocs/35.pdf> (accessed 19 September 2011).

<sup>262</sup> MOE UE 'Rapport des élections présidentielle, législatives et provinciales 2006' (2007) 21.

confidence in the process. In the DRC, the law 04/028 of December 2004 established the Independent Electoral Commission (IEC), which later became the National Independent Electoral Commission (NIEC) as the body responsible for the voter registration process.<sup>263</sup>

The registration of voters for the 2006 elections took place in 2005 prior to the constitutional referendum. Despite challenges in the electronic voter registration, due to the poor infrastructure and logistical challenges in the country, the Congolese population was eager to register.<sup>264</sup> The IEC was assisted by civil society engaged in the process and established 9 120 centres for enrollment.<sup>265</sup> Out of an estimated population of 28 million eligible voters, the registration of over 24 million voters shows that the process was in general successful.<sup>266</sup>

In 2011, the number of registered voters increased up to 6 312 088 voters making the total number of registered voters 32 024 640.<sup>267</sup> Moreover, the NIEC increased the number of centres for enrollment to 10 000 in order to carry on the registration process. During this process, a large number of civil society groups expressed raised their concern about the lack of accreditation by the NIEC. In fact, in certain provinces, civil society organisations were denied accreditation.<sup>268</sup> Moreover, political parties raised concerns about the credibility of the voters roll after its revision by the NIEC due to mismanagement, the lack of its transparency in the electoral process and the lack of cooperation between the NIEC and political parties.<sup>269</sup> Political parties expressed their concern about voter registration highlighting among other issues, the registration of the police and the military, registration of minors and the lack impartiality of the NIEC.<sup>270</sup> The political pressure exercised on the NIEC and its partiality was expressed by observers.<sup>271</sup>

#### *Participation of political parties*

The right to create political parties has been entrenched in the 2006 Constitution, the ICCPR ratified by the DRC and the law on political parties. Almost all political parties were newly registered and created as instruments of satisfaction of personal ambition without, in most cases, any program or ideology.<sup>272</sup> Moreover, in most cases, parties were formed from former armed groups.

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<sup>263</sup> Loi 04/028 du 24 décembre 2004 portant identification et enrôlement des électeurs en République Démocratique du Congo.

<sup>264</sup> Carter Center (n 247 above) 11.

<sup>265</sup> Carter Center (n 247 above) 28.

<sup>266</sup> MOE UE (n above 262) 6.

<sup>267</sup> Carter Center (n 254 above) 28.

<sup>268</sup> This is the case in the North Kivu for instance; see the Carter Center (n 258 above) 29.

<sup>269</sup> Carter Center (n 254 above) 31.

<sup>270</sup> Carter Center (n 254 above) 30.

<sup>271</sup> Carter Center (n 254 above) 11.

<sup>272</sup> MOE UE (n 262 above) 14.

In 2006, 267 political parties were registered and presented 9 709 candidates for the parliamentary elections and 33 candidates for the presidential elections.<sup>273</sup> Major political parties included the *Partie du Peuple pour la Reconstruction et la Démocratie* (PPRD), the *Union pour le Développement et le Progrès Social* (UDPS), the *Rassemblement Congolais pour la Démocratie* (RCD) and the *Mouvement de la Libération du Congo* (MLC).<sup>274</sup> The process was marked by the refusal of UDPS and its members to participate in the electoral process.<sup>275</sup>

In 2011, others political parties were formed including the *Union Nationale Congolaise* (UNC) which constitutes one of the major political parties. 443 political parties presented 18 386 candidates for the parliamentary elections while 99 others were independent candidates.<sup>276</sup> 8 political parties presented candidates for presidential elections and 3 independent candidates stood for elections including the incumbent president Kabila.<sup>277</sup> Prior to the elections, a code of conduct was signed by all political parties providing for rights, obligations and sanctions in case of violations except the UDPS who subjected his signature to the review of voter registry by the NIEC.<sup>278</sup> Another area of concern was the creation or corruption of political parties by the incumbent government to ensure that votes are secured.<sup>279</sup>

### *Participation of women*

The equality, non-discrimination and fair representation of women in all aspect of public life including in politic, is expressly guaranteed by article 14 of the 2006 constitution. Although it appears that the population distribution between women and men is equal, the participation of women in public life is very poor. This is due to the belief that women are not fit to run for office.<sup>280</sup> Nevertheless, women's organisations play a significant role in changing that attitude and in taking initiatives to educate women on the necessity of their participation in political life. Furthermore, women's organisations are known to be very active as elections observers.<sup>281</sup>

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<sup>273</sup> MOE UE 'Rapport final des élections présidentielle et législatives en République Démocratique du Congo' (2011) 15.

<sup>274</sup> R Diamaka *Pouvoir gouverner la République Démocratique du Congo* (2008) 32.

<sup>275</sup> Carter Center (n 247 above) 44.

<sup>276</sup> Carter Center (n 254 above) 36.

<sup>277</sup> Carter center (n 254 above) 35.

<sup>278</sup> Carter center (n 254 above) 26; see also the political parties code of conduct of the DRC <http://www.societecivile.cd/node/2431> (accessed 19 September 2013)

<sup>279</sup> R Diamaka (n 274 above) 51.

<sup>280</sup> Carter Center (n 247 above) 29.

<sup>281</sup> Carter Center (n 247 above) 29.

As a result, in 2011, the number of female candidates increased. Out of 18 386 candidates for the parliamentary elections, 2 277 were females. However, there was no female candidate for the presidential elections.<sup>282</sup>

#### *Participation of minorities and people with disabilities*

Although, the principle of non-discrimination is guaranteed by article 13 of the 2006 Constitution, the lack of inclusion of minorities in public life has been reported by the United Nations High Commissioner for Human Rights.<sup>283</sup> This is reflected in the fact that they do not feel involved in public life because they are not represented in parliament and there is no candidate or parties advocating for the improvement of their situation.<sup>284</sup> This can also be explained by the lack of any law or positive action to increase minorities' participation.

Nevertheless, observers reported a high level of participation of minorities in the 2011 electoral registration process almost 100%.<sup>285</sup> However, this high level is due to the fact that registration is the only way to get a national identity card and that minorities are subjected to police harassment.<sup>286</sup>

It has to be stressed that electoral processes in the DRC lack any form of accommodation of the needs of persons with disability.

#### *Participation of election observers and civil society*

The right to participate in public life includes also the right to participate in civil society organisations in order to be able to support the electoral process.

Although there were challenges relating to accreditation, many civil society organisations were involved in the 2006 electoral process including the Civil Society Domestic Observers Network, the Network of Partners Organisations, and the Coordination of Actions for the Success of the Catholic Church.<sup>287</sup>

In 2011, the environment became more restrictive to the participation of civil society organisations especially those who were critical of the ruling party or the government. Several leaders civil society organisations were threatened by different government forces especially the National Intelligence Service which reports to the President.<sup>288</sup> However the

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<sup>282</sup> Carter Center (n 254 above) 36.

<sup>283</sup> Carter Center (n 254 above) 18; furthermore, it should be noted that there is 48 % of pygmies in the DRC; see Carter Centre (n 254 above) 31.

<sup>284</sup> Carter Center (n 254 above) 32.

<sup>285</sup> Carter Center (n 254 above) 32.

<sup>286</sup> It should be noted that the registration card serves as national identity since 2006 and many citizens register in order to have an identity than to participate in the electoral process; see Carter Centre (n 254 above) 32.

<sup>287</sup> Carter Centre (n 247 above) 52.

<sup>288</sup> Carter Centre (n 254 above) 43.

NIEC managed to issue accreditation to important organisations including the Network of Main Religious Groups, the Consultation of Congolese Women and the National Counsel of the Youth.<sup>289</sup>

In addition, many other international observers were present during both electoral processes including the Carter Center, the EISA, the SADC, the COMESA , the EU EOM and, in 2011, the AU EOM.

#### *Voters' education*

A proper exercise of the right to vote requires adequate voter education. In the DRC the NIEC is body responsible for voter education.

Although, the IEC was assisted by the civil society, in 2006, voter education was poorly done as it was more concentrated on the constitutional referendum than on the electoral process itself.<sup>290</sup> The majority of the population did not know the meaning of elections and how they worked although they were eager about the fact that elections were approaching.<sup>291</sup> Hence the United Nations Mission and other organisations such as the EISA had to step in to address this challenge. However, civic education remained limited to urban areas.

In 2011, the situation improved with the support of many national NGOs and international organisations, although the NIEC lacked funds to carry out voter education activities and to send agents to remote places. For instance, posters on how to vote were disseminated in local languages by the UNDP.<sup>292</sup> Political parties assisted the NIEC, but primarily to disseminate information on how to recognise their candidates on electoral list.<sup>293</sup>

#### *General participation*

Congolese participated massively participated in what constituted an opportunity to freely choose their representatives after 40 years as reflected by the voter turnout.

In 2006, the voter turnout estimated at 70.5% was higher in the first round than in the second round were the figures indicated a turnout of 65.4%.<sup>294</sup> Despite irregularities, and instances of attempt to manipulate the process, elections were credible.<sup>295</sup>

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<sup>289</sup> Carter Centre (n 254 above) 44.

<sup>290</sup> Carter Centre (n 247 above) 40.

<sup>291</sup> Carter Centre (n 247 above) 40.

<sup>292</sup> Carter Centre (n 254 above) 33.

<sup>293</sup> Carter Centre (n 254 above) 33.

<sup>294</sup> Carter Centre (n 247 above) 70.

<sup>295</sup> Carter Centre (n 247 above) 13.



In 2011, figures were contradictory due to the manipulation of the process that discredited the electoral process.<sup>296</sup> For instance, a high rate of missing results in polling stations and contradictory high level of participation was reported in some provinces. In Kinshasa, for instance, 1.4 million of votes were reported to be lost in polling stations.<sup>297</sup>

## **Competition**

The realisation of the right to vote is in a great extent dependent on the degree of competitiveness in electoral process. This can be assessed by the extent to which freedoms were respected, the equal allocation of opportunities in terms of access to the media and to funds and also to the prospect of a change in government.

### *Respect for freedom and freedom from intimidation*

The 2006 Constitution guarantees all relevant freedoms conducive for a competitive environment including the freedom of speech, of assembly and of the freedom of expression.<sup>298</sup>

The first democratic elections were marred by a proliferation of exclusionary speeches by political parties.<sup>299</sup> Freedom of expression of political parties was limited in some provinces because the ruling party wanted to repress any negative comments on the government.<sup>300</sup>

During the 2011 elections, the situation became worse. The right of assembly was highly restricted to members of political parties during the electoral campaign. Most attempts to assemble resulted in abusive use of force by the. For instance, the opposition party UDPS's protests were excessively repressed by the police and resulted in escalation of violence in the capital.<sup>301</sup> Furthermore, opposition political parties were targeted when they were more likely to enjoy a strong community support.<sup>302</sup>

The government used also administrative techniques to hamper the freedom of assembly in public areas especially after or before a meeting of the ruling party. For instance, the opposition party UNC was prevented by the police from holding a meeting in a stadium after the ruling party event at the same place.<sup>303</sup> Harassment from the National Intelligence Service was also reported and in some provinces campaign materials of the opposition

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<sup>296</sup> Carter Centre (n 254 above) 60.

<sup>297</sup> Carter Centre (n 254 above) 60.

<sup>298</sup> Art 22, 23, 24, 24, 26 of the 2006 Constitution.

<sup>299</sup> MOE UE (n 273 above) 7.

<sup>300</sup> Carter Center (n 247 above) 52.

<sup>301</sup> Carter Center (n 254 above) 38.

<sup>302</sup> Carter Center (n 254 above) 38.

<sup>303</sup> Carter Center (n 254 above) 38.

parties were confiscated for alleged crimes against the state security.<sup>304</sup> Moreover, tension between the ruling parties and main opposition parties degenerated into violence.<sup>305</sup>

#### *Access and use of public funds*

Although, the law 08/005 of June 2008 on financing of political parties provided for the funding of political parties' activities, it did not apply to the 2011 general elections. The law sets criteria for eligibility of political parties including a bank account with a minimum balance of 25 000 USD and the respect of parity between women and men, and indicates that the amount given will constitute a supplement to the party's resources. During both elections, political parties other than the ruling party relied on individual membership fees donation.<sup>306</sup> This reduced the outreach of campaign activities.

In 2006, government activities such as the deployment of troops in unstable regions were used by the president to boost his campaign and to improve his image.<sup>307</sup>

In 2011, most public officials run for election in violation of the electoral law which requires them to resign or ask for a temporary leave prior registration.<sup>308</sup> Hence, the ruling party and public officials used public funds in their campaign in using public vehicles or using official events to boost the campaign. For instance, in most provinces, governors used official events and funds to campaign for the president or for themselves.<sup>309</sup>

#### *Access to media by political parties*

Article 112 of the DRC Constitution establishes a superior audiovisual and communication council (SACC) to ensure equal access for political parties and to monitor violations during elections.

There is a wide range of media outlet in the DRC, from news paper, to television and radio station. In addition to the state-owned station, RTNC (Congolese National radio and television), there are approximately, 52 television stations and 240 radio stations.

In the 2006, the media landscape was monopolised by major political parties' candidates during the first round of elections including the ruling party (PPRD), the MLC, and the RCD. The RTNC systematically violated the requirement of equal access to the media, according most of the time to the ruling party.<sup>310</sup> During the second round's campaign, the media environment became limited for the MLC who was competing with the PPRD. In some areas,

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<sup>304</sup> Carter Center (n 254 above) 38.

<sup>305</sup> Carter Center (n 254 above) 38.

<sup>306</sup> MOE UE (n 273 above) 22.

<sup>307</sup> Carter Center (n 247 above) 47.

<sup>308</sup> Art 10(5) and 6 of the DRC electoral law.

<sup>309</sup> Carter center (n 254 above) 37.

<sup>310</sup> MOE UE (n 273 above) 7.

the MLC was not given access to media and even its own stations suffered several incidents until the final hours of campaign.<sup>311</sup>

In 2011, the situation became worse as the parties had limited access to media including the state owned. Media played contradictory role as major source of information and as propaganda tools and source of inflammatory language. It should be noted that most media are owned by politicians in the DRC and thus rendering difficult impartiality during electoral campaign.<sup>312</sup> Journalists or stations' directors were under threat when criticizing the ruling party. The NGO Journalistes En Danger reported assassination, arbitrary arrests or harassment of journalists. Additionally, the signal of certain media stations who denounced irregularities after elections were interrupted.<sup>313</sup> International media were not spared from threat including interruption of signal, hindrance of freedom of movement or confiscation of materials. For instance the signal of Radio France Internationale was interrupted after a broadcast of a speech of the opposition candidate's Tshisekedi declaring himself president after elections' result.<sup>314</sup>

Though, sanctions were issued by the SACC on certain media which incited to violence, its independence was questioned. Firstly, its failed to impose sanctions on the RTNC for putting the president's banners on its wall and secondly its offices are located in the RTNC building.<sup>315</sup>

#### *Resolution of electoral disputes*

The realisation of the right to fair trial supposes not only the availability of mechanisms but also the independence of those mechanisms to ensure effective remedies. In the DRC, the constitution establishes the Constitutional Court for resolution of electoral justice in replacement of the Supreme Court of Justice (SCJ).<sup>316</sup> But seven years after the promulgation of the constitution the constitutional court is yet to be established. Therefore, the SCJ remains the competent body for electoral dispute.

In the 2006 elections a large number of complaints were brought before the SCJ but its faced challenges in the treatment of cases because, one the one hand its local took fire and on the other the large number of complaints. The inadmissibility of about the two-third of cases despite evidence indicating the existence of frauds in certain areas discredited the SCJ.<sup>317</sup> In a context of profound weakness of the congolese judicial system, the role of the SCJ was

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<sup>311</sup> MOE UE (n 273 above) 7.

<sup>312</sup> Carter Center (n 254 above) 41.

<sup>313</sup> Carter Center (n 254 above) 41.

<sup>314</sup> Carter Center (n 254 above) 41.

<sup>315</sup> MOE UE (n 273 above) 42.

<sup>316</sup> Art 157 of the 2006 constitution.

<sup>317</sup> MOE UE (n 273 above) 9.

often limited to approve information from the polling centres, exacerbating thus criticism regarding its impartiality.<sup>318</sup>

In 2011, the impression of the bias was reinforced by the appointment of new judges whose independence is questionable shortly before elections.<sup>319</sup> As a result, few complaints were brought before the SCJ regarding parliamentary elections and one complaint regarding presidential elections. Candidates sought other means than the judiciary to denounce electoral the results.<sup>320</sup>

Another concern is the time frame in which the case has to be settled. According to article 107 of the electoral law the court has seven days to settle the case concerning a presidential election dispute after the expiration of 48 hours after submission. For a parliamentary dispute, the case has to be settled in the seven days following its submission.<sup>321</sup> The time frame does not give sufficient time to give effectively analyse the case and issue an effective remedy. This further jeopardizes the right to justice as Sarokin rightly puts 'justice rushed is justice ruined'.<sup>322</sup>

#### *Opportunity of alternation in power*

From the discussions above, it can be concluded that the electoral process does not offer prospect of change in government. In the DRC, it is whether you win elections or you win elections but not whether you lose or win elections.<sup>323</sup> All strategies are put in place to ensure that the government stays in place from constitutional revision to restriction of democratic space.

Although challenges were reported in the 2006 elections, organising elections after 40 years was a major accomplishment. But soon after, violence was used to eliminate political opponents and to restrict democratic space in order to ensure reelection.<sup>324</sup>

A constitutional review on the electoral system and the appointment of new judges of the SCJ are the tools used shortly before the 2011 elections. The constitutional reform that changed the presidential electoral system from two rounds to one round in January 2011 has been interpreted as a mean to ensure reelection of the incumbent government.<sup>325</sup> While the

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<sup>318</sup> MOE UE (n 273 above) 9.

<sup>319</sup> MOE UE (n 262 above) 42.

<sup>320</sup> MOE UE (n 273 above) 9.

<sup>321</sup> Art 27 of the DRC electoral law.

<sup>322</sup> H Sarokin 'Justice rushed is justice ruined' (1986) 431 *Rutgers law review* 38.

<sup>323</sup> R Pourtier 'Les élections de 2011 en RDC : Entre cafouillage et tripatouillage'(2012) 8 <http://www.echogeo.revues.org/13119> (accessed 4 September 2013).

<sup>324</sup> Human Rights Watch 'We will crush you: The restriction of political space in the Democratic Republic of Congo (2008) 6 <http://www.hrw.org/reports/2008/11/25/we-will-crush-you> (accessed 2 September 2013).

<sup>325</sup> Pourtier (n 323 above) 1.

attempt to manipulate the process in the previous elections did not affect the overall results, in 2011, national and international observers concluded that results were not credible.<sup>326</sup>

### **Legitimacy**

Although the announcement of the first round results of the 2006 elections resulted into violence between the first two candidates J Kabila and JP Bemba, the second round process was more peaceful. Although the violence in the first round left a bitter memory, the electoral procedure was conducted peacefully in general and the outcome accepted<sup>327</sup>

During the 2011 elections, violence directed to political parties and media was documented prior to the elections.<sup>328</sup>

The distrust of Congolese in the result expressed through public manifestation by journalists, members of religious confessions or through media was harshly repressed by the government.<sup>329</sup> Many government forces including the republican guard, the police and the intelligence service were involved in killings and arbitrary arrests throughout the country.<sup>330</sup> Hence the hope raised by the 2006 elections quickly disappeared and was replaced by another struggle as the Congolese power remains characterised by a persistent crisis of legitimacy over years.

### **4.4 Conclusion**

The case studies above have demonstrated the contradictory trends of African elections. On the one hand it has depicted the qualities of elections in enhancing the right to democratic governance in Ghana and on the other the use of elections in disabling the right to democratic governance in the DRC.

The 'routinisation of elections' is maintained by several elements including electoral fraud, political repression, manipulation or restriction of the democratic space, manipulation of electoral rules and a general unfair competition. Many countries in Africa like the DRC have institutionalised 'competitive authoritarianism'.<sup>331</sup> Since it is increasingly becoming difficult to avoid elections if they want to have a facade of legitimacy, most African countries are hybrid regimes and possess features of democratic governance. These include regular elections as a survival strategy while repressing and disempowering opposition parties and excluding women and minority groups.

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<sup>326</sup> Poutier (n 323 above) 1.

<sup>327</sup> MOE UE (n 273 above) 77.

<sup>328</sup> MOE UE (n 262 above) 46.

<sup>329</sup> Human Rights Watch press release 'DR Congo: 24 killed since elections results announced' (22 December 2011) <http://www.hrw.org/news/2011/12/21/dr-congo-24-killed-election-results-announced> (accessed 2 September 2013).

<sup>330</sup> Human Rights Watch (n 324 above).

<sup>331</sup> Lynch & Crawford (n 23 above) 281; see countries like Cameroun, Uganda, Nigeria or Liberia for instance.

The respect of fundamental freedoms of political parties is crucial for elections to enhance the right to democratic governance, yet the 'strange combination of competitive elections and harsh repression' is one of the key features of African elections.<sup>332</sup> The mix of control and the illusion of freedom during electoral processes have undermined the right to democratic governance. Furthermore the use of states resources, media and security forces by incumbent parties result in unfair competition. Though, independent public media are emerging in Africa, state media are still largely controlled and thus they continue to have direct influence on the role of the media in electoral processes.

Another tool is the manipulations of institutions that are supposed to ensure impartiality in electoral process such as the electoral commissions or the judiciary. In the DRC for instance, the lack of impartiality of the NIEC and the appointment of new judges in the SCJ based on their allegiance to the ruling party were engineered to ensure reelection.

Even when they work, setbacks remain including the exclusion of women and minorities in politics or the lack of financial support for political parties like in Ghana. The right to democratic governance supposes not only the respect of civil rights but also economic empowerment of different groups in the society in order to ensure their competition including minorities and women. This is where civil rights and socio-economic rights go hand in hand. In effect, it is difficult for women or minorities groups in the society to participate in electoral process without the same level of education as others or without the same financial resources. In the DRC for instance, the only woman who tried to participate in the 2011 presidential elections could not because she was unable to pay 54 000 USD as registration fees.<sup>333</sup> On the other hand, the lack of positive actions for inclusion of minorities in the society justifies why they do not participate or they feel excluded.

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<sup>332</sup> L Diamond & M Plattner 'Is Iran democratising' (2000) 11 *Journal of Democracy* 107.

<sup>333</sup> MOE UE (n 262 above) 36.

## Chapter 5

### Conclusion and recommendations

#### 5.1 Conclusion

Democratic governance has emerged as a right as it has been asserted in this scholarship. International law has responded to the desperate call of the people for empowerment by establishing democratic governance as a right. On a regional level, the adoption of the ACDEG marks a big step in the empowerment of African citizens. All definitional elements of this right as articulated by Udombana can be found clearly in the ACDEG. It goes as far as requiring African States to adopt multiparty elections in contrast with the ICCPR or the UDHR.

As a key element of that right, multiparty elections have become a normal occurrence on the continent. Though they have become the only legitimate way to access power, elections have failed to enhance democratic governance in Africa. They have failed in their role of legitimising governments and increasing citizens' participation. This is to say that elections by themselves do not enhance the right to democratic governance.

Therefore, to measure the degree to which the right to democratic governance is realised during elections, elements including legitimacy, participation and competition have been explored. To demonstrate how elections can enable or disable the right to democratic governance, those elements have served as a basis for comparison between the DRC and Ghana. Though, each country has a different historical context and external influence may come to play, it has been demonstrated how in Ghana the elements above have enhanced the potential of elections in their contribution to the right to democratic governance and how elections have disabled that right in the DRC.

In countries like the DRC, several tools are used by incumbent rulers to maintain power including electoral fraud, political repression, manipulation or restriction of the democratic space, manipulation of electoral rules and exclusion of minorities and women. Thus most of the time, elections are smokescreen and do not contribute to the realisation of the right to democratic governance. In countries like Ghana, though elections are commendable there are areas of improvement including participation of women and minorities.

While the triumph of elections in enhancing democratic governance cannot be celebrated we should not lament its demise. It should be recognised that 'elections remains fundamental,

not only for installing democratic governments but as a necessary requisite for broader democratic consolidation'.<sup>334</sup> However, what matters, is the independence of institutions that support the process including electoral management bodies, political parties and the judiciary. Electoral process as a main component of the right to democratic governance is not enough without strong checks and balances and accountability in the political system. It means that institutions that support an electoral process have to be accountable, inclusive and independent. But, the level of checks and balances as a crucial element of the right to democratic governance can only be achieved when citizens are empowered and informed enough.

## 5.2 Recommendations

The recognition of the right to democratic governance is not complete without proper means to ensure its realisation. In order to effectively address the reasons why elections are not enabling the right to democratic governance, the following recommendations should be implemented:

- The right to democratic governance should be considered as a right. This right should be translated through legislative, judicial and administrative processes to ensure that the right to democratic governance is realised by citizens.
- Ensure that electoral management bodies are adequately staffed and well funded to electoral management bodies. Electoral management bodies should have an autonomous budget line allocated by the parliament.
- Governments should ensure meaningful participation in electoral processes of all citizens specially women, minority groups and people with disabilities without discrimination. These should include access to resources, education for all, information and employment.
- In cases of non compliance with the right to democratic governance, collective sanctions should be taken in order to discourage electoral fraud, political repression, manipulation or restriction of the democratic space, manipulation of electoral rules and exclusion of minorities and women. These can include diplomatic isolation or economic sanctions. In order to be made clear and assertive, these sanctions should be the subject of a resolution.
- It is crucial for Ghana and the DRC to ratify and incorporate the ACDEG into their domestic law in order to give effect to the right to democratic governance enshrined in the ACDEG.

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<sup>334</sup> Lynch & Crawford (n 23 above) 279.



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