CHAPTER TWO

THE EMERGENCE OF A RIGHT TO DEMOCRACY—
AN AFRICAN PERSPECTIVE

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1. INTRODUCTION

The poor quality of governance, lack of democracy and inability of the rule of law to take root in Africa, have been longstanding causes for concern and are directly linked to the ills befalling the continent. In the post-Cold War era there is a growing perception amongst global and regional organisations that democracy is indeed the only acceptable system of legitimate domestic rule. Despite a common acceptance amongst both African leaders and civil society of the human rights encapsulating the core elements of democracy, African voices often call for a distinctly African understanding of democracy.

This chapter examines the commitment of the African Union (AU) and sub-regional organisations to democracy and the extent to which distinctly African legal instruments encapsulating democracy are evolving. To provide a background to the discussion, a short explanation will be given of the historical and cultural context of governance in Africa and how it was shaped by colonial and post-colonial attempts at governance. This will be followed by an analysis of the continental conventional and customary international framework in place relating to democratic governance. Against this background the impact of the pro-democratic protests of 2011 in North Africa (NA) will be assessed pointing out the significant differences between NA and Sub-Saharan Africa (SSA) despite a common commitment to African unity. Before narrowing down the discussion to Africa, it is necessary to start with a brief discussion on the broader context of democracy within international law. It will be indicated that Africa played an important role in placing democratic entitlement on the international agenda.

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2. A Right to Democracy in International Law

The international law position that prevailed at the end of WWII was one of ideological neutrality, leaving it to the sole discretion of states to determine their systems of domestic governance.\(^1\) When the United Nations (UN) was established in 1945, democracy was not considered to be a precondition to the maintenance of international peace and security, which was the primary goal of the organisation. However, the seeds of the development of democracy as a standard for legitimacy in international law already appear in the recognition of ‘respect for the self-determination of peoples’ as identified by article 1 of the UN Charter as a measure to strengthen international peace. The UN Charter attempts to build an international community based on fundamental human rights where self-determination (art 1(2)), sovereign equality (art 2(1)), territorial integrity (art 2(4)) and non-intervention in matters falling in the domestic jurisdiction of states (art 2(7)) were regarded as principles that would enhance international peace and security. The system of governance states opted for was considered as falling within the domestic jurisdiction of states, hence no mention is made of democracy or any other system of governance by the UN Charter. Instead the UN system of the time emphasises the importance of peace-loving states (art 4(1)) as a qualification for UN membership and civilized nations (art 381(c)) of the statute of the International Court of Justice) as determinant of general principles of law that the International Court of Justice would apply to disputes that are submitted to it.

WWII saw African colonies fight in the armies of their colonial masters against an unknown enemy. When the UN was established, African states were still under colonial rule and did, therefore, not qualify for UN membership. Rising nationalism post WWII was, however, in the order of the day and stimulated African colonies to lobby for political independence. Repression of nationalism, be it tribal or continental (African) nationalism, in an effort to protect colonial interests led to tensions which destabilised not only states but whole regions, as neighbouring states often became involved supporting and harbouring national liberation movements. Thus the surge towards political independence spread like a wave across all of Africa. The struggle to free Africa from its colonial yoke gained momentum in the early sixties. The legality of these efforts was enhanced with