

FROM FREE TOWN TO CAIRO VIA KIEV: THE UNPREDICTABLE ROAD OF DEMOCRATIC LEGITIMACY IN GOVERNMENTAL RECOGNITION

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I. Introduction

Among Russia's justifications for its military intervention in Crimea in March 2014 was the argument that the intervention occurred at the request of the democratically elected (although by then ousted) Ukrainian President Yanukovich.¹ Intervention by invitation involves direct military assistance by the sending of armed forces by one state to another state upon the latter's request.² Since a "request" implies the freely expressed will of the requesting state as represented by the internationally recognized government, the intervention is in principle not contrary to the political independence or territorial integrity of that state and therefore not in violation of the prohibition of the use of force in Article 2(4) of the UN Charter and in customary international law.³

Russia's military intervention in Crimea occurred after Mr. Yanukovich's own Parliament had voted to remove him from power, on February 22, 2014, however this vote appeared to be unconstitutional as it did not conform to the two-thirds majority requirement contained in the Ukrainian Constitution. Nevertheless, no less than one hundred states subsequently supported UN General Assembly Resolution 262 of 27 March 2014⁴ not to recognize the altered status of Crimea. Only eleven states (including Russia) voted against the resolution, while fifty-eight states abstained. A resolution explicitly supported by more than half of the UN membership, while openly rejected by merely eleven states, can arguably be interpreted as an implicit rejection of Mr. Yanukovich's claim that he continued to represent the legitimate government of Ukraine.⁵ As a result,

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¹ Zachary Vermeer, *The Jus ad Bellum and the Airstrikes in Yemen: Double Standards for Decamping Presidents?*, *EJIL:TALK!* (Apr. 30, 2015); Nico Krisch, *Crimea and the Limits of International Law*, *EJIL:TALK!* (Mar. 10, 2014); Daniel Wischart, *The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia's Intervention?*, *EJIL:TALK!* (Mar. 4, 2014).

² *Chronological Index of the Resolutions*, INSTITUT DE DROIT INTERNATIONAL.

³ Erika de Wet, *The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force*, 26 *EUR. J. OF INT'L L.* 979 (2015); Theodore Christakis & Karine Bannelier, *French Military Intervention in Mali: It's Legal but... Why?: Part II: Consent and UNSC Authorisation*, *EJIL:TALK!* (Jan. 25, 2013); David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 *DUKE J. COMP. & INT'L L.* 209 (1996); Christopher J. Le Mon, *Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested*, 35 *N.Y.U. J. INT'L L. & POL.* 741 (2003).

⁴ *GA Res. 68/262* (Mar. 27, 2014).

⁵ See Gregory H. Fox, *Guest Post: The Russia-Crimea Treaty*, *OPINIO JURIS* (Mar. 20, 2014).

the Yanukovich government would have lost the right to request military assistance from a third state such as Russia. After all, had Mr. Yanukovich still been regarded as the Head of State, an invitation to Russia to intervene militarily in Crimea would not have resulted in the alteration of the territorial integrity and status of Ukraine.⁶

The fate of former President Yanukovich exposes the weakness of democratic legitimacy as a requirement for the recognition of *de jure* governments in international law. The recognition of a government is of great legal consequence, as it identifies the authority that can send representatives to international organizations, accredit ambassadors, and conclude treaties (including those pertaining to military assistance) on behalf of the state, as well as dispose of the state's assets and natural resources. Even though the formal recognition of governments has fallen increasingly out of fashion since the 1980s and the term "recognition" may seem outdated, states in practice still recognize governments (albeit implicitly) by dealing with them as such.⁷

The purpose of this contribution is to map the rocky road that democratic legitimacy has travelled as a criterion for recognition of the *de jure* government over the last 20 years, in particular in Africa. Developments, notably in Sierra Leone in the 1990s, have raised the expectation that democratic legitimacy was becoming an additional or even an alternative criterion to effective control for the purpose of recognition of governments. However, the following analysis will illustrate that the practice of states and international organizations regarding democratic legitimacy as a requirement for governmental recognition is still too inconsistent to constitute customary international law as recognized by the International Court of Justice,⁸ meaning a settled state practice accompanied by *opinio juris*.

The discussion that follows reveals the inconsistent application of the doctrine of democratic legitimacy by states and international institutions by illuminating their reactions to unconstitutional changes of government in Africa since the end of the Cold War. The emphasis on Africa is due to the fact that this region has been the most affected by unconstitutional regime change and has therefore produced the most state practice in recent years. The greater concentration of unconstitutional changes of government in Africa does not mean, however, that the issue is of marginal relevance to other regions, as vividly illustrated by recent developments in Crimea. Moreover, state practice produced in one region can have precedential value in other regions. This in turn underscores the need to reassess the status of democratic legitimacy as a requirement for the recognition of governments in customary international law.

II. Democratic Legitimacy as a Challenge to the Effective Control Doctrine

Traditionally, effective control has served as the point of departure for identifying the *de jure* government of a state.⁹ In accordance with this view, the fact that a particular government came into power through a military coup, popular uprising, or civil war was irrelevant for the purpose of recognition. Rather than the manner in which governmental power was acquired or exercised, recognition hinged on demonstrable and sustainable effective control over the majority of the territory and over the state institutions, which would normally also necessitate control over the capital. Such control implied a certain degree of acquiescence on the part of the civilian population, in the sense that it refrained from attempts to overthrow the government.¹⁰ The principle of effective control was thus based on the fiction that control resembles the

⁶ de Wet, *supra* note 3.

⁷ Stefan Talmon, *Recognition of the Libyan National Transitional Council*, 15 ASIL INSIGHTS (June 16, 2011).

⁸ *Jurisdictional Immunities of the State* (Ger. v. It.), Judgment, 2012 ICJ REP. 99 (Feb. 3).

⁹ Dapo Akande, *Recognition of Libyan National Transitional Council as Government of Libya*, EJIL:TALK! (July 23, 2011).

¹⁰ Brad R. Roth, *Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, 11 MELB. J. INT'L L. 393 (2010).

population's acceptance of (or at least its acquiescence in) the incumbent government's right to represent the state as a whole. Recognition of a government could either take the form of a formal statement of recognition, or (as has become common since the late twentieth century) *de facto* dealings with the regime that was effectively in control over the territory.¹¹

This approach, according to which the facts on the ground were decisive in determining the status of a government, has been hailed as providing the only clear basis for the conduct of international relations in the decentralized international legal order. However, by the end of the Cold War, calls for a right to democratic governance and for accountability for human rights atrocities gained new momentum, as evinced, *inter alia*, by democratic elections in various Central and Eastern European States, and by the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY)¹² and Rwanda (ICTR),¹³ respectively. As a result of this new thrust towards democratic governance and respect for human rights, traditional recognition practices based on a "might is right" approach came under increasing attack in the international law literature. Instead, democratic legitimacy was propagated as the appropriate criterion for recognition of a new government.¹⁴

Although there is no single definition of democracy in these scholarly debates, the lowest common denominator seems to be a procedural definition that focuses on a free and fair electoral process. References to democracy in international legal discourse tend to regard free and fair elections as a minimum requirement for democratic governance. This approach also resonates with state and institutional practice in the 1990s.¹⁵ The international community rejected the internal overthrow of Haitian¹⁶ President Jean-Bertrand Aristide in 1991 and that of Sierra Leonean¹⁷ President Ahmad Tejan Kabbah in 1997. In both instances the governments were democratically elected by a very large margin and subsequently took control of the state apparatus, only to be ousted by military coups shortly afterwards. Despite the loss of effective control, both governments continued to be recognized by the international community as the legitimate government.¹⁸

Furthermore, in both instances, these leaders subsequently requested - and received - foreign military assistance in order to regain power. In the case of Haiti, the military intervention was also underpinned by a Chapter VII Resolution¹⁹ of the United Nations Security Council. In the case of Sierra Leone, the military intervention by the Economic Community of West African States (ECOWAS) at the request of the exiled Kabbah government was subsequently praised by UN Security Council resolutions, none of which, however, authorized the use of force under Chapter VII of the UN Charter.²⁰ However, these differences between the UN Security Council resolutions on Haiti and on Sierra Leone are not decisive for the point at issue, namely that in both instances the democratic legitimacy of the government carried more weight for the purpose of recognition than did actual effective control.²¹

¹¹ See Talmon, *supra* note 7.

¹² SC Res. 827 (May 25, 1993).

¹³ SC Res. 955 (Nov. 8, 1994).

¹⁴ Jean d'Aspremont, *The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks*, 22 EUR. J. INT'L L. 549 (2011).

¹⁵ Jure Vidmar, *Democratic Statehood in International Law*, EJIL:TALK! (Aug. 6, 2013).

¹⁶ SC Res. 841 (June 16, 1993).

¹⁷ SC Res. 1132 (Oct. 8, 1997).

¹⁸ de Wet, *supra* note 3.

¹⁹ SC Res. 1542 (Apr. 30, 2004).

²⁰ Erika de Wet, *The Evolving Role of ECOWAS and the SADC in Peace-Operations: A Challenge to the Primacy of the United Nations Security Council in Matters of Peace and Security?* 27 LEIDEN J. INT'L L. 353 (2014).

²¹ Karsten Nowrot & Emily W. Schbacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 312 (1998).

III. Institutional Ambivalence Towards the Democratic Legitimacy Doctrine

The Sierra Leonean intervention was accompanied by institutional changes within the African Union. The Constitutive Act of the African Union of 2000 condemns any unconstitutional change of government in Article 4(p).²² In 2007, the African Union adopted the *African Charter on Democracy, Elections and Governance*.²³ Article 25 of the Democracy Charter calls for the suspension of governments that came into power by unconstitutional means from the exercise of their right to participate in AU activities. It further provides for wide-ranging measures in response to unconstitutional changes of government, including the perpetrators' non-participation in elections held to restore the democratic order and their trial before the competent court of the African Union, as well as economic sanctions. In February 2012, the Democracy Charter entered into force²⁴ and currently has twenty-three states parties. While this treaty does not yet apply to the remaining thirty-one members of the African Union, they do fall under the scope of Article 4(p) of the AU Constitutive Act. The African Union itself has, however, not been consistent in its enforcement of Article 4(p). Although the African Union sanctioned the unconstitutional seizure of power in Togo (2005), the Comoros (2008), Guinea (2008), and Madagascar (2009), the African Union merely condemned similar behaviour in São Tomé and Príncipe (2003) and Côte d'Ivoire (2010). By 2009, no less than eight African regimes that came to power through coups were allowed to address the UN General Assembly without any objection by the African Union or the United Nations.²⁵

The continued tolerance of regimes established by coups in Africa is accompanied by the ambivalent treatment of popular rebellion against authoritarian regimes on the continent, as well as against democratically elected regimes. The African Union's ambivalence became evident during the early days of the Arab Spring, when authoritarian regimes in Egypt and Libya were faced with popular revolts. Similar inconsistencies plagued the responses of other states, including major Western powers, to recent developments in these two countries.

In the case of Libya, the revolt culminated in the military intervention by the North Atlantic Treaty Organization (NATO) following the adoption under Chapter VII of UN Security Council Resolution 1973 of 17 March 2011 and the ousting of the Qaddafi regime. Despite disagreement within the African Union about the extent to which regime change was foreseen by Resolution 1973 (2011), it subsequently recognized the National Transitional Council of Libya (NTC) as the legitimate government of Libya. In a statement in October 2011, the AU—while underscoring the uniqueness of the situation in Libya and the exceptional circumstances surrounding it—authorized the NTC²⁶ to occupy Libya's seat in the African Union and its organs. Outside of the AU, the NTC had already been recognized as the legitimate governing authority by thirty-two countries²⁷ (including the United Kingdom and the United States) on July 15, 2011.

The fact that the NTC did not come to power through a democratic electoral process prevented neither the African Union nor these thirty-two States, which formed part of the Libya Contact Group, from recog-

²² *Constitutive Act of the African Union*, July 11, 2000.

²³ African Union (AU), *African Charter on Democracy, Elections and Governance* (Jan. 30, 2007).

²⁴ *Accelerating Member State Ratification of the African Charter on Democracy, Governance and Elections*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE (June 26, 2014).

²⁵ Zeray Yihdego, *Democracy, Peoples' Uprising and Unconstitutional Change of Government in Egypt: The African Union Principles and Responses*, EJIL:Talk! (July 8, 2013); See Roth, *supra* note 10.

²⁶ Peace and Security Council of the African Union (AU), *Communiqué of the 297th Meeting of the Peace and Security Council*, PSC/PR/COMM/2.(CCXCVII) (Oct. 20, 2011).

²⁷ *Fourth Meeting of the Libya Contact Group Chair's Statement, 15 July 2011, Istanbul*, REPUBLIC OF TURK. MINISTRY OF FOREIGN AFFAIRS (July 15, 2011).

nizing it as the legitimate government of Libya. In the case of the AU, the recognition took place at a time when the NTC was in effective control of most of the territory, a fact that may have contributed to the AU's acquiescence in the NTC's status as the recognized government.²⁸ However, doubts have been expressed as to whether the NTC was in effective control at the time of its recognition by the thirty-two States forming part of the Libya Contact Group. If not, then its recognition would have been premature and constituted illegal interference in the affairs of another state.²⁹ The United Nations accepted the credentials of the NTC³⁰ on September 16, 2011.

As regards Egypt, the African Union neither condemned the mass demonstrations against the authoritarian regime of President Mubarak in February 2011, nor did it explicitly come out in support of popular uprisings in favor of democratic elections.³¹ Subsequently, the African Union did reject the ouster of democratically elected Egyptian President Mohamed Morsi in 2013 as an unconstitutional change of government. President Morsi was removed from power by the military barely one year after winning the Egyptian elections in 2012. At the time of his removal, he was facing extensive popular protests, and millions of Egyptians had demanded his resignation.³² Nevertheless, the African Union emphasized³³ that the overthrow of a democratically elected President was unconstitutional and suspended Egypt from its activities until constitutional democracy was restored. On the other hand, Western countries³⁴ including the United States and members of the European Union were reluctant to call the ouster a coup or demand President Morsi's reinstatement.

Inconsistencies also plagued African and other responses to the coups in Guinea-Bissau (a party to the Democracy Charter) and Mali in 2012. While the African Union condemned³⁵ the coup and suspended Guinea-Bissau from its activities, ECOWAS supported³⁶ a process of cooperation with the coup government aimed at restoring democracy, despite its condemnation of the coup. The United Nations³⁷ and the European Union³⁸ condemned the coup and called for a reinstatement of the democratically elected government.

In the case of Mali, the junta responsible for the military coup against President Amadou Touré in March 2012 was subsequently accommodated in the transitional government³⁹ that took office in August 2012. This government was swiftly recognized⁴⁰ by the African Union, and the UN Security Council praised⁴¹ military assistance by France at the invitation of this government, due to the deterioration of the security situation in

²⁸ Stefan A.G. Talmon, *Recognition of Opposition Groups as the Legitimate Representative of a People*, 12 CHINESE J. INT'L L. 219 (2013).

²⁹ See Akande, *supra* note 9.

³⁰ GA Res. 66/1 (Sept. 16, 2011).

³¹ See Yihdego, *supra* note 25.

³² *Id.*

³³ Peace and Security Council of the African Union (AU), *Communiqué of the 384th Meeting of the Peace and Security Council*, PSC/PR/COMM.(CCCLXXXIV) (July 5, 2013).

³⁴ *World Reaction to the Ousting of Egypt's Mohammed Morsi*, BBC NEWS (July 4, 2013).

³⁵ Peace and Security Council of the African Union (AU), *Communiqué of the 318th Meeting of the Peace and Security Council*, PSC/PR/COMM.(CCCXVIII) (Apr. 17, 2012).

³⁶ Security Council, *Situation in Guinea-Bissau Marked by Insecurity, Impunity, Despite Recent Political Progress towards Development of Transitional Road Map, Security Council Told*, SC/10907 (Feb. 5, 2013).

³⁷ SC Res. 2048 (May 18, 2012).

³⁸ Council Conclusions on Guinea-Bissau (EC) No. 8857/12 of 23 Apr. 2012, 2012 O.J.

³⁹ ECOWAS, *Extraordinary Session of the Authority of ECOWAS Heads of State and Government: Final Communiqué* (Nov. 11, 2012).

⁴⁰ Peace and Security Council of the African Union (AU), *Communiqué of the 332nd Meeting of the Peace and Security Council*, PSC/PR/COMM.(CCCXXXII) (Sept. 4, 2012).

⁴¹ SC Res. 2100 (Apr. 25, 2013).

the north of Mali. Finally, in August 2013 elections⁴² were held, and President Ibrahim Keita was elected President.

The most recent coup in Africa (at the time of writing) was the ouster of former President Bozize of the Central African Republic (CAR) by the Seleka rebels in March 2013. In this instance, the African Union suspended the CAR from its activities and imposed sanctions, travel restrictions, and an asset freeze on the Seleka's leaders in response to the coup. Subsequently, in April 2013, a National Transitional Council came into being through the mediation efforts of an international contact group.⁴³ Although broadly representative of the different ethnic and religious groups in the state, the National Transitional Council was not democratically elected. It subsequently designated Ms. Catherine Samba-Panza as a transitional Head of State in January 2014. The African Union⁴⁴ and the United Nations⁴⁵ swiftly endorsed the National Transitional Council as interim Parliament, as well as its designation of the new Head of State. In July 2014, President Samba-Panza requested the resignation of the Prime Minister⁴⁶ and his cabinet, after negotiation with rebel groups and in an attempt to bring the sectarian violence in the country to an end. These far-reaching changes to the government in the absence of democratic elections did not affect the (continued) international recognition of the transitional President.

IV. Assessment

The preceding overview has revealed inconsistencies in the international community's reactions to unconstitutional changes of government in Africa. In essence, these inconsistent state responses suggest that democratic legitimacy is not (yet) a requirement for the recognition of a given African government either within the African Union or beyond. Seizing power in an unconstitutional manner in violation of Article 4(p) of the AU Constitutive Act or the *African Charter on Democracy, Elections and Governance* would not necessarily lead to non-recognition of the resulting government within the African Union. Similar inconsistent reactions by States from outside Africa to unconstitutional regime change on the continent further suggest the absence of any customary international obligation prohibiting unconstitutional changes of government. The flip side of this conclusion is that democratic legitimacy is not yet a requirement for the recognition of a *de jure* government under customary international law.

Although international legal scholarship since the 1990s may have raised high hopes in this regard, state practice in Africa—the region with the highest occurrence of unconstitutional change of government—does not support them. While the fact that a government was democratically elected can have an impact on its recognition by other states, it is not decisive under international law. Stated differently, while customary international law permits states to take into consideration the democratic legitimacy of a government for the purposes of recognition, it does not yet require them to do so. Similarly, the unconstitutional ouster of an elected government can lead to the withholding of *de jure* recognition. However, state practice does not yet support the conclusion that customary international law would oblige states to withhold recognition of a government that came into power through unconstitutional means.

⁴² *Mali Dismisses Candidates for Fraud in Elections*, REUTERS (Jan. 1, 2014).

⁴³ International Contact Group on the Central African Republic, *Press Statement of the Inaugural Meeting of the International Contact Group on the Central African Republic* (May 3, 2013).

⁴⁴ Peace and Security Council of the African Union (AU), *Communiqué of the 363rd Meeting of the Peace and Security Council*, PSC/PR/COMM.(CCCLXIII) (Mar. 25, 2013).

⁴⁵ *SC Res. 2149* (Apr. 10, 2014).

⁴⁶ David Ludwig, *Central African Republic's Prime Minister and Cabinet Resign*, THE WIRE (Aug. 5, 2014).

Seen from this perspective, the ouster of the Yanukovych government (the example given at the outset of this contribution) was not, as such, a violation of international law, nor was the recognition of its successor government. Moreover, the fates of the Yanukovych regime in Ukraine and the Morsi regime in Egypt also illustrate that the democratic legitimacy of a government is not necessarily a guarantee of its ability to conduct stable international relations. Accordingly, states will continue to apply the democratic legitimacy criterion as one of various factors to consider when recognizing a government—the most important of these, however, still being effective control.