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THE ROLE OF THE GENERAL ASSEMBLY IN DETERMINING THE LEGITIMACY OF GOVERNMENTS

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Abstract In 2021, unconstitutional transfers of power in Myanmar and Afghanistan highlighted that while States may desire a coherent response to questions about the status of governments, and may look for international guidance in such regard, there is no established process for providing such guidance. Thus, attention focuses on the General Assembly's credentials process, designed to assess the eligibility of delegates to represent their States at the UN. This article proposes that rather than the credentials process being stretched in this way, greater use should be made of the Assembly's competence to pass determinative resolutions on government legitimacy.

Keywords: recognition of governments, representation of States, United Nations General Assembly, credentials, legitimacy.

I. INTRODUCTION

In 2021, two events highlighted the persisting obscurity of the international law relating to the recognition of governments, and the related issue of their representation at the UN. In February, Myanmar's military overthrew the civilian government, which had won power in elections the previous November. In April a committee representing the elected parliamentarians announced the establishment of a National Unity Government,[1] but as of early 2022, the junta's power looked set to hold. Then in August 2021 the Taliban took control of Afghanistan, forcing the elected president into exile and ending a decades-long insurgency against the internationally supported government.[2] In relation to both countries, two fundamentally important questions immediately arose. First, would States recognise the new regimes? And second, who would represent Afghanistan and Myanmar at the General

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[1] See 'Opponents of Myanmar Coup Form Unity Government, Aim for "Federal Democracy"' (*Reuters*, 16 April 2021) <https://www.reuters.com/world/asia-pacific/opponents-myanmar-coup-announce-unity-government-2021-04-16/>.

[2] See H Ellis-Petersen, 'Taliban Declares "War is over in Afghanistan" as Foreign Powers Exit Kabul' *The Guardian* (London, 16 August 2021) <https://www.theguardian.com/world/2021/aug/16/taliban-declares-war-is-over-in-afghanistan-as-us-led-forces-exit-kabul>.

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Assembly? And moreover, what was the relationship between these two questions?

In relation to Afghanistan in particular, the political rhetoric of States affirmed the well-established consensus that it is the prerogative of States to choose whether to recognise foreign governments.[3] But what was not so clear was the legal implications of these unilateral decisions. Could the Taliban or the junta lawfully be denied access to State assets held in foreign banks? Could their representatives be denied diplomatic privileges and immunities, available to governments in international law? Could either of the deposed governments request and receive foreign military assistance, based on the recognition decisions of third States? Such questions raise a further question: is the discretion of States to recognise/not recognise other governments really unfettered, in international law?

While the international reaction to events in Afghanistan indicated that States were making their own recognition decisions, it was at the same time clear that there was a desire for a coherent international response. British Prime Minister Boris Johnson said in an appeal to States: 'we don't want anyone to bilaterally recognise the Taliban'.[4] In relation to Myanmar, while States were not quite so vocal on the matter of recognition, international organisations could not avoid such decisions. Following the unfortunate scenario in the first half of 2021 of Myanmar being represented at the General Assembly by a representative of its former civilian government, and simultaneously at the Human Rights Council and the Economic and Social Commission for Asia and the Pacific by a representative of the junta, at least two international bodies opted to deny Myanmar a seat at the table altogether, 'pending guidance' from the General Assembly.[5]

[3] See statements made in the UN Security Council (UNSC), available on C-SPAN, 'UN Security Council Holds Meeting on Afghanistan' (C-SPAN, 16 August 2021) <https://www.c-span.org/video/?514104-1/un-security-council-holds-meeting-afghanistan>; also statements cited in T Bridgeman and R Goodman, 'Expert Backgrounder: Recognition and the Taliban' (Just Security, 17 August 2021) <https://www.justsecurity.org/77794/expert-backgrounder-recognition-and-the-taliban/>.

[4] R Mason, 'Boris Johnson Urges International Unity over Taliban as He Recalls Parliament' *The Guardian* (London, 15 August 2021) <https://www.theguardian.com/politics/2021/aug/15/boris-johnson-urged-to-recall-parliament-over-afghanistan-crisis>.

[5] On Myanmar's representation at the Human Rights Council, see L Johnson, 'What's Wrong with This Picture? The UN Human Rights Council Hears the Military Junta as the Legitimate Government of Myanmar' (EJIL:Talk!, 31 March 2021) <https://www.ejiltalk.org/whats-wrong-with-this-picture-the-un-human-rights-council-hears-the-military-junta-as-the-legitimate-government-of-myanmar/>; for Myanmar's representation at the Economic and Social Commission for Asia and the Pacific (ESCAP), see ESCAP, 'Country Statement by H.E. Mr. Than Aung Kyaw, Deputy Minister for Investment and Foreign Economic Relations, Myanmar, on the Occasion of the 77th Session of ESCAP' (26–29 April 2021) <https://unescap.org/sites/default/d8files/2021-04/Myanmar_Statement_CS77.pdf>; and for the approach taken subsequently by international bodies, see World Health Organisation, 'Report of the Credentials Committee' (26 May 2021) A74/56; International Labour Organization, 'Reports on Credentials: Second Report of the Credentials Committee' (7 June 2021) ILC.109 / Record No 3B.

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While a united international response in such scenarios may be desirable, there is no established process in international law or practice for collectively determining the status of governments. In the case of both Afghanistan and Myanmar, in September 2021 the new regimes and deposed governments both claimed the right to represent their States at the General Assembly.[6] As such, all eyes turned to the Assembly's Credentials Committee, tasked with assessing the eligibility of delegates to represent their States at the Assembly's 76th session.[7] Actors within the UN system have described the assessment of credentials as a procedural process, not to be confused with the broader political question of government legitimacy.[8] However, in the absence of any competing process for collectively determining governmental status, the credentials process is inevitably looked upon by States and other parts of the UN as a point of reference on such matters. This article asserts that rather than the credentials process being stretched in this manner—that is, looked upon to serve a purpose for which it was not designed, and which actors within the UN system have explicitly resisted—in situations in which the international community seeks guidance on the question of which authority should be regarded as the government of a State, a more appropriate course is for the Assembly to pass a resolution expressly communicating its views on the matter, and recommending to States and international organisations that they take the Assembly's views into account in their engagement with the concerned State.

This article begins, in Part II, by reviewing the concept of recognition in international law. It reviews the well-established consensus regarding the discretion of States to recognise or not recognise other governments, and asserts that even if the unfettered discretion of States in this regard must be accepted, it does not follow that States may unilaterally determine the rights of other governments in international law. Because of the limits of State competence in this regard, in marginal cases States look to the attitude adopted by the international community, as do domestic courts—albeit there being no established process for either the adoption or communication of such attitude. Part III then considers the role of the General Assembly. It first considers the Assembly's credentials process, and then considers the Assembly's competence to pass resolutions on matters pertaining to the status

[6] See UNGA, 'Report of the Credentials Committee' (1 December 2021) UN Doc A/76/50, paras 7–8.

[7] See eg R Gladstone, 'Quandary at the U.N.: Who Speaks for Myanmar and Afghanistan?' *The New York Times* (New York, 11 September 2021) <https://www.nytimes.com/2021/09/11/world/un-ambassadors-myanmar-afghanistan.html>.

[8] See UNSC, 'Letter Dated 8 March 1950 from the Secretary-General to the President of the Security Council Transmitting a Memorandum on the Legal Aspects of the Problem of Representation in the United Nations' (1950) UN Doc S/1466; UNGA, 'Scope of "Credentials" in Rule 27 of the Rules of Procedure of the General Assembly: Statement by the Legal Counsel Submitted to the President of the General Assembly at his Request' (11 November 1970) UN Doc A/8160.

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of governments, and to make recommendations to States and international organisations in such regard. Part IV then considers what criteria the General Assembly might appropriately use, if it were to pass a resolution expressing its view on the legitimacy or illegitimacy of a government in a contentious situation.

II. RECOGNITION AND ITS LEGAL IMPLICATIONS

A. Government Policies 'Not to Recognise', and the Inevitability of Recognition

Most governments today have a policy of not explicitly recognising new governments. This is largely so as to avoid having to make, and announce, difficult political decisions following transfers of power.[9] Such policies have their origins in a policy developed in 1930 by Mexican Foreign Secretary Genaro Estrada. Pursuant to that policy—which subsequently became known as the 'Estrada doctrine'—it was announced that Mexico would henceforth issue 'no declaration in the sense of grants of recognition, since [Mexico] considers that such a course … implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments'.[10] In 2016, a study conducted by the International Law Association's Committee on Recognition/Non-Recognition in International Law found that 'the reasoning of the Estrada Doctrine finds place today in the practice of most of the States studied'.[11]

It is pertinent to note that, non-recognition policies notwithstanding, following a political transition in another State, third States still need to decide whether—for purposes of diplomatic, economic and trade relations—they will treat the new authority as the government of the State.[12] In this sense, Estrada-like policies must be understood not as policies 'not to recognise', but rather, as policies not to make—or at least not to be called upon to make—public statements regarding recognition. In most cases, this simply means that newly incumbent governments are accepted without comment regarding that government's legitimacy. As Brad Roth explains, such policies typically amount to 'automatic acknowledgment of

[9] For an explanation and discussion of the policies of States, see eg US Department of State, 'Diplomatic Recognition' (1977) 77 Department of State Bulletin 426; Australian Department of Foreign Affairs and Trade (DFAT), 'Australia's New Recognition Policy' (1988) 611 Backgrounder, reproduced in 'Recognition' (1988–89) 12 AustYBIL 357; H Charlesworth, 'The New Australian Recognition in Comparative Perspective' (1991) 18 MULR 1; C Warbrick, 'The New British Policy on Recognition of Governments' (1981) 30 ICLQ 568; HC Deb 23 May 1980, vol 985, col 385W.

[10] PC Jessup, 'The Estrada Doctrine' (1931) 25 AJIL 719.

[11] AT Saliba, 'Recognition/Non-Recognition in International Law' (2016) 77 IntlLAssRepConf 538.

[12] See LV Albari, 'The Estrada Doctrine and the English Courts: Determining the Legitimate Government of a State in the Absence of Explicit Recognition of Governments' (2016) 29 HagueYBIntlL 171, 176–7; S Talmon, 'Recognition of Governments: An Analysis of the New British Policy and Practice' (1992) 63 BYBIL 231, 238.

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governments exercising effective control, on the unspoken assumption that effective control has constituted … the internationally authoritative criterion for an apparatus's standing as the State's government'.[13]

Following military coups or other unconstitutional transfers of power, however, newly incumbent governments cannot be so easily accepted without attention to the question of legitimacy. In such cases, not only must States make quiet decisions regarding their bilateral engagement with the new regime; they may also feel compelled to publicly announce whether they recognise the new regime as the government of the State. Following the assumption of power by the Taliban in Afghanistan in 2021, for example, US Secretary of State Antony Blinken said that:

> a future Afghan government that upholds the basic rights of its people and that doesn't harbor terrorists is a government we can work with *and recognize*. Conversely, a government that doesn't … uphold the basic rights of its people, … [and] that harbors terrorist groups …, certainly that's not going to happen.[14]

Kenya, speaking on behalf of Kenya, Tunisia, Saint Vincent and the Grenadines and Niger, said 'we believe that the international community does not wish for peace processes to reward and legitimise the use of military interventions and association with terrorist organisations through political recognition'.[15] Canada, similarly, announced that it would not recognise the Taliban because it had 'taken over and replaced a duly elected democratic government by force' and was a recognised terrorist organisation.[16]

History provides many other examples of States explicitly pronouncing on the status of governments, Estrada-like policies notwithstanding. Following the military coup in Haiti in 1991, for example, several States said they recognised the legitimacy of the deposed government, and the General Assembly passed a resolution demanding 'the immediate restoration of the legitimate government of President Jean-Bertrand Aristide'.[17] In 1998, following the military coup in Sierra Leone the preceding year, the British Foreign Secretary said that 'Britain continued to recognise President Kabbah as the legitimate Head of Government'.[18] Following the establishment of the National Transitional Council (NTC) in Libya in 2011, 32 States issued a statement declaring that 'the Qaddafi regime no longer has any legitimate

[13] B Roth, *Sovereign Equality and Moral Disagreement* (Oxford University Press 2011) 200.

[14] Quoted on CNN, 'State of the Union' (15 August 2021) transcript at: <https://transcripts.cnn.com/show/sotu/date/2021-08-15/segment/02> (emphasis added).

[15] Available on C-SPAN (n 3).

[16] B Ellsworth, 'Canada Will Not Recognize Taliban as Government in Afghanistan' (Anadolu Agency, 17 August 2021) <https://www.aa.com.tr/en/americas/canada-will-not-recognize-taliban-as-government-in-afghanistan/2338369#>.

[17] UNSC, 'Provisional Verbatim Record' (3 October 1991) UN Doc S/PV.3011; UNGA Res 46/7 (11 October 1991) UN Doc A/RES/46/7; and see discussion in B Roth, *Government Illegitimacy in International Law* (Oxford University Press 2000) 372–3.

[18] HC Deb 12 May 1998, vol 312, cols 153–66.

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authority', and that they would 'deal with the [NTC] as the legitimate authority in Libya'.[19] More recently, in 2019 and again in 2020, the UK announced—similarly to numerous other States—that it 'recognises Juan Guaidó as the constitutional interim President of Venezuela'.[20]

In short, governments do still make decisions about whether or not to recognise other governments, and they do still on occasions—particularly following military coups or other unconstitutional transfers of power, where there is a perceived political interest in publicly dissociating from a rogue regime—announce these decisions publicly. What is more difficult to discern, however, is the relevance of such decisions and announcements to the assessment of an entity's actual legal status, insofar as that status is determinative of rights and responsibilities in international law.

As such, the statements quoted above regarding the recognition of governments raise a critical question that—despite considerable academic commentary—is not yet adequately answered by international law. Is the decision regarding whether or not to recognise a new government, with all concomitant rights and responsibilities in international law, one that governments may make unilaterally? And more fundamentally, if such decisions are *not* made by third States unilaterally, who *does* make them, and by what process? The first of these questions is considered in the following two sections, while the second is considered in Part III of this article.

B. The Discretion of States to Recognise or Not Recognise Governments

There is no question in international law that governments may freely determine their bilateral relations with other governments. Governments are free to close their embassies, refuse to meet with heads of State, decline to enter into bilateral treaties, and make any other decisions pertaining to their bilateral engagement, insofar as those decisions are not otherwise regulated by international law. The expulsion of Russian diplomats from several countries in March–April 2021 in protest over Russia's secret service operations provides a recent example;[21] as does France's decision in September 2021 to recall its ambassadors from Australia and the US following Australia's cancellation of an expensive submarine deal.[22] Such actions cannot be equated with 'non-recognition'. As Colin Warbrick explains, the severance of diplomatic relations in contexts of

[19] Republic of Turkey, Ministry of Foreign Affairs, 'Fourth Meeting of the Libya Contact Group Chair's Statement' (Istanbul, 15 July 2011) <https://www.mfa.gov.tr/fourth-meeting-of-the-libya-contact-group-chair_s-statement_-15-july-2011_-istanbul.en.mfa>.

[20] Cited in *'Maduro Board' of the Central Bank of Venezuela v 'Guaidó Board' of the Central Bank of Venezuela* [2021] UKSC 57, paras 16, 38.

[21] See 'Russia-West Ties Hit Low with Diplomatic Expulsions' (*Deutsche Welle*, 1 May 2021) <https://www.dw.com/en/russia-west-ties-hit-low-with-diplomat-expulsions/a-57396860>.

[22] See R Cohen and MD Shear, 'Furious over Sub Deal, France Recalls Ambassadors to U.S. and Australia' *The New York Times* (New York, 17 September 2021) <https://www.nytimes.com/2021/09/17/world/europe/france-ambassador-recall-us-australia.html>.

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relatively stable governance 'may take on the character of a sanction for an international wrong by the other State'.[23]

State practice, scholarly writing and the jurisprudence of domestic courts suggest, however, that the freedom of States vis-à-vis foreign governments is not limited to decisions about diplomatic relations. Rather, practice and jurisprudence seemingly assert that States are also free to decide, unilaterally, whether or not to recognise the actual legal status of a foreign entity as the government of a State. A legal memorandum on the representation of States in the UN, transmitted by UN Secretary-General Trygve Lie in 1950, described 'according or withholding recognition' as 'essentially a political decision, which each State decides in accordance with its own free application of the situation'.[24] The political statements cited in the preceding section regarding the non-recognition of particular regimes are in line with this, as is the fact that in the first half of the twentieth century, many States had policies of formally and explicitly recognising new governments. When governments moved to abandon these policies, such moves were not prompted by the notion that they were not legally entitled to decide whether or not to recognise foreign governments, but—as indicated above—by the desire not to have to communicate those decisions in contentious cases.[25]

In the British context, the discretion of the government to recognise or not recognise other governments has been affirmed by the British courts, in a long line of cases in which the courts have been called upon to settle problems arising from the question of whether a particular entity has the legal status of a government. Since 1980 the British Government has had a policy of not formally recognising other governments;[26] however, as recently observed by Lord Lloyd Jones SCJ in *"Maduro Board" of the Central Bank of Venezuela v "Guaidó Board" of the Central Bank of Venezuela*, 'notwithstanding this announced policy', the Government has still on occasions 'recognised or formally declined to recognise a foreign government where it considers it appropriate to do so'.[27] Lord Lloyd Jones SCJ affirmed in that case that—again notwithstanding the 1980 policy shift—there was 'nothing to prevent [the Government] … from tendering to the courts an unequivocal certificate of recognition or non-recognition of the existence of a foreign government', and that where the Government 'does issue a formal statement of recognition or non-recognition', that will be 'taken by the Court as conclusive'.[28] He said that the Government's statement of recognition was binding on the Court, because:

> it is for the executive to decide with which entities or persons it will have relations on the international plane. Where the executive makes an express statement of

[23] Warbrick (n 9) 569.
[24] UNSC, 'Memorandum on the Legal Aspects of Representation' (n 8).
[25] See references cited at (n 9).
[26] HL Deb 28 April 1980, vol 408, cols WA1121-2.
[27] *'Maduro Board'* (n 20) para 68.
[28] ibid para 68.

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> recognition of a government or head of state the courts will speak with the same voice, in accordance with the one voice principle.[29]

A similar approach has been taken in other jurisdictions including in the US, Canada and South Africa.[30] Summarising the approach taken by the US courts on the status of governments, John Hervey concludes that 'the recognition function is vested in the political departments of the government and may be exercised at their discretion', and that '[o]nce those departments have acted, whether favourably or unfavourably, the courts are bound thereby'.[31]

This consensus regarding the discretion of governments to recognise or not recognise, coupled with the notion that such decisions are binding on national courts, is arguably problematic, because it suggests that the government's power to recognise or not recognise is unconstrained by law.[32] It suggests that not only do governments have unfettered discretion in deciding whether or not to recognise other governments, but that courts are then bound to accept—and apply—the legal implications of those decisions. Thus, at the domestic level, governments have unfettered discretion to determine, among other things: which entities or individuals may access State assets held in banks within the jurisdiction of the recognising government; which entities or individuals have standing in courts within that jurisdiction; and which entities may enter into bilateral treaties with the recognising government. While at the domestic level this legal status quo may be justified by the cognisance of the executive vis-à-vis matters of foreign affairs, it becomes more problematic if the competence of governments to determine the rights and responsibilities of other governments is extended to the international plane.

As Patrick Capps has observed with regard to the British context, the approach taken by the courts could result in the courts being obliged to accept 'international wrongs for which the UK would be responsible' under international law.[33] Jurisprudence in the UK and elsewhere arguably implies, for example, that not only could governments unilaterally determine matters such as which entities/individuals may access assets held in banks within their jurisdiction, but also matters such as which entities may legally request and receive foreign military assistance, and which entities/individuals are entitled to immunity—matters regulated by international law. Such a scenario clearly does not promote consistency and coherence in international law. As such, if we must accept as doctrine the political discretion of States vis-à-vis the recognition of governments, it seems necessary to at the same time

[29] ibid para 79.

[30] G Barrie, 'Non-Recognition of Interim Government of Somalia: Locus Standi of Such Government' (1994) 1994 SALJ 384; see also Albari (n 12) 173; J Hervey, *The Legal Effects of Recognition in International Law: As Interpreted by the Courts of the United States* (University of Pennsylvania Press, PA 2016) 156.

[31] Hervey (n 30) 156.

[32] See discussion in P Capps, 'British Policy on the Recognition of Governments' [2014] PL 230, 231.

[33] ibid 230.

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clearly delineate the legal implications of such recognition, and in particular, the implications of unilateral recognition for international law.

C. Delimiting the Legal Implications of Decisions to Recognise / Not Recognise

It has been noted above that State practice and domestic jurisprudence affirm the unfettered discretion of governments to recognise or not recognise other governments. It is pertinent to note, however, that this discretion has been affirmed as operating at the domestic level for domestic purposes. Put otherwise, the fact that Government A has unfettered discretion to recognise/not recognise Government B, and that such decision is not open to interrogation by domestic courts, does not mean that Government A can unilaterally determine the rights and responsibilities of Government B for purposes of international law.[34] While jurisprudence and indeed scholarly writing on this issue is limited, the point is illustrated by the international reaction to situations in which individuals and entities claiming to be governments have requested foreign military intervention.

It is well-established in international law that States may intervene militarily in another State at the request of the host government,[35] but not at the request of the opposition or a rebel group.[36] In situations of disputed governance, traditionally the test for determining which entity may request and receive military assistance has hinged on the question of effective control.[37] Since the 1990s, however, State practice has evolved, and there has been an increasing willingness on the part of the international community to accept the entitlement of a democratically elected government to request and receive military assistance, despite lack of territorial control. State practice in this area goes some way towards elaborating what it takes for a government to be recognised as a government for purposes of international law, and highlights that such status is not determined by governments acting unilaterally.

[34] Some scholars have recognised that recognition decisions do not necessarily determine the legal status of governments for purposes of international law: see Roth, *Government Illegitimacy* (n 17) 2; S Talmon, *Recognition of Governments in International Law* (Oxford University Press 2001) 29–30; J Serralvo, 'Government Recognition and International Humanitarian Law Applicability in Post-Gaddafi Libya' (2015) 18 YIHL 3, 21.

[35] See M Byrne, 'Consent and the Use of Force: An Examination of "Intervention by Invitation" as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen' (2016) 3 JUFIL 97, 101; E de Wet, 'From Freetown to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition' (2014–15) 108 AJIL Unbound 201; M Zamani and M Nikouei, 'Intervention by Invitation, Collective Self-defence and the Enigma of Effective Control' (2017) 16 ChineseJIL 663, 666.

[36] UNGA Res 2625(XXV) (24 October 1970) UN Doc A/RES/2625(XXV); *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14, 246; and see discussion in de Wet (n 35) 201; Zamani and Nikouei (n 35) 666.

[37] GH Fox, 'Intervention by Invitation' in M Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 817.

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Following military coups in Haiti (1991) and Sierra Leone (1997), the deposed democratically-elected governments both requested, and received, military assistance. In the case of Haiti, deposed President Aristide requested that the international community take action to restore him to office,[38] and the Security Council responded by authorising a multinational force to 'facilitate the departure … of the military leadership'.[39] In the case of Sierra Leone, President Kabbah appealed to Nigeria for military assistance, and Nigeria responded by leading a force under the auspices of the Economic Community of West African States (ECOWAS) to restore Kabbah to power. The intervention was not authorised by the Security Council; however, by the time of the intervention the coup had been condemned by both the Organisation of the African Union (OAU) and the Security Council, and the Security Council had imposed sanctions on the junta.[40] The Security Council welcomed the ECOWAS intervention.[41]

Following the military coup in Mali in 2012, the Security Council similarly condemned 'the forcible seizure of power from the democratically-elected government', and on this occasion authorised a stabilisation force to support the Malian authorities to recover control.[42] The Council-mandated force failed to deploy in time, however, and the deposed Malian Government subsequently requested—and France provided—further military intervention.[43] As with Haiti, the intervention was welcomed by the Security Council.[44]

In 2015, Saudi Arabia led a multi-national intervention against the Houthi rebels in Yemen, at the request of ousted President Hadi.[45] The intervention was not authorised by the Security Council; however, similarly to the Sierra Leone scenario, it was preceded by a Council resolution condemning the coup and implicitly affirming the legitimacy of Hadi's government.[46] Subsequent to the intervention, the Security Council passed a resolution 'reaffirming its support for the legitimacy of the President of Yemen', and—albeit not explicitly welcoming the intervention—'noting' the request for intervention from the 'legitimate Government of Yemen'.[47]

[38] UNSC, 'Letter from the Permanent Representative of Haiti to the United Nations Addressed to the Secretary General' (29 July 1994) UN Doc S/1994/905.

[39] UNSC Res 940 (31 July 1994) UN Doc S/RES/940.

[40] UNSC Presidential Statement 29 (1997) UN Doc S/PRST/29; UNSC Presidential Statement 36 (1997) UN Doc S/PRST/36; UNSC Presidential Statement 42 (1997) UN Doc S/PRST/42; UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132; and on the OAU's response see A Meldrum, 'Coups No Longer Acceptable: OAU' (African Renewal, July 1997) <https://www.un.org/africarenewal/magazine/july-1997/coups-no-longer-acceptable-oau>.

[41] UNSC Presidential Statement 5 (1998) UN Doc S/PRST/5.

[42] UNSC Res 2056 (5 July 2012) UN Doc S/RES/2056; UNSC Res 2085 (20 December 2012) UN Doc S/RES/2085.

[43] See discussion in Fox (n 37) 825.

[44] UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100.

[45] See Zamani and Nikouei (n 35) 688.

[46] UNSC Res 2201 (15 February 2015) UN Doc S/RES/2201.

[47] UNSC Res 2216 (14 April 2015) UN Doc S/RES/2216.

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In all these cases, the deposed governments that requested and received military assistance were democratically elected but lacked territorial control. All the interventions were widely regarded as legal, albeit only the Haiti intervention being authorised by the Security Council. As such, these cases challenge the traditional consensus regarding effective control as the key criterion for determining whether an entity may consent to foreign military intervention. Critically, what these cases also have in common is that the ousted governments were recognised by the international community—as indicated in Security Council resolutions, and in the African cases pronouncements of ECOWAS and/or the OAU—as the legitimate governments of their States.

Standing in contrast to these cases is Russia's military intervention in Ukraine in 2014. Russia justified the intervention by citing the request of ousted Ukrainian President Yanukovych;[48] however, it was regarded by scholars and States alike as illegal.[49] Thus, Russia was seemingly not at liberty to unilaterally decide upon the legitimacy of ousted President Yanukovych, and to intervene militarily at his request.

What these military intervention cases suggest is that while in most cases the question of effective control will still determine which authority may request and consent to foreign military intervention, this default position may be displaced by international consensus regarding the legitimacy of the ousted government. In short, if recognition is to be understood as a unilateral political decision that States may make according to their own criteria, then it must also be understood that this unilateral act does not conclusively determine a government's rights and responsibilities in international law. In order to determine such rights and responsibilities, what is required is international recognition.

This conclusion begs two important questions. First, if questions of government status, insofar as that status is determinative of legal rights and responsibilities, must in cases of contested governance be determined internationally rather than unilaterally by States, what body makes such determination? And second, if we are to accept that in some circumstances the question of government status may be determined with reference to criteria other than effective control, as the military intervention cases show, what are the criteria to be used? These questions are addressed, in turn, in the remaining parts of this article.

III. THE ROLE OF THE UN GENERAL ASSEMBLY

As shown, the primary reason for which an authoritative, collective determination regarding the status of governments—insofar as such a

[48] See discussion in O Corten, 'The Russian Intervention in the Ukrainian Crisis: Was *Jus contra Bellum* "Confirmed Rather Than Weakened"?' (2015) 2 JUFIL 17.

[49] See UNGA Res 68/262 (27 March 2014) UN Doc A/RES/68/262; and discussion in ibid 19.

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determination may be possible—is desirable for international law and practice is to clarify the rights and responsibilities of entities claiming to be governments for purposes of international law. Beyond this, however, there are at least three types of decisions in relation to which decision-makers may wish to have regard to an international determination regarding governmental status.

First, while governments are free to engage bilaterally with whomever they choose, and to publicly announce which entities they recognise as governments, in doing so they may wish to 'follow certain legal principles',[50] or may desire a 'united position', as suggested by British Prime Minister Boris Johnson in relation to the Taliban in Afghanistan in 2021.[51] Second, where national governments do *not* make explicit recognition statements, national courts on occasions need to determine which entity is to be regarded as the government for domestic purposes. In the British context, the courts have said that in such cases they will apply a four-part test in order to assess the status of a government. The first three parts of the test consider issues of constitutionality, administrative control, and the nature of dealings between the entity in question and the UK Government. The fourth part, to be applied in 'marginal cases', considers 'the extent of international recognition that [the entity in question] has as the government of a State.'[52]

The third type of decision in relation to which decision-makers may wish to refer to a collective determination regarding the status of a government concerns the representation of States in international bodies. The most important of these is the General Assembly, but decisions also need to be made regarding the representation of States in the other organs, subsidiary bodies and specialised agencies of the UN. While the various parts of the UN are for the most part free to decide for themselves who they will allow to participate in their own meetings, it is obviously far from ideal for one part of the UN to recognise one entity as the government of a State, while another part of the UN recognises another. As the General Assembly presciently recognised in Resolution 396 (V), where there is a question as to the representation of a Member State in the UN, there is a 'risk that conflicting decisions may be reached by its various organs', and it is 'in the interest of the proper functioning of the organisation that there should be uniformity in the procedure applicable'.[53]

The spectre of Myanmar being represented at the General Assembly by a representative of the civilian government and at the Human Rights Council

[50] UNSC, 'Memorandum on the Legal Aspects of Representation' (n 8) 2.

[51] Mason (n 4).

[52] *Somalia v Woodhouse* [1993] QB 54 (QB) 68. This test was affirmed and applied in: *Sierra Leone Telecommunications Co Ltd v Barclays Bank Plc* [1998] 2 All ER 821 (QB) 506–7; *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 (CA) para 351; *Secretary of State for the Home Department v CC* [2012] EWHC 2837 (Admin) (QB) para 122.

[53] UNGA Res 396(V) (14 December 1950) UN Doc A/RES/396(V). See also discussion in D Ciobanu, 'Credentials of Delegations and Representation of Member States at the United Nations' (1976) 25 ICLQ 351, 362; R Higgins *et al.*, *Oppenheim's International Law: United Nations* (Oxford University Press 2018) 305.

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by a representative of the military junta, in early 2021, was alluded to at the start of this article. Even more incongruously, in early 2022—with Myanmar still represented at the Assembly by the civilian government—the International Court of Justice (ICJ) seemingly without question allowed the junta to represent Myanmar, despite the civilian government having communicated to the Court that *it* was the proper representative of Myanmar.[54]

Across these various types of decisions, there is no uniform rule, nor systematic process, according to which government legitimacy is assessed. As highlighted in relation to Afghanistan and Myanmar, this presents difficulties for individual States, international organisations and the international system as a whole.[55]

This section discusses the appropriateness of the General Assembly, as the world's foremost policymaking and deliberative body, as a forum for collectively determining questions of government legitimacy. It first describes the Assembly's credentials process, and secondly considers whether the Assembly may go beyond assessing credentials and provide guidance to the international system as a whole on the question of which entity should be regarded as the legitimate government of a State.

A. The Credentials Process: Rules and Practice

The process by which the General Assembly assesses the eligibility of delegates to represent their States at the Assembly's own sessions is essentially procedural in nature. The Assembly's Rules of Procedure stipulate that the credentials of delegates should be submitted to the Secretary-General one week ahead of the opening of the session, and that they should be 'issued either by the Head of State or Government or by the Minister for Foreign Affairs'.[56] The credentials are considered by the Assembly's Credentials Committee, which reports to the General Assembly plenary, typically with a recommendation

[54] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Verbatim Record) CR 2022/1 <https://www.icj-cij.org/public/files/case-related/178/178-20220221-ORA-01-00-BI.pdf>; and for discussion see M Weller, 'Is the ICJ at Risk of Providing Cover for the Alleged Genocide in Myanmar?' (EJIL:Talk!, 11 February 2022) <https://www.ejiltalk.org/is-the-icj-at-risk-of-providing-cover-for-the-alleged-genocide-in-myanmar/>; Special Advisory Council for Myanmar, 'Disgraceful ICJ Decision Irresponsible and Unnecessary Delay to Justice' (21 February 2022) <https://specialadvisorycouncil.org/2022/02/disgraceful-icj-decision-irresponsible-and-unnecessary-delay-to-justice/>.

[55] See eg A Malik, 'The Islamic Emirate of Afghanistan and the Recognition of Governments under International Law' (Research Society of International Law 2021) <https://rsilpak.org/wp-content/uploads/2021/10/afghanistan-taliban-recognition_rsil.pdf>, written shortly after the assumption of power by the Taliban in Afghanistan. The author notes that the criteria for the recognition of governments is 'vague, undefined and inconsistent', and that 'international law offers little by way of guidance for the largely political act which is the recognition of governments' (at 5).

[56] UNGA, 'General Assembly Rules of Procedure' (1984) UN Doc A/520/Rev 15, Rule 28.

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that all credentials be accepted. In most cases the Assembly accepts the Committee's recommendation without debate.[57]

Despite the procedural nature of the process, in cases where two or more authorities submit credentials, claiming to represent the same State, the Credentials Committee—and in some cases the General Assembly plenary—cannot help but involve itself in questions of government legitimacy. In such cases, the only formal guidance available to States is General Assembly Resolution 396(V), which was adopted in 1950 in the context of a dispute over China's representation at the UN. The text of that resolution reflects the failure of States at that time to agree on any particular criteria that should guide decisions on representation.[58] The resolution provides only that:

> whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations, the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case.[59]

Despite the ambivalence of Resolution 396(V), throughout most of the twentieth century, the Assembly's decisions regarding the representation of States were decided with reference to the question of which authority exercised effective control. As Matthew Griffin observes, 'between 1945 and 1991, unconstitutional seizures of power were not infrequent, and, with only a few exceptions, the General Assembly ultimately did recognise the representatives of each regime that illegally usurped power'.[60]

From the 1990s, however, the General Assembly's practice began to shift, with the relative importance of the effective control test diminishing, and issues of constitutionality and democratic legitimacy assuming greater prominence. The Assembly's deliberations and decisions on matters of representation during this period serve as an important reference regarding the evolving practice of States on the question of what constitutes a legitimate government.

The post-1990 cases in which the General Assembly has had cause to consider the credentials of ousted democratically elected governments can for the most part be considered in three groups: first, cases in which the ousted democratically elected governments continued to submit credentials, but the military junta, rebels or insurgents (loosely referred to hereafter as the 'usurping power') did not; second, cases in which the usurping power submitted credentials, but the ousted government did not; and third, cases in which the ousted government *and* usurping power both submitted credentials.

[57] For a summary of the credentials process, see Higgins *et al.* (n 53) 306.
[58] See discussion in 'General Assembly' (1951) 5 IntlOrg 106.
[59] UNGA Res 396(V) (14 December 1950) UN Doc A/RES/396(V).
[60] M Griffin, 'Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy through Its Accreditation Process, and Should It' (2000) 32 NYUJIntlL&Pol 743.

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The cases of Côte d'Ivoire (2010), Libya (2011) and Venezuela (2019) cannot be so easily categorised, and thus are considered separately, below.

The first group of cases includes Liberia (1991–1996), Haiti (1991–1993), Afghanistan (1996), Sierra Leone (1997) and Honduras (2009). In all these cases a democratically elected government was overthrown, and the ousted government continued to submit credentials. In all cases except Afghanistan, the General Assembly accepted the credentials submitted by the ousted government, despite that government lacking effective control.[61] In the case of Afghanistan in 1996, the Assembly decided to defer its decision on representation, leaving the previously-credentialled representative—representing the ousted democratically elected government—provisionally in place.[62]

The second group of cases, in which the usurping power submitted credentials but the ousted democratically elected government did not, includes Guinea and Madagascar, both in 2009. In both cases the General Assembly decided to defer its decision on representation, on the understanding that the previously-credentialled representatives would 'participate provisionally' in the Assembly's sixty-fourth session.[63]

The third group of cases, in which the ousted democratically elected government and the usurping power both submitted credentials to the General Assembly, includes Afghanistan from 1997 through to 2000, Cambodia in 1997, Guinea-Bissau in 2012, and Afghanistan and Myanmar in 2021. In the case of Afghanistan (1990s) and Guinea Bissau, the Assembly decided to defer its decision on credentials, explicitly on the understanding that the previously credentialled representatives (representing the ousted democratically elected government) would remain provisionally in place.[64] In

[61] On Liberia, see UNGA, Reports of the Credentials Committee: 11 October 1991 (UN Doc A/46/563); 9 October 1992 (UN Doc A/47/517); 17 December 1993 (UN Doc A/48/512/Add.1) (approved by UNGA Res 48/13B (12 December 1993)); 14 October 1994 (UN Doc A/49/517) (approved by UNGA Res 49/4 (20 October 1994)); 13 October 1995 (UN Doc A/50/559) (approved by UNGA Res 50/4 (23 October 1995)); 13 December 1996 (UN Doc A/51/548, Add.1) (approved by UNGA Res 51/9B (17 December 1996)); 11 December 1997 (UN Doc A/52/719) (approved by UNGA Res 52/178 (18 December 1997)). On Haiti, see UNGA, Reports of the Credentials Committee: 16 December 1991 (UN Doc A/46/563/Add.1); 9 October 1992 (UN Doc A/47/517); 20 October 1993 (UN Doc A/48/512) (approved by UNGA Res 48/12 (29 October 1993)). On Sierra Leone, see UNGA, 'Report of the Credentials Committee' (11 December 1997) UN Doc A/52/719 (approved by UNGA Res 52/178 (18 December 1997)). On Honduras, see UNGA, 'Report of the Credentials Committee' (17 December 2009) UN Doc A/64/571 (approved by UNGA Res 64/126 (16 December 2009)).

[62] UNGA, 'First Report of the Credentials Committee' (23 October 1996) UN Doc A/51/548; UNGA Res 51/9 (29 October 1996) UN Doc A/RES/51/9.

[63] UNGA, 'Report of the Credentials Committee' (17 December 2009) UN Doc A/64/571; UNGA Res 64/126 (16 December 2009) UN Doc A/RES/64/126.

[64] On Afghanistan, see UNGA, Reports of the Credentials Committee: 11 December 1997 (UN Doc A/52/719) (approved by UNGA Res 52/178 (18 December 1997)); 29 October 1998 (UN Doc A/53/556) (approved by UNGA Res 53/23 (10 November 1998)); 18 October 1999 (UN Doc A/54/475) (approved by UNGA Res 54/6 (25 October 1999)); 1 November 2000 (UN Doc A/55/537) (approved by UNGA Res 55/16 (6 November 2000)). On Guinea Bissau see: UNGA, 'Report of

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the case of Cambodia the Assembly also deferred its decision, but on the understanding (also explicit) that Cambodia's seat at the Assembly would remain temporarily unoccupied.[65] In the case of Afghanistan and Myanmar in 2021, the Assembly again deferred its decision on representation.[66] On this occasion the Assembly did not explicitly stipulate that the previously-credentialled representatives were to remain in place; however, based on the Assembly's practice and procedural rules there was little doubt that this was to be the case.[67]

As noted above, the situations in Côte d'Ivoire (2010), Libya (2011) and Venezuela (2019) are not so easily categorised. In Côte d'Ivoire in 2010, President Gbagbo lost an election to opposition candidate Ouattara. The results were affirmed by the electoral commission. President Gbagbo refused to cede power and appealed the results to the Constitutional Council. The Constitutional Council declared the election results to be 'null and void';[68] however, the UN Secretary-General's Special Representative for Côte d'Ivoire subsequently issued a statement affirming the outcome proclaimed by the electoral commission.[69] Following the election, Ouattara's representatives submitted their credentials to the UN Secretariat, and the Credentials Committee recommended their acceptance.[70]

In Libya in 2011, rebel forces took control of the nation's capital and forced President Gaddafi into hiding, and the NTC was established—with international support—as Libya's transitional government. Representatives of the NTC as well as those of Gaddafi submitted credentials to the UN Secretariat. The Assembly accepted the credentials submitted by the NTC, despite the NTC not yet having established control of the country.[71]

the Credentials Committee' (4 December 2012) UN Doc A/67/611 (approved by UNGA Res 67/103 (17 December 2012)).

[65] UNGA, 'Report of the Credentials Committee' (11 December 1997) UN Doc A/52/719; UNGA Res 52/178 (24 February 1998) UN Doc A/Res/52/178.

[66] UNGA, 'Report of the Credentials Committee' (1 December 2021) UN Doc A/76/550; UNGA Res 76/15 (6 December 2021) UN Doc A/RES/76/15.

[67] Rule 29 of the General Assembly's procedural rules states that if a member objects to the admission of any representative, that representative shall be seated provisionally until the Assembly decides otherwise: UNGA, 'General Assembly Rules of Procedure' (1984) UN Doc A/520/Rev 15.

[68] See Y Rim, 'Two Governments and One Legitimacy: International Responses to the Post-Election Crisis in Côte D'Ivoire' (2012) 25 LJIL 683, 685.

[69] United Nations Operation in Côte d'Ivoire, 'Statement on the Certification of the Result of the Second Round of the Presidential Election Held on 28 November 2010, by YJ Choi, SRSG, UNOCI' (Abidjan, 3 December 2010) <https://onuci.unmissions.org/sites/default/files/old_spip/docs/certification_Engl.pdf>.

[70] See UNGA, 'Verbatim Records, 65th Session, 73rd Plenary Meeting' (23 December 2010) UN Doc A/65/PV.73; UNGA, 'Report of the Credentials Committee' (22 December 2010) UN Doc A/65/583/Rev.1.

[71] UNGA, 'Report of the Credentials Committee' (14 September 2011) UN Doc A/66/360; UNGA Res 66/1 (18 October 2011) UN Doc A/RES/66/1; UNGA, 'Verbatim Records, 66th Session, 2nd Plenary Meeting' (16 September 2011) UN Doc A/66/PV.2, 11–12.

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In Venezuela in 2019, President Maduro was sworn in for a second term as President, following elections that were widely regarded as flawed.[72] The result was challenged both domestically and internationally, and in 2019 the Organisation of American States decided 'to not recognize the legitimacy of Nicolas Maduro's new term'.[73] President Maduro's representatives submitted their credentials to the UN Secretariat, and in the absence of any competing submission, in 2019, 2020 and 2021 the Credentials Committee recommended that the Assembly accept the credentials submitted.[74] Despite objections from the US, the Assembly has consistently approved the Committee's recommendations.[75]

To summarise: since the 1990s, the General Assembly has only rarely been required to consider cases of competing credentials. In most cases, credentials have been submitted either by a deposed democratically elected government, or a usurping power, but not both. In almost all cases of disputed governance—whether credentials have been submitted by both or only one of the authorities vying for power—the Assembly has favoured the democratically elected government, or at least an internationally recognised one, irrespective of the question of effective control. The only one of these post-1990s examples in which the Assembly has recognised the credentials of a government that came to power (or retained power) as a result of undemocratic and unconstitutional means is Venezuela, and as such this case seems not to accord with what now seems to be the Assembly's preferred approach—although it is pertinent to note that the Assembly has not in the Venezuelan case been presented with competing credentials.

B. The Appropriateness of the Credentials Process Being Used as a Point of Reference Regarding the Status of Governments

As stated above, the credentials process has traditionally been understood as a procedural one, limited to assessing whether the credentials submitted by delegates comply with the General Assembly's Rules of Procedure. This delineation of the credentials process as being only about the procedural requirements of representation at the UN, and not about the recognition of the status of governments more broadly, was enunciated in a 1970

[72] See discussion in J Genser, 'Challenge to the United Nations Credentials of the Delegation of Nicolás Maduro to Represent the Government of Venezuela' (Perseus Strategies, February 2019) 10–11 <https://www.perseus-strategies.com/wp-content/uploads/2019/01/Legal-Opinion-UN-Credentials-Challenge-on-Venezuela-2.1.19-FINAL.pdf>.

[73] Organisation of American States, 'Resolution on the Situation in Venezuela', Permanent Council Res CP/Res 1117 (2200/19) (10 January 2019).

[74] UNGA, Reports of the Credentials Committee: 4 December 2019 (UN Doc A/74/572), 23 November 2020 (UN Doc A/75/606) and 1 December 2021 (UN Doc A/76/550).

[75] UNGA Res 74/179 (18 December 2019) UN Doc A/RES/74/179; UNGA Res 75/19 (1 December 2020) UN Doc A/RES/75/19; UNGA Res 76/15 (6 December 2021) UN Doc A/RES/76/15.

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memorandum by the UN Legal Counsel. That memorandum described the examination of credentials as a 'procedural matter', limited to assessing compliance with the Assembly's procedural rules, and not involving questions of 'recognition' or 'substantive issues concerning the status of governments'.[76] In line with these memorandums, the Assembly itself has also stressed that the 'attitude adopted by the General Assembly' on matters of representation 'shall not of itself affect the direct relations of individual member States with the State concerned'.[77]

The problem, however, with insisting that the assessment of credentials is a procedural process pertaining only to the representation of States at the UN is that—as stated above—the international system has no other process for collectively and authoritatively establishing the status of governments. And so long as there is no other process, the credentials process will inevitably be looked upon to fill the gap.

Views differ on whether the credentials process should be looked upon as a forum for collectively determining the status of governments, with implications beyond the representation of States in the UN. Some scholars agree with the above-mentioned memorandums, that 'the credentials procedure … remains nothing but a technical matter', and 'in no way should … be understood as a "collective recognition" of governments'.[78] Others, however, recognise the inevitability of the credentials process being used as a point of reference regarding the status of governments. Joshua Downer, for example, asserts that 'the act of granting credentials … [has] gained legal significance beyond what the rules of procedure imply, as a credential to represent a State in the UN now represents the UN's position on the legitimacy of that government'.[79] Roth, similarly, asserts that 'notwithstanding the disclaimers rendered by its participants, the credentials process serves necessarily as a process of collective legal recognition.[80] Yejoon Rim, similarly again, observes that 'even though, in theory, approval of credentials is … a formal authentication procedure, … the standpoint adopted at the General Assembly may fairly be regarded as reflecting "the united position of the international community"'.[81]

Two points can be discerned from these competing positions. First, the credentials process was never meant to be a process for collectively determining the status of governments, and it is still not unequivocally

[76] UNGA, 'Scope of "Credentials"' (n 8); see also UNSC, 'Memorandum on the Legal Aspects of Representation' (n 8) 18–23.

[77] UNGA Res 396(V) (14 December 1950) UN Doc A/RES/396(V).

[78] A Kleczkowska, '"Recognition" of Governments by International Organizations – The Example of the UN General Assembly and Asian States' (2017) 35 ChinYBIntlL&Aff 136, 137; see also M Halberstam, 'Excluding Israel from the General Assembly by a Rejection of Its Credentials' (1984) 78 AJIL 179, 182.

[79] J Downer, 'Towards a Declaratory School of Government Recognition' (2013) 46 VandJTransnatlL 581, 603.

[80] Roth, *Government Illegitimacy* (n 17) 253.

[81] Rim (n 68) 695.

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recognised as such. Second, a decision by the General Assembly to recognise the credentials of one entity over another *does* in effect amount to a determination by the international community regarding which entity is best regarded as the government of the State. The co-existence of these two competing truths—that the credentials process is not supposed to be a process for collectively determining governmental status, and the fact that it is inevitably looked upon as such—seems an unsatisfactorily tenuous foundation for a matter so fundamental to international relations and international law as the determination of the status of governments. As such, the following section explores the possibility of the General Assembly being utilised as a forum through which to collectively determine the status of governments, outside the credentials process.

C. An Alternative to Stretching the Credentials Process: The General Assembly's Determinative Competence

It has been shown above that recognition is an essentially political act: governments determine unilaterally (or in groups) whether or not to recognise other governments, according to their own criteria; and in domestic contexts, courts have stressed that the issue of which entity constitutes the government of a State is a matter for the executive, not the courts. Where domestic courts have been required to assess the status of an entity in the absence of an explicit statement by their own government regarding recognition, they have made reference to the attitude adopted by the international community—that is, the decisions of governments—alongside other factors.

Just as at the domestic level, the matter of recognition is primarily a question for the executive, at the international level, it is the General Assembly—the UN's chief political organ—that is best placed to consider and determine such issues. As the Assembly itself affirmed in Resolution 396(V), 'the General Assembly is the organ of the UN in which consideration can best be given to the views of all member States in matters affecting the functioning of the organisation as a whole'.

Accepting that the General Assembly is the most appropriate organ to consider questions of governmental status does not mean accepting that the credentials process is the most appropriate mechanism for such consideration. To interpret credentials decisions as decisions about the status of governments, with far-ranging implications for the international system as a whole, would be to disregard statements by the UN Legal Counsel, the General Assembly and individual States explicitly cautioning against such interpretation.[82]

[82] See eg memorandum submitted by the Cuba to the UNSG, distinguishing between 'the formal problem of credentials' and 'the problem that arises with regard to the legality of the representation of a member state; that is, when the United Nations has to decide which government has the right to represent that state in the Organisation' (cited in Ciobanu (n 53) 364).

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Conversely, however, failing to give due deference to the Assembly's credentials decisions can lead to incongruous results, as highlighted by the scenario of Myanmar being represented at the ICJ by the military junta. While it may be the case that absent any other collective process for determining the status of governments, the decisions taken in the credentials process should generally be followed, there is a better—and more authoritative—way for the Assembly to provide guidance on such matters.

The General Assembly has previously passed resolutions on matters of government legitimacy, unconnected with the credentials process. As far back as 1948, in relation to Korea, the Assembly 'declare[d] that there has been established a lawful government … having effective control and jurisdiction', and that this was the 'only such Government in Korea'.[83] In relation to Southern Rhodesia in the 1960s and 1970s, the Assembly passed a series of resolutions referring to the 'illegal racist minority regime', and calling on States to refrain from any action which 'might confer a semblance of legitimacy on the illegal regime'.[84] In relation to Namibia in the 1970s and 1980s, the Assembly recognised the national liberation movement of Namibia as the 'authentic representative of the Namibian people', and called upon States to 'refrain from according any recognition to, or cooperation with, any authority which the illegal occupation regime may install'.[85] In relation to South Africa through the 1970s and 1980s, the Assembly 'proclaim[ed]' that the racist regime of South Africa was illegitimate and had 'no right to represent the people of South Africa', and that the national liberation movement was the 'authentic representative of the people of South Africa'.[86] In relation to Haiti in the early 1990s, the Assembly 'affirm[ed] as unacceptable any entity resulting from [the military coup] … and demand[ed] the immediate restoration of the legitimate Government'.[87] Following the military coup in Honduras in 2009, the Assembly demanded the 'restoration of the legitimate and Constitutional Government of the President of the Republic of Honduras' and called upon States to 'recognise no Government other than that of the Constitutional President'.[88]

General Assembly resolutions on the legitimacy of governments have in practice served as a guide for actors inside and outside the UN system.

[83] UNGA Res 195(III) (12 December 1948) UN Doc A/RES/195(III).

[84] eg UNGA Res 2508 (21 November 1969) UN Doc A/RES/2508; UNGA Res 2946(XXVII) (7 December 1972) UN Doc A/RES/2946(XXVII); UNGA Res 3397(XXX) (21 November 1975) UN Doc A/RES/3397(XXX).

[85] eg UNGA Res 3111(XXVIII) (I) (12 December 1973) UN Doc A/RES/3111(XXVIII) (I); UNGA Res 3295(XXIX) (13 December 1974) UN Doc A/RES/3295(XXIX); UNGA Res 31/146 (20 December 1976) UN Doc A/RES/31/146.

[86] eg UNGA Res 31/6(I) (26 October 1976) UN Doc A/RES/31/6(I); UNGA Res 34/93 (12 December 1979) UN Doc A/RES/34/93; UNGA Res 36/172 A (17 December 1981) UN Doc A/RES/36/172 A.

[87] eg UNGA Res 46/7 (11 October 1991) UN Doc A/RES/46/7; UNGA Res 47/20 (24 November 1992) UN Doc A/RES/47/20; UNGA Res 48/27 (6 December 1993) UN Doc A/RES/48/27.

[88] UNGA Res 63/301 (30 June 2009) UN Doc A/RES/63/301.

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Following the Assembly's resolutions on Haiti, for example, the Security Council adopted a resolution referencing the Assembly's resolutions and 'deploring' the fact that 'the legitimate government' had not been reinstated, and imposed mandatory sanctions on the junta.[89] It subsequently authorised a multinational force to facilitate the 'restoration of the legitimate authorities of the Government of Haiti'.[90] Following the Assembly's resolution on Honduras, demanding the restoration of the legitimate government, the UN Office of Legal Affairs advised that the UN Secretariat should act consistently with the resolution, meaning that only the authorised representatives of the previous government should be allowed to participate in the work of the Assembly and its subsidiary bodies.[91] Subsequently, the Organisation of American States (OAS) decided to suspend Honduras from its right to participate in the OAS.[92]

Beyond serving as a political guide, the ICJ has affirmed that General Assembly resolutions may 'make determinations or have operative design'.[93] The Court made this statement in relation to General Assembly Resolution 2145 (XXI) (1966), in which the Assembly: declared that South Africa had failed to fulfil its obligations in relation to the administration of Namibia; decided, accordingly, to terminate South Africa's mandate in Namibia; and determined that South Africa had no other right to administer Namibia.[94] The Court described the Assembly's declaration in that case as 'the formulation of a legal situation'.[95] Such a 'formulation' determines the legal rules that apply to (or in) the situation in question, and in turn, determines the legal rules with which States are required to comply in relation to that situation.[96] Thus, in

[89] UNSC Res 841 (16 June 1993) UN Doc S/RES/841.

[90] UNSC Res 940 (31 July 1994) UN Doc S/RES/940.

[91] UNSG, 'Note to the Under Secretary-General and Chef de Cabinet, Executive Office of the Secretary General, concerning General Assembly Resolution 63/301 on Honduras' in *UN Juridical Yearbook 2009* (United Nations 2010) 407; and see discussion in S Mathias and S Trengrove, 'Membership and Representation' in *The Oxford Handbook of International Organizations* (Oxford University Press 2016) 975.

[92] Organisation of American States, 'Suspension of the Right of Honduras to Participate in the Organisation of American States' General Assembly Res AG/Res 2 (XXXVII-E/09) (4 July 2009).

[93] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 (*Namibia*), para 105. General Assembly resolutions of the type referred to here are to be distinguished from resolutions of a normative nature. As recognised by the ICJ in its first *Nuclear Weapons* Advisory Opinion, and affirmed in its *Chagos* Advisory Opinion, 'General Assembly resolutions, … may sometimes have normative value' and 'can provide important evidence for establishing the existence of a rule or the emergence of an *opinio juris*': *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1966] ICJ Rep 226, para 70; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, para 151.

[94] UNGA Res 2145(XXI) (27 October 1966) UN Doc A/RES/2145(XXI).

[95] *Namibia* (n 93) para 105.

[96] For a similar discussion, see MD Öberg, 'The Legal Effect of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16 EJIL 879. Öberg takes the view that because General Assembly recommendations are non-binding, 'determinations' included in the Assembly's resolutions are also non-binding; however, he also acknowledges that

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relation to Namibia, the Security Council in 1970 referred to General Assembly Resolution 2145 (XXI), as well as subsequent Security Council resolutions, and declared that South Africa's continued presence in Namibia was illegal.[97] It was not a General Assembly *recommendation* that created a legal obligation for South Africa to withdraw from Namibia—because States are not required to comply with General Assembly recommendations[98]—but rather, the legal situation created by the General Assembly's determination that South Africa had breached its mandate.

It is pertinent to acknowledge the limitations of General Assembly determinations or declarations of this nature, particularly as pertains to their legal—as opposed to political—implications. Three in particular bear noting. First, a determination by the General Assembly regarding governmental legitimacy does not affect the sovereign right of States to independently determine their bilateral engagement with the government in question; nor the competence of domestic courts to independently assess the status of governments, for domestic purposes. However, governments will presumably be less likely to engage bilaterally with a government that has been described by most States—acting through the Assembly—as illegitimate; and as has been shown above, at least in the British context, domestic courts have indicated that in the absence of an explicit statement by the executive regarding the recognition of a government, they will refer among other things to the 'extent of international recognition'.

Second, the legal situation created by a General Assembly determination will not be irrefutable. With reference to Namibia again, the ICJ would feasibly have been competent to determine for itself that there was some other basis for South Africa's right to administer Namibia; and in relation to Haiti and Honduras, the ICJ could feasibly have found—if asked—that the coup regimes were entitled to exercise the rights available to governments in international law.[99] In most cases, however, the matters in question will never come before an international court, and as such, the presumption created by the General Assembly resolution—attesting to

'determinations have legal effects by blocking or causing the applicability of certain rules' (at 890). For other scholarly discussion of the Assembly's determinative competence, see M Ramsden, *International Justice in the United Nations General Assembly* (Elgar 2021) 100–51; N White, *The Law of International Organisations* (2nd edn, Manchester University Press 2005) 178; R Barber, 'Does International Law Permit the Provision of Humanitarian Assistance without Host State Consent? Territorial Integrity, Necessity and the Determinative Function of the General Assembly' (2020) 23 YIHL 85.

[97] UNSC Res 276 (30 January 1970) UN Doc S/RES/276.

[98] Articles 25 and 94 of the Charter stipulate that members will comply with the decisions of, respectively, the Security Council and the ICJ, but there is no equivalent provision for the Assembly: see M Ramsden, '"Uniting for Peace" in the Age of International Justice' (2016) 42 YaleJIntlL 1, 20; S Talmon, 'The Legalizing and Legitimizing Function of UN General Assembly Resolutions' (2014) 108 AJIL Unbound 123, 126.

[99] See *Case Concerning East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, in which the ICJ said that the position asserted by resolutions of the General Assembly and Security Council could not 'be regarded as "givens" which constitute a sufficient basis for determining the dispute between the parties' (para 32).

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the view of the majority of States—will be legally relevant. Moreover, while jurisprudence on such matters is limited, the limited consideration that international courts and tribunals have given to General Assembly resolutions of a declaratory/determinative nature suggests that the approach taken by the Assembly will generally be followed, particularly in relation to 'questions not readily susceptible to judicial determination'.[100]

Third, as recognised by the ICJ in its *Namibia* Advisory Opinion, the General Assembly lacks the power to ensure compliance with obligations arising from a legal situation it formulates. In order to ensure compliance with obligations—for example, an obligation not to provide military assistance at the request of an entity that the Assembly has said is not the government—the Assembly would need, as it did in relation to Namibia, to 'enlist[] the co-operation of the Security Council'.[101]

To conclude: the process by which the General Assembly assesses the credentials of delegates put forward to represent their States was designed as a procedural process, and actors both outside and inside the UN system have emphasised that it should not be stretched beyond the purpose for which it was conceived. At the same time, most scholars and States recognise that in the absence of any alternative process for collectively determining government legitimacy, the credentials process will in most cases be looked upon to provide guidance on the question of which entity should be regarded as the government of a State. The credentials process is not, however, the only possible source of guidance on such matters. The Assembly is competent to pass resolutions with determinative effect, and it has done so in the past on matters relating to the status of governments. There is no reason in international law that the Assembly cannot pass such a resolution whenever there is a situation in which the international community requires guidance on matters of government legitimacy—and recent events in Afghanistan and Myanmar highlight that there are, indeed, occasions on which such guidance is required. Proceeding on this basis, the remainder of this article considers what criteria the Assembly ought to use to assess whether an entity should be regarded as the government of a State, with concomitant rights and responsibilities in international law.

IV. WHAT CRITERIA SHOULD THE GENERAL ASSEMBLY USE TO ASSESS THE STATUS OF GOVERNMENTS?

The first point to be made regarding the question of what criteria the General Assembly should use to assess the status of governments is that, as stated

[100] See eg *Situation in Georgia* (Request for Authorisation of an Investigation Pursuant to Article 15) ICC-01/15 (17 November 2015) 33; ICC, 'Report on Preliminary Examination Activities' (2016) 35 <https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf>. For discussion, see Ramsden, 'Uniting for Peace' (n 98) 15; Barber, 'Does International Law Permit' (n 96); Ramsden, *International Justice* (n 96) 145–9.

[101] *Namibia* (n 93) para 106.

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above, there is no established test in international law for making such assessment, across all the types of decisions referenced above—political decisions made unilaterally by States, assessments by courts, and decisions by international organisations regarding representation. Indeed, for the most part, international law provides no firmly established test for *any* of these decisions, let alone one that encompasses all three.

Not only is there no established test for assessing government legitimacy, but even if there were such a test, the Assembly's discretion to express its views on such matters would still be largely unfettered. The Assembly's powers are limited by Article 2(7) of the UN Charter, which prohibits the Assembly from intervening in matters 'which are essentially within the domestic jurisdiction' of the State, however as many scholars have observed, this restriction has been interpreted narrowly, and 'does not exclude actions, short of dictatorial interference, undertaken with the view to implementing the purposes of the Charter'.[102]

Despite the General Assembly's freedom of action to pronounce on matters relating to the status of governments, in making such assessments, States may nevertheless wish to refer to relevant principles of international law, as well as established practice. Moreover, from the perspective of individual States as well as courts and other parts of the UN system, the Assembly's pronouncements on such matters will likely be more persuasive if they are perceived as reflecting international law and practice.

Proceeding on this basis, the following discussion canvasses two criteria that have dominated jurisprudence, practice and scholarly literature. These are: effective control; and democratic legitimacy.

A. Effective Control

As has been indicated in previous sections, traditionally—at least until the 1990s—the test for determining whether a particular entity should be regarded as the government of a State was whether the entity exercised effective control over territory. With limited exceptions, this test underpinned the political decisions made unilaterally by States for purposes of diplomatic relations, the decisions made by courts for purposes of determining whether an entity could avail itself of the rights associated with State sovereignty, and the decisions made by international organisations on the question of representation.

An early articulation of the effective control test is found in the 1923 *Tinoco Claims Arbitration*, which concerned a claim by the British Government in

[102] R Jennings and A Watts, 'Position of the States in International Law, Intervention' in R Jennings and A Watts (eds), *Oppenheim's International Law* (9th edn, Oxford University Press 2008) vol 1, 448–9; see also MJ Petersen, 'General Assembly' in TG Weiss and S Daws (eds), *The Oxford Handbook on the United Nations* (2nd edn, Oxford University Press 2018) 121.

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relation to agreements between its subjects and the former Tinoco Government of Costa Rica. In finding Britain's claim to be valid, the arbitrator determined that:

> The issue is not whether the new government assumes power or conducts its administration under constitutional limitations established by the people during the incumbency of the government it has overthrown. The question is, has it really established itself in such a way that all within its influence recognise its control?[103]

The effective control test was founded on the premise that, as Hans Kelsen opined in 1961, in international law 'a national legal order begins to be valid as soon as it has become … efficacious; and it ceases to be valid as soon as it loses this efficacy'. Thus, '[t]he government brought into permanent power by a revolution or *coup d'état* is, according to international law, the legitimate government of the State'.[104]

Such notions prevailed in jurisprudence as well as in the practice of States and international organisations, and in the scholarly literature, throughout most of the twentieth century.[105] When in 1980 the UK announced that it would no longer formally recognise new governments, for example, it explained that it would 'continue to decide the nature of [its] dealings with regimes which come to power unconstitutionally in the light of [its] assessment of whether they are able of themselves to exercise effective control of the territory of the State concerned'.[106] In the 1982 case of *Somalia v Woodhouse*, when Hobhouse J in the British High Court of Justice was prompted to consider how the courts should assess the status of governments in the absence of formal recognition statements issued by the British Government, he said that:

> If recognition by Her Majesty's Government is no longer the criterion of the *locus standi* of a foreign government … what criteria is the court to apply? The answers do confirm one applicable criterion, namely, whether the relevant regime is able of itself to 'exercise effective control of the territory of the State concerned' and is 'likely to continue to do so'.[107]

In establishing a four-part test for assessing the status of governments, referenced above, Hobhouse J listed the 'degree, nature and stability of administrative control' as the second of four factors to consider, following the question of whether the entity in question 'is the constitutional government of the State'.[108]

[103] *Tinoco Claims Arbitration (Great Britain v Costa Rica)* (1923) 1 RIAA 369, 381.
[104] H Kelsen, *General Theory of Law and State* (A Wedberg trans, Russel & Russel 1961) 220–1.
[105] See Roth, *Government Illegitimacy* (n 17) 136; SD Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' in G Fox and B Roth (eds), *Democratic Governance and International Law* (Cambridge University Press 2000) 139; de Wet (n 35); Zamani and Nikouei (n 35) 669.
[106] HL Deb 28 April 1980, vol 408, cols WA1121–2.
[107] *Somalia v Woodhouse* (n 52) 63.
[108] ibid 68.

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In the General Assembly's Credentials Committee, as discussed above, prior to the 1990s credentials disputes were also determined primarily with reference to the question of which authority exercised effective control.[109]

B. Democratic Legitimacy

Commencing in the late 1990s, in the practice of States and international organisations, the predominance of the effective control test began to fray, and alternative, more values-based criteria for assessing the status of governments began to assume greater prominence. This shift is evident across the various scenarios discussed in the preceding sections: the practice of individual States, in making political statements regarding the illegitimacy of regimes that came to power by force (Haiti, Afghanistan) and the legitimacy of ousted democratically-elected governments and nascent governments perceived to represent the will of the people (Haiti, Sierra Leone, Libya); the reaction of the international community to requests for military intervention from deposed governments (Haiti, Sierra Leone, Mali, Yemen); and the preparedness of the General Assembly to accept the credentials of the representatives of deposed governments (Liberia, Haiti, Sierra Leone, Honduras), and the corresponding reluctance to recognise the credentials of representatives of regimes that came to power by force (Guinea, Afghanistan, Cambodia, Guinea Bissau, Myanmar).

Reflecting on State and institutional practice since the 1990s, some scholars have asserted that in international law there is an emerging norm, according to which the status of governments is to be assessed with reference to democratic legitimacy rather than effective control. Jean D'Aspremont, for example, observed in 2006 that 'recognition of governments that have overthrown a democratically elected government is nearly always systematically refused', and that 'democracy has become the "touchstone of legitimacy" for any new government'.[110] Downer goes so far as to assert that international law now recognises a 'rule against the reversal of democracy through coups', and a 'concomitant requirement of States to reject governments that force such a reversal'.[111]

Most scholars, however, while recognising the increased attention in State and institutional practice to the question of democratic legitimacy, have stopped short of concluding that effective control has been replaced as the primary determinator of a government's status. Roth, for example, writing in 2000, concluded that 'the evidence does not substantiate any equation

[109] Griffin (n 60); see also R Barber *et al.*, 'Legal Opinion: United Nations Credentials Committee: Representation of the State of Myanmar to the UN' (Myanmar Accountability Project 2021) 5 <https://the-world-is-watching.org/wp-content/uploads/2021/09/Myanmar-Legal-Opinion-Final-2.pdf>.

[110] J D'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (2006) 38 NYUJIntL&Pol 877, 902.

[111] Downer (n 79) 585; see also Rim (n 68) 705.

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of a lack of (liberal) democracy with governmental illegitimacy', and that '[e]stablished, stable dictatorships have mostly eluded criticism of their governmental systems *per se*'.[112] Sean Murphy, also in 2000, observed similarly that 'the international community does not refuse to recognise governments simply by virtue of their being non-democratic', and that 'there are dozens of … non-democratic States' that are 'generally recognised by the international community'.[113] Erica de Wet, writing in 2015, observed that while the international community had recognised the ousted democratically elected governments in Haiti and Sierra Leone, 'by 2009, no less than eight African regimes that came to power by coups were allowed to address the UN General Assembly without any objection by the [African Union] or the UN'.[114]

As pertains specifically to the criteria to be used by the General Assembly if it were to make a declaratory statement now regarding the legitimacy of a government, three points bear noting. First, State practice has continued to evolve since much of the scholarly literature cited above, including in relation to the more recent cases of Guinea Bissau and Mali (2012), Yemen (2015) and Afghanistan and Myanmar (2021). This evolving State practice is indisputably tending towards the recognition of democratic legitimacy as the primary determinator of governmental status, at least in contested cases. Second, while it is true that plenty of undemocratic regimes continue to be accepted without question as the governments of their States, since the 1990s there has not been a case in which a regime has forcefully overthrown a democratically elected government, and subsequently had the credentials of its representatives accepted by the Assembly, in preference to those submitted by the ousted democratically elected government. In other words, in the context of the Assembly's credentials decisions, where there is a choice, the Assembly will preference the democratically elected government. And third, as noted above, irrespective of any established test in international law for assessing a government's status, the Assembly's discretion in relation to such matters is largely unfettered. Not only is the Assembly not bound to apply any particular criteria regarding government legitimacy, it is also not required to justify its views—although in practice it has, when pronouncing on such matters. By way of example, on those occasions cited above when the Assembly has explicitly pronounced on the legitimacy or illegitimacy of regimes, it has referenced: the refusal of a regime to recognise the right of people to self-determination and independence;[115] policies of oppression and racial discrimination, constituting crimes against humanity;[116] illegal occupation, brutal repression and persistent violation of human

[112] Roth, *Government Illegitimacy* (n 17) 411.
[113] Murphy (n 105) 143.
[114] de Wet (n 35) 204.
[115] UNGA Res 2138(XXI) (22 October 1966) UN Doc A/RES/2138(XXI); UNGA Res 3111 (XXVIII) (12 December 1973) UN Doc A/RES/3111(XXVIII).
[116] UNGA Res 2262(XII) (3 November 1967) UN Doc A/RES/2262(XII).

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rights;[117] policies of apartheid, massacres and other atrocities;[118] UN-supported free elections, followed by sudden and violent interruption of the democratic process;[119] and breakdown in the constitutional and democratic order, leading to endangerment of security, democracy and the rule of law.[120] These statements do not conform to any particular pattern; rather, they reflect the nature of the context under consideration, and the values held by a majority of member States at the time.

V. CONCLUSION

Events in Afghanistan and Myanmar in 2021 highlighted the fact that, in situations of contested governance, individual States, international organisations and in some cases domestic courts may for various reasons desire—or benefit from—an international opinion on the question of which entity is to be regarded as the government of a State. States must not only decide who they will engage with diplomatically but will also need to know which entity should be regarded as the government for purposes of international law; international organisations must decide who they will allow to represent the State; and domestic courts may be called upon to determine whether a particular entity has the legal status of a government for domestic purposes. For most of the twentieth century such questions were not particularly complicated, because for the most part they were answered with reference to the question of effective control—effectiveness was 'seen as a *condition sine qua non* to be considered the government of a State'.[121]

As has been shown, however, since the 1990s, democratically elected governments have with increasing frequency been regarded as the legitimate governments of their States, albeit lacking effective territorial control. As such, decisions regarding the status of governments have become more difficult, and in contentious situations, States, courts and international organisations must on occasions look for guidance from the 'international community'. However, neither international law nor established international practice provides a process for the collective determination of governmental status. In other words, while guidance is clearly desirable, and on occasions is expressly sought, it is not typically available.

The situations in Afghanistan and Myanmar in 2021 highlighted the extent to which, in the absence of a more appropriate mechanism, attention focuses by default on the General Assembly's Credentials Committee, despite the UN Legal Counsel having described the task of that Committee as 'procedural', and the Assembly having advised that the Committee's decisions should not

[117] UNGA Res 3111(XXVIII) (12 December 1973) UN Doc A/RES/3111(XXVIII).
[118] UNGA Res 31/6(I) (9 November 1976) UN Doc A/RES/31/6(I).
[119] UNGA Res 46/7 (11 October 1991) UN Doc A/RES/46/7.
[120] UNGA Res 63/301 (30 June 2009) UN Doc A/RES/63/301.
[121] Serralvo (n 34) 15.

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affect relations between States. Conversely, ensuing events in relation to Myanmar's representation on the international stage highlighted the incongruity that can result if deference is *not* accorded to the decisions of the Credentials Committee. In short, what was highlighted was the need for a more authoritative source of guidance on the matter of the status of governments.

This article has proposed an alternative. The ICJ and numerous scholars have recognised the Assembly's competence to pass resolutions with 'determinative' effect, and it is within the Assembly's competence to pass resolutions on the question of which authority should be regarded as the legitimate government of a State. Specific options available to the Assembly include: explicitly articulating its view on the question of which authority is the legitimate government of a State; making related recommendations to States, for example by recommending that they refrain from actions which confer legitimacy on an illegal regime; and making recommendations to international organisations, for example by recommending that they regard an ousted democratically elected government as the legitimate representative of a State. Such recommendations would not be binding on States or international bodies, but there would be a political expectation of compliance, and they would be useful for States looking to ensure that their response reflects the consensus—or at least majority view—of the international community. Similarly, such resolutions would not be binding on either domestic or international courts but would have value as evidence of the international community's attitude regarding the status of a government.

In relation to Myanmar, a General Assembly resolution describing the military junta as illegitimate, and the National Unity Government as the legitimate representative of the people of Myanmar, would be consistent with the Assembly's practice, and could serve as a guide both for States and international organisations. It could assist to resolve, among other things: which entity should be accorded the rights associated with State sovereignty, for purposes of international law; which entity should be recognised by those States wishing to act in conformity with the regard of the international community for democratic legitimacy; and who should represent Myanmar in international fora, both inside and outside the UN. Such a resolution could be justified—again consistently with the Assembly's practice—on the basis of the junta's violent disruption of the democratic process, its lack of constitutionality, and its persisting violations of international human rights and humanitarian law, or indeed peremptory norms of international law.[122] In relation to Afghanistan, a General Assembly resolution proclaiming that the Taliban should not be regarded as the legitimate government seems less feasible, given the lack of an available alternative. The Assembly could nevertheless pass a resolution calling on the Taliban to meet the responsibilities associated with State

[122] See discussion in Barber *et al*. (n 109).

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sovereignty, in particular respect for international human rights law, and calling on States and international organisations to refrain from conferring legitimacy on the Taliban until such standards are met.

General Assembly resolutions on the legitimacy of governments will never eliminate all disputes on the question of who should be regarded as the government of a State. But in the Westphalian system of sovereign States—each of whom has the prerogative to 'decide whom [it] will recognise as a fellow sovereign in the family of States'[123]—it is probably the best that can be managed, and likely to enable greater consistency and coherence in the international response to contentious situations, than the credentials process being looked upon to provide answers it was not designed, and is ill-equipped, to provide.

[123] *Republic of Spain vs SS 'Arantzazu Mendi'* [1939] AC 256 (HL) 264 (Atkin L).

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