

LEGITIMACY OF GOVERNMENTS IN THE AGE OF DEMOCRACY

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I. INTRODUCTION

The question of legitimacy has always been a source of great controversy among international legal scholars.¹ This enduring doctrinal debate can be traced back to a basic reality of the international legal order, namely that states are legal persons acting through their governments. The international legal order is consequently a legal order where legal persons act via proxies. These surrogates are not, however, immutable entities. Indeed, governments are short-lived bodies whose existence is contingent upon the form of political regime, the internal stability of the state concerned, and, ultimately, the life span of the human beings at their helm. As a result, the representatives of the legal persons in the international legal order are frequently being replaced.

This recurrent and inescapable reshuffle of governments has prompted a need for criteria to determine who is entitled to speak and act on behalf of each state. This necessity to determine each state's representative in the international arena is the essence of the concept of legitimacy in international relations. A legitimate authority (government) is the one entitled to speak and act on the behalf of a state. In that sense, legitimacy empowers an authority to act and speak on behalf of the state.²

The highly controversial character of governments' legitimacy stems from the subjectivity of its evaluation. Indeed, there are no objective criteria to determine governments' le-

1. The most recent book that tackles this question is B. R. ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* (2000).

2. See, e.g., CARL J. FRIEDRICH, *MAN AND HIS GOVERNMENT* 234 (1963) (defining the question of legitimacy as "the question of fact whether a given rulership is believed to be based on a good title by most men subject to it"). See also Norberto Bobbio, *Sur le principe de légitimité*, 32 *DROITS : REVUE FRANÇAISE DE THÉORIE, DE PHILOSOPHIE ET DE CULTURE JURIDIQUES* 148 (2000).

gitimacy.³ That means that each state enjoys a comfortable leeway when asked to recognize the power of an entity that claims to be another state's representative *in their bilateral intercourse*. Each state evaluates foreign governments' legitimacy through the criteria that it chooses. International legal relations are therefore replete with situations where a government is deemed legitimate by some states and illegitimate by others.⁴

The uncertainty surrounding the concept of legitimacy was not alleviated by the end of the Cold War. Although the almost unanimous acceptance of the democratic model brought about by the end of the ideological division of the world has profoundly eroded our understanding of the legitimacy of governments, disagreements about legitimacy have not faded. Controversies about the legitimacy of governments continue to arise, particularly when an elected government fails to respect the substantive elements of democracy. Such governments are known as illiberal democracies.⁵

Illiberal democracies have long existed. During the 1990s, a handful of governments could be listed as illiberal democracies.⁶ In the direct aftermath of the Cold War, however, they were tolerated because it was assumed that the contempt for the substantive elements of democracy was temporary and that it constituted a necessary transition stage for newly elected governments towards a consolidation of their regime.⁷ Although some of these illiberal democracies have actually been

3. JOE VERHOEVEN, *DROIT INTERNATIONAL PUBLIC* 90 (2000) [hereinafter Verhoeven, *Droit International*]; JOE VERHOEVEN, *LA RECONNAISSANCE DANS LA PRATIQUE CONTEMPORAINE* 597-603 (1975) [hereinafter VERHOEVEN, *LA RECONNAISSANCE*].

4. See, for instance, the discrepancies between the Russian and U.S. – E.U. positions with regards to the elections in Belarus. On this topic see C. J. Chivers & Steven Lee Myers, *U.S. Calls Belarus Vote for Leader Invalid*, N.Y. TIMES, Mar. 21, 2006, at A6; C. J. Chivers, *U.S. and Europe Plan Sanctions Against Belarus*, N.Y. TIMES, Mar. 25, 2006, at A1; Steven Lee Myers, *World Briefing Europe: Belarus: Putin Backs Leader*, N.Y. TIMES, Apr. 29, 2006, at A7.

5. Fareed Zakaria, *The Rise of Illiberal Democracies*, 76 FOREIGN AFF. 22 (1997).

6. For examples of illiberal democracies that have, in the meantime, turned more respectful of human rights, see *Id.*, at 23, 28.

7. See generally, Francis Fukuyama, *The End of History*, THE NAT. INTEREST, Summer 1989, at 3-19.

replaced by full-fledged democracies,⁸ many of them have persisted and even been strengthened.⁹ New illiberal democracies have come into existence. The recent elections in the Middle East, especially in Egypt,¹⁰ Iran,¹¹ Tunisia,¹² Pakistan,¹³ and Palestine,¹⁴ have shown that illiberal democracies comprise a distinct phenomenon of our time.¹⁵

The criteria to assess the legitimacy of governments that have been developed by mainstream legal scholarship are overly simplistic and fail to address the situation of illiberal democracies. Indeed, illiberal democracies are endowed with some democratic features, as their governments have usually gone through an electoral process. They can thus claim some form of legitimacy. They cannot, however, be considered wholly legitimate given their disrespect for some of the substantive elements of democracy.

In this paper, I offer a more elaborate understanding of the legitimacy of governments in order to deal with the rise of illiberal democracies. I argue that a distinction must be drawn between the *legitimacy of origin* and the *legitimacy of exercise*. While the former is based on the source of power, the latter pertains to the way this power is employed. Each of these types of legitimacy plays a different role. To spell out the respective roles of the legitimacy of exercise and the legitimacy of origin, I draw a distinction between the *qualification* and *disqualification* of governments. If a new government secures international recognition and its delegates are accredited within international organizations, it *qualifies* as the legitimate repre-

8. Clifford Krauss, *Peru's New Chief Sworn In, Vowing to Revive Democracy*, N.Y. TIMES, Nov. 23, 2000, at A14.

9. See *supra* notes 5 and 6.

10. Michael Slackman, et al., *Egypt Pushes 2-Year Delay In Local Vote*, N.Y. TIMES, Feb. 14, 2006, at A1.

11. Michael Ignatieff, *Iranian Lessons*, N.Y. TIMES MAGAZINE, July 17, 2005, at 50-51.

12. Editorial, *Undemocratic Tunisia*, N.Y. TIMES, Feb. 18, 2004, at A18; Kamel Labidi, *The Wrong Man to Promote Democracy*, N.Y. TIMES, Feb. 21, 2004, at A15.

13. See *infra* note 107.

14. See James Glanz, *A Little Democracy or a Genie Unbottled*, N.Y. TIMES, Jan. 29, 2006, at 4-1; Francis Fukuyama, *After Neoconservatism*, N.Y. TIMES MAGAZINE, Feb. 19, 2006, at 67; Steven Erlanger, *Hamas Leader Sees No Change Toward Israelis*, N.Y. TIMES, Jan. 29, 2006, at 1-1.

15. These examples are further discussed below. See *infra* Part IV.B.3.

sentative entitled to speak and act on behalf of the state. But I also demonstrate that legitimacy can have a disqualification function when a government *previously* seen as the legitimate representative entitled to act and speak on behalf of a state is *disqualified* from being the representative of that state. This leads me to show how the effect of the legitimacy of origin test has been confined to a *qualification* role and that the legitimacy of exercise test has been largely confined to a *disqualification* role. The persistence of illiberal democracies calls for a significant extension of the disqualification role of the legitimacy of exercise.

This paper is divided into three parts. In the first part of this paper, I bring the concept of legitimacy into relief and expound on my construction of legitimacy from a general point of view. I also outline the distinction between the legitimacy of origin and the legitimacy of exercise. In the second part, I highlight the impact of the advent of the democratic blueprint on the appraisal of governments' legitimacy and come back to the monolithic conception of legitimacy that has been widely adopted in the mainstream doctrine. In the third part, I develop the bulk of my argument and explain the significance of the distinction between legitimacy of exercise and legitimacy of origin in contemporary international relations.

II. THE MULTIFACETED CONCEPT OF LEGITIMACY

This paper focuses on a dichotomy that has been widely overlooked in theory.¹⁶ I posit that a distinction must be drawn between the legitimacy pertaining to the *source of power* and the legitimacy related to the *exercise of power*.¹⁷ These are what I call the legitimacy of origin and the legitimacy of exer-

16. *But see* PALOMA AGUILAR FERNÁNDEZ, MEMORIA Y OLVIDO DE LA GUERRA CIVIL ESPAÑOLA (1996) (on the Spanish Civil War). The way he resorts to that dichotomy is of little relevance here since it is only aimed at the explanation of how Franco consolidated his power in the wake of the Spanish civil war and does not echo the substantive and the procedural elements of democracy. The distinction drawn between *legitimacy* and *legality* (and between *tyrannia obsque titulo* and *tyrannia quoad execitium*) by Noberto Bobbio revolves around the same idea though the terminology is not similar. Bobbio, *supra* note 2, at 148.

17. Though not addressing the issue of legitimacy, F. A. Hayek offers a good explanation for the distinction between the exercise of power and the source of power. *See* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 71 (1976).

cise. I must emphasize that the relevance of this distinction only relates to the legitimacy of a *government*. The legitimacy of origin is a tool to assess the origin of the government (coup, dynasty, elections, etc.), while the legitimacy of exercise permits evaluation of the way in which the government exerts its power. The aforementioned distinction is therefore alien to the legitimacy of a *rule*, a topic that has been a matter of concern in the theory of international law and international relations.¹⁸

It is also noteworthy that, in this paper, the distinction between legitimacy of origin and legitimacy of exercise only concerns the *external* legitimacy of a government and does not address its *internal* legitimacy. The legitimacy of a government can be measured from two different standpoints. One can assess its internal legitimacy—that is, how it is perceived by the people subject to it—and its external legitimacy—that is, how it is perceived by other governments.¹⁹ The internal legitimacy of an authority is usually related to the achievement of social and distributive justice²⁰ and thus revolves around the existence of a government *for* the people.²¹ It is this type of legitimacy that, as Weber famously explained in another context, enhances the stability of an authority and secures obedi-

18. The question of the legitimacy of a rule classically relates to the reasons of why rules are obeyed. It accordingly touches on the theories of compliance. On this topic see THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990) esp. 204-07; Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988); Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT'L ORG. 379, 379-408 (1999); Claire K. Kelly, *Enmeshment as a Theory of Compliance*, 37 N.Y.U. J. INT'L L. & POL. 101 (2005). For a critical approach of the concept of compliance, see Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345 (1997-98).

19. The distinction between internal and external legitimacy only relates to the position of the observer. It does not have any bearing upon the yardsticks that are used to carry out the test of legitimacy. This means that external legitimacy can focus on the respect for the rights of the individual but as seen through the eyes of foreign governments.

20. On the relationship between justice and democracy, see IAN SHAPIRO, *DEMOCRATIC JUSTICE* (1999).

21. This has been called the "output legitimacy" as opposed to the "input legitimacy" (i.e. a government *by* the people). For such a distinction, see FRITZ W. SCHARPF, *Legitimacy and the Multi-actor Polity*, in *ORGANIZING POLITICAL INSTITUTIONS: ESSAYS FOR JOHAN P. OLSEN* 268 (Morton Egeberg & Per Lægveid eds., 1999).

ence.²² The internal legitimacy is, however, of little relevance to the appraisal of government in international law. International law is only concerned with the way in which a government's legitimacy is perceived by other international authorities. In that sense, the application of international law is not directly contingent upon the perception of the people, although it cannot be excluded that the internal legitimacy of a given authority affects the way other actors assess the external legitimacy of that authority.²³

Thus, the distinction between legitimacy of origin and legitimacy of exercise only relates to the external legitimacy of a government. This helps us to understand that the legitimacy of exercise and the legitimacy of origin, though rarely relied on in theory, have already played an unacknowledged but crucial role throughout the various "epochs of international law."²⁴

The legitimacy of governments has often been evaluated by the origin of each government's power. This was certainly true so long as the legitimacy of a government hinged on its dynastic origin.²⁵ Following the ideas developed by Locke²⁶ and Rousseau,²⁷ later magnified by the American and French revolutions, legitimacy came to be linked to "the will of the

22. MAX WEBER, *ECONOMY AND SOCIETY* 31 (Guenther Roth & Claus Wittich eds., 1968). See also, Robert Grafstein, *The Legitimacy of Political Institutions*, 14 *POLITY* 51, 51-46 (1981); J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 201 (Isaiah Berlin, Stuart Hampshire & Richard Wollheim eds., The Noonday Press 1954) (1832); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 *AM. J. INT'L L.* 46, 48 (1992).

23. See the criteria of representativity that is often resorted to in the recognition policy of states. On this question, see Stefan Talmon, *Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law*, in *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* 509-17 (Guy S. Goodwin & Stefan Talmon eds., 1999).

24. See generally WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* (Michael Byers trans., 2000).

25. This entailed that only dynastic authorities were recognized; see VERHOEVEN, *LA RECONNAISSANCE*, *supra* note 3, at 597; Gregory H. Fox, *The Right to Political Participation in International Law*, 17 *YALE J. INT'L L.* 539, 547 (1992).

26. JOHN LOCKE, *TWO TREATISES OF CIVIL GOVERNMENT* (J. M. Dent & Sons 1962) (1690).

27. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Maurice Cranston trans., Penguin Books 1968) (1762).

people.”²⁸ As Roth explains, even before the 1948 Universal Declaration of Human Rights, “almost all states—whether liberal democracies, one-party revolutionary states, military dictatorships, or traditionalist regimes—subscribed to the notion that ‘the will of the people’ constitutes the ultimate source of governmental legitimacy.”²⁹ In that sense, a government was deemed legitimate if it could be said to be a government “by the people,”³⁰ a criterion that, again, hints at the origin of the authority. But the practice of international relations is also pervaded by cases where legitimacy was assessed through the lens of the exercise of power, as illustrated by the continuous importance of the effectiveness of the authority.³¹

The history of international relations has thus witnessed the recourse to both the legitimacy of origin and the legitimacy of exercise. The end of the Cold War and the persistence of illiberal democracies have revived the relevance of this distinction. But, astoundingly, the theory has made no reference to this dichotomy. This point is further discussed in the following section.

III. LEGITIMACY IN THE AGE OF DEMOCRACY AND THE MONOLITHIC CONCEPTION OF LEGITIMACY IN MAINSTREAM LEGAL DOCTRINE

The demise of communist regimes put an end to the ideological division that had gripped the world for nearly fifty years. This has unmistakably caused remarkable changes in international society, particularly to the form of the institutions of international legal subjects. Indeed, the idea that democ-

28. The French Declaration Of The Rights Of Man And Of The Citizen And The American Bill Of Rights: A Bicentennial Commemoration. S. DOC. 101-9 (1989); FRIEDRICH GENTZ, *THE FRENCH AND AMERICAN REVOLUTIONS COMPARED* (John Quincy Adams trans., Henry Regnery Company 1955) (1800).

29. ROTH, *supra* note 1, at 38.

30. Letter from Thomas Jefferson to Admantios Coray (Oct. 31, 1823) *in* *The Writings of Thomas Jefferson* at 318, 319 (H.A. Washington ed., Derby and Jackson 1859).

31. This means that only effective governments are recognized. See P.K. MENON, *THE LAW OF RECOGNITION IN INTERNATIONAL LAW* 65-68 (1994). For a discussion of the different “vehicles of legitimation,” see ROTH, *supra* note 1, at 41-51. On the relationship between legitimacy and effectiveness, see Bobbio, *supra* note 2, at 154.

racy is the only acceptable type of regime has gained broad support, even monopolizing the political discourse³² (despite a lingering disagreement about its accurate meaning³³). This evolution has been underpinned by the common belief that democracy bolsters peace³⁴ and prosperity,³⁵ and even quells terrorism.³⁶

The dominant character of democracy has not been limited to political discourse but has manifested itself differently on the international plane. For instance, all of the entities which have reached statehood in the last few years have been induced to adopt democratic institutions.³⁷ Likewise, each ex-

32. See generally SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS* 30-49 (2003). See also Gregory H. Fox & Brad. R. Roth, *Introduction: the spread of liberal democracy and its implications for international law*, in, *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 1, 1-4 (Gregory H. Fox & Brad R. Roth eds., 2000).

33. GIOVANNI SARTORI, *THE THEORY OF DEMOCRACY REVISITED* 6 (1987). But see Armin von Bogdandy, *Globalization and Europe: How to Square Democracy*, *Globalization and International Law*, 15 *EUR. J. INT'L L.* 885, 889-90 (2004) (stating that a consensus on the requirements of democracy has not led to a consensus on the theory and premises of democracy).

34. See the neo-Kantian Liberal and democratic peace theories contained in Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, *PHIL. & PUB. AFF.* 205, 206-32 (1983); John Norton Moore, *Beyond the Democratic Peace: Solving the War Puzzle*, 44 *VA. J. INT'L L.* 341 (2004); JOHN M. OWEN IV, *LIBERAL PEACE, LIBERAL WAR: AMERICAN POLITICS AND INTERNATIONAL SECURITY* (1997); W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 *FORDHAM INT'L L. J.* 794, 796 (1995); BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD* (1993); Kenneth A. Schultz, *Do Democratic Institutions Constrain or Inform? Contrasting Two Institutional Perspectives on Democracy and War*, 53 *INT'L ORG.* 233 (1999); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *EUR. J. INT'L L.* 503 (1995).

35. G.A. Res. 46/151, Annex II, ¶ 13, U.N. Doc. A/RES/46/151 (Dec. 18, 1991). But see World conference on Human Rights, Preparatory Comm., Fourth Session, *Statement to the World Conference on Human Rights on Behalf of the Committee on Economic Social, and Cultural Rights*, Annex I, ¶ 9, U.N. doc. A/CONF. 157/PC/62/Add. 5 (Mar. 26, 1993).

36. See The Secretary General, *A More Secure World: Our Shared Responsibility*, *Report of the High Level Panel on Threats, Challenges, and Change*, ¶ 148, follow-up to the outcome of the Millennium Summit, U.N. Doc. A/59/565, (Dec. 2, 2004), available at <http://www.un.org/secureworld/report.pdf>. See also President George W. Bush, *President Addresses the Nation* (Sept. 7, 2003), available at <http://www.whitehouse.gov>.

37. See, e.g., *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, 62 *BRIT. Y.B. INT'L L.* 559, 559-60 (1991); *Declaration on Yugoslavia*, 62 *BRIT. Y.B. INT'L L.* 559, 560-61 (1991).

perience of international administration of territory has led to the creation of democratic states, as illustrated by the cases of East Timor and, to a lesser extent, Kosovo.³⁸ While new and restored states have been endowed with democratic institutions, violent changes of government have been deterred by a large array of sanction devices.³⁹ This systematic condemnation of coups against democratic governments surely buttresses the strong commitment of the international community to democracy. We have also witnessed the resort to peace-

38. On this topic, see Jean d'Aspremont, *La création internationale d'Etats démocratiques*, 109 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 889-908 (2005). See also Jean d'Aspremont, *International administration of territories*, European Society of International Law Forum 2005, <http://www.esil-sedi.org>. See generally, SIMON CHESTERMAN, *YOU THE PEOPLE: THE UNITED NATIONS, TRANSNATIONAL ADMINISTRATION AND STATE-BUILDING* 204-35 (2004). This tendency to install democracies through the international administration of territories has occurred even with the veiled support of non-democratic states, as if these states acknowledge that democracy is the only admissible political regime. See, e.g., S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004) (unanimously adopted resolution addressing the question of the future democratic government of Iraq). But see, S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999) (China abstaining from voting on the question of Kosovo).

39. For the Organization of American States, see Res. 1080 (XXI-O/91), available at <http://www.oas.org/juridico/english/agres1080.htm>; or OAS Charter, arts. 19-21, available at <http://www.oas.org/main/english/>; for the Organization for Security and Cooperation in Europe, see Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, available at http://www.osce.org/documents/odihr/1991/10/13995_en.pdf; for the Commonwealth, see the Millbrook Commonwealth Action Programme on the Harare Declaration, available at <http://www.thecommonwealth.org/>; for the African Union, see Decision AHG/Dec.142 (XXXV) and Decision 141 (XXXV) (though the emphasis was on the constitutional character of the government concerned). See generally, G.A. Res. 55/96, at 2, U.N. Doc. A/RES/55/96 (Feb. 28, 2001) on the promotion and consolidation of democracy which welcomes "measures, such as decision AHG/Dec.141 (XXXV) adopted in 1999 by the Assembly of Heads of State and Government of the Organization of African Unity, see A/54/424, annex II. resolution AG/RES.1080 (XXI-091) adopted in 1991 by the General Assembly of the Organization of American States and the Moscow Document on the Human Dimension adopted in 1991 by the Conference on the Human Dimension of the Conference for Security and Cooperation in Europe, which commit member states to taking certain steps in the event of an interruption of democratic government, as well as the Commonwealth Declaration adopted at the Commonwealth Heads of Government Meeting, held at Harare in 1991, A/46/708, annex. which commits members to fundamental democratic principles."

enforcement missions to restore overthrown democratic governments, as illustrated by the intervention in Sierra Leone.⁴⁰

These few examples—already much discussed in the literature⁴¹—suffice to demonstrate the far-reaching structural changes that international society has undergone over the last fifteen years with respect to the form of governments.⁴²

Since the end of the Cold War, therefore, the external legitimacy of an authority has come to depend almost entirely upon its democratic character.⁴³ The idea of a government based on the will of the people “expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures”⁴⁴—which during the Cold War had been

40. See generally Karsten Nowrot & Emily W. Schebacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 388 (1998). It is noteworthy that some of these missions were led by non-democratic states as if non-democratic states themselves are coming to terms with the ascendancy of democracy over any other kind of political regimes. See, e.g., Binaifer Nowrojee, *Joining Forces: United Nations and Regional Peacekeeping—Lessons from Liberia* 8 HARV. HUM. RTS. J. 133 (1995) for a discussion of the ECOMOG force in Liberia, which was led by Nigeria. See generally Michael Byers and Simon Chesterman, “*You the People*”: *Pro-democratic intervention in international law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 32, at 259.

41. See generally DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 32. See also JEAN D'ASPREMONT, *LES ETATS NON DÉMOCRATIQUES ET LE DROIT INTERNATIONAL* (forthcoming 2007).

42. This led some scholars to claim that we had reached the end of “History” in the Hegelian sense of the word, Fukuyama, *supra* note 7. See Susan Marks, *International Law, Democracy and the End of History*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 32, at 535.

43. See for instance the 1990 Charter of Paris which provides that: “Democratic government is based on the will of the people, expressed regularly through free and fair elections.” For a different analysis, see ROTH, *supra* note 1, at 417.

44. “(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country. (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.” Universal Declaration of Human Rights, G.A. Res. 217A, at 75, U.N. GAOR, 3d. Sess., 183 plen. Mtg., U.N. Doc A/810 (Dec. 10, 1948). This idea has been underpinned by many UN General Assembly resolutions. See, e.g., G.A. Res. 43/157, U.N. Doc. A/RES/43/157 (Dec. 8, 1988); G.A. Res. 45/150, U.N. Doc. A/RES/45/150 (Dec. 18, 1990); G.A. Res. 46/137,

loosely interpreted by states to legitimize any sort of government—is now understood to require a democratic political regime. Thus, there is little doubt today that democracy has become a prominent yardstick with which to assess the legitimacy of governments.⁴⁵

This is not to say that a non-democratic government will never be deemed legitimate, especially if that government has been in power for a long time.⁴⁶ The non-democratic character of a government is sometimes disregarded because of overriding geopolitical and strategic motives.⁴⁷ But, leaving these exceptional situations aside, it can reasonably be argued that, since the end of the Cold War, democracy has become “the touchstone of legitimacy”⁴⁸ for any new government.

The changes spawned by the end of the Cold War and the advent of the democratic model have also had far-reaching ripple effects on legal scholarship. Virtually all legal scholars were prompt to acknowledge that the “monopoly” achieved by the democratic blueprint also pervaded the international legal order. But these scholars failed to distinguish between the legitimacy of exercise and the legitimacy of origin, adopting instead a monolithic conception of legitimacy.

It is probably Thomas Franck who first broached the question of democracy in the post-Cold War legal order in 1992 in his groundbreaking article *The Right to Democratic Governance*.⁴⁹

U.N. Doc. A/RES/46/137 (Dec. 17, 1991); G.A. Res. 47/138, U.N. Doc. A/RES/47/138 (Dec. 18, 1992); G.A. Res. 49/190, U.N. Doc. A/RES/49/190 (Dec. 23, 1994); G.A. Res. 48/131, U.N. Doc. A/RES/48/131 (Dec. 20, 1993); G.A. Res. 52/129, U.N. Doc. A/RES/52/129 (Dec. 12, 1997); G.A. Res. 56/159, U.N. Doc. A/RES/56/159 (Dec. 19, 2001).

45. Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 494 (2001); Franck, *supra* note 22, at 46.

46. This has led some authors to contend that there exist “double standards” in that regard. See Marcelo G. Kohen, *La création d'Etats en droit international contemporain*, COURS EURO-MÉDITERRANÉENS BANCAJA DE DROIT INTERNATIONAL, vol. VI, 2002, at 619.

47. The most obvious example is the government of the People's Republic of China which is seen as legitimate by almost all countries in the world although it does not rest on any free and fair electoral process. The same cannot be said with respect to Pakistan since the government has relentlessly pledged to organized democratic elections. See *infra* note 107.

48. Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 599 (1999).

49. Franck, *supra* note 22. See Fox, *supra* note 25, at 542.

Franck argued that the legitimacy of governments was no longer confined to an assessment through purely national criteria but, rather, had to be gauged through the universal criterion of democracy.⁵⁰ Other scholars quickly followed,⁵¹ and the ensuing doctrinal strand endorsing such a theory has been identified as the “democratic entitlement school” or the “democratic entitlement theory.”⁵² It professes that a “democratic entitlement” has emerged in the international legal order. In sharp contrast with the “agnosticism”⁵³ that had prevailed before,⁵⁴ democratic entitlement represents “a revolutionary transformation of the full array of international norms from norms governing recognition of states and governments to those governing the use of force.”⁵⁵

The proponents of the democratic entitlement theory contend that the legitimacy of each government is to be measured by international standards, including democracy. Building on the existence of a “right to democratic governance” or a “right to political participation,”⁵⁶ these authors call for sweeping changes in the classical rules of international law – although there has not been any unanimity as to the appropriate extent of these transformations.⁵⁷ For instance, these au-

50. For a criticism of the Democratic entitlement school, see BRAD R. ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* 413, 320-426 (1999). See also MARKS, *supra* note 32, at 37-42.

51. See generally Christina M. Cerna, *Universal Democracy: An International Legal Right or the Pipe Dream of the West?*, 27 N.Y.U. J. INT'L L. & POL. 289 (1995); James Crawford, *Democracy and International Law*, 64 BRIT. Y.B. INT'L L. 113 (1993). See also Obiora Chinedu Okafor, *The Concept of Legitimate Governance in the Contemporary International Legal System*, 64 NETH. INT'L L. REV. 33 (1997).

52. Fox & Roth, *supra* note 32, at 10.

53. MARKS, *supra* note 32, at 31.

54. L.F.L. OPPENHEIM, 1 *INTERNATIONAL LAW: A TREATISE* 403 (Longmans, Green & Co., 1905) (“The Law of Nations prescribes no rules as regards the kind of head a state may have. Every state is, naturally, independent regarding this point, possessing the faculty of adopting any Constitution according to its discretion”).

55. Fox & Roth, *supra* note 32, at 11.

56. Fox, *supra* note 13, at 543, 596.

57. Franck is probably not the most bold in that respect, expressing some reservations as for the consequences. Franck, *supra* note 22. Conversely, Fox's bent for major changes is obvious. Fox, *supra* note 25.

thors contend that foreign aid and economic relations,⁵⁸ membership in international organizations,⁵⁹ acceptance of credentials of governments,⁶⁰ and the authority of a government to act on behalf of the state,⁶¹ have all proven to be conditioned on compliance with democracy. It has even been suggested that the rules pertaining to the use of force permit regime change.⁶² It has also been suggested that democratic courts should not pay deference to the interpretive methodologies of courts in non-democratic states.⁶³

There is no need to consider these arguments in this paper; they have been extensively discussed in the literature.⁶⁴ It only matters here to demonstrate that, in many aspects, the democratic entitlement theory has rested on a monolithic conception of legitimacy because it focuses only on the legitimacy of origin. I posit here that this oversimplified conception of legitimacy is the direct consequence of the restricted understanding of democracy adopted by the democratic entitlement school.⁶⁵

58. Gregory H. Fox, *International Law and the Entitlement to Democracy After War*, 9 GLOBAL GOVERNANCE 179 (2003).

59. Cerna, *supra* note 39.

60. Fox, *supra* note 25 at 597, 607; Crawford, *supra* note 50, at 128.

61. Gregory H. Fox, *Election Monitoring: The International Legal Setting*, 19 WIS. INT'L L.J. 295, 311-12 (2001).

62. See Reisman, *supra* note 34. But see W. Michael Reisman, *Why Regime Change Is (Almost Always) A Bad Idea*, 98 AM. J. INT'L L. 516, 517 (2004) ("Regime change is a more radical claim than 'humanitarian intervention', which has lately acquired a degree of legal acceptance long denied it. Nevertheless, both claims resonate with some of the same policies. Humanitarian intervention is a short-term initiative, aimed only at stopping massive and ongoing human rights violations. Once the violations cease it is no longer justified. In contrast, those responsible for a regime change may try to justify it by invoking past human rights violations, but it is, in fact, future-oriented – it is conducted to change the structure and/or personnel of a government."). See also ROTH, *supra* note 1, at 407 ("Sierra Leone is the best evidence yet of a fundamental change in international legal norms pertaining to 'pro-democratic' intervention."). See also Franck, *supra* note 22, at 47. But see Crawford, *supra* note 39, at 126.

63. Fox, *supra* note 61, at 306.

64. An entire book discusses the democratic entitlement theory. DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 32.

65. It is emphasized that in this paper the emphasis is put on the understanding of the democratic character of states; the question of the democratic character of the international legal order as a whole is left aside. On this question see, e.g., Daniel W. Drezner, *On the Balance Between International*

The authors of the democratic entitlement school interpret “democracy” as a narrow and process-oriented concept⁶⁶ defined by the holding of periodic elections. The understanding of democracy as a procedural requirement is not only supported by the authors of the democratic entitlement school but has also been endorsed by many other authors. It can be traced back to Mill’s,⁶⁷ Bentham’s,⁶⁸ and, later, Schumpeter’s⁶⁹ instrumental and utilitarian understandings of democracy.

Although, as I explain below, I disagree with this procedural understanding of democracy, I acknowledge that there are a handful of arguments buttressing the restriction of democracy to a process of free and fair elections. First, there are strong reasons to believe that the concept of democracy, as it is taken into account by the international legal order, does not operate at a high level of detail⁷⁰ and is accordingly limited to some tangible criteria.⁷¹ This means that international law does not regulate the behavior of its subjects with the same level of precision as that found in domestic law.⁷² In that sense, Franck is partly right when he argues that the element pertaining to the holding of free and fair elections reaches “the limit of what the still frail system of states can be expected

Law and Democratic Sovereignty, 2 CHI. J. INT’L L. 321 (2001); Louis Henkin, *International Law: Politics, Values and Functions*, 216 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 66 (1989). See also MARKS, *supra* note 32, at 76-100 (discussing the limits of the conventional approach of democratic theory and practice).

66. Fox, *supra* note 59, at 185. See also Gregory H. Fox, *The right to political participation in international law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 32, at 49.

67. JAMES MILL, *ESSAYS ON GOVERNMENT, JURISPRUDENCE, LIBERTY OF THE PRESS AND LAW OF NATIONS* (Kelley, 1967) (1825).

68. JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT* (Wilfrid Harrison ed., Blackwell, 1960) (1776).

69. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 269 (2d ed. 1947).

70. Fox, *supra* note 58, at 184-85.

71. Thomas Carothers, *Empirical Perspectives on the Emerging Norm of Democracy in International Law*, 86 AM. SOC’Y INT’L L. PROC. 261, 264 (1992).

72. See J.H.H. Weiler, *The Geology of International Law*, 64 ZAÖRV 547, 549 (2004) for an illuminating account of the level of regulations of international law.

to accept and promote as a right of people assertable against their own, and other, governments.”⁷³

It is moreover true that, in practice, the concept of democracy is first and foremost associated with the holding of “free and fair” elections.⁷⁴ Many international instruments en-

73. Thomas Franck, *Democracy as a Human Right*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 73, 75 (Louis Henkin & John Lawrence Hargrove eds., 1994).

74. See the Final Warsaw Declaration: Towards a Community of Democracies, June 27, 2000, 39 I.L.M. 1306, available at <http://www.state.gov/g/drl/rls/26811.htm>; G.A. Res. 55/96, U.N. Doc. A/RES/55/96 (Feb. 28, 2001) (Promoting and consolidating democracy); George H.W. Bush, U.S. President, Remarks on the Occasion of Elections in Nicaragua (Feb. 26, 1990). See also G.A. Res. 56/159, U.N. Doc. A/RES/56/159 (Feb. 20, 2002) (enhancing effectiveness of periodic and genuine elections); G.A. Res. 52/129, U.N. Doc. A/RES/52/129 (Feb. 28, 1998); G.A. Res. 48/131, U.N. Doc. A/RES/48/131 (Feb. 15, 1994); G.A. Res. 49/190, U.N. Doc. A/RES/49/190 (Mar. 9, 1995); G.A. Res. 47/138, U.N. Doc. A/RES/47/138 (Mar. 1, 1993); G.A. Res. 46/137, U.N. Doc. A/RES/46/137 (Dec. 17, 1991); G.A. Res. 45/150, U.N. Doc. A/RES/45/150 (Dec. 18, 1990); G.A. Res. 43/157, U.N. Doc. A/RES/43/157 (Dec. 8, 1998). Mention has also been made of the “participatory, representative and equitable nature” of democracy (Ulaanbaatar Declaration, Fifth Conference on New and Restored Democracies, (Sept. 12, 2003)) and to “genuine” (American Convention on Human Rights art. 23, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123) and “authentic” elections (Mexico, Cases 9768, 9780, 9828, Inter-Am. C.H.R., Resolution no. 01/90, OAE/Ser. L/V/IL.77 rev1 ¶ 39 (1990)). The practice and international instruments usually lay down further conditions to be complied with in order to have democratic elections. It is required, for instance, that elections be periodic. Understandably, the governed must effectively be given the chance to determine the mandate of the governing bodies at reasonable intervals. There would not be any accountability if control by the people were not exercised as frequently as possible (See Steven R. Ratner, *Democracy and accountability: the criss-crossing paths of two emerging norms*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 32, at 449; MARKS, *supra* note 32, at 64; Molly Beutz, *Functional Democracy: Responding to Failures of Accountability*, 44 HARV. INT’L L. J. 387 (2003)). The criterion of periodic elections—enshrined in most international law instruments—has, however, usually been skirted in practice. States generally assume that a free and fair election usually foreshadows the establishment of a true democratic regime. Universal suffrage—also referred to as a principle of non-discrimination, Fox, *supra* note 25, at 570—and secret ballots are also conditions whose breach prevents the regime from gaining a democratic character. Should an election be consistent with the aforementioned criteria, it does not automatically mean that the people have effectively been given the opportunity to consent to the authority and power the latter is due to exercise. Elections must also lead to the appointment of those *effectively* ruling the country (in a more direct type of democratic system) or those *effectively* checking the former (in

shrine this idea that democracy relies on the organization of free and fair elections,⁷⁵ and the idea has been reiterated in countless instances by many international organizations.⁷⁶ This idea can also be inferred from the systematic condemnations and sanctions against coups carried out against democratically-elected governments.⁷⁷

Although there is some grain of truth in the aforementioned arguments, I submit that they fail to exclude any conception of democracy embracing substantive elements, as it is explained in the next section. Leaving that aside, the forego-

a more representative type of democratic system). Because the elected body has not been endowed with any real power, some states, despite elections held in conformity with the aforementioned requirements, have not been deemed democratic.

75. See Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 193 (1991); *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, Jun. 29, 1990, available at <http://www.osce.org>; Universal Declaration of Human Rights art. 21, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights art. 25, Dec. 16, 1966, 999 U.N.T.S. 171; American Declaration on the Rights and Duties of Man art. 20, May 2, 1948, OEA/Ser.L./V/II 71 (1948); American Convention on Human Rights art. 23, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

76. See, e.g., Eur. Parl. Ass. Res. 800 (July 1, 1983). See also U.N. Doc. CCPR/C/21/Rev.1/Add.7, General Comment 25, ¶ 1 (July 12, 1996); G.A. Res. 47/138, ¶ 4, U.N. Doc. A/RES/47/138 (Mar. 1, 1993); G.A. Res. 46/137, ¶ 3, U.N. doc. A/RES/46/137 (Dec. 17, 1991); G.A. Res. 45/150, 0182 2, U.N. doc. A/RES/45/150 (Dec. 18, 1990); G.A. Res. 43/157, 0182 2, U.N. Doc. A/RES/43/157 (Dec. 8, 1988).

77. Among numerous examples, see *Declaration of President George Bush Concerning the Events in the Soviet Union*, Aug. 19, 1991, in DOCUMENTS D'ACTUALITÉ INTERNATIONALE, Nov. 15, 1991, at 437; *EEC: Declaration of the Twelve on the Situation in the Soviet Union*, Aug. 19, 1991, in DOCUMENTS D'ACTUALITÉ INTERNATIONALE, Nov. 15, 1991, at 438; G.A. Res. 46/7, ¶ 1-2, U.N. doc. A/RES/46/7 (Oct. 11, 1991) and S.C. Res. 940, ¶ 4, U.N. doc. S/RES/940 (July 31, 1994) (on Haiti); S.C. Res. 1072, ¶ 1, U.N. Doc. S/RES/1072 (Aug. 30, 1996) (on Burundi); *Communiqué of the Presidency on the Coup d'Etat in Gambia*, July 25, 1994, in DOCUMENTS D'ACTUALITÉ INTERNATIONALE, Sept. 15 1994 at 463; *Communiqué of the Presidency of the EU condemning the dissolution of the Parliament and Government of Lesotho*, Aug. 24, 1994, in DOCUMENTS D'ACTUALITÉ INTERNATIONALE, Nov. 1, 1994 at 546; *Declarations of the the European Union on the Coup d'Etat in Sierra Leone*, May 28, 1997, in DOCUMENTS D'ACTUALITÉ INTERNATIONALE, Aug. 1, 1997 at 557; *Meeting of Foreign and Defense Ministers of the ECOWAS, Final Communiqué*, July 3, 1998, in DOCUMENTS D'ACTUALITÉ INTERNATIONALE, Sept. 15, 1998 at 694; *Declaration of the European Union on Ivory Coast*, July 30, 1999, in DOCUMENTS D'ACTUALITÉ INTERNATIONALE, Mar. 1, 2000 at 205.

ing suffices to explain that a procedural conception of democracy rests on an analysis of the origin of power and discounts the way in which power is exercised. Indeed, the democratic entitlement theory's focus on elections, that is, the legitimacy of origin, has accordingly discounted the legitimacy of exercise. As a result, these authors have ignored the distinction between legitimacy of origin and the legitimacy of exercise and have adopted a monolithic conception of legitimacy exclusively based on origin. In the next section, I demonstrate that this understanding of legitimacy fails to reflect the practice and is, moreover, inadequate to tackle the problem of the persistence of illiberal democracies.

IV. THE LEGITIMACY OF ORIGIN AND THE LEGITIMACY OF EXERCISE AND THEIR RESPECTIVE ROLES IN THE AGE OF DEMOCRACY

In the age of democracy, the monolithic conception of legitimacy that pervades mainstream legal doctrine is at odds with both the theory and the practice of democracy. There is a need to make a distinction between the legitimacy of origin and the legitimacy of exercise (A). Building on this distinction, each of these types of legitimacy plays a different role in practice, ranging from qualification to disqualification of governments. In so doing, the persistence of illiberal democracies calls for an extension of the role played by the legitimacy of exercise (B).

A. *The Need for a Distinction Between the Legitimacy of Origin and the Legitimacy of Exercise*

I submit that the purely procedural conception of democracy that underlies the monolithic understanding of legitimacy of the mainstream legal doctrine does not dovetail with a conception of democracy embracing substantive elements (1). I also submit that the contemporary practice pertaining to democracy further demonstrates the inadequacy of a monolithic conception of legitimacy and the need for a distinction between the legitimacy of origin and the legitimacy of exercise (2).

1. *The Substantive Elements of Democracy*

A purely procedural conception of democracy fails to account for certain aspects of governance, the presence of which are necessary for a given regime to be properly labeled “democratic.” More specifically, besides procedural features democracy also embodies substantive elements.

Before demonstrating that democracy embraces some substantive elements, I must stress, for the sake of clarity, that the distinction between legitimacy of origin and legitimacy of exercise is not the direct consequence of a conception of democracy that includes substantive elements. The dichotomy between legitimacy of origin and legitimacy of exercise can be applied outside the democratic context and can be relied on to examine the various criteria which have been used to gauge government’s legitimacy at a time when democracy was not prominent. Legitimacy is always contingent upon a given pattern of reference, and this pattern of reference has undergone changes throughout the history of international relations.⁷⁸ Democracy is accordingly just one of the many paradigms that can be resorted to for the evaluation of a government’s legitimacy. For this reason, the significance of the distinction between the legitimacy of origin and the legitimacy of exercise goes beyond the democratic framework. The intention here, however, is to demonstrate the particular relevance of this distinction in the age of democracy.

The question of whether democracy includes only procedural elements or also embodies substantive features has gripped the theory⁷⁹ and the practice⁸⁰ for a long time. Given

78. *See supra*, Part I.

79. Many authors have lambasted what they saw as an “electoral” (LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* 8-9 (1999)) or “cosmetic” (LOW INTENSITY DEMOCRACY: POLITICAL POWER IN THE NEW WORLD ORDER 21 (Barty Gills, Joel Rocamora & Richard Wilson eds., 1993)) conception of democracy because of its “low intensity.” *Id.*; *See also* MARKS, *supra* note 32, at 57-75. The expression “low intensity democracy” alludes to the American strategy of containment known as “low intensity warfare.” MARKS, *supra* note 32, at 52. Relying on a definition of democracy close to that supported by theorists like John Rawls (JOHN RAWLS, *A THEORY OF JUSTICE* (1971)), Carl Schmitt (CARL SCHMITT, *LEGALITY AND LEGITIMACY* (Jeffrey Seitzer trans., Duke University Press, 2004) (1932)), or even Friedrich A. Hayek (HAYEK, *supra* note 17, at 227), these authors have put forward a substance-oriented conception of democracy embodying compliance with

the complex character of the concept of democracy⁸¹ and its bent for relentless re-contextualization,⁸² we will probably never agree on the accurate meaning of democracy.⁸³ But this should not prevent us from discussing its main components. In so doing, I lean towards a substantive understanding of democracy. The concept of democracy must include some substan-

Human Rights. See Brad R. Roth, *Evaluating democratic progress*, in Fox & Roth, *supra* note 32, at 493-95; Carothers, *supra* note 71, at 264.

80. This debate between *procedural* democracy and *substantive* democracy has also been echoed in the interpretation of the major human rights conventions. These instruments—though they often enshrine a right to political participation through regular elections—are hardly explicit on whether an electoral process is the core element of a democratic regime. See, e.g., International Covenant on Political and Civil Rights art. 25, Dec. 19, 1966, 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol art. 3, Mar. 20, 1952, C.E.T.S. No. 9; American Convention on Human Rights art. 23, Nov. 22, 1969, 1144 U.N.T.S. 123; Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms art. 29, May 26, 1995 Council of Europe Doc. H (95) 7 rev. This is probably because such an affirmation would have barred their adoption by all the communist regimes during the cold war. It is not to say that these instruments do not refer in any manner to a democratic regime. Indeed, the qualifying clauses are usually phrased as to limit interferences with the exercise of human rights with “what is necessary in a democratic society.” See Convention for the Protection of Human rights and Fundamental Freedoms art. 8-11, Nov. 4, 1950, C.E.T.S. No. 5; International Covenant on Civil and Political Rights art. 4, Dec. 19, 1966, 999 U.N.T.S. 171. According to some authors, this implies that a democratic regime is the sole type of governmental system where human rights are complied with. Crawford, *supra* note 50, at 115. Whether this is true or not, these qualifying clauses more certainly entail that democracy remains the ultimate yardstick to assess the acceptability of interferences with some human rights. Be that as it may, the idea that democracy furthers the compliance of human rights and, cogently, that these instruments somehow lay down an obligation pertaining to the adoption of a democratic regime has emerged from both the practice and the interpretation provided by the monitoring bodies of these instruments. *United Communist Party of Turkey and Others v. Turkey*, 26 Eur. H.R. Rep. 121 (1998).

81. Martii Koskeniemi, *Intolerant Democracies: A Reaction*, 37 HARV. J. INT’L L. 231, 234 (1996). This is a response to Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. J. INT’L L. 1 (1995).

82. See MARKS, *supra* note 32, at 151.

83. For a different opinion see Gregory H. Fox, *The Right to Political Participation in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 32, at 90.

tive requirements, namely some basic political freedoms and civil rights⁸⁴ and some hints of the rule of law.

The reason I include some political and civil human rights in the concept of democracy traces back to the democratic procedural requirements themselves. There can hardly be a *free* democratic process if basic political rights are infringed. The “*freedom*”⁸⁵ of elections must take place in a “free market of ideas”⁸⁶ where free political competition is assured.⁸⁷ To ensure the free competition in this market of ideas, the respect for basic political freedoms must be insured. The organization of a “free” electoral process requires the respect of the freedom of expression, freedom of assembly, freedom of thought, freedom of press, etc.⁸⁸ These freedoms are

84. Even though I admit that dire economic conditions can impinge on the freedom of the fairness of any electoral process, I contend that economic, social and cultural rights are alien to the idea of democracy. These rights are not aiming at a democratic organization of the power but are rather directed at a form of social and distributive justice. For a very entrenched position, see FRIEDRICH. A. HAYEK, *THE CONSTITUTION OF LIBERTY*, 231 (Routledge and Kegan Paul, 1960). He asserts that distributive justice is non-democratic. For the opposite view, see SHAPIRO, *supra* note 20; *see also* Beutz, *supra* note 70, at 418.

85. The freedom of the elections is a more continuous assessment (mostly focused on the period of time prior to the elections and on the respect of political freedoms) whilst the “*fairness*” of the elections is all about the electoral process itself. The “*fairness*” of the elections is related to the regularity of the elections which excludes any manipulation by any of the competing parties. This requirement is mostly concerned with the rigging of elections. The fairness is probably the requirement whose respect is the most difficult to monitor, despite the huge means devoted to international elections monitoring by both governmental organisations and NGO’s. In practice, only obvious and large-scale riggings will be reported (should the state have consented to international elections monitoring or asked for international assistance) and will prevent from considering the elections as conferring a democratic and legitimate power to the government.

86. Franck, *supra* note 22, at 90.

87. Beutz, *supra* note 70, at 418.

88. G.A. Res. 55/96, ¶ i, U.N. Doc. A/RES/55/96 (Feb. 28, 2001) (on the promotion and consolidation of democracy); UNHCR Res. 1999/57, ¶ 1(a) (Apr. 27, 1999); UNHCR Res. 2002/46, ¶ 1; General Comment of the Human Rights Committee No 25, CCPR/C21/Rev.1/Add.7, par. 25 seq. *See also* the case-law of the Interamerican Court of Human Rights (Compulsory Membership in an Association Prescribed by Law For the Practice of Journalism, Advisory Opinion, OC-5/85, ¶ 69) or that of the European Court of Human Rights (Lingens v. Austria, App. No. 9815/82, 8 Eur. H.R. Rep. 407 (1986); Open Door and Dublin Well Woman v. Ireland, App. No. 14234.88,

“democratic rights”⁸⁹ or, as stated by the UN Commission on Human Rights, “rights pertaining to democratic governance.”⁹⁰ In that sense, one can contend that the requirement of free elections *already* encompasses a substantive component, that is compliance with the political freedoms ensuring pluralism.

To my understanding, the concept of democracy also includes the respect for the rule of law. As the Human Rights Committee has emphasized, there can hardly be a free and fair election if the rules regulating the electoral process have not been established prior to the holding of the elections and have not been complied with by the authorities.⁹¹

Contemporary international relations support the inclusion of substantive as well as procedural elements in the concept of democracy. States have voiced their support for “democratic values”⁹² and noted that “elections are only a step towards the establishment of a democratic regime.”⁹³

It is true, however, that it often takes massive and gross violations of human rights for states to deny the democratic character of the governments responsible.⁹⁴ This is anything

15 Eur. H.R. 244 (1992); *United Communist Party of Turkey and Others v. Turkey*, 26 Eur. H.R. Rep. 121 (1998); *Handyside v. The United Kingdom*, app. No. 5493/72, 1 Eur. H.R. Rep. 737 (1972); Warsaw Declaration, *supra* note 74; Inter-American Democratic Charter, Sept. 11, 2001, OAS Doc. OEA/Ser.P/AG/RES.1 (XXVIII-E/01), available at www.oas.org/main/English/ (follow “Democratic Charter” hyperlink under “Documents”).

89. Richard J. Arneson, *Democratic Rights at the National Level*, in PHILOSOPHY AND DEMOCRACY 95 (Thomas Christiano ed., 2003).

90. U.N. Commission on Human Rights Res. 1997/64 (Apr. 16, 1997); (on Myanmar). See also UNCHR General Comment 25, CCPR/C/21/Rev.1/Add.7 (Dec. 7, 1996).

91. U.N. Human Rights Committee, General Comment 25, CCPR/C/21/Rev.1/Add.7 (Dec. 7, 1996), ¶ 10.

92. The Heads of Government of the Commonwealth of Nations, *Coolum Declaration*, (Mar. 5, 2002), <http://www.thecommonwealth.org/document/34293/35468/35799/coolum.htm>. See also Jo Johnson, *EU Observer attacks big flaws in Afghan Poll*, *The Financial Times*, Sept. 15, 2005, at 12 (noting an EU observer’s skepticism that Democracy would take hold following the elections in Afghanistan).

93. See Secretary of State Condoleezza Rice, *Joint Remarks of the Secretary of State*, Apr. 27, 2005 (excerpted in Marie Delcas & Paulo A. Paranagua, *Les Etats-Unis comptent sur le Brésil pour modérer le Venezuela*, *LE MONDE*, Apr. 29, 2005, at 2).

94. See, e.g., G.A. Res. 46/7, U.N. Doc. A/RES/46/7 (Oct. 11, 1991) (on Haiti); C.H.R. Res. 55/18, U.N. doc. E/CN.4/RES/1999/18 (Apr. 23, 1999)

but astounding. As mentioned earlier, international law does not operate at a high level of detail and is only concerned with behaviors that blatantly contradict the principles lying at its core.⁹⁵ Nevertheless, the mere fact that an infringement of the rule of law and human rights, whatever its extent, has prompted systematic disapproval in the name of democracy demonstrates that, in practice, democracy has been construed as including certain substantive elements.

If democracy inevitably embraces some substantive elements, then any monolithic conception of legitimacy reveals itself as insufficient to verify the respect for the various constitutive elements of democracy. Thus, there is a need to distinguish between the legitimacy of origin and the legitimacy of exercise. From the standpoint of the legitimacy of origin, a government is legitimate if it rests on the “will of the people” expressed through a free and fair electoral process. From the vantage point of the legitimacy of exercise, a government is legitimate if it exerts its power in a manner consistent with basic political freedoms and the rule of law. Only a distinction between the legitimacy of origin and the legitimacy of exercise can allow for a theory that embraces all the constitutive elements of democracy.

2. *Legitimacy in Practice*

In the context of democracy, the legitimacy of *origin* addresses the procedural elements of democracy that insure that the authority originates in popular sovereignty through free and fair elections, while the legitimacy of *exercise* bears upon the substantive elements of democracy depicted in the previous section. In the following paragraphs, it is posited that the contemporary practice pertaining to the legitimacy of governments shows that each of these types of legitimacy has had an impact on international relations. Their respective effects underpin the need for this distinction and demonstrate the inadequacy of a monolithic conception of legitimacy.

(on the Federal Republic of Yugoslavia, Croatia and Bosnia-Herzegovina); Organization of American States, *Declaration on Democracy in Venezuela*, G.A. Res. 32/28, OAS Doc. AG/DEC. 28 (XXXII-O/02) (June 4, 2002); Third Conference of the New or Restored Democracies on Democracy and Development, Bucharest, Rom., U.N. Doc. A/52/334 (Sept. 11, 1997).

95. See *supra* Part II.

Before examining the practice, it should be briefly emphasized that governmental legitimacy is not constantly under scrutiny in the international legal order. Legitimacy is only intermittently tested. Even if attention is often paid to the form of governments in the international arena, the assessment of their legitimacy is not systematic. The mere measurement of the democratic character of a government—which is very common in international relations—does not necessarily involve an evaluation of its legitimacy.⁹⁶ The question of legitimacy only arises when there is a need to determine the authority entrusted with the power to act and speak on behalf of the state. By my account, such a determination is only required in limited, but significant, situations. The authority that can speak and act on behalf of the state in the international legal order must be determined ahead of any recognition of government (a), when accreditation within international organizations is sought by two warring governments (b), and, finally, when a state invites another state to carry out a military operation on its own territory (c). As I explain in the following paragraphs, the tests of legitimacy applied in each of these contexts have examined the legitimacy of origin, the legitimacy exercise of the power or both. In the cases where only one type of legitimacy has been taken into account, I will further demonstrate that the test of legitimacy has come to be

96. This is well illustrated by international economic relations that are the most common leverage for various sorts of policies. These relations are often conditioned upon compliance with democracy. The suspension or the severance of economic relations following a breach of democracy is not tantamount to a judgment about legitimacy. Indeed, the government barred from cooperating with another because of its non-democratic character is not necessarily seen as illegitimate by the former. On the US international economic policy, see generally MICHAEL P. MALLOY, *ECONOMIC SANCTIONS AND U.S. TRADE* (1990); ZACHARY SELDEN, *ECONOMIC SANCTIONS AS INSTRUMENTS OF AMERICAN FOREIGN POLICY* (1999); HOSSEIN G. ASKARI ET AL., *CASE STUDIES OF U.S. ECONOMIC SANCTIONS: THE CHINESE, CUBAN, AND IRANIAN EXPERIENCE* (2003). Regarding the international financial relations, see BARTRAM S. BROWN, *THE UNITED STATES AND THE POLITIZATION OF THE WORLD BANK*, (1992). On the importance of democracy in the European international economic relations, see the Cotonou Agreement between the European Community and the ACP Countries signed on 23rd of June 2000 and concluded for a twenty-year period from March 2000 to February 2020, 2001 O.J. (L 043). On this agreement, see Joe Verhoeven, *La Communauté Européenne et la Sanction Internationale de la Démocratie et des Droits de L'homme*, 1999 LIBER AMICORUM MOHAMMED BEDJAQUI 771 (1999).

unsatisfactory, especially in the context of illiberal democracies.

a. Recognition of Governments

The most common situation in which an authority's legitimacy is tested is when there has been a change of government irrespective of the normal constitutional procedure. In such a situation, all governments must, in one way or another,⁹⁷ determine whom they will recognize as the representatives of the state whose government has suddenly changed. Whether through express recognition or establishment of diplomatic relations,⁹⁸ the recognition of the government of a foreign state involves a test of legitimacy. Should an authority be deemed illegitimate, it will not be recognized as representing the state of which it claims to be at the helm.

Since the end of the Cold War,⁹⁹ recognition of governments that have overthrown a democratically elected government is nearly always systematically refused, as is illustrated by the reactions following the coups in Sierra Leone,¹⁰⁰ Haiti,¹⁰¹

97. Stefan Talmon, *Recognition of Governments: An Analysis of the New British Policy and Practice*, 63 BRIT. Y.B. INT'L L. 231, 246 (1992); HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 157 (1947); Joe Verhoeven, *La reconnaissance internationale: declin ou renouveau?*, 39 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 7, 16 (1993); Henkin, *supra* note 65, at 33.

98. Since express recognition of governments has more or less fallen into disuse, at least as far as European states are concerned, the determination of the authority as representing the foreign state concerned must be sought in the establishment of diplomatic relations or the conclusion of a treaty (or in any other behaviour which entails a tacit recognition). Regarding the British recognition policy, see generally Colin Warbrick, *The New British Policy on Recognition of Governments*, 30 INT'L & COMP. L.Q. 568 (1981); *see also* Talmon, *supra* note 97.

99. In the past, recognition policies of states have entailed the resort to various yardsticks used to assess legitimacy of government. For a long time, non-dynastic governments have not been recognized. *See* VERHOEVEN, *supra* note 25; *See also* Fox, *supra* note 25. It later became more common to subordinate recognition to constitutional criteria as illustrated by the recognition policies stemming from the 1907 and 1923 Washington Conventions or the Seward, Tobar, Wilson or Betancourt doctrines. *See generally* LAUTERPACHT, *supra* note 97, at 107. *See also* Noël-Henry, *La doctrine américaine en matière de reconnaissance de gouvernement étrangers*, 35 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 249, 259 (1928).

100. *Rebel Soldiers Overthrow Sierra Leone's President*, N.Y. TIMES, May 26, 1997, § 1 at 6; Editorial, *Nigeria's Game in Sierra Leone*, N.Y. TIMES, June 6, 1997, at A30. *See* The President of the Security Council, *Statement by the Presi-*

Burundi,¹⁰² Niger,¹⁰³ Ivory Coast,¹⁰⁴ Guinea Bissau,¹⁰⁵ and Togo.¹⁰⁶ Recognition has sometimes been granted to “putschist” authorities, but it is noticeable that in these instances the new government had pledged to organize elections within a reasonable time and/or had overthrown an autocratic regime. The examples of the coups in Pakistan, Togo, Ivory Coast, and Nigeria, to name only a few, are telltale, as the putschist governments there did not rest on electoral processes but were recognized due to their announced commitment to democracy.¹⁰⁷

dent of the Security Council, U.N. Doc. S/PRST/1997/29 (May 27, 1997); The President of the Security Council, *Statement by the President of the Security Council*, U.N. Doc. S/PRST/1997/36 (July 11, 1997); and The President of the Security Council, *Statement by the President of the Security Council*, U.N. Doc. S/PRST/1997/42 (Aug. 6, 1997) condemning the military coup in Sierra Leone. See also S.C. Res. 1132, U.N. Doc. S/RES/1132 (Oct. 8, 1997).

101. Marc Bazin, *Military in Haiti Names A Premier*, N.Y. TIMES, June 3, 1992, at A9; John G. Healey, Reed Brody, & Michael Posner, Letter to the Editor, *Brutality Escalates in Haiti Since Coup*, N.Y. TIMES, June 23, 1992, at A20. See also Organization of American States, *Support to the Democratic Government of Haiti*, MRE/RES. 1/91 (Oct. 3, 1991); and Organization of American States, *Support for Democracy in Haiti*, MRE/RES. 2/91 (Oct. 8, 1991). See also G.A. Res 46/7, U.N. Doc. A/Res/46/7 (Oct. 11, 1991) (on the situation of democracy and human rights in Haiti).

102. See The President of the Security Council, *Statement by the President of the Security Council*, U.N. Doc. S/PRST/1996/31 (Jul 24, 1996); and The President of the Security Council, *Statement by the President of the Security Council*, U.N. Doc. S/PRST/1996/32 (July 29, 1996) in which the Council strongly condemned any attempt to overthrow the legitimate Government of Burundi by force or coup d'état. See also S.C. Res. 1049, U.N. Doc. S/RES/1049 (Mar. 5, 1996).

103. Howard W. French, *Coup in Africa Frightens Democratic Neighbors*, N.Y. TIMES, Feb. 3, 1996, at 1-3; *Military Junta That Seized Niger Gets Some Support*, N.Y. TIMES, Apr. 13, at 1999, A-15. See also *Triste Niger*, LE MONDE, Jan. 30, 1996.

104. Editorial, *Another Destructive Coup*, N.Y. TIMES, Dec. 29, 1999, at A24; Donald G. McNeil Jr., *Ivory Coast Coup Draws French Reply*, N.Y. TIMES, Dec. 26, 1999, at A6.

105. See S.C. Res. 1216, U.N. Doc. S/RES/1216 (Dec. 10, 1982); and The President of the Security Council, *Statement by the President of the Security Council*, U.N. Doc. S/PRST/1998/31 (Nov. 6, 1998).

106. *Coup de force des militaires au Togo*, LE MONDE, Dec. 4, 1991.

107. See Barry Bearak, *Democracy in Pakistan: Can a General Be Trusted?*, N.Y. TIMES, Nov. 21, 1999, § 1 at 12; Barry Bearak, *Awaiting Clinton, Pakistani Takes Election Step*, N.Y. TIMES, Mar. 24, 2000, at A8; Jane Perlez, *Clinton Decides to Visit Pakistan, After All*, N.Y. TIMES, Mar. 8, 2000, at A12; Donald G. McNeil Jr., *Ivory Coast's Leader Offers Signs of Democratic Revival*, N.Y. TIMES, Dec. 28,

In the age of democracy, it is also noteworthy that the legitimacy of a democratically elected government generally offsets its lack of effectiveness. For instance, the new democratic governments of Panama and Angola were recognized despite an obvious lack of effectiveness, an element that is normally a prerequisite for international recognition.¹⁰⁸

In all the above-mentioned instances, the legitimacy test has focused on the legitimacy of origin and not on the way in which the government wields power. This means that little attention is paid to the legitimacy of exercise when the question of recognition arises. This lack of attention to the legitimacy of exercise has not been without problems in regards to illiberal democracies.

b. Accreditation of Delegates

The practice pertaining to the accreditation of delegates within international organizations also involves an examination of governments' legitimacy. To understand the significance of legitimacy in these situations, I begin by recalling the reasons why the accreditation process within international organizations has led to a test of the legitimacy of governments.

Each international organization has to approve the credentials of the delegates sent by member states. In theory, the approval of credentials is originally to be confined to a technical operation aimed at validating the power of delegates without engaging in any political appraisal.¹⁰⁹ In practice, however, accreditation proceedings have been used to deny standing to some governments.¹¹⁰ This is exemplified by the UN

1999, at A10; Norimitsu Onishi, *Nigeria's Military Turns Over Power to Elected Leader*, N.Y. TIMES, May 30, 1999, § 1 at 1; *Coup Leader Tells Diplomats He Will Honor Ivory Coast's Debts*, N.Y. TIMES, Dec. 29, 1999, at A11; *Togo: Gnassingbé promet des élections libres*, LE MONDE, Feb. 9, 2005.

108. See *Tinoco Case* (Gr. Brit. v. Costa Rica), 1 RIAA 369 (1923).

109. See generally Yuen-Li-Liang, *Notes on Legal Questions concerning the United Nations*, 45 AM. J. INT'L L., 689 (1951); see also Jean-François Flauss & Philippe Singer, *La vérification des pouvoirs de l'Assemblée générale des Nations Unies*, 31 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 620-52 (1985).

110. One could cogently contend that the recourse to accreditation as a means to sanction foreign governments is not strictly consistent with the UN Charter. On this question see generally, HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* 186 (3d ed. 1995). See also Daphna Shrager, *La qualité de membre non représenté*. *Le*

General Assembly's refusal to approve the credentials of the delegates of South Africa¹¹¹ and Hungary.¹¹²

It must be pointed out that in some cases of accreditation a test of legitimacy is somewhat inescapable. This arises when two contestants claim to represent a single state (usually due to a civil war). In such a scenario, the organization is forced to determine which is the actual representative. It is therefore bound to engage in an assessment of the relative legitimacy of the warring representatives.¹¹³

In such situations, it would be much less problematic to rely exclusively on the effectiveness criterion to determine which of the competing parties constituted the legitimate authority to be granted standing within the organization.¹¹⁴ The

cas du siege vacant, 45 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 649 (1999).

111. See G.A. Res. 2636, U.N. GAOR, 25th Sess., U.N. Doc. A/8142 (Nov. 13, 1970); G.A. Res. 2862, U.N. GAOR, 26th Sess., U.N. Doc. A/8625 (Dec. 20, 1971); and G.A. Res. 2948, U.N. GAOR, 27th Sess., U.N. Doc. A/8921 (Dec. 8, 1972) (UN General Assembly opposing the credentials' approval by the Credentials Committee).

112. See The Chairman of the Credentials Committee, *Report of the Charman of the Credentials Committee, delivered to the General Assembly*, U.N. Doc. A/3536 (Feb. 13, 1957); The Chairman of the Credentials Committee, *Report of the Charman of the Credentials Committee, delivered to the General Assembly*, U.N. Doc. A/3773 (Dec. 9, 1957); The Chairman of the Credentials Committee, *Report of the Charman of the Credentials Committee, delivered to the General Assembly*, U.N. Doc. A/4074 (Dec. 12, 1958); The Chairman of the Credentials Committee, *Report of the Charman of the Credentials Committee, delivered to the General Assembly*, U.N. Doc. A/4346 (Dec. 9, 1959); The Chairman of the Credentials Committee, *Second Report of the Charman of the Credentials Committee, delivered to the General Assembly*, U.N. Doc. A/4743 (Apr. 20, 1961); The Chairman of the Credentials Committee, *Report of the Charman of the Credentials Committee, delivered to the General Assembly*, U.N. Doc. A/5055 (Dec. 18, 1961); The Chairman of the Credentials Committee, *Report of the Charman of the Credentials Committee, delivered to the General Assembly*, U.N. Doc. A/5395 (Dec. 20, 1962).

113. Matthew Griffin, *Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy through Its Accreditation Process, and Should It*, 32 N.Y.U. J. INT'L L. & POL. 725, 728-32 (1999-2000); Fox, *supra* note 25, at 606.

114. This was the solution endorsed by the U.N. Secretary General Trygve Lie in the Memorandum on the Legal Aspects of Problems of Representation in the U.N., U.N. Doc S/1466 (Mar. 8, 1950) *quoted in* G. H. Fox, *supra* note 58, at 182.

practice of the United Nations and its specialized agencies has, however, demonstrated resort to other criteria.¹¹⁵

Although democracy as such has not been relied on by the General Assembly to determine member states' representatives, it must be pointed out that the United Nations has nevertheless used a test of legitimacy based on origin. Indeed, in credential controversies, the General Assembly has usually resorted to the criterion of constitutionality. This is well illustrated by the accreditation of the delegates of Kuwait,¹¹⁶ Afghanistan,¹¹⁷ Haiti,¹¹⁸ and Sierra Leone,¹¹⁹ where delegates of the constitutional governments were accredited. The constitutionality of a government bears upon the origin of its power as the constitution classically contains the rules of how power is transferred from one government to the ensuing one. If a government is deemed legitimate because it has gained power in a manner prescribed by the constitution of the state concerned, only the origin of its power is considered. Focusing on the constitutionality of governments, legitimacy tests carried out in credentials controversies have thus revolved around the legitimacy of origin without any consideration for the way in which the claimants have exercised their power.

So far, the democratic character of a government does not seem to have played a crucial role in any of the credentials controversies which have gripped the United Nations, such as the controversies related to Kuwait and Afghanistan.¹²⁰ This is

115. See generally Griffin, *supra* note 113, at 725-85. See also Fox, *supra* note 25, at 596-606; ROTH, *supra* note 1, at 255-284.

116. See U.N.G.A., *First Report of the Credentials Committee*, U.N. DOC. A/45/674 (Oct. 29, 1990); *Note verbale dated 18 December 1990 from the Permanent Mission of Iraq to the United Nations addressed to the Secretary-General*, U.N.DOC. A/45/891 (Dec. 20, 1990).

117. See U.N.G.A., *Reports of the Credentials Committee*, U.N. Doc A/51/548 (Oct. 23, 1996), U.N.Doc A/52/719 (Dec. 11, 1997), U.N.Doc A/53/556 (Oct. 29, 1998), U.N.Doc A/55/537 (Nov. 1, 1997), U.N.Doc A/56/724 (Dec. 20, 2001), U.N.G.A., U.N.Doc A/57/634 (Dec. 2, 2002).

118. U.N.G.A., *Report of the Credentials Committee*, U.N. DOC. A/47/517/Add.1 (1992).

119. U.N.G.A., *Report of the Credentials Committee*, U.N. DOC. A/52/719 (Dec. 11, 1997).

120. Regarding the controversies about Kuwait, see U.N.G.A., *Report of the Credentials Committee*, U.N. DOC. A/45/674 (Oct. 29, 1990) and U.N. Doc. A/45/891 (Dec. 20, 1990); as for Afghanistan, see U.N.G.A., *Reports of the Credentials Committee*, U.N.DOC. A/51/548 (Oct. 23, 1996), U.N.DOC. A/52/719 (Dec. 11, 1997), U.N.DOC. A/53/556 (Oct. 29, 1998), U.N.DOC. A/

probably due to the fact that neither of the competing governments could point to any democratic characteristics in the credentials controversies that have arisen thus far in the United Nations.¹²¹ Their legitimacy therefore had to be buttressed in some other manner. In the rare cases where it would have been possible to defuse a credentials crisis on the basis of democratic criteria, the United Nations put the emphasis on the *constitutional* character of the government, as illustrated by the approval of Aristide's credentials (Haiti)¹²² and Kabbah's credentials (Sierra Leone)¹²³.

While most credentials controversies have thus been worked out on the basis of the legitimacy of origin, there is one case where credentials were refused because of the way power was exercised. This was the case when South Africa was denied standing in the General Assembly because of its apartheid policy. There is little doubt that the decision not to approve the credentials of the South African delegates pertained to the discriminatory and racist exercise of power in South Africa.¹²⁴

The example of South Africa, however, is unique. There are no other instances where the delegates of a government have been denied standing because of the way they exert power. This case demonstrates that it is conceivable for the UN General Assembly to regard a government as illegitimate because of its illegitimate exercise of power.

c. Intervention by Invitation

A government threatened by a wide-ranging popular uprising or a rebel group may call upon an allied foreign country to provide military support. This scenario is called an inter-

55/537 (Nov. 1, 2000), U.N.DOC. A/56/724 (Dec. 20, 2001) and U.N.DOC. A/57/634 (Dec. 2, 2002).

121. Regarding democracy in Kuwait, see Flora Lewis, *The Windy Mideast*, N.Y. TIMES, Mar. 6, 1990, at A23; On the lack of democracy in Afghanistan at the time of the credentials controversies, see Elaine Sciolino, *State Dept. Becomes Cooler to the New Rulers of Kabul*, N.Y. TIMES, Oct. 3, 1996, at 14.

122. U.N.G.A., *Report of the Credentials Committee*, U.N. DOC. A/47/517/Add.1 (1992).

123. U.N.G.A., *Report of the Credentials Committee*, U.N. Doc. A/52/719 (Dec. 11, 1997).

124. *See supra* note 110.

vention by invitation, and the legitimacy of exercise has played a crucial role in such scenarios.

States have not always responded to requests for military assistance of foreign, non-democratic governments that they had previously regarded as legitimate. France's policies towards its former colonies are illustrative. In situations of civil war involving two competing governments, requests by non-democratic governments have generally been ignored by France. The requests of Bokassa (1979),¹²⁵ Dacko (1981),¹²⁶ and Patassé (2003)¹²⁷ in the Central African Republic, as well as those of Hissene Habre in Chad (1992)¹²⁸ and Henri Konan Bédié (2000)¹²⁹ and Laurent Gbagbo (2002)¹³⁰ in Ivory Coast seem to have been dismissed by France because these regimes were responsible for massive violations of human rights. They had each conducted sweeping crackdowns to stifle opposition, resulting in blatant violations of human rights. These governments had previously been recognized as legitimate.¹³¹ But, when military intervention was requested, France discounted their legitimacy of origin and focused on the way in which they had been exercising their power. France expressly stated in some of these cases that it had dismissed the request for inter-

125. *Afrique du Sud* 83 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 910 (1979); *Centrafrique* 84 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 878 (1980).

126. *Pressions Politiques* 85 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 905 (1981).

127. Stephen Smith, *Le général François Bozizé a pris le pouvoir à Bangui en fustigeant dix ans d'errements démocratiques*, LE MONDE, Mar.18 2003, at 7. See also, *World Briefing Africa: Central African Republic President Deposed*, N.Y. TIMES, Mar. 18, 2003, at A5.

128. *Chadian Insurgents Claim Capture of 2 Towns*, N.Y. TIMES, Jan. 3, 1992, at A3.

129. Donald G. McNeil Jr., *Ousted Leader Of Ivory Coast Flees to Togo*, Dec. 27, 1999, N.Y. TIMES, at A10; Editorial, *Another Destructive Coup*, N.Y. TIMES, Dec. 29, 1999, at A24.

130. Louis Balmond, *De la tentative de coup d'Etat (sept. 2002) aux accords de Marcoussis (janv. 2003)*, 107 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 443-444 (2003); *Ivory Coast Rebels Shun Officialdom and Threaten a New War*, N.Y. TIMES, Sept. 24, 2003, at A7.

131. Craig G. Whitney, *France Snips at the Old Ties That Bind It to Africa*, N.Y. TIMES, July 25, 1997, at A10; Richard Bernstein, *In Africa, France is Still a Military Power*, N.Y. TIMES, Apr. 19, 1987, § 4 at 3; *David Dacko, 73, Central African Leader*, N.Y. TIMES, Nov. 22, 2003, at B7; Norimitsu Onishi, *Dictator Gone, Violence Erupts In Ivory Coast*, N.Y. TIMES, Oct. 27, 2000 at A1.

vention because of the massive violations of human rights of the requesting government.¹³² From the vantage point of the legitimacy of exercise, these governments could not be considered legitimate. It can thus be reasonably argued that in the aforementioned situations consideration of the legitimacy of exercise led to disqualification of these governments as the recognized representatives of the states concerned.

In practice, the legitimacy of exercise has played a significant role in intervention by invitation. The legitimacy of origin has also had some role in these situations. Indeed, as illustrated by interventions in Sierra Leone¹³³ and Haiti,¹³⁴ the legitimacy of origin of a government can sometimes offset its lack of effectiveness. In these cases, the foreign interventions were based on requests by ineffective but democratically elected governments. Likewise, the United States based its 1989 intervention in Panama on the request of an elected government that had no claim to effective control.¹³⁵

132. In the case of Bokassa, France expressly stated that violations of human rights were the reason not to give assistance to that government, 25 *ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL* 910 (1979).

133. See David Wippman, *Pro-democratic intervention by invitation*, in Fox and Roth, *supra* note 32, at 307. See also Nowrot & Schebacker, *supra* note 40, at 396-97.

134. Wippman, *supra* note 134, at 301. See also David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 *DUKE J. COMP. & INT'L L.* 209, 217 (1996).

135. *Fighting in Panama; Panama Task Forces: Who They Were, What They Did*, *N.Y. TIMES*, Dec. 21, 1989, at A20. See also the statement of the US President cited in Marian Nash Leigh, *Contemporary Practice of the United States Relating to International Law*, 84 *AM. J. INT'L L.* 536, 545-549 (1990): "We consulted with the duly elected Panamanian government which Noriega had illegally kept out of office, and they indicated that they welcomed our assistance. . . . In addition, the legitimate democratically elected government of Panama was consulted and welcomed our actions. . . . The United States has not acted to install any government. The Panamanians chose their government on May 7 [1989]. All credible international observers certified that President Endara was elected by an overwhelming majority. We recognize the democratically elected, legitimate government of Panama."); the statement of the British Foreign and Commonwealth Office of 21 July 1993, 64 *BRIT. Y.B. INT'L L.* 741 (1993) ("The American intervention in Panama was undertaken with the agreement of President Endara, who won the elections held in May 1989. We welcomed the establishment of democratic government in Panama and gave full support to the action which led to this."); and U.N. SCOR, 44th Sess., 2899th mtg. at 26, U.N. Doc. S/PV.2899 (Dec. 20, 1989). This position was almost unanimously condemned by the UN Gen-

In situations of intervention by invitation, it seems clear that the legitimacy of origin and the legitimacy of exercise have played discrete roles. This demonstrates the relevance of the distinction between these two types of legitimacy and the inadequacy of a monolithic conception of legitimacy.

The next section expounds on the respective roles of the legitimacy of origin and the legitimacy of exercise.

B. *The Qualification and Disqualification Roles of Legitimacy and the Expanding Role of the Legitimacy of Exercise*

As the practice pertaining to accreditation and intervention demonstrates, both the origin and the exercise of power have played a role in evaluating governments' legitimacy. But, each plays a distinctive role (1). Drawing on the need for a prompt appraisal of governments' legitimacy in contemporary international relations, I explain the reasons why each legitimacy test has fulfilled a different function (2). Finally, I submit that the role of the legitimacy of exercise will grow, particularly with regards to illiberal democracies (3).

1. *The Qualification Role of the Legitimacy of Origin and the Disqualification Role of the Legitimacy of Exercise*

To understand the different roles played by the two types of legitimacy, one must draw a distinction between the *qualification* and *disqualification* of governments. If a new government secures international recognition¹³⁶ or its delegates are accredited,¹³⁷ it *qualifies* as the legitimate representative entitled to speak and act on behalf of the state. Legitimacy can also have a disqualification function when a government, previously recognized as the legitimate representative entitled to act and speak on behalf of a state, loses this recognition. In other words, it is *disqualified* from being the representative of that state. In the situation of intervention by invitation,¹³⁸ disqualification occurs when the state's requests for intervention are refused. In the situation of the accreditation of delegates

eral Assembly. See G.A.Res. 44/240, U.N. Doc. A/RES/44/240 (Dec. 29 1989). It was also condemned by the OAS, G/P/Res. 534 (800/89), Dec. 22, 1989. See ROTH, *supra* note 1, at 310-11.

136. See *supra* Part IV.A.2.a.

137. See *supra* Part IV.A.2.b.

138. See *supra* Part IV.2.c.

by international organizations,¹³⁹ disqualification occurs when the state's delegates are refused accreditation. I argue that the effect of the legitimacy of *origin* test has been confined to a *qualification* role (a), whereas the legitimacy of exercise has been confined to a *disqualification* function (b).

a. Qualification of Governments: The Legitimacy of Origin

The question of determining who qualifies as the legitimate government of a state has almost always been resolved through the legitimacy of origin test. States must determine the legitimate authority entitled to act and speak on behalf of a state in instances of recognition and accreditation. As illustrated by the discussion above, a new government will typically be recognized so long as its power originates in a free and fair electoral process.¹⁴⁰ I have also shown that such democratic origins can usually overcome a government's ineffectiveness.¹⁴¹ In the case of credential controversies within international organizations, only the democratic (or constitutional) origin of a government generally matters.¹⁴² When the question of the qualification of a new government arises, only the legitimacy of origin has been considered. The way that government exercises (or plans to exercise) its power has been discounted so long as it has been democratically (and constitutionally) elected.

b. Disqualification of Governments: the Legitimacy of Exercise

The exercise of power has, on the other hand, been the basis for the disqualification of a government previously considered the legitimate representative of a state. A legitimately elected government can lose its legitimacy and be barred from speaking and acting on behalf of the state because its exercise of power conflicts with substantive elements of democracy. This is well illustrated by the aforementioned practice in regard to invitations for intervention.¹⁴³

139. See *supra* Part IV.2.b.

140. See *supra* Part IV.2.a.

141. See *supra* note 108.

142. See *supra* Part IV.A.2.b.

143. See *supra* Part IV.A.2.c.

Likewise, the U.N. General Assembly disqualified the government of South Africa due to the way in which the government was exercising its power, namely through its racist apartheid policy.¹⁴⁴

2. *The Need for a Swift Appraisal of Governments' Legitimacy*

Having explained how the functions of the legitimacy of origin and legitimacy of exercise play different roles in practice, I now interpret this distribution of roles through the lens of contemporary international relations.

No one will dispute the necessity in contemporary international relations for a swift assessment of governments' legitimacy to quickly determine who can act and speak on behalf of a state. Indeed, no state or international organization can afford to leave the determination of the legitimacy of a foreign government—upon which any conclusion as to who can act on behalf of the foreign state depends—pending for long.

Against this backdrop, one should not be astonished that legitimacy of exercise is avoided in qualification situations. An appraisal of the legitimacy of a government's exercise of power necessarily requires that the government has exercised power over a period of time. In cases of an unconstitutional change of government or credentials controversies, there has usually yet to be any "exercise" of power. As such, the legitimacy of exercise test does not comport with the necessity for swift determination of a state's legitimate representatives.¹⁴⁵

In this context, the origin of power has been seen as a more appropriate test of legitimacy. It is easy to understand how the origin of a government can be quickly assessed.¹⁴⁶ Le-

144. *See id.*

145. The refusal of accreditations of the delegates of South Africa during the apartheid period for reasons pertaining to the legitimacy of exercise was possible because the credentials of delegates are reviewed every year and the apartheid government had been in power for a significant period of time. *See supra* Part IV.A.2.

146. It must, however, be pointed out that the primary qualification role of the legitimacy of origin has been possible only because the periodicity of electoral processes, as it is construed in the age of democracy, has been played down. The practice demonstrates that the evaluation of the legitimacy of origin generally does not include any consideration of the sustainable character of this electoral origin. That means that the *periodicity* of elections (and the related willingness of the democratically elected government

gitimate origins entail a free and fair electoral process, so foreign states can typically just rely on the accounts of elections monitoring missions sent by international organizations to quickly make their decisions.¹⁴⁷ To put it differently, free and

to undergo future electoral processes) is not taken into account when determining the legitimacy of government. It could be reasonably argued that this contempt for the criterion of periodicity of elections probably conflicts with several international texts. *See, e.g.*, Universal Declaration on Human Rights art 21, G.A. Res. 217A (III) ¶ 21, U.N. Doc. A/810 (Dec. 12, 1948) (“The will of the people shall be the basis of the authority of government; this will shall be expressed in *periodic* and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”) (emphasis added); or the International Covenant on Civil and Political Rights art. 25, G.A. Res. 2200 (XXI), ¶ 25, U.N. doc. A/6316 (Dec. 16, 1966) (“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: . . . (b) To vote and to be elected at genuine *periodic* elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors”) (emphasis added). In that respect, see UNHCR, *General Comments under article 40, paragraph 4 of the International Covenant on Civil and Political Rights, General Comment No. 25*, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (Aug. 27, 1996). *See also* G.A. Res. 55/96, ¶ 1, U.N. Doc. A/RES/55/96 (Feb. 28, 2001 (on promoting and consolidating democracy). For General Assembly resolutions concerned with “[s]trengthening the role of the UN in enhancing the effectiveness of the principle of periodic and genuine elections and promotion of democratization,” see also G.A. Res. 43/157, U.N. Doc. A/RES/43/157 (Dec. 8, 1988); G.A. Res. 45/150, U.N. Doc. A/RES/45/150 (Dec. 18, 1990); G.A. Res. 46/137, U.N. Doc. A/RES/46/137 (Dec. 17, 1991); G.A. Res. 47/138, U.N. Doc. A/RES/47/138 (Mar. 1, 1993); G.A. Res. 48/131, U.N. Doc. A/RES/48/131 (Feb. 15, 1994); G.A. Res. 49/190, U.N. Doc. A/RES/49/190 (Mar. 9, 1995); G.A. Res. 50/185, U.N. Doc. A/RES/50/185 (Mar. 6, 1996); G.A. Res. 52/129, U.N. Doc. A/RES/52/129 (Feb. 26, 1998); G.A. Res. 56/159, U.N. Doc. A/RES/56/159 (Feb. 20, 2002); G.A. Res. 58/180, U.N. Doc. A/RES/58/180 (Mar. 17, 2004). *See also* the Inter-American Democratic Charter art. 4, A.G. Res. 1838 (XXXI-O/01), AG/DOC.8 (XXVIII-E/01) (Sept. 11, 2001), available at http://www.oas.org/charter/docs/resolution1_en_p4.htm. On the periodicity of elections and what it actually means, see Sarah Joseph, *Rights and Political Participation, in THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM* 535, 554 (David Harris & Sarah Joseph eds., 1995).

147. *See, e.g.*, the electoral missions set up by the OSCE Office for Democratic Institutions and Human Rights, <http://www.osce.org/odihr/>. Regarding UN electoral missions, see G.A. Res. 46/137, ¶ 3, U.N. Doc. A/RES/46/137 (Dec. 17, 1991) (on enhancing the effectiveness of the principle of periodic and genuine elections); and The Secretary General, *Report of the Secretary General on Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, ¶ 13, U.N. doc. A/46/609 (Dec. 19, 1991) (discussing the close rela-

fair elections are “easier to capture” than the substantive elements of democracy.¹⁴⁸ This is the reason why the legitimacy of exercise has not played a role in the qualification of governments and has been confined to a disqualification function. Qualification of governments has almost exclusively rested on the legitimacy of origin.

3. *The Expanding Disqualification Role of the Legitimacy of Exercise*

I have suggested that the legitimacy of origin has played an important qualification role while the legitimacy of exercise has been moderately used in disqualification situations, mostly in situations of intervention by invitation. I now submit that the disqualification role of legitimacy of exercise will increase dramatically with respect to the recognition of governments and the accreditation of their delegates within international organizations because of the persistence of illiberal democracies.

An illiberal democracy is a democratically elected government exercising its power in violation of the substantive elements of democracy.¹⁴⁹ There are many nations whose governments are elected through a more or less free and fair electoral process but commit blatant violations of human rights. To identify just a few examples, the most recent elections in Egypt,¹⁵⁰ Iran,¹⁵¹ Tunisia,¹⁵² Pakistan,¹⁵³ and Palestine¹⁵⁴ may well have been free and fair, but in each instance the government elected or maintained in office is not committed to respecting basic human rights.

The persistence of illiberal democracies has already prompted some Western states to reconsider their policy in

tionship between U.N. electoral missions and election processes). *See generally* Margaret Satterthwaite, Note, *Human Rights Monitoring, Elections Monitoring, and Electoral Assistance as Preventive Measures*, 30 N.Y.U. J. INT'L L. & POL. 709 (1998).

148. Zakaria, *supra* note 5, at 40.

149. *Id.* at 22.

150. Slackman et al., *supra* note 10.

151. Ignatieff, *supra* note 11, at 51.

152. Editorial, *supra* note 12; Labidi, *supra* note 12.

153. *See supra* note 107.

154. *See Glanz, supra* note 14; Fukuyama, *supra*, note 14; Erlanger, *supra* note 14.

matters of democratisation.¹⁵⁵ These policies have, so far, largely relied on the assumption that free and fair elections necessarily go hand in hand with respect for human rights.¹⁵⁶ I argue that among the changes that will be brought about by the persistence of illiberal democracies in the international arena will be a revamping of the way that governmental legitimacy is assessed. More specifically, I submit that the legitimacy of exercise will play a greater disqualification role in the recognition of governments and accreditations processes within international organizations.

Illiberal democracies will first drive states to reconsider their policy of recognition. The legitimacy of exercise could affect recognition in two ways. First, it could induce states not to recognize a government whose *expected* policies are likely to be contrary to the substantive elements of democracy. Second, if the expected exercise of power does not deter states from granting recognition, a subsequent exercise of power inconsistent with human rights could then lead to a *withdrawal* of previous recognition.

It must be acknowledged that the *withdrawal* of recognition is extremely rare in practice. The withdrawal of recognition of the government in Taiwan as the government of China after the recognition of the communist government in Beijing may be the only clear example.¹⁵⁷ The growing importance of legitimacy of exercise could spawn a sweeping change in this

155. This phenomenon has, for example, triggered an important debate about the United States foreign policy's priorities. See Steven R. Weisman, *Democracy Push by Bush Attracts Doubters in Party*, N.Y. TIMES, Mar. 17, 2006, at A1; Hassan M. Fattah, *Arab Democracy, a U.S. Goal, Falters*, N. Y. TIMES, Apr. 10, 2006, at A1.

156. See, e.g., the European Convention for the Protection of Human Rights and Fundamental Freedoms pmbl., Nov. 4, 1950, Europ. T.S. 005, available at <http://conventions.coe.int/treaty/en/Treaties/html/005.htm>; see also *United Communist Party of Turkey and Others v. Turkey*, 26 Eur. H.R. Rep. 121 (1998); Inter-American Democratic Charter art. 7, Sept. 11, 2001, OAS Doc. OEA/Ser.P/AG/RES.1 (XXVIII-E/01), available at www.oas.org/main/English/ (follow "Democratic Charter" hyperlink under "Documents").

157. On this question see Hungdah Chiu, *The International Law of Recognition and the Status of the Republic of China*, 3 J. CHINESE. L. 193 (1989); Victor H. Li, *The Law of Non-Recognition: The Case of Taiwan*, 1 Nw. J. INT'L L. & BUS. 134 (1979). See generally JAMES CRAWFORD, *THE CREATION OF STATE IN INTERNATIONAL LAW* 198-220 (1979). It could also be argued that the United Kingdom withdrew its recognition of the Italian administration over Ethio-

respect, thereby making withdrawal of recognition of governments more common. For instance, if the elected Iraqi government were to embark on a wide-ranging policy of human rights violations, it is not unconceivable that some foreign governments would withdraw their recognition of that government.¹⁵⁸ Some could even understand the reactions following the election of Hamas to a dominant position in the Palestinian government as a partial withdrawal of recognition of the Palestinian government.¹⁵⁹ Such withdrawals of recognition would constitute a disqualification of the legitimacy of governments on the basis of their exercise of power.

In the situation of the accreditation of delegates of a democratically elected government, the legitimacy of exercise could also be a factor prompting the refusal of credentials. An international organization could refuse to recognize delegates of a government whose exercise of power is significantly at odds with the substantive elements of democracy. As previously discussed, this was the case with apartheid South Africa.¹⁶⁰ Denying accreditation to delegates of illiberal democracies would undoubtedly increase the disqualification role of the legitimacy of exercise, as a government would be judged according to the manner in which it exercises power.

The persistence of illiberal democracies has puzzled states whose foreign policy is largely devoted to the promotion of democracy.¹⁶¹ Long committed to elections, latter states did not foresee that elections could coexist with persistent viola-

pia in 1940 as explained by Malcolm N. Shaw, *INTERNATIONAL LAW* 389 (5th ed. 2003).

158. See Sabrina Ravernise & Robert F. Worth, *US Warns Iraq It Won't Support Sectarian Goals*, N.Y. TIMES, Feb. 21, 2006, at A1 (discussing the U.S. government's warning about the sectarian character of the politics of the future Iraqi government).

159. In addition to suspending aid to the government, several countries completely severed their relations. See Steven R. Weisman, *U.S. Digs In on Withholding Aid to Hamas Government*, N.Y. TIMES, Feb. 17, 2006, at A12; Steven R. Weisman and Craig S. Smith, *U.S. and Europe Halt Aid to Palestinian Government*, N.Y. TIMES, Apr. 8, 2006, at A6. But see Steven Lee Myers and Greg Myre, *In Moscow, Hamas Delegation Gets a Warning and a Crash Course in Diplomacy*, N.Y. TIMES, Mar. 4, 2006, at A6; Joel Brinkley, *France Backs Putin on Speaking to Hamas*, N. Y. TIMES, Febr. 11, 2006, at A7.

160. See *supra* Part IV.A.2.b and note 111.

161. See the aforementioned re-examination by the United States of its democratization foreign policy, *supra* note 155.

tions of substantive elements of democracy. As the legitimacy of governments is assessed in only a few specific situations,¹⁶² states have only a limited number of tools to deal with the difficulties caused by illiberal democracies. Recognition and accreditation are two of these instruments, and it would be surprising if they were not used to fight the persistence of illiberal democracies. Accordingly, we will likely witness an expansion of the disqualification role of the legitimacy of exercise through the practice of the recognition of governments and the accreditation of delegates within international organizations. These changes would thus underpin the disqualification role already played by the legitimacy of exercise in situations of intervention by invitation.¹⁶³

V. CONCLUSION

In a legal order where the representatives of legal persons are continuously replaced, the question of legitimacy constitutes an ongoing concern. The advent of democracy as the sole acceptable political regime has compounded the importance of this question and has provoked the need for a better understanding of the different dimensions of the legitimacy of governments in the international arena.

In this paper, I have argued that legitimacy can no longer be construed as a unitary and monolithic concept. Contrary to the conception of legitimacy endorsed by mainstream legal scholars a distinction must be drawn between the legitimacy of origin and the legitimacy of exercise. The former pertains to the source of power whereas the latter is related to the way power is exercised.

Building on practice and a substantive understanding of democracy, I have demonstrated that the legitimacy of origin overwhelmingly bolsters the qualification of democratically elected governments whereas the legitimacy of exercise can trigger the disqualification of governments that consistently wield power in a manner violative of the substantive elements of democracy even where those governments are democratically elected. Although the role of legitimacy of exercise has, until now, remained somewhat modest, I argue that the persis-

162. *See supra* Part IV.A.2.

163. *See supra* Part IV.A.2.c.

tence of illiberal democracies paves the way for a significant extension of the disqualification role of the legitimacy of exercise, especially with respect to the recognition of governments and the accreditation of delegates within international organizations.

Ultimately, the persistence of illiberal democracies demonstrates that the spread of democracy is far more complex than originally envisaged. In particular, it has undermined the democratization program of many countries and international organizations. A correct understanding of the different roles played by the legitimacy of origin and the legitimacy of exercise in international relations can alleviate this complexity and provide new tools to address the difficulties brought on by these lingering non-democratic strongholds.

