

Democratic Legitimacy of Governments: From Theory to Practice

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Abstract

In traditional international law, "Effective Authority" has been the applicable criterion in recognizing the legitimacy of governments and their recognition by other states. The United Nations also took note of this criterion in accepting representatives identified by governments. However, after the Cold War, a new criterion, the "Democratic Legitimacy," was introduced to recognize the legitimacy of new governments. Increasing attention to human rights and adherence to democratic norms in governance has strengthened this theory among jurists. The main question of this article is what is the applicable criterion in examining the "legality of governments" in international law? In this article, which is written by descriptive-analytical method and by studying books and articles, we examine the application of the theory of democratic legitimacy in the recognition of governments. By studying the change of governments after the adoption of the UN Charter until 2020, we conclude that the theory of democratic legitimacy was applied only in response to military coup d'état against democratically elected governments after the end of the Cold War. In other causes of regime change including revolutions and civil war; The New Government is recognized by the international community and credentials of its representatives accredited to the United Nations on the basis of the traditional criterion of effective authority. However, there are few exemptions such as Islamic Emirate of Afghanistan.

Keywords: Democratic Government Legitimacy; Effective Authority; Military Coup D'état; Government Recognition; Credential Committee.

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Introduction

“Democratic legitimacy” is a descriptive combination of the terms “legitimacy” and “democracy”. In the literal sense, legitimacy means being generally accepted, and in the literal sense, it means that the performance and behavior of a state conforms to the views of its citizens or other states. The word “democracy” is also derived from the two words “demos” meaning people and “kratos” meaning government. Therefore, democracy means the rule by the people.¹

In this article, we will examine the democratic legitimacy of government, and by examining the practice of the UN General Assembly, state practice, and the views of legal scholars, we will answer the important question of what is the applicable criterion for examining the “legitimacy of governments”? For example, in the wake of recent events in Afghanistan, the question is to whether the Taliban's effective control over Afghanistan will be recognized by other states because of its effective control of Afghanistan, or whether other states will refuse to recognize the Taliban because the group is undemocratic.

In the traditional international law, the criterion of “effective authority” is the applicable rule in explaining the legitimacy of governments. Developing of the discourse of democracy and human rights, it seems that the criterion of “democratic legitimacy of government” in the functioning of various UN bodies and the theory of legal scholars has been gradually trying to replace the traditional criterion of “effective exercise of authority”. If a change of government takes place as a result of free elections, it will obviously not face opposition from other governments. Also, assuming that the current rulers transfer power peacefully, the legitimacy of the new government in the international legal system will not be challenged by other states.

A debatable issue is that the change of government takes place in a process that is contrary to the rules of domestic law and contrary to peaceful means. Cases of change of government illegally and non-peaceful may be the result of a popular revolution, a military coup (violent or non-violent), or a civil war. This article examines the application of the theories of “Effective Authority” and “Democratic Governance” by inducing the identification of new governments that have come to power following a change of government as a result. But first we need to consider what is the position of states and the United Nations on the legitimacy of incumbent governments that do not govern democratically.

1. Hilary Charlesworth, “Democracy and International Law”, In: *Recueil des Cours, Collected Courses of the Hague Academy of International Law* 2014, Edit. by Hilary Charlesworth (Leiden, Netherlands: Brill, 2015), 54.

1- Legitimacy of Incumbent Governments

The criterion of “effective authority” has long been used in the traditional international law as the dominant criterion in the recognition of governments.² The history of explicit reference to this criterion relates to the Tinoco Arbitration (to resolve the dispute between Britain and Costa Rica).³

It should be noted that on January 27, 1917, a coup took place in Costa Rica and Federico Tinoco came to power with a military coup. As riots and public discontent erupted, one of the Tinoco's brothers was assassinated, and Federico fled to France on August 13, 1919. Thus ended the rule of the Tinoco brothers. The Tinoco military dictatorship lasted just over two years. “It was recognized by some Latin American and European States, but not by others, such as the United States and Great Britain.”⁴

During his rule, The Tinoco Government had granted a petroleum concession to a British-owned company the new Costa Rican government, which came to power after the overthrow of Tinoco, has declared all the concessions granted to foreigners by the previous government to be null and void.⁵ The British government objected to the new government's policy, claiming that the only effective and dominant government in Costa Rica for thirty months at the time of the concession was the Tinoco government, so the new government must abide by the former government's commitments.

The new government refused this argument because the British government itself did not recognize the Tinoco government, so it could not claim credit for the oil concession. The parties decided to refer the matter to arbitration.⁶ William Howard Taft, the sole arbiter, declared that if a government could run the country effectively, “the non-recognition of that government by other states would not harm the actual and practical existence of that government, and the concession has granted to foreign companies is transferred to the successor government as the country's obligations.”⁷

Tinoco's arbitration was in fact a follow-up to the prevailing practice of states, because other states, other than the United States and Britain, did not

2. Weller marc (2021). “Myanmar: Testing the Democratic Norm in International Law”, See at <https://www.ejiltalk.org/myanmar-testing-the-democratic-norm-in-international-law/> 30 march 2021.

3. Charlesworth, “Democracy and International Law”, 75.

4 Charlesworth, “Democracy and International Law”, 75

5. Ian Brownlie, “Recognition in Theory and Practice”, *British Yearbook of International Law* 53, (1982): 199.

6. Brownlie, “Recognition in Theory and Practice”, 198.

7 Brownlie, “Recognition in Theory and Practice”, 199-200.

take a negative stance against the Tinoco government. Thus, the prevailing practice in the twentieth century seems to have been to accept the criterion of “effective power” in identifying governments. In other words, if a government exercised power effectively over the territory, it would be considered the legitimate government of that country and could be responsible for all the rights and duties that arise in the international arena and as a result of the functioning of this government. The Estrada Doctrine has been a clear example and important reflection of this dominant tendency of governments. According to the Strada doctrine, every state had to recognize the new government in all circumstances and in all circumstances, and other states had no right to judge the legitimacy of the new government (even a government that came to power by force).⁸

This practice was the dominant rule in international relations until the drafting of the Charter of the United Nations and even until the end of the Cold War.⁹ Because the UN Charter lacked rules for determining the internal form of governments and issues related to violent and revolutionary change of governments. According to Article 2 (4) of the Charter, the use of force is prohibited only in international relations, but the use of force by domestic forces to change the government of their country without foreign intervention is not prohibited in the Charter. The system of international law generally lacks the structure of a country's constitution, the nature of its political system, and how government arrangements are organized. “The UN Charter also does not consider the democratic nature of government as a condition for membership in the United Nations.”¹⁰ The Charter approach was derived from the traditional international legal system, which used the criterion of “effective authority” in determining the ruling governments of member states of the international community.

The charter does not contain rules on the internal form of governments and issues related to violent and revolutionary change of governments. “International law has a neutral position on the change of government in countries.”¹¹ In the Travaux préparatoires (preparatory works) of the Charter in San Francisco, the proposal was made that the governments of all member

8. Mohammad Reza Ziaei Bigdeli, *Public International Law*, 65th edition. (Tehran, Ganj-e-Danesh, 2019), 164.

9. Erica De Wet. “The Role of Democratic Legitimacy in the Recognition of Governments in Africa since the end of the Cold War”, *International Journal of Constitutional Law* 17, (2019): 471.

10. Ali Tavakoli, “Democratic Legitimacy and Change in the Concept of Recognition of Countries and Governments”, *Public Law Research* 13, no. 32 (2011): 3.

11. *Oppenheim's International Law*, Edit. by Sir Robert Jennings QC, Arthur Watts KCMG QC, 9th Edition, Volume 1 peace (Oxford: Oxford Press, 1992), 51.

states should have a democratic structure, but this proposal was rejected in terms of interfering in the internal affairs of the member states.¹²

The structure and ideology of governments and whether or not they adhere to democratic norms in governance; It was outside the subject matter of international law, and it was within the jurisdiction of States that other States, as well as the United Nations (pursuant to Article 7 of the Charter), were prohibited from interfering in such matters. Therefore, no State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.¹³

At the same time, it seems that each of the internal societies, according to their cultural and religious traditions, has a specific reading of the democratic system. For example, in Islam, the concept of council can be a window on the acceptance of democratic government. It should also be noted that the Universal Declaration of Human Rights states that “the will of the people is the basis of the authority of the government.”¹⁴

2- Change of regime resulting from popular revolution

Since 1945, we have seen many popular revolutions in the world. Twenty-eight instances of popular revolutions in the world have taken place since the formation of the United Nations. The United Nations has not been challenged, because the people have the right to revolutionize against tyrannical governments.¹⁵

Of course, some governments may not have welcomed the revolution in the country due to their close and friendly relations with the previous governments, or even the political relations between the revolutionary government and some governments have been severed on this basis. However, these hostile individual relations of some governments, has had no effect on the acceptance of the recognition of revolutionary governments by the United Nations and some other international organizations. For example, after the Iranian Revolution in 1978, the new revolutionary government was recognized by most of the world's governments, including the United States (which had strategic relations with the monarchy), and the representatives of the Iranian

12. Heike Henn, *A Concise Encyclopedia of the United Nations* (Leiden: Martinus Nijhoff Publishers, 2010), 661.

13. Nicaragua Case, 1986: para. 55.

14. Seyed Mohammad Qari Seyed Fatemi, *Human Rights in the Contemporary World*, Tehran, Second Office, Second Edition (Tehran: Shahr-e Danesh Institute for Legal Studies and Research, 2010), 101.

15. Ziaei Bigdeli, *Public International Law*, 99.

government in the United Nations were recognized by the government. New were introduced and accepted. The recognition of revolutionary governments must be seen both because of the respect of other states for exercising the right to self-determination of other states and because of the acceptance of the rule of “effective power”.

In the sense that the new revolutionary government, after the overthrow of the previous regime, had succeeded in effectively exercising sovereignty over the land and population of that country. As mentioned earlier, the international legal system generally lacks a provision on the structure of countries' constitutions and the type of their political system, and how government arrangements are organized, and changes in the governmental organization of states, especially if they precede the public will. It will not face opposition from other governments. It should be noted that in the 1980s, the US government sought to overthrow the ruling socialist regime in Nicaragua and provided military and weapons assistance to its opponents (the Contras). The Nicaraguan government has sued the United States in the International Court of Justice. The Court rejected the US attempt to overthrow the Sandinistas in Nicaragua on the grounds of its undemocratic structure.¹⁶ The court rejected the US justification for overthrowing the Sandinista government, stressing that ideological issues do not fall within the scope of international regulations. The Court declared:

The finding of the United States Congress also expressed the view that the Nicaraguan Government had taken “significant steps towards establishing a totalitarian Communist dictatorship”. However the régime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty. On which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State. Consequently, Nicaragua's domestic policy options, even assuming that they correspond to the description given of them by the Congress finding, cannot justify on the legal plane the various actions of the Respondent complained of. The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.”¹⁷

16. Nicaragua Case, 1986: 263-268.

17. Nicaragua Case, 1986: 263

The Court emphasizes: “Every state has the fundamental right to choose and implement its own political, economic and social system.”¹⁸ Of course, the Court adds that the same government that has this sovereignty to choose and exercise its political system, based on the same sovereignty, can accept restrictions in this framework. Therefore, any government may commit itself to holding free elections by ratifying the Convention on Human Rights; In that case, that government will be committed to holding free elections in its own country. Thus, the International Court of Justice has rejected political doctrines such as the Brezhnev Doctrine, which were applied in the Czechoslovak crisis, or the Reagan Doctrine, which was used against the Nicaraguan government. Could be committed to holding free elections in its own country.¹⁹

Nicaragua's verdict appears to have been used in the aftermath of the Cold War and the Court's concern about growing threats to international peace and security as a result of the growing use of force by superpowers against rival camp governments. This claim is supported by the Court's reference to General Assembly Resolution 2625, which is based on the peaceful coexistence of different ideologies in the international community.²⁰ As Hans Kelsen points out, from the point of view of international law, phenomena such as revolution are “law-making facts”.²¹

3- Change of regime resulting from a military coup

Coup in a simple definition refers to the overthrow of a government by force and the use of military force that is contrary to the constitutional provisions of that government. Since the adoption of the UN Charter in 1945 until the end of the Cold War, we have seen 155 successful coups in the international community. As mentioned, the traditional approach of international law in identifying governments has been to consider the exercise of the effective authority of that government over the territory and population of the country concerned. Coups were not banned during the Cold War, and the new government was not considered illegitimate simply because it came to power. During the Cold War, none of the military coups, even those against popularly elected governments, met with universal condemnation, and the legitimacy of new military governments was not challenged, including the Batista coup.

18. Nicaragua Case, 1986: 258

19. Steven Wheatley, *The Democratic Legitimacy of International Law* (UK: Hart Publishing Ltd, 2010), 232; Nicaragua Case, 1986: 259

20. Nicaragua Case, 1986: 264.

21. Hans Kelsen, *General Theory of Law and State*, Trans. by Anders Wedberg (UK: Russell & Russell, 1961), 118.

(Batista) in Cuba in 1952 against the democratic government, the coup d'état of August 28, 1953 against the Mossadegh government in Iran, the overthrow of the elected government of Juan Jacobo Arbenz Guzmán in 1954 in Guatemala, the overthrow of the democratic government in 1962 in Myanmar, the coup against the elected government of Ángel Víctor Paz Estenssoro in Bolivia in 1964, the overthrow of Salvador Allende in 1973 by Pinochet in Chile, and finally the military coup of Omar Hassan al-Bashir Ahmad al-Bashir v. Sadiq al-Mahdi (1989) noted that he had been democratically elected Prime Minister.²² Similarly, the United Nations did not respond to military coups in other Asian member states, such as Syria, Iraq, Bangladesh, and Turkey, which led to a change of government and established governments.

Many African countries also experienced numerous military coups from the late 1960s to the early 1980s, and in many of these countries, the coup d'état would be overthrown after a period of rule by the next coup. For example, there have been six coups in each of Benin, Burkina Faso and Nigeria.²³

In some cases, some countries have helped their allies regain power from coup plotters. For example, France helped Gabonese President Leon Meba return to power a few weeks after the February 18, 1964 coup²⁴, or the April 18, 1964 coup. Laos was defeated just five days later, with American support for the monarchy.

Some governments, such as the Greek military government that came to power after the coup d'état of April 1967, have been criticized by some human rights organizations such as the European Commission of Human Rights and the European Community. European Community due to widespread violations of Civil Rights and freedoms in Greece, including the provisions of the European Convention on Human Rights, adopted a set of “countermeasure” against that government²⁵, and financial assistance to Greece, required by Protocol No. 19 to the 1963 Agreement, suspended.²⁶ However, the legitimacy of the coup government was never challenged, and representatives nominated by that government were present at the United Nations.

22. J. Patrick McGowan, “African military coups d'état, 1956–2001: frequency, trends and distribution”, *The Journal of Modern African Studies* 41, Issue 03 (2003): 352-360.

23. McGowan, “African military coups d'état”, 345.

24. K. Issaka Souaré, “The African Union as a norm entrepreneur on military coups d'état in Africa (1952–2012): an empirical assessment”, *The Journal of Modern African Studies* 52, (2014): 73-74.

25. Walldorf C William, “Argument, Institutional Process, and Human Rights Sanctions in Democratic Foreign Policy”, *European Journal of International Relations* 16, no. 4 (2010): 655.

26. Mohsen Abdollahi, Parisa Roshanfekr and Zahra Dabiri, “The Effectiveness of Counter Measures as a Guarantee of Human Rights”, *International Law Journal*, no. 15 (2015): 138.

The international community's negative reaction to Idi Amin's government and the crimes committed by his regime against the people of Uganda is not focused on his military coup against President Milton Obote in 1971, but only on inhumane acts. It was his rule. Likewise, Hissène Habré was prosecuted by Belgian courts not for the 1982 coup against the then government, but for the killing of more than 40,000 citizens of his country, and was eventually sentenced to life in prison in Senegal.²⁷

The Economic Community of West Africa (ECOWAS) also suspended the membership of the government of Samuel Canyon Doe, which came to power following a coup in Liberia in 1980, with the help of European governments. They cut the country.²⁸ But all of this was in response to human rights abuses, and they would not have been punished if the coup governments had complied with human rights law. Therefore, these actions should not be considered a reaction to the coup.

The events that followed the military rule in some states and led to foreign military intervention should not be interpreted as a reaction to the coup itself. Rather, these interventions were made to secure the interests of the interventionist governments, whose interests were jeopardized by the change of government in another country. For example, in the wake of the events of the October 12, 1983 coup that finally brought General Hudson Austin to power, the United States feared that the small island nation of Granada would seek refuge in communism to address this concern. He attacked that country militarily. The US government blamed the attack on saving the lives of 1,100 Americans in the country so that they would not be held hostage by General Austin, as in the case of US diplomats in Iran.²⁹

The overthrow of the Greek Cypriot leader, Bishop Makarios III in July 1974, was intended to bring about enosis, yet by triggering Turkey's military intervention it unleashed a war that led to the island's partition. Turkish forces occupied 37 per cent of Cyprus' territory.³⁰

27. Mohammad Hossein Ramezani Ghavamabadi, "Establishment of Senegal Extraordinary Branches for the Trial of Hussein Habre: A Step Forward in the Fight against International Crimes", *Journal of Criminal Law* 4, no. 2 (2013): 89-117.

28. Alireza Ebrahim Gol, *The Impact of counter Measures on the Execution of International Government Responsibility with Emphasis on Responsibility Arising from Collective Interests*, PhD Thesis in International Law, Faculty of Law (Tehran: Shahid Beheshti University, 2009), 299-300.

29. Christopher Joyner, "US Attack on Granada: Consequences and Legal Situation", Trans. by Assadollah Karimi, *International Law Journal* 9, no. 11 (1989): 230-231.

30. Tozun Bahcheli, "Under Turkey's wings: The Turkish Republic of Northern Cyprus, the struggle for international acceptance", in: Tozun Bahcheli, Barry Bartmann and Henry Srebrnik (eds.), *De Facto States: The quest for sovereignty* (NY: Routledge, 2004), 167-171.

Thus, during the Cold War, none of the military coups, even those against popularly elected governments, met with global condemnation, and the legitimacy of new military governments was not challenged. The reason for this approach was that in the ideological rivalry of the superpowers during the Cold War, they welcomed the overthrow of rival superpower-prone governments, including using coup tools. Even the procedures that indicated the non-acceptance of the representatives of the new government resulting from the coup in some international conferences showed the acceptance of the criterion of effective authority.

Representatives of the previous government, who were ousted by the coup, did not justify the illegality of the new government's presence at the conference, but the new government lacks the ability to exercise effective power in the country and the resistance in their country against They referred to the coup government. For example, in 1971, a coup took place in Uganda and Idi Amin came to power. The delegations of the old and new regimes both claimed to sit on Uganda's seat at the 16th meeting of the Organization of African Unity. The faction opposing Amin's delegation argued that it was not certain whether the new junta had effective control over Uganda.³¹

In 1982, two delegations claiming to represent Chad arrived at the OAU's meeting of Foreign Ministers in Libya. One delegation, representing the faction led by Hussein Habre, insisted on participating in the meeting since it was in effective control of Chad. However, another delegation representing Oueddei arrived at the meeting also demanding to be seated as the official Chadian delegation. Libya, the host government, led the countries that supported this delegation's claim Libya argued that Habre's government was not the true representative government of Chad. This was based on the claim that Oueddei was organizing resistance to Habre in Chad's northern radical region and, therefore, Habre lacked popular support.³² Of course, Libya was motivated by politics and considered Habre as the base of imperialism in Africa.

Thus, the prevailing practice of governments in the pre-Cold War era was to identify and accept governments based on control theory. In fact, the traditional approach to identifying governments has been to consider the Effectiveness of Control of that government over the territory and population of the country

31. Kufuor Oteng Kofi, "The OAU and the Recognition of Governments in Africa: Analyzing Its Practice and Proposals for the Future", *American University International Law Review* 17, no. 2 (2002): 378.

32. Kofi, "The OAU and the Recognition of Governments", 383-384.

concerned, so that such control must have the characteristics of Stability and Permanence.³³

In all these cases, the representatives nominated by the coup government were accepted by the United Nations as representatives of the relevant government. Although some governments objected to the new government's effectiveness, these protests remained only in the political arena, and the legitimacy of these governments was not challenged in terms of international law. Thus, until 1990, we did not see a negative (but individual) response to coups by governments.

Following the end of the Cold War, when ideological rivalries disappeared, attention to democracy seems to have taken a better place than in the past and has become one of the most important components in identifying governments.³⁴ After the end of the Cold War and the emergence of the wave of democratization in Eastern Europe and some other parts of the world, the political theory emerged that the only desirable model of governance was Liberal Democracy. In an article entitled "The Emerging Right to Democratic Government," Thomas Franck argued that in the new system of international law, the criterion for identifying new governments is their commitment to democratic principles.³⁵

The international community's approach to the coup was preceded by the issuance of a joint declaration by the twelve member states of the European Union on August 22, 1991, in response to the failed coup d'état of Soviet survivors against Mikhail Gorbachev. Europeans, pleased with Gorbachev's reforms of Glasnost and Prostria, saw and condemned the failed coup by pro-Soviet communists as an attempt to return to the Soviet dictatorship.³⁶ The United Nations has also changed its approach to military coups in its member states since the 1990s.

The September 29, 1991 coup in Haiti by the military, which ousted President-elect Jean-Bertrand Aristide, provoked a United Nations response. In fact, Haiti

33. Weller marc (20121). "Myanmar: Testing the Democratic Norm in International Law", See at <https://www.ejiltalk.org/myanmar-testing-the-democratic-norm-in-international-law/> 30 march 2021.

34. Murphy D. Sean, "Democratic Legitimacy and the Recognition of States and Governments", in: Gregory H. Fox and Brad R. Roth (eds.), *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000), 123.

35. Franck M Thomas, "The Emerging Right to Democratic Governance", *The American Journal of International Law* 86, no. 1 (1992): 46-91.

36. Susan Marks, "What has become of the Emerging Right to Democratic Governance?" *European Journal of International Law* 22, no. 2 (2011): 508.

was the first case the Security Council authorized the use of force to restore democracy in that country.³⁷ In 1993, in response to the coup in Haiti, the Security Council first imposed economic sanctions on the country under Resolution 841³⁸, and after failing to achieve the desired result in the return of the previous government to power, decided to intervene militarily in Haiti under Resolution 940. In that resolution, the Security Council stated that the goal of the international community is to restore democracy in Haiti. UN Security Council Resolution 1132 also unanimously imposed arms and oil sanctions on the Sierra Leonean government in response to the 1997 coup. The Security Council requested that in addition to the International Atomic Energy Agency's ongoing inspections in Sierra Leone, that it monitor Iran's compliance with "the steps required by the IAEA Board".³⁹ The OAU authorized the countries of the Economic Community of West Africa States (ECOWAS) to pursue their campaign against the military action in Sierra Leone.⁴⁰

The UN General Assembly has also, in most cases, refused to accept the credentials of delegates nominated by the coup government.⁴¹ It was as follows:

After the military coups in Liberia (1990)⁴², Haiti (1991)⁴³ and Sierra Leone (1997)⁴⁴, the coup plotters did not nominate delegates to the United Nations, and the accreditation committee recognized the credentials of the former delegates.⁴⁵ Conversely, after the coup in Guinea and the illegal seizure of power in Madagascar, both of which took place in 2009, the new governments nominated representatives to the United Nations, but the ousted government did not nominate a new representative. However, the accreditation committee did not accept the nominees.⁴⁶

It should also be noted that in 2009 African governments called for a ban on the presence of the "Chairman of the High Council of Transition" in Madagascar to address the General Assembly. The basis for this demand was

37. S/RES/940 (July 31, 1994).

38. S/RES/841 (16 June 1993)

39. S/RES/1132 (Oct. 8, 1997)

40. <https://www.un.org/africarenewal/magazine/july-1997/coups-no-longer-acceptable-oau>

41. Roth R Brad, "Secessions, Coups, and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine", *Melbourne Journal of International Law* 11, (2010): 435.

42. 4/46/563, 11 October 1991

43. 4/46/563/Add.1, 16 October 1991

44. A/52/719, 11 October 1997

45. Rebecca, 2021. <https://www.ejiltalk.org/will-the-taliban-represent-afghanistan-at-the-un-general-assembly>

46. A/64/571, 17 December 2009

that the council came to power following a military coup. The President of the General Assembly called for the application of Article 29 of the Rules of Procedure. This means that the chairman of the High Council for Transition, as the interim representative of Madagascar, will be allowed to speak. But in the General Assembly, a vote was taken on this issue. Following the announcement of the results, the Speaker of the General Assembly announced that Article 29 would not apply in this case and prevented the Speaker of the Transitional Council from speaking.⁴⁷

There is also a reaction to the coup in the jurisprudence. In particular, we can mention the African Commission on Human Rights. Following the July 1994 military coup in the Gambia, a complaint was lodged with the African Commission on Human Rights alleging violations of several articles of the African Convention on Human Rights and Peoples. The plaintiff claimed that some of his rights under the African Charter on Human Rights, including the right to self-determination, had been violated by the July 1994 military coup in the Gambia. The commission believed that although the coup in Gambia was carried out without bloodshed, since no change of government had taken place through the ballot box, it should be considered a serious violation of the Gambian people's right to self-determination under Article 20 of the Convention.⁴⁸ Gradually, the statute of other international organizations also changed under the influence of the new approach.⁴⁹ Article 9 of the statute of the Organization of American States provided for the possibility of suspending the membership of any of the member states whose democratically elected government was overthrown as a result of the coup.⁵⁰ Central American countries also stressed the need to strengthen democracy after the Cold War.⁵¹ Article 8 of the Central American Democratic Security Treaty (a multilateral treaty signed between Costa Rica, Guatemala, El Salvador, Honduras and Panama on 15 December 1995), provides that "For the strengthening of democracy, the Parties reaffirm their obligation to abstain from providing political, military, financial or any other kind of support to individuals, groups, irregular forces or armed gangs which attack the unity and order of the State

47. A/64/PV.8

48. Communications 147/95 and 149/96.para.73

49. Schnably J. Stephen, "Constitutionalism and the Democratic Government in the Inter-American System", in Gregory H. Fox and Brad R. Roth (eds.), *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2020), 155.

50. See: http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp#Chapter_II

51. Jean D'Aspremont, "Responsibility for Coups d'Etat in International Law", *Tulane Journal of International and Comparative Law* 18, (2010): 451-476.

or advocate the overthrow or destabilization of the democratically elected Government of another Party.”⁵²

On the African continent, after the end of the Cold War, we are witnessing a change in the position of the African Union. Union in response to military coups in Togo (2005), Comoros (2007), Guinea (2009), Madagascar (2009), Niger (2010), Egypt (2012), Mali (2012), Guinea-Bissau (2012), Central African Republic (2013), Burkina Faso (2015), suspended the membership of those governments in the organization and even imposed sanctions on them.⁵³

Also after the coups in Sudan (April 2019)⁵⁴, Mali (June 2021)⁵⁵ and Guinea (September 2021)⁵⁶, the membership of those governments in the organization was suspended immediately.⁵⁷

Another point that needs to be made about the legitimacy of military coups is the overthrow of dictatorial regimes by military coups. In some cases, a group of the military may actually carry out a coup d'etat to overthrow an authoritarian government and then hand over power to civilians, leaving the government to the nation through free elections. Now the question arises whether such a military coup is illegitimate or should it be welcomed because of the favorable outcome of this military coup that led to the establishment of a democratic government.

A group of jurists consider the examination of the legitimacy of the coup to be the positive or negative effect of the coup on the state of democracy in the country concerned. In other words, if the coup plotters overthrow an authoritarian ruler and then hand over power to the civilian electorate of the nation in a short period of time, they will not consider that coup illegitimate. In some countries, the military may oust rulers following public outrage at the rulers to quell public anger. This is called a “coup d'etat” if it is done to transfer power to the real elected representatives of the people, and the military, after a short period of time temporarily running the government during the transition period, holds free and democratic elections. Is called “democratic coup”.⁵⁸

52. <https://www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/FrameworkTreaty.aspx>

53. De Wet. “The Role of Democratic Legitimacy”, 473.

54. <https://au.int/en/articles/sudan-suspended-african-union>

55. <https://www.reuters.com/world/africa/african-union-suspends-mali-after-military-coup-threatens-sanctions-2021-06-01>

56. <https://www.france24.com/en/africa/20210910-african-union-suspends-guinea-after-coup-ousting-cond%C3%A9>

57. De Wet. “The Role of Democratic Legitimacy”, 473.

58. Varol O. Ozan, “The Democratic Coup d’E’ tat”, *Harvard International Law Journal* 53, no. 2 (2012): 291-356.

In democratic coups, military action is carried out through the use of force or the threat of use of force against the current rulers. As a result, coup plotters use undemocratic means (resorting to force) to achieve a democratic goal. The justification for accepting democratic coups against authoritarian regimes is that, due to the authoritarian nature of the ruling regime, the opposition may not be able to organize to mobilize the people and the revolution against the government. In such cases, a military coup would result in lower human costs of regime change.

One of the most important examples of democratic coups is the military coup in 1974 against the dictatorial government in Portugal, known as the Clove Revolution. On April 25, 1974, a riot broke out by young officers in Lisbon, Portugal, ending the dictatorship of António Salazar, which led to the rise to power of General António Spínola and the overthrow of the former dictatorship.⁵⁹

Because this revolution or coup took place without bloodshed and turmoil, it is known in Portuguese history as the Democratic Revolution, and it became known as the Clove Revolution because people welcomed soldiers with carnations. After a while, the military handed over power to the civilians and free elections were held in this country, so this coup is called a democratic coup and it was welcomed by the international community. Therefore, it seems that the new generation coups do less damage to democracy than the previous coups.⁶⁰

Recently, we have witnessed military coups on the African continent, during which army commanders have promised to establish democracy and the peaceful transfer of power to civilians by overthrowing dictatorial rulers. The difference between the coups of the last decade and the coups of the 1970s and 1980s is that in the previous coups, the people were basically not in power during the power struggle between the elites. The coups were carried out at night without the knowledge of the people, and they had neither the ability nor the desire to interfere in the process. But in coups in Africa over the past decade, the military has used popular discontent to oust the ruler, and military coups after days or weeks in which people have taken to the streets to express their dissatisfaction with the government's actions. They appear and stage a coup against the ruler. During the transition period, they also hand over the administration of the country to the Transitional Military Councils.

59. Ozan, "The Democratic Coup d'E' tat", 299.

60. Nikolay Marinov, and Hein Goemans, "Coups and Democracy", *British Journal of Political Science* 44, Issue 4 (2014): 799 – 825.

Military coups in Egypt (2011 and 2013), Zimbabwe (2017), Sudan (April 2019) and Mali (August 2020) are among these military coups. In fact, the coup plotters seem to be well aware that, given the prevailing pro-democracy discourse in international relations, they are forced to use the term, although in practice they do not act on its content. Thus, in the guise of establishing democracy and overthrowing dictatorial rulers, the way is opened for the exercise of power by the new ambitious. In all of these coups, the African Union and the Economic Community of West Africa (AQUA) have called on military rulers to immediately hand over power to the civilian electorate. But they have not reacted harshly to the coup plotters.⁶¹

It should be noted that the “High Committee Responsible for Reviewing the Reform of the United Nations Structure” in December 2004 in a plan published by the then Secretary-General entitled “A Safer World in the Face of Threats, Challenges and Change: Our Common Responsibility”; Proposed that a mechanism be devised at the United Nations to “protect democratic governments against overthrow that is unconstitutional.”⁶² It was the same plan drafted by a committee of 16 high-level experts on the recommendation of Kofi Annan to strengthen the United Nations' ability to meet the challenges of the 21st century. Naturally, the very nature of this proposal to an organization whose charter has been indifferent to the political structure of the member states indicates a very important development, but its final approval by governments will be very difficult.

4- Change of regime resulting from the civil war

Since 1945, we have seen several governments change resulting from the Civil War. A civil war erupted after the pro-government Costa Rican parliament annulled the results of the 1948 presidential election. The rebels defeated the army after 44 days of fighting. Interestingly, after the insurgents won, both the incumbent president and the winning candidate were forced to leave the country, and the rebel commander became president.⁶³ In 1949, the Communists, led by Mao Zedong, succeeded in fleeing Taiwan and taking control of China after years of conflict with the ruling Nationalist

61. Yihdego, Zeray (2013). “Democracy, Peoples' uprising and Unconstitutional Change of Government in Egypt: The African Union Principles and Responses”, See at: <https://www.ejiltalk.org/democracy-peoples-uprising-and-unconstitutional-change-of-government-in-egypt-the-african-union-principles-and-responses/www.ejiltalk.org>

62. U.N. High-Level Panel on Threats, Challenges & Change, A More Secure World: Our Shared Responsibility, 94, U.N. Doc. A/59/565 (Dec. 2, 2004).

63. Marcia Olander, “Costa Rica in 1948: Cold War or Local War?” *The Americas* 52, no. 4 (1996): 467-471.

Party.⁶⁴ In Cuba, too, Fidel Castro succeeded in ending the guerrilla war against the incumbent government, which had begun in 1956, with a victory over General Batista. In 1962, following three years of US intervention following the overthrow of the Castro government, he approached the Soviet Union with the proclamation of the establishment of the Socialist Republic in 1962.⁶⁵ Also in the civil war between 1953 and 1975, the Communists in Laos succeeded in overthrowing the monarchy in Laos and the Democratic People's Republic of Laos was established.⁶⁶

In Chad, after a decade of conflict, the forces of the Patriotic Liberation Movement, a Libyan-backed group led by General Idriss Déby, entered the Chadian capital on December 3, 1990, and Hassan Habre fled to Senegal.⁶⁷

In May 1991, the Ethiopian People's Revolutionary Democratic Front captured Addis Ababa and ousted Mengistu Haile Mariam. Mariam held power in Ethiopia from 1977 to 1991.⁶⁸ The Algerian military also rejected the results of the December 26, 1991, Algerian parliamentary election in favor of the Islamists, forcing President Chadli Bendjedid to resign.⁶⁹ The move sparked a decade of civil war between the Islamists and the military.

In 1996, the Taliban succeeded in gaining control of more than three-quarters of Afghanistan after four years of civil war and establishing the Islamic Emirate of Afghanistan. Once again, in August 2021, the group succeeded in capturing Kabul with the withdrawal of American troops.⁷⁰

The Libyan civil war began on February 15, 2011 following the Arab Spring, and eight months later, on October 23, 2011, the National Transitional Council declared Libya liberated. As of November 30, 2011, the council had been recognized by more than 100 governments as the legitimate representative of the Libyan government.⁷¹ The United Nations had previously recognized the council on September 16, 2001, as the sole legitimate representative of the Libyan people.⁷² In September 2011, when two rival applications were

64. In 1949, the Communists, led by Mao Zedong, succeeded in fleeing Taiwan and taking control of China after years of conflict with the ruling Nationalist Party.

65. <https://www.britannica.com/biography/Fidel-Castro>

66. <https://voxeu.org/article/devastating-legacy-secret-war-laos>

67. The New York Times. 6 December 1990. Retrieved 17 June 2019

68. <https://www.britannica.com/topic/Ethiopian-Peoples-Revolutionary-Democratic-Front>

69. <https://www.britannica.com/biography/Chadli-Bendjedid>

70. <https://www.justsecurity.org>, 2021

71. Giuseppe Nesi, "Recognition of the National Transitional Council: When, How and Why", *The Italian Yearbook of International Law* 21, no.1 (2011): 47.

72. <https://www.un.org/press/en/2011/ga11137.doc.htm>

submitted to the United Nations by the government of Muammar Gaddafi (Muammar al-Gaddafi) and the National Transitional Council, the Accreditation Committee decided to accept the representative of the Transitional Council as the representative of Libya.⁷³

Except in the case of the Taliban, the government of the Islamic Emirate of Afghanistan (1996-1991) was not recognized by the Security Council because of its links to al-Qaeda and terrorist groups, as well as systematic human and women's rights violations. The name of the Taliban group is used to address it and it is specified that they introduce themselves as the Islamic Emirate⁷⁴, Which means non-recognition by the Security Council. This confirms that the General Assembly also accepted the representatives of the United Nations in that body only from the Northern Coalition led by Rabbani⁷⁵, In other cases, victorious insurgent groups have been recognized as legitimate governments by other governments and the United Nations.

It should be noted that the only binding international treaty that outlaws change of government as a result of the use of force by insurgents is (the African Charter on Democracy, Elections and Governance), signed on 30 January 2007. Receipt. The document entered into force on 15 February 2012 after the approval of fifteen governments, and so far (September 1, 2021) 34 African governments have ratified the document in their domestic parliaments.⁷⁶ Article 23 of this document mentions each of the following as an example of an unconstitutional change of government:

- 1- Any putsch or coup d'Etat against a democratically elected government
- 2- Any intervention by mercenaries to replace a democratically elected government
- 3- Any replacement of a democratically elected government by armed dissidents or rebels
4. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or
5. Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government

73. A/66/PV.2, p. 7.

74. S/RES/1267 (1999), 15 October 1999, para.1

75. A/51/548,23 October 1996, paras.6-7

76. <https://au.int/en/treaties/african-charter-democracy-elections-and-governance>

The remarkable note about this document is that only the overthrow of a democratically elected government is considered illegal, and revolts and coups against authoritarian and dictatorial governments are not covered by this document. Moreover, any change resulting from the popular revolution in the established governments has not been considered illegal. It should be noted that the 2007 document was adopted in line with Article 4 of (the Constitutive Act of the African Union), adopted in 2000. Article 4 of the organization's statute emphasized the “right of the Union to intervene in its member states, following a decision by the General Assembly in very exceptional cases of war crimes, genocide and crimes against humanity. Was also condemned and rejected”, Constitutive Act of the African Union (11 July 2000) art 4).

Therefore, except the states that ratified the above document, other states do not have a contractual obligation not to recognize the governments resulting from the coup or the governments that came to power by overthrowing the democratic governments. Thus, it seems that a right called democratic legitimacy does not generally exist in the current system of international law; instead, we can speak of the emergence of the principle of “democratic teleology”, “the principle by which they have a legal obligation to move towards democracy”.⁷⁷

That is why today governments that come to power after a revolution or a civil war are required to form a government that represents all people. Therefore, in addition to the concept of representative government, the term “inclusive government”⁷⁸ is also used. In the current practice of governments, inclusive government mainly refers to the type of government that includes all ethnic groups and religions living in the country and includes all of them in the structure of government. United Nations Security Council also emphasizing the importance of the establishment of an inclusive and representative government, further emphasizing the importance of the full, equal and meaningful participation of women, and upholding human rights, including for women, children and minorities.

Conclusion

The predominant state practice in the pre-Cold War era was to identify and accept governments based on the theory of “effective authority”. Whenever a

77. Niels Petersen, “The Principal of Democratic Teleology in International Law”, *Brooklyn Journal of International Law* 34, (2008): 49

78. S/RES/2596 (2021)

government could effectively seize power in the country and eliminate its rivals, it would be recognized by the international community. Regardless of whether the performance of the new government was in accordance with democratic norms or not. In fact, the practice of governments shows that the will of the majority of the people of a country to change the political system of their country has not been positively supported, and governments avoid the conflict between the central government and the opposition to change or maintain the political system. And have avoided interfering in this area. The existence of many undemocratic and dictatorial governments whose formation and perpetuation is not based on elections shows the fact that the theory of democratic legitimacy of governments has not been applied in practice to established governments.

In the case of changes of government that take place contrary to the constitutional process, the verdict of each case varies according to the manner of change of government. The change of government resulting from the popular revolution has always been recognized by other governments in order to be in line with the will of the people. Regarding the change of government resulting from the military coup, which was a common phenomenon in Third World countries during the Cold War, the reaction of the international community should be divided into two periods before and after the Cold War. In the pre-Cold War era, the criterion of "effective control" was also applied to coup d'état governments, but it seems that since the 1990s there has been a shift in the approach to changing governments from the criterion of "effective authority" to "democratic legitimacy". We are the government. The General Assembly and the Security Council have taken a hard line on the coup in several cases and called for the return of democratically elected governments in condemnation of the coup.

In the event of a change of government due to a civil war, the United Nations has usually identified a new government that has come to power following the success of the civil war. Of course, in the last three decades, the victorious insurgents have also announced to the international community that they will abide by human rights standards in governance. In Africa, we also see a special contract rule that does not recognize governments that have overthrown democratically elected governments through coups or civil war.

In conclusion, it can be argued that the international law system on the legitimacy of governments, unlike the classical international law system, in the

last three decades, does not use the criterion of “effective authority” as the only applicable criterion on the legitimacy of governments and in cases of unjust transfer. The power and unconstitutionality of the constitution, especially through military coups, has a very negative position and has refused to recognize military governments that have come to power through undemocratic means. At the same time, the criterion of “democratic legitimacy” cannot be considered as the only criterion in measuring the legitimacy of governments, especially if the way to come to power undemocratic government based in these countries, preceded the removal and overthrow of democratic governments and the will of the people in countries. There has always been an undemocratic military in that country. In recent cases, other governments have often been content to criticize the human rights performance of those governments and refuse to challenge the legitimacy of the government itself.

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