Who is a legitimate government in exile? Towards normative criteria for governmental legitimacy in international law, in Guy Goodwin-Gill/Stefan Talmon (eds.), The Reality of International Law. Essays in Honour of Ian Brownlie (Oxford University Press, 1999), pp. 499-537

Who is a legitimate government in exile? Towards normative criteria for governmental legitimacy in international law

Stefan Talmon

I. Introduction

In recent years such diverse authorities in exile as the Coalition Government of Democratic Kampuchea - CGDK (1979-90), the Delvalle Government of Panama (1988-89), the Sabah Government of Kuwait (1990-91), the Aristide Government of Haiti (1991-94), the Kinigi Government of Burundi (1993), and the Kabbah Government of Sierra Leone (1997-98) have been recognized by States and international organizations as the 'legitimate government' of their respective countries. For example, the British Foreign Secretary Robin Cook stated on 13 May 1998 in the House of Commons:

> 'President Kabbah, the democratically elected leader of Sierra Leone, was deposed in a military coup in 1997. Britain continued to recognize President Kabbah as the legitimate head of Government of Sierra Leone ... Earlier this year, President Kabbah was restored to power ... that was a positive outcome and represented the restoration of the legitimate and democratic Government, in place of a military regime.'[1]

Several other authorities in exile, such as the Dalai Lama`s Government of Tibet in exile (1959-present), the ousted Hutu Government of Rwanda (1994)[2] or the deposed Emir of Qatar (1995-96),[3] on the other hand, have not been recognized as 'legitimate governments'. Although reference to 'legitimacy' in the case of governments in exile is not without precedent - already during the Second World War the exiled Allied Governments in London were sometimes referred to as the 'legitimate' governments or 'legitimate representatives' of their countries under Axis domination[4] - the attribute 'legitimate' has been added to 'government' with any frequency only in recent times. What is not clear is who is a 'legitimate government' in exile in international law and what distinguishes a (simple) 'government', either in exile or in situ, from a 'legitimate government'. These questions are of fundamental importance as only legitimate

---

[1] See http://www.fco.gov.uk/texts/1998/may/13/tops1205.txt. On the legal effects of the continued recognition of the exiled Kabbah Government, see *Sierra Leone Telecommunications Co. Ltd* v. *Barclay`s Bank Plc*, (1998) 2 All ER 821. On Sierra Leone generally, see K. Nowrot / E.W. Schabacker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone' (1998) 14 *Am. U. Int`l LR* 321-412.

[2] *Washington Post*, 4 August 1994, Sec. 1, 24; *NY Times*, 29 December 1994, Sec. A, 1.

[3] *FAZ*, 4 December 1995, 4; ibid., 9 April 1996, 6.

[4] See, e.g., F. de Kerchove d`Exaerde, 'Quelques questions en droit international public relatives à la présence et à l`activité du gouvernement belge en exil à Londres (Octobre 1940 - Septembre 1944)' (1990) 23 *RBDI* 93-151 at 111; H. Ripka, *The Repudiation of Munich* (London, 1943), 17; I. Tomšiæ 'The Identity of the Yugoslav State Under International Law' (1956) 3 *JRZMP* 15-27 at 17, n. 8.

governments in exile are regarded as competent to bind their State, dispose of its assets abroad, protect its nationals, represent their State in judicial proceedings and international fora and, most importantly, consent to armed (pro-democratic or humanitarian) intervention in their State (i.e., the use of force against the effective government in situ).[5] It has been said that it is 'almost impossible to set out clear-cut criteria for governments-in-exile, as the relevant decisions concerning the attribution of competence lie exclusively with the governments of the recognizing States.'[6] However, if the notion of 'legitimate government' is to be more than a relative concept, in that each State by its own unfettered discretion can decide who is and who is not the legitimate government of another State, then there must be certain (minimum) criteria which an authority in exile must fulfil to qualify as a legitimate government in international law. Practice shows that States do not feel free to recognize any authority in exile they like 'as the legitimate government' of another State. In this connection it is important to distinguish between the different meanings of recognition: recognition may indicate the recognizing State`s willingness to enter into certain relations (and in so far it is within its discretion) and/or express its opinion on the legal status of the authority recognized (and in so far it is regulated by international law).[7] Recognition is used, as a rule, in the latter meaning if the authority in question is not just accorded 'recognition' but is recognized *as something*, for example, 'as a legitimate government' or 'as the sole legitimate representative of a people'. Since the beginning of this century some seventy-five authorities in exile have called themselves or claimed to be the 'governments' of certain States. Of these, more than half have been recognized 'as (legitimate) governments'. By examining what authorities in exile States have recognized 'as governments' and by asking for the reasons of their recognition or non-recognition decisions it is hoped to establish in a first step the (minimum) criteria for recognition of an authority as a 'government' (i.e. the criteria for the status of government laid down by international law). In a second step, it will then be asked what makes a government 'legitimate' in the eyes of international law.

II. Criteria for government status

1. State

According to the predominant view in the legal literature a 'government in exile' is not a subject of international law but the 'representative organ' of the international legal person 'State' and, as such, the depository of its sovereignty.[8] There can thus logically be no 'government', either in exile or in situ, without the legal existence of State which the

---

[5] On the legal status of authorities in exile recognized as (legitimate) governments, see S. Talmon, *Recognition of Governments in International Law* (Oxford, 1998), 113-268.

[6] M. Rotter, 'Government-in-Exile' in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, II (Amsterdam, 1995), 607-11 at 608.

[7] S. Talmon, n. 5 above, 21-43.

[8] See ibid., 15-16 with further references. See also the French statement in response to the proclamation of the Provisional Government of Algeria (GPRA) that this 'government' was in no sense the 'depository of any Algerian sovereignty whatever' ([1958] *Keesing`s* 16410A).

government represents.[9] A brief for the British Secretary of State of early March 1943 on the 'British Attitude of Albania' noted:

> 'We, however, interpret our declaration to mean that while we shall endeavour to re-establish an independent Albanian State after the war we do not regard an Albanian State as now existing. Thus no question of recognizing any Albanian government in exile arises at present.'[10]

State, in the present context, means sovereign and independent State. As the Permanent Court of International Justice said in the *Lighthouses in Crete and Samos Case* 'an autonomous entity is not a State'.[11] Governments in exile for autonomous regions, such as the Basque and Catalan 'Autonomous Governments' in exile (1939-79),[12] thus do not qualify as governments in exile in the sense of international law. The Court of Appeal of Poitiers stated with respect to the Basque Government that, while it enjoys a certain autonomy inside the Spanish State, it 'is not sovereign and is not recognized from the point of view of international law'.[13] The governments in exile of the Spanish autonomous regions did not receive any recognition as governments and must be regarded as 'autonomous divisions' of the Government in exile of the Spanish Republic.[14] The criterion of legal existence of a (sovereign and independent) State also militates today against recognition of the 'Government of Tibet in exile'.[15] Speaking on 18 August 1958 the Indian Prime Minister submitted that Tibet 'was always looked upon and considered by the world community as being under the suzerainty of China. At no time did any country consider it independent. They considered it as autonomous under the suzerainty of China.'[16] Thus, even if Tibet was in law autonomous[17] (what in fact, of course, it is not), recognition of the Dalai Lama`s Government in exile as a government would not be possible

---

[9] G. Dahm, *Völkerrecht*, I (Stuttgart, 1958), 308; J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine* (Paris, 1975), 81. See also Art. 1 of the Inter-American Convention on Rights and Duties of States ['Montevideo Convention] of 26 December 1933 which lists as one of the criteria the State as a person of international law should possess 'government'. For the text of the Convention, see (1934) 28 *AJIL Suppl.* 75-8.

[10] FO 371/37138, reproduced in R. Hilbert, *Albania`s National Liberation Struggle: The Bitter Victory* (London, 1991), 40.

[11] (1937), PCIJ, series A/B, no. 71, 103.

[12] See [1977] *Keesing`s* 28519; [1979] *Keesing`s* 29665; [1980] *Keesing`s* 30181A.

[13] *Rousse et Maber* v. *Banque d`Espagne et autres* (1937), (1939) 46 *RGDIP* 427-8 at 428 = (1935-7) 8 AD no. 67. On the Basque Government (in exile) see also *Pesquerias* y *Secaderos de Bacalao de Espana, S.A. v. Beer*, (1946) 79 Ll.LR 417 and (1947) 80 Ll.LR 318 (CA); *In re Estate of de Galindez*, 243 NYS2d 57 (1963); *Fitzgibbon* v. *CIA*, 578 F.Supp. 704 (DC 1983).

[14] Cf. *The Baurdo* (1937), (1935-7) 8 AD no. 73. The London delegation of the Basque Government in exile operated out of the Spanish Republican Embassy (cf. [1938] *Keesing`s* 3087E). See also *NYTimes*, 10 February 1946, 26.

[15] Cf. J. Verhoeven, n. 9 above, 81, n. 60, who compares the status of the Tibetan Government in exile to that of the National Committees during the First World War.

[16] N. Singh / M.K. Nawaz, 'The Contemporary Practice of India in the Field of International Law (1958-I)' (1959-60) 1 *Internat. Stud.* 88-104 at 91. See also Hengtse Tu, 'The Legal Status of Tibet' [1970] No. 7 *Annals of Chinese Society of International Law* 1-38 at 28.

[17] Under the Sino-Tibetan Agreement on 'Measures for the Peaceful Liberation of Tibet' of 23 May 1951 Tibet has the right to 'national regional autonomy under the unified leadership of the Central People`s Government'. For the text of the treaty, see 158 BFSP 731.

without implying a change in the legal status of Tibet. Recognition as 'Government of Tibet' would necessarily imply recognition of Tibet as a sovereign independent State and would justly be resented by the People`s Republic of China. It is, inter alia, for this legal reason that no State recognizes the 'Government of Tibet in exile' as such. For example, the German Foreign Minister declared on 20 June 1996 in the Federal Parliament that:

> 'The Federal Government, as all governments in the world, regards Tibet as part of the Chinese State. From this clear statement of international law it follows that the Federal Government will not recognize the self-styled Government of Tibet in exile. This is not a formality but a question of international law.'[18]

Colonial possessions and self-governing territories are also not (sovereign and independent) States. The governments in exile of Burma (in Simla, India), the Philippines (in Washington), and the Netherlands East Indies (in Brisbane, Australia) during the Second World War as well as the exiled 'Government for the Portuguese State of India', which was established in Lisbon on 17 February 1962 after the Indian invasion of Goa, Damão and Dio,[19] were not governments in exile in the sense of international law[20] and were not recognized as such. These governments were rather maintained (or established) as a symbol showing that the colonial or administering power regarded the loss of its territory only as temporary. In no way were they to imply a change of status of the territories.[21] For example, on 8 September 1943 US Secretary of State Cordell Hull wrote that the 'Philippine Commonwealth Government in exile' was not a 'separate and distinct government' from the Government of the United States which 'exercises *de jure* sovereign rights in the Philippines'.[22] Consequently, all questions related to the Philippines were regarded as internal affairs and were dealt with by the Department of the Interior.[23] On 13 November 1943 President Roosevelt signed a bill extending the terms of office of President Quezo and Vice President Osmena until the expulsion of the Japanese from the Philippines.[24] As subdivisions or organs of the (sovereign) metropolitan governments of the colonial or administering States these governments may however enjoy in third countries, at least in part, the same legal status as governments in exile.[25]

In the case of governments in exile which had to flee their country 'State' as a criterion of governmental status will usually create few problems. It is well established that neither

---

[18] BT Sten. Ber., 13th Legislative Period, 113th Session, 20 June 1996, 10096-8 at 10097 (translation provided by the author).

[19] For profiles of these governments in exile, see S. Talmon, n. 5 above, Appendix II.

[20] So J. Verhoeven, n. 9 above, 81, n. 60, for the Philippines and Portuguese India.

[21] E. Reut-Nicolussi is mistaken when he states that the US by implicitly recognizing the Philippine Government in exile also implicitly recognized the independence of the Philippines. See 'Exilregierung' in Görres-Gesellschaft(ed.), *Staatslexikon. Recht, Wirtschaft, Gesellschaft*, III (6th edn., Freiburg, 1959), 209-12 at 212.

[22] [1943] III FRUS 1100-2 at 1101.

[23] Ibid., 1102-3. While the Philippine Government was in Washington the function of US High Commissioner to the Philippines were transformed by Executive Order No. 9245 of 16 September 1942 to the Secretary of the Interior ([1942] I FRUS 910, n. 71).

[24] *NY Times*, 14 November 1943, 19.

[25] For example, they enjoyed sovereign immunity. See *Grangemouth & Forth Towing Company, Ltd.* v. *Government of the Netherlands East Indies*, (1942) 72 Ll.LR 216.

belligerent occupation nor illegal annexation affects the continued legal existence of a State.[26] Thus, the (purported) annexation of Kuwait by Iraq on 8 August 1990 could have no effect on the legal status of the Kuwaiti Government in exile.[27] The establishment of a 'puppet State' in the territory under belligerent occupation also does not lead to the extinction of a previously existing State.[28] As a belligerent occupant does not acquire sovereignty by virtue of the occupation it cannot transfer sovereignty to the new 'State'.[29] The creation under Axis auspices of the puppet States of Slovakia (14 March 1939), Croatia (10 April 1941)[30] and Montenegro (12 July 1941) thus proved (at least *ex post*) no legal obstacle to the continuity of Czechoslovakia and Yugoslavia.[31] However, third States that recognized these (puppet) States *de jure* were prevented from recognizing the Czechoslovak and/or Yugoslav Government in exile until they withdrew their recognition from these States. For example, Switzerland which had accorded *de jure* recognition to Slovakia and the German protectorate over Bohemia and Moravia could not recognize the Czechoslovak Government in exile until 27 February 1945 when it withdrew recognition from Slovakia.[32] On the other hand, its *de facto* recognition of Croatia did not prevent Switzerland from continuing to recognize the Yugoslav Government in exile.[33] Similarly, the *de jure* recognition of the Italian annexation of Albania and Ethiopia stood against recognition of governments in exile for these countries.

The legal existence of a State may be in question if a government in exile is established for a new State. Two situations may be distinguished. Independence may be granted (and sovereignty may be transferred) by a sovereign State to part of its territory which it is under belligerent occupation. For example, in 1943 the United States considered to grant independence to the Japanese occupied Philippines immediately in order to counteract plans by Japan to establish a Philippine puppet State.[34] In a Memorandum, dated 2 October 1943, US Assistant Secretary of State Long outlined the consequences of such a move for the relations between the Philippine Government in exile and the US Government:

---

[26] See I. Brownlie, *Principles of Public International Law* (5th edn., Oxford, 1998), 78; J. Crawford, *The Creation of States in International Law* (Oxford, 1979), 407, 418-19; K. Marek, *Identity and Continuity of States in Public International Law* (Geneva, 1954), 412-16; A. Verdross, *Völkerrecht* (4th edn., Berlin, 1959), 81.

[27] See also UN Security Council S/RES/662 (1990).

[28] J. Crawford, n. 26 above, 64.

[29] See *Co Kim Cham* v. *Valdez Tan Keh* (1945), (1950-1) 3 *Stanford LR* 7-13 at 10; *State of the Netherlands* v. *Federal Reserve Bank of New York*, 99 F.Supp. 655 at 660 (SDNY 1951); *Société la Belgique Industrielle* v. *Masure* (1917), [1917] I Pas.belge 275 at 281.

[30] On the puppet character of Slovakia and Croatia, see *Socony Vacuum Oil Company Claim* (1954), 21 ILR 55.

[31] Puppet States were also set up in Burma (1 August 1943) and the Philippines (14 October 1943).

[32] See H. Klarer, *Schweizerische Praxis der völkerrechtlichen Anerkennung* (Zurich, 1981), 163-6, 334. See also DDS, vol. 13, nos. 66, 235; ibid., vol. 15, no. 380

[33] See H. Klarer, n. 32 above, 166-9, 193-4. See also DDS, vol. 15, no. 353, at 877.

[34] Already in a declaration made on 25 February 1942 the Japanese Prime Minister Tojo had said: 'If the Philippines would well understand the real intentions of Japan and would offer their collaboration, Japan would voluntarily accord them independence.' During 1943 the Japanese Government reiterated its promise. On 14 October 1943 the 'Republic of the Philippines' was inaugurated within the 'Greater East Asia Co-prosperity Sphere'. See [1943] *Keesing`s* 6059; *Dictionnaire Diplomatique*, IV (Paris, 1947), 899.

> 'The American Government would upon the attainment of independence by the Philippines immediately proceed to deal with the Government of the independent Philippines on the new basis. There would be an exchange of ambassadors and we would approach the new Government on an entirely new basis than that upon which we would now deal with the Philippines.'[35]

In the end the United States did not grant independence to the Philippines in 1943 but instead treated the Philippine Government in exile 'as having the same status as the governments of other independent nations'.[36] This example shows however that, at least in principle, the legal status of an entity may change while it is under belligerent occupation (or foreign domination) and that this change, in turn, may affect the legal status of the authority in exile.

The question that arises is whether a new (sovereign and independent) State can also come into existence by a proclamation of its (future)[37] government in exile. As a rule, a new State cannot be established by a mere proclamation if the government proclaiming the State does not exercise effective control over the State`s people and territory. The question is whether the situation is different if the new State is proclaimed by a national liberation organization (turned government in exile) on behalf of a people exercising its right to self-determination. Ian Brownlie has pointed out that 'one aspect of *jus cogens*, the principle of self-determination, may justify the granting of higher status to ... exile governments than would otherwise be the case.'[38] By virtue of the principle of self-determination, all peoples have the right freely to determine, without external interference, their political status. The establishment of a sovereign and independent State is envisaged by the UN General Assembly`s 'Friendly Relations Declaration' of 24 October 1970 as one of the modes (which in practice turned out to be the main mode) of implementing the right to self-determination by a people.[39] The proclamation of a sovereign and independent State by a national liberation organization could thus be taken as a valid exercise of a people`s right of self-determination which *ipso jure* changes the legal status of the self-determination unit.[40] At the end of the OAU Ministerial Council meeting, held in Addis Ababa on 23-28 February 1976, OAU Assistant Secretary-General, Mr Peter Onus, stated with regard to the proclamation of the Saharan Arab Democratic Republic (SADR) by the Frente Polisario in the night from 27 to 28 February 1976:

> 'The people of the Western Sahara have now declared a free, sovereign, independent republic. It seems to the Council that the people there have already exercised their right

---

[35] [1943] III FRUS 1102-3 at 1102. In 1944 the question was discussed what would be the situation when the Philippines would still be occupied by Japan on 4 July 1946, the day of their promised independence. See [1944] V FRUS 1302-3.

[36] Address by President Roosevelt to the People of the Philippines, 13 August 1943: (1943) 9 *DSB* 91; DAFR VI, 618.

[37] The government in exile will usually be established at the time of the proclamation of the new State or soon thereafter by the people proclaiming the State.

[38] I. Brownlie, n. 26 above, 78. See also M. Shaw, *International Law* (4th edn., Cambridge, 1997), 144.

[39] See Principle V, para. 4: A/RES/2635 (XXV), Annex.

[40] By operation of the principle of self-determination sovereignty is transferred to the self-determination unit, legitimizing recognition of it as a sovereign and independent State by other States. Cf. also J. Crawford, n. 26 above, 262.

to self-determination. The real problem now is that of recognizing the government, and the Council felt that this is within the sovereign right of each member state.'[41]

However, as the International Court of Justice emphasized in the *Western Sahara, Advisory Opinion*, 'the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned.'[42] The crux of the matter thus is whether a proclamation by an authority in exile can be deemed to constitute a 'free and genuine expression of the will' of the people.[43] There is no norm of international law requiring a people to exercise its right to self-determination by any particular method, such as a referendum, although UN practice has usually held it to be necessary. It has been pointed out by Judge Dillard that 'self-determination is satisfied by a free choice not by ... a particular method of exercising it.'[44] The International Court of Justice noted in the *Western Sahara, Advisory Opinion* that the requirement of consulting the inhabitants may be dispensed with 'in view of special circumstances'.[45] Especially where the colonial or administering power prevents or obstructs by forcible action a consultation of the inhabitants of a given territory there must surely by other methods than a referendum for a people to exercise its right to self-determination. It is submitted that in such cases the right of self-determination can be exercised by an authority in exile, provided that it can properly be regarded as representative of the people of the territory.[46] There will usually be no doubt about its representative character if the national liberation organization proclaiming independence has been recognized by the international community (i.e., the United Nations or a regional organization such as the Organization of African Unity) as 'the sole and legitimate representative of the people'.[47] States which consider such a proclamation as a valid exercise of self-determination may recognize the proclaiming authority in exile as the new State`s government in exile. Recognition of the government in exile then implies recognition of the new State.[48] Practice in this area does not seem entirely consistent: this is attributable at least in part to the fact that the principle of self-determination has undergone a considerable development over the last decades and that, in the context of decolonization, politics more than once has overwhelmed considerations of principle and law. There is however a substantial body of practice supporting the present view as shown by the following examples:

Algeria. On 19 September 1958 the Front de Libération National (FLN), which had been referred to as 'l`unique représentant de l`Algérie combattante'[49] proclaimed the Algerian

---

[41] [1976] ARB 3918C.

[42] ICJ Rep. 1975, 12 at 32; ibid., 120 (sep. op. Judge Dillard).

[43] Cf. G.J. Naldi, 'The Organization of African Unity and the Saharan Arab Democratic Republic' (1982) 26 *Journal of African Law* 152-162 at 156.

[44] *Western Sahara, Advisory Opinion*, ICJ Rep. 1975, 12 at 123.

[45] Ibid., 33.

[46] Cf. J. Crawford, n. 26 above, 261; G.J. Naldi, n. 43 above, 156.

[47] On recognition of national liberation organizations as 'the sole legitimate representative of a people' by the UN and OAU, see, e.g., K. Ginther, 'Die völkerrechtliche Stellung nationaler Befreiungsbewegungen im südlichen Afrika' (1982) 32 *ÖZöR* 131-57; E.K. Kouassi, *Les rapports entre l`Organisation des Nations Unies et l`Organisation de l`Unité Africaine* (Bruxelles, 1978).

[48] G.M. Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline' (1962) 8 *Howard LJ* 95-121 at 112; S. Prakash Sinha, 'Perspectives of the Newly Independent States on the Binding Quality of International Law' (1965) 14 *ICLQ* 121-31 at 126.

[49] See the final communiqué of the Tanger Conference on the Unification of the Arab Maghreb, 27-30 April 1958, reproduced in Ch.-H. Favrod, *Le F.L.N. et l`Algérie* (Paris, 1962),

Republic and at the same time announced the constitution of the Provisional Government of the Algerian Republic (GPRA) in exile. There was no doubt that the Algerian people had the right to self-determination which, in the end, even had to be recognized by France.[50] By the time France granted formal independence to Algeria on 3 July 1962 the GPRA had been recognized, either *de facto* or *de jure*, by 39 States.[51] It has been claimed that the GPRA was not a government in exile (and therefore could not be recognized as such) as there was not yet a State of which it could be the representative organ.[52] While it is true that not all States which 'recognized' the GPRA did recognize it as a government,[53] the States that did, considered an Algerian State to be in existence (if not in fact, so at least in law). For example, President Kwame Nkrumah, of Ghana, which had accorded *de jure* recognition to the GPRA on 5 September 1961, stated at the Belgrade conference of Non-Aligned States: 'The most significant fact of this conference so far is the presence of the head of the Provisional Government of Algeria. This stresses the fact that we accept Algeria as a free, sovereign and independent State which, in my view, should be admitted to the United Nations.'[54] Tunisia also recognized the GPRA 'as the representative of the Algerian people, nation *and State*'.[55] Other States which recognized the GPRA (even *de jure*) regarded it (only) 'as the sole representative of the will and interests of the Algerian people'.[56] These Sates, while recognizing that the Algerian people had the right to self-determination, were of the opinion that it had not yet exercised that right.

Western Sahara. When Spain withdrew from its former colony on 28 February 1976, the mineral-rich desert territory was carved up between the neighbouring States: Morocco annexed the northern two-thirds of the territory and granted control of the southern third to

---

269-70; Th. Oppermann, *Le problème algérien* (Paris, 1961), 220, n. 9. See also N. Grimaud, *La politique extérieure de l`Algérie* (Paris, 1984), 269, n. 6.

[50] For example, the Pan-African Conference of independent States, held at Monrovia on 5-10 August 1959, called upon France 'to recognize the right of the Algerian people to self-determination and independence' (*Times*, 6 August 1959, 7; ibid., 11 August 1959, 6). On 16 September 1959 General de Gaulle for the first time recognized in a declaration the principle of self-determination for Algeria. See Ch-H. Favrod, n. 49 above, 333; Th. Oppermann, n. 49 above, 272. See also UN General Assembly resolutions A/RES/1573 (XX), 19 Dec. 1960 (63/8/27), and A/RES/1724 (XVI), 20 Dec. 1961 (62/0/38).

[51] For a list of States recognizing the GPRA, see S. Talmon, n. 5 above, 300-1.

[52] J. Verhoeven, n. 9 above, 81, 148; K.P. Misra, 'Recognition of the "Provisional Government of the Algerian Republic": A Study of the Policy of the Government of India' (1962) 10 *Polit. Stud.* 130-45 at 139.

[53] The statement of Mr Wedgewood Benn in the British Parliament that 'in 1958 the Algerian Government in exile was formed and nineteen countries recognized the Algerian Government as being the Government of Algeria' (HC Debs., vol. 629, col. 610: 4 November 1960) is misleading.

[54] [1961-2] *Africa Diary* 123. On Ghanese *de jure* recognition, see *Times*, 6 September 1961, 10. In March 1963 Ghana and the GPRA exchanged diplomatic representatives at ambassadorial level (BBC, *SWB*, 2nd Series, ME/893/B/5, 13 March 1962).

[55] M. Bedjaoui, *Law and the Algerian Revolution* (Brussels, 1961), 113, n. 9 (emphasis added).

[56] So the USSR which had recognized the GPRA *de jure* on 19 March 1962. See [1961-2] *Africa Dairy* 473. Similar statements were made by China, Libya, North Vietnam, Yugoslavia.

Mauritania.[57] In the night from 27 to 28 February 1976 the Frente Polisario,[58] which is widely recognized as 'the representative of the people of Western Sahara',[59] issued the following proclamation:

> 'The Saharan Arab people, convinced that all peoples have an inalienable right to freedom, to exercising their sovereignty and to preserving their territorial integrity, determined to put a speedy and unconditional end to colonialism in all its forms ... announces to all peoples of the world by the free resolve of the people, based on democratic choice, the creation of an independent, sovereign state, exercising a national, unitary, democratic, Muslim, Arab and progressive authority called the Saharan Arab Democratic Republic ... In these historic hours when the birth of this new State is proclaimed, the Saharan Arab Democratic Republic issues a pressing appeal to the Governments of brother countries and all states loving justice to give it their recognition.'[60]

On 4 March 1976 the formation of a Government of the SADR in Algiers was announced.[61] By the end of 1998 more than seventy States had accorded recognition to the SADR and its exiled government.[62] At first sight this recognition practice is rather confusing. Subsequent developments namely show that the proclamation of the SADR by the Polisario Front is not considered a valid exercise of the Sahrawi people`s right to self-determination.[63] For example, on 23 June 1979 the OAU 'Committee of Wise Men' on the Western Sahara published a communiqué which stated, inter alia, that 'all the interested parties except Morocco agreed that the right of the Western Saharan people to self-determination had not been exercised'.[64] Strictly speaking after recognition of the SADR as a State the question of self-determination of the Saharan people could no longer arise. However, if the Saharan people have not yet exercised their right to self-determination, recognition of the SADR as a State, which is only one of four possibilities to be put to the people in the planed referendum under UN auspices,[65] pre-empts the outcome of that referendum and may be regarded at least as disregard for the people`s right

---

[57] The ICJ in the *Western Sahara, Advisory Opinion* had rejected any claims of sovereignty over Western Sahara by Morocco and Mauritiania. See ICJ Rep. 1975, 12 at 40-68.

[58] Frente Popular para la Liberación de Saguia el-Hamra y de Río de Oro (Popular Front for the Liberation of Saguia el Hamra and Rio de Oro).

[59] On 21 November 1979, the UN General Assembly for the first time referred to the Polisario as 'the representative of the people of Western Sahara'. See A/RES/34/37 (85-6-41).

[60] BBC, *SWB*, 2nd Series ME/5147/A/1, 1 March 1976.

[61] Ibid., ME/5153/I 8 March 1976 and ME/5153/A/2-A/3, 8 March 1976. See also G.J. Naldi, n. 43 above, 155; M. Barbier, *Le conflit du Sahara occidental* (Paris, 1982), 200.

[62] For a list of States recognizing the SADR, see S. Talmon, n. 5 above, 308-9.

[63] See, e.g., UN GA Res. A/RES/33/31A (1978), A/RES/34/37 (1979), A/RES/35/19 (1980), A/RES/36/46 (1981).*Contra* G.J. Naldi, n. 43 above, 156, n. 21.

[64] [1979] *Keesing`s* 29918. This position was adopted by the 16th Ordinary Session of the OAU Assembly of Heads of State and Government in July 1979: AHG/Dec. 114 (XVI), reprinted in UN Doc. A/34/483. See also T. Hodges, *The Western Saharans* (London, 1991), 15; R.T. Vance, 'Recognition as an Affirmative Step in the Decolonization Process: The Case of Western Sahara' (1980) 7 *Yale JWPO* 45-87 at 60-2.

[65] The four possibilities are: independence, Saharawi autonomy within Morocco, Maghreb federation (with either Morocco or Mauritania), integral part of Morocco, i.e. maintenance of the status quo.

to self-determination. The various 'recognition' statements ('X recognizes the (Government of the) SADR') may however not be taken at face value. In many cases closer examination will show that the Government of the SADR has not been recognized as a government in exile but as 'the legitimate representative of the struggling Saharan people'.[66] However, States that do recognize it as a government must be taken as also having recognized the SADR as a 'sovereign and independent State'[67] as there can be no government without a State.

2. Representative character

It has been noted that 'for the last hundred years, or indeed the past millennium, a group of people in effective control of a state, has been regarded as forming the ... government of the state.'[68] Thus in the legal literature governmental status is regularly equated with territorial effectiveness.[69] Several authors[70] which have argued that (Western-style) democracy is (or rather should be) a criterion of lawful government in international law have not been able to adduce much evidence of its existence in State practice.[71] The proposition that in international law a government need not necessarily be representative (still less democratic) thus still represents the general rule.[72] One exception to that rule is where the government is in exile. In that case the government does not exercise effective control over the State`s people and territory. There must therefore necessarily exist a criterion for governmental status other than territorial effectiveness. In the following it is to be examined what this other criterion may be. René Cassin has suggested that States can recognize a government in exile 'if they regard it as being representative of the national will'[73] and Giuseppe Sperduti has submitted that 'the recognition of a government in exile requires that it shows a sufficient quality by which it

---

[66] See, e.g., the statement of Burundi which 'recognized' the SADR on 1 March 1976: BBC, *SWB* 2nd Series, ME/5154/A/7, 9 March 1976.

[67] See, e.g., the express statements of Ecuador ([1984] *Keesing`s* 32822), Sierra Leone ([1980] *Africa Diary* 10042), Venezuela ([1983] *Keesing`s* 32102). See also R.T. Vance, n. 64 above, 63, n. 108.

[68] Panel, 'The Panamanian Revolution: Diplomacy, War and Self-Determination in Panama' (1990) 84 *ASIL Proc.* 182-203 at 188 (remarks by T.J. Farer). See also the same, 'Panama: Beyond the Charter Paradigm' (1990) 84 *AJIL* 503-15 at 510.

[69] Cf. R. Jennings / A. Watts (eds.), *Oppenheim`s International Law* (9th edn., Harlow, 1992), 150-4; K. Nowrot / E.W. Schabacker, n. 1 above, 388-9.

[70] R. Higgins, *Problems and Process* (Oxford, 1994), 119-21; K. Nowrot / E.W. Schabacker, n. 1 above, 388-96; J. Paust, 'International Legal Standards Concerning the Legitimacy of Governmental Power' (1990) 5 *AUJILP* 1063-8. See also T. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *AJIL* 46-91, who argues for a customary international law right to a democratically elected government.

[71] For criticism of democracy as a criterion of lawful government in international law, see I. Brownlie, *The Rule of Law in International Affairs* (The Hague, 1998), 59-62; J. Crawford, *Democracy in International Law* (Cambridge, 1993), 21-2; V.P. Nanda, 'The Validity of United States Intervention in Panama under International Law' (1990) 84 *AJIL* 494-503 at 499.

[72] The better rule, however, seems to be that there is a (refutable) presumption that an effective government is also representative.

[73] R. Cassin, 'Vichy or Free France?' (1941) 20 *Foreign Affairs* 102-12 at 112.

seems an emanation of the community for which it intends to act.'[74] The practice of States, and especially their reasons given for non-recognition, confirms that the representative character of an authority in exile is regarded as dispositive in recognizing it as a government. This may be illustrated by the following statements:

Albania. On 20 January 1943 the US Department of State informed Mr Peter V. Kolina, 'Acting Representative' in Washington of King Zog, who had requested the Department to extend recognition to King Zog[75] as head of the 'Albanian Government in exile', that 'recognition of a particular group outside of Albania would raise the question of which group actually represented the Albanian people'.[76] The Department was of the opinion that there was 'no Albanian authority abroad able to muster sufficient strength to lay any substantial claim to representing either resistance forces within the country or unified Albanian groups abroad.'[77] Recognition was consequently denied.

France. In a letter, published on 25 July 1943, US Assistant Secretary of State Berle explained why the United States was not going to recognize the Comité Français de la Libération Nationale (CFLN). He stated:

> 'no French group today can authoritatively claim to represent the will of the French people under Axis domination. The French Government of early 1940 disappeared and since that time the French people have had no opportunity to express themselves politically. In the circumstances it seems to me that the only truly democratic course for the friends of France to take is along the lines of policy which the Government has consistently followed, namely, to refrain from recognizing any group of Frenchmen as the Government of France until the French people are liberated and are again in a position to exercise their free will in the choice of their leaders.'[78]

Similarly, a British Foreign Office Memorandum circulated to the War Cabinet on 8 July 1942 stated that General de Gaulle was the only leader of French resistance to emerge since the collapse of France, but he had no claim to be regarded as 'France' or as the head of the Government of France. There was, in fact, 'no French authority which could be regarded as generally representative of the French people.'[79]

Korea. In a statement, released to the press on 8 June 1945, US Acting Secretary of State Grew explained the reasons why the United States did not recognize the 'Korean Provisional Government' established at Chungking, China. He said:

> '...the "Korean Provisional Government" and other Korean organizations do not possess at the present time the qualifications requisite for obtaining recognition by the United States as a governing authority. The "Korean Provisional Government" has

---

[74] G. Sperduti, 'Governi in esilio e comitati nazionali all`estero' (1952) 7 *Com. Int.* 404-13 at 407-8 (translation by the author). See also B. Landheer, 'The Legal Status of the Netherlands' (1943) 41 *Michigan LR* 644-64 at 651: 'The government in exile remains the *de jure* government as long as it can be assumed that it represents the majority of the population.'

[75] Italy had been invaded and annexed Albania in April 1939. King Zog fled the country first to Greece and later to London.

[76] 'Question of Recognition of an Albanian Government in exile': [1943] II FRUS 1.

[77] [1944] III FRUS 271-2.

[78] DAFR, VI, 667-8. See also [1943] II FRUS 50.

[79] WP(42)285, quoted in L. Woodward, *British Foreign Policy in the Second World War*, II (London, 1970), 302-3.

never exercised administrative authority over any part of Korea, nor can it be regarded as representative of the Korean people of today.'[80]

The United States and China stated as the factors militating, inter alia, against recognition of the 'Korean Provisional Government' the lack of unity existing among Korean exile groups[81] and the inability of the 'Korean Provisional Government' to show that it had a real following among the Koreans in the homeland or even among exiled Koreans.[82]

Not only the recognizing States but also the authorities in exile seeking recognition as a government seem to have been aware of the criterion of representativeness. For example, on 20 May 1976 the Polisario Front published a Memorandum justifying the proclamation of the Saharan Arab Democratic Republic (SADR) on 27/28 February 1976. In it the representative character of the SADR Government in exile was especially affirmed.[83] The Provisional Government of the Algerian Republic (GPRA) also stressed its representative character in several communiqués.[84]

In several cases, the criterion of representativeness has prevented a government in exile from being formed. On 15 November 1988 Yassir Arafat proclaimed an independent Palestinian State at the Algiers meeting of the Palestine National Council (PNC).[85] The issue of forming a government in exile for the State proclaimed proved decidedly more controversial than the idea of proclaiming a State. The creation of a government in exile would have raised difficult questions with respect to the representative status of the PLO and the participation of representatives of the Israeli occupied territories. It was therefore decided to approve a provisional government in principle, but to leave it to the Executive Council to set it up when that body saw fit to do so.[86] However, no government in exile for the State of Palestine was subsequently set up.

The criterion of representative character may have different meanings in different contexts. In particular, it is important to distinguish representative character as an initial qualification for governmental status, and as a criterion for its continuation. For example, the presumption of continuity of existing legal rights, which may be regarded as a general principle of law,[87] may operate in different directions in the two cases. New governments formed in exile will have to demonstrate substantial representative character, both formal and factual, before they will be recognized as the government of a State. On the other hand, existing governments

---

[80] (1945) 12 *DSB* 1058-9 at 1058; also reproduced in DAFP, VII, 230-1. See also [1945] VI FRUS 1029-30. The British Foreign Office was in 'full agreement' with Mr Grew`s statement, ibid., 1030, n. 34.

[81] There existed two main parties: the Korean Provisional Government Party and the Korean Revolutionary Party.

[82] Cf. [1942] I FRUS 873-5; [1943] III FRUS 1092; [1944] V FRUS 1296-7; [1945] VI FRUS 1018-20. See also M. Whiteman (ed.), *Digest of International Law*, II (Washington, D.C., 1963), 173.

[83] M. Barbier, n. 61 above, 199, quoting from Brochure du Front Polisario, *Mémorandum relatif à la proclamation de la République arabe sahraouie démocratique (R.A.S.D.) et à la constitution de son gouvernement*, 20 mai 1976.

[84] See, e.g., Algerie Presse Service, 31 March 1962: BBC, *SWB*, 2nd Series, ME/912/A/4, 4 April 1962.

[85] For the text of the declaration of independence, see BBC, *SWB*, 3rd Series ME/0310 A/1-A/3 at A/2, 16 November 1988.

[86] (1988) 12 *Middle East Contemporary Survey* 245.

[87] J. Crawford, n. 26 above, 48.

which had to flee their country are protected by international law rules against illegal invasion and intervention, so that there exists a strong presumption that governments forced from their State`s territory as a consequence of an international illegality are representative of that State and its people. This presumption will usually operate until such time as the people themselves can again freely decide on their future government.[88] As the continued recognition of the Governments of Greece[89] and Yugoslavia[90] in 1941 and of the Government of Kuwait in 1990[91] shows, the presumption does not operate only in favour of constitutional or democratically elected governments but in favour of all former governments in situ.[92] The continued recognition of unrepresentative governments forced into exile by an international illegal act may be based on the ground that, in the absence of a superior claimant to governmental status in situ, there is no basis for withdrawing recognition from an existing government. As the continued recognition of the Government of Democratic Kampuchea (GDK) and its successors[93] shows, the large majority of States still seems to be of the opinion that any government is better than no government. Only the United Kingdom[94] and Australia[95] withdrew recognition form the genocidal Pol Pot Government[96] after it had been ousted by what was rightly regarded as an illegal Vietnamese invasion of Cambodia in January 1979. It is submitted, *de lege ferenda,* that if 'respect for human rights'[97] is to have any meaning in international law an unrepresentative government which is guilty of massive human rights

---

[88] Cf. W. Churchill, *The Second World War* ['Chartwell' Edition], V (London, 1954), 411.

[89] On 4 August 1936, fearing a Communist revolt, General Metaxas took over the Government, proclaimed martial law, suspended certain articles of the constitution, dissolved the Parliament, and set up a dictatorship with the consent of King George II. See H.L. Scanlon, *European Governments in Exile* (Washington, D.C., 1943), 10. The dictatorship was brought to an end by decree on 7 February 1942. See *NY Times*, 8 February 1942, 31.

[90] On 27 March 1941, two days after Yugoslavia had acceded to the Tripartite Pact of 27 September 1940 (between Germany, Italy, and Japan), opponents of this pro-Axis policy, encouraged by the Allied Governments, overthrew the Government of Prime Minister Cvetkovic, deposed the regent and installed King Peter II, who was still a minor, in his place. See DAFR, III, 324.

[91] After repeated criticism of his Government on 3 July 1986 the Emir of Kuwait dissolved parliament, suspended several articles of the constitution, reintroduced formal press censorship and ruled by decree. As to the internal political situation in Kuwait prior to the Iraqi invasion, see *NY Times*, 26 September 1990, Sec. A, 9 and H. Ishow, 'Régime et institutions politiques de la principauté du Kuwait' in P.R. Baduel (ed.), *Crise du Golfe, la "logique" des chercheurs* (Paris, 1991), 18-23 at 22-3.

[92] But according to G. Sperduti, n. 74 above, 408, the presumption operates only in favour of the last democratically elected government.

[93] On the GDK and its successors, see S. Talmon, n. 5 above, 309-10.

[94] The United Kingdom withdrew recognition from the Pol Pot Government on 6 December 1979 but did not recognize any claim by the Vietnamese-installed Heng Samrin Government. See [1981] *Keesing`s* 30671.

[95] On 14 February 1981 Australia withdrew recognition from the 'loathsome' Government of Democratic Kampuchea, whose policies it regarded as abhorrent, and subsequently recognized no government in Kampuchea. See [1981] *Keesing`s* 30675; [1982] *Keesing`s* 31433.

[96] The figure usually cited for the total number of deaths due to Khmer Rouge rule is over one million, out of population in April 1975 of 7.3 million.

[97] Cf. Art. 1 (3), Art. 55 UN Charta. On the protection of human rights under the Charta regime in general, see I. Brownlie, n. 26 above, 573-5.

violations or even genocide of its own people is to forfeit its right to represent the people and thus its status of government when it looses effective control irrespective of whether or not it is deposed by outside intervention. The presumption that a government that is effective is also representative operates only so long as the government exercises effective control. A government, however, that violates the human rights of its people on a massive scale cannot be regarded as its representative. It may be argued that in such cases no government is better than a government in exile tainted with genocide. The 'non-return' formulation added to the General Assembly`s resolutions on Cambodia in 1988 and 1989[98] and finally the refusal in 1990 to give Cambodia`s United Nations seat to the Coalition Government of Democratic Kampuchea because of its domination by the Khmer Rouge[99] may be seen as a first tentative step in this direction.

The presumption of representativeness may be questioned and in the final analysis be refuted. The 'fate' of the Montenegrin Government of King Nicholas I, which had been forced into exile by the Austro-Hungarian occupation of the country during the First World War, may serve as an example.[100] On 10 November 1920 the British Government justified its refusal to appoint a diplomatic agent to the King`s Government in exile by the fact that its 'representative character has been called in doubt.'[101] When the Austro-Hungarian forces were withdrawn from Montenegro early in November 1918 their place was taken by Serbian troops. Under their control a 'National Assembly' met at Podgorica and on 26 November 1918 proclaimed the deposition of the King and the union of Montenegro with Serbia. A Montenegrin rising followed with demands for an Allied occupation and free election. This movement was suppressed and in April 1919 a Serbian civil governor assumed authority. King Nicholas` Government protested to the Allied Supreme Council against the proceedings at Podgorica and was assured that the Montenegrin people would be afforded 'an opportunity to pronounce freely on the political form of their future government'. No such opportunity however was afforded. Allied investigations on the spot led to the conclusion that nearly all Montenegrins desired inclusion in the new Yugoslavia. The Allied Governments accordingly took the elections for the Yugoslav Constituent Assembly on 28 November 1920 as the free pronouncement of the Montenegrin people[102] and consequently withdrew recognition form the King`s Government in exile.[103] Similarly, the United Kingdom, the USA and other States on 5

---

[98] The General Assembly expressed its conviction that 'the non-return to the universally condemned policies and practices of a recent past' was one of the 'principal components of any ... settlement of the Kampuchean problem.' See UN GA Res. A/RES/43/19 (1988), A/RES/44/22 (1989). What was in fact mean by this formulation was that the Khmer Rouge should not regain power. See also S.R. Ratner, 'The Cambodia Settlement Agreements' (1993) 87 *AJIL* 1-41 at 4, n. 15. It should also be noted that the restoration of the GDK and its successors was never called for in UN resolutions, the Declaration of the International Conference on Cambodia, 1981, and the working mandate of the Paris Conference on Cambodia, 1989.

[99] *NY Times*, 15 April 1990, Sec. 1, 3; [1990] *Keesing`s* 37598; AFPCD 1990, nos. 458, 474.

[100] On the Montenegrin Government in exile, see A. Jumeau, *Le refuge du gouvernement national à l`étranger* (Aix-en-Provence, 1941), 147-50; P. Fedozzi, 'La situation juridique et internationale du Monténégro' (1922) 49 *JDI* 549-51.

[101] HC Debs., vol. 134, col. 1182, 10 November 1920; *Times*, 11 November 1920, 9.

[102] See DBFP, First Series, vol. 7, appendix 2, no. 24; ibid., vol. 12, nos. 355, 347, 384, 399, 424, 425.

[103] See 'Termination of Official Relations Between the United States and the Kingdom of Montenegro': [1921] II FRUS 945-9. See also *Times*, 28 December 1920, 7; ibid., 14 January

July 1945 withdrew their recognition from the Polish Government in London and recognized instead the 'Polish Provisional Government of National Unity' at Warsaw which was regarded as representing the people of Poland.[104]

Unrepresentative governments in exile have usually attempted to put their membership on a broad(er) representative basis by including leaders of opposition groups and by that to secure continued recognition. For example, the Khmer Rouge Government of Democratic Kampuchea (GDK), when faced with de-recognition and the loss of Cambodia`s seat in the United Nations, on 22 June 1982 concluded an agreement with the leaders of the two main opposition groups[105] which provided for the formation of a Coalition Government of Democratic Kampuchea (CGDK).[106] Similarly, when mutinies against the Government in exile of King George II broke out in the Greek Army and Navy in Egypt, a 'Government of National Unity' was formed on 24 May 1944 which included members of the National Liberation Front (EAM) and the Greek Communist party.[107] Unrepresentative governments in exile have also sought the official endorsement by the political opposition. Triggered by criticism in the Western media of the Emir`s autocratic rule the Government of Kuwait in exile on 13-15 October 1990 convened a 'popular congress' of more than 1,000 Kuwaitis, including prominent opposition figures, in Jeddah, Saudi Arabia. The opposition affirmed its loyalty to the 'sole legitimate and constitutional government' of Kuwait in return for a reported undertaking by the Government to restore the 1962 constitution which the Emir had abolished in 1986.[108]

The recognition of governments formed in exile, i.e. governments which are not identical or the legal successor of the last recognized government in situ, is not precluded on principle.[109] For example, the Government of the Czechoslovak Republic formed by Dr Eduard Beneš in London in 1940, the Provisional Revolutionary Government of the Algerian Republic (GPRA) proclaimed in Cairo in 1958, the Revolutionary Government of Angola in Exile (GRAE) established in Kinshasa in 1962, and Government of the Saharawi Arab Democratic Republic (SADR) set up in Tindouf (Algeria) in 1976, all were recognized by a

---

1921, 9; ibid., 19 March 1921, 10.

[104] See DPSR, II, nos. 378, 382, 383. See also W. Churchill, n. 88 above, V, 254-6 at 255. For criticism of the withdrawal of recognition from the Polish Government in London, see Y. Shain, *The Frontier of Loyalty: Political Exiles in the Age of the Nation-State* (Middletown, Conn., 1989), 115.

[105] The Khmer People`s National Liberation Front (KPNLF) led by former Prime Minister Son San and the Front Uni National pour un Cambodge Indépendant, Neutre, Pacifique, et Coopératif (FUNCINPEC) headed by Prince Sihanouk.

[106] For the text of the agreement, see BBC, *SWB*, 2nd Series, FE/7057/A3/1-3, 21 June 1982. On the CGDK, see C. Etcheson, 'Civil War and the Coalition Government of Democratic Kampuchea' (1987) 9 *Third Wld. Quart.* 187-202; R. Ross (ed.), *Cambodia: A Country Study* (3rd edn., Washington, D.C., 1990), 195-203.

[107] H.L. Scanlon, n. 89 above, 10-11. See also W. Churchill, n. 88 above, 407-22.

[108] Already on 21 August 1990 the three principal leaders of the parliamentary opposition had confirmed in a declaration published in London their support for the dynasty of the al-Sabahs. See H. Ishow, n. 91 above, 22-3.

[109] G. Sperduti, n. 74 above, 408; R. Cassin, n. 73 above, 112; C. Tschoffen, 'The Exceptional Powers Exercised by the Belgian Government' [July 1942] No. 9 *Message* 23-7 at 24.

considerable number of States.[110] Furthermore, there were plans to establish in exile and to recognize governments for Poland in 1917,[111] Cuba in 1959,[112] and Southern Rhodesia in 1965.[113] However, as Yossi Shain has rightly pointed out 'Governments have been reluctant to confer the title of government in exile on an exile group ... that lacks governmental authority before exile.'[114] This reluctance may be explained by the problem of establishing the representative quality of an exile group in the absence of access to the people the group claims to represent. As there exists no presumption, the representative character of a government formed in exile has to be established in each individual case. It may be established by popular support within the country and/or among the exile community[115] but the standard to be applied is extremely strict and there must be some sort of evidence for the alleged support. This may be shown by the following examples:

Czechoslovakia. On 21 July 1940 the United Kingdom accorded *de facto* recognition to the Provisional Government of the Czechoslovak Republic in London. One reason not to accord 'further recognition' at that time was that 'Dr Beneš had not so far been able to secure unity among Czechs and Slovaks abroad, and his influence in the Protectorate and in Slovakia was uncertain.'[116] Full, *de jure*, recognition followed only on 18 July 1941 after Dr Beneš had promised the (at least nominal) inclusion of Sudeten Germans and Slovaks in his Government and the Czechoslovak State Council.[117]

Spain. Despite antipathy towards the Government of General Franco the British Government in 1945 declared itself against recognition of the Spanish Republican Government in exile on the ground that 'quite apart form the fact that the Giral Government does not even enjoy general support among the exiled Spanish politicians the information in the possession of His Majesty`s Government goes to show that it does not command any real support in Spain, and that in fact its return would not be acceptable to the Spanish people.'[118] In this connection it is also of interest to note that the UN General Assembly on 12 December 1946 adopted a resolution calling on all member-States of the United Nations to withdraw their ambassadors and ministers plenipotentiary from Madrid so long as the Franco Government remained in

---

[110] On recognition of these Governments in exile see S. Talmon, n. 5 above, 293-4, 300-1, 303-4, 308-9, respectively.

[111] [1917] I FRUS Supp. 2, 760; [1914-29] II FRUS. The Lansing Papers 35-6.

[112] H. Thomas, *The Cuban Revolution* (New York, 1977), 493.

[113] See [1963] *Keesing`s* 19463A, [1964] *Keesing`s* 20254, [1965] *Keesing`s* 21051A; BBC, *SWB*, 2nd Series, ME/1681/E/2-19 at 6, 13 October 1964 and ibid., ME/1704/ii, 9 November 1964.

[114] Y. Shain, n. 104 above, 116.

[115] Cf. J. Crawford, n. 26 above, 220; K. Marek, n. 26 above, 314.

[116] DAFP, IV, no. 201, 272-4 at 273-4.

[117] Cf. DCER, vol. 9, no. 1495, 1821.

[118] DBPO, First Series, vol. V, no. 104, 481-6 at 484. The British Ambassador in Spain had reported that the government in exile was 'discredited' and enjoyed no support in Spain (ibid., nos. 5.ii, 55.vii). The US Government concurred with the British position: ibid., no. 13.I, at 61; [1945] V FRUS 706-7. On factionalism and disunity of the Spanish Republican exiles, see also L. Stein, *Beyond Death and Exile: The Spanish Republicans in France, 1939-1955* (Cambridge, Mass., 1979), 191, 194; J. Tusell and A. Alted, 'The Government of the Spanish Republic in Exile: 1939-1977' in Y. Shain (ed.), *Governments-in-Exile in Contemporary World Politics* (New York, 1991), 145-65 at 147-50.

power but did not recommend the recognition of the Republican Government in exile.[119] It should however be noted that the Spanish Republican Government was nevertheless recognized by eleven Eastern European and South American States.[120]

Afghanistan. On 23 February 1989 a *Shura* (council) of the Islamic Union of Mujahidin of Afghanistan (IUAM), held in Rawalpindi, Pakistan, elected an Afghan Interim Government (AIG). This government in exile was recognized only by four Islamic States. Other States sympathetic to the Afghan cause did not accord recognition to the AIG, inter alia, because 'it had little claim to be representative.'[121] The *Shura* 'was clearly not a broad-based body' as it excluded Iran based resistance groups and the supporters of the ex-King.[122] Furthermore, the AIG had no control over the mujahidin fighters inside Afghanistan which continued to be controlled by the various factions.

In sum, factionalism and frictions between exile groups and their leaders, internal disunity, rivalries, and partisanism will speak against representative character while popular support within the State, the ability to rally around itself all, or the great majority of the State`s nationals abroad, internal cohesion and unity will support the claim to governmental status. Before this background it seems unlikely, for this reason alone, that any one of the two recently established governments in exile for the 'Republic of Kosovo' (one in Bonn, Germany, the other in Tirana, Albania) will be recognized.[123]

3. Independence

For an authority (irrespective of whether in exile or in situ) to qualify under international law as the government of a State and not just as the subsidiary organ or subordinate body[124] of another State`s government it must have a certain independence. Thus, when French President Poincaré, on 11 October 1914 invited the Belgian Government to establish itself in France, he assured King Albert I that 'the Government of the Republic ... will immediately arrange for the necessary measures to guarantee the stay in France of His Majesty and his ministers in full

---

[119] A/RES/39(I). See also [1947] *Keesing`s* 8384A. The French proposal, contained in a note of Foreign Minister Georges Bidault of 23 December 1945, urging that the UN Security Council consider a break in relations with the Franco Government and the possibility of recognizing the Spanish Republican Government in exile, was rejected by the United States and Great Britain (L. Stein, n. 118 above, 203, 204).

[120] S. Talmon, n. 5 above, 298.

[121] M.G. Weinbaum, 'War and Peace in Afghanistan: The Pakistani Role' (1991) 45 *MEJ* 71-85 at 82.

[122] *Guardian*, 13 April 1989, 14; B.R. Rubin, 'Afghanistan: Political Exiles in Search of a State' in Y. Shain (ed.), *Governments-in-Exile in Contemporary World Politics* (New York, 1991), 69-91 at 80-3, 86.

[123] The 'Republic of Kosovo', a part of the Federal Republic of Yugoslavia (FRY), declared its independence on 2 July 1990. The Bonn Government was formed on 19 October 1991 and is headed by 'Prime Minister' Bukoshi, the Tirana Government was formed on 9 April 1999 and is headed by 'Prime Minister' Thaçi. See *Guardian*, 27 May 1993, 8; *FAZ*, 13 April 1999, 2; ibid., 29 April 1999, 3.

[124] On the status of 'subordinate body' of another government, see *Carl Zeiss Stiftung* v. *Rayner & Keeler Ltd. And Others (No. 2)* (1966), [1967] 1 AC 853 (HL) = 43 ILR 23; *Gur Corporation* v. *Trust Bank of Africa Ltd.* (1986), [1987] 1 QB 599 (CA) = 75 ILR 675.

independence and sovereignty.'[125] Independence, in this context, may be defined as freedom from (direct of indirect) control by the host government or any other government. This is essentially a question of fact. Independence, as a criterion of governmental status, should not be confused with the legal question of privileges and immunities of a government in exile and its members in the host State.[126] Privileges and immunities are a legal consequence of (recognized) governmental status not a prerequisite for it. Governments in exile which do not enjoy privileges and immunities in their host States (because they are not recognized by them) may nevertheless be recognized as governments by other States. For example, the British Government on 6 July 1945 withdrew recognition from the Polish Government in London and, from that time onwards, did no longer grant diplomatic privileges to its members.[127] Despite its loss of privileges in the host State, the Polish Government in London continued to be recognized as the Government of Poland by other States, by some as late as 1958.[128] Similarly, the Spanish Republican Government in Paris (1946-1977) and the Afghan Interim Government in Peshawar, Pakistan (1989), were recognized by several States although - because of non-recognition by their host States - they did not enjoy privileges and immunities there.[129] The lack of privileges and immunities is a legal consequence of non-recognition. Non-recognition, however, may have many (political) reasons. A non-recognized government in exile will regularly be limited in its functioning in the host State but this does not mean that it is not independent of the host State. International practice shows that, despite non-recognition, governments in exile have been tolerated and sometimes have even been actively supported by their host State.[130] Speaking on the unrecognized Polish Government in London the British Joint Parliamentary Under-Secretary of State for Foreign Affairs said:

---

[125] Royaume de Belgique, *Correspondence diplomatique relatif à la guerre de 1914-1915*, II (Paris, 1915), no. 56, at 49 (translation by the author). See also ibid., no. 57, at 50, and F. Van Langenhove, *L`action du Gouvernement belge en matière économique pendant la guerre* (Paris, 1927), 232. The Belgian Government which fled the German invading forces arrived at Le Havre on 13 October 1914. With respect to the Polish Government in exile, see G. de Fieorowicz, 'Continuité de l`Etat' (1939) 24 *RDI* 129-75 at 167.

[126] On privileges and immunities of governments in exile, see S. Talmon, n. 5 above, 251-68.

[127] On 26 January 1946 Mr Noel-Baker, Minister of State for Foreign Affairs, stated: 'No diplomatic privileges are granted to any members of the Polish Government formerly established in this country...' (HC Debs., vol. 418, WA, col. 188: 29 January 1946). On the loss of diplomatic privileges, see also E.J. Rozek, *Allied Wartime Diplomacy. A Pattern in Poland* (New York, 1958), 400. On the withdrawal of recognition, see DBPO, First Series, vol. VI, nos. 2, 8, 70; DPSR, vol. II, nos. 378, 382, 383.

[128] By 22 October 1945 24 States still maintained diplomatic relations with the Polish Government in London: DBPO, First Series, vol. VI, no. 70.i., at 273. In 1952, it was still recognized by some ten States, among them the Holy See, Spain and several State in the Middle East (J. Charpentier, *La reconnaissance internationale et l`évolution du droit des gens* (Paris, 1956), 226). The last country to discontinue recognition was the Vatican in 1958.

[129] But, the members of the (unrecognized) Spanish Republican Government in exile in Paris enjoyed diplomatic status in France from 1946 to 1961 (A. Iwańska, *Exiled Governments: Spanish and Polish* (Cambridge, Mass., 1981), 2, 35).

[130] On French toleration and support of the Spanish Republican Government, see A. Iwańska, n. 129 above, 33-5. On visas for the members of that government, see *NY Times*, 31 January 1946, 5.

> 'We have no wish to deter people form lending their support to the legal activities in this country of the emigré organizations which have established themselves here. But to give official support or encouragement to any emigré body, particularly one which purports to be a government in exile or anything of that nature, would be contrary to the established policy of successive British Governments. There is no question, however, in any way of discouraging or ignoring such organizations.'[131]

The fact that a government in exile formally enjoys privileges and immunities in the host State as of right is not a guarantee for its factual independence. For example, the 'Délégation gouvernementale française pour la Défense des Intérêts nationaux', the French Government in exile of Marshal Pétain, which resided in Sigmaringen, Germany, from 30 September 1944 to April 1945, could not be regarded as independent, despite the fact that it had been accorded the 'privilege of extraterritoriality' by the German Government.[132] If an authority in exile is granted privileges and immunities as of right then there is prima facie evidence of independence. However, there is no justification for ignoring evidence of foreign control which is exercised in fact.

Whether or not a government in exile is in fact independent may be difficult to answer as the line between direction and control, on the one side, and friendly 'advice' and 'suggestions',[133] on the other, is usually rather thin. In practice, however, this causes less problems than might have been thought. Practice reveals that the degree of independence of a government in exile necessary, as a matter of international law, is slight. This may be illustrated by the following example: because the Czechoslovak Government in London was financially dependent on United Kingdom credits, the Treasury had to approve the dispatch of each military or diplomatic mission to other countries.[134] It should be noted that a certain dependence (varying from government in exile to government in exile) on the host State (and other States) in matters financial, logistic, military and political is inherent in the situation of a State`s government being in exile. Thus, restrictions resulting from the fact that the government is deprived of its home base are not regarded as derogating from its independence. To prove lack of independence, according to Ian Brownlie, one must show 'foreign *control* overbearing the decision-making of the entity concerned on a wide range of matters of high policy and doing so systematically and on a permanent basis.'[135] In other words, for an authority in exile to be denied recognition as a government on the ground of lack of independence it must be a mere puppet of the host State. The 'Délégation gouvernementale française pour la Défense des Intérêts nationaux' may be seen as such a 'puppet government in exile'.[136]

4. International illegality of the government in situ

---

[131] HL Debs., vol. 204, col. 756: 4 July 1957 (Earl of Gosford).

[132] L. Noguères, *La dernière étape: Sigmaringen* (Paris, 1956), 68; A. Brissaud, *Pétain à Sigmaringen (1944-1945)* (Paris, 1960), 231.

[133] Cf. HC Debs., vol. 371, cols. 1340-1, 15 May 1941 (Solicitor-General, Sir William Jowitt).

[134] DCER, vol. 8, no. 711, 884. On the financial dependence of the Royal Government of National Union of Cambodia (1970-5) on the People`s Republic of China, see 'Sihanouk Says China Finances His Regime', *NY Times*, 7 June 1970, 3.

[135] I. Brownlie, n. 26 above, 72.

[136] See L. Noguères, n. 132 above; A. Brissaud, n. 132 above.

a. Non-intervention and the requirement of international illegality

There is general agreement that States are under a legal obligation to refrain from intervention in matters which are essentially within the domestic jurisdiction of other States.[137] Non-intervention is the corollary to the sovereign equality and independence of States. Matters within the domestic jurisdiction of States may be defined as matters which are not regulated by international law.[138] The extent of domestic jurisdiction thus depends on international law and varies according to its development. One of the matters which, as a rule, is still within the domestic jurisdiction of States is the choice of (the form and system of) their government.[139] In particular, despite a trend in the literature to the contrary,[140] general international law does not (yet) prescribe a specific form of (democratic) government.[141] As the International Court stated in the *Nicaragua Case*:

> 'However the régime ... 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.'[142]

Recognition of a government in exile, when there is a government effectively holding power in the State, is regarded as amounting to unlawful intervention in the internal affairs of that State.[143] In the words of Quincy Wright 'multual respect by states for one another`s independence leaves the form and continuance of its government to the domestic jurisdiction of a state. Non-recognition of the existing government and recognition of a government in exile are hardly compatible with such respect.'[144] This may be illustrated by the following examples:

England. James II, King of England, Scotland and Ireland, was overthrown by the Glorious Revolution in 1688 and in early 1689 had to flee to France. On his death, in 1701,

---

[137] I. Brownlie, n. 26 above, 293; R. Jennings / A. Watts, n. 69 above, 382, 428-30.

[138] I. Brownlie, n. 26 above, 293. Cf. also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA), Merits, Judgment* [hereinafter *Nicaragua Case*], ICJ Rep. 1986, 14 at 108.

[139] Cf. *Nicaragua Case*, ICJ Rep. 1986, 14 at 131, 133. See also T.J. Farer, n. 68 above, 507; H.-J. Heintze, International Law an Democratic Constitutions: Reinstating Democracy in Haiti' (1997) 55 *Law and State* 27-50 at 27-8.

[140] See the references in n. 70 above.

[141] R. Jennings / A. Watts, n. 69 above, 382-4; M. Akehurst, *A Modern Introduction to International Law* (6th edn., London, 1987), 64.

[142] ICJ Rep. 1986, 14 at 133. See also the third principle of the UN General Assembly`s 'Friendly Relations Declaration' of 24 October 1970: A/RES/2635 (XXV), Annex.

[143] See the statement of the representative of Spain, Mr Martinez Caro, on the principle of non-interference during the debates on the Principles of International Law concerning Friendly Relations and Co-operation among States: GAOR, 20th Session, 6th Committee, 877th Meeting, 17 November 1965, 214-15. See also R. Jennings / A. Watts, n. 69 above, 143 and especially n. 3; T.J. Farer, n. 68 above, 507; W. Fiedler, 'Das Staatsoberhaupt im Exil' (1988) 26 *AVR* 181-202 at 188-9.

[144] Q. Wright, 'Non-Military Intervention' in K.W. Deutsch / S. Hoffmann (eds.), *The Relevance of International Law: Essays in Honour of Leo Gross* (Cambridge, Mass., 1968), 5-19 at 14.

Louis XIV recognized James` son (also living in France) as King of Great Britain. That recognition 'was justly resented by England as a wanton insult; as a direct interference in her internal affairs, as an assumption of authority to pronounce against the lawfulness of her government.'[145] It was made one of the principal grounds of the war shortly afterward declared against France.[146]

Soviet Socialist Republics. During the turmoil following the Bolshevik revolution in 1917 several provinces of the Russian Empire declared their independence.[147] These new States received a certain amount of recognition, either *de facto* or *de jure*, by other States. By 1920 however the Bolsheviks had consolidated their power in Russia and the new States, with the exception of the three Baltic Republics, one by one were 'reintegrated' as Soviet Socialist Republics into the Union of Soviet Socialist Republics (USSR). The national ('bourgeois') governments of Armenia, Azerbaijan, Georgia, and Ukraine took refuge abroad. The Soviet Socialist Republics as well as the USSR regarded the continued recognition (or mere toleration) of these governments as an intervention in their internal affairs. In the 1920s and 1930s the Soviet governments concluded several treaties with foreign States which provided, inter alia, that 'each of the two Contracting Parties reciprocally undertakes to respect the national sovereignty of the other and to abstain from any intervention in the internal affairs of the other, and decides ... not to form or lend support to organisations which claim to represent the Government of the opposite Party.'[148] This clause was directly directed against these governments in exile and led to the withdrawal of recognition and the closure of their diplomatic missions.[149]

Cambodia. On 8 January 1979 Heng Samrin, President of the People`s Revolutionary Council of Cambodia, sent a message to the President of the UN Security Council informing him that the Pol Pot Government (GDK) was overthrown on 7th January 1979 at 1230 local time and ceased to exist as of that date. The Council presently controlled the whole of Cambodian territory and had assumed the function of Government of Cambodia. He continued: 'Thus a meeting of the Security Council to listen to the representative of the Pol Pot clique - that is, a non-existent government - would constitute a flagrant intervention in the Cambodian people`s internal affairs and a violation of the principle of the UN Charter.'[150]

---

[145] Sir James Mackintosh in the debate on the London petition for the Recognition of the Independence of South America: HC Debs., vol. 11, col. 1354, 15 June 1924. See also R. Phillimore, *Commentaries upon International Law*, II (3rd edn., London, 1882), 29.

[146] E. de Vattel, *The Law of Nations or the Principles of the Law of Nature* (new edition by J. Chitty, London, 1834), 458.

[147] Lithuania (11 December 1917), Ukraine (22 Januar 1918), Estonia (24 February 1918), Georgia (26 May 1918), Armenia and Azerbaijan (28 May 1918), Latvia (18 November 1918).

[148] Art. 2 of the Preliminary Treaty of Peace and Armistice Conditions between Poland and the Soviet Republics of Russia and Ukraine, signed at Riga on 12 October 1920: 4 LNTS 7. This clause was directed against the Ukrainian Government under Symon Petlyura which had its seat in Poland. See also Art 5 of the Pact of Non-Aggression between France and the USSR, signed at Paris on 29 November 1932: 157 LNTS 411. This clause was directed against the exiled Governments of the Transcaucasian Republics in Paris and especially against the Georgian Government there.

[149] On the debate in the French chamber of deputies on the closure of the Georgian legation in Paris in connection with the Franco-Soviet Non-Aggression Pact, see *Journal Officiel*, Débats parlementaires, Chambre, 1933, 2383, cols. 2-3; 2395, col. 2; 2433, col. 3; 2438, col. 3; 2429, col. 3; 2430 col. 1; 2441, col. 2.

[150] BBC, *SWB*, 3rd Series, FE/6012/A3/1, 10 January 1979; [1979] *Keesing`s* 29615.

Practice however shows that not every recognition of a government in exile is regarded as amounting to unlawful intervention. Of the some seventy-five authorities in exile which since 1914 have called themselves or claimed to be the 'governments' of certain States, forty-one have received either *de facto* or *de jure* recognition by one or more States.[151] In several of these cases recognition of the government in exile was clearly regarded as lawful under international law. This may be explained be the fact that while the matter of government, as a matter of domestic jurisdiction, is not (directly) regulated by international law, international law nevertheless has some bearing on it where a government is created in breach of international law or is the result of an international illegality. Especially, where the government (in situ) of a State is the result of a violation of a norm of *jus cogens*, an obligation *erga omnes*, or a special treaty obligation, the matter of government becomes of concern to other States. Ian Brownlie has pointed out that the legal status of an 'exile government ... will be established the more readily when its exclusion form the community of which it is an agency results from acts contrary to the *jus cogens*, for example, an unlawful resort to force.'[152] It is submitted that where the government in situ is tainted by an international illegality and therefore may not be recognized as the State`s *de jure* government,[153] recognition of an independent and representative government in exile does not amount to unlawful intervention in the internal affairs of that State. Where, on the other hand, the government in situ is brought about by internal *coup d`état* or revolution in contravention of national (constitutional) law only no illegality in terms of international law is involved and, for that reason, recognition of the exiled government constitutes unlawful intervention in the internal affairs of the State. Precondition for the recognition of a government in exile not being regarded as an unlawful intervention thus is an international illegality affecting the governmental status of the government in situ.

b. International illegality and governmental status

The question of the relation between an international illegality and the status of government has been neglected. Writing in 1979 James Crawford stated that illegality affecting the title of a government to represent a State 'is a topic on which practice is, to say the least, scanty.'[154] The following discussion must therefore necessarily be a tentative one. This must be all the more so as illegality is a relative concept, in that changing and developing principles of international law may affect its contents. Surely, not every international illegality can justify the recognition of a government in exile, where there is an effective government in situ. The question must be whether the illegality tainting an effective government in situ is so central to the question of governmental status that international law may justifiably, and exceptionally, treat a non-effective (but representative and independent) government in exile as the government of the State instead. It is submitted that in order to justify the recognition of a government in exile the illegality must affect one of the criteria for governmental status not based on the principle of (territorial) effectiveness: representative character and independence. If the government in situ has no 'flaw' in this respect the government in exile can have no superior claim to governmental status. For example, the violation of human rights by an effective government in

---

[151] See S. Talmon, n. 5 above, 286-317. Apart from the seventy authorities in exile listed there 'governments' or 'presidents' in exile also existed for the following countries: Laos (1946), Kashmir (1947), Thailand (1953), Cyprus (1974), Kosovo (1991/1999), Sierra Leone (1997).

[152] I. Brownlie, n. 26 above, 65.

[153] In the context of illegality and governmental status, a specific technique which has been adopted in the case of effective but illegal governments is that of (collective) non-recognition.

[154] J. Crawford, n. 26 above, 84, n. 24.

situ undoubtedly constitutes one of the most severe internationally illegal acts. Human rights violations, however, do not give other States the right to recognize an alternative government in exile. Despite massive human rights violations[155] by the military junta ruling Burma (Myanmar)[156] no State has recognized the National Coalition Government of the Union of Burma (NCGUB) in exile which was formed by elected parliamentary representatives on 18 December 1990, after the military junta had refused to hand over power to Aung San Suu Kyi whose opposition party, the National League for Democracy (NLD), won a sweeping victory in the May 1990 national elections.[157] A violation of treaty or customary law obligations as to human rights does not make the government that violates these obligations a 'non-government' under international law but a government that violates international human rights law.

The relation between international illegality and governmental status is best illustrated by examining the situations in which States felt entitled to recognize governments in exile despite the existence of effective governments in situ.

(1) Governments created by the threat or use of force

Art. 2, para. 4, of the UN Charter prohibits the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. These rules concerning the illegal use of force belong to the core principles of *jus cogens*. Moreover, the principle that territory may not be validly acquired by the illegal use of force is well established.[158] The protection accorded States by Article 2, para. 4, extends to the status of their governments in the face of invasion, belligerent occupation and annexation: the international community has with considerable consistency refused to recognize governments created by the illegal use of force and has continued to recognize the last incumbent government, despite the fact that it is in exile.[159] To do otherwise is regarded as being tantamount to approving foreign military intervention.[160] Indeed, States are under a legal obligation not to recognize a government created in violation of the rules relating

---

[155] On human rights violations in Burma see, e.g., *National Coalition Government of the Union of Burma* v. *UNOCAL, Inc.*, 176 FRD 329 (C.D.Cal. 1997). See also the various UN General Assembly resolutions on the 'Situation in Myanmar' and the 'Situation of Human Rights in Myanmar': A/RES/46/132 (1991), A/RES/47/144 (1992), A/RES/48/150 (1993), A/RES/49/197 (1994), A/RES/50/194 (1995), A/RES/51/117 (1996), A/RES/52/137 (1997), A/RES/53/162 (1998).

[156] The military junta, the State Law and Order Restoration Council (SLORC), seized power on 17 September 1988.

[157] Prime Minister of the NCGUB and Vice Chairman of the National Council of Burma is Dr Sein Win, a cousin of Aung San Suu Kyi. On the NCGUB, see [1990] *Keesing`s* 37915, [1991] ibid. 38681; *Times*, 20 December 1990, 9; *NY Times*, 28 March 1991, Sec. A, 15; *Guardian*, 11 April 1994, 10 and S. Talmon, n. 5 above, 315.

[158] M. Whiteman, n. 82 above, V (Washington, D.C., 1965), 874-965 and the authorities there cited. See also Principle IV of the Declaration on Principles Guiding Relations between Participating States, forming part of the (Helsinki) Final Act of the Conference on Security and Cooperation in Europe, 1 August 1975: (1975) 10 ILM 1292 at 1294.

[159] See the profiles of the various governments in exile in S. Talmon, n. 5 above, 286-317.

[160] See, e.g., the statement of the Foreign Minsters of the ASEAN countries on Cambodia on 4 December 1979: [1980] *Keesing`s* 30673.

to the use of force.[161] Speaking on 25 October 1982 in the debate on the representation of Cambodia in the United Nations, the representative of China stated with regard to the Coalition Government of Democratic Kampuchea (CGDK):

> 'It may be recalled that when many countries were subjected to foreign aggression or occupation during the Second World War, the international community recognized the Governments in exile as the true representatives of the national interests of those countries, rather than the puppet régimes which controlled the territories.'[162]

A similar statement was made by the representative of Singapore, who said:

> '...the normal rule under international law of recognizing a government if it is in effective control of territory is not applicable when the country is under foreign military occupation. I remind the Assembly that during the Second World War many of the countries of Western Europe were occupied by Nazi Germany. The Governments of those countries fled abroad and established themselves in exile. Although the Governments in exile were not in effective control of their territories, they were nevertheless recognized by the rest of the world.'[163]

For the continued recognition of a government in exile it is irrelevant whether the belligerent occupant imposes its own military or, in case of annexation, civilian government on the territory or whether a (nominally independent but foreign controlled) 'puppet government'[164] made up of nationals of the occupied State is formed under its auspices. Puppet governments are regarded as no more than agents of the belligerent occupant.[165] The so-called 'national governments' set up in Axis occupied countries during the Second World War[166] and, more recently, the Government of the People`s Republic of Kampuchea (PRK) under Heng Samrin established on 10 January 1979 in Vietnam occupied Cambodia[167] and the Provisional Free

---

[161] Cf. Art . 53 of the ILC Draft Articles on State Responsibility: (1998) 37 ILM 442. See also R. Jennings / A. Watts, n. 69 above, 183-97.

[162] GAOR, 37th Session, 42nd Plenary Meeting, 25 October 1982, 734 (Mr Ling Qing).

[163] Ibid., 749 (Mr Koh).

[164] On the question how the puppet character of a given government is to be determined, see J. Crawford, n. 26 above, 65.

[165] Cf. Judgment 107/1945 of the Criminal Court of Heraklion *In re G.*, (1943-5) 12 AD no. 151, 437-40 at 439; *William F. Peralta* v. *The Director of Prisons* (1945), (1947) 22 *Philippine LJ* 26-32 at 28. See also J. Crawford, n. 26 above, 60, S. Talmon, n. 5 above, 227.

[166] Puppet governments were set up in Albania under Shefket Bey Verlatzi (12 April 1939), in Norway under Vidkun Quisling (25 September 1940), in Greece under George Tsolakoglou (21 April 1941), Constantine Logothetopoulos (2 December 1942), and John Rallis (7 April 1943), and in Serbia under Milan Nediæ(29 August 1941).

[167] A statement of the Government of the People`s Republic of China on 14 January 1979 said: '...The so-called "People`s Republic" of Kampuchea is only a hastily rigged-up puppet and tool of Vietnam and the Soviet Union, and it is utterly illegal ...' (BBC, *SWB*, 2nd Series, FE/6017/A3/1, 16 January 1979). On the puppet character of the PRK Government see also the statement of US Foreign Secretary James Baker: AFPCD 1990, no. 473, at 679.

Kuwaiti Government established on 2 August 1990 in Iraq occupied Kuwait[168] were recognized only by the occupying power itself and its allies.

A puppet government established under belligerent occupation must be distinguished from a pre-existing government which continues to function in the occupied State. The illegal use of force by a foreign State has no effect on the governmental status of the incumbent government. For example, the Vichy Government under Marshal Pétain was regarded as the Government of France by several States until August 1944.[169] As a result the Free French authorities of General de Gaulle could not be recognized as the Government of France in exile.[170] Similarly, the continued existence of the pre-occupation governments militated against recognition of governments in exile for Denmark[171] and Thailand[172] during the Second World War.

In the case of (puppet) governments established during a period of belligerent occupation the continued recognition of a government in exile is justified on the ground that there is a strong presumption against the independence and representative character of these governments.[173] The question that arises is, however, whether an effective government in situ created during belligerent occupation may be recognized as the State`s government instead of the (recognized) government in exile once the occupation comes to an end or whether its illegal creation rules out any recognition. This is first of all a question of fact. The problem will be to ascertain whether the government is in fact representative and independent of the former occupant. Practice on this question is scarce. In all cases but one (in which there existed an alternative government in exile) governments installed by a belligerent occupant did not survive the end of the occupation.[174] Only the Government of the State of Cambodia (SOC)[175] survived the withdrawal of Vietnamese troops from Cambodia in September/October 1989.[176] While several States subsequently initiated official but informal relations with the SOC Government

---

[168] BBC, *SWB*, 3rd Series ME/0833 I(a), 3 August 1990; ibid., ME/0835 I(a), 6 August 1990. See also S/RES/661 (1990), para. 9, where the UN Security Council called upon all States 'not to recognize any régime set up by the occupying Power'.

[169] Recognition was withdrawn on the following dates: United Kingdom (23 June 1940), South Africa (23 April 1942), USA (8 November 1942), Canada (11 November 1942), Australia (7 December 1942), Switzerland (23 August 1944), Portugal, Spain, Sweden, Turkey, and the Vatican (24 August 1944).

[170] J. Verhoeven, n. 9 above, 139; J. Crawford, n. 26 above, 65, n. 168.

[171] [1943] III FRUS 1121-5 at 1124; [1943] II FRUS 6 and 20-1. The Danish Government in Copenhagen resigned only on 28 August 1943.

[172] 'The establishment of a government-in-exile while there was still a legally constituted government in Bangkok would be an "anomalous situation".' ([1945] VI FRUS 1252). See also [1943] III FRUS 1121-5 at 1122; [1945] VI FRUS 1247.

[173] Cf. J. Crawford, n. 26 above, 107.

[174] The case of Afghanistan is of no assistance: although the Karmal Government was installed by Soviet military intervention in December 1979 and it successor, the Najibulah Government, was kept in power with the aid of Soviet forces, there existed no recognized government in exile when the USSR completed the withdrawal of its forces from Afghanistan on 15 February 1989. The AIG was formed only on 23 February 1989 and lacked representative character. See above at n. 121.

[175] The successor of the SOC Government, the PRK Government, was established on 10 January 1979 after the Vietnamese invasion of Cambodia on 25 December 1978 ([1979] *Keesing`s* 29613-7). The PRK was renamed the SOC on 30 April 1989.

[176] [1989] *Keesing`s* 36881-2; [1990] *Keesing`s* 37289; (1989) 8/4 *Ind. Chron.* 7.

(mainly in order to achieve an overall settlement of the Cambodian conflict),[177] no State withdrew its recognition from the exiled Coalition Government of Democratic Kampuchea (CGDK) and accorded *de jure* recognition to the SOC Government as the Government of Cambodia. It seems that the illegality of origin was regarded as paramount in accordance with the maxim *ex injuria non oritur jus*. However, the withdrawal of the Vietnamese forces from Cambodia was not without effect on the status of the two governments. For example, the USA, the 12 European Community countries and other States in 1990 no longer supported the CGDK`s claim to occupy Cambodia`s seat in the United Nations. They argued that while it was reasonable to let the CGDK occupy the seat while it was fighting a Vietnamese army, the Cambodian conflict had now become a civil war in which the United Nations should not take sides.[178] The reference to 'civil war' shows, by implication, that these States regarded the SOC no longer as a Vietnamese puppet government,[179] to which the same rules apply as to occupation governments, but as a *de facto* government. This is also supported by the fact that the European Parliament in its resolution on Cambodia, adopted on 23 November 1989, called 'upon all EEC Member States to recognize the *de facto* Government of Cambodia.'[180] The question whether the SOC Government could have been recognized as the *de jure* Government of Cambodia if it had won the civil war against the CGDK remains open. On 10 September 1990 representatives of the SOC and the CGDK agreed on the formation of a 12-member Supreme National Council (SNC) of Cambodia which the UN Security Council described as the 'unique legitimate body and source of authority in which, during the transitional period, the independence, national sovereignty and unity of Cambodia is embodied.'[181] The change of status of the SOC Government from puppet to *de facto* government suggests that sooner or later a government created during belligerent occupation will be recognized (*de jure*) as the State`s Government if it succeeds in consolidating its position after the withdrawal of the occupying forces.[182] This position would also appear to be most consistent with the general principle of effectiveness.[183] *De jure* recognition as the State`s Government should be denied to an effective government in situ on the grounds of its illegal

---

[177] E.g., Australia ((1990) 9/2 *Ind. Chron.* 11), France ([1990] *Keesing´s* 37777), United Kingdom ((1989) 8/4 *Ind. Chron.* 9), USA ((1990) 2/37 *DSD* 102).

[178] *NY Times*, 15 April 1990, Sec. 1, 3. Consequently, Cambodia`s UN seat was left vacant in 1990.

[179] On 18 July 1990 US Secretary of State James Baker said with regard to the SOC Government: 'It certainly *was* a puppet government while Vietnamese troops were in the country supporting it.'(AFPCD 1990, no. 473, 679 [emphasis added]). He also spoke of the 'Cambodian Government'.

[180] [1989] OJ No. C 323/101-2. See also [1989-90] OJ (Annex). Debates of the European Parliament No. 3-383/257.

[181] S/RES/668 (1990). On the status of the SNC, see also Art. 3 of the Agreement on a Comprehensive Political Settlement of the Cambodian Conflict, signed in Paris on 23 October 1991: (1991) 31 ILM 183. The SNC was regarded as a 'super government' above the two rival Cambodian Governments, the SOC and the CGDK (renamed the National Government of Cambodia (NGC) on 3 February 1990), which continued to exist ([1991] *Keesing`s* 38293).

[182] Cf. G. Dahm, n. 9 above, 150, who writes that after the Polish Government, instituted by the Soviets, had definitely consolidated its position States were no longer allowed to treat the Polish Government in London as the Government of Poland. See also A. Verdross, n. 26 above, 253; G. Sperduti, n. 74 above, 410.

[183] See generally, K. Doehring, 'Effectiveness' in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, II (Amsterdam, 1995), 43-8.

creation only as long as the illegality lasts, i.e, as long as it affects the government`s representative character or independence.

(2) Governments installed by outside intervention

The prohibition of intervention in the internal affairs of States is 'part and parcel of customary international law'.[184] It has been said that 'support for an opposition within another state is perhaps one of the clearest examples of unlawful intervention in the affairs of that state'.[185] This was the central issue in the *Nicaragua Case*, in which the International Court of Justice considered that:

> '... in international law, if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to an intervention by the one State in the internal affairs of the other, whether or not the political objective of the State giving such support and assistance is equally far-reaching.'[186]

The rule that no State shall organize, assist, ferment, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the government of another State, or interfere in civil strife in another State has also been reflected in numerous declarations adopted by international organizations and conferences.[187] For support of opposition forces to constitute unlawful intervention it must not involve direct military action by the supporting State: the supply of funds, weapons or logistical support is sufficient.[188]

The prohibition to intervene in the internal affairs of another State also protects the status of governments ousted with foreign assistance. While it may be controversial whether in a particular case there is in fact foreign involvement and/or whether it amounts to unlawful intervention the principle seems undisputed. This may be illustrated by the following examples:

Laos. During the ongoing civil war in Laos Prince Souvanna Phouma was re-established as Prime Minister in a *coup d`état* in Vientiane on 9 August 1960 and subsequently was officially invited by the King to form a new Government. In December 1960 General Phoumi Nosavan set up a rival government under Prince Boun Oum at Savannakhet and launched a successful attack on Vientiane. Prince Souvanna Phouma, together with six of his Ministers, escaped by air to Phnom Penh, Cambodia, on 9 December 1960.[189] Both the United

---

[184] *Nicaragua Case*, ICJ Rep. 1986, 14 at 106. See also *Corfu Channel Case*, ICJ Rep. 1949, 4 at 35. See also, generally, M. Schröder, 'Non-Intervention, Principle of' in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, III (Amsterdam, 1997), 619-22.

[185] R. Jennings / A. Watts, n. 69 above, 431.

[186] ICJ Rep. 1986, 14 at 124.

[187] Ibid., 107. See, e.g., UN General Assembly resolutions A/RES/2131 (XX), para. 2, and A/RES/2625 (XXV), Annex, principle III, para. 2. See also the highly controversial resolution A/RES/36/103 (1981), para. 2.II(a). See further Principle VI of the Declaration on Principles Guiding Relations between Participating States, forming part of the (Helsinki) Final Act of the Conference on Security and Cooperation in Europe, 1 August 1975: (1975) 10 ILM 1292 at 1294.

[188] Cf. *Nicaragua Case*, ICJ Rep. 1986, 14 at 103-4, 119, 124.

[189] On the events in Laos, see [1960] *Keesing`s* 17476, 17719-21 and S. Na Champassak, *Storm over Laos* (New York, 1961). On 31 January 1961 three members of the Phouma Government officially re-established the government inside Laos at Xieng Khouang ([1961] *Keesing`s* 17977). The Prime Minister and other Ministers however remained outside the country.

States and the Soviet Government accused each other of intervening in Laotian internal affairs by giving military aid to the opposing forces. Already on 15 November 1960 Prince Souvanna Phouma had accused the USA of supporting the rebels against his Government and claimed that the Laotian question was 'no longer an internal but an international problem'.[190] While the United States and its allies recognized the Boun Oum Government on 14 December 1960, a considerable number of States, among them China, the USSR, Cambodia and India, continued to recognize the Phouma Government in exile 'as the sole legitimate Government of Laos'[191] on the ground that the Boun Oum Government had been installed by 'US intervention'.[192]

Cambodia. Prince Norodom Sihanouk was ousted as head of State of Cambodia on 18 March 1970. On 5 May 1970 he announced in Peking the formation of a Royal Government of National Union of Cambodia (RGNUC) which during the next three years was recognized as 'the only legitimate and legal Government of Cambodia' by some 45 States.[193] The States recognizing the RGNUC did so because, in their opinion, the Lon Nol Government in Phnom Penh 'came into power through foreign [i.e. US] intervention' and was nothing more than a 'puppet regime'.[194] Already on 11 April 1970 the Government of Albania had declared that 'in compliance with its principled line ... of the determined opposition to the policy of intervention ... [it] declares that it continues to recognize Samdech Norodom Sihanouk as the lawful Head of State of Cambodia ... considers as unlawful the so-called present-day government of Phnom Penh ... and will not maintain with it any tie whatever.'[195]

Cyprus. On 15 July 1974 the Cypriot National Guard under the command of Greek officers staged a violent *coup d`état* against President Archbishop Makarios III with the aim of ENOSIS (unification of the island with Greece).[196] The Sampson Government installed at Nicosia was not recognized by any State but Greece. Archbishop Makarios who claimed that the coup was an 'invasion' and a 'flagrant violation of the independence and sovereignty of the Republic of Cyprus' continued to be recognized as 'President of the Republic of Cyprus' and in this capacity on 19 July addressed the UN Security Council.[197]

---

[190] [1961] *Keesing`s* 17975. On foreign military aid to the Boun Oum group, see ibid., 17976.

[191] (1961) 4/7 *PR* 20.

[192] For the Chinese view on US intervention and aggression against Laos, see (1960) 3/51 *PR* 20-21; (1960) 3/52 *PR* 19-20; (1961) 4/1 *PR* 19-20; (1961) 4/3 *PR* 5, 6-7; (1961) 4/5 *PR* 10; (1961) 4/6 *PR* 7, 19; (1961) 4/7 *PR* 20; (1961) 4/9 *PR* 6-7.

[193] For a list of countries recognizing the RGNUC, see S. Talmon, n. 5 above, 306-7.

[194] See the various statements in the General Assembly debate on the representation of Cambodia in the UN: GAOR, 28th Session, 2130th Meeting, 27 September 1973, 3 (Yugoslavia); ibid., 2132nd Meeting, 28 September 1973, 12-13 (Albania); ibid., 2188th Meeting, 4 December 1973, 1 (Algeria); ibid., 2189th Meeting, 4 December 1973, 14 (Romania); ibid., 2190th Meeting, 5 December 1973, 6 (Syria); ibid., 2191st Meeting, 5 December 1973, 1 (Tanzania) and 5 (Democratic Yemen); ibid., General Committee, 212th Meeting, 16 October 1973, 22 (China). See also the declarations of China and the USSR, reproduced in Académie Diplomatique Internationale, *Dictionnaire Diplomatique*, VIII (Paris, 1973), 186-90.

[195] 'Declaration of the Albanian Government on the Cambodian Situation': (1970) 13/16 *PR* 18-19 at 19.

[196] On the coup in Cyprus, see Z.M. Necatigil, *The Cyprus Question and the Turkish Position in International Law* (2nd rev. edn., Oxford, 1998), 89-92.

[197] UN Doc. S/PV.1780, 19 July 1974. See also Security Council resolution S/RES/353 (1974). On the continued recognition and legal status of President Makarios, see E. Collins / T.M. Cole, 'Regime Legitimation in Instances of Coup-Caused Governments-in-Exile: The Cases of

In the case of governments coming to power through unlawful intervention the continued recognition of the last incumbent government is justified on the ground that there is a strong presumption against the independence and representative character of these governments. The presumption, where the intervention involves direct military action by the intervening State, is particularly rigorous. As in the case of governments in situ created by the illegal use of force, once they have definitely consolidated their position (and do no longer depend on foreign financial, logistical and military support for their survival) they will sooner or later be recognized *de jure* as the State`s government.

(3) Racist minority governments

The principle of racial equality and non-discrimination is regarded as an obligation *erga omnes* and even as a norm of *jus cogens*.[198] There is substantial support for the view that a government established in violation of the principle of racial non-discrimination is illegal in international law: the international community without exception refused to recognize the 'illegal racist minority regime' under Ian Smith (and its successor) in Southern Rhodesia from 1965 to 1980 .[199] The Smith Government, which on 11 November 1965 unilaterally declared Southern Rhodesia independent, only represented the white settlers who formed 4 per cent of the population of the British colony. On 20 May 1963 the Foreign Ministers of 31 African countries, meeting in Addis Ababa, considered the question of a 'government in exile' to be set up by a Southern Rhodesian nationalist organization 'if power were usurped by a Government of the White minority'.[200] The OAU Council of Ministers, meeting in Cairo on 13-17 July 1964, adopted resolution CM/Res. 33 (III) on Southern Rhodesia which said in the relevant part:

> 'African States take a vigorous stand against a Declaration of Independence of Southern Rhodesia by a European Minority government and pledge themselves to take appropriate measures, including the recognition and support of an African nationalist government in exile should such an eventuality arise ...'.[201]

A similar position was adopted in the Final Declaration of the Second Conference of Heads of State or Government of 47 non-aligned countries, held in Cairo on 5-10 October 1964.[202] In the end no African nationalist government in exile was set up because the OAU was

---

Presidents Makarios and Aristide' (1996) 5 *J. Int`l L. & Practice* 199-238 at 203-17.

[198] J. Crawford, n. 26 above, 227; I. Brownlie, n. 26 above, 602, and works there cited.

[199] See Security Council resolution S/RES/216 (1965), para. 2. See also S/RES/ 217 81965), para. 6; S/RES/277 (1970), para. 2, S/RES/288 (1970), para. 5. On non-recognition of the illegal minority white Government under Ian Smith in general, see J. Nkala, *The United Nations, International Law, and the Rhodesian Independence Crisis* (Oxford, 1985), 53-76; J. Dugard, *Recognition and the United Nations* (Cambridge, 1987), 90-8.

[200] [1963] *Keesing`s* 19463A.

[201] [1964] *Keesing`s* 20253A. A similar resolution was adopted OAU Council of Ministers in 1965. See CM/Res. 50 (IV): [1965] *Africa Diary* 2277.

[202] 'The participating countries urge all States not to recognize the independence of Southern Rhodesia if proclaimed under the rule of the racist minority, and instead to give favourable consideration to accord recognition to an African nationalist government in exile, should such a government be set up ...' (BBC, *SWB*, 2nd Series, ME/1681/E/2-19 at 6, 13 October 1964).

unsuccessful in inducing the two Rhodesian nationalist movements (ZAPU and ZANU) to form a single Government in exile.[203] However, the Government of the United Kingdom, as the 'administering Power', continued to be recognized by other States 'as the legitimate government for Rhodesia'[204] although it did not exercise effective control there.

A government whose composition is based on race (or on creed or colour) in which a small minority dominates an overwhelming majority is surely not representative so that recognition of a representative and independent (or even the last incumbent) government in exile may be justified. It has rightly been pointed out that the case of Southern Rhodesia concerned a self-determination unit and not an existing State. The establishment of a racist minority regime in an existing State is however not only a theoretical possibility as the case of apartheid South Africa showed. There is no reason why the above rule should not also apply to racist minority governments in existing States. Racist minority regimes are only one aspect of governments established in violation of the right of self-determination.[205] It is accepted that the right of self-determination may apply to existing States which are not 'possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.'[206] In this connection it is of interest to note that while the apartheid Government of South Africa (in the absence of a representative South African Government in exile) continued to be recognized as the Government of South Africa it was denied representation of South Africa in the United Nations and other international organizations (in some cases as early as 1963).[207]

(4) Governments depriving a people of its right to self-determination

The right of peoples to self-determination is one of the essential principles of international law to which the character of an obligation *erga omnes*[208] and even of *jus cogens* is attributed.[209] Any forcible action, direct or indirect, which deprives a (colonial) people of this right thus constitutes an international illegality.[210] The question of the relation between self-determination and the status of government will in practice only arise if the proclamation of a sovereign and independent State by a national liberation organization (turned government in exile) is taken as a valid exercise of a people`s right of self-determination.[211] There is some support in State

---

[203] Cf. [1965] *Keesing`s* 21051A.

[204] See *Shyu Jeng Shyong* v. *Esperdy*, 294 F.Supp. 355 at 356 (SDNY 1969); *Ngai Chi Lam* v. *Esperdy*, 411 F.2d 310 at 311 (2nd Cir. 1969).

[205] Cf. J. Crawford, n. 26 above, 103-6.

[206] Principle V, para. 7, of the 'Friendly Relations Declaration' of 24 October 1970: UN General Assembly Resolution A/RES/2625 (XXV), Annex.

[207] See R. Jennings / A. Watts, n. 69 above, 90 n. 13 and 181 n. 15, with further references. See also H.J. Richardson, 'The Obligation to Withdraw Recognition From Pretoria as the Government of South Africa' (1987) 1 *Temple ICLJ* 153-78.

[208] *East Timor (Portugal* v. *Australia), Judgment*, ICJ Rep. 1995, 90 at 102.

[209] J.A. Frowein, 'Jus cogens' in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, III (Amsterdam, 1997), 65-9 at 67. Cf. also Art. 19 of the ILC Draft Articles on State Responsibility: (1998) 37 ILM 442.

[210] See UN GA Res. 2160 (XXI), 30 Nov. 1966 ('Strict Observance of the Prohibition of the Threat or Use of Force in International Relations, and of the Right of Peoples to Self-Determination'), para. 1 (b). See also 'Friendly Relations Declaration' of 24 October 1970 (UN GA res. A/RES/2625 (XXV), Annex), principle V, para. 5.

[211] See above at n. 37 *et seq.*

practice for the proposition that the principle of self-determination may deprive a colonial or administering power which (illegally) prevents a people by forcible action from translating its chosen mode of self-determination into reality of its governmental status with respect to the (colonial) territory.[212] For example, when the Congo-Léopoldville[213] on 29 June 1963 accorded *de jure* recognition to the Revolutionary Government of Angola in Exile (GRAE) as the Government of Portuguese Angola it withdrew recognition of the Portuguese Government as the 'legitimate representative of Angola'.[214] In such cases the legal position and representative capacity of the colonial or administering power is comparable to that of a belligerent occupant, the difference being that an initially legal presence turns into an illegal occupation through the valid exercise of the right of self-determination. Thus, when the International Labour Organization (ILO) Governing Body decided to convene a commission of experts on social policy in the North African countries in Tunis in 1960, Tunisia, which on 19 September 1958 had recognized the GPRA as the 'representative of the Algerian State', declared that it 'could not recognize any right of representation to a delegate of the French Government in Algeria'.[215]

(5) Undemocratic governments

In recent practice States have continued to recognize democratically elected governments forced into exile by internal *coup d`état* or revolution while at the same time denying recognition to the effective but undemocratic governments in situ: in 1988 the United States, as yet standing alone, continued to recognize the Government of ousted President Delvalle and denied recognition to the Noriega-controlled governments in Panama;[216] in 1991 the member States of the Organization of American States (OAS) as well as several other States and organizations refused to recognize the military-backed governments in Port-au-Prince and, instead, carried on to recognize the deposed Government of President Aristide as the Government of Haiti;[217] in 1996 the OAU and several African and Western States, at least formally, continued to recognize President Ntibantunganya as President of Burundi and refused to recognize the Government of Pierre Buyoya;[218] and in 1997 foreign States and international organizations did not recognize the AFRC-Government[219] in Freetown but continued to recognize deposed President Kabbah, who resided in neighbouring Guinea, as head of State of

---

[212] However, the principle of self-determination, as a rule, does not invalidate the status of unrepresentative governments in existing States. There may be an exception with respect to unrepresentative governments based on race, creed or colour. See above at n. 206.

[213] Later named Zaire, today named the Democratic Republic of the Congo.

[214] For the statement of *de jure* recognition, see J.A. Marcum, *The Angolan Revolution*, II (Cambridge, Mass., 1978), 78-9. See also *NY Times*, 30 June 1963, 16; ibid., 8 January 1964, 4. On the withdrawal of recognition from the Portuguese Government, see ibid., 10 July 1963, 5.

[215] M. Bedjaoui, n. 55 above, 134.

[216] (1989) 89/11 *DSB* 67-9; [1988] *Keesing`s* 35818, [1989] *Keesing`s* 36683.

[217] On the OAU response to the *coup* in Haiti, see D.E. Acevedo, The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy' in L.F. Damrosch (ed.), *Enforcing Restraint. Collective Intervention in Internal Conflicts* (New York, 1993), 119-55; C.M. Cerna, 'The Case of Haiti before the Organization of American States' (1992) 86 *ASIL Proc.* 378-83; S. Talmon, n. 5 above, 10-13.

[218] *IHT*, 26 July 1996, 6, ibid., 27-28 July 1996, 5; *NZZ*, 26 July 1996, 1, ibid., 27/28 July 1996, 2; *FAZ*, 27 July 1996, 6; *Le Monde*, 28-29 July 1996, 3. See also K. Nowrot / E.W. Schabacker, n. 1 above, 392.

[219] Armed Forces Ruling Council.

Sierra Leone.[220] Under the traditional (and still prevailing) notion of State sovereignty all these continued recognitions, on principle, constituted unlawful intervention in the internal affairs of the States in question as there was no international illegality involved.[221] Despite a trend in the literature to the contrary,[222] there is still no rule of general (or regional) international law that a government of a State, to be a government in the sense of international law, must be democratically elected.[223] It is necessary to observe that the principle of democratic legality has never been consistently applied to make it one of the requirements for governmental status. Too many undemocratic governments are still recognized and too often the champions of the principle of representative democracy close their eyes to obvious violations of the principle when political interests demand them to do so. For example, when Peruvian President Alberto Fujimori on 5 April 1992 seized power in an army-backed constitutional *coup d`état*, suspended the Constitution and dissolved Congress this action was only 'deeply deplored' by OAS members.[224] Recognition was not withdrawn and the First Vice-President who was named 'Constitutional President' by the dissolved Congress received no recognition.[225] Another interesting example is Congo-Brazzaville where on 16 October 1997 the democratically elected Government of President Lissouba was ousted by force of arms (and with the help of some 3.500 Angolan soldiers). Although the *coup d`état* was 'deplored' its leader, General Sassou-Nguesso, was inaugurated President on 25 October and was recognized as such soon after.[226] To these examples, the *coups* against democratically elected governments in The Gambia (23 July 1994), Sao Toe and Principe (15 August 1995), and Niger (27 January 1996) may be added. In all theses cases the new undemocratic governments were recognized. As a general rule, a government that seizes power from a democratically elected government in an internal *coup d`état* is thus (still) not illegal in international law. There may however be exceptions to that rule where a State is bound to retain a certain form of (democratic) government by treaty, by (regional) customary law, or by its membership in an international or regional organization.[227] The International Court of Justice confirmed in the *Nicaragua Case* that a State may undertake an obligation to retain a certain form of (democratic) government. It said:

> 'The Court cannot discover, within the range of subjects open to international agreement, any obstacle or provision to hinder a State from making a commitment of this kind. A State, which is free to decide upon the principle and methods of popular consultation within its domestic order, is sovereign for the purpose of accepting a limitation of its sovereignty in this field.'[228]

---

[220] *FAZ*, 28 May 1997, 9; ibid., 3 June 1997, 1; ibid., 10 October 1997, 9.

[221] See above II.4.a.

[222] For references, see n. 70 above.

[223] This is also the position of I. Brownlie, n. 71 above, 59-62; J. Crawford, n.71 above, 20-2; H.-J. Heintze, n. 139 above, 47; D. Schindler, 'Völkerrecht und Demokratie' in G. Hafner et al. (eds.), *Liber Amicorum Professor Seidl-Hohenveldern - in Honour of His 80th Birthday* (The Hague, 1998), 611-30 at 622, 626.

[224] See MRE/RES.1/92, 13 Apr. 1992; MRE/RES.2/92, 18 may 1992. See also the OAS`s reaction to the constitutional *coup* in Guatemala on 25 May 1993; (1993) 4/23 *DSD* 409-10.

[225] [1992] *Keesing`s* 38846.

[226] *FAZ*, 17 October 1997, 10; ibid., 18 October 1997, 2; ibid., 31 March 1999, 8.

[227] Cf. R. Jennings / A. Watts, n. 69 above, 383, n. 4; 383-4; 446, n. 39.

[228] ICJ Rep. 1986, 14 at 131.

An early example for such a commitment may be seen in the General Treaty of Peace and Amity and its Additional Convention which were concluded by the five Central American Republics on 20 December 1907.[229] In the Art. II of the Treaty the five Republics 'declared that every disposition or menace which may tend to alter the constitutional organization in any of them is to be deemed a menace to the peace of the said Republics.' Art. I of the Additional then provided that:

> 'The Governments of the High Contracting Parties shall not recognize any other Government which may come into power in any of the five Republics as a consequence of a *coup d`état*, or of a revolution against the recognized Government, so long as the freely elected representatives of the people thereof, have not constitutionally reorganized the country.'[230]

The seizure of power in an internal *coup d`état*, in violation of a treaty (or contrary to another international) commitment to democratic government, constitutes an international illegality and may thus justify the continued recognition of the deposed democratically elected government in exile. There is a strong presumption that an undemocratic government is also unrepresentative, especially if the State in question has opted for representative democracy as a political system. But, the violation of a treaty obligation, as a rule, has legal effects only *inter partes*.[231] Third States not party to the treaty thus cannot rely on its violation as justification for the continued recognition of the deposed (democratically elected) government in exile. However, a State which binds itself by treaty to democratic government (and thereby gives the other parties to the treaty a limited right to intervene in its internal governmental affairs) is estopped from claiming that the continued recognition of its ousted democratically elected government in exile by third States constitutes an unlawful intervention in its internal affairs: such a claim would defeat the object and purpose of the treaty. The crucial question thus is whether a State has in fact entered into a *legal* commitment to democratic government (as opposed to a mere political pledge). Surely, not every (general) reference to the principle of representative democracy in a treaty or other international instrument will suffice,[232] what is needed is rather a specific undertaking by the State that it will only have a democratic government. It is necessary to point out that even if a State violates a commitment to democratic government other States may only continue to recognize the last democratically elected incumbent government in exile and not a new government formed in exile as such a government would lack the required democratic mandate. However, it does not seem necessary that States automatically discontinue their recognition of a democratic government in exile once its term of office expires.[233]

III. Legitimacy of governments in exile

---

[229] (1908) 2 *AJIL Suppl.* 219-30.

[230] See also Art. II, para. 2, of the General Treaty of Peace and Amity concluded by the five Central American Republics on 7 February 1923: (1923) 17 *AJIL Suppl.* 117-22. See also C.P. Anderson, 'The Central American Policy of Non Recognition' (1925) 19 *AJIL* 164-6.

[231] Cf. Arts. 34-38 of the Vienna Convention on the Law of Treaties, 1969 (1155 UNTS 331).

[232] Cf. *Nicaragua Case*, ICJ Rep. 14 at 131-2.

[233] But, the United States terminated their recognition of ousted President Delvalle on 1 September 1989 when his term of office as President of Panama expired. See *Washington Post*, 5 October 1989, Sec. A, 39.

It has been shown that for an authority in exile to qualify as a 'government' in international law the following four criteria must be fulfilled:

(1) State,
(2) representative character,
(3) independence,
(4) internationally illegality of the government in situ.

The question that remains is what additional criterion (or criteria) an authority in exile must fulfil to qualify as a 'legitimate government' in international law, or in other words, what distinguishes a (simple) 'government' from a 'legitimate government'. The doctrine of governmental legitimacy in its various forms of dynastic, constitutional and democratic legitimacy has a long history in international law.[234] None of which has gained general acceptance: international law (still) does not know a test of legitimacy.[235] An isolated examination of the most recent cases of exiled governments (Haiti, Sierra Leone) has led several authors to conclude that the legitimacy of a government in exile is determined by its (Western-style) democratic legitimization.[236] Apart from the fact that considerable ideological differences still obstruct a universal understanding and uniform application of the concept of representative democracy[237] a comprehensive review of international practice shows that not only democratically elected governments in exile have been recognized as 'legitimate governments'. For example, the (autocratic) Government of the Emir of Kuwait,[238] the (gnociadal) Coalition Government of Democratic Kampuchea (CGDK),[239] the Royal Government of National Union of Cambodia (RGNUC),[240] and the Sovanna Phouma

---

[234] See T.-C. Chen, *The International Law of Recognition* (London, 1951). 105-16.

[235] W. Fiedler, n. 143 above, 196; F.A.v.d. Heydte, 'Einige Aspekte der Anerkennung im Völkerrecht' in R. Marcic et al. (eds.), *Internationale Festschrift für Alfred Verdross zum 80. Geburtstag* (Munich, 1971), 129-51 at 142-3; H. Lauterpacht, *Recognition in International Law* (Cambridge, 1947), 102-6.

[236] See, e.g., K. Nowrot / E.W. Schabacker, n. 1 above, 391-6; E. Collins / T.M. Cole, n. 197 above, 229-33, 238; C.M. Cerna, n. 216 above; J.C. Pierce, 'The Haitian Crisis and the Future of Collective Enforcement of Democratic Governance' (1995-6) 27 *L. & Policy in Int`l Business* 477-512.

[237] The concept of democracy could universally be applied only if it had actually been defined in international law.

[238] Reference is made to 'the legitimate Government of Kuwait' e.g. in several UN Security Council resolutions: See S/RES/661 (1990), S/RES/662 (1990), S/RES/679 (1990), S/RES/674 (1990), S/RES/677 (1990), S/RES/678 (1990). For US and EU statements, see AFPCR 1990, nos. 284, 301, 302, 313; *EC-Bulletin*, 7/8-1990, 122.

[239] See UN Docs. A/40/1033 (12 Dec. 1985); A/41/967 (15 Dec. 1986). See also the Thai Foreign Ministry Statement of 22 June 1982: 'the Government of Democratic Kampuchea is still the internationally recognized and legitimate government' (BBC, *SWB*, 2nd series, FE/7062/A3/9, 26 June 1982).

[240] For statements of States recognizing the RGNUC as the 'only legitimate Government of Cambodia', see (1970) 13/20 *PR* 20, 22, 24. The Fourth Conference of the Heads of State or Government of Non-Aligned Countries, meeting in Algiers from 5-9 September 1973 recalled 'the legality and legitimacy of the Royal Government headed by Prince Norodom Sihanouk' (NAC/ALG/CONF.4/Res.10, reproduced in UN Doc. A/9330, at 48).

Government of Laos,[241] all were recognized as the 'legitimate government' of their countries although none of them had a democratic mandate. Some of them had even come to power by coup d`état or revolution themselves. Legitimacy, used in the sense of 'legitimate government', thus cannot mean democratic legitimization. The labelling of a government as 'legitimate' could, of course, be only an expression of (political or moral) approval based on a subjective value judgment of the recognizing States. However, it is submitted that in modern parlance a 'legitimate government' in exile denotes an authority in exile meeting the criteria for governmental status set out above. The attribute 'legitimate' is used in diplomatic and legal language to distinguish a 'government' in the sense of international law, either in exile or in situ, from a non-government, i.e. from an authority in exile not meeting the criteria for governmental status. This is necessary as reference is usually made to such authorities in terms of 'occupation governments', 'puppet governments', '*de facto* governments', 'apartheid governments' or 'racist minority governments'. None of these 'governments' however qualifies as a government qualifies as a government in the sense of international law. For example, an 'occupation government' or a 'puppet government' is not the government of a State, i.e. its representative organ in international affairs, but the administrative agency of another State in the occupied territory. Nevertheless, for the sake of convenience, in general (legal and diplomatic) parlance it is incorrectly referred to as a 'government'. The real distinction is thus not to be made between legitimate and illegitimate governments but between governments in the sense of international law and non-governments or what is sometimes referred to as 'so-called governments'.[242]

---

[241] See (1961) 4/7 *PR* 20.

[242] On 22 November 1985 the Government of Thailand reiterated 'that the *so-called Government* of the People`s Republic of Kampuchea does not represent, and cannot be considered to represent, Kampuchea in any manner whatsoever, as only the Coalition Government of Democratic Kampuchea ... which is the *sole legitimate Government* of Kampuchea overwhelmingly recognized in the United Nations, can represent Kampuchea.' (UN Doc. A/40/1033, 12 Dec. 1985 (italics added)).