4
The International Legal Criteria for Governmental Status

4.1 Introduction

This chapter concerns itself with the criteria under customary international law for the identification of a state's government. More specifically, it seeks to ascertain the objective customary international legal framework for the enjoyment of governmental status by examining state practice concerning the recognition of governments in the light of the conceptual international legal aspects relating to the governments of states. Ascertaining this framework is important for assessing the compliance by states and possibly other actors with certain international legal rules. The existence and content of such a framework informs whether or not, at least in certain circumstances, the recognition or denial of the governmental status of a specific ostensible government is or may result in a violation of international law. Additionally, the application of at least certain international legal rules concerning the representation of states and the treatment owed in respect of certain persons requires the customary international legal identity of the government of a state to be known.[1] An analysis of relevant practice demonstrates the following.

As a general matter, the constitution of a state, while reflecting the identity of a state's government, is insufficient for the identification of a state's government. Moreover, the presumption against limitations on state sovereignty weighs against both the absence of an objective customary international legal framework for the identification of a state's government and the existence of any customary international legal criterion for governmental status that would limit the presumptive sovereign freedom of each state to choose its government, its political system, or its constitution. Accordingly, a plausible explanation of state practice on the recognition or denial of governmental status which does not reflect a limitation on any of these freedoms ought to be preferred over an alternative explanation which would reflect such a limitation.

[1] Recall sections 3.4.2–3.4.3. Recall also sections 5.5.1–5.5.2.

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Indeed, there exists an objective customary international legal framework for identifying the government of a state that preserves the presumptive sovereign freedom of each state to choose its government, its constitution, and its political system. There is no clear acceptance of a limitation on any of these presumptive sovereign freedoms in the customary international legal criteria for governmental status. Indeed, this framework has developed since the 1990s in a way that further privileges what is perhaps the most direct way by which a state can be taken to express its choice of government, namely its constitution. International law now has regard to alternative, less direct means for ascertaining the state's choice of government only where there is no claimant to governmental status that can be taken to reflect the state's more direct choice of government.

Under the contemporary customary international legal framework for the assessment of governmental status, a person or collectivity of persons need not have a valid claim to governmental status under the existing constitution of that state in order to qualify for governmental status as a matter of customary international law. If it is autonomous and if it exercises effective control over the territory and population of the state, an 'unconstitutional' ostensible government can attain governmental status as a matter of customary international law in the absence of a rival 'constitutional' claim. An autonomous 'unconstitutional' claimant can retain governmental status in the event that it loses effective control over the state's territory and population as long as there is neither a rival autonomous 'unconstitutional' claimant with effective control over that state's territory and population nor an autonomous 'constitutional' claimant to governmental status. An autonomous 'constitutional' ostensible government will invariably enjoy governmental status as a matter of customary international law as long as it maintains its claim to governmental status. This is so regardless of whether it exercises or has ever exercised effective control over the territory and population of the state. Whether 'constitutional' or otherwise, an ostensible government need not be democratically representative or otherwise 'legitimate' in order to qualify as the government of a state as a matter of customary international law. It is also unnecessary for an ostensible government of a state to be willing to ensure the state's compliance with the latter's international legal obligations in order for that claimant to enjoy governmental status as a matter of customary international law. It appears, moreover, that an ostensible government can enjoy governmental status as a matter of customary international law even if it is established in consequence of, or if its enjoyment of governmental status would amount to, the violation of an obligation arising under a peremptory norm of general international law.

4.2 The Criteria for Governmental Status

4.2.1 In General

While the constitution of a state invariably reflects the configuration of a state's government,[2] the constitution of a state does not suffice for the identification of a state's government as a matter of customary international law. This is clear from both the possibility that a state fundamentally changes its constitution through the success of a claim to governmental status by an 'unconstitutional' government[3] and from the practice by states concerning recognition of governments, which involves the reliance on additional considerations in determining whether they consider a specific ostensible government to enjoy governmental status as a matter of customary international law. Ultimately, the existence and content of the objective customary international legal framework for the assessment of governmental status derives from the general[4] practice of states, as accompanied by *opinio juris*, concerning the recognition of governments.

In assessing relevant state practice to ascertain which specific criteria comprise the objective framework for the identification of a state's government under customary international law, two points concerning the presumption against limitations on state sovereignty are noteworthy, in addition to the possible presumption in favour of *opinio juris* in state practice concerning recognition of governments.[5]

First, the presumption against limitations on state sovereignty militates against readily inferring the existence of a customary international legal criterion for governmental status that would limit the freedom of each state to choose its government, its constitution, or its political system. At least an equally-plausible understanding of relevant practice which does not in effect result in such a limitation is to be preferred over an alternative plausible understanding which would in effect result in such a limitation,[6] as, for example, would be the case with the limitation on the freedom of each state to choose its political system that would arise from a requirement of democratic representativity for the enjoyment of governmental status.[7] In what relates to the possible presumption in favour of *opinio juris* being reflected in state practice concerning recognition of governments, the

[2] Recall section 2.2.1.
[3] Recall chapter 2, n 8 and accompanying text.
[4] On what comprises 'general' practice, see ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' in *ILC Report* (2018) UN Doc A/73/10, 122, 135–8 (conclusion 8 and commentary thereto).
[5] Recall also section 3.5.2 on *opinio juris* generally accompanying state practice concerning recognition of governmental status, regardless of such a presumption.
[6] Recall section 2.4.
[7] On this, see section 4.2.2.5.1.2.

absence of an objective framework for the identification of a state's government under customary international ought also not to be presumed.[8]

Secondly, the presumptive sovereign freedom of each state to choose its government is in principle capable of providing the basis for the rationalization of the customary international legal framework for the identification of the government of a state. This framework may—indeed, is presumed to—operate as a means of ascertaining whom the state has chosen as its government.[9] That the customary international legal framework for the identification of a state's government may give effect to the state's choice of government can be seen in the traditional framework for the enjoyment by an 'unconstitutional' ostensible government of governmental status as a matter of customary international law. This framework was largely 'based on the principle of effectiveness'[10] and in practice often resulted in an 'unconstitutional' claimant enjoying governmental status insofar as that claimant exercised effective control over the state's territory and population.[11] As Taft CJ put it, as sole arbitrator in the so-called '*Tinoco Case*', governmental status for an 'unconstitutional' claimant generally followed from its attainment of 'independence and control'.[12] This can be understood as having comprised a generic means for the ascertainment of a state's choice fundamentally to change its constitution and, consequently, also to possess the 'unconstitutional' government in question.[13]

Before considering specific possible criteria for governmental status as a matter of customary international law, it is perhaps worth clarifying that the existence of a customary international legal framework for the identification of the government of a state does not preclude the possibility that occasionally the identity of a state's government is uncertain. As with virtually any legal standard, there may exist evidential or other difficulties in the application of one or more aspects of this framework.[14] Nor does such difficulty undermine the presumptive sovereign freedom

[8] Recall section 2.5.

[9] Recall section 2.4.

[10] Lauterpacht, *Recognition in International Law* (CUP 1947, repr 2013) 98, 115; Jennings and Watts (eds), *Oppenheim's International Law*, vol 1 (Wildy 1992) §45, 151; Roth, *Governmental Illegitimacy in International Law* (OUP 2000) 136–42; Talmon, 'Who Is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law' in Goodwin-Gill and Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (OUP 1999) 499, 509.

[11] Further on effective control, see section 4.2.2.4. There also existed a general requirement of autonomy for any ostensible government to enjoy governmental status as a matter of customary international law, a criterion which in practice was often readily satisfied. See further section 4.2.2.2.

[12] *Aguilar-Amory and Royal Bank of Canada Claims (Great Britain v Costa Rica)* (1923) I UNRIAA 375 ('*Tinoco*') 381. Further on autonomy being labelled as 'independence', see n 36 below and accompanying text.

[13] Recall chapter 2, n 8 and accompanying text.

[14] See eg UNSC, 'Official Records, 900th Meeting' (14 September 1960) UN Doc S/PV.900, §67 (China): '[i]t is honestly impossible for my delegation to determine who constitutes the Government of the Republic of the Congo now, whether *de facto* or *de jure*'; UNGA, 'Official Records, 66th Session, 2nd Plenary Meeting' (16 September 2011) UN Doc A/66/PV.2, 14: '[Saint Vincent and the Grenadines] has not considered itself to be in a position—or in possession of sufficient factual data—to extend recognition to the National Transitional Council at this point in time'.

that each state enjoys to choose its government. The will of a state for one or more purposes of international law may be unclear,[15] including its choice of government.

4.2.2 Specific Criteria for Governmental Status

4.2.2.1 A Claim to Governmental Status

Most fundamentally, a person or collectivity of persons must claim or purport to be the government of that state in order to comprise the government of a state as a matter of customary international law.[16] This requirement applies in respect of ostensible governments which do not already enjoy governmental status and continues to apply in respect of ostensible governments which have already attained governmental status.

This criterion can readily be satisfied in a number of ways and, as such, does not often pose an obstacle to the ascertainment of the customary international legal identity of a state's government. Nor can this criterion readily be understood as a restriction on a state's freedom to choose its government.

Two of the ways in which the criterion of a claim to governmental status may be satisfied is through a public declaration or the issuance of an instrument purporting to have the force of municipal law. While any ostensible government may claim governmental status in these ways, it is common for ostensible governments not previously enjoying governmental status under customary international law to claim governmental status in these ways. For example, the declaration by the *Comité français de liberation nationale* (CFLN) in 1943 that it comprised 'the central power of France' exercising 'French sovereignty' and the *ordonnance* issued by the CFLN purporting to give legal effect to similarly-worded stipulations involve claims to governmental status.[17] Further possible examples of claims to governmental status through a public declaration concern the joint statement by the Allied Powers as to their assumption of 'supreme authority with respect to Germany, including all the powers possessed by the German Government'[18] and, more recently, the statement by the NTC in 2011 that 'it is the sole representative of all Libya'.[19] One further example of a claim to governmental status through the

[15] Recall section 2.3.1.

[16] See also O'Connell, 'The Status of Formosa and the Chinese Recognition Problem' (1956) 50 AJIL 405, 415; Brownlie, 'Recognition in Theory and Practice' (1982) 53 BYIL 197, 202.

[17] See *Declaration du 3 juin 1943* and *Ordonnance du 3 juin 1943 portant institution du Comité français de la libération nationale*, both available at <http://mjp.univ-perp.fr/france/co1943cfln.htm>.

[18] 'Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom and the Provisional Government of the French Republic' (5 June 1945), available at <http://avalon.law.yale.edu/wwii/ger01.asp>. On the recognition of the quadripartite authority as the government of Germany, see n 55 below.

[19] See 'Founding Statement of the Interim Transitional National Council' (5 March 2011), available at <http://oxcon.ouplaw.com/display/10.1093/law:ocw/law-ocw-rd118.regGroup.1/law-ocw-rd118>.

promulgation of an instrument purporting to have the force of municipal law concerns the Transitional Military Council and the Forces for Freedom and Change, both of which signed the Draft Constitutional Charter for the 2019 Transitional Period. Article 9 of this designates certain specific collective bodies as 'the head of state' and as 'the supreme, executive authority of the state'.[20]

A person or groups of persons may additionally or alternatively claim governmental status by purporting to exercise one or more functions reserved for the occupant of one or more governmental offices. Again, a claim may be made in this way by an ostensible government regardless of whether or not it has previously enjoyed governmental status. For example, by commanding the armed forces of Libya, Muammar Qadhafi retained a claim to governmental status, despite his apparent renouncement of governmental functions.[21]

In what principally concerns the retention of a claim to governmental status, a person who or a collectivity of persons that is designated by the municipal law of a state as the occupant of one or more governmental offices may maintain a claim to governmental status simply by not resigning from the office or all of the offices in question. This enables an existing government to retain its governmental status whilst neither continuously making an express claim to governmental status nor regularly exercising specific functions.

In the absence of an express claim to governmental status or of any purported exercise of functions reserved for the occupants of governmental offices, however, a person who or collectivity of persons that has occupied de facto a governmental office may be considered not to maintain a claim to governmental status as a matter of customary international law.[22] The general recognition by states of the NTC as Libya's government before Muammar Qadhafi's death[23] may be explained in part on this basis. One commentator, in asserting that the continued enjoyment of governmental status by a claimant to governmental status 'that . . . is itself a progeny of a revolution or a *coup d'État* occurring at some juncture in the past' may be fatally undercut',[24] appears to make a similar point. That said, being 'a progeny of a revolution or a *coup*' does not alone 'undercut' a claimant's enjoyment of governmental status. What might be relevant is the combination of occupying no governmental office under the municipal law of the state and neither making an express claim to governmental status nor in fact exercising any relevant authority. At the very least,

[20] Draft Constitutional Charter for the 2019 Transitional Period (2019), available at <http://constitutionnet.org/sites/default/files/2019-08/Sudan%20Constitutional%20Declaration%20%28English%29.pdf>, art 9(1)–(2).

[21] See *Keesing's* [1979] 29665A. On the functions exercised by the occupants of governmental offices, recall section 2.2.1.

[22] On de facto state organs, recall chapter 2, n 5.

[23] See UNGA, 'Official Records, 66th Session, 2nd Plenary Meeting' (n 14) 15 (114-17-15). On the relevance to governmental status of the acceptance of an ostensible state representative's credentials, see sections 5.4.1.2 and 5.4.3.

[24] Dinstein, *Non-International Armed Conflicts in International Law* (CUP 2014) 104.

an express claim by such a person or collectivity of persons to not occupying a governmental office appears tantamount to resignation.[25]

When the person or collectivity of persons comprising an ostensible government occupies one or more governmental offices under the municipal law of a state, the person or collectivity of persons in question may terminate their claim to governmental status by resigning from the governmental office or offices in question, at least where the resignation concerns the office or offices whose occupant or occupants lead or appoint any other person as a member of the same ostensible government. In practice, this often means that the resignation of a head of state or head of government amounts to the termination of a claim to governmental status, while the resignation of a minister of a state does not amount to the termination of the claim to governmental status by the government to which that minister belongs.

The effectiveness as a matter of customary international law of a purported resignation from a governmental office may be questioned where the purported resignation is ineffective under that state's constitution. There is, however, little practice from which to draw a definitive conclusion on this point. For example, the continued acceptance by virtually all states of Abdrabbuh Mansur Hadi as the President of Yemen after he retracted his resignation in February 2015[26] until April 2022[27] does not provide much evidence as to the effectiveness of a constitutionally-ineffective resignation.[28] Although the continued recognition by states of Abdrabbuh Mansur Hadi as the President of Yemen may have related to the view that his resignation had not been effective as a matter of international law, it may instead have been that Mr Hadi was able successfully to reclaim governmental status[29] in the presence of no rival autonomous 'constitutional' claimant or rival autonomous 'unconstitutional' ostensible government that exercised

[25] Not only did Muammar Qadhafi appear not to hold any governmental office under the municipal law of Libya (recall *Keesing's* (n 21)), but he also reportedly stated that there is no governmental office from which he can resign, with '[t]he people [being] free to choose the authority they see fit'. See 'Gaddafi: Libya Dignity under Attack' (*Al Jazeera*, 2 March 2011), available at <http://aljazeera.com/news/2011/3/2/gaddafi-libya-dignity-under-attack>. See also section 4.2.2.4.2 on the possibility that a lower threshold applies for 'effective control' where an 'unconstitutional' claimant to governmental status faces no rival claim.

[26] See eg UNSC res 2216 (14 April 2015) UN Doc S/RES/2216, eighth unnumbered preambular paragraph.

[27] By presidential decree of 7 April 2022, Mr Hadi established the Presidential Leadership Council, led by Rashad al-Alimi, to which Mr Hadi ceded his powers. See 'Hadi Out, Presidential Council Takes Over' (*Sana'a Center for Strategic Studies*, 8 April 2022), available at <http://sanaacenter.org/publications/analysis/17378>.

[28] The constitutional ineffectiveness of his resignation is reflected in the fact that the parliament of Yemen had not accepted his resignation and the fact that the constitution of Yemen required parliamentary consent for the first attempted resignation by the President of Yemen to be constitutionally effective. See Constitution of Yemen (2001, as amended by the 2011 Agreement on the Implementation Mechanism for the Transition Process in Yemen in accordance with the Initiative of the Gulf Cooperation Council) art 115.

[29] On the possible subsistence of a state's existing constitution in such circumstances, see also section 4.2.2.3.

sufficiently-effective control over Yemen's territory and population so as to qualify as the new government of Yemen.[30]

It is unclear, moreover, whether duress affects the effectiveness as a matter of international law of resignation from a governmental office. In seemingly all of the cases in which a claim of resignation under duress appears at least arguable, there had been no attempt by the resigning government to reclaim governmental status once the possible duress had ended. Examples in this regard involve the resignation of President Jean-Bertrand Aristide in Haiti in 2004 and of President Robert Mugabe in Zimbabwe in 2017.[31]

4.2.2.2 Autonomy

It is a general requirement for the enjoyment of governmental status as a matter of customary international law that an ostensible government be autonomous. A claimant to governmental status cannot qualify as the government of a state as a matter of customary international law if it is subordinate to a foreign entity.[32] In precluding the possibility of a state possessing a government which is subordinate to another state, the requirement of autonomy cannot readily be conceptualized as a restriction on a state's freedom to choose its government. Indeed, it serves to protect a state's freedom of action more generally since it is generally through its government that a state is represented for the purposes of international law.[33]

An ostensible government which lacks the requisite autonomy for the enjoyment of governmental status is sometimes referred to as a 'puppet' government. Examples of 'puppet' governments include the collaborationist regimes established in Greece during its occupation by the Axis powers during the Second World War[34] and the Heng Samrin regime established during Vietnam's occupation of Cambodia between 1979 and 1989.[35]

[30] On the enjoyment of governmental status by a claimant to governmental status in either such situation, see sections 4.2.2.2–4.2.2.4.

[31] For other ostensible changes of government in such circumstances, see Peterson, 'Recognition of Governments Should Not Be Abolished' (1983) 77 AJIL 31, 40.

[32] See eg *Tinoco* (n 12); HL Debs, 21 November 1956, vol 200, col 423; *Aksionairnoye Obschestvo Dlia Mechanicheskoyi Obrabotky Diereva (1) AM Luther (Company for Mechanical Woodworking AM Luther) v James Sagor and Company* [1921] 3 KB 532 ('*Luther v Sagor*') 548: 'an independent sovereign Government'; HL Debs, 28 April 1980, vol 408, col 1121–2WA; Blix, 'Contemporary Aspects of Recognition' (1970) 130 Hague *Recueil* 587, 642; Marek, *Identity and Continuity of States in Public International Law* (Librarie Droz 1954) 64–70; Talmon, *Recognition of Governments in International Law with Particular Reference to Governments in Exile* (OUP 1998) 173; Talmon (n 10) 517–20; Magiera, 'Governments' (2007) MPEPIL, available at <http://opil.ouplaw.com/home/mpil>, §16; Dinstein (n 24) 97.

[33] Recall section 2.3.

[34] See *In Re G* (Greece, Criminal Court of Heraklion, 1 January 1945) (1951) 12 ILR 437, 438–9.

[35] See eg UNGA, 'Credentials of Representatives to the Thirty-Fifth Session of the General Assembly: First Report of the Credentials Committee' (29 September 1980) UN Doc A/35/484, §13 (Singapore); HC Debs, 6 December 1979, vol 975, col 760. For other examples of 'puppet' governments, see Crawford, *The Creation of States in International Law* (2nd edn, CUP 2006) 81 n 199.

When it is considered in state practice or elsewhere, the criterion of autonomy is sometimes stated to be a criterion of 'independence'.[36] The present work uses an alternative term to avoid conflating the independence of a state and the autonomy of a government since the two criteria are distinct, each applicable in respect of a different entity. That said, they overlap in part. Actual independence, which is one of the two aspects of independence that a putative state must satisfy in order to attain statehood, reflects the requirement of autonomy for the enjoyment of governmental status as a matter of customary international law. Put differently, a putative state will attain statehood only if the authorities in which the powers of the putative state vest possess a sufficient 'degree of real governmental power at the[ir] disposal'—that is, if the government of the putative state is autonomous.[37]

There is a general presumption that a claimant to governmental status is autonomous, including with respect to a 'constitutional' claimant to governmental status that comes to power during belligerent occupation of the state whose government the claimant purports to be or in consequence of the unlawful use of force against that state.[38] An example in this regard is the change to the composition of the government of France after its occupation by Germany. The existing French government granted Philippe Pétain '*tout pouvoir au gouvernement de la République . . . à l'effet de promulguer par un ou plusieurs actes une nouvelle constitution de l'État français*';[39] on the basis of which Pétain established the 'Vichy government' in a non-occupied part of France, an ostensible government which was widely accepted, at least for some time thereafter, as France's government.[40] Other examples include the change to the government of Iran after the Anglo-Soviet invasion of 1941[41] and perhaps also the change to the government of Hungary following the forced abdication of Hungary's Regent in October 1944 during German occupation.[42] The requirement of autonomy may well have informed also the reluctance of states to recognize the regime in Hungary in 1956[43] and the ostensible government of Babrak Karmal that came to power in Afghanistan in 1979.[44]

An exception to this presumption applies in respect of an 'unconstitutional' claimant to governmental status of a state that comes to power either during the

[36] See eg *Tinoco* (n 12); *Luther v Sagor* (n 32); Talmon (n 10) 517.

[37] See Crawford (n 35) 72. See also ibid, 76, in which the requirement of actual independence of states is discussed as relevant also to a putative government of a state.

[38] See also Marek (n 32) 112–13; Roberts, 'What Is a Military Occupation?' (1984) 55 BYIL 249, 284; Crawford (n 35) 81 n 198; Talmon (n 10) 526; Foakes, *The Position of Heads of State and Senior Officials in International Law* (OUP 2014) 51–2.

[39] *Loi constitutionelle du 10 juillet 1940*.

[40] On the rival French national movement led by Charles de Gaulle, see chapter 3, n 88.

[41] See eg FRUS [1941] vol III, 461–2: 'the British Government had decided to support the new Shah and recognize his government because of the wishes express with regard thereto by the Iranian Government itself'; ibid, 461 on recognition of the new Shah by the USSR.

[42] See Crawford (n 35) 87–8.

[43] See chapter 5, n 84 and the text accompanying nn 89–90.

[44] See the text accompanying chapter 5, nn 129–33.

belligerent occupation of that state or in consequence of the unlawful use of force against that state.[45] A presumption of subordination instead applies in respect of any such claimant. The applicability of the presumption of subordination in the context of the lawful use of force is less clear,[46] at least as regards ostensible governments of existing states. For example, the NTC was generally accepted as the government of Libya subsequent to the military intervention in Libya. There were only isolated assertions that the NTC was a 'puppet' government,[47] although it may have been that the presumption of subordination was rebutted in that case.[48] In any event, the assertion by one commentator that 'foreign intervention . . ., even where lawful, vitiates the significance of effective control'[49] accords too much weight to intervention in relation to the enjoyment of governmental status. It is simply that a rebuttable presumption of subordination applies in respect of 'unconstitutional' ostensible governments which come to power in consequence of the use of force and perhaps only if the use of force is unlawful. An 'unconstitutional' ostensible government is not precluded from enjoying governmental status as a result of its having come to power in consequence of foreign intervention.[50]

As for the claim that the presumption of subordination 'may apply' to an ostensible government which is established pursuant to the threat of force,[51] there is little practice to indicate whether or not the presumption of subordination applies to an ostensible government which is established in consequence of a threat of the use of force.

Perhaps distinct from a claimant coming to power during belligerent occupation is a claimant which has 'good title to supreme authority, by subjugation'.[52] In such a case, 'substantial external domination may not be regarded as "foreign" '.[53] A notable example in this regard may be the claim by the Allied Powers with respect to Germany at the end of the Second World War.[54] The 'unconditional surrender' by Germany to the Allied Powers might have removed the Allied Control Council from the scope of application of the presumption of subordination of certain ostensible governments. In any event, this ostensible government was not deemed to be a 'puppet' government of Germany.[55]

[45] See also Brownlie (n 16) 210; Crawford (n 35) 132 (on the use by Crawford of the term 'entities' to refer to both ostensible states and governments, see ibid, 80); Marek (n 32) 65–6; Foakes (n 38) 51.

[46] But see eg Crawford (n 35) 80.

[47] UNGA, 'Official Records, 66th Session, 2nd Plenary Meeting' (n 14) 7.

[48] On the rebuttal of this presumption, see nn 59–63 and the accompanying text.

[49] Roth (n 10) 415. See also Talmon (n 32) 228.

[50] But see section 4.2.2.5.3 on the distinct possibility concerning claims to governmental status which arise in consequence of the breach of an obligation arising under a peremptory norm of general international law.

[51] See Crawford (n 35) 80.

[52] See Jennings, 'Government in Commission' (1946) 23 BYIL 112, 135.

[53] Crawford (n 35) 76. See also Kelsen, 'The Legal Status of Germany According to the Declaration of Berlin' (1945) 39 AJIL 518, 518–20.

[54] Recall n 18 above.

[55] On acceptance of the governmental status of the quadripartite authority, see eg *Rex v Bottrill, ex parte Kuechenmeister* (UK, Court of Appeal of England and Wales, 30 July 1946) (1951) 13 ILR 312,

The presumption in favour of the autonomy of a claimant to governmental status is said to be rebutted where there exists '[systematic] foreign control overbearing the decision-making of the [claimant] concerned on a wide range of matters . . . on a permanent basis'.[56]

To establish the subordination of an ostensible government in respect of which the presumption of autonomy applies, it is necessary 'to overcome a formidable burden of proof, though the fact that an entity is a puppet may be self-evident. Perhaps the most difficult situation is where an existing [*viz* 'constitutional'] government remains in power during a period of foreign occupation in time of war.'[57] That said, the absence of autonomy was the basis of the eventual derecognition of the Vichy government as the government of France. In Canada's view, for example,

> [t]he fact that the men who have been in nominal control of the Government of France have ordered the armed forces of France to offer resistance to military forces of the United Nations set to assist in the liberation of France from Nazi domination makes it perfectly clear that there no longer exists in France a government that has any effective independence existence—in other words, that there no longer exists in France a legal or constitutional government . . . but only a German puppet government. In these circumstances the Canadian Government has ceased to recognize the present Government at Vichy as being the *de jure* Government of France.[58]

The autonomy of an ostensible government in respect of which the presumption of subordination applies is perhaps most readily apparent where that ostensible government directs the exercise of authority over a state's territory and population after the force pursuant to which or the occupation under which it came to power has ended. For example, 'having regard to the completion of the withdrawal of Vietnamese forces from Cambodia', the European Parliament 'call[ed] upon all EEC Member States to recognise the *de facto* Government of Cambodia'.[59]

313–14. See further 'Exchange of Notes between the Government of the United Kingdom and the Spanish Government for the Recognition of the Assumption by the Allied Control Council of Powers of Disposal in regard to German Enemy Assets in Spain' (letters exchanged and agreement entered into force 28 October 1946) 147 BFSP 1058; *Clement v Agent Judiciaire du Trésor Public* (France, Court of Appeal of Paris, 10 February 1961) (1970) 41 ILR 478, 479–80.

[56] Crawford (n 35) 85–6 (emphasis removed, quoting Brownlie, *Principles of Public International Law* (2nd edn, OUP 1973) 76).

[57] Crawford (n 35) 86 (footnote omitted).

[58] See DCER [1943] vol IX, 19, 20–1.

[59] European Parliament, 'Resolution on Cambodia', 23 November 1989, OJ C 323/101–102, recital C, §9. See also 'Australian Practice in International Law 1978–1980' (1983) 8 AYIL 253, 273, 274. See, more generally, *Charles J Jansen v Mexico* (1868) in Moore (ed), *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol 3 (US Government Printing Office, 1898) 2902, 2927; Warbrick, 'Kampuchea: Representation and Recognition' (1981) 30 ICLQ 234, 245; Talmon (n 32) 182, n 363; Marek (n 32) 113.

It appears that the autonomy of an ostensible government may be established sooner, especially where that claimant is able to maintain its authority over the state's territory and population without reliance on foreign military assistance. Notable in this regard is the distinction in treatment between the ostensible government of Uganda, which came to power subsequent to Tanzania's intervention, and the Heng Samrin regime, which came to power subsequent to Vietnam's intervention. Only the former was generally considered to enjoy governmental status, apparently on the basis that only the latter 'would not . . . survive without the support of [foreign] armed forces'.[60]

A claimant in respect of which the presumption of subordination applies may be autonomous even without establishing that that claimant can itself maintain its authority over the state's territory and population. The UNSC's apparent determination that the GCI comprised the government of Iraq[61] despite having been established during the occupation of Iraq by the Coalition Provisional Authority is a possible example. The establishment of the GCI pursuant to an internationally-facilitated political process[62] might have been relevant to the GCI's apparent satisfaction of the requirement of autonomy.

Where the presumption of subordination applies in respect of a specific claimant, the existence of that claimant as an autochthonous political movement prior to the occupation under which or the force subsequent to which it claimed governmental status might not be sufficient to rebut the presumption of subordination. The non-recognition and denial of governmental status to the ostensible government acting under Heng Samrin's leadership demonstrates this point.[63]

Whether an ostensible government is autonomous is ultimately a question of 'political fact'.[64] As such, there might not always be a clear answer to this question.[65]

[60] See HR Debs, 22 November 1979, vol 116, 3506 (question No 4917) (Australia). For a similar approach in respect of other ostensible governments, see eg UNGA, 'Official Records, 36th Session, 103rd Plenary Meeting' (17 December 1981) UN Doc A/36/PV.103, §99 (Germany); Marston (ed), 'UKMIL' (1985) 56 BYIL 363, 387, 389; UNSC, 'Official Records, 1974th Meeting' (22 November 1976) UN Doc S/PV.1974, §205 (USA). See further Brownlie (n 16) 210–11; Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815–1995* (Macmillan 1997) 77–80; Jennings and Watts (n 10) 151–2, §45, including the references contained therein. On the denial of governmental status to the Heng Samrin regime, see n 63 below.

[61] UNSC res 1511 (16 October 2003) UN Doc S/RES/1511, §4. On the possible evidential value of the UNSC's practice to the identification of customary international law, see chapter 3, n 279.

[62] See eg UNSC res 1483 (22 May 2003) UN Doc S/RES/1483, §8(c). See also 'Report of the Secretary-General Pursuant to Paragraph 24 of Security Council Resolution 1483 (2003)' (17 July 2003) UN Doc S/2003/715, §24.

[63] On denial of the governmental status of this claimant, recall n 35 above. See also UNGA, 'Official Records, 35th Session, 35th Plenary Meeting' (13 October 1980) UN Doc A/35/PV.35, §33 (Nepal), §§70–1 (Japan), §90 (Pakistan), §§101–2 (Thailand), §107 (Indonesia), §120 (Senegal), §130 (Zaire), §143 (China), §§205–6 (Philippines), §240 (Canada), §253 (USA).

[64] Crawford (n 35) 72. On the importance of considering each case on its merits, see also Marek (n 32) 66.

[65] See also Talmon (n 10) 519. For the possibility that the autonomy of a particular claimant is unclear, see eg UNGA, 'Credentials of Representatives to the Eleventh Session of the General Assembly: Report of the Credentials Committee' (13 February 1957) UN Doc A/3536, §9 (Netherlands).

A list of factors have been said to be 'taken into account' in determining whether or not an ostensible government is a 'puppet'.[66] But one of these factors, namely that the claimant in question is 'in important matters . . . subject to foreign direction or control', is the basis on which the subordination of an ostensible government is established. The other factors, namely that the claimant 'was established unlawfully, by the . . . use of external armed force', 'that it was imposed on, and rejected by the vast majority of the population it claimed to govern', and 'that it was staffed, especially in more important positions, by nationals of the dominant State', may be indicative of the subordinate character of an ostensible government,[67] although the presence or absence of any of these appears not to be determinative of the 'puppet' status of an ostensible government. For example, the Heng Samrin regime in Cambodia was a 'puppet' government even though it was not 'staffed, especially in more important positions, by nationals of the dominant State'. In any event, mere foreign influence over the decisions of an ostensible government does not amount to the subordination of that claimant.[68] Foreign influence over the composition of an ostensible government appears insufficient, in at least circumstances, to preclude the autonomy of that claimant.[69] Additionally, a 'parent' state (that is, a state part of whose territory a nascent state claims as its own) may influence the identity of a nascent state's government, not least because the influence is not 'foreign'. At the same time, special arrangements, such as a mandate agreement, or other factors, such as the right of the nascent state's population to self-determination, may limit the 'parent' state's discretion in this regard.[70]

4.2.2.3 'Constitutionality': Significant But Not Indispensable

Since the person who or collectivity of persons that comprises the government of a state as a matter of customary international law invariably occupies certain offices under the constitution of a state, the configuration of a state's government reflects at least part of the constitution of a state. This does not mean that only a 'constitutional'[71] claimant to governmental status may enjoy governmental status as a matter of customary international law.[72] The presumptive sovereign freedom that each state enjoys under international law to change its constitution[73] militates

[66] Crawford (n 35) 80–1.

[67] See also eg UNGA, 'Official Records, 29th Session, 2301st Plenary Meeting' (27 November 1974) UN Doc A/PV.2301, §269 (Equatorial Guinea); UNGA, 'Official Records, 36th Session, 103rd Plenary Meeting (n 60) §98 (Belgium); UNGA, 'Credentials of Representatives to the Thirty-Sixth Session of the General Assembly: First Report of the Credentials Committee' (17 September 1981) UN Doc A/36/517, §7 (China), §12 (Papua New Guinea); UNGA, 'Credentials of Representatives to the Thirty-Eighth Session of the General Assembly: First Report of the Credentials Committee' (17 October 1983) UN Doc A/38/508, §11 (USA), §14 (Indonesia).

[68] See also Crawford (n 35) 76; Talmon (n 10) 519.

[69] Recall n 62 above.

[70] See, generally, Crawford (n 35) 333–4.

[71] On the use of the term 'constitutional' within the present work, recall section 1.3.

[72] Recall section 2.2.1.

[73] Recall chapter 2, n 115.

against readily inferring any requirement that an ostensible government have a valid claim to power under the state's existing constitution in order to qualify as the government of that state as a matter of international law. This is because it is precisely by opting for an 'unconstitutional' claimant to governmental status that a state may fundamentally change its constitution.[74] Put differently, a requirement of 'constitutionality' for the enjoyment of governmental status under customary international law would restrict the presumptive sovereign freedom of each state to choose its constitution, and the existence of such a restriction ought not readily to be inferred.

Indeed, despite the occasional, usually historical indication to the contrary,[75] the continued success of certain 'unconstitutional' claims to governmental status in receiving general recognition by other states as the government of a state demonstrates that 'constitutionality' is not a requirement for the enjoyment of governmental status under customary international law.[76] Put differently, an ostensible government need not have a 'constitutional' claim to power in order to qualify as the government of a state as a matter of customary international law. Relevant examples include the government that came to power as a result of the 1994 *coup* in The Gambia and the government formed after the 1997 *coup* in the Republic of the Congo.[77] More recent examples include the change to the identity of the government of Libya in 2011, of Egypt in 2013, and of Sudan in 2019.

Customary international law has nevertheless privileged 'constitutional' claimants in excluding them from having to satisfy the requirement of effective control, an exception which historically was of practical relevance for an autonomous 'constitutional' claimant only insofar as it faced no rival claim by an autonomous 'unconstitutional' ostensible government in effective control.[78] State practice since the early 1990s demonstrates that customary international law now privileges the claim of a state's autonomous 'constitutional' ostensible government over that of any 'unconstitutional' claimant to governmental status, even one that exercises effective control, whether the 'constitutional' claimant seeks to attain or retain governmental status. Indeed, an autonomous 'constitutional' claimant to governmental status will now generally enjoy governmental status as a matter of customary international law even where there exists a rival autonomous claimant in effective control over the state's territory and population. Examples of the attainment by a 'constitutional' claimant of governmental status as a matter of customary international law in the

[74] See chapter 2, n 8 and accompanying text.

[75] See Lauterpacht (n 10) 102–3; Brown, 'The Legal Effects of Recognition' (1950) 44 AJIL 617, 621.

[76] See also UNSC, 'Official Records, 899th Meeting' (14 September 1960) UN Doc S/PV.899, §37 (Argentina); UNGA, 'Official Records, 20th Session, 877th Meeting of the Sixth Committee' (17 November 1965) UN Doc A/C.6/SR.877, §10 (Spain); Marston (ed), 'UKMIL' (1999) 70 BYIL 517, 584. See further Moore, *Digest of International Law*, vol 1 (US Government Printing Office 1906) 250; *Tinoco* (n 12) and the various sources cited in 377–8.

[77] On these and other examples, see eg Talmon (n 10) 534.

[78] See further section 4.2.2.4.1.

presence of a rival autonomous claimant which was in effective control over the state's territory and population include the attainment of governmental status by Alassane Ouattara in respect of Côte d'Ivoire and by Adama Barrow in respect of The Gambia, subsequent to the constitutionally mandated presidential election of Côte d'Ivoire in 2010 and of The Gambia in 2016, respectively.[79] One example of the retention by a 'constitutional' government of its governmental status as a matter of customary international law where there is a rival autonomous claimant in effective control over the state's territory and population is the continued acceptance of Manuel Zelaya as President of Honduras after the 2009 '*coup*'.[80] An earlier example, which, in fact, concerns the first time there was consensus as to the enjoyment of governmental status as a matter of customary international law by a state's 'constitutional' claimant after an autonomous 'unconstitutional' claimant secured effective control over that state's territory and population, relates to the identity of the government of Haiti between 1991 and 1994.[81]

The privileging of 'constitutional' claims to governmental status in this way does not undermine the presumptive sovereign freedom of each state to choose its government. Indeed, absent a fundamental change to its constitution, a state can be said to have expressed its choice of government through its existing constitution[82] and, by privileging the claim of an autonomous 'constitutional' ostensible government over the claim of an autonomous 'unconstitutional' ostensible government, customary international law privileges what is perhaps the most direct means by which a state can be deemed to have expressed its choice of government. This is one important reason—in addition to all the practice that best lends itself to a conclusion that customary international law privileges 'constitutional' claimants[83]—to favour the plausible explanation of contemporary state practice concerning the recognition of governments which reflects the preferential treatment accorded to 'constitutional' claimants over an alternative understanding of practice, for example one which suggests that there exists no objective customary international legal framework for the assessment of governmental status or that such a framework includes a requirement of representativity. These alternative understandings

[79] In respect of Côte d'Ivoire, see eg UNGA, 'Credentials of Representatives to the Sixty-Fifth Session of the General Assembly: Report of the Credentials Committee' (22 December 2010) UN Doc A/65/583/Rev.1, §7, which was approved by the UNGA res 65/237 (23 December 2010) UN Doc A/RES/65/237. On The Gambia, see eg UNSC res 2337 (19 January 2017) UN Doc S/RES/2337, §2.

[80] UNGA res 63/301 (30 June 2009) UN Doc A/RES/63/301, §§1–3.

[81] See UNGA res 46/7 (11 October 1991) UN Doc A/RES/46/7, §§1–2; UNGA res 47/20 A (24 November 1992) UN Doc A/RES/47/20, §§1–2; UNGA res 48/27 A (6 December 1993) UN Doc A/RES/48/27, §§1–3. See also UNSC res 841 (16 June 1993) UN Doc S/RES/841, §8.

[82] Cf Research Services of the German Bundestag, 'Legal Questions Concerning Recognition of the Interim President in Venezuela' (15 February 2019), available at <http://bundestag.de/resource/blob/827466/f4de0cf7eb1e74f552fb711f7d07fb76/WD-2-017-19_EN-pdf-data.pdf>, 11 for the view that the reliance on a contested interpretation of a state's constitution to recognize a specific ostensible government is 'questionable' in the light of 'the principle of non-interference'.

[83] See further 4.2.2.5.1.2.

would undermine, among other things, the presumptive sovereign freedom of each state to choose its government.[84]

The preferential treatment accorded by international law to 'constitutional' claimants does not undermine the freedoms of each state to express anew its choice of government, constitution, and political system. An 'unconstitutional' claimant to governmental status may, albeit in limited circumstances,[85] enjoy governmental status, and it is precisely by opting for an 'unconstitutional' government that a state may fundamentally change its constitution and its political system.[86]

While the privileging of an autonomous 'constitutional' claim to governmental status over any 'unconstitutional' claim to governmental status is now apparent with the existence of no clear example to the contrary since the mid-1990s,[87] it may be noteworthy that, as is not infrequently the case,[88] practice was not entirely consistent, nor was the precise nature of the change in the law clear when the change to the scope of the privilege accorded to 'constitutional' claimants first gained traction. For example, in 1992, subsequent to his assertion of authority on an 'unconstitutional' basis,[89] Alberto Fujimori of Peru continued to be recognized as President of Peru even though the Congress he sought to dissolve impeached him and elected a new head of state, as it was constitutionally permitted to do to where the president attempted improperly to dissolve Congress. The uncertainty and inconsistency in practice in the early 1990s may have contributed to the proliferation of alternative accounts of the customary international legal framework for the assessment of governmental status[90] which are less convincing in the light of both the presumption against limitations on state sovereignty and further state practice on the recognition of governments.

In what concerns the identification of a 'constitutional' claimant to governmental status, the constitution of a state may take different forms. Although it typically takes the form of a municipal 'basic law', the constitution of a state may instead, for example, take the form of an agreement between warring factions within the state. Illustratively, the Peshawar Accord of 26 April 1992 comprised at least part of the constitution of Afghanistan at that time.[91] The same can be said of the Libreville Political Agreement of 11 January 2013 as regards the constitutions of the

[84] Recall section 4.2.1. See further section 4.2.2.5.1.2.

[85] An autonomous 'unconstitutional' ostensible government may enjoy governmental status as a matter of customary international law where there exists no rival autonomous 'constitutional' claimant.

[86] See chapter 2, n 8 and accompanying text.

[87] Note that, in 2011, the political authority operating under Qadhafi's leadership may, at some point prior to the recognition of the NTC as the government of Libya, be deemed no longer to have been a claimant to governmental status. Recall section 4.2.2.1.

[88] See also Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 Hague *Recueil* 9, 66, §80.

[89] See Decree Law No 25418 of 6 April 1992.

[90] See eg Roth (n 10) 404.

[91] Available at <http://peacemaker.un.org/sites/peacemaker.un.org/files/AF_920424_PESHAWAR%20ACCORD.pdf>.

Central African Republic.[92] As another example, the Libyan Political Agreement of 17 December 2015 'was in essence a new constitutional settlement' of Libya.[93] Other forms that a state's constitution may take include an agreement between that state and one or more other states. This was the case with the General Framework Agreement for Peace in Bosnia and Herzegovina of 14 December 1995, Annex 4 of which comprised the constitution of Bosnia and Herzegovina,[94] and the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict of 1991, which reflected the constitution of Cambodia at that time.[95] The constitution of a state may also, or instead, take the form of the established practice of a state's organs.[96]

It may not always be clear whether an ostensible government qualifies as the 'constitutional' claimant to governmental status, especially where two or more rival claimants purport to be the 'constitutional' government.

Where only one claimant purports to be the 'constitutional' government of a state, a barely-plausible 'constitutional' claim that is uncontested by central organs of that state may be considered 'constitutional'. The invocation by Edvard Beneš of the 1920 Constitution of Czechoslovakia as the municipal legal basis of his authority appears to be an example in this regard. Although other authors take the view that his claim was not 'constitutional',[97] the acceptance by many states of his attainment of governmental status from 'exile', alongside the otherwise-clear difference in treatment between 'unconstitutional' and 'constitutional' ostensible 'governments-in-exile' as regards their prospect for the attainment of governmental status from 'exile',[98] suggests that many states did consider Edvard Beneš's claim to be 'constitutional'. More recent practice in respect of Mr Hadi's claim to governmental status in respect of Yemen might also be taken to suggest that a state's existing constitution may subsist in the absence of a 'constitutional' government[99] until the state fundamentally changes it. In any event, the acceptance by states of

[92] Available at <http://peaceagreements.org/viewmasterdocument/809>. See also eg UNSC res 2127 (5 December 2013) UN Doc S/RES/2127, §2.

[93] *Dr Ali Mahmoud Hassan Mohamed v Mr Abdulmagid Breish and others* [2020] EWCA Civ 637 ('*Mohamed v Breish*') §3.

[94] Attached to 'Letter Dated 29 November 1995 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General' (30 November 1995) UN Doc A/50/790–S/1995/999.

[95] Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, annexed to 'Letter Dated 30 October 1991 from the Permanent Representatives of France and Indonesia to the United Nations Addressed to the Secretary-General' (30 October 1991) UN Doc A/46/608–S/23177 ('Agreement Concerning Cambodia').

[96] Kelsen, *Pure Theory of Law* (Max Knight tr, 2nd edn, University of California Press 1967) 222; Roth (n 10) 51–2. Recall also, eg chapter 2, n 22 on the finding by the Court of Appeal of Paris that Muammar Qadhafi comprised Libya's head of state on the basis that he 'effectively and continuously' exercised certain functions.

[97] See both Marek (n 32) 313 and Oppenheimer, 'Governments and Authorities in Exile' (1942) 36 AJIL 568, 581.

[98] See n 147 below and accompanying text.

[99] Recall n 26 above and the accompanying text.

the transfer of power to Mr Pétain in respect of France in 1940[100] and to Rashad al-Alimi in respect of Yemen in 2022[101] suggests that there may be some flexibility in the treatment of the sole claimant purporting to be 'constitutional' as indeed being 'constitutional'. The acceptance of the governmental status of the Coalition Government of Democratic Kampuchea (CGDK) is a further possible example in this regard.[102]

That said, it is not necessarily the case that the only claimant purporting to have a valid claim to power under the state's existing constitution will invariably be considered 'constitutional', perhaps especially if the constitutionality of the claim is contested by one or more central organs of the state. Even without or before such contestation, the only ostensibly-'constitutional' claimant to governmental status may be 'unconstitutional'. A possible example in this regard involves the states comprising the so-called 'Lima Group', who considered 'that the electoral process that took place in Venezuela on May 20, 2018, lacked legitimacy' and therefore did 'not recognize the legitimacy of the new presidential term of Nicolas Maduro'.[103] This preceded the declaration by the National Assembly of Venezuela that Mr Maduro had 'usurped' power and the purported assumption of the presidency of Venezuela by Juan Guaidó.[104] The apparent reluctance of states to accept the governmental status of Amrullah Saleh—who, in August 2021, claimed to be 'caretaker' President of Afghanistan—might be another example.[105]

Where two or more rival claimants purport to be the 'constitutional' government on the basis of a contested election, an international mechanism for the verification or certification of the electoral results may prove useful, as was the case

[100] Recall n 38 above and the accompanying text.

[101] Recall n 27 above. On the apparent recognition of Mr al-Alimi's governmental status, see eg 'EU Ambassadors Meet President Rashad al-Alimi' (5 September 2022), available at <http://eeas.europa.eu/delegations/yemen/eu-ambassadors-meet-president-rashad-al-alimi_en?s=211>.

[102] On the formation of the CGDK, see 'Declaration of the Formation of the Coalition Government of Democratic Kampuchea' (1982) 4 CSEA 410. See also 'Letter Dated 11 September 1981 from the Permanent Representative of Democratic Kampuchea to the United Nations Addressed to the Secretary-General' (14 September 1981) UN Doc A/36/498–S/14687, Annex. On recognition of the CGDK, see eg UNGA, 'Official Records, 37th Session, 45th Plenary Meeting' (26 October 1982) UN Doc A/37/PV.45, §21 (Belgium), §27 (Federal Republic of Germany), §137 (Egypt). See also UNGA res 37/6 (28 October 1982) UN Doc A/RES/37/6, fourth unnumbered preambular paragraph, adopted by 105 votes to 23, with 20 abstentions. On recognition of governmental status by and in the context of international organizations, see section 5.4.

[103] 'Lima Group Declaration' (4 January 2019), available at <http://international.gc.ca/world-monde/international_relations-relations_internationales/latin_america-amerique_latine/2019-01-04-lima_group-groupe_lima.aspx>, §1. But recall section 2.2.1 on the different meanings of recognition, and see section 4.2.2.5.1 on the different senses in which the term 'legitimate' is used.

[104] See n 113 below.

[105] See also Paddeu and Pavlopoulos, 'Between Legitimacy and Control: The Taliban's Pursuit of Governmental Status' (*Just Security*, 7 September 2021), available at <http://justsecurity.org/78051/between-legitimacy-and-control-the-talibans-pursuit-of-governmental-status> and chapter 5, n 86 (on 'provisional' representation as not involving recognition of governmental status, see section 5.4.1.2).

in respect of the 2010 presidential election in Côte d'Ivoire.[106] Other situations, particularly those calling for complex constitutional legal analysis or an assessment of disputed incidents, may prove more difficult. Four examples further demonstrate the significance of 'constitutionality' to governmental status as a matter of customary international law while indicating that the 'constitutionality' of a claim may be unclear or contested or at least require an assessment of complex factual or legal issues.

The first example relates to the situation in Honduras when, in 2009, the incumbent president, Manuel Zelaya, was purportedly replaced by way of parliament's acceptance of a letter of resignation of disputed authenticity, following his forcible expatriation. Although there was no clear basis in the text of the Constitution of Honduras on which to find that any of these actions were 'unconstitutional', there was consensus on the 'constitutionality' of Manuel Zelaya's claim and on his governmental status from 'exile'.[107]

The second example concerns the apparent acceptance of the Ukrainian parliament's constitutional authority to declare that President Yanukovych 'has in the non-constitutional manner withdrawn from performing constitutional powers', to appoint Oleksandr Turchynov as interim President, and to resolve that presidential elections were to be held,[108] despite the absence of an explicit municipal legal basis for any such action and although neither the procedural nor the substantive constitutional conditions for the impeachment of the president were satisfied. The member states of the Council of Europe accepted the victor of the 2014 presidential election as the President of Ukraine, seemingly on the basis that the Ukrainian parliament had, in its conduct resulting in this election, acted with 'due consideration for constitutional principles',[109] although by that point, Viktor Yanukovych no longer claimed to be the President of Ukraine. Perhaps more notable is the acceptance by Lithuania and the UK of Oleksandr Turchynov's transitional government as the government of Ukraine at a time when Viktor Yanukovych still claimed to be President of Ukraine. Lithuania stated that Oleksandr Turchynov's government had been '[appointed by] the Ukrainian Rada, whose legitimacy have never and cannot be challenged . . . in accordance with the Ukrainian Constitution'.[110] According to the UK, 'an attempt to cast doubt on the legitimacy of the transitional Government in Ukraine . . . is entirely unwarranted'.[111] It was nevertheless Russia's

[106] See Special Representative of the Secretary-General for Côte d'Ivoire, 'Statement on the Certification of the Result of the Second Round of the Presidential Election Held on 28 November 2010', available at <http://peacekeeping.un.org/sites/default/files/past/unoci/documents/unoci_srsg_certification_en_03122010.pdf>.

[107] For the UNGA's response, see n 80 above.

[108] 'Plenary Meeting of the Fourth Session of the Verkhovna Rada' (22 February 2014), available at <https://www.rada.gov.ua/en/news/88480.html>.

[109] Council of Europe, res 1988 (9 April 2014), available at <http://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=20873&lang=en>, §3.

[110] UNSC, 'Official Records, 7134th Meeting' (13 March 2014) UN Doc S/PV.7134 (provisional) 16.

[111] Ibid, 7.

view that 'the legitimate legal President was overthrown and forced to leave Kyiv under the threat of physical violence'.[112]

The third example pertains to the ongoing situation in Venezuela. Nicolás Maduro retained a claim as President of Venezuela following the 2018 presidential election, even though the National Assembly rejected the result of this election with its then-President, Juan Guaidó, subsequently claiming to be interim President of Venezuela on the basis of a plausible reading of the Constitution of Venezuela.[113] The matter was complicated by the fact that the Supreme Tribunal of Justice had already declared the National Assembly to be unconstitutional, although the court itself faced a rival claim from the Supreme Tribunal of Justice 'in exile'. The situation became no less complex with the apparent end in 2020 of the constitutional term of the National Assembly over which Mr Guaidó presided and the subsequent emergence of a rival claim to the presidency of the National Assembly. Nicolás Maduro and Juan Guaidó nevertheless each enjoyed recognition by some states as President of Venezuela, seemingly on the view that the claimant being recognized is the 'constitutional' President.[114] In January 2023, the situation developed further, when the pre-2021 National Assembly dissolved Mr Guaidó's government, extended its own mandate, and conferred certain executive powers on itself, its Delegated Commission (*Comisión Delegada de la Asamblea Nacional*), and the Council of Administration and Protection of Assets (*Consejo de Administración y Protección de Activos*) it established.[115]

The fourth example relates to the rival ostensible governments of Myanmar since February 2021. Pursuant to a claim of fraud in relation to the November 2020 general election, the military proclaimed the electoral result invalid, declared a state of emergency, and purported to vest executive power in the commander-in-chief in reliance on certain provisions of the 2008 Constitution.[116] The military then formed the State Administration Council (SAC), which purports to be the government of Myanmar. By that time, hours before the electoral victors took oath

[112] Ibid, 15.

[113] See National Assembly of Venezuela, 'Acuerdo sobre la declaratoria de usurpación de la presidencia de la república por parte de Nicolas Maduro Moros y el restablecimiento de la vigencia de la constitución' (15 January 2019) 2 *Gaceta Legislativa* 4, on the basis of which Mr Guaidó subsequently claimed to be President of Venezuela. See eg 'Venezuela Opposition Leader Swears Himself in as Interim President' (*Reuters*, 23 January 2019), available at <http://reuters.com/article/us-venezuela-politics-guaido-idUSKCN1PH2AN>.

[114] See eg UNSC, 'Official Records, 8452nd Meeting' (26 January 2019) UN Doc S/PV.8452 (provisional) 27–9 for the views of Nicaragua, Cuba, and Saint Vincent and the Grenadines, on the one hand, and 32–3, 36 for the views of Paraguay, Argentina, and Chile on the other; and UNSC, 'Official Records, 8476th Meeting' (28 February 2019) UN Doc S/PV.8476 (provisional) 2, 6 for the views of South Africa and Russia, on the one hand, and the UK on the other.

[115] National Assembly of Venezuela, 'Ley de reforma del estatuto que rige la transición a la democracia para restablecer la vigencia de la constitución de la repúbica bolivariana de Venezuela' (3 January 2023) 66 *Gaceta Legislativa* 2, 6–8 (arts 7–9, 11).

[116] See eg 'Statement from Myanmar Military on State of Emergency' (*Reuters*, 1 February 2021), available at <http://reuters.com/article/us-myanmar-politics-military-text-idUSKBN2A11A2>.

as members of parliament, the military had arrested a number of individuals belonging to the NLD, the then-ruling party which had won enough seats to form also the post-2020 government. In response, a group of the elected individuals formed the Committee Representing Pyidaungsu Hluttaw (CRPH). The CRPH first reportedly claimed to have extended the term of the State Counsellor for five years, before ostensibly replacing the 2008 Constitution with an Interim Constitutional Arrangement,[117] on the basis of which the National Unity Government (NUG) was formed 'with the authority bestowed by the people's mandate resultant of all parties' democratic election held in 2020'.[118] With the military's actions considered 'unconstitutional' by a number of states,[119] and the NUG not claiming power on the basis of the existing constitution of the state, there is no apparent 'constitutional' claimant. The limited recognition by states of either ostensible government as the government of Myanmar[120] is thus unsurprising, given also that neither claimant appears to exercise effective control, as is necessary for the attainment of governmental status by an 'unconstitutional' ostensible government.[121]

4.2.2.4 Effective Control, Sometimes

4.2.2.4.1 Applicability and significance of effective control

An 'unconstitutional' claimant to governmental status in respect of an existing state[122] must exercise effective control over the territory and population of that state in order to attain governmental status.[123]

[117] See Part II of the Federal Democracy Charter (2021), available at <http://crphmyanmar.org/wp-content/uploads/2021/04/Federal-Democracy-Charter-English.pdf>.

[118] The announcement is available at CRPH, 'Announcement Number 23/2021: Formation of the National Unity Government' (16 April 2021), available at <http://burmakommitten.org/wp-content/uploads/2021/04/CRPH-Formation-of-National-Unity-Government.pdf>.

[119] See eg UNGA, 'Official Records, 75th Session, 83rd Plenary Meeting' (18 June 2021) UN Doc A/75/PV.83, 7 (Bangladesh), 14 (Costa Rica), 15 (Ukraine).

[120] On the avoidance of recognition of any claimant as the government of Myanmar, see chapter 3, n 128 and chapter 5, nn 21 and 86, including the accompanying text. See also European Parliament, 'Resolution on Myanmar, One Year after the Coup', 10 March 2022, OJ C 347/191, 195, §2 on the call upon 'the Tatmadaw to fully respect the outcome of the democratic elections of November 2020 [and to] reinstate the civilian government' and on the support for 'the CRPH, the NUG and the National Unity Consultative Council (NUCC) as the only legitimate representatives of the democratic wishes of the people of Myanmar'. (On the distinction between recognition as a government and recognition in other capacities, recall section 2.2.2.)

[121] See further section 4.2.2.4.1.

[122] As for an emerging state, the requirement of 'effective control' for governmental status is varied in accordance with the criterion of 'effective government' applicable in respect of statehood (on this latter criterion, see Crawford (n 35) 55–61). For example, where the 'parent' state has conferred independence on the local authorities of the nascent state, the requirement of 'government' for the purposes of statehood is applied more loosely, in which case the criterion of effective control for governmental status is satisfied more readily.

[123] See also Marek (n 32) 57–9; *Tinoco* (n 12); Lauterpacht (n 10) 88; Blix (n 32) 639–43; HL Debs, 28 April 1980, vol 408, col 1121–2WA; Marston (ed), 'UKMIL' (2000) 70 BYIL 517, 584. See also UNSC, 'Official Records, 899th Meeting' (n 76) §37 (Argentina); Siekmann, 'Netherlands State Practice for the Parliamentary Year 1989–1990' (1991) 22 NYIL 237, 237–8; Jimenez de Aréchaga, *Derecho Internacional Publico*, vol II (Fundación de Cultura Universitaria 1995) 57.

Whether 'constitutional' or 'unconstitutional', no ostensible government of an existing state must exercise effective control in order to retain governmental status as a matter of customary international law. An ostensible government that already enjoys governmental status as a matter of customary international law may retain this status without exercising any control over the territory and population of the state whose government it comprises and without retaining a physical presence in the territory of that state. In other words, a presumption operates in favour of incumbent governments.[124] For example, during the Spanish Civil War, most states continued to recognize the republican claimant as the government of Spain, even when nationalist forces controlled the greater part of Spain's territory and population, before the latter secured effective control over the territory and population of Spain.[125] Also, it is at least in part on the basis of this presumption that the possession by a state of a so-called 'government-in-exile' has historically been a not-infrequent phenomenon.[126]

Moreover, the criterion of effective control does not apply in respect of 'constitutional' claimants. This appears to have been the case long before the 1990s,[127] given changes to the composition of several 'constitutional' 'governments-in-exile' and other 'constitutional' governments not in effective control.[128] In other words, it appears to have been historically possible for a 'constitutional' ostensible government to attain governmental status as a matter of customary international law without first securing effective control over the state's territory and population, including from 'exile'.

The suggestion that, at least historically, the governmental status as a matter of customary international law of a 'government-in-exile' has depended instead on the 'international illegality of the government *in situ*' and on the 'representative character' of the 'government-in-exile'[129] does not withstand scrutiny. At least five points may be made in this regard.

First, the application of certain customary international legal criteria for governmental status to specific factual contexts might mistakenly be seen to reflect a requirement concerning the 'international illegality of the government *in situ*' for

[124] See, generally, Lauterpacht (n 10) 93–7. See also Siekmann (n 123) 238.

[125] See also Lauterpacht (n 10) 93–4.

[126] See the examples mentioned in Lauterpacht (n 10) 91 n I; Oppenheimer (n 97). See, generally, Talmon (n 32).

[127] This aspect of the customary international legal framework appears frequently to have been overlooked in the literature. See eg Crawford (n 35) 86, Talmon (n 10) 526, and n 147 below on the treatment of a 'constitutional' government as an incumbent government. See also Chen, *The International Law of Recognition, With Special Reference to the Practice in Great Britain and the United States* (Praeger 1951) 273. But see Blix (n 32) 641, who may be seen as acknowledging that the requirement of effective control applies only to 'revolutionary régime[s]' (*viz* 'unconstitutional' ostensible governments).

[128] See eg the changes to the composition of various governments-in-exile during the Second World War, including those of Belgium, Poland, Yugoslavia, and Greece. On some of these 'governments-in-exile' and others, see eg Oppenheimer (n 97) 569–70. See also Lauterpacht (n 10) 91 n I.

[129] Talmon (n 10) 523, 536. See also Redaelli, *Intervention in Civil Wars: Effectiveness, Legitimacy, and Human Rights* (Hart 2021) 137–8.

the enjoyment of governmental status by an ostensible 'government-in-exile'. More specifically, this misconception might arise from the application of the presumption of subordination in respect of an 'unconstitutional' ostensible government established during the belligerent occupation of or subsequent to the unlawful use of force against a state,[130] coupled with the fact that in such circumstances an incumbent government or a 'constitutional' claimant to governmental status may enjoy governmental status from 'exile', at least insofar as there was no rival autonomous claimant exercising effective control over the state's territory and population. The acknowledgement that the 'recognition as the state's government should be denied to an effective government *in situ* on the grounds of its illegal creation only as long as the illegality lasts, that is, as long as it affects the government's . . . independence'[131] further supports the view that the enjoyment of governmental status by an ostensible 'government-in-exile' historically resulted from the subordinate character of the ostensible government '*in situ*', not its 'international illegality'.[132]

Secondly, that it is not the 'illegality of the government *in situ*' that allows an ostensible 'government-in-exile' to enjoy governmental status as a matter of customary international law is apparent from those cases in which a state possessed a 'government-in-exile' as a matter of customary international law at a time when the conduct that led to the 'exile' or prevented the return from that 'exile' of the 'government-in-exile' was not internationally unlawful. Examples in this regard include the government of Belgium (1914–18) and the government of Serbia (1915–18).[133] This contributes *a fortiori* in dismissing any significance that has been accorded to the peremptory character of the obligation whose violation is apparently necessary for an ostensible 'government-in-exile' to enjoy governmental status as a matter of customary international law.[134] The emergence of peremptory norms as a part of positive international law postdates the prohibition on the conduct which has been considered relevant to the success of certain claims to governmental status by 'governments-in-exile'.

Thirdly, the existence of a requirement of a 'representative character' for the enjoyment of governmental status by an ostensible 'government-in-exile' does not necessarily follow from the references by states, in the context of decisions to recognize or deny governmental status, to whether an ostensible government had a representative character. Such references may instead relate to the view that the government of a state is the presumptive representative of the people of that state[135]

[130] Recall section 4.2.2.2.

[131] Talmon (n 10) 528.

[132] On the broader range of circumstances in which a 'government-in-exile' may enjoy governmental status as a matter of present-day customary international law, all unrelated to the 'international illegality of the government *in situ*', recall section 4.2.2.3.

[133] See eg Talmon (n 32) 286–7.

[134] Talmon (n 10) 522–3.

[135] See chapter 3, n 253 and accompanying text. Accordingly, a reference to an ostensible government having or not having a representative character might indicate whether or not that claimant is deemed to enjoy governmental status.

or to the 'constitutionality' of a claim to governmental status. Such plausible understanding of practice is to be preferred in the light of the presumptive sovereign freedoms of each state to choose its government and its political system.[136] Indeed, the author who suggests that representativity of an ostensible 'government-in-exile' is relevant to its enjoyment of governmental status accepts that the 'legal [*viz* 'constitutional'] successor of the last recognized government *in situ*' benefits from a presumption of representativity[137] and that 'Governments have been reluctant to confer the title of government in exile on an exile group . . . that lacks governmental authority'.[138] This accords with the view that the requirement of effective control does not and has not historically applied to 'constitutional' claimants.[139]

Fourthly, the fact that no 'unconstitutional' ostensible government has attained governmental status from 'exile', at least not without directing armed forces present in the territory of the state, further suggests that it is only on the basis of either the presumption in favour of incumbent governments or the exception to the requirement of effective control in respect of 'constitutional' ostensible governments that an ostensible government has enjoyed governmental status from 'exile'. Edvard Beneš's claim to governmental status in 1940, to which regard has been had in support of the possibility that an 'unconstitutional' ostensible government may attain governmental status from 'exile',[140] appears to have been 'constitutional'.[141] As for the examples involving the recognition of 'unconstitutional' ostensible 'governments-in-exile' of Algeria, of Angola, and of the Saharan Arab Democratic Republic (SADR),[142] the group of persons purporting to be the government of each putative state directed armed forces present in the territory of the respective putative state. It may also be relevant that each of those claims to governmental status was connected with a claim to statehood, as a result of which the application of the requirement of effective control may have varied.[143] Moreover, the statehood of the SADR and, consequently, the governmental status of its ostensible government remains unsettled.[144] Neither the mere existence of 'plans to establish in exile and to recognize governments'[145] nor the recognition by only a very small number of states of the attainment of governmental status by an ostensible 'government-in-exile'[146] provides much evidence that an 'unconstitutional' government may attain

[136] See further section 4.2.2.5.1.2.
[137] Talmon (n 10) 512, 515.
[138] Ibid, 516, quoting from Shain, *The Frontier of Loyalty: Political Exiles in the Age of the Nation-State* (Wesleyan University Press 1989) 116.
[139] See the text accompanying n 127 above.
[140] Talmon (n 10) 515–16.
[141] See n 98 above and accompanying text.
[142] See Talmon (n 10) 515.
[143] See n 122 above.
[144] See eg UNGA res 77/133 (16 December 2022) UN Doc A/RES/77/133.
[145] Talmon (n 10) 515–16.
[146] Ibid, 516 in respect of the 'Afghan Interim Government'.

governmental status as a matter of customary international law from 'exile'. As another commentator has noted, the

> difference between the continuing [or 'constitutional'] exiled governments which merely transferred their seat abroad . . . and the governments newly formed in exile after a period of complete break in governmental continuity . . . is clearly illustrated by the uncontested standing of the exiled constitutional governments of the Second World War, as contrasted with the precarious position of the Czechoslovak Government in exile and, to a much stronger degree, the French National Committee.[147]

Fifthly, situations which have been suggested to involve derecognition of a 'government-in-exile' on the grounds of '[t]he presumption of representativeness [being] refuted'[148] can be explained on other grounds, such as the existence of an autonomous claimant in effective control that rivalled the existing government operating from 'exile', which would historically have resulted in the enjoyment of governmental status by the autonomous claimant in effective control.[149] This may well have been the case with respect to both Montenegro in 1918 and Poland in 1945.

Regardless of the historical position, state practice concerning the recognition of governments since the early 1990s makes clear the present-day inapplicability of the requirement of effective control in respect of 'constitutional' claimants under customary international law. Such a claimant may attain governmental status without ever having exercised effective control over the state's territory and population.[150] The main difference between the historical position and present-day customary international law as regards the criterion of effective control appears to be the weight accorded to it for a successful claim to governmental status.

On account of either the presumption in favour of incumbent governments or the exception to the requirement of effective control in respect of 'constitutional' claimants, an autonomous ostensible government not in effective control of the state's territory and population could historically enjoy governmental status as a matter of customary international law only insofar as there was no rival autonomous claimant exercising effective control over the territory and population of the

[147] Marek (n 32) 99 (reference omitted).

[148] Talmon (n 10) 514.

[149] On this possibility more generally, see eg n 151 below and accompanying text.

[150] On the privilege accorded to 'constitutional' governments as a matter of present-day customary international law, recall section 4.2.2.3. For the occasional view to the contrary, see eg ICC, 'The Determination of the Office of the Prosecutor on the Communication Received in Relation to Egypt' (Press release, 8 May 2014) (ICC-OTP-20130508-PR1003), available at <http://icc-cpi.int/Pages/item.aspx?name=pr1003>, §4; *Valores Mundiales, SL and Consorcio Andino SL v Bolivarian Republic of Venezuela* (ICSID Case No ARB/13/11), *Annulment Proceeding, Procedural Resolution No 2* (29 August 2019) §42; OASPC (Permanent Council of the Organization of American States), 'Acta de la Sesión Extraordinaria celebrada el 9 de abril de 2019' (9 April 2019) OEA/Ser.G CP/ACTA 2217/19, 18 (Antigua and Barbuda).

state. Once a rival autonomous claimant secured effective control over the state's territory and population, it would attain governmental status. For example, once nationalist forces were in effective control of Spain's territory and population, most states treated the ostensible government operating under Francisco Franco's leadership, not the republican ostensible 'government-in-exile', as the government of Spain.[151] While there is little practice directly on this point, the same would appear to be true where a rival 'puppet' claimant in effective control established its autonomy. Although the situation in Cambodia was resolved through the establishment of a transitional government formed on an inclusive basis,[152] it may be relevant that once Vietnam withdrew its troops from Cambodia, the European Parliament 'call[ed] upon all EEC Member States to recognize the *de facto* Government of Cambodia',[153] an ostensible government which, having been a 'puppet' government, did not previously enjoy governmental status. Additionally, in an earlier situation involving the contested identity of Cambodia's government, the states which supported the claim to governmental status by the Royal Government of the National Union of Kampuchea (GRUNK) asserted that the Lon Nol regime was a 'puppet' government, dependent on foreign support.[154] This could be taken to suggest that the Lon Nol regime, in the view of those states, might otherwise have qualified for governmental status as a matter of customary international law.

In contrast, as a matter of present-day customary international law an 'unconstitutional' ostensible government will not enjoy governmental status, even if it exercises effective control, as long as a rival 'constitutional' claimant to governmental status exists.[155] Put differently, the contemporary privilege accorded by international law to autonomous 'constitutional' ostensible governments limits the sufficiency of autonomous effective control for a successful claim to governmental status.[156] An autonomous 'constitutional' claimant to governmental status will now

[151] Cf Talmon (n 32) 298.

[152] See Framework for a Comprehensive Political Settlement of the Cambodia Conflict in 'Letter Dated 30 August 1990 from the Permanent Representatives of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the Secretary-General' (31 August 1990) UN Doc A/45/472, Appendix, section 1, §§1–4, 7.

[153] European Parliament (n 59).

[154] See eg UNGA, 'Official Records, 29th Session, 2244th Plenary Meeting' (26 September 1974) UN Doc A/PV.2244, §56 (Equatorial Guinea); UNGA, 'Official Records, 29th Session, 2298th Plenary Meeting' (26 November 1974) UN Doc A/PV.2298, §27 (Somalia), §§53–4 (Dahomey); UNGA, 'Official Records, 29th Session, 2301st Plenary Meeting' (n 67) §37 (Somalia). But see also n 177 below and the accompanying text.

[155] On the privilege accorded to 'constitutional' governments as a matter of present-day customary international law, recall section 4.2.2.3.

[156] For the sake of comprehensiveness, the privilege accorded to 'constitutional' claimants limits also the extent to which the presumption in favour of incumbent governments may apply. Recall eg n 79 above on the practice in relation to Côte d'Ivoire in 2010 and The Gambia in 2016.

enjoy governmental status as a matter of customary international law even where an autonomous rival claimant exercises effective control over the state.

4.2.2.4.2 Assessing effective control

In accordance with the presumptive sovereign freedom of each state to choose its political system and its constitution,[157] effective control—that is, it the effective direction of the exercise of public authority—can in principle be established and maintained through any form of government and any institutional arrangement. In order to demonstrate the exercise of such control, regard can nevertheless be had to the existence and effective functioning of those organs of state through which a government typically directs the exercise of public authority over a state's territory and population.[158] Regard can be had also to the existence and effective functioning of other common central organs of state (for example, a legislature and municipal courts) in a manner that demonstrates the acceptance of the assertion by the ostensible government of executive authority.[159]

To be effective, the exercise of public authority must, at least where there is more than one claimant to governmental status in respect of the same state, extend over a substantial majority of the territory and population of that state.[160] Although formally unnecessary in order to be 'effective', the direction by an ostensible government of the exercise of public authority over the territory and population of a state's capital may enable that claimant to exercise sufficiently-effective control for the attainment of governmental status as a matter of customary international law since the capital is where the central organs of state are usually located and since a significant portion of a state's population often resides there. Control over the capital alone, however, is unlikely to be sufficiently effective for the attainment of governmental status as a matter of customary international law by an 'unconstitutional' claimant.[161]

To be effective, at least where there is more than one claimant to governmental status, control must be consolidated. Ephemeral control will not suffice.[162] In other words, for an ostensible government to satisfy the requirement of effective control, its exercise of public authority must, at least where there are two or more

[157] Recall chapter 2, nn 114–15. On the criterion of effective control not undermining these freedoms, see section 4.2.2.4.3.

[158] Note that, '[b]eyond a certain limit, what is regarded as [an exercise of public authority] depends on the particular society [*viz* state], its history and traditions' (ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts' in Ybk ILC [2001] vol II(2), 31, 43 (art 5, comment 6)).

[159] See also *Tinoco* (n 12) 379; *Government of the Republic of Spain v SS 'Arantzazu Mendi'*, 264–5.

[160] See also *George W Hopkins (USA) v United Mexican States* (1926) IV UNRIAA 41, 45; UNGA, 'Official Records, 29th Session, 2301st Plenary Meeting' (n 67) §205 (Barbados); Lauterpacht (n 10) 88; Blix (n 32) 641.

[161] Compare Blix (n 32) 641–2; Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People' (2013) 12 CJIL 219, 232–3.

[162] See *Cuculla v Mexico*, Mexico–US Claims Commission, reproduced in (1868) in Moore (n 59) 2873, 2877; Blix (n 32) 642.

rival claimants to governmental status, have a 'reasonable prospect of permanence and stability',[163] it being understood that a government can never guarantee its permanence.

The extent to which the state's population habitually obeys the assertion of authority by an ostensible government might be indicative of that claimant's prospects of permanence and stability.[164] Widespread opposition to a claimant's assertion of public authority may raise doubt as to the prospect of the latter's permanence and stability, even though the exercise of effective control does not require the popular approval of the ostensible government's claim to authority.[165] This might be at least part[166] of the reason why, since 2021, neither the Taliban in Afghanistan nor the SAC in Myanmar have received widespread acceptance of their respective claims to governmental status.[167]

Perhaps because of the evidential value that the habitual obedience of the state's population might have in relation to the effectiveness of an ostensible government's control, the allegiance of a state's population to an ostensible government might be indicative of the effectiveness of control by that claimant.[168] Not entirely dissimilarly, the requirement of effective control may be applied more loosely in respect of an ostensible government which is composed on an inclusive basis, as might be the case, for example, with an ostensible government that is composed by agreement of the main, if not all, persons or political movements previously competing for governmental status. The habitual obedience of a state's population to the assertion of authority by such a government might be presumed and its prospect of permanence and stability might be inferred from its inclusive character. Relevant examples in this regard might include the recognition of the Supreme National Council as Cambodia's government,[169] of the government of Afghanistan that was formed in accordance with the Peshawar Accord in 1992,[170] and of the GNA as the government of Libya, which was formed under the Libyan Political Agreement of 2015.[171]

[163] Jennings and Watts (n 10) 150. See also HL Debs, 28 April 1980, vol 408, col 1121–2WA; *Tinoco* (n 12) 378–80; Lauterpacht (n 10) 99.

[164] See Blix (n 32) 642–3; Roth (n 10) 138–41 and citations therein. See also Aréchaga (n 123); Lauterpacht (n 10) 88.

[165] See also Lauterpacht (n 10) 115. See further section 4.2.2.5.1.2. Recall also section 4.2.2.4.1.

[166] As regards other possible reasons for the reluctance to accept the governmental status of certain ostensible governments, recall section 3.4.1.

[167] In relation to Afghanistan, notable in this regard are the groups actively opposing Taliban rule, including the National Resistance Front, the Afghanistan Freedom Front, and the Afghanistan Islamic National and Liberation Movement. As for Myanmar, the SAC, for its part, faces widespread opposition to its rule.

[168] See also UNGA, 'Official Records, 29th Session, 2301st Plenary Meeting' (n 67) §40 (Somalia); *Western Sahara, Advisory Opinion* [1975] ICJ Rep 12, 44, §95, albeit in a different context.

[169] See eg Agreement Concerning Cambodia (n 95) art 3.

[170] See eg UNGA, 'Credentials of Representatives to the Forty-Ninth Session of the General Assembly: Second Report of the Credentials Committee' (9 December 1994) UN Doc A/49/517/Add.1, §§4–7.

[171] See 'Ministerial Meeting in Paris (France + Germany + United Kingdom + Italy + USA + EU): Statement on Libya' (13 March 2016), available at <http://diplomatie.gouv.fr/IMG/pdf/statement_on_libya_13th_march_cle82f4c6.pdf>.

Alternatively or additionally, the recognition of the governmental status of some inclusive ostensible governments might indicate that less extensive and less consolidated control may satisfy the requirement of effective control where there is only one claimant to governmental status in respect of a state. Perhaps the state's choice of its government can more readily be inferred in such circumstances. For example, the NTC was widely recognized as Libya's government at a time when 'a number of cities remain[ed] outside of the control of the NTC, and military action continue[d]'.[172] It is nevertheless unclear whether, in each of these cases the recognition of governmental status related only to the absence of any rival claim to governmental status rather than also or instead to the inclusive character of the ostensible governments in question. Indeed, in recognizing the governmental status of the NTC, at least certain states apparently took note of the fact that the NTC was operating 'through an inclusive political process'.[173]

In any event, neither the existence of only one claimant nor the existence of a claimant composed on an inclusive basis suggests that the qualification by an ostensible government for governmental status as a matter of customary international law may be based 'on the aspirations of the international community that effective control and free and fair elections will result from a negotiated government that includes all or most parties to the conflict'.[174] Indeed, 'free and fair elections' are in themselves of no relevance to the enjoyment of governmental status.[175]

As a separate consideration, effective control might be more readily satisfied where an ostensible government usurps control of the existing institutional machinery of a state as compared to where a claimant seeks to establish entirely novel institutions.[176] That said, the satisfaction of the requirement of effective control is ultimately dependent on the facts of each situation. The precise degree of control exercised by a claimant to governmental status or whether such control is sufficiently effective may be unclear. For example, at least part of the disagreement over the identity of the government of the Khmer Republic/Kampuchea arose from a difference in views over the extent of control exercised by the Lon Nol regime, on the one hand, and the GRUNK on the other.[177] More recently, Saint Vincent and the Grenadines raised a question as to both the effectiveness of the control exercised by the NTC and the information available in this regard.[178] As one commentator has

[172] UNGA, 'Official Records, 66th Session, 2nd Plenary Meeting' (n 14) 14. On recognition of the NTC, see n 23 above.

[173] See eg the UK Foreign Secretary's statement of 27 July 2011 in Hartmann, Shah, and Warbrick (eds), 'UKMIL' (2012) 82 BYIL 676, 742.

[174] Cf De Wet, *Military Assistance on Request and the Use of Force* (OUP 2020) 67–8.

[175] See section 4.2.2.5.1.2.

[176] *Georges Pinson (France) v United Mexican States* (1928) V UNRIAA 327, 422–4.

[177] See eg UNGA, 'Official Records, 29th Session, 2301st Plenary Meeting' (n 67) §108 (Mali), §213 (Zambia), §244 (Sudan). Cf ibid, §48 (Australia), §172 (UK), §§190–1 (Barbados), §§281–2 (Indonesia). But see also n 154 above and the accompanying text.

[178] UNGA, 'Official Records, 66th Session, 2nd Plenary Meeting' (n 14) 14 (Saint Vincent and the Grenadines).

put it, it is 'hard to quantify' stability.[179] The case of the Interim Government of Somalia, which was established in 1991 and which received some but not general recognition as the government of Somalia[180] may suggest the existence of uncertainty as regards the extent to which the threshold for effective control is lowered in respect of an ostensible government which is formed on an inclusive basis or in respect of the sole claimant to governmental status of a state.

4.2.2.4.3 Relevance of effective control to the state's freedom to choose its government

It has been suggested that the requirement of effective control operates as a 'presumptive guide' to ascertaining the 'popular will' of the population of a state.[181] While the exercise of effective control might indeed reflect the population's submission to the claimant's direction of the exercise of public authority within the state,[182] the presumption against limitations on state sovereignty favours an understanding of effective control as a means of ascertaining the state's choice of government, not of ascertaining the 'popular will' of a state's population.[183]

Indeed, the criterion of effective control is to be understood as comprising part of a generic basis for determining that a state has chosen a specific political system, a particular disposal of public power as its constitution, and an 'unconstitutional' claimant to governmental status as its government.[184] This explains why customary international law does not require and appears historically not to have required the exercise of effective control for the attainment, let alone the retention, of governmental status by a 'constitutional' claimant.[185] The generic criterion of effective control is relevant only in respect of an ostensible government which cannot be taken to reflect the state's choice of government as expressed in a more direct way, namely through its constitution.

The change in the customary international legal framework for the enjoyment of governmental status since the early 1990s—pursuant to which autonomous effective control no longer suffices for a successful claim to governmental status where there exists a rival autonomous 'constitutional' claim[186]—reflects the further prioritization by international law of what is perhaps the most direct means by which a state may express its choice of government. Since the early 1990s, customary international law defers to the generic criterion of effective control only

[179] Blix (n 32) 642.

[180] For the apparent recognition of this ostensible government, see eg UNSC, 'Official Records, 3060th Meeting' (17 March 1992) UN Doc S/PV.3060, 2. (On the recognition of governmental status by international organizations, see sections 5.4.1–5.4.2.) But see also eg *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA and others* [1993] QB 54, 67–8.

[181] Roth (n 10) 419.

[182] See n 164 above and accompanying text.

[183] See further 4.2.2.5.1.2 on the absence of a clear indication to the contrary, including in the light of state practice and the right of peoples to self-determination.

[184] See also section 4.2.1.

[185] Recall section 4.2.2.4.1.

[186] Ibid.

in the absence of an autonomous 'constitutional' claimant; a claimant would reflect the state's choice as expressed more directly by it. Historically, the exercise of effective control by an autonomous 'unconstitutional' claimant was taken as an indication that a state had chosen fundamentally to change its constitution and to have an 'unconstitutional' government, even in the presence of a rival autonomous 'constitutional' claim.[187] In the presence of an autonomous 'constitutional' claimant, a state is no longer deemed to have opted for a fundamental change to its constitution and for an 'unconstitutional' government. As a matter of present-day customary international law, a state is taken to have opted for such changes only where an autonomous 'unconstitutional' claimant exercises effective control in the absence of a rival autonomous 'constitutional' claim.[188]

4.2.2.5 Other Considerations?

4.2.2.5.1 A 'legitimate' basis

The term 'legitimate' in characterizing an ostensible government has been, and continues to be, used in several different senses. It may be used to refer to an ostensible government that enjoys or that is seen by the person or entity using the term to enjoy governmental status as a matter of customary international law.[189] The term may instead be used to refer to the 'constitutionality' of a claim to governmental status.[190] The term 'legitimate' and its antonym are sometimes also used in relation to an ostensible government as a means of expressing approval or disapproval of the basis of its claim to power or of its conduct without this necessarily encompassing a view as to the 'constitutionality' of, or the qualification for governmental status by, the claimant in question.[191] Given the different senses in which the term 'legitimate' is used, care must be taken as regards the evidential value assigned to practice that refers to the 'legitimacy' or 'illegitimacy' of an ostensible

[187] Recall chapter 2, n 8 and section 4.2.2.3.

[188] Recall section 4.2.2.4.1.

[189] See eg UNGA, 'Official Records, 28th Session, 2189th Plenary Meeting' (4 December 1973) UN Doc A/PV.2189, §76 (Mauritania); UNGA, 'Official Records, 29th Session, 2320th Plenary Meeting' (16 December 1974) UN Doc A/PV.2320, §41 (Albania); UNGA, 'Official Records, 24th Session, 1805th Plenary Meeting' (10 November 1969) UN Doc A/PV.1805, §88 (Mali); UNSC res 661 (6 August 1990) UN Doc S/RES/661, §9; UNGA res 63/301 (1 July 2009) UN Doc A/RES/63/301, §2; Guymon (ed), *Digest of United States Practice in International Law* [2019], available at <http://state.gov/wp-content/uploads/2020/09/2019-Digest-Complete.pdf>, 241. See also Talmon (n 10) 537; Crawford, *Brownlie's Principles of Public International Law* (OUP 2019) 135; Regulations concerning the Laws and Customs of War on Land, art 43 (annexed to Convention (IV) respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910), available at <http://ihl-databases.icrc.org/assets/treaties/195-IHL-19-EN.pdf>); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion* [1971] ICJ Rep 16, 218 (Separate Opinion of Judge de Castro); *Mohamed v Breish* (n 93) §35(2).

[190] To avoid confusion, the present work avoids using the term 'legitimacy' as a synonym for '"constitutionality"'.

[191] See eg Talmon (n 161) 238–9.

government in ascertaining the criteria for governmental status under customary international law.

It has been said that an ostensible government must, at least in certain circumstances, have a 'legitimate' claim to governmental status—by which is meant a claim founded on some specific source from which the claimant derives its authority—in order to qualify for governmental status as a matter of customary international law.[192] While certain instances of state practice can be taken to support the position that the claim of an ostensible government must be 'legitimate' in this sense in order for it to qualify for governmental status as a matter customary international law, the existence of such a criterion is not to be readily inferred since it would impose a limitation on the presumptive sovereign freedoms of each state to choose its constitution and its political system.[193] In any event, the bases of authority suggested as necessary for the enjoyment of governmental status have varied over time, and there is ultimately too little evidence in favour of, and a substantial amount of evidence against, any requirement that an ostensible government have some 'legitimate' claim to governmental status in order to qualify as a matter of customary international law as the government of a state.[194] Two of the more prominently-alleged bases of the 'legitimacy' of a government of a state have been some specific socio-political affiliation and, more recently, democratic representativity.

4.2.2.5.1.1 An affiliation with a specific family or political party

The need for an ostensible government to have a 'legitimate' basis in order to qualify as a state's government was invoked by the European hereditary monarchies at a time when the concepts of state and government were not as distinct as they are today.[195] In the early nineteenth century, the view 'that a dynasty enjoyed historical rights to rule a state and, thus, the prince continued to be sovereign even if in fact displaced from his throne' informed relevant practice,[196] although this practice may have simply reflected the presumption in favour of incumbent governments or an exception to the requirement of effective control in respect of 'constitutional' claimants to governmental status.[197] In any event, it eventually became

[192] See eg D'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (2006) 38 NYUJILP 877, 910; Redaelli (n 129) 131, 151; Weller, 'Myanmar: Testing the Democratic Norm in International Law' (*EJIL:Talk!*, 30 March 2021), available at <http://ejiltalk.org/myanmar-testing-the-democratic-norm-in-international-law>.

[193] Recall section 4.2.1.

[194] See also Talmon (n 10) 536–7.

[195] On the distinction between a state and its government, see chapter 1, n 2. On the earlier character of the relationship between a state and its government under international law, see Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 Hague *Recueil* 9, 35; O'Connell, *State Succession in Municipal Law and International Law*, vol 1 (CUP 1967) 5–6.

[196] Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1999) 37 CJTL 403, 419. See, generally, ibid, 418–20; Lauterpacht (n 10) 99–106.

[197] Recall section 4.2.2.4.1.

clear, especially once the distinction between state and government was more definitively established, that as a matter of customary international law a claim to governmental status could be successful without a basis in an established monarchical system, hereditary or otherwise. Monarchical legitimacy eventually ceased to be a basis on which states withheld recognition from ostensible governments of other states.[198]

While it remains common for the government of a state to be comprised of persons that share a political or social connection (for example, a common affiliation to a specific political party or family), there is virtually nothing to suggest that such a connection is necessary for the enjoyment of governmental status as a matter of international law. A state remains free as a matter of international law to have a 'coalition' government (that is, a government composed of persons affiliated with different political parties) or a government whose constituent members share no political or social affiliation with its predecessor. The existence of such governments is uncontroversial as a matter of customary international law. Given, however, the significance of the 'constitutionality' of a claim for the enjoyment of governmental status under international law,[199] the political or social affiliation of an ostensible government will be relevant to assessing its claim to governmental status where the constitution of the state requires that its government has some affiliation with a specific political party or family.

4.2.2.5.1.2 Democratic representativity

Considerations of the 'legitimacy' of a claim to governmental status took a different form in the early twentieth century.[200] In 1907, in apparent furtherance of the so-called 'Tobar doctrine', five Central American states concluded a treaty under which they were obliged not to recognize an 'unconstitutional' government of any 'of the five Republics . . . so long as the freely elected representatives of the people thereof have not constitutionally reorganized the country'.[201] In other words, these states undertook not to accept in respect of any other state party the governmental status of any claimant whose claim had no basis in either the existing constitution or any novel constitution agreed by democratically-elected representatives. In 1923, the same states concluded a treaty in which they undertook the same obligation as in the 1907 treaty, alongside some additional obligations concerning the recognition of certain other 'unconstitutional' claims to governmental status.[202]

[198] See also Peterson (n 31) 37.

[199] Recall section 4.2.2.3.

[200] Isolated earlier instances of relevant practice also exist. See Peterson (n 31) 37 and the references therein.

[201] Additional Convention to the General Treaty of Peace and Amity of 1907 (adopted 20 December 1907) reproduced in (1908) 2 AJIL Supp 229, art I.

[202] The states undertook 'not to acknowledge the recognition' of an 'unconstitutional' claimant to governmental status even if 'the freely elected representatives of the people have . . . constitutionally reorganized the country' insofar as the situation of a person elected to one of a number of specified posts fell within one of the specific categories of situations, including but not limited to having been involved

These provisions provided for considerations of democratic representativity as informing what the states parties to the treaties in question may have recognized as a successful change to a state's constitution and consequently also as the possession by a state of an 'unconstitutional' government.[203] They did not generally require that a claimant be democratically representative in order to enjoy governmental status. In any event, the states parties did not generally adopt an approach consistent with these treaties when it came to claimants to governmental status in respect of non-party states or states parties. As it was, by 1934, the states parties had either denounced these treaties or no longer supported the approach of these treaties on the question of recognition of governmental status.[204] As for the practice of non-party states on the recognition of governments, this was not generally consistent with these treaties.[205] Indeed, throughout the first half of the twentieth century, any practice to suggest that either of these treaties reflected customary international law was far from general.[206]

Some relevant practice nevertheless emerged in the subsequent decades that might be taken to support the relevance of democratic representativity to the recognition and enjoyment of governmental status.[207] More recently, especially since the end of the Cold War, it has occasionally been suggested that an ostensible government of a state may enjoy governmental status as a matter of customary international law simply because it is democratically representative[208]—that is, because its claim to governmental status is based on a genuine electoral process in which the vast majority of adult citizens or residents of that state have had the opportunity to participate.[209]

in one or more specified ways in the emergence of the 'unconstitutional' claim. They also undertook not to recognize 'a government which arises from election to power of a citizen expressly and unquestionably disqualified by the Constitution of his country as eligible to election as President, Vice-President or Chief of State designate'. See General Treaty of Peace and Amity (adopted 7 February 1923, entered into force 24 November 1924) art II, reproduced in (1923) 17 AJIL Supp 117.

[203] Recall chapter 2, n 8 and accompanying text.

[204] See, generally, Woolsely, 'The Recognition of the Government of El Salvador' (1934) 28 AJIL 325; Stansifer, 'Application of the Tobar Doctrine to Central America' (1967) 23 The Americas 251.

[205] Some states, most notably the USA, did occasionally refuse recognition on such grounds. See Peterson (n 60) 60–1; Menon, *The Law of Recognition in International Law: Basic Principles* (Edwin Mellen Press 1994) 76; Woolsely (n 204) 328.

[206] See also *Affaire du Guano (Chili/France)* (1901) XV UNRIAA 77, 350; *Tinoco* (n 12) 381. See, generally, Menon (n 205) 91–2; Ben Achour, 'Changements anticonstitutionnels de gouvernement et droit international' (2015) 379 Hague *Recueil* 397, 439–41, §§73–9.

[207] See eg Peterson, 'Political Use of Recognition: The Influence of the International System' (1981–1982) 34 World Politics 324, 336 on the Betancourt doctrine and related practice.

[208] For some of the proponents of this position, see nn 216, 219, and 221 below.

[209] As one commentator has noted, 'there is no unitary definition of democracy in the scholarly debate' in relation to the criteria for governmental status as a matter of customary international law, but 'a procedural definition that focuses on a free and fair electoral process seems to constitute the smallest common denominator. References to democracy in the international legal discourse tend to regard free and fair elections as a minimum requirement for democratic governance': De Wet, 'The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force' (2015) 26 EJIL 979, 984–5. See also Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing 2013) 15–19.

In terms of state practice, there have indeed been situations in which a democratically-representative ostensible government has received general recognition as a state's government over an autonomous rival claimant, including where the latter exercised effective control over the territory and population of the state. This was the case with the claim of Alassane Ouattara in respect of Côte d'Ivoire in 2010 and of Adama Barrow in respect of The Gambia in 2016, as well as with the claim of Jean-Bertrand Aristide in respect of Haiti between 1991 and 1994 and of Manuel Zelaya in respect of Honduras in 2009.[210] At the same time, there has continued to exist a number of claimants to governmental status which have lacked a plausible claim to democratic representativity but which states have generally accepted as enjoying governmental status, sometimes after overthrowing a democratically-elected government. Examples include the government of The Gambia in 1994 and of the Republic of the Congo in 1997,[211] as well as the transitional authority established in Sudan in 2019. A claimant may continue to be recognized, moreover, as the government of a state where a democratic election has demonstrated overwhelming support for a rival claimant. Albeit only in 1990, the 'National Coalition Government of Union of Burma', comprised of members of the National Legal for Democracy, received virtually no international support for its claim to governmental status despite the latter's electoral victory.[212] Instead, the military authority then known as the State Law and Order Restoration Council (SLORC) continued to be recognized as Myanmar's government. All of this strongly suggests that democratic representativity is unnecessary for the enjoyment of governmental status as a matter of customary international law. It suggests, moreover, that democratic representativity is insufficient for the enjoyment of governmental status.[213]

Even those who nevertheless claim that 'democratic representativity' is at least in certain circumstances relevant to the enjoyment of governmental status as a matter of customary international law seem unable to ascertain or at least agree on the conditions that would satisfy this requirement and the broader legal framework in which this requirement ostensibly operates.

For example, in 2010, one author, who acknowledges that '[n]othing has yet happened to demonstrate that the international community posits democracy, however defined, as a *sine qua non* of governmental legitimacy',[214] expressed

[210] For details, recall nn 79–81 above. For the view that such practice demonstrates the application of 'democratic criteria', see eg Fox, 'Intervention by Invitation' in Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 816, 835–7. See also Crawford, 'Democracy and the Body of International Law' in Fox and Roth (eds), *Democratic Governance and International Law* (CUP 2000) 91, 117.

[211] See n 77 above.

[212] See Talmon (n 32) 315.

[213] See also UNGA, 'Official Records, 29th Session, 2281st Plenary Meeting' (12 November 1974) UN Doc A/PV.2281, §166 (US); Talmon (n 10) 533–4; Crawford (n 35) 150–5; Marks, 'What Has Become of the Emerging Right to Democratic Governance?' (2011) 22 EJIL 507, 511–13; De Wet (n 209) 984–90; Crawford (n 88) 282, §506.

[214] Roth (n 10) 417.

the view that '*at least some electoral results*—whether because of the presence of officially-invited international monitors or the magnitude of the electoral mandate, or both—[may be relevant to the assessment of governmental status]'.[215] The same author suggests that the results of democratic elections may comprise 'unambiguous manifestations of popular repudiation of the ruling apparatus', in which case these election are said to be relevant to the identification of the government of a state as a matter of customary international law.[216] But this author accepts the existence of 'limitations' to this view since practice does not generally support it.[217] In 2010, the same commentator posited that 'effective control . . . continues to play a crucial role [in relation to governmental status]', with democratic legitimacy being 'destined to have an ad hoc quality'.[218]

As a further example, in 2006, another commentator expressed the view that 'democratic origins can usually overcome a government's ineffectiveness',[219] while in 2011, this same commentator suggested that 'the emphasis put on the democratic origin of governments during the 1989–2010 period is ebbing away'.[220] In 2021, one other author posited that, '[w]hile the universal reach of the democratic principle can no longer be doubted, it has to be admitted that there are significant limitations to its application'.[221] Other authors accept that democratic representativity is not generally decisive, if at all relevant, to the enjoyment of governmental status as a matter of customary international law.[222] The acknowledgement of such variation in practice as regards the relevance of democratic representativity to governmental status has contributed to the suggestion that customary international law possesses no objective framework for the assessment of governmental status.[223]

A distinct attempt to explain the divergence in practice as regards the significance of democratic representativity to governmental status as a matter of customary international law has taken the form of a suggestion that democratic representativity may be acquiring significance as a matter of regional customary international law.[224] One issue with this suggestion is that there is no specific region within which democratic representativity has been consistently relevant. The

[215] Ibid, 384 (emphasis in the original).
[216] Ibid, 416.
[217] Ibid, 416, 418.
[218] Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine' (2010) 11 MJIL 393, 396.
[219] D'Aspremont (n 192).
[220] D'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks' (2011) 22 EJIL 549, 561.
[221] Weller (n 192). See also Redaelli (n 129) 131, 151.
[222] See eg Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' in Fox and Roth (n 210) 123, 143–51; Vidmar, 'Abusive Governments as a Threat' in Footer and others (eds), *Security in International Law* (Hart Publishing 2016) 249, 254; De Wet, 'The Role of Democratic Legitimacy in the Recognition of Governments in Africa since the End of the Cold War' (2019) 17 IJCL 470, 470; De Wet (n 174) 72–3.
[223] Recall chapter 1, n 27.
[224] See Wippman, 'Pro-Democratic Intervention', in Weller (ed) (n 210) 797, 801.

inconsistency in state practice concerning the recognition of governmental status as it relates to democratic representativity extends throughout the world.

Ultimately, both the practice that appears to accord weight to the democratic representativity of an ostensible government in assessing its claim to governmental status and the practice which suggests that democratic representativity is irrelevant to the enjoyment of governmental status can generally be explained on the basis of the traditional international legal criteria for governmental status alongside the enhanced privilege accorded to 'constitutional' claimants since the early 1990s.[225] Indeed, the result of a democratic election has been relevant to the 'constitutionality' of every ostensible government whose democratic representativity appears to have been relevant to its enjoyment of governmental status as a matter of customary international law.[226]

Even if it were equally plausible that democratic representativity is of direct relevance to the enjoyment of governmental status as a matter of customary international law in certain circumstances (for example, only if there are rival claimants of which only one is democratically elected[227]), the presumptive sovereign freedom of each state to choose its political system would militate in favour of the explanation that is based on the enhanced privilege accorded to 'constitutional' governments rather than on an 'application of the democratic norm'. In contrast to the privilege accorded to 'constitutional' claimants, the direct relevance of democratic representativity to the enjoyment of governmental status as a matter of customary international law would limit the freedom of each state to choose its political system.[228]

That said, democratic representativity as a criterion for governmental status does not even appear to be equally plausible to the alternative explanation of relevant practice which concerns the traditional international legal criteria alongside the enhanced privilege accorded by international law to 'constitutional' claimants. For example, some states accepted Mr Turchynov as President of Ukraine before Victor Yanukovych resigned and despite not having been democratically elected, apparently on the ground that his appointment was 'constitutional', even though Mr Yanukovych had been democratically elected.[229] Moreover, the disagreement

[225] This does not preclude the existence of the occasional instance of state practice which appears not to be explained on this basis. See eg 'Canada Will Not Recognize Taliban as Afghan Gov't—PM Trudeau' (*Reuters*, 17 August 2021), available at <http://reuters.com/world/asia-pacific/canada-will-not-recognize-taliban-afghan-govt-pm-trudeau-2021-08-17>. But even this can be explained on alternative grounds, specifically on the different meanings of the term 'recognition'. Recall section 3.2.1.

[226] See also Weller (n 192) on the circumstances in which he has said 'the democratic principle' applies, which can be seen to coincide with the situations in which democratic representativity is relevant to the 'constitutionality' of an ostensible government.

[227] For such a suggestion, see Redaelli (n 129) 131, 138–9, who nevertheless accepts (at ibid, 146) the existence of practice that does not fit her approach. See also ibid, 151. She ultimately considers that 'international law does not offer objective criteria to determine whom the government of a particular state is'. See ibid, 119.

[228] Recall section 4.2.1.

[229] See section 4.2.2.3.

among states as to the identity of Venezuela's governments since 2019 centres not directly on the democratic representativity but on the 'constitutionality' of each claimant.[230] Also, the NUG—which claims power not on the basis of the existing constitution of Myanmar but on 'the authority bestowed by the people's mandate resultant of all parties' democratic election held in 2020'[231]—has not generally been accepted as the government of Myanmar.[232]

The significance of democratic representativity to the identity of a state's government as a matter of present-day customary international law is thus indirect and restricted to situations where there is a 'constitutional' claim and where the 'constitutionality' of a claimant is assessed at least in part on the basis of the democratic representativity of that claimant. In other words, a democratic election is relevant to the enjoyment of governmental status under customary international law only insofar as such an election comprises the basis of a 'constitutional' claim to governmental status. For this reason, it is worth noting that the result of an election might not provide a basis for a 'constitutional' claim to governmental status. The 1990 election in Myanmar might be an example in this regard. At least in the post-election view of the incumbent government, the election was held solely to elect a committee tasked with drafting a new constitution and not a political party that would be constitutionally empowered to direct the exercise of public authority on Myanmar's behalf.[233] Another possible example concerns the 2020 election in Myanmar, the result of which was to determine the composition of its central legislature and which did not, in itself, provide a direct basis for a constitutionally-valid claim to power. The new government was to be elected by the national legislature subsequent to the commencement of its new term. It may be for this reason that the NUG—which is composed of persons who were elected in the legislative elections 2020, rather than persons who were elected to government by the legislature, with the legislature not having had an opportunity to commence its new term—does not claim to be the 'constitutional' government of Myanmar.[234]

The occasional suggestion in state practice that the identity of a state's government depends on the choice of that state's population in the latter's quality as a

[230] Recall eg chapter 3, n 333.
[231] See n 118 above and accompanying text.
[232] See chapter 5, nn 21 and 86.
[233] See SLORC, Declaration 1/90 of 27 July 1990, available at <https://natlex.ilo.org/dyn/natlex2/r/natlex/fe/details?p3_isn=79571>, §15. See also ibid, §§2, 11–14. That said, the continued recognition of Myanmar's incumbent government after this election preceded the first time there was consensus on the enhanced significance of the 'constitutionality' of a claim to governmental status to the enjoyment of governmental status as a matter of customary international law. The practice concerning the identity of Myanmar's government at that time may instead be explained by reference to the traditional customary international legal framework for the enjoyment of governmental status, according to which an autonomous claimant in effective control over the state's territory and population enjoyed governmental status, regardless of a subsisting claim by a 'constitutional' claimant. Recall section 4.2.2.4.1.
[234] Recall section 4.2.2.3.

people[235] appears to be a result of the not-uncommon use of the terms 'state' and 'people' as interchangeable.[236] A notable example in this regard is in the first preambular sentence of the UN Charter, which records the determination of 'the peoples of the United Nations' and the agreement of '[their] respective Governments', although the Charter was formally concluded by states through their respective governments. As another example, it has been said that preventing a state's government from representing that state in a particular context 'would constitute interference in the domestic affairs of the people, whose exclusive right it is to choose their own political regime or system of government',[237] even though it is uncontroversial that, at that time, it was the state that enjoyed the presumptive sovereign freedom to choose its political regime and system of government.[238]

As a formal legal matter, however, a people is distinct from a state. Accordingly, despite what has been said,[239] the right of a people to self-determination does not necessarily support the notion that the identification of the government of a state as a matter of customary international law involves the ascertainment of the will of the population of that state. Nor does the possibility that at least in certain circumstances the government of a state is the representative of that state's people[240] necessarily support the position that governmental status as a matter of customary international law is ascertained at least in part by the views of the population of a state. There is no clear indication that the right of a people to self-determination encompasses a right of a people to choose its representative in such a way.[241]

While there is no inherent reason why international law may not develop otherwise, the identity of a state's government under customary international law is not at present dependent on the expression by the population of a state of its support, through democratic elections, for some ostensible government.

That democratic representativity is unnecessary for the enjoyment of governmental status as a matter of customary international law does not preclude the possibility that a state consents to the limitation of one or more of its rights when it is possessed of a government which has not been democratically elected.[242]

[235] See eg UNGA, 'Official Records, 29th Session, 2301st Plenary Meeting' (n 67) §34 (Somalia), §166 (Grenada), §283 (Indonesia).

[236] See also Crawford, 'The Rights of Peoples: "Peoples" or "Governments"?' in Crawford (ed), *The Rights of Peoples* (Clarendon Press 1988) 55, 67, who suggests that the reiteration of certain international legal rules that substitute 'people' for 'state' 'are merely affirmative reformulations' of existing rules.

[237] UNGA, 'Official Records, 29th Session, 2301st Plenary Meeting' (n 67) §34 (Somalia). For another possible example of the use of the term 'people' as interchangeable with 'state' in a different context, see O'Keefe, 'The Meaning of "Cultural Property" under the 1954 Hague Convention' (1999) 46 NILR 26, 53.

[238] Recall chapter 2, nn 114–15.

[239] Roth (n 10) 414–15.

[240] Recall chapter 3, n 253 and accompanying text.

[241] Cf eg Human Rights Committee, 'General Comment No. 25' (1996) UN Doc CCPR/C/21/Rev.1/Add.7, §2.

[242] See eg sections 5.6.2.1.1–5.6.2.1.2.

4.2.2.5.2 Willingness or ability to ensure compliance with international law

There is some state practice that might or in any event has been taken to suggest that the willingness of an ostensible government to ensure compliance with some or all of the international legal obligations of the state of which it claims to be the government is necessary for the enjoyment of governmental status as a matter of customary international law.[243] Two of the more prominent recent examples[244] in this regard concern the identity of the government of Afghanistan between 1996 and 2001 and of Libya in 2011.[245] Another possible example relates to Afghanistan since the Taliban offensive in 2021. A closer look at the practice concerning these situations demonstrates, however, that there is little clear support for a customary international legal requirement according to which an ostensible government of a state must be willing to ensure that state's compliance with international law in order for that claimant to enjoy governmental status.

For example, much of the state practice on the identity of Afghanistan's government between 1996 and 2001 arose in relation to the credentials of ostensible representatives of Afghanistan to the UNGA.[246] During this time, the Taliban was not generally recognized as the government of Afghanistan. Indeed, some states denied its governmental status. More specifically, in 1996, when the Taliban—which controlled most of Afghanistan's territory and population, including the territory and population of Kabul—first presented credentials to the UN ostensibly in Afghanistan's name, some states expressed the view that the rival authority operating under Burhanuddin Rabbani's leadership was still the government of Afghanistan.[247] In subsequent years, until the 2001 peace process, Burhanuddin Rabbani's government continued to represent Afghanistan at the UN, albeit without acceptance of the credentials presented by his government,[248] perhaps because of a reluctance to recognize this transitional government.[249] For what it is

[243] See eg Siekmann (n 123) 237–8; Vidmar (n 222) 255–60; d'Aspremont (n 192) 910–11.

[244] For another recent example of practice where the willingness of an ostensible government of a state to ensure compliance with the latter's international legal obligations appears relevant to the derecognition of governmental status, see *The 'Maduro Board' of the Central Bank of Venezuela v The 'Guaidó Board' of the Central Bank of Venezuela* [2021] UKSC 57, §18.

[245] See eg Wolfrum and Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law' (2002) 6 MPUNYB 559, 573, 575; Vidmar, 'International Community and Abuses of Sovereign Power' (2014) 35 LLR 193, 196.

[246] On the evidential value of this practice, see section 5.4.2.

[247] UNGA, 'Credentials of Representatives to the Fifty-First Session of the General Assembly: First Report of the Credentials Committee' (23 October 1996) UN Doc A/51/548, §§6, 10–11.

[248] See chapter 5, n 88.

[249] On the possible reluctance to recognize certain transitional governments, see the text accompanying chapter 3, n 206. On the transitional character of Burhanuddin Rabbani's government, see Peshawar Accord, 24 April 1992 (n 91); Islamabad Accord of 7 March 1993, reproduced in 'Letter Dated 17 March 1993 from the Charges d'Affaires A.I. of the Permanent Mission of Afghanistan to the United Nations Addressed to the Secretary-General' (19 March 1993) UN Doc S/25435, Annex I, §§1, 3.

worth, prominent Afghan political figures eventually acknowledged Burhanuddin Rabbani's position of authority during this time.[250]

While it is apparent that between 1996 and 2001 the Taliban was not generally recognized as the government of Afghanistan, it is far from clear, in contrast to what has been suggested,[251] that the Taliban's disregard for certain international legal obligations was the reason for which states did not consider the Taliban to comprise the government of Afghanistan. Both the presumption in favour of incumbent governments[252] and the preferential treatment accorded by international law to 'constitutional' claimants[253] can explain the widespread non-recognition of the governmental status of the Taliban between 1996 and 2001[254] and the continued if limited express acceptance of the governmental status of the ostensible government of Burhanuddin Rabbani.

As for Libya, there is some—yet only limited—practice directly linking the continued enjoyment of governmental status by the authority acting under Muammar Qadhafi's leadership to respect for certain international legal obligations.[255] Again, the general acceptance of the NTC as the government of Libya and the implicit concomitant derecognition of the Qadhafi regime is explicable by reference to the existing customary international legal framework for the enjoyment of governmental status.[256]

As regards Afghanistan since 2021, some states indicated that '[t]he legitimacy of any future government depends on the approach it now takes to uphold its international obligations and commitments to ensure a stable Afghanistan',[257] but this does not necessarily involve a denial of governmental status.[258] Not dissimilarly, statements along the lines that the Taliban 'cannot expect to enjoy any legitimacy' if it 'continues to abuse basic human rights'[259] need not be understood as concerning the denial of the Taliban's governmental status under customary international law. Additionally, while some states have expressed their unwillingness to recognize a

[250] See the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions of 2001, UN Doc S/2001/1154, fifth recital, which acknowledges Burhanuddin Rabbani's 'readiness to transfer power'.

[251] Recall n 245 above.

[252] See n 124 above and accompanying text.

[253] Recall section 4.2.2.3.

[254] On the limited recognition of the Taliban's governmental status, see eg Wolfrum and Philipp (n 245) 566.

[255] See eg 'Libya/National Transitional Council—Statement by Alain Juppé, Ministre d'Etat, Minister of Foreign and European Affairs' (7 June 2011), available at <http://in.ambafrance.org/Libya-National-Transitional> and, in respect of the conduct of the claimant in question more generally, Hartmann, Shah, and Warbrick (n 173) 741, 742.

[256] See n 25 above and accompanying text.

[257] See eg 'G7 Leaders Statement on Afghanistan' (24 August 2021), available at <http://gov.uk/government/news/g7-leaders-statement-on-afghanistan-24-august-2021>.

[258] On the different uses of the word 'legitimacy', recall section 4.2.2.5.1.

[259] UNSC, 'Official Records, 8834th Meeting' (16 August 2021) UN Doc S/PV.8834 (provisional) 7 (UK).

government 'that harbors terrorist groups',[260] the term 'recognition' may have been used in a narrower sense that does not concern non-acceptance of governmental status.[261] The doubt as to whether the statements invoking certain international legal obligations do indeed express views on the qualification for governmental status, coupled with uncertainty as to the Taliban's enjoyment of sufficiently-effective control[262] and the apparent recognition by some states of the Taliban as the government of Afghanistan,[263] suggests the development of no requirement of willingness to ensure compliance with international legal obligations for the enjoyment of governmental status under customary international law.

In light of the above, the assessment of one commentator, writing in relation to practice until the late 1940s, that the willingness of an ostensible government of a state to ensure the state's compliance with its international legal obligations did not appear to have 'gained wide acceptance' in state practice on the recognition of governments[264] remains accurate as regards contemporary state practice on the recognition of governments.[265]

In addition to the limited practice which might be taken to support the relevance of a claimant's willingness to ensure compliance with international law, the existence of alternative and no-less-plausible explanations for this practice which would not limit the presumptive sovereign freedom of each state to choose its government ought to be preferred.[266] Weight must be given also to the practice of states which expressly distinguishes the conduct of an ostensible government as regards flagrant non-compliance with certain international legal obligations from the question of governmental status.[267]

As for the occasional reference to a requirement that a claimant is able to comply with the international legal obligations of the state in order to qualify

[260] See eg Iqbal, 'US to Recognize Taliban Only If They Respect Basic Rights, Says Blinken' (*Dawn*, 16 August 2021), available at <http://dawn.com/news/1640919>.

[261] On the use of the term 'recognition' in different ways, recall section 3.2.1.

[262] Recall n 167 above.

[263] For possible instances of recognition of the Taliban's governmental status, see UNSC, 'Official Records, 9137th Meeting' (27 September 2022) UN Doc S/PV.9137 (provisional) 19 (China); 'Joint Statement of the Participants in the Moscow Format Consultations on Afghanistan' (20 October 2021), available at <http://archive.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4913908>, §7; 'First Diplomat of Taliban-Led Afghanistan Accredited in Moscow' (*RFEL*, 31 March 2022), available at <http://rferl.org/a/moscow-accredits-afghan-taliban-diplomat/31779443.html>. (On recognition of governmental status by the receiving state's acceptance of a person as a diplomatic agent of the sending state, recall section 3.3.2.2.1.2.) Recall also chapter 3, nn 29–33 and the accompanying text.

[264] Lauterpacht (n 10) 110. See, generally, ibid, 109–14.

[265] For the view that this criterion is invoked inconsistently and by only a few states, see also Jennings and Watts (n 10) 153. Note chapter 3, n 254 on the distinct possibility that the government of a state may, on such grounds, no longer qualify as the representative of the people of that state.

[266] Recall section 4.2.1.

[267] See eg UNGA, 'Official Records, 35th Session, 35th Plenary Meeting' (n 63) §90 (Pakistan), §133 (Zaire), §163 (New Zealand), §209 (Philippines), §236 (Haiti), §240 (Canada), §245 (Federal Republic of Germany); UNGA, 'Credentials of Representatives to the Thirty-Sixth Session of the General Assembly' (n 67) §12 (USA).

for governmental status,[268] this is best seen as concerning effective control,[269] although the requisite degree of control does not vary according to the international legal obligations incumbent on the state whose government's identity is under consideration.

4.2.2.5.3 Not being in consequence of or amounting to the violation of a peremptory norm

International law might preclude the success of certain claims consequent upon a violation of an obligation arising under a peremptory norm of general international law. This appears to be the case for claims to statehood which are consequent upon the violation of at least certain peremptory norms.[270] As a separate matter, and as again appears to be the case in respect of claims to statehood, international law may preclude the success of a claim which, if accepted, would amount to the violation of a peremptory norm.[271] In either of these circumstances, international law would consequently also preclude the enjoyment of governmental status by an ostensible government of a putative state in precluding the putative state from attaining statehood on account of the claim to statehood resulting in, or being consequent upon, the violation of a peremptory norm. Possible examples in this regard concern the 'illegal racist minority régime' in Southern Rhodesia and the executive authority of the Turkish Republic of Northern Cyprus, respectively.[272]

As the above rules might be taken to suggest, customary international law may preclude the enjoyment by an ostensible government of governmental status in respect of an existing state where the claim of that ostensible government is consequent upon—or where, if accepted, it would amount to the violation of—an obligation arising under a peremptory norm. But each of these possibilities merits separate assessment on the basis of relevant practice. At the same time, as a general matter concerning both of these possible rules, the limitations imposed by international law on the success of certain claims on account of their being in consequence of or amounting to a violation of an obligation arising under a peremptory norm need not extend to a claim to governmental status in respect of an existing

[268] See eg Hackworth, *Digest of International Law*, vol 1 (US Government Printing Office 1940) 17; UNSC, 'Official Records, 899th Meeting' (n 76) §37 (Argentina); UNGA, 'Official Records, 22nd Session, 1602nd Plenary Meeting' (21 November 1967) UN Doc A/PV.1602, §5 (Iraq).

[269] See also Marek (n 32) 58; Lauterpacht (n 10) 109; Moore (n 76) 250, that to qualify as the government of a state, an 'unconstitutional' claimant to governmental status ought to be 'sufficiently established . . . to discharge [the state's] external obligations'.

[270] See, generally, Crawford (n 35) 128–48, 341–5; Nicholson, *Statehood and the State-Like in International Law* (OUP 2019) 165–70; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* [2010] ICJ Rep 403 ('*Kosovo*') 437, §81.

[271] See eg Nicholson (n 270) 175–80. See also *Kosovo* (n 270).

[272] On Southern Rhodesia, see eg Crawford (n 35) 129–31; Nicholson (n 270) 175–80; Talmon (n 10) 530–2. On the Turkish Republic of Northern Cyprus, see eg Crawford (n 35) 133–4, 146–7; Nicholson (n 270) 165–7.

state.[273] Nor does the existence or otherwise of an obligation under customary international law not to recognize the governmental status of an ostensible government on grounds related to peremptory norms necessarily provide guidance on whether such a claimant qualifies for governmental status as a matter of customary international law,[274] although relevant practice overlaps.

In terms of relevant practice,[275] notable examples concern the successive Nationalist governments in South Africa during the *apartheid* era, the claim to governmental status of each of which was in consequence of the violation of what today is generally considered to be the peremptory prohibition on systematic racial discrimination.[276] Moreover, the enjoyment of governmental status by each of these ostensible governments arguably comprised in itself a violation by South Africa of what may have been the peremptory right of the people of South Africa to self-determination,[277] at least insofar as at that time this right encompassed an obligation on each state to be 'possessed of a government representing the whole people belonging to the territory [of a state] without distinction as to race, creed or colour'.[278]

While there is some practice that might be taken to reflect doubt as to whether the Nationalist government in South Africa qualified as the government of South Africa for the purposes of customary international law at least in part because it 'was not representative of the people of South Africa',[279] a significant number of states accepted that this claimant did indeed qualify as South Africa's government.[280] Its capacity to express South Africa's consent to be bound by a treaty was

[273] See also Costelloe, *Legal Consequences of Peremptory Norms in International Law* (CUP 2017) 286; Nicholson (n 270) 147. But see Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008) 216–17.

[274] Recall chapter 3, nn 296–7, including the accompanying text.

[275] Recall also chapter 3, nn 270–2 and the accompanying text in relation to the respective ostensible governments of Tanzania in 1979 and of Cambodia between 1979 and 1989.

[276] On the peremptory status of this prohibition, recall chapter 3, n 275.

[277] On the peremptory status of this right, recall chapter 3, n 276.

[278] UNGA res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV) Annex, §1.

[279] See eg UNGA, 'Credentials of Representatives to the Eighteenth Session of the General Assembly: Report of the Credentials Committee' (14 December 1963) UN Doc A/5676/Rev.1, §16 (Algeria, the USSR, and Liberia); UNGA, 'Credentials of Representatives to the Nineteenth and Twentieth Sessions of the General Assembly' (20 December 1965) UN Doc A/6208, §18 (USSR, as well as Madagascar, Syria, and the United Arab Emirates); UNGA, 'Official Records, 25th Session, 1882nd Plenary Meeting' (23 October 1970) UN Doc A/PV.1882, §259; UNGA, 'Credentials of Representatives to the Twenty-Fifth Session of the General Assembly: Report of the Credentials Committee' (28 October 1970) UN Doc A/8142, §12; UNGA, 'Credentials of Representatives to the Twenty-Seventh Session of the General Assembly' (1 December 1972) UN Doc A/8921, §5. See also chapter 5, nn 93, 316, and 343 on the non-acceptance of credentials issued ostensibly in South Africa's name. On the possible relevance of such practice, see section 5.4.3.

[280] See eg UNGA, 'Credentials of Representatives to the Nineteenth and Twentieth Sessions of the General Assembly'(n 279) §19 (Australia, Costa Rica, Guatemala, Iceland, and the USA); UNGA, 'Official Records, 25th Session, 1900th Plenary Meeting' (11 November 1970) UN Doc A/PV.1900, §82 (USA); UNGA, 'Credentials of Representatives to the Twenty-Sixth Session of the General Assembly: Report of the Credentials Committee' (17 December 1971) UN Doc A/8625, §16 (Colombia); UNGA, 'Official Records, 36th Session, 103rd Plenary Meeting' (n 60) §§16–18 (Netherlands, speaking on behalf of the then 10 member states of the European Community), §19 (Canada), §23 (Austria),

also accepted[281] after the constitution on which its claim to power was based had been declared by both the UNGA and the UNSC to be 'null and void'.[282] Moreover, both the UNSC and the UNGA regularly referred to the Nationalist government in South Africa as 'the Government of South Africa'.[283] This practice does not support the view that there exists a criterion for governmental status that relates to peremptory norms.

A later example of an ostensible government whose claim to governmental status was consequent upon the violation of an obligation arising under a peremptory norm is that of the FPGK, which was established in consequence of Iraq's aggression against Kuwait.[284] In this regard, it is noteworthy that, unlike in respect of Iraq's subsequent annexation of Kuwait,[285] the UNSC did not decide that the proclamation of the FPGK lacked legal effect.[286] The UNSC did nevertheless call upon states '[n]ot to recognize any régime set up by the occupying Power',[287] which may be an indicator that international law precludes the attainment of governmental status by a claimant whose claim is in consequence of the breach of an obligation arising under a peremptory norm. Even if this call does reflect the *opinio juris* on the part of the states which voted in favour of it as to some pertinent rule of customary international law,[288] and although virtually all states denied the governmental status of the FPGK and accepted the governmental status of Kuwait's 'government-in-exile',[289] this does not lend clear support to the existence of a rule

§34 (USA), §37 (Iceland, on behalf of the Nordic countries), §40 (UK), §48 (New Zealand), §§58–9 (Australia), §60 (Samoa), §61 (Portugal), §63 (Costa Rica); UNGA, 'Credentials of Representatives to the Twenty-Seventh Session of the General Assembly' (n 280) §8 (Belgium, Costa Rica, Japan, USA, and Uruguay). On the acceptability to a state of another state's ostensible credentials as involving recognition of governmental status, see section 5.4.3. For what it is worth, see also UNSC res 311 (4 February 1972) UN Doc S/RES/311 for references in the fourth unnumbered preambular paragraph and in §1 to 'the Government of South Africa'.

[281] See Agreement among the People's Republic of Angola, the Republic of Cuba and the Republic of South Africa of 22 December 1988, annexed to 'Note verbale Dated 22 December 1988 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General' (22 December 1988) UN Doc A/43/989.

[282] UNSC res 554 (17 August 1984) UN Doc S/RES/554, §2; UNGA res 39/2 (28 September 1984) UN Doc A/RES/39/2, §1.

[283] See eg UNSC res 276 (30 January 1970) UN Doc S/RES/276, §2; UNSC res 282 (23 July 1970) UN Doc S/RES/282, first preambular para; UNSC res 311 (n 280) first preambular para. See also the titles of the following UNGA resolutions: 3324 (XXIX) (16 December 1974) UN Doc A/RES/3324(XXIX); 3411 (XXX) (28 November 1975) UN Doc A/RES/3411(XXX); 31/6 (26 October 1976) UN Doc A/RES/31/6; 41/35 (10 November 1986) UN Doc A/RES/41/35. On the evidential value of this practice and of the practice of states in adopting these resolutions, see sections 5.4.2–5.4.3.

[284] On the peremptory status of this prohibition, recall chapter 3, n 269.

[285] See UNSC res 662 (9 August 1990) UN Doc S/RES/662, §1 (emphasis omitted), where the UNSC '[*d*]*ecide*[*d*] that the annexation of Kuwait by Iraq . . . has no legal validity, and is considered null and void'.

[286] On the UNSC's response to Iraq's aggression against Kuwait prior to the former's annexation of the latter, see UNSC res 661 (n 189).

[287] Ibid, §9(*b*).

[288] On the possibility, but not the certainty, that this resolution reflected the *opinio juris* of the states in favour of its adoption, recall chapter 3, n 279.

[289] Talmon (n 32) 315.

of customary international law that precludes the success of a claim to governmental status which is consequent upon the violation of an obligation arising under a peremptory norm. The call not to recognize 'any régime set up by the occupying Power' and the views of states on the identity of Kuwait's government can both be explained by the presumption of subordination applicable in respect of any such regime, including the FPGK.[290]

By way of a more recent situation, the UNSC's determination that the GCI, which claimed governmental status in consequence of the US-led invasion of Iraq, comprised the government of Iraq[291] provides no further support for the existence of a rule of customary international law precluding the success of an ostensible government whose claim to power is in consequence of the violation of an obligation arising under a peremptory norm. Indeed, the recognition of the GCI's claim to governmental status may suggest that no such rule exists. That said, the UN's support for the formation of the GCI[292] may have served to break the chain of causation, as it were, between the violation of the peremptory prohibition on aggression and the GCI's claim to governmental status. It may be that any relevant customary rule applies only in respect of ostensible governments established in direct or sole consequence of the violation of an obligation arising under a peremptory norm.

Ultimately, the limited practice does not suggest that customary international law precludes the enjoyment of governmental status by an ostensible government whose claim, if accepted, would amount to the violation of an obligation arising under a peremptory norm. Nor does the practice concerning an ostensible government whose claim to power is consequent upon the violation of an obligation arising under a peremptory norm conclusively demonstrate existence of a criterion for governmental status which precludes the enjoyment of governmental status by an ostensible government whose claim to power is consequent upon the violation of an obligation arising under a peremptory norm, even if there are indications in recent practice which are suggestive as to the existence of such a rule. Relatedly, the presumptive sovereign freedom of each state to choose its government militates against readily inferring the existence of such a limitation on who can comprise the government of a state for the purposes of customary international law, although peremptory norms do limit the freedom of states in respect of other matters, including in relation to a state's political system.[293]

[290] Recall section 4.2.2.2. Recall also n 274 above and accompanying text on the possibility that an obligation of non-recognition applies in respect of an ostensible government whose governmental status international law does not definitively preclude.

[291] Recall n 61 above and the accompanying text.

[292] Ibid.

[293] See eg UNSC res 554 (n 282) §§1–2.

4.3 Conclusion

The presumption against limitations on state sovereignty weighs against the existence of any customary international legal criterion for governmental status which would limit the presumptive sovereign freedom of each state to choose its government, its political system, or its constitution. This includes considerations such as democratic representativity and a willingness to ensure the state's compliance with its international legal obligations. At the same time, this presumption suggests that the absence of an objective customary international legal framework for identifying the government of a state ought not to be readily inferred. Indeed, there does exist an objective framework for identifying the government of a state for the purposes of customary international law which preserves the presumptive sovereign freedoms of each state to choose its political system, its constitution, and its government. Put differently, the objective framework by reference to which the identity of the government of a state is to be ascertained for the purposes of customary international law gives effect to the presumptive sovereign freedom of each state to choose its government, its political system, and its constitution. There is no clear acceptance of a limitation on any of these freedoms in the customary international legal criteria for governmental status.

Rather than changing in a way that has imposed a limitation on the presumptive sovereign freedom of each state to choose its government, the law in this regard has developed since the early 1990s so as to further privilege what is perhaps the most direct way by which a state can be taken to express its choice of government, namely its constitution. International law now has regard to alternative, less direct means for ascertaining the state's choice of government only where there is no claimant to governmental status that can be taken to reflect the state's more direct choice of government—that is, where there is no autonomous 'constitutional' claimant. An autonomous 'constitutional' claimant to governmental status will invariably enjoy governmental status as a matter of customary international law as long as it maintains its claim, regardless of whether it exercises or has ever exercised effective control over the territory and population of the state. An 'unconstitutional' ostensible government may attain governmental status as a matter of customary international law only in the absence of a rival 'constitutional' claim and only if it is autonomous and if it exercises effective control over the territory and population of the state. What satisfies the requirement of effective control may vary depending on the circumstances.

A claimant to governmental status need not be democratically representative or otherwise 'legitimate' in order to qualify as the government of a state as a matter of customary international law. It is also unnecessary for an ostensible government to be willing to ensure that the state complies with its international legal obligations

in order for it to enjoy governmental status as a matter of customary international law. It appears, moreover, that an ostensible government can enjoy governmental status as a matter of customary international law even if it is established in consequence of, or if its enjoyment of governmental status would amount to, the violation of an obligation arising under a peremptory norm of general international law.