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THE COMPLEMENTARY FACES OF LEGITIMACY IN INTERNATIONAL LAW: THE LEGITIMACY OF ORIGIN AND THE LEGITIMACY OF EXERCISE

Jean d'Aspremont * *and Eric De Brabandere* **

INTRODUCTION

Global governance rests on the exercise of public authority by a myriad of actors. In the international order, the more powers and influence these actors acquire, the more their legitimacy proves to be controversial. It is submitted here that the legitimacy of international, regional, and domestic actors that partake in global governance—those considered here as global actors—must be appraised from a two-fold standpoint. Their legitimacy can first be gauged through the lens of the *origin* of their powers. This is what this Article calls the *legitimacy of origin*. The origin of the power may often prove an insufficient indicator of an actor's legitimacy. For this reason, legitimacy is also evaluated in light of the way in which the actor *exercises* its power. This is what this Article calls the *legitimacy of exercise*. This Article is based on the assumption that failing to recognize this dual character of legitimacy of actors involved in global and regional governance can undermine any endeavor to grasp the contemporary complexity of the latter.

The legitimacy of global actors is primarily a question about how, when exercising public authority, this actor is *perceived* as having a "right to rule."[1] In that sense, there is no doubt that the question of legitimacy of global actors exercising public authority

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1. *See* Allen Buchanan, *The Legitimacy of International Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 80 (Samantha Besson & John Tasioulas eds., 2009); John Tasioulas, *The Legitimacy of International Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 97, *supra*.

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is, to a large extent, a moral question.[2] Yet, this Article does not seek to examine the moral criteria through which the legitimacy of actors exercising public authority on the international plane ought to be established. This has artfully been endeavored elsewhere.[3] This Article is—more modestly—concerned with the distinction between different faces of legitimacy that should arguably be taken into account when making a (moral) evaluation, as well as how the importance of these various dimensions of legitimacy have been fluctuating in practice. It thus attempts to unearth the multiple faces of legitimacy and the evolutions thereof, irrespective of the moral criteria which could eventually be used in each case.

Another important preliminary caveat must be formulated. It cannot be denied that the legitimacy of an authority classically impinges on the extent to which the rules it prescribes are deemed legitimate.[4] The legitimacy of such rules will not only bear upon the authority and the degree of compliance with the rule,[5] but it also impacts the legitimacy of the legal system as a whole,[6] which in turns affects its viability.[7] This Article, however, while not ignoring that the legitimacy of the actors affects the legitimacy of the rules and of the system, is not concerned with either of these two questions and solely concentrates on the legitimacy of international actors. Yet, it will be shown that the legitimacy of exercise, because it requires an examination of how

2. *See* Buchanan, *supra* note 1, at 80; Thomas Christiano, *Democratic Legitimacy and International Institutions*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 119, *supra* note 1; Philip Pettit, *Legitimate International Institutions: A Neo-Republican Perspective*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 139, supra note 1.

3. *See supra* note 1.

4. *See* Buchanan, *supra* note 1, at 80.

5. The question of the legitimacy of a rule classically relates to the reasons why rules are obeyed. It accordingly touches on the theories of compliance. *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 204–07 (1990); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988); Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT'L ORG. 379, 379–408 (1999). *See generally* Claire K. Kelly, *Enmeshment as a Theory of Compliance*, 37 N.Y.U. J. INT'L L. & POL. 101 (2005). For a critical approach to the concept of compliance, see generally Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345 (1998).

6. For a moral evaluation of the legitimacy of international law as a whole, see generally ALLEN BUCHANAN, JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW (2007).

7. *See* H.L.A. HART, THE CONCEPT OF LAW 193–200 (2d ed. 1997) (viewing "the minimal content of natural law" as a condition of viability for the system).

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public authority is exercised, cannot always be severed from the question of legitimacy of rules.

After sketching some of the contemporary features of legitimacy in international law in Part I, this Article focuses on the extent to which the so-called principle of democratic legitimacy has impinged on how legitimacy of global actors is conceived today in Part II. In Part III, this Article then turns to assessing how, against that backdrop, legitimacy of global actors is evaluated in contemporary practice. Although not ignoring that the question of legitimacy may arise in connection with other actors, this Article focuses on two public global actors in particular, namely governments and international organizations,[8] with a view to demonstrating that the appraisal of the legitimacy of governments differs from the legitimacy of international organizations. This Article argues that while the legitimacy of origin has constituted the classical measure to evaluate the legitimacy of governments, recent practice has shifted the paradigm toward the legitimacy of exercise. This Article also submits that the exact opposite paradigm shift is simultaneously taking place in the context of the legitimacy of international organizations, for the legitimacy of international organizations is incrementally reviewed from the vantage point of the legitimacy of origin, despite having classically been based on the legitimacy of exercise.

I. *LEGITIMACY IN GLOBAL GOVERNANCE*

As has been indicated, this Article draws on a distinction between the legitimacy of exercise and the legitimacy of origin. This dichotomy points to a distinction between the legitimacy pertaining to the *source of power* and the legitimacy related to the *exercise of power*.[9] The division between these two dimensions of legitimacy has been part of the legal and political discourse for

8. This Article uses the term "international organization" as it is classically understood in international legal scholarship: intergovernmental associations of States, commonly created by treaty. As such, the term includes intergovernmental and supranational organizations.

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

several years[10] although the terminology has varied. Some have used the terms "original legitimacy" and "legitimacy of conduct or exercise,"[11] while others have preferred "instant legitimacy" and "continual legitimacy,"[12] or have used the similar notions of "representative democracy" and "participatory democracy."[13] This Article uses the terms "legitimacy of origin" and "legitimacy of exercise."[14]

The distinction between the legitimacy of origin and the legitimacy of exercise has classically been explored against the backdrop of the legitimacy of a *government*. In this particular context, the legitimacy of origin is a tool to assess the manner in which a government comes to power (e.g., coup, dynasty, election), while the legitimacy of exercise permits evaluation of the way in which the government exerts its power. It is the intention of this Article to also examine how this dichotomy applies to actors other than governments and, in particular, international organizations.

It is important to note here that, in the context of the legitimacy of governments, the distinction between legitimacy of origin and legitimacy of exercise only concerns the *external*—and not the *internal*—legitimacy of a government. The legitimacy of a government can be measured from two different standpoints. One can assess its internal legitimacy—how it is perceived *by the people subject to it*—and its external legitimacy—how it is perceived by other international authorities.[15] The internal legitimacy of an

10. Organization of American States, *Meeting the Political Priorities of the Organization of American States*, O.A.S.T.S. Doc. No. CP/doc.4071/05, at 3 (Dec. 14, 2005) ("The Secretariat will continue to work to ensure the legitimacy of origin of governments (electoral observation, etc.) but will broaden its work to assist with the legitimacy of exercise of government (governance).").

11. *See* Thomas Cottier & Maya Hertig, *The Prospects of 21st Century Constitutionalism*, 7 MAX PLANCK Y.B. U.N. L. 261, 261–328 (2003).

12. *See, e.g.*, Vesna Pusić, *Democracy Versus Nation: Dictatorships with Democratic Legitimacy*, 5 HELSINKI MONITOR 69, 80 (1994).

13. On the notion of participatory democracy in the context of post-conflict peace-building, see generally Jarat Chopra & Tanja Hohe, *Participatory Intervention*, 10 GLOBAL GOVERNANCE 289 (2004).

14. This distinction has been used by Jean d'Aspremont in *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. INT'L L. & POL. 877, 894 (2006).

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

authority is usually related to the achievement of social and distributive justice,[16] and thus revolves around the existence of a government *for* the people.[17] It is this type of legitimacy that, as Weber famously explained in another context, enhances the stability of an authority and secures obedience.[18] The internal legitimacy is, however, of little relevance to the appraisal of government, especially from the standpoint of international law. Indeed, international law is only concerned with the way in which a government's legitimacy is perceived by other international authorities. In that sense, the application of international law is not directly contingent upon the perception of the people, although it cannot be denied that the internal legitimacy of a given authority affects the way other actors assess the external legitimacy of that authority.[19]

The distinction between internal and external legitimacy has classically been less relevant in the context of international organizations. Strictly speaking, there is no subject-sovereign relationship between individuals and international organizations. It must be acknowledged, however, that more recently some international organizations have embarked on missions that include the administration of territories, in which case individuals within those territories are subject to the authority of the intergovernmental organization.[20] Other international organizations, like the European Union ("EU"), are endowed

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

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

18. MAX WEBER, ECONOMY AND SOCIETY 31 (Guenther Roth & Claus Wittich eds., 1968); *see also* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 200–01 (1832); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 48 (1992); Robert Grafstein, *The Legitimacy of Political Institutions*, 14 POLITY 51, 51 (1981).

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

20. *See generally* ERIC DE BRABANDERE, POST-CONFLICT ADMINISTRATIONS IN INTERNATIONAL LAW: INTERNATIONAL TERRITORIAL ADMINISTRATION, TRANSITIONAL AUTHORITY AND FOREIGN OCCUPATION IN THEORY AND PRACTICE (2009).

with sweeping powers that directly affect the lives of people. This means that there are an increasing number of instances where the legitimacy of international organizations can be construed from an internal perspective as well.

A remark must also be formulated about *when* and *how* legitimacy of global actors is generally *tested*. In this respect, it should be briefly emphasized that governmental legitimacy is not constantly under scrutiny in the international legal order. Legitimacy is only intermittently tested. This is well illustrated by the question of legitimacy of governments. Even if much attention is often paid to the form of governments in the international arena, the assessment of their legitimacy is not systematic. The mere measurement of the democratic character of government does not necessarily involve an evaluation—which is very common in international relations—of its legitimacy.[21] The question of legitimacy only arises when there is a need to determine the authority entrusted with the power to act and speak on behalf of the state. Such a determination is only required in limited, but significant, situations. The authority that can speak and act on behalf of the state in the international legal order must be determined ahead of any recognition of government, when accreditation within international organizations is sought by two warring governments, or when a state invites another state to carry out a military operation on its

21. This is well illustrated by international economic relations that are the most common leverage for various sorts of policies. These relations are often conditioned upon compliance with democratic principles. The suspension or the severance of economic relations following a breach of democracy is not tantamount to a judgment about legitimacy. Indeed, the government barred from cooperating with another because of its nondemocratic character is not necessarily seen as illegitimate by the former. On US international economic policy, see generally HOSSEIN G. ASKARI ET AL., CASE STUDIES OF U.S. ECONOMIC SANCTIONS: THE CHINESE, CUBAN, AND IRANIAN EXPERIENCE (2003); MICHAEL P. MALLOY, ECONOMIC SANCTIONS AND U.S. TRADE (1990); ZACHARY SELDEN, ECONOMIC SANCTIONS AS INSTRUMENTS OF AMERICAN FOREIGN POLICY (1999). Regarding the international financial relations, see BARTRAM S. BROWN, THE UNITED STATES AND THE POLITICIZATION OF THE WORLD BANK (1992). On the importance of democracy in the European international economic relations, see the Cotonou Agreement between the European Community and the African, Carribean, and Pacific ("ACP") Countries signed on June 23, 2000 and concluded for a twenty-year period from March 2000 to February 2020. Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, on the Other Part, June 23, 2000, O.J. L 317 (2000).

own territory. The tests of legitimacy applied in each of these contexts have usually been centered on the legitimacy of origin.[22]

In the case of international organizations, occasions where their legitimacy has been tested have, until recently, remained rather scarce. This may happen when states are confronted with the growing powers of international organizations, for instance, on the basis of the implied powers doctrine.[23] Likewise, the question of the legitimacy of international organizations may arise when, in the context of a reform of the constitutive treaty of the organizations concerned, the endowment of more powers to the organization is envisaged. The same is true when states consider terminating the organization or withdrawing from it. In recent years, the greater involvement of international organizations in the reconstruction and administration of states in the aftermath of conflicts has, however, offered new instances where the legitimacy of international organizations has been tested.[24] Indeed, the question of the legitimacy of these international organizations has been raised since on these occasions they have been endowed with wide-ranging powers bearing inevitable resemblance to sovereign power over individuals. The last part of this Article is especially devoted to the question of legitimacy of international organizations in the context of post-conflict administrations.

A word must also be said about the *historical relevance* of the distinction between the legitimacy of exercise and the legitimacy of origin. While it only has been recently systematized, the distinction between legitimacy of exercise and origin helps one understand the practice even at a time when there were no international organizations and international relations were exclusively within the hands of states. It is true that the legitimacy of origin was the dominant criterion, at least so long as the legitimacy of a government hinged on its dynastic origin.[25]

22. For an analysis of these cases where legitimacy of government is tested, see d'Aspremont, *supra* note 14, at 877–918.

23. *See* Legality of the Use by a State of Nuclear Weapons in Armed Conflicts, Advisory Opinion, 1996 I.C.J. 226 (July 8).

24. On the contemporary practice of international administration of territories, see DE BRABANDERE, *supra* note 20.

25. This entailed that only dynastic authorities were recognized. *See* Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 48, 49 (1992).

Following the ideas developed by Locke[26] and Rousseau[27] that were later magnified by the American and French Revolutions, legitimacy came to be linked to "the will of the people."[28] As Roth explains, even before the 1948 Universal Declaration of Human Rights, "almost all states—whether liberal democracies, one-party revolutionary states, military dictatorships, or traditionalist regimes—subscribed to the notion that 'the will of the people' constitutes the ultimate source of governmental legitimacy."[29] In that sense, a government was deemed legitimate if it could be said to be a government "*by* the people,"[30] a criterion that, again, hints at the origin of the authority. But the early practice of international relations is also pervaded by cases where legitimacy was assessed through the lens of the exercise of power, as illustrated by the continuous importance of the effectiveness of the authority.[31] The history of international relations has thus witnessed the recourse to both the legitimacy of origin and the legitimacy of exercise. The end of the Cold War and the emergence of democracy as the only acceptable model of domestic governance have revived the relevance of this distinction. This point is further discussed in the following section.

II. *LEGITIMACY IN THE AGE OF DEMOCRACY*

There is little doubt that the end of the Cold War and the sweeping fallout of that event on the international plane have impinged significantly on international law and the manner in that legitimacy is perceived in the international legal order.

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

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

28. The French Declaration of the Rights of Man and of the Citizen and the American Bill Of Rights: A Bicentennial Commemoration. S. DOC. NO. 101–09 (1989); FRIEDRICH GENTZ, THE FRENCH AND AMERICAN REVOLUTIONS COMPARED (John Quincy Adams trans., Henry Regnery Company 1955) (1800).

29. BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 38 (2000).

30. Letter from Thomas Jefferson to Admantios Coray (Oct. 31, 1823), *reprinted in* 7 THE WRITINGS OF THOMAS JEFFERSON 318–19 (H.A. Washington ed., 1859) (emphasis added).

31. This means that only effective governments are recognized. *See* P.K. MENON, THE LAW OF RECOGNITION IN INTERNATIONAL LAW 65–68 (1994). For a discussion of the different "vehicles of legitimation," see ROTH, *supra* note 29, at 41–51.

Indeed, the demise of communist regimes put an end to the ideological division that had gripped the world for nearly fifty years. This has unmistakably caused remarkable changes in international society, however short-lived they may be. In particular, the idea that democracy is the only acceptable type of regime has gained broad support, even monopolizing the political discourse[32] (despite a lingering disagreement about its accurate meaning[33]). It is accordingly no surprise that international law and its rules pertaining to the legitimacy of governments have been deeply affected by the rise of democracy as the only acceptable model of governance at the domestic level. Before spelling out the precise consequences of the emergence of a consensus about democracy on the legitimacy of global actors itself, it is necessary to briefly take stock of the state of international law pertaining to democratic governance.

A. *Democracy in International Law*

International legal scholars promptly recognized that the post-Cold War international legal order had become more amenable to the prominent role of democracy. American liberal scholars, in particular, have enthusiastically supported the idea that democracy today plays a crucial role in the international legal order and have swiftly provided various optimistic accounts of the extent of the legal changes brought about by democracy.[34] French positivist lawyers, although they have usually voiced greater skepticism and refrained from embracing the whole array of consequences that liberals attached to a lack of democracy,

32. *See generally* SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS 30–49 (2000); *see also* Gregory H. Fox & Brad R. Roth, *Introduction: The Spread of Liberal Democracy and its Implications for International Law*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 1–4 (Gregory H. Fox & Brad R. Roth eds., 2000).

33. *See* GIOVANNI SARTORI, THE THEORY OF DEMOCRACY REVISITED 6 (1987). *But see* Armin von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization and International Law*, 15 EUR. J. INT'L L. 885, 889–90 (2004).

34. The most radical liberal view on this question is probably offered by Fernando R. Tesón in *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 54–55 (1992). For milder forms of the democratic entitlement theory, see Christina M. Cerna, *Universal Democracy: An International Legal Right or the Pipe Dream of the West?*, 27 N.Y.U. J. INT'L L. & POL. 289, 329 (1995); Franck, *supra* note 18, 47–48. For an overview of how participatory rights emerged in international law, see Fox, *supra* note 25, at 10–33. For a basic account of the arguments for and against the democratic entitlement theory, see generally Fox & Roth, *supra* note 32.

have also recognized that democracy can play a role in the international legal order.[35] Even if one does not agree with all the legal consequences that American scholars have associated with the emergence of democracy in the international legal order,[36] it is reasonable to contend that living up to some democratic standards corresponds with an international customary obligation. Indeed, contemporary practice shows that, to a large degree, states consider the adoption of the main characteristics of a democratic regime to amount to an international obligation and act accordingly toward nondemocratic states.[37] It is of particular relevance that many nondemocratic states do not oppose the principle of democracy, and even claim that they are themselves in the midst of progress toward the establishment of democracy.[38] In that sense, nondemocratic states, with a view to strengthening the legitimacy of their government, try to portray their political regime in a democratic fashion rather than choosing to dispute the role that democracy plays in the international order.

Nonetheless, this customary legal obligation to adopt a democratic regime must not be exaggerated—such overreaching is where the aforementioned liberal theories about democracy prove unconvincing.[39] First, the scope of *ratione materiae* of the

35. *See* JEAN D'ASPREMONT, L'ETAT NON DEMOCRATIQUE EN DROIT INTERNATIONAL. ETUDE CRITIQUE DU DROIT POSITIF ET DE LA PRATIQUE CONTEMPORAINE [THE NON-DEMOCRATIC STATE IN INTERNATIONAL LAW. CRITICAL STUDY OF POSITIVE LAW AND CONTEMPORARY PRACTICE] 263–93 (2008). For earlier analyses, see LINOS-ALEXANDRE SICILIANOS, L'O.N.U. ET LA DEMOCRATISATION DE L'ETAT: SYSTEMES REGIONAUX ET ORDRE JURIDIQUE UNIVERSEL [THE U.N. AND THE DEMOCRATIZATION OF THE STATE: REGIONAL SYSTEMS AND UNIVERSAL LEGAL ORDER] 31 (2000); Pierre Klein, *Le droit aux élections libres en droit international: Mythes et réalités* [*The Right to Free Elections in International Law: Myths and Realities*], *in* LA RECHERCHE DU NOUVEL ORDRE MONDIAL [THE SEARCH FOR THE NEW WORLD ORDER] 93, 95–98 (Olivier Corten et al. eds., 1993).

36. For one criticism of the liberal theories of democracy, see D'ASPREMONT, *supra* note 35.

37. *See id.*

38. For one example, consider the recent events in Pakistan. In particular, see Carlotta Gall et al., *Rebuffing U.S., Musharraf Calls Crackdown Crucial to a Fair Vote*, N.Y. TIMES, Nov. 14, 2007, at A1 (interviewing President Musharraf). Musharraf has since stepped down from military leadership. *See, e.g.*, David Rohde & Carlotta Gall, *In Musharraf's Shadow, a New Hope for Pakistan Rises*, N.Y. TIMES, Jan. 7, 2008, at A3. Also relevant are the developments in Myanmar. *See, e.g.*, Seth Mydans, *Myanmar Claims Step to Democracy, but Junta Still Grips to Power*, INT'L HERALD TRIB., Sept. 4, 2007, at N3. *See also* LARRY DIAMOND, DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION 8–9 (1999).

39. *See* D'ASPREMONT, *supra* note 35.

principle of democracy in international law is limited, as the obligation rests on only an *electoral* and *procedural* understanding of democracy.[40] States are customarily obliged to abide by democracy to the sole extent that their effective leaders (or the parliamentary body that oversees their executive mandate) are chosen through free and fair elections.[41] Likewise, this customary obligation, while being *erga omnes*,[42] is certainly not of a *jus cogens* character, as it is underscored by the existence of numerous persistent objectors to that customary rule.[43]

It would also be a mistake to consider the obligation to be democratic utterly groundbreaking. The development of a customary norm in this area is unsurprising, given that international law has long regulated some aspects of states' political regimes. Through human rights law, the international community has regulated the way in which power is exercised and has prohibited some types of political regimes—for example, apartheid[44] and, to a lesser extent, fascism.[45] Moreover, the obligation to organize free and fair elections is not entirely new in the international legal order, as a similar obligation is already embedded in the International Covenant on Civil and Political

40. *See* Fox, *supra* note 25. For criticism of this "minimalistic" understanding of democracy, see DIAMOND, *supra* note 38, at 8–9; Barry Gills et al., *Low Intensity Democracy*, *in* LOW INTENSITY DEMOCRACY: POLITICAL POWER IN THE NEW WORLD ORDER 3, 21 (Barry Gills et al. eds., 1993); J. ROLAND PENNOCK, DEMORATIC POLITICAL THEORY 3–15 (1979); Richard Burchill, Book Review, *The Developing International Law of Democracy*, 64 MOD. L. REV. 123, 128 (2001) (reviewing Fox and Roth's *Democratic Governance and International Law*); Russell A. Miller, *Self-Determination in International Law and the Demise of Democracy*, 41 COLUM. J. TRANSNAT'L L. 601, 603–05 (2003).

41. *See* D'ASPREMONT, *supra* note 35, at 15.

42. *Id.* at 291.

43. The People's Republic of China and several states in the Middle East can probably be considered persistent objectors to that rule. *See, e.g.*, ZHANG LIANG, THE TIANANMEN PAPERS (Andrew J. Nathan & Perry Link eds., 2001).

44. *See* International Convention on the Suppression and Punishment of the Crime of Apartheid, July 18, 1973, 1015 U.N.T.S. 243; International Convention on the Elimination of All Forms of Racial Discrimination, art. III, Mar. 7, 1966, 660 U.N.T.S. 195. For UN resolutions condemning apartheid, see S.C. Res. 288, U.N. Doc. S/RES/288 (Nov. 17, 1970); S.C. Res. 277, U.N. Doc. S/RES/277 (Mar. 18, 1970); S.C. Res. 253, U.N. Doc. S/RES/253 (May 29, 1968); S.C. Res. 221, U.N. Doc. S/RES/221 (Apr. 9, 1966); S.C. Res. 232, U.N. Doc. S/RES/232 (Dec. 16, 1966); S.C. Res. 216, U.N. Doc. S/RES/216 (Nov. 12, 1965); S.C. Res. 217, U.N. Doc. S/RES/217 (Nov. 12, 1965); G.A. Res. 1791, U.N. Doc. A/RES/1791 (Dec. 11, 1962); G.A. Res. 1598, U.N. Doc. A/RES/1598 (Apr. 13, 1961).

45. *See* G.A. Res. 36/162, U.N. Doc. A/RES/36/162 (Dec. 16, 1981).

Rights ("ICCPR"),[46] which has been ratified by 161 states.[47] It must be pointed out, however, that even if the international legal order enshrines a principle of *procedural* democracy applicable to the political regime of states, there is no corresponding requirement of democracy applicable to the structure and functioning of the international legal system as a whole. This is not totally astonishing, given the inapplicability of the classical domestic blueprints of governance to the international system.[48]

Despite its limited ambit, democracy has borne observable legal consequences. This is especially true in connection with the ability of states to take countermeasures to sanction violations of democracy. Indeed, notwithstanding the safeguarding clause adopted by the International Law Commission,[49] there is a fair amount of practice as well as scholarship buttressing the idea that, in the case of the violation of democracy, all states—or at least those states party to the ICCPR, when the obligation only arises under that treaty—are entitled to take countermeasures against the offending state.[50] Given the dramatic impact such sanctions may have, one should not underestimate the importance of such a remedy.

B. *Democratic Legitimacy of Global Public Actors*

Because rules pertaining to democracy in international law are restricted to domestic governance, their impact is

46. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-29 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]. *See generally* Andreas Mavrommatis, *The International Covenant on Civil and Political Rights and Its Role in Promoting Democracy*, *in* HUMAN RIGHTS AND DEMOCRACY FOR THE 21ST CENTURY 255 (Kalliopi Koufa ed., 2000).

47. *See* Katie Lee, *China and the International Covenant on Civil and Political Rights: Prospects and Challenges*, 6 CHINESE J. INT'L L. 445 (2007) (on the possible ratification of the ICCPR by the People's Republic of China); Office for U.N. Comm'r for Human Rights, Status of Ratification of the Principal International Human Rights Treaties (July 14, 2006), http://www2.ohchr.org/english/bodies/docs/status.pdf; *see also* James C. McKinley Jr., *Cuba Signs Two Treaties on Rights*, N.Y. TIMES, Mar. 1, 2008, at A6.

48. *See generally* J.H.H. Weiler, *The Geology of International Law: Governance, Democracy and Legitimacy*, 64 HEIDELBERG J. INT'L L. 547 (2004).

49. *See* G.A. Res. 56/83, art. 54, U.N. Doc. A/RES/56/83 (Jan. 28, 2001).

50. *See* U.N. Int'l. Law Comm'n, *Report on the Work of its Fifty-Third Session*, U.N. Doc. A/56/10, 137–39 (2001) [hereinafter ILC Report] (discussing practices mentioned by the special rapporteur in its commentary on Article 54); *see also* Christian J. Tams, *Enforcing Obligations* Erga Omnes, *in* INTERNATIONAL LAW 220–21 (2005); sources cited *supra* note 35.

unsurprisingly almost exclusively limited to the legitimacy of governments. Their application to the legitimacy of international organizations is less evident given that rules pertaining to domestic governance cannot always easily be transposed as such at the level of international organizations. Eventually, it must be acknowledged that international organizations are not subjected to the international obligations to abide by some procedural form of democracy in organizing free and fair elections. This is why this Part only deals with the *democratic legitimacy of governments*. That does not mean, however, that democratic legitimacy is of no relevance at all in the case of international organizations. As will be argued in Part III.B, criteria pertaining to the legitimacy of origin is no longer entirely alien to the assessment of the legitimacy of international organizations. For the time being, however, this section only deals with the democratic legitimacy of governments.

In the case of the legitimacy of governments, it is important to realize that, while possibly constituting a customary international legal obligation, the breach of which triggers the legal consequences described above, democracy has simultaneously become a fundamental criterion for the legitimization of governments in the sense that, today, a new government hardly qualifies as the legitimate representative of a state if it has not been democratically elected.[51] This formidable development is not a consequence of the abovementioned obligation to have democratic institutions, but rests on the discretion of states to choose whether to recognize a new government. There is indeed no such obligation not to recognize nondemocratic governments. As mentioned above, the obligation to be democratic does not constitute a *jus cogens* norm. Even if it were a *jus cogens* norm, it is not certain that a state, in recognizing a nondemocratic government, would also recognize as legal the violation of the obligation to be democratic.[52]

Even though this does not correspond to any legal obligation, it seems uncontested that, since the end of the Cold War, the (external) legitimacy of an authority has come to

51. *See* d'Aspremont, *supra* note 14, at 887–88.
52. *See* D'ASPREMONT, *supra* note 35, at 151.

depend almost entirely upon its democratic character.[53] The idea of a government based on the will of the people, "expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures"[54]—which during the Cold War had been loosely interpreted by states to legitimize any sort of government—is now understood to require a democratic political regime. Thus, there is little doubt today that democracy has become a prominent means by which to assess the legitimacy of governments.[55] This is not to say that a nondemocratic government will never be deemed legitimate, especially if that government has been in power for a long time.[56] The nondemocratic character of a government is sometimes disregarded because of overriding geopolitical and strategic motives.[57] But, leaving these exceptional situations aside, it can reasonably be argued that, since the end of the Cold War,

53. *See* Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 190, 193 ("Democratic government is based on the will of the people, expressed regularly through free and fair elections."). *Contra* ROTH, *supra* note 29, at 417.

54. Universal Declaration of Human Rights, G.A. Res. 217A, art. 21, U.N. G.A.O.R., 3d. Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948).

> (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country. (3) The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections, which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Id. This idea has been underpinned by many UN General Assembly resolutions. *See, e.g.*, G.A. Res. 56/159, U.N. Doc. A/RES/56/159 (Dec. 19, 2001); G.A. Res. 52/129, U.N. Doc. A/RES/52/129 (Dec. 12, 1997); G.A. Res. 49/190, U.N. Doc. A/RES/49/190 (Dec. 23, 1994); G.A. Res. 48/131, U.N. Doc. A/RES/48/131 (Dec. 20, 1993); G.A. Res. 47/138, U.N. Doc. A/RES/47/138 (Dec. 18, 1992); G.A. Res. 46/137, U.N. Doc. A/RES/46/137 (Dec. 17, 1991); G.A. Res. 45/150, U.N. Doc. A/RES/45/150 (Dec. 18, 1990); G.A. Res. 43/157, U.N. Doc. A/RES/43/157 (Dec. 8, 1988).

55. Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 494 (2001); Franck, *supra* note 18, at 46.

56. *See* Marcelo G. Kohen, *La création d'Etats en droit international contemporain* [*The Creation of States in Contemporary International Law*], 6 COURS EURO-MÉDITERRANÉENS BANCAJA DE DROIT INTERNATIONAL 546, 619 (2002) (this has led some authors to contend that there exist "double standards" in that regard).

57. The most obvious example is the government of the People's Republic of China, which is seen as legitimate by almost all countries in the world although it does not rest on any free and fair electoral process. The same cannot be said with respect to Pakistan since the government has relentlessly pledged to organized democratic elections. *See infra* note 84.

democracy has become "the touchstone of legitimacy"[58] for any new government.

Because democracy has turned into one of the central measures to appraise the legitimacy of governments, it is important to clarify how democratic legitimacy applies against the backdrop of the abovementioned distinction between the legitimacy of origin and the legitimacy of exercise. In the context of democracy, it is submitted here that the legitimacy of *origin* addresses the *procedural elements* of democracy that ensure that the authority originates in popular sovereignty through free and fair elections. A democratic legitimacy of *exercise*, on the contrary, rests on some of the substantive elements of democracy. The application of the distinction between legitimacy of exercise and legitimacy of origin in the context of democracy thus presupposes the existence of a substantive understanding of democracy. It must be acknowledged that the idea is slightly controversial.

Indeed the question of whether democracy includes only procedural elements or also embodies substantive features has gripped the theory[59] and the practice[60] for a long time. Given the

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

59. *See* LARRY DIAMOND, DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION 8–9 (1999) (lambasting an "electoral" conception of democracy); Gills et al., *supra* note 40, at 21 (criticizing a "cosmetic" conception of democracy because of its "low intensity"); *see also* MARKS, *supra* note 32, at 52, 57–75 (the expression "low intensity democracy" alludes to the American strategy of containment known as "low intensity warfare"). Relying on a definition of democracy close to that supported by theorists like John Rawls (A THEORY OF JUSTICE (1971)), Carl Schmitt (LEGALITY AND LEGITIMACY (Jeffrey Seitzer trans., Duke University Press, 2004) (1932)), or even Friedrich A. Hayek (*supra* note 9, at 227), these authors have put forward a substance-oriented conception of democracy embodying compliance with human rights. *See* Brad R. Roth, *Evaluating Democratic Progress*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 32, at 493–95; Thomas Carothers, *Empirical Perspectives on the Emerging Norm of Democracy in International Law*, 86 AM. SOC'Y INT'L L. PROC. 261, 264 (1992).

60. This debate between *procedural* democracy and *substantive* democracy has also been echoed in the interpretation of the major human rights conventions. These instruments—though they often enshrine a right to political participation through regular elections—are hardly explicit on whether an electoral process is the core element of a democratic regime. *See, e.g.*, Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms art. 29, May 26, 1995, 3 I.H.R.R. 212; ICCPR, *supra* note 46, art. 25; American Convention on Human Rights art. 23, Nov. 22, 1969, 1144 U.N.T.S. 123; Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]. This is probably because such an affirmation would have barred their adoption by all the

complex character of the concept of democracy[61] and its bent for relentless re-contextualization,[62] scholars will probably never agree on the accurate meaning of democracy.[63] But this should not prevent a discussion of its main components. It does not seem unreasonable to defend here that the concept of democracy includes some substantive requirements, namely some basic political freedoms and civil rights[64] and hints of the rule of law. The reason why some political and civil human rights are included in the concept of democracy can be traced back to the democratic procedural requirements themselves. There can hardly be a *free* democratic process if basic political rights are infringed. The "*freedom*"[65] of elections must take place in a "free

communist regimes during the Cold War. It is not to say that these instruments do not refer in any manner to a democratic regime. Indeed, the qualifying clauses are usually phrased as to limit interferences with the exercise of human rights with "what is necessary in a democratic society." ICCPR, *supra* note 46, art. 4; ECHR, *supra* arts. 8–11. According to some authors, this implies that a democratic regime is the sole type of governmental system where human rights are respected. *See* James Crawford, *Democracy and International Law*, 64 BRIT. Y.B. INT'L L. 113, 115 (1993). Whether this is true or not, these qualifying clauses more certainly imply that democratic principles are the best means to assess the acceptability of interference with some human rights. Be that as it may, the idea that democracy furthers the compliance of human rights and, cogently, that these instruments somehow lay down an obligation pertaining to the adoption of a democratic regime has emerged from both the practice and the interpretation provided by the monitoring bodies of these instruments. *See* United Communist Party of Turkey v. Turkey, 1998-I Eur. Ct. H.R. 1 (1998).

61. Martti Koskenniemi, *Intolerant Democracies: A Reaction*, 37 HARV. INT'L L. J. 231, 234 (1996) (responding to Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. J. INT'L L. 1 (1995)).

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

63. *But see* Gregory H. Fox, *The Right to Political Participation in International Law*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 32, at 90.

64. Even though these authors admit that dire economic conditions can impinge on the freedom of the fairness of any electoral process, these authors contend that economic, social, and cultural rights are alien to the idea of democracy. These rights are not aiming at a democratic organization of the power, but rather a form of social and distributive justice. *See e.g.*, FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 231 (Routledge & Kegan Paul eds., 1960) (asserting that distributive justice is nondemocratic). *But see* IAN SHAPIRO, DEMOCRATIC JUSTICE (1999); Molly Beutz, *Functional Democracy: Responding to Failures of Accountability*, 44 HARV. INT'L L.J. 387, 418 (2003).

65. The freedom of elections is a more continuous assessment (mostly focused on the period of time prior to the elections and the respect of political freedoms), while the *fairness* of elections is all about the electoral process itself. The fairness of elections is related to the regularity of elections, which excludes any manipulation by any of the competing parties. This requirement is mostly concerned with the rigging of elections. Fairness is probably the requirement the respect of which is the most difficult to monitor, despite the huge amount of resources devoted to international elections

market of ideas"[66] that assures free political competition.[67] To ensure free competition in this market of ideas, the respect for basic political freedoms must be ensured. The organization of a "free" electoral process requires respect for the freedoms of expression, assembly, thought, press, etc.[68] These freedoms are "democratic rights"[69] or, as stated by the UN Commission on Human Rights, "rights pertaining to democratic governance."[70] In that sense, one can contend that the requirement of free elections *already* encompasses a substantive component, namely, compliance with the political freedoms ensuring pluralism. It does not seem unreasonable to contend that the concept of democracy also includes respect for the rule of law. As the UN Human Rights Committee has emphasized, there can hardly be a free and fair election if the rules regulating the electoral process have not been established prior to the holding of the election or have not been complied with by the authorities.[71]

monitoring by both intergovernmental organizations and NGOs. In practice, only obvious and large-scale riggings will be reported (if the state has consented to international elections monitoring or asked for international assistance) and will prevent the elections from being deemed as conferring democratic and legitimate power to the government.

66. Franck, *supra* note 18, at 90.

67. Beutz, *supra* note 64, at 418.

68. *See* G.A. Res. 55/96, ¶ i, U.N. Doc. A/RES/55/96 (Feb. 28, 2001) (on the promotion and consolidation of democracy); Comm'n on Human Rights Res. 1999/57, Promotion of the Right to Democracy, E/CN.4/RES/1999/57, ¶ 1(a) (Apr. 27, 1999); Comm'n on Human Rights Res. 2002/46, Further Measures to Promote and Consolidate Democracy, E/CN.4/2002/200, ¶ 1 (Apr. 23, 2003); Human Rights Comm., General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, ¶ 25, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996) [hereinafter General Comment No. 25]; *see also United Communist Party of Turkey*, 26 Eur. Ct. H.R. at 121; Open Door Counselling Ltd. v. Ireland, 15 Eur. Ct. H.R. 244, 268 (1992); Lingens v. Austria, 8 Eur. Ct. H.R. 407, 407 (1986); Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) 737, 762 (1972); Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 69 (Nov. 13, 1985); OAS, *Inter-American Democratic Charter*, Sept. 11, 2001, *available at* http://www.oas.org/OASpage/eng/Documents/Democractic_Charter.htm. *See generally* Marc Cogen & Eric De Brabandere, *Democratic Governance and Post-Conflict Reconstruction*, 20 LEIDEN J. INT'L L. 669 (2007) (discussing the application of these rights in post-conflict reconstruction).

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

70. Comm'n on Human Rights Res. 1997/64, Situation of Human Rights in Myanmar, 67th mtg., E/RES/1997/64, ¶ 2(b) (Apr. 16, 1997); *see also* General Comment No. 25, *supra* note 68, ¶ 12.

71. *See* General Comment No. 25, *supra* note 68, ¶ 10.

The inclusion of substantive elements in the concept of democracy seems underpinned by contemporary international relations, for states often voice their support for "democratic values."[72] Likewise, in cases of massive and gross violations of human rights, states tend to deny the democratic character of the responsible states.[73] The mere fact that an infringement of the rule of law and human rights, whatever its extent, prompts systematic disapproval in the name of democracy demonstrates that, in practice, democracy has been construed as including certain substantive elements.

If, as it is argued here, democracy embraces some substantive elements, then the distinction between origin and exercise proves of fundamental relevance, and any monolithic conception of legitimacy reveals itself insufficient to explain how legitimacy of global actors is appraised in a post-Cold War world. From the standpoint of democratic legitimacy of origin, a government is legitimate if it rests on the "will of the people," expressed through a free and fair electoral process. From the vantage point of democratic legitimacy of exercise, a government is legitimate if *it exerts its power in a manner consistent with basic political freedoms and the rule of law.* Drawing on this distinction between the democratic legitimacy of origin and the democratic legitimacy of exercise, the next section tries to outline how the legitimacy of global actors is evaluated.

72. Commonwealth of Nations, Coolum Declaration (Mar. 5, 2002), *available at* http://www.thecommonwealth.org/document/34293/35468/35799/coolum.htm; *see also* Jo Johnson, *EU Observer Attacks Big Flaws in Afghan Poll*, FIN. TIMES, Sept. 15, 2005, at 12 (noting an EU observer's skepticism that democracy would take hold following the elections in Afghanistan).

73. *See, e.g.*, G.A. Res. 46/7, ¶ 2, U.N. Doc. A/RES/46/7 (Oct. 11, 1991) (on Haiti); Comm'n on Human Rights Res. 55/18, U.N. Doc. E/CN.4/RES/1999/18 (Apr. 23, 1999) (on Bosnia-Herzegovina, Croatia, and the Federal Republic of Yugoslavia); OAS, *Declaration on Democracy in Venezuela,* OAS Doc. AG/DEC. 28 (XXXII-O/02) (June 4, 2002); Third International Conference of the New or Restored Democracies on Democracy and Development, Sept. 2–4, 1996, Progress Review and Recommendations, Adopted by the Third International Conference of the New or Restored Democracies on Democracy and Development Held at Bucharest from Sept. 2–4, 1997, in Note Verbale dated Sept. 10, 1997 from the Permanent Representative of Romania to the United Nations addressed to the Secretary General, U.N. Doc. A/52/334 (Sept. 11, 1997).

III. *CONTEMPORARY OSCILLATIONS BETWEEN EXERCISE AND ORIGIN*

This section aims to demonstrate that the legitimacy of governments and the legitimacy of international organizations are subject to contradictory logic. On the one hand, it will be shown that, in modern practice, the legitimacy of governments—classically judged from the standpoint of the origin of its powers—is incrementally tested on the basis of legitimacy of exercise.[74] On the other hand, when the legitimacy of international organizations is at stake, it will be explained that their legitimacy is increasingly evaluated from the vantage point of their origin, as opposed to legitimacy of exercise, which has been the classic measure of their legitimacy.

A. *Legitimacy of Governments: From Origin to Exercise*

The question of governmental legitimacy has always been a source of great controversy. This can be traced back to a basic reality of the international order, namely, that states act through their governments. The international order is consequently an order in which its main actors act via proxies. These surrogates are not, however, immutable entities. Indeed, *governments are short-lived bodies* whose existence is contingent upon the form or stability of the political regime of the state concerned, and ultimately, the life span of the human beings at their helm. This means that the representatives of the states in the international order are frequently replaced. This recurrent and inescapable change of governments has prompted a need for criteria to determine who is entitled to speak and act on behalf of each state. This necessity to constantly identify each state's representative in the international arena lies at the heart of the question of legitimacy of governments in international relations.

The highly controversial character of governments' legitimacy mostly stems from the *subjectivity of its evaluation.* Indeed, there are no objective criteria to determine governments' legitimacy. That means that each state enjoys comfortable leeway when asked to recognize the power of an entity that claims to be another state's representative *in their*

74. This section constitutes a condensed version of the abovementioned article, d'Aspremont, *supra* note 22.

bilateral intercourse. International relations are therefore replete with situations where a government is deemed legitimate by some states and illegitimate by others.

It is submitted here that, despite the prominent role played by elections in legitimizing governments in contemporary practice, the *"monopoly" of the legitimacy of origin* to gauge the legitimacy of governments has recently been curtailed by the *growing importance of the legitimacy of exercise*. This means that for a government to be seen as legitimate, it must not only be "*by* the people" but also "*for* the people."

The authors have analyzed this practice elsewhere[75] and contemporary developments have confirmed it;[76] it would be of no avail to reiterate conclusions here. It suffices to recall that in the practice pertaining to recognition, accreditation, and intervention demonstrate that both the origin and exercise of power have played a role in evaluating governments' legitimacy. The legitimacy of origin has remained the decisive factor. However, recent practice shows that more emphasis has been put on the legitimacy of exercise. To understand the different roles played by the two types of legitimacy, and hence the paradigm shift, one must draw a distinction between the *qualification* and *disqualification* of governments. If a new government secures international recognition or its delegates are accredited, it *qualifies* as the legitimate representative entitled to speak and act on behalf of the state. But lack of legitimacy can have a disqualifying function when a government, previously recognized as the legitimate representative entitled to act and speak on behalf of a state, loses this recognition. In other words, it is *disqualified* from being the representative of that state. In the case of intervention by invitation, disqualification occurs when the state's requests for intervention are refused. In the case of the accreditation of delegates by international organizations, disqualification occurs when the state's delegates are refused accreditation. This Article argues that the effect of the legitimacy of *origin* test has been confined to a *qualification* role, whereas the

75. *See id.*

76. See, for instance, the recent debate about the increase of American military efforts in Afghanistan on the occasion of which the American administration has engaged in a review of the legitimacy of the Karzai government. *See, e.g.*, Peter Baker & Sabrina Tavernise, *U.S. Wants Afghan "Partner,"* INT'L HERALD TRIB., Oct. 20, 2009, at 3.

legitimacy of exercise has been confined to a *disqualification* function.

1. Qualifying Governments: The Primary Role of the Legitimacy of Origin

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

The exercise of power has, on the other hand, been the basis for the disqualification of a government previously considered the legitimate representative of a state. A legitimately elected government can lose its legitimacy and be barred from speaking and acting on behalf of the state because its exercise of power conflicts with substantive elements of democracy. This is well illustrated by the aforementioned practice regarding invitations for intervention. Likewise, the UN General Assembly disqualified the government of South Africa due to the way in which the government was exercising its power, namely, through its racist apartheid policy.

This distribution of roles between the legitimacy of exercise and the legitimacy of origin is not at all surprising. Indeed, no one disputes the necessity in contemporary international relations for a swift assessment of governments' legitimacy to determine who can act and speak on behalf of a state. Indeed, no state or international organization can afford to leave the determination of the legitimacy of a foreign government—upon which any conclusion as to who can act on behalf of the foreign

state depends—pending for long. Against this backdrop, it is not surprising that legitimacy of exercise is avoided in qualification situations. An appraisal of the legitimacy of a government's exercise of power necessarily requires that the government has exercised power over a period of time. In cases of an unconstitutional change of government or credentials controversies, there has yet to be any "exercise" of power. As such, the legitimacy of exercise test does not comport with the necessity for swift determination of a state's legitimate representatives.[77] In this context, the origin of power has been seen as a more appropriate test of legitimacy. It is easy to understand how the origin of a government can be quickly assessed.[78] Legitimate origins entail a free and fair electoral

77. The refusal of accreditations of the delegates of South Africa during the apartheid period for reasons pertaining to legitimacy of exercise was possible because the credentials of delegates are reviewed every year and the apartheid government had been in power for a significant period of time. For an analysis of this question, see d'Aspremont, *supra* note 14, at 903.

78. It must be pointed out, however, that the primarily qualificatory role of legitimacy of origin has been possible only because the *periodicity* of electoral process, has been downplayed. That means that the periodicity of elections (and the related willingness of the democratically elected government to undergo future electoral processes) is not taken into account when determining the legitimacy of government. This practice demonstrates that the evaluation of the legitimacy of origin generally does not include any consideration of the sustainable character of electoral origins. It could be reasonably argued that this contempt for the criterion of periodicity of elections probably conflicts with several international texts. *See, e.g.*, International Covenant on Civil and Political Rights, *supra* note 46, art. 25 ("Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: . . . (b) [t]o vote and to be elected at genuine *periodic* elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors . . . .") (emphasis added); Universal Declaration of Human Rights, *supra* note 54, art. 21 ("The will of the people shall be the basis of the authority of government; this will shall be expressed in *periodic* and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures") (emphasis added); *see also* G.A. Res. 55/96, ¶ 1, U.N. Doc. A/RES/55/96 (Feb. 28, 2001) (on promoting and consolidating democracy); General Comment No. 25, *supra* note 68, ¶ 9. For additional General Assembly resolutions concerned with "[s]trengthening the role of the UN in enhancing the effectiveness of the principle of periodic and genuine elections and promotion of democratization," see generally G.A. Res. 58/180, U.N. Doc. A/RES/58/180 (Mar. 17, 2004); G.A. Res. 56/159, *supra* note 54; G.A. Res. 52/129, *supra* note 54; G.A. Res. 50/185, U.N. Doc. A/RES/50/185 (Mar. 6, 1996); G.A. Res. 49/190, *supra* note 54; G.A. Res. 48/131, *supra* note 54; G.A. Res. 47/138, *supra* note 54; G.A. Res. 46/137, *supra* note 54; G.A. Res. 45/150, *supra* note 54; G.A. Res. 43/157, *supra* note 54; *Inter-American Democratic Charter*, *supra* note 68, art. 4. On the periodicity of elections and what it actually means, see Sarah Joseph, *Rights and Political Participation*,

process, so foreign states can typically just rely on the accounts of elections monitoring missions sent by international organizations to quickly make their decisions.[79] To put it differently, free and fair elections are "easier to capture" than the substantive elements of democracy.[80] This is the reason why the legitimacy of exercise has not played a role in the qualification of governments and has been confined to a disqualification function. Qualification of governments has almost exclusively rested on the legitimacy of origin.

2. Illiberal Democracies: Turning to the Legitimacy of Exercise

Having demonstrated that the legitimacy of origin has played an important qualification role while the legitimacy of exercise has been moderately used in disqualification situations, mostly in situations of intervention by invitation, this Article argues that the disqualification role of legitimacy of exercise is due to increase dramatically with respect to the recognition of governments and the accreditation of their delegates within international organizations because of the persistence of *illiberal democracies*. By "illiberal democracy" this Article means a democratically elected government exercising its powers in violation of the substantive elements of democracy.[81] There are many nations whose governments are elected through a more or less free and fair electoral process, but commit blatant violations of human rights. To identify just a few examples, recent elections in Egypt,[82] Iran,[83] Pakistan,[84] Palestine,[85] and Tunisia[86] may well

in THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM 535, 554 (David Harris & Sarah Joseph eds., 1995).

79. For example, see the electoral missions set up by the Office for Democratic Institutions and Human Rights at http://www.osce.org/odihr/ (last visited Oct. 25, 2010). Regarding UN electoral missions, see G.A. Res. 46/137, *supra* note 54, ¶ 3 (on enhancing the effectiveness of the principle of periodic and genuine elections); U.N. Secretary-General, *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections: Rep. of the Secretary-General*, ¶ 13, U.N. Doc. A/46/609 (Dec. 19, 1991) (discussing the close relationship between UN electoral missions and election processes). *See generally* Margaret Satterthwaite, *Human Rights Monitoring, Elections Monitoring, and Electoral Assistance as Preventive Measures,* 30 N.Y.U. J. INT'L L. & POL. 709 (1998).

80. *See* Fareed Zakaria, *The Rise of Illiberal Democracies*, FOREIGN AFF., Nov./Dec. 1997, at 22, 40 (1997).

81. *See id.* at 22.

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

have been free, but the elected government has not always proved committed to respecting basic human rights.

The persistence of illiberal democracies has already prompted some Western states to reconsider their policy in matters of democratization.[87] These policies have, so far, largely relied on the assumption that free and fair elections directly correspond with respect for human rights.[88] This Article argues that among the changes that will be brought about by the persistence of illiberal democracies in the international arena will be a revamping of the way that governmental legitimacy is assessed. More specifically, this Article argues that the legitimacy of exercise will play a greater disqualification role in the accreditations processes within international organizations. Indeed, in the case of the accreditation of delegates from a democratically elected government, the legitimacy of exercise could be a factor prompting the refusal of credentials. An international organization could refuse to recognize delegates from a government whose exercise of power is significantly at odds with the substantive elements of democracy. Denying accreditation to delegates from illiberal democracies would undoubtedly increase the disqualification role of the legitimacy of exercise, as a government would be judged according to the manner in which it exercises power.

Likewise, illiberal democracies will drive states to reconsider their policy on recognition. The legitimacy of exercise could affect recognition in two ways. First, it could induce states to not

83. *See* Michael Ignatieff, *Iranian Lessons*, N.Y. TIMES MAG., July 17, 2005, at 51.

84. *See* Barry Bearak, *Awaiting Clinton, Pakistani Takes Election Step*, N.Y. TIMES, Mar. 24, 2000, at A8; Barry Bearak, *Democracy in Pakistan: Can a General Be Trusted?*, N.Y. TIMES, Nov. 21, 1999, § 1, at 12; Jane Perlez, *Clinton Decides to Visit Pakistan, After All*, N.Y. TIMES, Mar. 8, 2000, at A12.

85. *See* Steven Erlanger, *After the Elections: The Leadership; Hamas Leader Sees No Change Toward Israelis*, N.Y. TIMES, Jan. 29, 2006, § 1, at 1; Francis Fukuyama, *After Neoconservatism*, N.Y. TIMES MAG., Feb. 19, 2006, at 67; James Glanz, *The World: Blowback; A Little Democracy or a Genie Unbottled*, N.Y. TIMES, Jan. 29, 2006, § 4, at 1.

86. *See* Editorial, *Undemocratic Tunisia*, N.Y. TIMES, Feb. 18, 2004, at A18.

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

88. *See, e.g.*, ECHR, *supra* note 60; *see also* Organization of American States (OAS): Inter-American Democratic Charter art. 7, Sept. 11, 2001, 40 I.L.M. 1289; United Communist Party of Turkey v. Turkey, 1998-I Eur. Ct. H.R. 1, 20–22 (1998).

recognize a government whose *expected* policies are likely to be contrary to the substantive elements of democracy. Second, if the expected exercise of power does not deter states from granting recognition, a subsequent exercise of power inconsistent with human rights could then lead to a *withdrawal* of previous recognition.

It must be acknowledged that the *withdrawal* of recognition is extremely rare in practice. The withdrawal of recognition of the government based in Taiwan and the simultaneous recognition of the communist government based in Beijing as the government of China may be one of very few examples.[89] The growing importance of legitimacy of exercise could spawn a sweeping change in this respect, thereby making withdrawal of recognition of governments more common. Contemporary practice already contains some hints of this leaning, as is illustrated by the partial withdrawal of recognition of the branch of the Palestinian Authority controlled by Hamas.[90]

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

89. *See* Hungdah Chiu, *The International Law of Recognition and the Status of the Republic of China*, 3 J. CHINESE. L. 193, 193 (1989); Victor H. Li, *The Law of Non-Recognition: The Case of Taiwan*, 1 NW. J. INT'L L. & BUS. 134, 134 (1979). On the legal status of dependent states, see generally JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 198–220 (1979).

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

This section has argued that the disqualification role of legitimacy of exercise is currently gaining momentum. This tendency represents a paradigm shift in the manner in which legitimacy of governments is appraised. The next section will show that the practice pertaining to international organizations has experienced the exact opposite phenomenon.

B. *Legitimacy of International Organizations: From Exercise to Origin*

From a conventional perspective, international organizations derive their legitimacy from the powers that have been conferred to them by the member states of that organization. The *source* of their powers is thus only very briefly tested through the consent of states when signing the constitutional treaty of the organization.[91] In this sense, the legitimacy of origin of international organizations is not necessarily a controversial issue. Consequently, international organizations need to ensure that they exercise their powers in conformity with the functions assigned to them by the states. Therefore, international organizations traditionally buoy their legitimacy by ensuring that decision making in respect to the exercise of their specific functions is in conformity with the institutional law of the organization and international law. This is a manifestation of what previous sections described as the legitimacy of exercise.

It is submitted here that the way in which authority is exercised by international organizations—traditionally viewed as the criterion that measures the legitimacy of these institutions—is increasingly subjected to the growing importance of how authority to exercise certain activity is granted to international organizations, i.e., the legitimacy they can derive from the origin of their power. Recent developments in the role and functions of international organizations, such as the increasing involvement of international organizations in the exercise of governmental functions, have indeed caused a cross-fertilization of both forms of legitimacy, with a clear move from the legitimacy of exercise to various forms of legitimacy of origin. The question of how power is bestowed upon international organizations, especially for those

91. On the idea of consent as a basis of legitimacy, see Buchanan, *supra* note 1, at 90–94.

activities having potential or effective far-reaching influence on the daily lives of citizens, has become an essential question in international law and international relations. This section starts by depicting the traditional conception of institutional legitimacy before turning to several developments that evidence the move toward the legitimacy of origin of international organizations. This section then addresses how the dual character of the legitimacy of international organizations has manifested itself in the reconstruction and administration of states in post-conflict situations.[92]

1. International Organizations and the Legitimate Exercise of Powers

International organizations, although created by states, cannot be seen as their equivalent, especially in terms of democratic legitimacy. Decision making at the international level by international organizations lacks any direct electoral foundation since they have no direct popular legitimacy of origin. For these reasons, the functioning of international organizations and global governance is often generally considered to be naturally illegitimate[93] or "undemocratic."[94]

However, since an international organization is created by states, the source and legitimacy of the exercise of powers by international organizations is derived from the consent validly expressed by the different states party to the constitutional treaty of the organization. Since states and their governments are to be considered as the legitimate representatives of the population in their territory, under the conditions described and discussed in the sections above, the delegation of certain powers to international organizations by these representatives is *indirectly* based on a form of popular consent. Consequently, the exercise of powers by international organizations cannot be considered

92. On the contemporary practice of international administration of territories, see DE BRABANDERE, *supra* note 20.

93. Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1515 (2006).

94. Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2017–21 (2004).

illegitimate by definition, although its legitimacy will often not be "democratic" as is traditionally understood.[95]

In light of this lack of *direct* legitimacy of origin, and the absence of a periodical legitimacy or accountability test through direct elections or any other mechanism, the legitimacy of international organizations has been classically addressed through the way in which the functions were exercised, i.e., through the legitimacy of exercise. The exercise of powers by international organizations is then subjected to a legitimacy assessment principally through the procedures followed,[96] often referred to as input legitimacy.[97] From a legal perspective, the most obvious method to ensure the legitimate exercise of powers by an international organization, with a focus on the procedural aspects of decision making, is to ensure that the decisions are in conformity with the legal obligations of the international organization,[98] particularly in terms of the legal restraints stemming from the application of international law and the organization's constitution. Especially when international organizations take actions that have a potential impact on human rights, such as in the case of the Security Council, there is a tendency to subject this exercise of power to some form of ex post facto legitimacy or legality check.[99] Traditionally, the international community views as legitimate an international

95. *See* Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 646 (1999).

96. On the issue of procedural legitimacy and fairness, see FRANCK, *supra* note 5, at 204–07; Franck, *supra* note 5, at 705. Another method is to assess the substantive outcome of the decisions of international organizations, which is, however, more a question of *effectiveness* of the organizations than a question of legitimacy and legitimate exercise of functions. On the issue of substantive legitimacy, see Rüdiger Wolfrum, *Legitimacy of International Law and the Exercise of Administrative Functions: The Example of the International Seabed Authority, the International Maritime Organization (IMO) and International Fisheries Organizations*, 9 GER. L.J. 2039, 2040 (2008). The substantive outcome of the decisions of international organizations is then referred to as output legitimacy.

97. *See generally* Markus Krajewski, *International Organizations or Institutions, Democratic Legitimacy*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2008).

98. With respect to Security Council actions, see ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL (2004).

99. *See* JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 221–28 (2d ed. 2009).

organization's decision when made within the limits of its constitutional treaty.[100]

Of course, the issue of legitimacy is closely connected to the accountability of international organizations, which functions as a test for the legitimate exercise of power. It is an issue that has been taken up, inter alia, by the International Law Association's Committee on the Accountability of International Organizations. The Committee, in its final report, noted that "as a matter of principle, accountability is linked to the authority and power of an [international organization]. Power entails accountability, that is, the duty to account for its exercise."[101] The Committee identified three levels of accountability. The first level is non-legal, and relates to the extent to which international organizations, in the exercise of their functions, subject themselves to certain forms of "internal and external scrutiny and monitoring."[102] The second and third levels concern tort-based liability and international responsibility for breaches of rules of international or institutional law, respectively. The importance of the latter two forms of accountability is also shown through the recent work of the International Law Commission in the codification and progressive development of rules regarding the responsibility of international organizations.[103] These three levels of accountability, including the work of the International Law Commission on the responsibility of international organizations, are manifestations of the traditional measurement of the legitimacy of international organizations, which is how the functions are exercised.

Against this backdrop, and taking into account the legitimacy of international organizations derived from the consent expressed by the member states, the debate on the legitimacy of *origin* of international organizations is, in theory, relatively unequivocal. International organizations habitually, and as a matter of principle, have no ambition to govern a place

100. *See id.*; THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 219–21 (1995).

101. COMM. ON THE ACCOUNTABILITY OF INT'L ORGS., INT'L LAW ASS'N [ILA], FINAL REPORT, BERLIN CONFERENCE 5 (2004).

102. *Id.*

103. For the latest report of the Special Rapporteur and discussion of this topic in the International Law Commission, see Rep. of the Int'l Law Comm'n, 61st Sess., Supp. No. 10, May 4–June 5, July 6–Aug. 7, U.N. Doc. A/64/10 (2009).

or people. Therefore, the need to establish legitimacy of origin appears to be a theoretical issue only. Of course, the question of the legitimacy of origin of international organizations has particular relevance for those organizations that have activities that go beyond mere technical interstate cooperation.[104] This is also why the question of the legitimacy of origin of international institutions has traditionally not been addressed in international legal scholarship. Indeed, a few decades ago, the activities of international organizations had been relatively weak with respect to effectively exercised authority and the question of their legitimacy was, as a consequence, of little relevance.[105] Thus, one can say that the combination of the multiplication of areas in which international organizations are currently involved, and the altered interconnection and relation between international organizations and other actors have, from a factual perspective, sparked the legitimacy debate of international institutions.[106]

2. Institutional Legitimacy: From the Legitimacy of Origin to the Legitimacy of Exercise and Back

Traditionally, when an organization's activity has had an impact on the state and individuals, international organizations have, in the exercise of their functions, relied on the general or ad hoc consent of states.[107] However, several developments confirm that with increasing frequency, international organizations are seeking to establish a form of legitimacy of origin beyond the mere consent of the member states and beyond the legitimacy of the exercise of their functions. As a consequence, the dual character of the legitimacy of international organizations has recently been at the forefront of legal and political discourse through the greater involvement of organizations in several areas.

The first development toward the establishment of a form of legitimacy of origin relates to the European Union. The functioning and legitimacy of the European Union now lies at the intersection of states and international organizations in terms

104. Krajewski, *supra* note 97, ¶ 11.

105. Bodansky, *supra* note 58, at 597.

106. L. Boisson de Chazournes, *Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies*, 6 INT'L ORG. L. REV. 655, 665 (2009).

107. Bodansky, *supra* note 58, at 597.

of democratic legitimacy. Evidence of this is the direct election by the citizens of the Members of the European Parliament. As such, the legitimacy of the EU in the exercise of its function is very well established, since the decisions of the various institutions of the European Community are, under certain conditions, subject to direct judicial scrutiny by the General Court (formerly the European Court of First Instance) or the Court of Justice. But the direct elections of the members of the EU Parliament are important for the EU because it adds a popular legitimacy of origin to the exercise of its functions. This has particular relevance taking into consideration the undeniably strong(er) impact of the EU's decisions on the daily lives of the European citizens. It is also for the same reason that several Member States have decided to organize referenda in order to add a certain popular legitimacy to the proposed institutional changes.[108]

The discussions on the reform of the United Nations Security Council and the need to expand the (permanent) membership of the Security Council is a second example that evidences an apparent shift from the legitimacy of exercise to the legitimacy of origin in assessing institutional legitimacy. The question of whether a decision is made in conformity with the UN Charter and principles of international law, i.e., whether a decision is legitimate from the perspective of the exercise of functions, is incrementally being complemented by the question of whether the Security Council as an institution has the necessary legitimacy to make certain decisions.[109] The recommendations of the High-Level Panel on Threats, Challenges and Change, which besides suggesting a set of guidelines to be used by the Security Council in its decision-making process (legitimacy of exercise), proposed a reform of the Council in order to "increase the democratic and

108. *See* J.H.H. Weiler, *A Constitution for Europe? Some Hard Choices*, 40 J. COMMON MKT. STUD. 563 (2002) (discussing the constitutional treaty and the legitimacy question in the EU). On the question of the referenda, see Jirí Zemánek, *Consent of Parliament or People's Referendum?*, *in* A CONSTITUTION FOR EUROPE: THE IGC, THE RATIFICATION PROCESS AND BEYOND 141–48 (Ingolf Pernice & Jirí Zemánek eds., 2005).

109. *See generally* J. Taubman, *Towards a Theory of Democratic Compliance: Security Council Legitimacy and Effectiveness after Iraq*, 37 N.Y.U. J. INT'L L. & POL. 161, 192 (2004).

accountable nature of the body" (legitimacy of origin).[110] Former United Nations Secretary-General Kofi Annan, in his report *In Larger Freedom*, also criticized the lack of legitimacy of origin of the Security Council by stating, "[T]he Security Council has increasingly asserted its authority and, especially since the end of the cold war, has enjoyed greater unity of purpose among its permanent members but has seen that authority questioned on the grounds that its composition is anachronistic or insufficiently representative."[111] Therefore, the Secretary-General suggested to make the Security Council more broadly representative of the international community as a whole.[112] The justification for the authority of the Security Council is thus no longer seen as a consequence of state consent to the constitutional treaty of the organization, which grants certain functions and powers to the Security Council, but rather the "universal" acceptance of certain decisions. The guarantee that the Security Council exercises its functions within the framework and limits set by the UN Charter and international law thus is increasingly complemented by a tendency to ensure that the origin of functions exercised by that organ is "democratic." Of course, and as noted, these developments towards the legitimacy of origin are both a consequence of, and proportional to the impact of the activity of, the organization on the population. The debate on the legitimacy of origin of international organizations has little or no relevance for those organizations of which the direct impact on the population is limited.

The third development is the increased influence of international economic and financial institutions on the public policy decisions of states, and the coinciding renewed attention paid to the legitimacy of these institutions. In particular, the involvement of the World Bank and the International Monetary Fund ("IMF") in the financial development of states on the one hand, and the strengthened impact of the World Trade

110. Chair of the High-level Panel on Threats, Challenges, and Change, *Report of the High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, transmitted by Note of the Secretary General*, ¶ 249, U.N. Doc. A/59/565 (Dec. 2, 2004).

111. U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All: Rep. of the Secretary-General*, ¶ 165, U.N. Doc. A/59/2005 (Mar. 21, 2005).

112. *Id.* ¶ 169.

Organization ("WTO") and its dispute settlement mechanism on various non-trade policies on the other hand, have been subjected to increased scrutiny in terms of legitimacy. As noted in the previous paragraphs, the legitimacy of many international organizations has in the past attracted only little attention, principally because their activity was limited in terms of impact on the state or the individuals. The growing impact of international institutions on the domestic affairs of the state, and thus on the nationals of the state, has brought about an increased attention to the legitimacy of institutions in taking or imposing far-reaching measures on the state. International financial and trade institutions, in particular, have seen a considerable intensification of the impact of their rules, regulations, and policies, not only on states, but also and mainly, as a consequence, on individuals.

For example, the impact of the Bretton Woods institutions on the human rights situations in states has seriously expanded in the past decades. Traditionally, international financial institutions did not have the authority to address human rights issues under their respective constitutions.[113] The World Bank, for instance, was at its inception prohibited from conditioning loans on political or non-economic considerations.[114] The IMF also traditionally paid little attention to human rights considerations, since, as stated by its General Counsel Mr. Gianviti, the IMF indeed is a monetary agency and not a development agency.[115] These traditional perspectives stand in contrast with an undeniable amplification of the effects of international financial institutions' policies on states and individuals, which in turn has prompted a debate on the legitimacy of international financial institutions in general. Discussions on the legitimacy of international financial and trade institutions have resulted in a renewed attention to the legitimacy

113. ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 142 (2006).

114. *See* Marc Cogen, *Human Rights, Prohibition of Political Activities and the Lending-Policies of Worldbank and International Monetary Fund*, *in* THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW 379 (Subrata Roy Chowdhury et al., eds., 1992).

115. Econ. & Soc. Council, Comm. on Econ., Soc. and Cult. Rights, Rep. on the Twenty-Fifth, Twenty-Sixth and Twenty-Seventh Sessions, ¶ 988, U.N. Doc. E/C.12/2001/17 (April 23–May 11, August 13–31, November 12–30, 2001); *see also* François Gianviti, *Economic, Social, and Cultural Rights and the International Monetary Fund*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 132 (Philip Alston ed. 2005).

of origin of these institutions. As will be discussed, the perceived lack of legitimacy has principally been remedied by attempts either to rethink the distribution of voting powers or to accept some form of public participation in order to ensure a "popular" acceptance of institutional policies. As far as the latter is concerned, a clear parallel can be drawn with what was mentioned earlier with respect to the legitimacy of the EU and the attempts there to establish some form of popular legitimacy.

When viewed from the traditional perspective, international financial institutions, like any other international organization, derive their legitimacy from the powers that have been conferred on them by the member states of that organization. The source of their powers is thus principally tested through the consent of states. However, a unique characteristic of international financial institutions, such as the IMF, is that the unequal financial contributions of donor states to the institutions as a whole and to specific projects in other states has resulted in a departure from the "traditional" equality in voting rights in favor of a weighted vote.[116] Although the principle of weighted voting can easily be defended taking into account the financial character of these institutions,[117] this peculiarity has raised the important question of the legitimacy of the organization especially when dealing with projects in developing countries that have no or little representation in the institution.[118] The IMF's recent review of the distribution of voting power is clear evidence of the attempt to enhance and reinforce the legitimacy of origin of the IMF because of the changed factual realities.[119]

116. *See* SERGEI A. VOITOVICH, INTERNATIONAL ECONOMIC ORGANIZATIONS IN THE INTERNATIONAL LEGAL PROCESS 78 (1995).

117. I. SEIDL-HOHENVELDERN, *International Economic Law: General Course on Public International Law, in* COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 118 (1986); *see* MOHAMMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 210 (1979) (critiquing weighted voting).

118. *See* N. Matz, *Financial Institutions between Effectiveness and Legitimacy—A Legal Analysis of the World Bank, Global Environment Facility and Prototype Carbon Fund*, 5 INT'L ENVTL. AGREEMENTS 265, 270 (2005).

119. *See generally* ARIEL BUIRA, *The Bretton Woods Institutions: Governance without Legitimacy?, in* REFORMING THE GOVERNANCE OF THE IMF AND THE WORLD BANK 7–43 (2005); J. M Griesgraber, *Reforms for Major New Roles of the International Monetary Fund? The IMF Post–G-20 Summit*, 15 GLOBAL GOVERNANCE 179 (2009); D. P. Rapkin & J. R. Strand, *Reforming the IMF's Weighted Voting System*, 29 WORLD ECON. 305 (2006).

Here one can easily see the interplay between the forms of legitimacy described and discussed above. While traditionally the consent of the states, coupled with the exercise of institutional powers in conformity with the functions assigned to them by the states and the respect for international law and other internal procedures, would have been a sufficient legitimacy test, the growing impact of financial institutions' policies on both the state and individuals has prompted new considerations of the question of the *source* of the authority of the institution.

The renewed attention to the legitimacy of origin of international financial institutions is only part of the recent attempt of these institutions to enhance their legitimacy, and, of course, is principally based on the "unequal" distribution of voting power within these institutions. However, besides the question of how power is bestowed upon these institutions, enhancing public participation in both decision-making and dispute settlement processes forms an important part of the debate.[120] To a large extent, public participation is a form of legitimacy of origin, since it aims to ensure that the general public supports the exercise of power. Individuals are often seen as the final recipients of the adopted rules and regulations and are thus given a sense of ownership in the process.[121] This form of legitimacy of origin thus *complements*, rather than *replaces*, the consent of states as the original legitimacy of international institutions.

An example of this development at the level of the World Bank is the establishment of the World Bank Inspection Panel. The Inspection Panel can receive requests for inspection from any party that is a community of persons, "such as an organization, association, society or other grouping of individuals," who need to show that their "rights or interests have been or are likely to be directly affected by an action or omission of the Bank."[122] Although the Inspection Panel will review whether the Bank is complying with its own policies and procedures, which essentially is a question of *legitimacy of exercise*,

120. *See* Matz, *supra* note 118, at 271–72.

121. *See* Bodansky, *supra* note 58, at 617. *See generally* Boisson de Chazournes, *supra* note 106, at 665 (discussing the links between the concepts of transparency and participation).

122. Int'l Bank for Reconstruction and Dev. [IBRD], *The World Bank Inspection Panel*, Resolution No. IBRD 93-10, ¶ 12 (Sept. 22, 1993).

the reason behind the establishment of the Panel is to increase public participation by non-state actors in the activities carried out by the World Bank and thus to add legitimacy of origin to the World Bank.[123]

A similar development has taken place at the WTO, albeit at a different level. The "legitimacy gap" at the WTO in fact has been the result of two different discourses. On the one hand, representatives from developing member states have had the impression of being excluded from mainly informal decision-making processes. On the other hand, representatives of civil society criticize the organization for its lack of consideration of non-state and non-corporate interests in decision-making and dispute settlement procedures, thus lacking a genuine legitimacy of origin.[124] The first issue essentially relates to a critique of the legitimacy in the functioning of the organization and thus to the *legitimacy of exercise* of the organization, while the latter fundamentally concerns the need to broaden the *legitimacy of origin* of the WTO.

Thus, the legitimacy problem of the WTO is essentially linked to the difficult societal acceptance of the institution and its policies.[125] This is despite the indisputable existence of a legitimacy of origin based on the consent of member states, which is expressed through their signature and ratification of the WTO constitution. However, since international economic law is traditionally open only to states, only state—and perhaps corporate—interests are represented at the WTO level, thus effectively disregarding broader public or transnational interests. Trade disputes, however, increasingly involve other policy areas, such as human rights and environmental issues.[126] Since the

123. *See* Laurence Boisson de Chazournes, *Compliance with Operational Standards: The Contribution of the World Bank Inspection Panel*, *in* THE INSPECTION PANEL OF THE WORLD BANK: A DIFFERENT COMPLAINTS PROCEDURE 67, 67–85 (Gudmundur Alfredsson & Rolf Ring eds., 2001).

124. *See* Markus Krajewski, *Democratic Legitimacy and Constitutional Perspectives of WTO Law*, 35 J. WORLD TRADE 167, 167 (2001); Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT'L ECON. L. 123, 131 (1998).

125. *See* Esty, *supra* note 124, at 167–86 (discussing the ways in which the WTO can embrace NGO participation, thereby improving its economic management role).

126. *See generally* Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043 (1994) (arguing that neither trade

WTO is ill-equipped to consider such non-state concerns due to its traditional interstate character, it has habitually been regarded as closed, lacking both transparency and legitimacy.[127] Here again, one can clearly see that institutional legitimacy is closely interconnected with the impact of international organizations on individuals directly or indirectly through policy decisions taken by the organization.

The legitimacy gap at the WTO has resulted in many scholarly discussions and proposals to enhance and restore the legitimacy of the WTO.[128] Proposals include, inter alia, an increased role for national parliaments and even the establishment of a WTO Parliamentary Assembly.[129] These suggestions, however, although theoretically sound, do not seem to be realistically practical in the short term. A more realistic suggestion is to rely on increased public participation and enhanced transparency.[130] Public participation at various stages of the WTO system, through the representative function of NGOs, has been envisaged in the legal literature. NGO participation as *amici curiae* in dispute settlement procedures,[131] but also, for example, their participation through consultation at the decision-making level and through access to documents, have been suggested and also partly implemented.[132] Similarly, a high-

bodies, like GATT, which was the predecessor to the WTO, nor adjudicatory bodies are the right forums for resolving trade or environment disputes).

127. *See* Sungjoon Cho, *A Quest for WTO's Legitimacy*, 4 WORLD TRADE REV. 391–99 (2005) (discussing legitimacy as one of the main challenges for the WTO and how education and social marketing can improve the WTO's legitimacy); Esty, *supra* note 124, at 123.

128. *See* Boisson de Chazournes, *supra* note 106, at 656–66; Krajewski, *supra* note 97, at ¶¶ 13–24(discussing the different forms of "remedies" to the legitimacy problems of international institutions).

129. Krajewski, *supra* note 124, at 183.

130. *See* Steve Charnovitz, *Transparency and Participation in the World Trade Organization*, 56 RUTGERS L. REV. 927, 928 (2004).

131. For general information on NGO participation in international dispute settlement, see Eric De Brabandere, *Non-State Actors in International Dispute Settlement: Pragmatism in International Law*, *in* PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM–MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW (Jean d'Aspremont ed., forthcoming 2011).

132. For an overview of NGO involvement in the WTO, see Yves Bonzon, *Institutionalizing Public Participation in WTO Decision Making: Some Conceptual Hurdles and Avenues*, 11 J. INT'L ECON. L. 751, 751–77 (2008); Charnovitz, *supra* note 130, at 927, 939–42; Frank Loy, *Public Participation in the World Trade Organization*, *in* THE ROLE OF THE WORLD TRADE ORGANIZATION IN GLOBAL GOVERNANCE 113, 118–21 (Gary P.

level panel report on the future of the WTO issued on the tenth anniversary of the organization, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (otherwise known as the Sutherland Report), indirectly tackled the WTO's legitimacy problem. Without explicitly mentioning the legitimacy of the WTO, however, the report contains a chapter entitled "Transparency and Dialogue with Civil Society," which is aimed at remedying and countering the often alleged lack of legitimacy and transparency of the institution.[133] NGO and civil society participation cannot, however, solve every legitimacy problem, and, as already noted, is insufficient for replacing the legitimacy of origin conferred on the organization through state consent. Such participation does not necessarily enhance democratic legitimacy, since NGO are themselves nondemocratic in the sense that they are neither generally elected nor accountable to their members or the general public.[134]

This section has argued that international organizations traditionally have, in the exercise of their functions, relied on the general or ad hoc consent of states to legitimize the exercise of their powers. Due to the increasing impact of the activities of international organizations on the state and individuals, however, international organizations are increasingly seeking to establish a form of legitimacy of origin that goes well beyond the mere consent of member states and the legitimacy of exercise, which is the traditional measuring tool of institutional legitimacy.

3. Institutional Legitimacy and Post-Conflict International Administrations

Traditionally, the UN's task in conflict or post-conflict situations was limited to the deployment of military personnel

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Sampson ed., 2001); Peter Van den Bossche, *NGO Involvement in the WTO: A Comparative Perspective*, 11 J. INT'L ECON. L. 718, 718–49 (2008).

133. CONSULTATIVE BOARD TO THE DIRECTOR-GENERAL SUPACHAI PANITCHAPKDI, THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM 66 (2004)*; see also* Cho, *supra* note 127, at 391–99.

134. *See generally* Kenneth Anderson, *What NGO Accountability Means—and Does Not Mean*, 103 AM. J. INT'L L. 170, 170–78 (2009) (reviewing NGO ACCOUNTABILITY: POLITICS, PRINCIPLES & INNOVATIONS (Lisa Jordan & Peter van Tuiji eds., 2006)). For a discussion on the legitimacy of NGOs as participants in international investment arbitration, see Charles H. Brower II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 73 (2003).

and a limited number of civilian staff to assist or advise the existing governmental structures. Recent peace-building or post-conflict reconstruction missions have been the latest manifestation of an evolving approach towards situations presenting a (potential) threat to international peace and security. International administrations occupy a special place in this evolution. The cases of Kosovo and Timor-Leste are, to a certain extent, a culmination of this evolution, since the UN has taken over the entire administration of the territories in these post-conflict scenarios.

Following the North Atlantic Treaty Organization's ("NATO") armed intervention in Kosovo in March 1999, the UN Security Council adopted Resolution 1244, establishing the United Nations Interim Administration Mission in Kosovo ("UNMIK").[135] Resolution 1244 called upon UNMIK to promote the establishment of substantial autonomy and self-government in Kosovo; perform basic civilian administrative functions; support the reconstruction of key infrastructure; maintain civil law and order; promote human rights; and assure the safe return of all refugees and displaced persons.[136] UNMIK's authority included full legislative and executive power in the areas of responsibility laid out the resolution. A few months later, the Security Council authorized the establishment of the United Nations Transitional Authority in East Timor ("UNTAET").[137] A popular consultation, conducted earlier among the Timorese, had revealed a clear wish on their part to begin a transition toward independence. In the transitional process, UNTAET was endowed with overall responsibility for the administration of Timor-Leste and was empowered to exercise all legislative and executive authority, including the administration of justice.[138]

Essentially, the dual character of legitimacy under international administrations is the consequence of the functional duality of an international organization's exercise of public authority. On the one hand, an international administration is a subsidiary organ of an international organization; on the other hand, it functions as the government

135. S.C. Res. 1244, ¶ 10, U.N. Doc. S/RES/1244 (June 10, 1999).
136. *Id.* ¶ 11(a)–(k).
137. S.C. Res. 1272, ¶ 1, U.N. Doc. S/RES/1272 (Oct. 25, 1999).
138. *Id.*

of a territorial entity. The acts of the international administration are thus both international acts of the international organizations and internal acts of the state. When such missions are looked at according to their first capacity, they will be tested through the legitimacy of exercise. When international administrations are essentially seen as surrogate national governments, the tendency is to concentrate on the legitimacy of origin as the appropriate method of assessing the legitimacy of the exercise of those functions.

Even if the international community has been somewhat reluctant in the past to accept the UN's capacity to take over territorial administration, one can easily assert that this controversy is actually at an end.[139] Despite some contentions to the contrary,[140] there are clear bases for the legal authority to exercise administrative functions in post-conflict situations.[141] Several articles of the UN Charter can be interpreted to authorize peace-building missions and international administrations, depending on whether or not the consent of the host state has been obtained. Article 39 of the UN Charter gives the Security Council the power to make recommendations to the parties concerned. Operations authorized under this article are, therefore, based not only on the Security Council's recommendatory power, but also on the consent of the state concerned. Article 41 gives the Security Council the power to impose measures not involving the use of armed force. In theory, when the consent of the host state cannot be obtained for whatever reason, and if a situation presents a threat to the peace, breach of the peace, or act of aggression, this article can also be considered an adequate legal basis to authorize such a mission. Of course, one might consider that in light of the expanded interpretation of what constitutes a "threat to international peace

139. *See* Erika de Wet, *The Direct Administration of Territories by the United Nations and Its Member States in the Post Cold War Era: Legal Basis and Implications for National Law*, 8 MAX PLANCK Y.B. U.N. L. 291, 306–40 (2004).

140. *See, e.g.*, Hollin K. Dickerson, *Assumptions of Legitimacy and the Foundations of International Territorial Administration*, 100 AM. SOC'Y INT'L L. PROC. 144, 145 (2006).

141. Eric De Brabandere, *The Responsibility for Post-Conflict Reforms: A Critical Assessment of* Jus Post Bellum *as a Legal Concept*, 43 VAND. J. TRANSNAT'L L. 119, 126–28 (2010).

and security," the Security Council has a particular duty to act in good faith when making determinations in this respect.[142]

If one takes a classical approach to the legitimacy of international organizations and their exercise of powers, the establishment of peace-building missions in conformity with the UN Charter would clearly be sufficient to render international administrations legitimate. The legitimacy of establishing international post-conflict administrations is then principally derived from the procedural and legal validity of the action taken, i.e., its conformity with the UN Charter and other rules of international law. However, such activity is also legitimate as a consequence of the general consent of member states to the power of the Security Council to deal with situations that can be categorized as a threat to international peace and security.[143] This is because states delegate certain powers to the Security Council by being a party to the UN Charter, which grants the UN Security Council the authority to establish these types of missions. Despite some reluctance in legal literature to accept the expanding role of the Security Council and the expanding range of measures the Security Council adopts under its Chapter VII powers,[144] it is important to note that UN member states have not objected to recent comprehensive peace-building mandates.[145] But despite these relatively undisputed legal bases, the question has been raised whether, in light of the impact of such decisions, the consent of either the host state or host population should not form the legitimate basis for the exercise of such functions, since such a requirement would be placed onto a national government exercising such functions.[146]

142. *See* Frederic L. Kirgis, *Security Council Governance of Postconflict Societies: A Plea for Good Faith and Informed Decision Making*, 95 AM. J. INT'L L. 579, 580–82 (2001).

143. *See* Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 LAW & CONTEMP. PROBS. 1, 21 (2008).

144. For a critical overview, see BENEDETTO CONFORTI, THE LAW AND PRACTICE OF THE UNITED NATIONS 206–07 (3d rev. ed. 2005).

145. As noted by Erika de Wet, the international community has accepted such mandates, either through explicit support in the General Assembly or indirectly by the acceptance of the expenses for such missions as expenses of the organization. Erika de Wet, *Beginning and End of Occupation—UN Security Council's Impact on the Law of Occupation,* 34 COLLEGIUM 34, 37 (2006).

146. *See generally* Hollin K. Dickerson, *Assumptions of Legitimacy: The Foundations of International Territorial Administration*, 34 DENV. J. INT'L L. & POL'Y 161, 172, 175–77 (2006).

The consent of the host state is not absolutely necessary when the Security Council acts under Chapter VII. When possible, however, the consent of the host state is often sought and obtained for intrusive reconstruction activities.[147] One reason for this is that from a practical perspective, international administrations cannot adequately operate without the consent of the sovereign state. More importantly, however, the specific ad hoc consent of the host state plays an important function from the perspective of the legitimacy of international administrative missions. In addition to the legal basis for the creation of comprehensive peace-building missions by the Security Council, the consent of the host state can be sought to enhance the legitimacy of origin, from an institutional perspective, of the exercise of such intrusive powers on a state's territory. The consent of the host state, in general, to the authority of the Security Council is then complemented by the specific consent of the state for a particular type of activity; the legitimacy of exercise is complemented by the legitimacy of origin.

In the case of Kosovo, the Federal Republic of Yugoslavia explicitly consented to the deployment of both civil and military personnel.[148] Nevertheless, consent was not absolutely necessary, as UNMIK was established under a Chapter VII resolution. In this particular case, a purely legal argument could explain why the Security Council sought the consent of Yugoslavia. The consent of the Federal Republic of Yugoslavia was crucial given the ambiguities concerning its membership in the UN, as both the Security Council[149] and the General Assembly[150] had clearly indicated that it could not automatically be seen as the successor to the Socialist Federal Republic of Yugoslavia. The Federal

147. *See, e.g.*, Letter from Dieter Kastrup, Permanent Rep. of Germany to the U.N., to the United Nations addressed to the President of the Security Council (June 7, 1999), U.N. Doc. S/1999/649 ("[A]greement on the principles (peace plan) to move towards a resolution of the Kosovo crisis presented to the leadership of the Federal Republic of Yugoslavia"). In the case of Kosovo, the plan presented by Martti Ahtisaari, President of Finland, and Victor Chernomyrdin, Special Representative of the President of the Russian Federation, which contained the general principles of an agreement on the Kosovo crisis, was accepted by the Federal Republic of Yugoslavia. *See id.*; *see also* S.C. Res. 1244, U.N. SCOR, 54th year, ¶ 2, U.N. Doc. S/INF/55, at 32 (June 10, 1999).

148. *See* S.C. Res. 1244, *supra* note 147, ¶ 5.

149. *See, e.g.*, S.C. Res. 757, ¶ 10, U.N. SCOR, 47th Year, U.N. Doc. S/INF/48, at 13 (May 30, 1992); S.C. Res. 777, ¶ 1, U.N. Doc. S/RES/777 (Sept. 19, 1992).

150. *See, e.g.*, G.A. Res. 47/1, ¶ 1, U.N. Doc. A/RES/47/1 (Sept. 22, 1992).

Republic was considered by the Secretariat to be the de facto successor to the Socialist Federal Republic.[151] The consent of Yugoslavia not only legalized the deployment of the mission in its territory, but it also added the necessary legitimacy to the authorization of this international administrative mission by the Security Council.

The case of UNTAET is also rather unusual in this respect, since Indonesia's consent was sought in spite of the very doubtful character of Indonesian sovereignty over Timor-Leste.[152] Timor-Leste was formally still a non-self-governing territory at the time of the 1999 popular consultation that led to the establishment of an international administration. According to the principles applicable to non-self-governing territories,[153] Portugal retained formal sovereignty over Timor-Leste. However, an agreement was concluded between Portugal and Indonesia to organize the referendum and the international administration in the event of a vote in favor of independence.[154] But the consent of Indonesia in this case could by no means legitimate the creation of an international administration on the territory of Timor-Leste, and can perhaps be explained by pragmatism. On the other hand, the consent of Portugal, which formally had sovereignty over the territory, had also been obtained through the signature of the treaty with Indonesia to organize the referendum.[155]

However, when the consent of the state is problematic, such as in Timor-Leste, the lack of consent from the host population is often advanced as the reason such intrusive operations lack legitimacy.[156] The focus here thus shifts from international administrations as subsidiary organs of international organizations to international administrations as substitute

151. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 91, ¶ 95 (Feb. 26).

152. *See* East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, ¶¶ 15, 31, 37 (June 30); *see also* Steven R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence,* 16 EUR. J. INT'L. L. 695, 697 n.6, 698 n.12 (2005).

153. *See* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 613–15 (2d ed. 2006).

154. Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor, Indon.-Port., art. 6, May 5, 1999, 2062 U.N.T.S. 8.

155. *See, e.g.*, *id.* pmbl.

156. *See, e.g.*, Dickerson, *supra* note 140, at 145.

national governments by seeking to establish popular legitimacy of origin similar to that of national governments. From an international organization perspective, the legitimacy of these missions is clearly established, but international administrations will typically lack the necessary democratic legitimacy usually required for national governments. Indeed, popular consent has never been the basis for the *establishment* of the latest post-conflict administrations or peace-building missions. Even in Timor-Leste, when prior to the establishment of UNTAET a referendum had been organized, the only question put to the citizens was whether they agreed or not to independence. There was no explicit ambition to seek consent of the Timorese for the exercise of administrative powers by the UN, although the choice for an independent Timor-Leste implied the exercise of such powers by the organization.

In the absence of popular legitimacy of origin, post-conflict international administrations have been somewhat forced to enhance the legitimacy of their exercise of legislative, executive, and even judicial powers through consultation with national authorities. This type of legitimacy, although incomplete when viewed from the standards for national governments set out above, in fact combines elements relating to the source of authority (legitimacy of origin) and elements relating to the legality and thus the legitimacy of the national level decision-making process of international administrations in their government functions (legitimacy of exercise). Former UNTAET transitional administrator Vieira de Mello explained:

> The more powers conferred on local representatives, the closer power is to the people and thus the more legitimate the nature of the administration. But conferring power on non-elected local representatives can also have the undesired effect of furthering a particular party. The inclination of the U.N. is thus to be cautious about delegating power in the interest of avoiding furthering any particular political party. There is consultation, but all essential decision making and executive authority remains with the U.N.[157]

157. Sergio Vieira de Mello, *How Not to Run a Country: Lessons for the UN from Kosovo and East Timor* 4 (2000) (unpublished paper), *available at* http://www.jsmp.minihub.org/Resources/2000/INTERFET%20DETAINEE%20MANAGEMENT%20UNIT%20(e).pdf.

At the same time, the former transitional administrator questioned the appropriateness of such an approach.[158]

In practice, consultation with local actors has been paramount to enhancing the legitimacy of such missions, and local institutions often have been created for this purpose. The Special Representative in Kosovo, upon his arrival, established a Kosovo Transitional Council ("KTC") as a consultative, quasi-legislative organ.[159] A few months later it was expanded and integrated into the first Kosovar multi-ethnic governmental structure: the Joint Interim Administrative Structure ("JIAS").[160] Soon after UNTAET's arrival, the transitional administrator for East Timor established the National Consultative Council ("NCC"), a political body consisting of eleven Timorese and four UNTAET members, to oversee the decision making by the international administration.[161] The Council's primary responsibility was to make policy recommendations on significant executive and legislative matters, and to consult with the Timorese on all aspects of UNTAET's involvement. Review of UNTAET regulations was included in the Council's advisory mandate, and all UNTAET regulations adopted during the National Consultative Council's tenure were endorsed by the Council.[162]

This section has shown that, although the legitimacy of international organizations has been traditionally tested only from the perspective of the legitimacy of exercise, recent developments show a tendency towards assessing decision-making power within international organizations also through the lens of the legitimacy of origin. Of course, the dual character of legitimacy is most visible when international organizations take over administrative functions within a state, therefore effectively

158. *See id.*

159. Press Release, United Nations Interim Administration Mission in Kosovo [UNMIK], UNMIK Convenes First Meeting of Kosovo Transitional Council; Recruitment of New Kosovo Police Service Launched; Confidence-Building Measures Agreed (July 16, 1999), U.N. Press Release UNMIK/PR/12.

160. UNMIK Regulation No. 2000/1, On the Kosovo Joint Interim Administrative Structure, § 1(c)–(d), U.N. Doc. UNMIK/REG/2000/1 (Jan. 14, 2000).

161. UNTAET Regulation No. 1999/2, On the Establishment of a National Consultative Council, §§ 1, 2, U.N. Doc. UNTAET/REG/1999/2 (Dec. 2, 1999).

162. U.N. Secretary-General, *Financing of the United Nations Transitional Administration in East Timor: Rep. Of the Secretary-General*, ¶ 14, U.N. Doc. A/54/769 (Mar. 7, 2000).

combining the two forms of legitimacy. In those cases, the decision-making process at the institutional level tends to be supported by both the legal validity of the decisions taken and the consent of the host state. During the performance of their missions, international administrations, although legitimate from an institutional perspective, typically will lack popular legitimacy of origin. In those circumstances, international post-conflict administrations have sought to legitimize their activity by consulting with local ad hoc authorities, which offers some form of legitimacy of origin in their decision-making power on the national level.

CONCLUSION

This Article has argued that the complexity of global governance can hardly be disentangled if one fails to understand the dual nature of legitimacy of its main actors, i.e., governments and international organizations. It has been submitted that legitimacy should, for each of them, be gauged from the standpoint of both their *origin* and the way in which they *exercise* their powers. Such a distinction has been insufficiently taken into account in international legal scholarship. While emphasizing the need for a distinction between the legitimacy of origin and the legitimacy of exercise for both governments and international organizations, this Article has tried to demonstrate that each of these aspects of legitimacy has been given varying weight. In particular, it has been explained that, with respect to the legitimacy of governments, the emphasis classically put on the legitimacy of origin is no longer exclusive, and more attention is paid to the legitimacy of exercise. Recent practice and contemporary literature have shown that the question of the legitimacy of international organizations is no longer solely based on the way in which these organizations exercise their powers but also based on their origin. This Article ultimately expresses the hope that the conceptual clarifications that have been put forward here will be instrumental in stimulating more systematized research about legitimacy of global actors in the context of global governance.