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National and International Legitimacy of Governments

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I. Introduction

When the Security Council adopted resolutions 1970 (2011) and 1973 (2011) authorizing the UN member States' military intervention in Libya, the global condemnation of the Libyan regime was almost unanimous. The fact that the government of Muammar Al Gaddafi employed military force against the Libyan population was regarded as unacceptable. Remarkably, most official statements invoked the lost legitimacy of the government as justification of their position. In March 2011, US President Obama, for example, declared: 'Muammar Qaddafi has lost the legitimacy to lead, and he must leave.'¹ A similar statement was issued by the G8 summit in May 2011: 'Gaddafi and the Libyan government have failed to fulfil their responsibility to protect the Libyan population and have lost all legitimacy. (...) He must go.'²

An almost identical attitude was and still is to be observed in the case of Syria. Even though the Security Council has not authorized the UN member States to intervene due to vetoes by Russia and China, most States reject the legitimacy of the Syrian government since 2011. The use of indiscriminate violence against the Syrian population brought several States to call on Assad to resign from office invoking, again, his lost legitimacy. The UK, France and Germany, for example, stated in August 2011: 'Our three countries believe that President Assad, who is resorting to brutal military force against his own people and who is responsible for the situation, has lost all legitimacy and can no longer claim to lead the country. We call on him (...) to step aside

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¹ Mark Landler, 'Obama Tells Qaddafi to Quit and Authorizes Refugee Airlifts', *The New York Times* (New York City, 4 March 2011) 11.

² 'G8: Libya's Gaddafi "should go", say world leaders', *BBC News Africa* (27 May 2011). <<http://www.bbc.co.uk/news/world-africa-13572830>> accessed 14 July 2015.

(...).³ Similar statements were issued during a debate at the Human Rights Council in August 2011. The example of the Bulgarian declaration may suffice: 'Despite outstanding efforts by many international mediators, the Syrian regime has continued with the policy of repression rather than dialogue, leading to a loss of legitimacy nationally and internationally.'⁴ This position is still voiced continuously. In November 2014, the White House spokesman Josh Earnest stated: 'We believe that he [Assad] has lost the legitimacy to lead'.

These official declarations may be interpreted as the birth of a new approach towards the legitimacy of governments. So far, legitimacy has been regarded as an exclusively internal matter (national legitimacy of governments⁵). Are we about to experience the development of an international dimension of legitimacy (international legitimacy of governments⁶) which supplements its national dimension?

There are several (well-known and largely discussed) aspects of international law which seem to be related to the concept of international legitimacy of governments or which may be characterized as its predecessors, such as the concept of humanitarian intervention and the right to use force⁷ or the condemnation of governments not compliance with international law.⁸ In all of these instances, however, the question whether the respective government was *internationally legitimate* or not (in the sense that it had the recognition of the international community to rule the country) was neither asked nor used as an argument. Furthermore, in all of these well-known cases the governments were only urged to comply with international law; they were not urged to resign. This is no longer the case. A fundamental change of language, the creation of a new term ('international legitimacy') is to be observed which may imply a shift in international law with far reaching consequences. Has international law lost its 'neutrality' concerning the choice and form of government? Does a government have to fulfil certain criteria, defined by international law, in order to be regarded as internationally legitimate?

There are only very few scholars who have dealt with or even identified this new question. The first one to pick up this issue did so about 15 years ago, cautiously stating that the international legitimacy of governments was a concept *in statu nascendi*: 'We are witnessing a sea change in international law, as a result of which the legitimacy of each government will one day be measured definitively by international rules and processes'.⁹ Since the events of the Arab Spring, however, a growing number of scholars are of the opinion that the international legitimacy of governments is an

³ 'Joint UK, French and German Statement on Syria' (18 August 2011) <<http://www.number10.gov.uk/news/joint-uk-french-and-german-statement-on-syria/>> accessed 14 July 2015.

⁴ OHCHR, 'Statement of Bulgaria at the Human Rights Council debates situation of human rights in Syrian Arab Republic in Special Session' (22 August 2011) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11324&LangID=E>> accessed 14 July 2015.

⁵ Another term could also be 'internal' or 'domestic' legitimacy of governments.

⁶ Another term could also be 'external' legitimacy of governments.

⁷ Thomas M. Franck and Nigel S. Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force' (1973) 67 AJIL 275.

⁸ UN General Assembly, Resolution 3151 G (XXVIII) (14 December 1973) para. 1.

⁹ Thomas M. Franck, 'Legitimacy and the Democratic Entitlement', in Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law* (CUP 2000) 25, 29.

existing concept which supplements their national legitimacy. They make a clear distinction between the ‘internal’ and the ‘external’ legitimacy of a government.¹⁰ Some authors have seen the question, but they reject such a new approach: “‘Legitimacy’ is a political concept and not a legal term of art. In fact, international law does not provide any criteria for defining and determining legitimacy.”¹¹

This Reflection will, as a first step, recall the traditional concept of legitimacy of governments, i.e. its national dimension. As a second step it will define and develop the new concept of an international legitimacy of governments as such. As a third step, it will aim to sketch its main aspects as derived from current State practice – an analysis lacking in those papers which affirm its existence.

II. The National Legitimacy of Governments

The term ‘legitimacy’ is difficult to define; it is employed in various contexts and by different disciplines. There is, however, a large consensus as to its definition when it is used in relation to governments, i.e. to State authority. In this case, legitimacy is understood as ‘justification of the exercise of public authority’.¹² A plainer expression would be: *Legitimacy means the right to rule a country*. This right is awarded by those who are ruled. It is the consent, the will of the people which legitimizes a government. As long as the State authority is recognized and accepted by the people, it has the power to take binding decisions. Once the government has lost its legitimacy, it has to resign, or the people have got the right to change or even overthrow the government. The idea that the exercise of public authority by a government needs a justification dates back to the age of Enlightenment.¹³

There is, however, no consensus as to the criteria for gaining legitimacy. The various views in legal literature concerning the ways that normative legitimacy is gained, may be regrouped in three schools of thought:¹⁴ Legitimacy depends on formal factors (public

¹⁰ Jean d’Aspremont, ‘Legitimacy of Governments in the Age of Democracy’ (2006) 38 JILP 877, 882; Jean d’Aspremont and Eric De Brabandere, ‘The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise’ (2011) 34 *Fordham Int’l L.J.* 190, 193; Reinhard Merkel, ‘Die Intervention der NATO in Libyen’ (2011) *Zeitschrift für internationale Strafrechtsdogmatik* 771, 778.

¹¹ Stefan Talmon, ‘The Difference between Rhetoric and Reality: Why an Illegitimate Regime May Still be a Government in the Eyes of International Law’ (*EJIL Talk*, 3 March 2011) <<http://www.ejiltalk.org/the-difference-between-rhetoric-and-reality-why-an-illegitimate-regime-may-still-be-a-government-in-the-eyes-of-international-law/>> accessed 14 July 2015.

¹² Rüdiger Wolfrum, ‘Legitimacy in International Law’, in MPEPIL (March 2011) MN 1; Reinhold Zippelius, *Allgemeine Staatslehre* (16th edn, Beck 2010) 95; Niels Petersen, *Demokratie als teleologisches Prinzip. Zur Legitimität von Staatsgewalt im Völkerrecht* (Springer 2009) 5; Daniel Bodansky, ‘The Concept of Legitimacy in International Law’, in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 309, 312;

¹³ For a more in-depth analysis see Kerstin Odendahl, ‘Gibt es eine völkerrechtliche Legitimität von Regierungen?’, in Jost Delbrück and Others (eds) *Von Kiel in die Welt: Kiel’s Contribution to International Law. Festschrift zum 100-jährigen Bestehen des Walther-Schücking-Instituts für Internationales Recht* (Duncker & Humblot 2014) 99, 103 *et seq.*

¹⁴ Anne Peters, *Elemente einer Theorie der Verfassung Europas* (Duncker & Humblot 2001) 8 *et seq.*; Rüdiger Wolfrum, ‘Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations’ in Rüdiger Wolfrum and Volker Röben (eds) (n 12) 1, 6 *et seq.*

authority is exercised through pre-agreed procedures seen as adequate or fair), on material factors (the decisions taken by the public authority are consistent with the values and aspirations of the people) or on its origin (those exercising public authority have been chosen by the people). In spite of their divergent approaches all of these views are based on the same three assumptions:

1. State authority needs legitimacy.
2. Legitimacy is awarded by those who are ruled, i.e. the people.
3. The criteria for legitimacy in the normative sense stem from domestic law.

Accordingly, the legitimacy of governments is traditionally regarded as an internal matter (national legitimacy of governments). International law is neutral in this regard. Obviously, the national legitimacy of governments does have implications at the international level, too. The most evident implication concerns the recognition of governments by other States. For centuries, the efficiency of State authority was the sole criterion for the recognition of a new government. As practice shows, however, this attitude has changed since the end of the Cold War. There is a clear tendency of States to recognize only 'legitimate' governments. According to this view, governments are legitimate if they have come to power in accordance with national constitutional law or if they have been elected democratically.¹⁵ Another implication of national legitimacy, i.e. acceptance by the people, at the international level, concerns States like South Africa during the times of the apartheid regime. The UN General Assembly declared that the South African government had 'no right to represent the people of South Africa and that the liberation movements recognized by the Organization of African Unity [were] the authentic representatives of the overwhelming majority of the South African people.'¹⁶ Such a consideration of national factors and of national acceptance, however, is no more than taking into account the – national – legitimacy of governments at the international level. It is not equivalent to the international legitimacy of governments.

III. The International Legitimacy of Governments

In contrast, the statements cited at the beginning of this Reflection seem to imply that the traditional, national dimension of the legitimacy of governments has been expanded by a second, a truly international dimension ('a loss of legitimacy nationally and internationally'¹⁷). If we take over the model of national legitimacy, the international legitimacy of governments is also based on three assumptions, but the second and the third criterion are different:

1. State authority needs legitimacy.
2. Legitimacy is awarded by equals, i.e. the international community.
3. The criteria for legitimacy in the normative sense stem from international law.

¹⁵ Brad R. Roth, *Governmental Illegitimacy in International Law* (Clarendon Press 1999).

¹⁶ UN General Assembly, Resolution 3151 G (XXVIII) (14 December 1973) para. 11.

¹⁷ See n 4.

There are several theoretical arguments against and in favour of the existence of an international legitimacy of governments. They have been addressed in detail in another paper.¹⁸ The most important argument is that States increasingly accept that their governments have to meet normative expectations of the international community if they strive to be regarded as legitimate.¹⁹ Most of these normative expectations are laid down in international treaties establishing regional organisations, such as ECOWAS, the OAS, the ASEAN or the Council of Europe. They establish that only governments that meet certain criteria (like the protection of human rights, democracy, the rule of law or good governance) will be accepted as legitimate by the other States parties. Apparently, States have acknowledged that their governments are not only in need of national legitimacy (i.e. acceptance by the people) but also of international legitimacy (i.e. acceptance by the international community).

IV. The Main Aspects of an International Legitimacy of Governments as Derived from Current State Practice

In the end, however, scholarly arguments will not be sufficient. It will be for State practice to decide whether the concept of an international legitimacy of governments will be recognized or not. Therefore, the potential substance of an international legitimacy of governments as derived from State practice so far will be examined. In the following, I will focus on three aspects:

1. Which are the international criteria that determine whether a government is internationally legitimate or not?

The State practice so far is clear, yet (perhaps) somewhat disappointing. There are no cases, outside of treaty law,²⁰ in which States invoked international law in order to deny the legitimacy of a *new* government. They have invoked international law exclusively when they thought that a government *in power* had lost its legitimacy. The key argument was always as follows: A government which commits grave violations of certain international rules loses its international legitimacy.

But which are these rules? So far, only grave violations of humanitarian law and international human rights against the State's own population are regarded as meeting the criterion leading to the loss of legitimacy. Other violations of essential rules of international law, like the prohibition of the use of force or the violation of the territorial integrity of States, do not lead to the loss of international legitimacy. Despite the strong criticism of the annexation of Crimea by Russia, for example, no State has denied the legitimacy of the Russian government.

2. What are the consequences of a loss of international legitimacy?

The official statements are again clear: A government which has lost its international legitimacy 'has to go', i.e. to resign. Does this mean that the government has a duty,

¹⁸ Odendahl (n 13) 110 *et seq.*

¹⁹ Franck (n 9) 26.

²⁰ See, for example, Art. 30 Constitutive Act of the African Union; Art. 9 Charter of the Organization of American States.

according to international law, to resign? And what happens if the government does not do so?

In the case of Libya, the international community intervened on the basis of a Security Council resolution. The Security Council, however, did not invoke the loss of legitimacy of the government but – simply – Chapter VII of the UN Charter. Furthermore, the official aim of the UN and the international community was certainly not to change the government but to stop a threat to international peace and security. Such an intervention, however, may lead to a change of government.

3. *What is the relationship between national and international legitimacy?*

National and international legitimacy of governments are clearly independent from one another: They are awarded (and denied) by two different groups of actors, and their criteria stem from two different legal orders. So which one of them prevails?

In the case of Libya the government had lost both its national and its international legitimacy. But what about the Syrian government? There are good arguments to state that the Syrian government, which was re-elected in June 2014, is the nationally legitimate government of Syria. This government, however, has lost its international legitimacy. Does the international community have to respect the national legitimacy of the Syrian government? Or does the loss of international legitimacy oblige/authorize States to call on the government to resign, or to take steps to induce a change of government?

V. Conclusion

This brief sketch of some of the most important aspects of the international legitimacy of governments shows that even though the outline of this potential new concept is already quite clear, there are still more questions than answers.

Furthermore, it has to be emphasized that State practice is not uniform and not without contradictions. This becomes very clear when looking at the example of Syria. While most States deny the legitimacy of the Syrian government, Russia²¹ and China²², for example, still regard the Syrian government as internationally legitimate. And of course, the Syrian government itself rejects any kind of allegations concerning a loss of legitimacy.²³ In all these instances the essentially same argument is advanced, which is best expressed as follows: 'Nobody in this world has a right to withdraw legitimacy from a president or government... other than the Syrians themselves.'²⁴ Such statements clearly demonstrate that the States in question completely reject the notion of an

²¹ 'Moskau: Westen darf Assad-Regime nicht die Legitimität absprechen' (*Sputnik Deutschland*, 16 March 2012) <<http://de.sputniknews.com/politik/20120316/263074013.html>> accessed 14 July 2015.

²² 'China: Assad's Legitimacy Must Not Be Questioned' (*Truth Revolt*, 23 January 2014) <<http://www.truthrevolt.org/news/china-assads-legitimacy-must-not-be-questioned>> accessed 14 July 2015.

²³ "No one, Mr. Kerry, has right to withdraw president's legitimacy' - Syrian FM' (*Russia Today*, 22 January 2014) <<http://rt.com/news/geneva-two-peace-conference-008/>> accessed 14 July 2015. See also 'West has no right to give or refuse Syrian people legitimacy – Assad's advisor' (*Russia Today*, 7 June 2014) <<http://rt.com/news/164380-syrian-election-legitimate-vote>> accessed 14 July 2015.

²⁴ See n 22.

international legitimacy of governments. The reason for the Russian and Chinese statements is, however, evident: Their geopolitical, military and financial interests in Syria (not legal arguments) lead them to adopt such a position. Still, we have to take them into account as only a uniform State practice accompanied by a corresponding *opinio iuris* may lead to the creation of new concepts of international law.

The concept of international legitimacy of governments would not simply be 'old wine in new bottles'. It would be 'a sea change in international law'.²⁵ Carried to its logical end the international legitimacy of governments would imply a right of the international community to call on a government to resign or even to intervene in order to change the government. The scope of application of the principle of non-intervention would diminish significantly.²⁶ Let us see how things develop – both in State practice and in legal scholarship.

²⁵ Franck (n 9).

²⁶ See Kerstin Odendahl, 'Regimewechsel und Interventionsverbot: die Elfenbeinküste und Libyen als Fall-studien' (2012) 50 *Archiv des Völkerrechts* 318 *et seq.*