

## ***THE DUALITY OF LEGITIMACY IN GLOBAL GOVERNANCE***

*Jean d'Aspremont\**

Global governance rests on the exercise of power by a myriad of authorities. The more powers and influence these authorities acquire, the more their legitimacy proves to be a matter of controversy. It is submitted here that the legitimacy of these (global and regional) authorities that partake in global governance must be appraised from a two-fold standpoint. Their legitimacy must first be gauged through the lens of the *origin* of their powers (*legitimacy of origin*). But, as an authority often comes to exercise powers that exceed those that were originally bestowed upon it, the origin of the power may prove an insufficient indicator of an authority's legitimacy. For this reason, legitimacy must also be evaluated in the light of the way in which it *exercises* its power (*legitimacy of exercise*). This paper is based on the assumption that failing to recognize this dual character of legitimacy of authorities involved in global and regional governance can undermine any endeavor to grasp the contemporary complexity of the latter.

The legitimacy in the context of global governance is a question that has been classically directed at the status of *governments* (1). The legitimacy of governments still constitutes a very complex issue despite the end of the Cold War. Recently, however, the legitimacy of *intergovernmental organizations* has proven to be a matter of greater concern given the multiplication of these organizations and the sweeping powers that they have gained on the world plane (2). Although not ignoring that the question of legitimacy arises in connection with other actors, this paper zeroes in on these two types of authorities in global and regional governance with a view of demonstrating that for each of them the legitimacy of origin and the legitimacy of exercise play a different role.

---

\* Lecturer in International Law, University of Leiden; *Global Research Fellow*, NYU Law School (2005-2006); Ph.D. University of Louvain (2005); LL.M. University of Cambridge (2001).

## **I. 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 are acting through their governments. The international order is consequently an order where 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 of the political regime of the state concerned or the internal stability of the latter, 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 enabling 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 question of the legitimacy of governments has always triggered dramatic controversies. 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 a comfortable leeway when asked to recognize the power of an entity that claims to be another state's representative *in their bilateral intercourse*. International relations are therefore replete with situations where a government is deemed legitimate by some states and illegitimate by others.

The controversies swirling around the legitimacy of governments have not helped unravel the various dimensions of the question. In particular, scholars have hardly perceived that both the *origin* of governmental powers and the way in which such powers are *exercised* impinge on the legitimacy of a governmental authority and have, accordingly, failed to recognize the importance of the distinction between the *legitimacy of origin* and the *legitimacy of exercise*. As far as governments are concerned,

the former refers to the procedure that an authority has followed to secure its power (for instance coup, dynasty, elections, etc.). The latter pertains to the way in which such powers are exercised (effectiveness, respect for human rights, interests being promoted, etc.). In the context of the legitimacy of governments, it must be acknowledged that the legitimacy of origin has played a paramount role.

For a very long time, the legitimacy of a government hinged on its dynastic origin. Following the ideas developed by Locke and Rousseau, later magnified by the American and French revolutions, legitimacy came to be linked to “the will of the people.” Even before the 1948 Universal Declaration of Human Rights, almost all states – whatever the form of their political regime – endorsed the idea that ‘the will of the people’ constitutes the ultimate source of governmental legitimacy. The contemporary requirement of the organization of free and fair elections that emerged after the end of the Cold War has further underpinned this conception of legitimacy based upon the origin of the power of the authority concerned. Nowadays, there is no doubt that, to be seen as legitimate, a *new* government must insure that its authority originates in popular sovereignty through free and fair elections (liberal democracy). In this sense, a government is currently perceived as legitimate if it could be said to be a government “*by* the people”.

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 only be “*by* the people” but also “*for* the people”. To correctly understand the respective role of the legitimacy of origin and the legitimacy of exercise in contemporary controversies about the legitimacy of governments, one must read this distinction together with another distinction, that is the distinction between *qualification* and *disqualification* of authorities. If a new government secures international recognition or its delegates are accredited within international organizations, it *qualifies* as the legitimate representative entitled to speak and act on behalf of the state. The legitimacy then plays a qualification role. Legitimacy can also have a disqualification 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 situation of military interventions by invitation of the government, disqualification can also occur when the state's request for intervention is refused for reasons pertaining to the capacity of the government involved to speak and act on behalf of the state. In the situation of the accreditation of delegates by international organizations, there may be disqualification as well when the state's delegates are refused accreditation because the government is no longer seen as the legitimate representative of the state). Contemporary practice seems to demonstrate that the effect of the legitimacy of *origin* has been confined to a *qualification* role, whereas the legitimacy of exercise has been confined to a *disqualification* function.

The question of determining who *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. A new government will typically be recognized so long as its power originates in a free and fair electoral process. By the same token, democratic origins can usually overcome a government's ineffectiveness. In the case of credential controversies within international organizations, the democratic (or constitutional) origin of a government will generally be taken into account to determine the member states' representative in situation of a dual government. When the question of the *qualification* of a new government arises, the legitimacy of origin plays thus an overarching role. The way that government exercises (or plans to exercise) its power is classically discounted so long as it has been democratically (and constitutionally) elected.

The limited role that legitimacy of *exercise* has played in *qualification* situations can be traced back to the necessity in contemporary international relations for a swift assessment of governments' legitimacy to quickly determine who can act and speak on behalf of a state. Indeed, no state or international organization can afford leaving 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. An appraisal of the legitimacy of a government's exercise of power necessarily requires that the government have exercised power over a period of time. The legitimacy of exercise test does accordingly not comport with the necessity for swift determination of a state's legitimate representatives. In this context, the origin of power has been seen as a more appropriate test of legitimacy as the origin of a government can be quickly assessed and is "easier to capture". Against the backdrop of the growing consensus on democratic legitimacy states will usually rely on the accounts of elections monitoring missions sent by international organizations to quickly make their decisions.

Although the exercise of power has been of little relevance as far as qualification of governments is concerned, it has rather 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 practice with regard to invitations for military intervention where considerations based on the legitimacy of exercise led to disqualification of the requesting government (Central Africa, Chad, Ivory Coast). The same can be said in connection with the U.N. General Assembly disqualification of the delegates of the government of South Africa due to the way in which the government was exercising its power, namely through its racist apartheid policy.

It is argued that *the disqualification role of legitimacy of exercise is currently gaining momentum*, especially with respect to the recognition of governments and the accreditation of their delegates within international organizations. This is verified in situation where democratically elected governments exercise their powers in violation of human rights and bears upon their recognition or the accreditation of their delegates in international organizations. More precisely, the legitimacy of exercise could affect recognition in two ways. First, it could induce states to not 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 in Taiwan as the government of China after the recognition of the communist government in Beijing may be the only clear example. The growing importance of legitimacy of exercise can 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 illustrated by the partial withdrawal of recognition of the branch of the Palestinian Authority controlled by the Hamas). In the situation of the accreditation of delegates of a democratically elected government, the legitimacy of exercise could also be a factor prompting the refusal of credentials. An international organization could refuse to recognize delegates of a government whose exercise of power is significantly at odds with human rights. This was already the case with respect to apartheid in South Africa. Denying accreditation to delegates of 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.

These emerging tendencies *towards a greater disqualification role of the legitimacy of exercise* will nonetheless not abate controversies related to legitimacy of government. This is probably inevitable given the continuous and inescapable replacement of states' representatives. The aforementioned distinctions, however, facilitate a better understanding of the current complexities riddling the legitimacy of governments.

## II. LEGITIMACY OF INTERNATIONAL ORGANIZATIONS: FROM EXERCISE TO ORIGIN

The 20th century's multiplication of international organizations and the powers with which these organizations have been – sometimes impliedly – entrusted have prodded a debate on their legitimacy. Concerns about the legitimacy of international organizations have deepened as their powers have soared. Such a debate has been

particularly acute in the context of the current activism of the United Nations Security Council – sometimes portrayed as a world legislator – or the enlarged competences of the European Union.

It is far from certain that the lack of legitimacy of international organizations may be addressed through the classical patterns of domestic governance. It is true that international organizations bear some resemblance with governments in that they adopt binding rules to which significant consequences are attached in case of failure to comply. It can however be cogently argued that these institutions do not amount to governments because they do not attempt – nor intend – to wield anything that approaches governmental powers. This is why the classical domestic blueprints of legitimacy – as developed for domestic governance – fails to provide any satisfactory answer to the problems of legitimacy of international organizations. It is accordingly argued that one can not transpose the concept of democracy – which has proved to be the overarching standard for the legitimacy of governments – to international organizations, at least not as it is understood in the context of the legitimacy of governments.

The standards of legitimacy of international organizations are yet to be developed and the debate is still in its infancy. One can however already notice that contemporary practice as well as the recent literature tend to show a shift from the criteria that pertains to the *exercise* of the power of the organizations towards those that relates to the *origin* of the delegation of powers on which the organization rests.

Classically, the legitimacy of international organizations has been appraised from the standpoint of the exercise of the power with which these organizations are entrusted. This is not entirely surprising. International organizations are often deemed based on the consent of their creators, whether states or any other entities. As long as this consent is seen as validly expressed, there is no reason why the origin of the delegation of powers on which the organization is built should be scrutinized. The consent is deemed valid and sufficient, once and for all, to legitimize the origin of organizations. Accordingly, *the legitimacy of international organizations has typically been gauged from the vantage point of the exercise of its powers*. In particular, the way in which decisions are

adopted – that is the 'right process' criterion – has been taken into account to evaluate the legitimacy of the organization as a whole. Likewise, the legitimacy of the organization and that of its action has been examined through the lens of the *interest that it serves*. In that respect, the promotion of public interests by the organization usually enhances the legitimacy of the organization as whole. The classical importance of the way in which international organizations exercise their power to appraise the legitimacy of international organizations has been furthered by the debate over their *accountability*. In that context, international scholars have, for instance, been discussing particular mechanisms which would allow the organization to be held internationally responsible for the acts that are formally attributable to it. The devising of rules regulating the responsibility of international organizations has even been bestowed upon the law-codifying body of the United Nations, *i.e.* the International Law Commission with a view of completing a set of principles within a decade. Other international scholarly bodies, like the International Law Association and the *Institut de droit international* have also considered the topic, although from a different angle. The debates over the accountability of international organizations – which are probably intermingled with those over their *transparency* as accountability mechanisms would be a sham if transparency were totally absent – have confirmed the primary importance of the legitimacy of exercise when gauging the legitimacy of international organizations.

Although legitimacy of international organizations has been mostly assessed on the basis of the way in which these organizations exercise their power, it must be acknowledge that, recently, *more attention has been devoted to the origin of their powers*. Especially, the consent on which these organizations had been resting has turned to be incrementally challenged. Consent, as the basis of legitimacy, can be more seriously put into question in connection with the *depreciation of the original consent* which might call for a periodic reaffirmation by its authors. It is more and more felt that *a reaffirmation of the consent* is required when the scope of the powers of the international organization concerned has been dramatically extended through a far-reaching interpretation by the organization itself. The debate about the legitimacy of origin has even gained more momentum because of the controversies regarding the

(direct and indirect) *representativity* of the main decision-making bodies of modern international organizations as illustrated by the discussion about the reform of the composition of the United Nations Security Council. Because the question of the 'representativeness' of the main decision-making bodies of international organizations is intertwined with that of their origin, it has bolstered the *importance of the legitimacy of origin in the debate about the legitimacy of international organizations*.

#### **CONCLUDING REMARKS:**

This brief paper 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. states 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 barely been taken into account. This may explain why the debate about legitimacy in the context of global governance has remained so disarticulated and obscure. While emphasizing the need for a distinction between the legitimacy of origin and the legitimacy of exercise for both governments and international organizations, this paper has tried to demonstrate that each of these aspects of legitimacy has carried a varying weight. In particular, it has been explained that, with respect to the legitimacy of governments, the emphasis classically put on the origin is no longer exclusive and more attention is paid to the legitimacy of exercise whereas, as regards international organizations, recent practice and contemporary literature have shown that the question of legitimacy is no longer solely about the way in which these organizations exercise their powers but also about their origin. It is hoped here that, building on this contribution, further research about legitimacy in the context of global governance will be amenable to this two-tiered understanding of legitimacy.

## **SELECT BIBLIOGRAPHY on the topic**

### From the same author:

J d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (2006) 38 *NYU Journal of International Law and Politics* 101-138

J d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States', 4 *International Organizations Law Review* (2007), 1-29.

J d'Aspremont, 'Regulating Statehood: The Kosovo Status Settlement', 20 *Leiden Journal of International Law* 3 (2007), 649-668.

J d'Aspremont, 'The limits to the exclusive responsibility of International Organizations', 2 *Human Rights and International Legal Discourse* (2007), 215-228.

J d'Aspremont, 'Contemporary International Rulemaking and the Public Character of International Law' (2006) Institute for International Law and Justice Working paper 2006/12

J d'Aspremont, 'La création internationale d'Etats démocratiques', (2005) 109 *Revue générale de droit international public*, 889-908.

J d'Aspremont, *Le statut de l'Etat non-démocratique en droit international – Analyse critique de la pratique et du droit positif* (Paris, Pedone, 2008).

### General literature:

CJ Friedrich, *Man and His Government: An Empirical Theory of Politics* (McGraw-Hill, New York 1963)

JS Nye and RO Keohane, *Transnational Relations and World Politics* (1972)

J Verhoeven, *La reconnaissance internationale dans la pratique contemporaine: les relations publiques internationales* (A. Pedone, Paris 1975)

FA Hayek, *The Road to Serfdom* (Routledge and Kegan Paul, London 1976)

J Crawford, *The Creation of States in International Law* (Clarendon Press, Oxford 1979)

TM Franck, 'Legitimacy in the International System' (1988) 82 AJIL 705-759

TM Franck, *Fairness in International Law and Institutions* (Clarendon Press, Oxford, 1995)

TM Franck, *The Power of Legitimacy Among Nations* (OUP, Oxford 1990)

TM Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100 AJIL 88-106

HG Schermers, 'Liability of International Organizations' (1988) 1 Leiden Journal of International Law 3-14

GH Fox, 'The Right to Political Participation in International Law', (1992) 17 Yale Journal of International Law 539-607

S Joseph, 'Rights and Political Participation' in D Harris and S Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon Press, Oxford 1995), 535-562

AM Slaughter, 'The Real New World Order' (1997) 76(5) Foreign Affairs 183-197

R Wolfrum, 'Kontrolle auswärtiger Gewalt' (1997) 56 VVDStRL 38

F Zakaria, 'The Rise of Illiberal Democracies' (1997) 76(6) Foreign Affairs 22-43

B Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law' (1997-1998) 19 *Michigan Journal of International Law* 345-372

RA Dahl, 'Can International Organizations be democratic?' in I Shapiro and C Hacker-Cordón (eds), *Democracy's Edges* (CUP, Cambridge 1999), 19-36

I Hurd, 'Legitimacy and Authority in International Politics' (1999) 53 *International Organization* 379-408

BR Roth, *Governmental Illegitimacy in International Law* (Clarendon Press, Oxford 1999)

L Curran, 'Unlocking the Doors on Transparency and Accountability' (1999-2000) 11 *Current Issues in Criminal Justice* 135-152

N Bobbio, 'Sur le principe de légitimité', (2000) 32 *Droits: Revue Française de Théorie, de Philosophie et de Culture Juridiques* 147-156.

R Falk and A Strauss, 'On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty' (2000) 36 *Stanford Journal of International Law* 191-220

AM Slaughter, 'Accountability of Government Networks' (2000-2001) 8 *Indiana Journal of Global Legal Studies* 347-367

JE Alvarez, 'Constitutional Interpretation in International Organizations' in JM Coicaud and V Heiskanen (eds), *The Legitimacy of International Organizations* (United Nations University Press, Tokyo 2001), 104-154

A Reinisch, 'Governance without Accountability?' (2001) 44 *German Yearbook of International Law* 270-306

A Reinisch, 'Securing the Accountability of International Organizations' (2001) 7 *Global Governance* 131-149

A Buchanan and RO Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 *Ethics & International Affairs* 405-437

P Szasz, 'The Security Council Starts Legislating' (2002) 96 *AJIL* 901-905

AM Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy' (2002-2003) 24 *Michigan Journal of International Law* 1041-1075

WE Holder, 'Can International Organizations be Controlled? Accountability and Responsibility' (2003) 97 *ASIL Proc.* 231-240

D Stasavage, 'Transparency, Democratic Accountability, and the Economic Consequences of Monetary Institutions' (2003) 47 *American Journal of Political Science* 389-402

G Teubner, 'Globale Zivilverfassungen: Alternativen zu staatszentrierten Verfassungstheorien' (2003) 63 *ZaöRV* 1-28

K Wellens, 'Accountability of International Organizations: Some Salient Features' (2003) 97 *ASIL Proc.* 241-245

EA Young, 'The Trouble with Global Constitutionalism' (2003) 38 *Texas International Law Journal* 527-545

A Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (OUP, Oxford 2004)

B Kingsbury, N Krisch, R Stewart, 'The Emergence of Global Administrative Law' (2004) Institute for International Law and Justice Working paper 2004/1  
<<http://iilj.org/papers/2004/documents/2004.1KingsburyKrischStewart.pdf>> accessed 12 December 2006

M Shapiro, "'Deliberative," "Independent" Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?' (2004) Institute for International Law and Justice Working paper IILJ 2004/5

<<http://iilj.org/papers/2004/2004.5%20Shapiro.pdf>> accessed 12 December 2006

JHH Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *ZaöRV* 547-562

D Zaring, 'Informal Procedure, Hard and Soft, in International Administration' (2004-2005) 5 *Chicago Journal of International Law* 547-603

JL Goldsmith and EA Posner, *The limits of international law* (OUP, Oxford 2005)

CK Kelly, 'Enmeshment as a Theory of Compliance' (2005) 37 *NYU Journal of International Law and Politics* 303-356

M Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Reissue with a New Epilogue CUP, Cambridge 2005)

F Orrego Vicuna, 'In Memory of Triepel and Anzilotti: The Use and Abuse of Non-Conventional Law-Making' in R Wolfrum and V Röben (eds), *Developments of international law in treaty making* (Springer, Berlin 2005), 497-506

JA Rabkin, *Law without Nations? Why Constitutional Government Requires the Sovereign State* (Princeton University Press, Princeton 2005)

S Talmon, 'The Security Council as a World Legislature' (2005) 99 *AJIL* 175-193

C Tomuschat, 'The Complementarity of International Treaty Law, Customary International Law, and Non-Contractual Lawmaking' in R Wolfrum and V Röben (eds), *Developments of international law in treaty making* (Springer, Berlin 2005), 401-407

## **SELECT DOCUMENTS**

IDI, 'The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties', Resolution adopted at the Session of Lisbonne (1995) <[http://www.idi-iil.org/idiE/resolutionsE/1995\\_lis\\_02\\_en.pdf](http://www.idi-iil.org/idiE/resolutionsE/1995_lis_02_en.pdf)> accessed 12 December 2006

ILC, First report on responsibility of International Organizations by Mr. Giorgio Gaja, Special Rapporteur, 55<sup>th</sup> Session (2003), UN Doc A/CN.4/532

ILA, 'Accountability of International Organizations', Berlin Conference (2004), Final report, published in (2004) 1 International Organizations Law Review 221-293.