

THE MURKY STATE PRACTICE ON RECOGNITION OF GOVERNMENTS AND THE NATIONAL UNITY GOVERNMENT IN MYANMAR

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ABSTRACT

Many times, when there are competing claims to power legitimate states are not consistent in their recognition of the competing governments. Ostensibly, many states do not recognize governments, and in contentious cases, leave the determination of which competing foreign governments have a legitimate claim to represent the state open. However, in practice, such abandonment of recognition of governments is not always maintained. This article argues that there are cogent reasons for states to continue to recognize governments. Specifically, in the case of a democratically elected government overthrown by a coup d'état, such as what happened in Myanmar in February 2021, the practice of not recognizing governments coming to power by the use of brute force is desirable.

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INTRODUCTION

On February 1, 2021, Myanmar's military took power by overthrowing the elected government of Myanmar.¹ The military detained elected leader Aung San Suu Kyi and members of her National League for Democracy (NLD) party and declared a year-long state of emergency.² The military junta detained elected leaders on the pretext that the parliamentary election was tainted by widespread fraud, in which 396 out of 476 NLD seats in the combined lower and upper houses of parliament were determined fraudulent.³ This, of course, is not to imply that the military was not enjoying political power before this date. Under the Constitution of 2008, the military had 25 percent of the seats in the national parliament and key cabinet ministries reserved.⁴ Even with the military holding such power, analysts were hoping, analysts were hoping for democracy to flourish progressively in Myanmar. This, unfortunately, did not occur and violence would follow. After the coup, there have been strong demonstrations on the streets of Myanmar in opposition of the military, which has met with brutal response from the military and hundreds of lives lost.⁵ Some protestors have even invited foreign forces to invade Myanmar, with the hashtag “#R2P” (responsibility to protect) trending on Twitter in Myanmar.⁶

1. *Military Coup in Burma Draws International Condemnation and Pressure*, 115 AM. J. INT' L. 558, 558 (2021) [hereinafter *Military Coup*]; Alice Cuddy, *Myanmar coup: What is Happening and Why?*, BBC NEWS (April 1, 2021), <https://www.bbc.com/news/world-asia-55902070>.

2. Cuddy, *supra* note 1; *Military Coup*, *supra* note 1 at 558.

3. Cuddy, *supra* note 1; *Explained: Why is the Military Taking Control in Myanmar?*, ECON. TIMES, (Feb. 1, 2021, 2:51 PM), <https://economictimes.indiatimes.com/news/defence/explained-why-is-the-military-taking-control-in-myanmar/articleshow/80629463.cms> [hereinafter *Why is the Military Taking Control*]; see *Military Coup*, *supra* note 1, at 599 (noting that the fraudulent behaviour consisted of widespread violations of laws and procedure to procure the landslide results).

4. *Explained: Why is the Military Taking Control in Myanmar*, *supra* note 3.

5. See Cuddy, *supra* note 1, see also *Military Coup*, *supra* note 1, at 560.

6. Hannah Beech, *Myanmar Military Storms Universities and Hospitals and Revokes Press Licenses*, N.Y. TIMES (Mar. 9, 2021), <https://www.nytimes.com/2021/03/08/world/asia/myanmar-coup-violence.html>

On April 16, 2021, a National Unity Government (“NUG”) was formed consisting of elected Parliamentarians of the November 2020 election and some representatives of ethnic groups.⁷ The NUG includes U Win Myint as the President, Aung San Suu Kyi as the State Counsellor, and Mahn Win Khaing Than as the Prime Minister.⁸ The NUG has also crafted a Federal Democracy Charter, which is modeled on an interim constitution drafted between 1990 and 2008 by members of the NLD who were elected in 1990 and various ethnic armed forces in Myanmar.⁹ The NUG aims to establish a government-in-exile that can vie with the junta for international recognition and launch a long campaign to eventually oust the usurper from power.¹⁰

Many countries around the world have condemned the the military and its crackdown on demonstrators, but the NUG is yet to receive any form of formal recognition from other governments as the legitimate government of Myanmar.¹¹ The only semblance of recognition came from non-state actors such as the Special Advisory Council for Myanmar, a group of international experts, lauding the setting up of the NUG and labelling it as the legitimate government of Myanmar.¹² Conversely, the joint statement of the G7 Foreign and Development Ministers’ Meeting held in London on May 5, 2021 has merely expressed solidarity with the NUG.¹³ In April 2021, Kyaw Zwar Minn, Myanmar’s ex-

7. Delwar Hossain, *The National Unity Government in Myanmar: Role and Challenges*, MOD. DIPL. (May. 11, 2021), <https://moderndiplomacy.eu/2021/05/11/the-national-unity-government-in-myanmar-role-and-challenges/>

8. *Id.*

9. *Id.*

10. *Id.*

11. See Cuddy, *supra* note 1 (Noting that the military has received international condemnation); see also Hossain, *supra* note 7 (Noting that countries are waiting on the NUG to receive formal recognition).

12. *Historic National Unity Government OF Myanmar Is the Legitimate Government*, Special Advisory Council for Myanmar (April 16, 2021), <https://specialadvisorycouncil.org/2021/04/sac-m-historic-national-unity-government-of-myanmar-is-the-legitimate-government>.

13. *G7 Foreign and Development Ministers’ Meeting Communiqué*, ¶ 22 (May 5, 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/983631/G7-foreign-and-development-ministers-meeting-communique-london-5-may-2021.pdf.

ambassador in London was locked out of the embassy by the military attaché, and he was dismissed as the country's representative for not showing loyalty to the junta government.¹⁴ The British Foreign Secretary condemned the actions of the military but accepted the change.¹⁵ Myanmar's neighbouring countries, members of the Association of South-East Asian Nations (ASEAN), have invited the military government to join a recent ASEAN Summit.¹⁶ These may not be events in isolation. Rather, they may be emblematic of the recent state practice that governments will recognize a foreign government who may have ascended to power through illegitimate means.¹⁷

This article argues that liberal democracies can help the cause of democracy in Myanmar by not recognizing the military junta as the representative government of Myanmar or at least recognizing the NUG as the *de jure* government. However, the practice of many states officially not recognizing governments, but only recognizing states, may impede progress by those governments.¹⁸ This article demonstrates that the practice of explicitly recognizing a government has been far from uniform. It also argues refusing to recognize governments takes away an option of engaging in a situation where an undemocratic force overthrows a legitimately elected government. While this article uses the NUG of Myanmar as a springboard for elaborating its main points, the questions that it addresses have a broader appeal to situations beyond Myanmar.

The next part of the article discusses the competing theories of recognizing governments. The part that follows discusses the contemporary practice of certain states regarding the recognition of governments. The following part analyses why the practice of not recognizing an illegitimate government and recognizing a

14. James Landale, *Myanmar's Ex-UK Envoy Says Military Attaché Has 'Occupied' Embassy*, BBC NEWS (Jan. 24, 2022, 9:52 AM), <https://www.bbc.com/news/world-asia-56670524>.

15. *Id.*

16. Hossain, *supra* note 7.

17. Sebastian Strangio, *China Steps Toward De Facto Recognition of Myanmar's Junta*, DIPLOMAT (Jan. 25, 2022, 12:39 AM), <https://thediplomat.com/2021/06/china-steps-toward-de-facto-recognition-of-myanmars-junta/>.

18. Hossain, *supra* note 7.

legally elected government, once overthrown, as the de jure government may attain certain legitimate objectives. The part that follows addresses some counter-arguments to the practice of recognizing governments. The next part discusses how a government such as the NUG may benefit from the recognition as a de jure government.

II. COMPETING DOCTRINES AND STATE PRACTICE ON RECOGNITION OF GOVERNMENTS

While the non-recognition of a state would mean that the concerned entity would struggle to perform its functions under international law, the consequences of non-recognition of a government are different. Because after all, a government is not the state but only an element of it. Thus, some scholars seem to downplay the importance of the recognition of governments.¹⁹ A renowned scholar observes, “the absence of a (recognized) government does not lead to a loss of title, and may instead require some form of curatorship.”²⁰

The Tobar Doctrine, named after Carlos Tobar, a former Foreign Minister of Ecuador, propounded that a revolutionary government should only be recognized after it has been elected.²¹ In other words, an unelected government coming into power by force should not be recognized by other states.²² Tobar stated that states in the American continent should “intervene indirectly in the internal dissensions of the continent.”²³ Such intervention might consist, at the least, in the denial of recognition to de facto governments springing from revolution against the constitutional order.²⁴ Tobar viewed this as disincentivizing the use of force as a way of forming governments.²⁵ A resounding expression of this doctrine could be found as early as 1907 in the *Additional*

19. JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 151 (8th ed. 2012).

20. *Id.*

21. See Charles L. Stansifer, *Application of the Tobar Doctrine to Central America*, 23 AMS. 251, 251–53 (1967).

22. See *id.*

23. *Id.*

24. *Id.*

25. *Id.*

Convention to the General Treaty, signed by five Central American states: Costa Rica, Guatemala, Honduras, Nicaragua, and Salvador. Article 1 of the Treaty proclaimed that²⁶:

The Governments of the High Contracting Parties shall not recognize any other Government which may come into power in any of the five Republics as a consequence of a *coup d'état*, or of a revolution against the recognized Government, so long as the freely elected representatives of the people thereof, have not constitutionally reorganized the country.²⁷

An opposite doctrine is the Estrada Doctrine, named after a former Foreign Minister of Mexico.²⁸ The Estrada Doctrine enunciates that the change in government is an internal matter for a state, and other states have nothing to do with it.²⁹ Thus, according to this theory, as long as a government is controlling the territory and ready to meet its international legal obligations, its legal legitimacy or otherwise should not be a matter of concern for other states.³⁰ In the words of Estrada:

After a very careful study of the subject, the Government of Mexico has transmitted instructions to its Ministers or Chargés d'Affaires in the countries affected by the recent political crises, informing them that the Mexican Government is issuing no

26. Additional Convention to the General Treaty, Dec. 20, 1908, 2 Am. J. Int'l L. Supp. 229. This treaty was subsequently updated in 1923 by the General Treaty of Peace and Amity. For full text of the 1923 treaty, see General Treaty of Peace and Amity, Feb. 7, 1923, 17 Am. J. Int'l L., Supp. 117. In particular, Article 2 of the Treaty provided that 'the governments of the contracting parties will not recognize any other government which may come into power in any of the five republics through a coup d'etat or a revolution against a recognized government, so long as the freely elected representatives of the people thereof have not constitutionally reorganized the country.' This article also elaborated that any architect of a coup d'etat would not be eligible for assuming high office in a government formed in an election following the coup.

27. *Id.* at 229-30

28. Raul Fernando, *AMLO Vows Return to Mexico's Non-Interventionist Foreign Policy*, TELESUR (Dec. 1, 2018, 1:01 PM), <https://www.telesurenglish.net/analysis/AMLO-Vows-Return-to-Mexicos-Non-Interventionist-Foreign-Policy-20181129-0047.html>.

29. *Id.*

30. Fred L. Morrison, *Recognition in International Law: A Functional Reappraisal*, 34 U. OF CHI. L. REV. 857, 861-62 (1967).

declarations in the sense of grants of recognition, since that nation considers that such a course is an insulting practice and one which, in addition to the fact that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments, inasmuch as the latter assume, in effect, an attitude of criticism, when they decide, favorably or unfavorably, as to the legal qualifications of foreign régimes.

Therefore, the Government of Mexico confines itself to the maintenance or withdrawal, as it may deem advisable, of its diplomatic agents, and to the continued acceptance, also when it may deem advisable, of such similar accredited diplomatic agents as the respective nations may have in Mexico; and in so doing, it does not pronounce judgment, either precipitately or a posteriori, regarding the right of foreign nations to accept, maintain or replace their governments or authorities.³¹

An expression of the extreme adherence to this may be found in the Pact of the League of Arab States³² which appears to impose an obligation on member states to recognize a government irrespective of its legitimacy. Article 8 of this Pact states that “[e]very member State of the League shall respect the form of government obtaining in the other States of the League, and shall recognize the form of government obtaining as one of the rights . . . and shall pledge itself not to take any action tending to change that form.”³³

Arguably, this over-emphasis on the control of territory is a primacy to pragmatism and may fit with autocracies or illiberal democracies, but would appear to be incompatible with the ethos of liberal democracies. This seems to be like a vestige of the

31. Señor don Genaro Estrada, Secretary of Foreign Relations of Mexico, Declaration: Estrada Doctrine of Recognition (Sep. 27, 1930), *in* 25 AM. J. INT'L L., 203, 203. (Supp. 4 1931). For a scholarly overview of the doctrine, *see generally* Philip C. Jessup, 'The Estrada Doctrine' (1931) 25 AM. J. INT'L L., 719.

32. Pact of the League of Arab States, art. 8, Mar. 22, 1945, 70 U.N.T.S. 237.

33. *Id.*

practice of states of a bygone era where even forceful assumption of territory was eventually treated as legitimate by the community of states.³⁴ The moral limit of the approach is also evident. This approach seems to render the question of recognition of governments bereft of moral value judgements and thus, opens questions of its legitimacy. As a judge has observed, “a theory about law which seeks to exclude considerations of morality and justice cannot be made the binding rule of decision in the Courts... .”³⁵

However, beginning from the Briand Kellogg Peace Pact³⁶ and other international legal instruments such as United Nations General Assembly Resolutions No 2625 and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, the stance of the community of states has been that forceful acquisition of territory would not be treated as legitimate.³⁷ Thus, if the forceful acquisition of territory by another state is illegitimate, by analogy, the assumption of power by overthrowing a democratically elected regime should also be illegitimate as a matter of international law and cannot be entirely within the domain of national law.³⁸ This is not to claim that democratic legitimacy is well-entrenched as a requirement of the validity of a government in international law as Professor Thomas Franck argues in his widely cited article.³⁹ It is just to

34. MALCOLM N. SHAW, *INTERNATIONAL LAW* 371 (Cambridge Univ. Press, 8th ed. 2017).

35. Maria Aristodemou, *Choice and Evasion in Judicial Recognition of Governments: Lessons from Somalia*, 5 EUR. J. INT'L L. 532, 548 (1994).

36. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57–63 (1929).

37. For instance, despite the Israeli occupation of the territories in West Bank and East Jerusalem since 1967, the community of states still today does not recognize that territory as Israel's legitimately occupied territory. For a good scholarly account of this occupation and international law, see generally *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 60 (1990).

38. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 871–72 (1990).

39. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 47 (1992) (“This newly emerging ‘law’—which requires democracy to validate governance—is not merely the law of a particular state that, like the United States under its Constitution, has imposed such a precondition on national governance.”).

argue that there is a persuasive case for states to consider not recognizing a government that comes into power by force and pays complete disregard to the people's will and democratic norms.

As already indicated, many states today do not typically formally recognize governments; they only recognize states. Switzerland has declared only recognizing states as early as 1945.⁴⁰ France and Belgium made similar declarations in 1965.⁴¹ The UK began only recognizing states in 1980, essentially asserting it would only deal with the recognition of states and would not directly recognize governments.⁴² The US started doing this in the 1970s, and this was affirmed by the Carter Administration in 1980.⁴³ Australia announced doing this in January 1988.⁴⁴ Some states, like New Zealand, seem to follow a mixed and *ad hoc* approach to recognition of governments.⁴⁵

When a government does not formally recognize foreign governments, in contentious situations involving competing claims of ruling a territory, the role of the judiciary becomes

40. STEFAN TALMON, *RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE* 3 (Oxford University Press, 2001).

41. *Id.* at 4, 8.

42. Geoffrey Marston, *United Kingdom Materials On International Law 1980*, 51 BRIT. Y.B. INT'L L. 362, 367 (1980). This builds on 1951 statement on the criterion of recognition, *see* 485 Parl Deb HC (1951) cols. 2410–11 (UK) (discussing 1951 statement of criterion of recognition). For a scholarly overview of this see Colin Warbrick, *The New British Policy on Recognition of Governments* (1981) 30 INT'L & COMPAR. L. Q. 568, 568 (discussing British policy recognizing states, rather than governments). One justification that the UK officially gave is as follows, *see* HL Deb (28 Apr. 1980) (408) cols. 1121–2WA ("This practice has sometimes been misunderstood, and, despite explanations to the contrary, our 'recognition' interpreted as implying approval. For example, in circumstances where there might be legitimate public concern about the violation of human rights by the new regime, or the manner in which it achieved power, it has not sufficed to say that an announcement of 'recognition' is simply a neutral formality.").

43. Michael E. Field, *Liberia v. Bickford: The Continuing Problem of Recognition of Governments and Civil Litigation in the United States*, 18 MD. J. INT'L L. & TRADE 113, 122 (1994).

44. Hilary Charlesworth, *The New Australian Policy on Recognition of Governments in Comparative Perspective*, 18 MELB. U. L. REV. 1, 1 (1991).

45. Stefan Talmon, *New Zealand's Policy of Implied Recognition of States: One Step Ahead or Falling Behind*, 7 NZ Y.B. INT'L L. 3, 9–10 (2009) (explaining that while New Zealand has ceased making formal statements of recognition, the doctrine of recognition of states has not been abolished altogether).

prominent.⁴⁶ The importance of judicial recognition is exemplified by the decision of the British Court in *Sierra Leone v Barclays*.⁴⁷ This court decided whether the military junta was the government of Sierra Leone and thus, the owner and controller of Sierratel Ltd (Sierratel), wholly-owned and controlled by the government of Sierra Leone.⁴⁸ Sierratel claimed that the military junta could not be considered the legal government of Sierra Leone; rather, the Kabbah Government was the legal government of Sierra Leone.⁴⁹ The British Court agreed.⁵⁰ The Court's decision was based on a combination of factors such as the fact that the military government was not in control over the entire territory of Sierra Leone, it was not a constitutional government, and the Kabbah Government was favoured by the international community, including the government of the UK.⁵¹

However, in *British Arab Commercial Bank PLC v National Transitional Council of the State of Libya*, ex parte Foreign and Commonwealth Office, in a question relating to assets belonging

46. Aristodemou, *supra* note 35, at 533. However, even before this, in some cases of private matters, the domestic courts have at times looked beyond the executive's recognition on private matters. See for instance, the observations of Lord Denning in *Hesperides Hotels v. Turkish Aegean Holidays* [1978] 1 All ER 277, at 283:

the courts of this country can recognize the laws or acts of a body which is in effective control of a territory even though it has not been recognized by Her Majesty's Government *de jure* or *de facto*, at any rate in regard to the laws which regulate the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations and so forth; and furthermore that the courts can receive evidence of the state of affairs so as to see whether the body is in effective control or not.

The above, however, is in contradiction with the following position in *Arantzazu Mendi* [1939] Appeal Cases 256, at 264 that "[o]ur state cannot speak on two voices on such a matter, the judiciary saying one thing, the executive another. Our Sovereign has to decide whom he will recognize as a fellow sovereign in the family of states."

47. See *Sierra Leone Telecommunications Company Limited v. Barclays Bank plc* [1998] 2 All ER 832 (Comm) ("In the light of my analysis of the factors...I conclude that the military junta are not 'the Government of Sierra Leone'").

48. See *id.* at 824 ("Sierratel is a company incorporated in Sierra Leone as a parastatal company, i.e. a company wholly owned by the Sierra Leone government which controls its business dealings.").

49. *Id.* at 825–26 (noting that the plaintiff's account "remains subject to the terms of the mandate" because the mandate had not been validly revoked from the legitimate government of Sierra Leone).

50. *Id.* at 832.

51. *Id.* at 829–32.

to the embassy of Libya in London, the British government, retreating from its previous practice, issued a formal certificate that it recognized the national transitional government as the sole government of Libya.⁵² The court followed the British government in making its decision to recognize the transitional government in its holding.⁵³ Following *Gur Corporation v Trust Bank of Africa Ltd*,⁵⁴ and *Arantzazu Mendi*,⁵⁵ the court held that the executive and judicial branch should speak with one voice, and the certificate signed by the Foreign Secretary recognizing the NTC as the government of Libya would be treated as conclusive.⁵⁶

While France officially proclaimed in 1965 that it would not recognize governments, France recognized the Syrian National Coalition Government in November 2012.⁵⁷ The President of France, pronounced, “I announce today that France recognizes the Syrian National Coalition as the sole legitimate representative of the Syrian people and thus as the future provisional government of a democratic Syria which paves the way to put an end to Bashar Assad’s regime.”⁵⁸ Even the Ministerial Council of the Arab League member states (whose Charter shows a clear reticence to weigh in the form of government of the member states) could not ignore the situation in Syria and “urged regional and international organisations to recognize the [Syrian National Coalition] as a legitimate representative for the aspirations of the Syrian people”, and labelled it “as a legitimate representative and a primary

52 British Arab Commercial Bank PLC v. National Transitional Council of the State of Libya [2011] EWHC 2274 (Comm.), [2011] 147 ILR 667, [668].

53. *Id.*

54. *Gur Corporation v. Trust Bank of Africa Ltd.* (1986) 1 Q.B. 599 at 599–600 (Eng.)

55. *Arantzazu Mendi v. Government of the Republic of Spain* (1939) 1 AC 256 (HL) 256–57 (appeal taken from Eng.).

56. *British Arab Commercial Bank PLC* [2011] 147 ILR 667, [676].

57. Talmon, *supra* note 40, at 8; Stefan Talmon, *Recognition of Opposition Groups as the Legitimate Representative of a People*, 12 CHINESE J. INT’L L. 219, 221 (2013).

58. *Id.* (declaration of President François Hollande) (“I announce today that France recognizes the Syrian National Coalition as the sole legitimate representative of the Syrian people and thus as the future provisional government of a democratic Syria which paves the way to put an end to Bashar Assad’s regime.”).

negotiator with the Arab League.”⁵⁹ In a similar vein, during the recent crisis in Venezuela, many governments have explicitly stated that they would recognize the opposition government led by Juan Guaidó of Venezuela as the legal government of Venezuela.⁶⁰

III. THE LEGAL BASIS FOR AND ADVANTAGES OF RECOGNIZING OR NON-RECOGNIZING GOVERNMENTS

Arguably, the overthrow of a democratically elected government may constitute a threat to peace, as declared by the United Nations Security Council (UNSC). For example, in Haiti in 1991, the government led by Aristide was recognized as the legitimate government, although clearly not in control of the territory of Haiti.⁶¹ Similarly, the Kabbah government in exile from Somalia was recognized as the legitimate representative government of Somalia, despite having no physical control over the territory.⁶² The democratic governments of Panama and Angola were recognized despite them lacking in effectiveness.⁶³ In a similar fashion, the UNSC adopted a resolution in 1970 calling on states to not recognize the racist regime of Southern Rhodesia.⁶⁴ Following the invasion of Kuwait by Iraq, the government of Kuwait in exile was treated as the only representative government of Kuwait despite it lacking physical control over its territory.⁶⁵ It may be true that the aggression by Iraq may mean that the characteristic of the Kuwaiti government in exile or the condemnation of the racist regime in Southern Rhodesia was different from military coups. However, in all of these cases, the removal of the government or the formation of a

59. *Id.* at 220.

60. See *United States Recognizes the Opposition Government in Venezuela and Imposes Sanctions as Tensions Escalate*, 113 AM. J. INT'L L. 601, 604–05 (2019).

61. Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, 48 INT'L & COMPAR. L.Q. 545, 545 (1999).

62. Erika de Wet, *From Free Town to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition*, 108 AJIL UNBOUND 201, 203 (2015).

63. Jean D'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. INT'L L. & POL. 877, 903 (2006).

64. S.C. Res. 277, ¶¶ 1–3 (Mar. 18, 1970).

65. S.C. Res. 661, ¶¶ 1–2 (Aug. 6, 1990); S.C. Res. 662, ¶¶ 1–2 (Aug. 9, 1990).

new government in question was the outcome of an *illegal process*. And in all these cases, the effectiveness of the government would not seem to confer on them any legitimacy in the eye of the community of states.

However, one may argue that short of a determination by the UNSC as to the illegality of a government, as long as it is effectively controlling the territory of a state, it should be treated as the representative government of the concerned state. Even then, while an adverse UNSC resolution as to the assumption of power may authoritatively determine the illegitimacy of a government, the mere absence of such a resolution should not lead to a conclusion to the contrary. The instances of adverse UNSC resolutions or other international intergovernmental organizations as to the change of government in states should rather imply that change in governments by a military coup is not merely a domestic matter and should concern the international community. To claim otherwise would appear to be too rigid and expansive of domestic jurisdiction, which is not in consonance with the contemporary international law's limits on 'internal affairs of a state'.

In a situation like Myanmar, where states condemn the coup, if the international community treats the military government of Myanmar as the only government of Myanmar, then any assistance to the NUG could be tantamount to interference in the internal affairs of Myanmar. Interference would mean a violation of Article 2(7) of the Charter of the United Nations, codifying the well-established norm of customary international law on non-interference.⁶⁶ A state may lawfully render assistance to the NUG backed forces where the Myanmar military government is not recognized, or where NUG is recognized as the *de jure* government of Myanmar. Recognition would, in fact, mean the assisting government is rendering assistance to the legitimate government of a state against a usurping power.

On the other hand, through the non-recognition of the Myanmar military government as the government of Myanmar, or at least the recognition of NUG as the *de jure* government of

66. For a detailed analysis of the scope of Article 2(7) of the Charter of the United Nations, see Niki Aloupi, *The Right to Non-Intervention and Non-Interference*, 4 CAMBRIDGE J. INT'L & COMPAR. L. 566, 573 (2015).

Myanmar, a state may lawfully render assistance to the NUG backed forces.⁶⁷ Recognition means, in the latter case, the other state would, in fact, render assistance to the legitimate government of a state against a usurping power.⁶⁸

IV. THE ARGUMENTS FOR ABOLITION OF RECOGNITION OF GOVERNMENTS

As already indicated in this article, states would have some pragmatic advantages by not recognizing governments. States would have more flexibility in dealing with foreign governments and can deal with more than one government of a foreign state without taking an explicit position on the vexed questions of their legitimacy or effectiveness.⁶⁹ One argument for not recognizing governments is that by recognizing a government among competing factions, there may be needless uncertainty.⁷⁰ According to Judge Baxter, recognition of government creates more problems than it resolves, as he writes:

[A]n institution of law [recognition of governments] that causes more problems than it solves must be rejected and replaced by working arrangements that are flexible and realistic. The partial withdrawal of law from this area of international relations will facilitate the maintenance of relations with states in which extraconstitutional changes of government are taking place, and that in itself is a good thing.⁷¹

There is also an argument that states maintain diplomatic relations with other states, not governments; so, the recognition of states matters, but not recognition of governments.⁷² However,

67. See Murphy, *supra* note 61, at 577; see also Aloupi, *supra* note 66, at 583.

68. See Reisman, *supra* note 38, at 871.

69. Aristodemou, *supra* note 35, at 535.

70. See M. J. Peterson, *Recognition of Governments Should Not be Abolished*, 77 AM. J. INT'L L. 31, 33 (1983) (discussing how issues of government recognition can cause confusion in multilateral political relations).

71. R. R. Baxter, *Foreword* to L. THOMAS GALLOWAY, *RECOGNIZING FOREIGN GOVERNMENTS: THE PRACTICE OF THE UNITED STATES*, at ix, xi (Am. Enter. Inst. for Pub. Pol'y Rsch., Wash., D.C. 1978).

72. Peterson, *supra* note 70, at 48.

this argument does not reflect real practice. Clearly, states as abstract entities cannot act with each other without governments and their representatives interacting with each other in the course of their international exchanges.⁷³ Indeed, had it been states who could directly act with each other without any form of governments, then the recognition of governments would have been a completely redundant exercise, and there could never have been any confusion whatsoever by the recognition of governments.⁷⁴

A somewhat cogent argument against the recognition or non-recognition of governments is that the recognition can be an arbitrary political decision.⁷⁵ However, while this may apply in some cases, such non-recognition of government may only be for reasons of political imperatives.⁷⁶ In the case of a coup, where the change in the form of government has nothing to do with the free choice of the people, the case is different. In this situation, justification for the invalidity of the non-recognition of governments would appear to be reasoned. Where a government is not recognized, there could be an issue in exchanging diplomatic envoys, and that may stand in the way of exchange between that government and the non-recognized government.⁷⁷ However, where non-recognition is intended to show a form of disapproval, the loss of diplomatic exchange may be a non-issue. Some may also evoke the principle of self-determination in that it should solely be the forces within the state which can determine the form of government appropriate for them.⁷⁸ However, a counter-argument to this would be that the recognition *de jure* to a clearly representative government or the non-recognition of a

73. *Id.*

74. *Id.*

75. *Id.* at 31–2.

76. *See id.* at 32 (discussing how the Portuguese government used nonrecognition to express political disapproval of the Soviet Union).

77. SHAW, *supra* note 34, at 338.

78. *See, e.g.,* Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43 INT'L & COMP. L.Q. 857, 864 (1994) (stating that "The 'internal' aspect of the right [of self-determination] concerns the right of peoples within a State to choose their political status, the extent of their political participation and *the form of their government*, i.e., a State's 'internal' relations are affected." (emphasis added)).

usurper is in respect to the embodiment of the will of the people and thus, squarely in line with the principle of self-determination.

Another strand of argument supporting the abolishing of recognition of governments is premised on the fact that since the government is an essential element of a state, non-recognition of a government brings to question the existence of the state as there can be no state without an effective government.⁷⁹ However, this line of argument ignores the point that not recognizing a government does not necessarily mean denying its existence; it can simply be an expression of disapproval. And at any rate, this can easily be addressed by according *de jure* government status to an entity like the NUG within that state and not recognizing the government coming into power through illegal means.

Some argue that the non-recognition of a government may be a completely arbitrary decision of a government of another state for subjective political reasons without any basis in reality.⁸⁰ For example, the former Soviet Union, led a Warsaw Pact military intervention to remove Czechoslovakia's Alexander Dubcek as First Secretary of the Communist Party for rejecting the political reforms taking place in 1968 for essentially nullifying the political reforms undertaken.⁸¹ Following the intervention, the Soviet Union asserted that it would act to prevent deviations from the socialist system among its allies, i.e., it would not recognize any non-communist government taking over power in those states.⁸² Clearly, this is an abuse of the process of recognition of governments. Recognition has often been used as a means of coercion; governments of powerful states have demanded their less powerful counterparts concede to demands regarding some general policy issues or perform certain actions.⁸³ The USA is said to have done this in the case of some governments in Central

79. Philip Marshall Brown, *The Legal Effects of Recognition*, 44 AM. J. INT'L L. 617, at 630–33 (1950) (explaining that the administration of state services continue and certain aspects of sovereignty must continue be recognized despite transitions in a government).

80. Peterson, *supra* note 70, at 31 (explaining that recognition may seem like an arbitrary political game).

81. Thomas M. Franck & Edward Weisband, *The Johnson and Brezhnev Doctrines: The Law You Make May Be Your Own*, 22 STAN. L. REV. 979, 983–984 (1970).

82. *Id.* at 985.

83. Peterson, *supra* note 70, at 39.

America and the Caribbean.⁸⁴ Some European states have done this with regard to the Chinese government.⁸⁵ Having said that, a powerful government can far too often portray that it is more influential than other governments and may show its displeasure or flex its muscles over the less powerful counterparts in a number of ways.⁸⁶ Thus, abuse of either of this nature would not appear to be a compelling reason for abandoning the practice of recognizing governments.

Another argument may be about the futility of the non-recognition of a usurping government or the recognition of a government such as the NUG in Myanmar, which may not have enough authority over the territory of the state. For example, despite the strong pronouncement in the General Treaty signed by five Central American states, in the following decades, legitimately elected governments in Central America have been overthrown by brute force.⁸⁷ Honduras has conducted the affairs of the state virtually unaffected by the IADC states until the Permanent Council of Organization of American States ("OAS") condemned the coup d'état and forced expulsion of President

84. *Id.*; see also, William Thomas Worster, *Law, Politics, and the Conception of the State in State Recognition Theory*, 27 B.U. INT'L L.J. 115, at 142 (2009) (quoting Michael E. Field, *Liberia v. Bickford: The Continuing Problem of Recognition of Governments and Civil Litigation in the United States*, 18 MD. J. INT'L L. & TRADE 113, n. 58 (1994) (noting that the U.S. has, at different phases in history, used recognition for endorsing anti-monarchical governments, to promote economic hegemony, to promote constitutional government, or to stall expansion of communism).

85. Peterson, *supra* note 70, at 39.

86. See, e.g., Robert E. Berls, Jr., *Strengthening Russia's Influence in International Affairs, Part II: Russia and Its Neighbors: A Sphere of Influence or a Declining Relationship*, Nuclear Threat Initiative (Jul. 13, 2021), <https://www.nti.org/analysis/articles/strengthening-russias-influence-in-international-affairs-part-ii-russia-and-its-neighbors-a-sphere-of-influence-or-a-declining-relationship/> (describing the influence Russia yields over neighboring countries to maintain dominance in the region); see generally Michael Beckley, *The Power of Nations: Measuring What Matters*, 43 INT'L SEC. 7, 8, 11 (2018) (discussing how scholars measure a country's power and the effects of such power on the global stage).

87. See Chandler P. Anderson, *Our Policy of Non-Recognition in Central America*, 25 AM. J. INT'L LAW 298, 298 (1931); Thomas M. Leonard, *Central America and the United States: Overlooked Foreign Policy Objectives*, 50 AMERICAS 1, 15 (1993); see also John Weeks, *An Interpretation of the Central American Crisis*, 21 LATIN AM. RSCH. REV. 31, 46 (1986).

Zelaya; OAS demanded that President Zelaya be reinstated.⁸⁸ However, the illegal assumption of power in the Central American states do not imply that the condemnation of illegal regimes by the treaty was futile. From a moral and legalistic point of view, that treaty provision meant that the unconstitutional assumption of power and recognition of such governments in those Central American states were not merely a national legal issue but also a violation of international treaty law. Even from a purely utilitarian point of view, it could be argued that such a condemnation of illegal assumption of power was a factor that potential usurpers must weigh. And it would appear that had such a condemnation of illegal governments been truly global, any illegal regime would find it extremely difficult to perform fully functionally as a subject of international law. It could face ostracization ossifying its existence on the international plane.

With the increasing exchange of resources and people between states multiplied by the presence of a growing number of multilateral inter-state international organisations, state delegate interactions become awkward where one is not recognized by another. The delegates of a state may have to interact with delegates of other states where the government of the former does not recognize the latter.⁸⁹ There may also be an argument that by not recognizing a government *de facto*, it may not be internationally legally responsible for its acts to other states.⁹⁰ However, these concerns seem to be overblown as non-recognition does not completely shut the door of diplomacy. Parties may negotiate via third-party states and obviously, non-recognition does not absolve a government of its international

88. Christina M. Cerna, *Democratic Legitimacy and Respect for Human Rights: The New Gold Standard*, 108 AJIL UNBOUND 222, 224 (2015). Similarly, efforts by member states of the African Union to use democratic legitimacy as a criterion for governmental recognition has only achieved limited and sporadic success. See Erika de Wet, *The Role of Democratic Legitimacy in the Recognition of Governments in Africa since the End of the Cold War*, 17 INT'L J. CON. L. 470, 470 (2019).

89. Peterson, *supra* note 70, at 33.

90. See generally Gunnar M. Ekelove-Slydal et al., *Human Rights Behind Unsettled Borders*, FOREIGN POL'Y CTR. (Sept. 26, 2009), <https://fpc.org.uk/human-rights-behind-unsettled-borders/> (noting lack of clarity regarding responsibilities of *de facto* regimes); see also Daron Tan, *Filling the Lacuna: De Facto Regimes and Effective Power in International Human Rights Law*, 51 N.Y. U. J. INT'L L. POL. 435, 454–55 (2019).

legal responsibility. In a similar vein, the recognition of a government as the de jure government should not also mean that this would deprive the people of their legitimate rights. This has been clarified by the ICJ in the *Namibia* Advisory Opinion in the following words:

In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.⁹¹

So, the idea that by not offering complete recognition to a regime, and thus, the hardship of its people may be magnified seems to be embellished. This point has been also elucidated by the European Court of Human Rights in *Cyprus v Turkey*:

The Court notes that the view expressed by the International Court of Justice in the context described in the preceding paragraph is by no means an isolated one. It is confirmed both by authoritative writers on the subject of de facto entities in international law and by existing practice, particularly judgments of domestic courts on the status of decisions taken by the authorities of de facto entities. This is true, in particular, for private-law relationships and acts of organs of de facto authorities relating to such relationships. Some State organs have gone further and factually recognized even acts related to public-law situations, for example by granting sovereign immunity to de

91. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 56, at 125 (June 21).

facto entities or by refusing to challenge takings of property by the organs of such entities.⁹²

Another contention regarding the issue of recognition of governments is that when an unrecognized government operates and deals with foreign subjects, there may be a question of continuity of international relations. The *Tinoco* case resolves the problem of non-continuity.⁹³ Tinoco overthrew the government of Costa Rica by use of force.⁹⁴ An election followed and Tinoco, and a legislative assembly led by him, peacefully administered Costa Rica for two years.⁹⁵ In 1919, he was removed from power and the successor government repudiated certain obligations accepted by the government of Tinoco towards British nationals.⁹⁶ When the government of the United Kingdom (“UK”) sought to enforce the claims of its nationals, the question of the recognition of the government of Tinoco became a material issue.⁹⁷ The arbitrator upheld the position taken by the UK “that the executive of Great Britain takes the position that the Tinoco government which it did not recognize, was nevertheless a de facto government that could create rights in British subjects which it now seeks to protect.”⁹⁸ The arbitrator did so by emphasizing that “from the evidence that the Tinoco government was an actual sovereign government”⁹⁹ and that its action must bind its successor government.¹⁰⁰ It has become a settled principle of international law that the action de facto governments take in the exercise of normal governmental functions would be considered as valid.¹⁰¹ Thus, even when there are dealings between a non-recognized government and foreign actors, the subsequent governments

92. *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, 26–27.

93. *Aguilar-Amory and Royal Bank of Canada Claims* (Gr. Brit v. Costa Rica), 1 R.I.A.A. 369, 377, 380 (1923).

94. *Id.* at 378.

95. *Id.* at 378–79.

96. *Id.*

97. *Id.*

98. *Id.* at 382.

99. *Id.* at 380.

100. *Id.*

101. Brown, *supra* note 79, at 617.

would have to honour the legal obligations undertaken by the predecessor.

In *Republic of Somalia v. Woodhouse Drake Carry Suisse S.A.*, the government of Somalia purchased a cargo of rice to be delivered to its capital in 1991.¹⁰² When the ship arrived in Mogadishu, the government was toppled, and there was a civil war.¹⁰³ The master of the ship deemed it was too dangerous to deliver the cargo and, as per order of a commercial court in London, it was sold, and the proceeds of the sale were paid into the court.¹⁰⁴ In July 1991, following an international conference, the Djibouti Agreement was signed, which named Mr Mahdi as the interim president.¹⁰⁵ A suit was brought by a representative of the interim government for recovering the £2 million belonging to Somalia.¹⁰⁶ The court rejected the claim as, in its view, it could not fulfil any of the criterion on which the existence of a foreign government would be assessed, namely: (a) constitutional character of the government (b) its control and stability over the territory (c) its dealings with the British government and (d) the international recognition that it has received.¹⁰⁷ While factually, the Court's decision is appreciable, it is arguably lamentable as, due to vagueness of recognition of a Somali government, assets belonging to the Republic of Somalia were languishing in the custody of a foreign court.¹⁰⁸ And it would appear that the Court here did not consider the effective control over the territory as the sole factor for its status, rather as one of the factors.¹⁰⁹

V. DEALING WITH UNCONSTITUTIONAL REGIMES

This article does not assert that states should only consider the legitimacy of a government and can completely abandon

102. *Republic of Somalia v. Woodhouse Drake & Carey (SUSSIE) S.A. and Others, UNITED SETTLEMENT*, <http://www.uniset.ca/other/cs3/1993QB54.html>, (last visited Feb. 8, 2022).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 61.

109. *Id.* at 63.

dealings with unconstitutional regimes. It also does not claim that there is a customary international law rule that the democratic legitimacy of governments shall be a condition precedent for the recognition of a de jure government. States seem to enjoy a great degree of latitude when it comes to recognizing foreign states or governments.¹¹⁰ There is no treaty obligation imposed on states to recognize an effective government of another state.¹¹¹ The patchy and conflicting state practice would connote otherwise.¹¹² Again, the disparate state practice, as discussed in this article, would imply that there is no real legal obligation imposed on states to recognize an effective government in another state, which the former considers as illegal. Thus, even the first element of the formation of a customary international law: uniform state practice, would not be fulfilled.¹¹³ Furthermore, the fact that a state has never sued another state for recognizing or not recognizing another state or government would imply that states consider the act of recognition of foreign governments as a purely political act left to their discretionary choice.¹¹⁴

Indeed, more powerful global players have been much more inclined in installing, recognizing, and fortifying friendly regimes than in the democratic nature of the respective government ascending to power.¹¹⁵ However, these government actions simply reinforce that there is no customary legal obligation to recognize a new government coming into power by illegal means; it does not legally impose any restraint on a state who may decide to do otherwise.¹¹⁶ The state practice premised on the freedom of states

110. See de Wet, *supra* note 62, at 201 (indicating that states exercise flexibility in recognizing foreign states); see also Fred Morrison, *Recognition in International Law: A Functional Reappraisal*, 34 U. CHI. L. REV. 857 (1967) (emphasizing the formal recognition requirement despite a factual basis suggesting statehood).

111. de Wet, *supra* note 62, at 201.

112. See generally *id.* at 201–07 (discussing inconsistent application of the doctrine of democratic legitimacy by states and international institutions.).

113. S.S. “Lotus” (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

114. Miyazaki Takashi, *Recognition of States and Governments in International Law: Theory and Practice*, 28 CHINESE (TAIWAN) Y.B. INT’L L. & AFF. 64, at 67.

115. Obiora Chinedu Okafor, *Democratic Legitimacy as a Criterion for the Recognition of Governments: A Response to Professor Erika de Wet*, 108 AJIL UNBOUND 228, 228 (2015).

116. *Id.*

in the domain of recognition of governments would imply that a government not willing to recognize an illegal regime in a foreign state can do so without violating any rule of international law. Again, there is persuasive scholarly opinion asserting that due to the emergence of various treaty provisions, it is no longer the effective control of territory, rather the democratic legitimacy and human rights, which are the legal basis of recognition of governments.¹¹⁷ Perhaps intuitively appealing, the problem with this argument is the following observation of the ICJ in its advisory opinion in *Western Sahara* is that “[n]o rule of international law, in the view of the Court, requires the structure of a state to follow any particular pattern, as is evident from the diversity of the forms of state found in the world today”.¹¹⁸ One may question whether, in the four decades that have followed since the advisory opinion of the ICJ, the pronouncement still holds. Whether or not, treaty provisions do not in any way seem to contain the right of governments to refrain from recognizing a foreign government when the former considers the latter to have been constituted illegally.

This article demonstrates that there are compelling reasons for states to continue *recognizing governments*, not just states. A state willing to deal with an unconstitutional overthrow of a democratically elected regime in another state may take one of several options. In extreme cases involving massive humanitarian disasters, it may directly intervene in the state by using force. Most scholarly works agree that such an intervention, even during a genuine disaster would violate international law and may constitute aggression.¹¹⁹ And even more importantly, in history, it would be extremely difficult to find examples of

117. See Cerna, *supra* note 88, at 222. Regards may be had for instance, to Article 21(3) of the Universal Declaration of Human Rights, G.A. Res. 217A (III), UN Doc. A/810 (Dec. 10, 1948) stating that “[t]he 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.”

118. *Western Sahara*, Advisory Opinion, 1975 I.C.J. 61, ¶ 94 (Oct. 16).

119. Kevin Jon Heller, *The Illegality of ‘Genuine’ Unilateral Humanitarian Intervention*, 20 EUR. J. INT’L L. 1 (2021); cf. Reisman, *supra* note 38, at 871–72 (arguing that in some cases to use force by a state against a foreign usuring power in another state may be one of the factors of legitimizing the use of force).

genuinely effective unilateral humanitarian intervention by a state in foreign territories to have served the state whose territorial integrity has been breached for '[a] humanitarian purpose'.¹²⁰ As a second option, a state may declare that it will continue to recognize the democratically elected regime as the only legitimate government of the state. As a third option, the state may treat the democratically representative government as the *de jure* government and the illegal but controlling government as the *de facto* regime. An easier and less drastic option may be the severance of a formal diplomatic relationship; severance may not be available where the government willing to chart that course does not already have a formal relationship with the other state. A more direct assertion of the position of the state would seem to be in order.¹²¹

Direct intervention or direct assertions means that a government may conduct some of the functions of a legitimate government, such as suing for recovering moveable property belonging to the state or even immovable property situated abroad.¹²² Practical benefits aside, there are obvious symbolic gains of such a recognition, particularly when it would be from a state which has global clout.¹²³ As John Foster Dulles, a former US Secretary of State, has observed, "recognition gives the recognized regime valuable rights and privileges, and, in the world of today, recognition by the United States gives the recipient much added prestige and influence at home and abroad."¹²⁴

Determining the intricate task of the legitimacy or otherwise of foreign governments would appear to be better left to the executive than the judiciary. This does not mean the recognition of a democratically elected government would automatically ensure that the recognized government would be able to conduct its international relations in toto, but that does not detract from the fact that without any recognition from foreign governments, its option to perform its international relations remains non-

120. *Id.* at 644–645.

121. Peterson, *supra* note 70, at 45.

122. *Id.* at 36.

123. Effect of Nonrecognition, 2 *WHITEMAN DIGEST*, ch. 3, §69, at 606.

124. *See generally* 2 *WHITEMAN DIGEST*, ch. 3, §1, at 13.

existent. Thus, the recognition of NUG by governments of other states is no magic wand to its effective rule over the territory of Myanmar. However, this would appear to be a firm statement of support to NUG and should give some impetus to the eventual restoration of a democratic regime in Myanmar.

One may squabble over the democratic forms of government, i.e., whether the election was representative and held freely and fairly. However, while reasonable minds and states can differ about the prevalence of democracy in a state, it is likely that few would disagree about the undemocratic nature of a government.¹²⁵ As pointed out by Roth, when a regime would seem “manifestly repudiated by the subject population, an aspect of democratic principles can be upheld—over and against the rule of effective control through internal processes—without . . . parochialism”.¹²⁶ This is precisely the case in Myanmar of today. In clear cases, where the illegitimacy of the regime is questioned by few in the international community (though falling short of a universal condemnation),¹²⁷ the non-recognition of the military government or recognition of the democratic government as *de jure* government would seem to be apt.

Interestingly, even some scholars who have advocated for the retention of recognition of governments have posited that it should be limited to the sole consideration of effective control of the territory of the respective state.¹²⁸ Of course, when recognition would be refused solely on political considerations such as what the former Soviet Union or the US has done, the non-recognition or recognition may lose much of its candour. However, the policy of effectiveness should not be the only ground that a government should consider in deciding on recognizing or not recognizing a foreign government. To do so would mean that practicality and

125. Brad R. Roth, *Whither Democratic Legitimism?: Contextualizing Recent Developments in the Recognition and Non-Recognition of Governments*, 108 AJIL UNBOUND 213, 215 (2015).

126. *Id.*

127. See Thomas H. Andrews (Special Rapporteur on the Situation of Human Rights in Myanmar), *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, ¶ 15, U.N. Doc. A/HRC/46/56 (March 4, 2021).

128. See, e.g., Peterson, *supra* note 70, at 50 (arguing that recognition should be based only on whether a government has control over its state); see also Crawford, *supra* note 19, at 142.

convenience would trample all other questions of legitimacy. In the contemporary world where there is an emerging concept around the responsibility to protect which calls on states to take action in protecting people of other states.¹²⁹ And in recognizing a legally elected government, there is no question of a premature recognition as would be the case when a secessionist state is prematurely recognized or an aggressor is illegally recognized. For instance, in 1938, the UK recognized Italy as the government of Ethiopia.¹³⁰ In the latter cases, the recognition may constitute a threat to the territorial integrity of a state and thus, a question of the principle of non-intervention may legitimately arise, but in the former no such concern should arise.¹³¹

VI. CONCLUSION

The pre-ponderance of a pragmatic position is somewhat tying in the hands of governments to act with an option that they could take against rogue regimes. When a state continues to deal with a government in another state that has come into power by a coup d'état, the continuance of the relationship on the basis of a theory of not recognizing governments rather than states is a *tacit recognition* of the regime coming into power while disregarding the means to the ascending to power. Arguably, this is not merely pragmatism but rather somewhat blissful oblivion to the issue of legitimacy, which, if not indefensible, is morally susceptible to questions. In the contemporary world, the principles of human rights and democratic governance are given so much premium in liberal democracies around the globe. And, the recognition of a democratic government ousted by undemocratic forces, at least as the de jure government of the respective state, warrants some serious considerations. This is less stringent a rejection of the undemocratic forces than an outright non-recognition of the usurper. However, still, it may help a legal regime such as the one overthrown by brute force in Myanmar. It is not the reductionist assertion of the paper that such recognition would automatically

129. G.A. Res. 60/1, ¶¶ 72, 139 (Sept. 16, 2005).

130. Ian Brownlie, *Recognition in Theory and Practice*, 1982 BRIT. Y.B. INT'L L. 197, 204.

131. *Id.*

empower the NUG to have full control over the territory in Myanmar, but it can bolster the position of NUG and can do no harm to its position.

A universal or nearly universal non-recognition of a regime could make that government a pariah, but in a world where governments in pursuit of strategic interests would trample the question of legitimacy, such a rejection would far too often be elusive. However, even the non-recognition of a regime or at least recognizing the legitimately elected government as the *de facto* regime would appear to have both moral and practical values. Much of the problems associated with the recognition of governments are to do with how the states have used it in practice and much less to do with the recognition of governments as a norm itself. After all, it is the use or abuse of recognition as a blatant political tool that is evil, not the practice of recognizing governments *per se*.