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Towards a Declaratory School of Government Recognition

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NOTES

Towards a Declaratory School of Government Recognition

ABSTRACT

Recognition of governments has historically been a political matter. Governments could choose to recognize or not to recognize any other government, free from the auspices of international law. However, in the wave of prodemocracy optimism after the dissolution of the Soviet Union, a group of international legal scholars declared the existence of a universal democratic entitlement, which implied that recognition of governments had legal significance. These scholars, known collectively as the Manhattan school, are generally regarded as having vastly overstated the legal implications of the shift toward democratic governance. While it is true that there is scant evidence of a general democratic entitlement, this Note argues that there is a strong preference against the reversal of democracy. This preference is reflected, in part, in a norm against the recognition of coup regimes that displace democratically elected governments. This norm represents a partial but critical vindication of the Manhattan school's assertion that a government's legality depends on its democratic character. It also has important theoretical implications, as recognition of governments is no longer merely political, but rather must reflect governments' underlying legal status. This shift aligns the theory of recognition of governments with the declaratory school of state recognition, in which recognition is said to merely "declare" the underlying legal status of the state. This Note proposes that the UN Credentials Committee, which already adheres to the principle of nonrecognition of coup regimes that displace democratic governments, formally adopt this norm as a rule guiding representation disputes before the United Nations.

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I. INTRODUCTION

Recognition by governments of other governments has long been viewed as a political rather than legal act.[1] Governments were free to recognize any government as the legitimate representative of a state based on whatever political and diplomatic considerations were relevant to them.[2] However, disputes about the proper basis for evaluating government legitimacy would nevertheless arise in situations in which multiple governments claimed equal status as a state's legitimate representative. While the outcome of these disputes has serious legal consequences, such as the right to represent a state before the United Nations, they have historically been determined by resort to political considerations.[3] This situation contrasts starkly with the legal nature of state recognition. Recognition of states by governments is considered to be governed by law: states are obligated to recognize other states that meet the legal criteria of statehood, and such recognition is merely "declaratory" of those states' underlying legal status.[4]

Since the dissolution of the Soviet Union, however, some scholars have argued that international law protects a universal right to democracy, an assertion that introduces the possibility of legal obligations to decisions regarding government recognition.[5] Proponents of this view, known collectively as the Manhattan school, have not been vindicated on the existence of a broad democratic entitlement.[6] However, this Note argues that there exists a narrower entitlement against the reversal of democracy through coups, as evidenced by a norm against recognizing coup regimes that displace democratically elected governments.

This narrower entitlement can be seen in the shift in doctrines used to settle representation disputes. Prior to the rise of the

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1. Memorandum, Trygve Lie, U.N. Secretary-General, Legal Aspects of Problems of Representation in the United Nations 2, U.N. Doc. S/1466 (Mar. 8, 1950).

2. *Id.*

3. JEFFREY DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 144–46 (3d ed. 2010); *see also* Memorandum, Trygve Lie, *supra* note 1, at 6 (stating that member governments must be "able and willing to carry out the obligations of membership," which "can be carried out only by governments which in fact possess the power to do so"); *infra* Part III.A.

4. Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT'L L. REV. 107, 116–18 (2002).

5. *See infra* Part III.B.

6. *See, e.g.*, David Kennedy, *Tom Franck and the Manhattan School*, 35 N.Y.U. J. INT'L L. & POL. 397, 432–33 (2003) (stating that a right to democratic governance is not codified and is merely a "state[ ] of mind").

Manhattan school, the primary theory used to settle such disputes was the effective control doctrine, which asserts that the proper government to represent a state in international forums is the one that has authority and control over the vast majority of a state's territory and population.[7] Not only was this doctrine based primarily on political considerations,[8] there was also never a suggestion that recognition on such a basis was legally required.[9] In contrast, assertions of a democratic entitlement are grounded in normative standards of what states and international organizations *ought* to do, rather than what they are merely allowed to do out of political preference.[10] Thus, while originally aspirational, asserted norms under the Manhattan school at least had the potential to become binding under customary international law.[11]

The primary context for the crystallization of this norm against recognition of coup regimes that displace democratic governments has been the UN Credentials Committee.[12] The Credentials Committee has long been the UN body that arbitrates questions of government legitimacy.[13] This Note argues that since the fall of the Soviet Union, the Credentials Committee has shifted from settling credentialing disputes based on primarily political considerations to making such decisions based on democratic legitimacy. When faced with a representation dispute between a coup government that maintains effective control of a state and a displaced, democratically elected government, the Committee will credential the latter.[14] However, the Committee has not formally codified this rule, and the lack of transparent standards for determining representation in credentialing disputes has created confusion and undermines the perceived legitimacy of the Committee's actions.[15]

This shift from political to legal criteria for credentialing in certain instances also affects the expectations placed on member governments regarding their individual recognition practices.[16] The

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7. *See* Memorandum, Trygve Lie, *supra* note 1, at 4 (analogizing the "proper [recognition] principle" to Article 4 of the UN Charter).

8. *See* Brad Roth, *Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, 11 MELB. J. INT'L L. 393, 394–96 (2010).

9. *Id.*

10. *See infra* Part III.B.

11. *See infra* Part IV.A.

12. *See infra* Part IV.A.1.

13. See *infra* Part IV.A.1.

14. *See infra* Part IV.A.2.

15. *See, e.g.*, Joseph Klein, *The U.N. and Double Standards*, FRONTPAGE MAGAZINE (Sept. 21, 2009), http://archive.frontpagemag.com/readArticle.aspx?ARTID=36363 (describing a question to the UN Secretary-General on why the United Nations barred the coup government from representing Honduras at the United Nations).

16. *See infra* Part IV.A.2.

United Nations has reversed its previous practice of leaving government recognition to the political discretion of individual governments and has made, in a number of cases, firm calls for nonrecognition of coup governments that clearly lack democratic legitimacy.[17] While consistent refusal to recognize coup governments does not vindicate a broad democratic entitlement, it does reflect a norm against the reversal of democracy through coups.

In Part II, this Note explores the legal basis of state recognition. The well-established declaratory school of state recognition, which asserts that there exists legally binding criteria for state-recognition practices,[18] provides the theoretical framework from which this Note evaluates the shift to a legal basis of government recognition. Against this backdrop, Part III presents an analysis of the political nature of the effective control doctrine and the legal nature of claims by the Manhattan school. This Note argues that the effective control doctrine did not bind states' or international organizations' recognition-of-government practices, while assertions of a democratic entitlement did imply binding rules on government-recognition practices. In Part IV, this Note advocates for a declaratory school of recognition of governments. The norm of nonrecognition of coup regimes that displace democratically elected governments justifies conceiving of recognition of governments as a legal act that must reflect the underlying legitimacy of such governments. Such a rule against the reversal of democracy through coups, and the concomitant requirement of states to reject governments that force such a reversal, represents a partial but significant vindication of the Manhattan school's assertion of a democratic entitlement.[19]

Finally, this Note proposes that the Credentials Committee explicitly embrace this norm by formally adopting a rule against credentialing regimes that displace democratically elected governments through coups, unless the coup governments subsequently "cure" their actions by holding elections.

II. THE DECLARATORY SCHOOL AND THE LEGAL BASIS OF STATE RECOGNITION

Doctrines surrounding the recognition of states have a venerable intellectual tradition in international law, and divide primarily along two lines.[20]

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17. *See infra* Part IV.A.2.
18. *See infra* Part II.B.
19. *See infra* Part IV.
20. *See generally* Roth, *supra* note 8, at 396–98 (laying out the contours of the two different approaches).

A. *The Constitutive School*

The constitutive school of state recognition is comprised primarily of realists and legal positivists who assert that recognition itself provides the basis of statehood.[21] The constitutive school lost the day among international legal scholars because its elevation of the political decisions of states in determining the status of other states undermines the legal nature of national personality, a bedrock principle of international law.[22] However, Brad Roth, an imminent scholar of statehood and recognition, argues that the constitutive school deserves more credit than many scholars recognize.[23] Roth contends that, without recognition, a state cannot exercise the many rights and obligations of statehood.[24] Thus, while "[a] foreign state may acknowledge (or *take cognizance of*) the entity's legal status, even while being unwilling to make what looks like a political statement . . . [a]n aggregation of such acknowledgements . . . is much more plausibly constitutive of statehood than the orthodox view concedes."[25] Nevertheless, Roth agrees that the "predominant view of recognition among international law scholars, officials and courts today is the declaratory view."[26]

B. *The Declaratory School*

The most broadly accepted doctrine of state recognition is the declaratory school, which asserts that a state's status as a state is constitutive of underlying legal principles and that recognition of a state by other states is merely declaratory of that status.[27] In other words, "[a]n entity is not a state because it is recognized; it is recognized because it is a state."[28] The legal criteria for conditions of statehood are laid out in the Montevideo Convention on the Rights and Duties of States (Montevideo Convention).[29] The Montevideo

21. Sloane, *supra* note 4, at 115–16.

22. *See* Roth, *supra* note 8, at 396 ("Most authorities repeat the orthodoxy that the entity's legal status is an objective matter and that the entity's reception by other states is merely 'declaratory,' rather than 'constitutive,' of that status . . . .").

23. *Id.* at 397–98.

24. *Id.* at 397.

25. *Id.*

26. BRAD ROTH, GOVERNMENT ILLEGITIMACY IN INTERNATIONAL LAW 126 (1999); *see also* M.J. PETERSON, RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE, 1815–1995, at 23 (1997) ("By 1975, the vast majority of specialists accepted the declaratory theory."); Sloane, *supra* note 4, at 117 (speaking to court recognition).

27. Sloane, *supra* note 4, at 115–16.

28. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 93 (2d ed. 2006).

29. Convention on Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19, *reprinted in* 28 AM. J. INT'L L. SUPP. 75 (1934).

Convention creates a presumption in favor of statehood if there exists "*a*) a permanent population; *b*) a defined territory; *c*) government; and *d*) capacity to enter relations with the other states."[30]

The intellectual and moral significance of self-determination in international law requires that a people who fit the conditions of statehood obtain the rights associated with statehood.[31] However, after the dissolution of the former Yugoslavia, when republics such as Serbia asserted their independence and sought recognition, the European Union's Badinter Commission applied a more limited principle of self-determination. The Badinter Commission found that, while self-determination entitles minority groups to a right to be recognized and protected within a state from violations of their human rights, self-determination does "not involve changes to existing frontiers at the time of independence."[32] In other words, the Commission believed that the dissolution of Yugoslavia only entitled peoples to form new states along "existing frontiers," while the rights of specific minority groups within those frontiers were more limited.[33]

However, the Badinter Commission was not the last word on the issue, and self-determination was ultimately used to justify secession. Citing the principle of self-determination, Kosovo declared independence in 2008.[34] A majority of states now recognize Kosovo as a state, including a majority of the permanent members of the UN Security Council.[35]

The dispute over the role of self-determination in statehood illuminates the tension within the declaratory school of state recognition. On the one hand, a state without recognition from any other does not seem like a valid state; on the other hand, statehood must be grounded in some legal basis, such as self-determination. Hersch Lauterpacht, an international scholar "unsurpassed by any

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30. *Id.* art. 1.

31. *See* U.N. Charter arts. 1, 2 (stating, in part, that one of the goals of the United Nations is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . ."). *See generally* DUNOFF, RATNER & WIPPMAN, *supra* note 3, at 123–26 (providing excerpts of various UN documents to better demonstrate the concept of self-determination).

32. Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia opinion 2, Jan. 11, 1992, 31 I.L.M. 1488, 1494 [hereinafter Conference on Yugoslavia]; DUNOFF, RATNER & WIPPMAN, *supra* note 3, at 126–29.

33. Conference on Yugoslavia, *supra* note 32.

34. Dan Bilefsky, *Kosovo Declares Its Independence from Serbia*, N.Y. TIMES Feb. 18, 2008, http://www.nytimes.com/2008/02/18/world/Europe/18kosovo.html?pagewanted=all&_r=0.

35. Ministry of Foreign Affairs, *Countries that Have Recognized the Republic of Kosovo*, REPUBLIC KOS., http://www.mfa-ks.net/?page=2,33 (last visited Feb. 1, 2013). However, the International Court of Justice refused to affirm that Kosovo's declaration of independence was grounded in international law, sidestepping the question of the limits of self-determination. *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶¶ 20–21 (July 22).

international lawyer of this century,"[36] has attempted to reconcile this tension at the heart of the dispute between the constitutive and declaratory schools. Lauterpacht conceded that the "full international personality of rising communities . . . cannot be automatic" and that the role of ascertaining who qualifies as a state "must be fulfilled by a state already existing."[37] However, "the valid objection is not against the fact of their discharging it, but against their carrying it out as a matter of arbitrary policy as distinguished from legal duty."[38] Thus, the declaratory school does not ignore the important role that state recognition plays in enabling a fledgling state to gain the full rights of a state, but rather conceives of international law as requiring recognition and, thus, the granting of those full rights, when underlying legal criteria are met.[39] The primary consequence is not an ignorance or dismissal of the important role that political actions have in granting the benefits of statehood, but rather a distinction between the intrinsic legal status of a state and the political measures necessary to actualize the full benefits of that status.

There is support for such a distinction even among legal positivists, who generally are associated with the constitutive school of state recognition.[40] Jean d'Aspremont, another prominent scholar of statehood and recognition,[41] explains that legal positivists distinguish between legal *acts* and legal *facts*, considering the former to be actions that create law and the latter to be actions that merely reflect law.[42] In order "to qualify as a legal act, the legal effect of the act in question must directly originate in the will of the legal subject to whom the behaviour is attributed and not to any pre-existing rule in the system."[43] In contrast, "those acts which yield legal effects but which are not a direct consequence of the will of legal persons cannot be considered legal acts."[44] Furthermore, "[t]heir legal effects originate in the legal system itself, which provides for such an effect prior to the adoption of the act."[45] Certainly, legal positivists could use this framework to support the constitutive school, but its

36. STEPHEN M. SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS, at xiii–xiv (1987).

37. HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 55 (1947).

38. *Id.*

39. *See id.* (providing an overview of the perceived "rights" of current states to play a role in state recognition).

40. *See* Sloane, *supra* note 4, at 116 (arguing that, under the constitutivist view, the concept of statehood is contingent on recognition by other states).

41. Brad Roth, *A Response to Jean d'Aspremont*, OPINIO JURIS (May 18, 2011, 10:30 AM), http://opiniojuris.org/2011/05/18/a-response-to-jean-d'aspremont-by-brad-roth/.

42. Jean d'Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, 19 EU. J. INT'L L. 1075, 1078–79 (2008).

43. *Id.* at 1078 (emphasis omitted).

44. *Id.* at 1079 (emphasis omitted).

45. *Id.*

relevance here is that actions that have legal effects are not necessarily legal acts. While recognition brings to fruition the full benefits of statehood, those benefits are conceived of not in the minds of the actors who grant such recognition, but rather derive from the legal definition of statehood. In that sense, recognition of such statehood by governments is merely a legal fact.[46]

Modern critics of the declaratory school of state recognition will also point to the "'Montevideo Illusion,' whereby it is thought that states are necessarily created under and in accordance with international law,"[47] when in fact the process of statehood creation is often messy and not in conformance with the legal doctrines represented by the Montevideo Convention. Examples abound in which statehood creation fails to conform to the legal mandate, including the inconsistent application of the Montevideo Convention after the dissolution of Yugoslavia.[48] However, such criticism misses the point, at least in relation to the declaratory school. The point is not that the process of statehood creation always conforms to law, but rather that the process is governed by law, regardless of whether governments sometimes arbitrarily apply their own standards.[49] This "illusion" is akin to the "fiction" of international law itself, in which sovereign states that routinely violate international law nevertheless recognize the necessity of espousing its "binding" nature. The legitimacy of the declaratory school stems in part from its enduring predominance in the face of illegal, or at least extralegal, actions by governments regarding state recognition.

III. GOVERNMENT RECOGNITION: FROM A POLITICAL TO LEGAL BASIS

Against the backdrop of the recognition of states, recognition of governments has historically been purely a political matter in the sense that states have never been under legal obligation to recognize or not recognize other governments.[50] In fact, the nonbinding nature of doctrines regarding the recognition of governments has led some to go so far as to assert that states should not officially recognize or deny recognition to any government, but rather simply deal with

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46. *See id.* (noting that "they are legal facts . . . even though they take the form of an act").

47. Jean d'Aspremont, *A Response to Brad Roth*, OPINIO JURIS (May 18, 2011, 8:30 AM), http://opiniojuris.org/2011/05/18/a-response-to-brad-roth-by-jean-d'aspremont/.

48. *See* DUNOFF, RATNER & WIPPMAN, *supra* note 3, at 126–35 (providing numerous examples of such failure).

49. LAUTERPACHT, *supra* note 37, at 73–74.

50. *See, e.g.*, Memorandum, Trygve Lie, *supra* note 1 ("[T]he practise of States shows that the act of recognition is still regarded as essentially a political decision, which each State decides in accordance with its own free appreciation of the situation.").

whatever government purports to represent a given state.[51] This approach is known as the Estrada doctrine.[52] The Estrada doctrine is still dominant in many ways, as most modern states do not feel the need to issue certificates of recognition or otherwise formally recognize a new government once it has come to power. Thus, in certain contexts, the entire idea of recognition of governments is an anachronism.

The Estrada doctrine, however, provides no guidance when multiple governments claim to be the rightful representative of a state. In such situations, recognition of governments is not only still relevant, but also critical to the functioning of the modern international order. This is true both for interstate relations as well as for international organizations, such as the United Nations. To deal with this particular problem, both states and international organizations have historically relied most heavily on the effective control doctrine.[53] The effective control doctrine asserts that if a government controls a state's territory and has secured acquiescence to its authority from the state's population, that government should be entitled to represent the state on the world stage.[54] In contrast to the Montevideo Convention, however, effective control has merely provided a functional basis for recognition, and has not carried with it any legal imperative.[55] The rise of a democratic entitlement, on the other hand, introduces a legally binding framework into the theory of recognition of governments.[56]

A. *The Age of Effective Control: The Political Character of Recognition Practices from 1950–1991*

Disputes about the theory of the recognition of governments have proceeded along a different path than that of the recognition of states. Whereas two competing theories about the recognition of states eventually gave way to a consensus victor, for the majority of the twentieth century, a single theory of government recognition enjoyed the consensus of scholars, only to face competition in recent decades. The effective control doctrine was the dominant theory of government recognition until the end of the Cold War, benefiting from widespread support among international legal scholars.[57] Yet, while this theory did not have a rival in the international legal community, it remained vulnerable to replacement because of its political character. This

51. Sloane, *supra* note 4, at 123.
52. *Id.*
53. Roth, *supra* note 8, at 394–95.
54. *Id.*
55. *See infra* Part III.A.
56. *See infra* Part IV.
57. Roth, *supra* note 8, at 396.

vulnerability was highlighted during the representation dispute between competing Chinese regimes after Mao Zedong declared control over the People's Republic of China (PRC). This dispute reflects the functional considerations and nonbinding nature of the effective control doctrine.[58]

1. The China Dispute: An Example of the Nonbinding Nature of the Effective Control Doctrine

On October 1, 1949, the most significant representation dispute of the twentieth century began when Mao Zedong declared the birth of the PRC and the Nationalist leaders of the previous regime fled to Taiwan.[59] Both governments claimed that they were the rightful representatives of China and were entitled to the powerful permanent seat on the UN Security Council.[60]

Secretary-General Trygve Lie issued a memorandum arguing that the United Nations should credential Chairman Mao's government on the basis that it controlled the territory of China and was thus best able to implement the requirements of UN membership.[61] His reasoning spelled out the effective control doctrine, and set the stage for the dominant role it played in recognition-of-government practices for the next forty years.[62] Lie relied on Article 4 of the UN Charter, which requires that member states be "able and willing to carry out the obligations of membership."[63] Lie reasoned that "[t]he obligations of membership can be carried out only by governments which in fact possess the power to do so."[64] In Lie's estimation, this required that "the new government exercise[ ] effective authority within the territory of the State and is habitually obeyed by the bulk of the population."[65] Lie also made clear that applying this standard to membership did not implicate any obligation for individual member states to also

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58. *See, e.g.*, Memorandum, Trygve Lie, *supra* note 1, at 2 (explaining that the act of recognition is a political decision that states make in accordance with their own independent assessment of the situation).

59. DUNOFF, RATNER & WIPPMAN, *supra* note 3, at 159.

60. *Id.*

61. Memorandum, Trygve Lie, *supra* note 1, at 6.

62. *See id.* (arguing that the obligations of membership in the United Nations can only be carried out by governments with the power to do so); *see also* Roth, *supra* note 8, at 395–96 ("The effective control doctrine squares popular sovereignty with ideological pluralism by establishing a presumption—in many circumstances, an irrebuttable one—that enduring patterns of effective authority reflect underlying realities consistent with the *Charter*'s idealisation of existing states and governments.").

63. Memorandum, Trygve Lie, *supra* note 1, at 6.

64. *Id.*

65. *Id.*

recognize the PRC.[66] Lie wrote that "while States may regard it as desirable to follow certain legal principles in according or withholding recognition . . . [it] is still regarded as essentially a political decision, which each State decides in accordance with its own free appreciation of the situation."[67]

Just as Secretary-General Lie defended the political nature of recognition decisions for states, he similarly relied on political, rather than legal, rationales for using effective control as the basis for standing before the United Nations. The United Nations was a young organization in 1950. Its predecessor, the League of Nations, was plagued by political ineptness and was eventually disbanded.[68] To have China, one of the United Nations' most prominent members, represented by a government powerless to put into effect the decisions of the body, certainly would not increase the United Nations' credibility. Nevertheless, driven by Cold War politics, the United States led a coalition to deny Mao's government representation within the United Nations, despite its clear effective control of China and Lie's arguments that such representation was critical to the United Nations' legitimacy.[69]

The political nature of the effective control doctrine's implementation is also made evident by the freedom of governments to inconsistently apply different standards of recognition within and outside of the United Nations.[70] On the Chinese question, it was perfectly acceptable for the United Kingdom to "recognize[ ] the Central People's Government of the People's Republic of China as the Government of China," but nevertheless support the motion preventing the United Nations from recognizing the government for the following year.[71] Recognition can hardly be seen as governed by binding legal doctrines when it is acceptable to support the recognition of a government in one context but not another.

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66. *Id.*

67. *Id.*

68. F.S. NORTHEDGE, THE LEAGUE OF NATIONS: ITS LIFE AND TIMES, 1920–1946, at 276–78 (1986); GEORGE SCOTT, THE RISE AND FALL OF THE LEAGUE OF NATIONS 404 (1973).

69. DUNOFF, RATNER & WIPPMAN, *supra* note 3, at 144–46; Farrokh Jhabvala, *The Credentials Approach to the Representation Question in the U.N. General Assembly*, 7 CAL. W. INT'L L.J. 615, 626–28 (1977).

70. *See* Jhabvala, *supra* note 69, at 628 (explaining that member states are not required to follow one particular practice of recognition because the practice, itself, is not legally binding).

71. Jhabvala, *supra* note 69, at 627; *see also* U.N. GAOR, 10th Sess., 516th plen. mtg. at 4, U.N. Doc. A/PV.516 (Sept. 20, 1955) (speaking on behalf of Great Britain, Anthony Nutting indicated that although "the question of Chinese representation in the United Nations" was a pressing issue, Great Britain would again support the motion to postpone its discussion).

2. The Cambodia Dispute: An Example of the Nonbinding Nature of the Effective Control Doctrine

The dispute between the People's Republic of Kampuchea (PRK) and the Khmer Rouge to gain recognition as the representative of Cambodia in the 1970s also illustrates the political mutability of government-recognition practices prior to the Manhattan school.[72] The Khmer Rouge usurped power from General Lon Nol in 1975 and began governing with a remarkable amount of brutality, including abuse of Vietnamese minorities.[73] Vietnam then invaded Cambodia in late 1978, took control of the state's capital in January of 1980, and backed a government of former Khmer Rouge members that had previously fled to Vietnam.[74] This new Vietnam-backed government, the PRK, gained control over the majority of the population and territory, but the United States and its allies supported the coalition of the ousted Khmer Rouge.[75]

The dispute can be understood as one primarily between Soviet-allied Vietnam (supporting the PRK) and the Western-allied Khmer Rouge. Both the Khmer Rouge and the PRK sent a delegation to represent Cambodia at the thirty-fourth session of the General Assembly.[76] The Credentials Committee narrowly approved a draft resolution to be voted on by the General Assembly, which recommended credentials for the ousted Khmer Rouge.[77] Despite the brutality of the Khmer Rouge and the effective control exhibited by the PRK, the United States sided with the Khmer Rouge in the credentialing fight.[78] While the PRK controlled the majority of the country, the General Assembly approved the Credentials Committee's draft resolution by a vote of seventy-one in favor to thirty-five against, with thirty-four abstentions. [79] Notably, the votes fell generally along political lines, with Western states supporting the resolution and Soviet-block states against it.[80]

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72. DUNOFF, RATNER & WIPPMAN, *supra* note 3, at 157–59.

73. *Id.*; Suellen Ratliff, *UN Representation Disputes: A Case Study of Cambodia and a New Accreditation Proposal for the Twenty-First Century*, 87 CAL. L. REV. 1207, 1250 (1999).

74. Ratliff, *supra* note 73, at 1252.

75. *Id.*

76. DUNOFF, RATNER & WIPPMAN, *supra* note 3, at 157–59.

77. Ratliff, *supra* note 73, at 1254.

78. *Id.*

79. *Id.* at 1255.

80. DUNOFF, RATNER & WIPPMAN, *supra* note 3, at 161.

3. Analysis of the Effective Control Doctrine for Government Recognition

Beyond being applied in a clearly political manner, the effective control doctrine is inherently antithetical to the nature of law. Brad Roth summarizes this critique by stating that the effective control doctrine is born not of legal principle, but of an unwillingness to challenge the ability of "each to fight its civil war in peace and to be ruled by its own thugs."[81] The process to achieve effective control is often "marked by the very violence and coercion that the international order disdains to dignify in interstate relations."[82]

Proponents of effective control, however, have their own "moral reading" of the doctrine.[83] Roth also argues that despite this valid critique of the doctrine, effective control can be defended as being grounded in two fundamental principles of international law: ideological pluralism and popular sovereignty.[84] The United Nations depends on the coexistence of "various ideologies" of states that have "different political, economic and social systems." [85] In contrast, supporting a legal regime that demands nonrecognition of governments that have established effective control arguably invites unwelcome intervention into a state's internal affairs. Malaysia made this argument in the 1979 credentials dispute between the Khmer Rouge and the PRK.[86] In arguing for the United Nations to credential the government that had effective control of the country, the Malaysian representative said to do otherwise "would mean that we would be condoning armed intervention and aggression that is in direct violation of the various principles we are supposed to uphold."[87] As for ideological pluralism, recognizing a government that has effective control reflects the interest in giving effect to the "self-determination of (the state's) population without distinction," although the validity of this interest is based on the fiction that "existing government structures . . . authentically represent" those populations.[88]

These justifications either overstate their case or have become untenable in an era in which international law emphasizes the importance of individual people. Not recognizing a government that has effective control over a territory does not amount to intervention,

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81. Roth, *supra* note 8, at 394.
82. *Id.*
83. *Id.* at 395 n.3 (citing RONALD DWORKIN, LAW'S EMPIRE 411 (1986)).
84. *Id.* at 395.
85. *Id.* at 395–96.
86. DUNOFF, RATNER & WIPPMAN, *supra* note 3, at 162–63 (citing U.N. GAOR, 34th Sess., 3d & 4th, plen. mtgs. (1979)).
87. *Id.*
88. Roth, *supra* note 8, at 395.

though it may presage such acts. Furthermore, given the pervasive access the public has to conditions in oppressive states, it is impossible to maintain "an irrebuttable presumption that effective control manifests popular will." [89] Indeed, in many cases, a government that has effective control brutally suppresses popular will.[90] Thus, while appeal to popular sovereignty hardly creates a binding requirement to recognize a government in effective control of its people, it nevertheless demonstrates the historical and intellectual heft of popular sovereignty as a legal rationale for government-recognition practices.

This discussion on the political nature of the effective control doctrine is not to say that use of the doctrine as the predominant means of determining which government represents a state does not have legal *implications* for other areas of law. In the area of sovereign debt, for example, a state can be bound by agreements entered into by governments that previously had effective control over its population, regardless of later claims of illegitimacy.[91] In the seminal case on this subject, the *Tinoco Arbitration*, Chief Justice William Taft held that Costa Rica had an obligation to repay debts its government incurred after it came to power through extraconstitutional means, but during which time it nevertheless maintained effective control of the state.[92] However, while Costa Rica as a state was bound to these agreements, there was no suggestion that other governments had an obligation to recognize this government as legitimately representing Costa Rica in light of its effective control.[93]

B. *The Manhattan School: The Aspiration of a Broad Democratic Entitlement*

In the aftermath of the dissolution of the Soviet Union, a school of thought emerged that argued that democracy was not simply an ideal form of government and the preferred political structure of Western states, but rather a universal human entitlement.[94] This came to be known as the Manhattan school, and it asserted legally binding norms much more universal in scope than merely one government's obligations regarding recognition of other

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89. Roth, *supra* note 8, at 396.

90. *See infra* Part IV.A.

91. *See, e.g.*, Tinoco Case (Gr. Brit. v. Costa Rica), 1 R.I.A.A. 369, 375–85 (1923), *reprinted in* 18 AM. J. INT'L L. 147 (1924) (explaining that a de facto government can bind the state with its loans and contracts).

92. Sloane, *supra* note 4, at 119 n.42.

93. *Tinoco Case*, 1 R.I.A.A. 369.

94. Christian Pippan, *International Law, Domestic Political Orders, and the "Democratic Imperative": Has Democracy Finally Emerged as a Global Legal Entitlement?* 5 (The Jean Monnet Program, Working Paper No. 02/10, 2010).

governments.[95] Thomas Franck, an intellectual founder of the movement, famously stated that "both textually and in practice, the international system is moving toward a clearly designated democratic entitlement, with national governance validated by international standards and systematic monitoring of compliance."[96] This entitlement rests on the premise that a government that does not provide political rights will inevitably violate human rights.[97] For Franck, the primary basis for a democratic entitlement was "to ensure meaningful participation by the governed in the formal political decisions *by which the quality of their lives and societies are shaped*."[98] Nevertheless, assertions about a new democratic entitlement were made with the understanding that an abstract entitlement was not sufficient. Robert Jennings, a Cambridge scholar and president of the International Court of Justice during the rise of the Manhattan school, noted that "[a] right—even human rights—does not amount to much in practice unless it is established and seen to be established as an integral part of the whole system of international law which alone can create effective corresponding obligations in the international community."[99] Such integration can be understood as the process of an ideal crystallizing as a customary norm of international law.

In his 1990 article *Sovereignty and Human Rights in Contemporary International Law*, Manhattan school scholar Michael Reisman argued that a democratic entitlement had become a customary norm of international law.[100] In his estimation, the legal principle of popular sovereignty had evolved in international law from a focus on protecting governments to a focus on protecting people.[101] For instance, Article 21(3) of the Universal Declaration of Human Rights (UDHR) mandates: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections. . . ."[102] Requirements such as these inextricably

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95. Kennedy, *supra* note 6, at 432.

96. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 91 (1992).

97. *See generally* Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 859, 866–76 (1990) (discussing the relationship between constitutional procedures, transfers of power, and individual rights).

98. Pippan, *supra* note 94, at 8 n.18 (emphasis added) (citing Thomas M. Franck, *Legitimacy and the Democratic Entitlement*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 25, 26 (Gregory H. Fox & Brad R. Roth eds., 2000)).

99. *Id.* at 6 (citing Robert Jennings, *Speech on the Report of the International Court of Justice*, 86 AM. J INT'L L. 249, 254 (1992)).

100. Reisman, *supra* note 97, at 872–73.

101. *Id.* at 872; *see also* Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539, 550 (1992).

102. UDHR: Universal Declaration of Human Rights, G.A. Res. 217 (III)A, art. 21(3), U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

bound together human rights and political rights.[103] Reisman decried the "refined comedy" of brutal dictators declaring that the international community should respect their claims of "popular sovereignty" despite the "endless misery" these dictators "inflict upon the human beings trapped within the boundaries of the territory."[104] While there may be some confusion from time to time about the people's true will, Reisman argued that when free and fair elections make clear which government represents the people's choice, popular sovereignty can no longer be used to justify the displacement of that government by usurping power.[105] Thus, the norm of popular sovereignty, long used to justify effective control, must thus be reinterpreted in light of the requirement to protect *people's* sovereignty.[106]

Christian Pippan, another scholar of the law of recognition, argues that a right to free and periodic elections has become an embedded norm in international law.[107] To support this conclusion, Pippan cites the vast array of treaties and soft-law instruments that extol the necessity of democracy. For instance, the International Covenant on Civil and Political Rights contains a ringing endorsement of democracy, and has been ratified by 164 nations as of January 2010.[108] UN resolutions regularly assert the right of democracy, and a resolution from the UN Commission on Human Rights that pointed to "the large body of international law and instruments . . . which confirm the right to full participation and the other fundamental democratic rights and freedoms inherent in any democratic society" was affirmed by a vote of 51–0.[109] The large body of law referenced in that resolution consists of, among other sources, resolutions by the Outside of the World Conference on Human Rights, the United Millennium Declaration, and the World Summit Outcome, all of which recognize that supporting democracy means supporting human rights.[110] The link between human rights and democracy makes both concepts "universal and indivisible core values and

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103. *See id.* ("The significance of this statement in the Universal Declaration was that it was now expressed in a fundamental *international* constitutive legal document. In international law, the sovereign had finally been dethroned.").

104. *Id.* at 870.

105. *Id.* at 871.

106. *Id.* at 873.

107. Pippan, *supra* note 94, at 2.

108. *Status: International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Feb. 17, 2013) (listing the participants to the treaty).

109. Pippan, *supra* note 94, at 21 (alteration in original) (quoting U.N. Comm'n H.R. Res. 1999/57, pmbl. para. 5, U.N. Doc. E/CN.4/RES/1999/57 (Apr. 27, 1999)) (internal quotation marks omitted).

110. *Id.* at 16 n.57.

principles of the United Nations."[111] The centrality of democracy in the principles of the United Nations is not a view just held by Western democracies, but rather has been affirmed by undemocratic countries such as Libya and Saudi Arabia.[112] Democracy as a core value is not something that has merely been adopted in the aftermath of the dissolution of the Soviet Union, though that certainly added credibility to the assertion. Rather, the Secretary-General has asserted the democratic mandate as a core UN value that derives from the United Nations' founding documents.[113] Under this view, "democracy has become both an expectation of peoples and a universal norm."[114]

However, these declarations that a broad democratic entitlement has crystallized as customary international law cannot be defended by reference to state practice. David Kennedy, an early critic of the Manhattan school, counters such triumphalism by arguing that democratic governance is "not a codified right, consented to by states, available now for enforcement by institutions, still less by hegemonic lone rangers"—rather, it is merely "a description, for the future, of where we are as a universe . . . . These rights are states of mind."[115] Quite clearly, Kennedy is at least partially correct, as many nondemocratic regimes govern states without being challenged as those states' representatives. Furthermore, that nondemocratic regimes regularly espouse democracy while rejecting it in practice only further calls into question the legal heft of soft-law instruments extolling democracy as a right.

Nonetheless, the continuation of nondemocratic regimes does not fully undermine the assertion of the rise of a democratic entitlement. Any emerging norm must coexist with other deeply embedded norms, such as the norm of nonintervention. In the tension between nonintervention and a move toward a democratic entitlement, the latter principle is often most clearly exemplified when forces seek to *reverse* an already vindicated democratic aspiration.[116] As discussed in Part IV, it is in exactly those circumstances that the rise of a democratic entitlement is most clearly demonstrated.

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111. *Id.* (quoting G.A. Res. 60/1, ¶ 119, U.N. Doc. A/RES/60/1 (Dec. 16, 2005)) (internal quotation marks omitted).

112. *See id.* at 17 n.61 (discussing UN Resolution 62/7, ratified by both Saudi Arabia and Libya, stating that democracy is a central value of the United Nations).

113. *Id.* at 21 & n.78 (citing U.N. Secretary-General, Guidance Note of the Secretary-General on Democracy 1–2 (Sept. 2009), *available at* http://www.un.org/democracyfund/Docs/UNSG%20Guidance%20Note%20on%20Democracy.pdf).

114. *Id.* at 6 n.13 (quoting THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW 497 (2006)).

115. Kennedy, *supra* note 6.

116. *See* Jean d'Aspremont, *Responsibility for Coups d'État in International Law*, 18 TUL. J. INT'L & COMP. L. 451, 456 n.19 (discussing the broad adherence to the principle of the irreversibility of democracy).

While scholars will disagree over the degree to which a democratic entitlement is aspirational, it has undoubtedly introduced a decidedly legal tenor to the discourse surrounding recognition of government practices. While the sweeping ambitions of the early proponents of the Manhattan school have not been fulfilled, their theories have had a significant, if narrow, impact on practices regarding the recognition of governments.

IV. IDENTIFYING THE RISE OF A DECLARATORY SCHOOL OF GOVERNMENT RECOGNITION

The emergence of a norm against the reversibility of democracy through coups and the requirement to enforce this rule through nonrecognition of such coup governments represents a significant expansion of the scope of international law regarding government recognition. States consistently adhere to this rule both individually and through the UN Credentials Committee, and the evidence suggests that they act out of a sense of legal obligation in doing so. To the degree that this rule can be persuasively shown to exist, the traditional theory of recognition of governments must be revised. The existence of such a norm portends a legal framework in which government recognition is merely declaratory of an entity's status as the legitimate representative of a state. Under such a legal regime, international actors must prioritize the objective legal criteria underlying a government's claim to legitimacy over its own political preferences in determining whether to recognize a government.

The transition toward a legal regime for government-recognition practices stems from the progressive application of popular sovereignty. Despite the nonbinding nature of the effective control doctrine, its appeal to the legal principle of popular sovereignty is instructive in light of the legal assertions of the Manhattan school. Under the Manhattan school's formulation, popular sovereignty is transformed from the "refined comedy" that it was under effective control to a moral and legal mandate for democracy.[117] Just as recognition of states is legally required to enable peoples to achieve self-determination, there is a similar legal imperative for states to help vindicate peoples' right to popular sovereignty through their recognition-of-government practices. As such, there is a consensus against recognition of certain governments that offend popular sovereignty.[118]

Certainly, a rule against the reversibility of democracy through coups does not necessarily affect the legal requirements regarding

117. Reisman, *supra* note 97, at 870.
118. *See supra* Part I; *see also infra* Part V.

recognition, as there is a distinction between the scope of a norm and "the legal consequences of its violation."[119] However, in contrast to the regime under the effective control doctrine, in which political legitimacy did not result in requirements on recognition, the legal consequences of an entitlement against the reversal of democracy has had significant impact on expectations regarding recognition.

This Part discusses the norm against recognition in the scenario in which a democratically elected government is supplanted through a coup. It also discusses the primary mechanism through which this norm is gaining binding power: the UN credentialing process. It then recommends the formal adoption of rules for the nonrecognition of certain coup governments.

A. *The Norm of Nonrecognition of Coup Governments*

While the Manhattan school's view that a democratic entitlement necessarily renders illegitimate all governments that fall short of its democratic ideal has failed to take hold,[120] states consistently refuse to recognize governments that displace democratically elected governments through a coup.[121] Governments that gain power offend the special distaste for the reversal of democracy.[122] Jean d'Aspremont has observed that "recognition of overthrown democratic governments is generally not questioned and the recognition of putschists (perpetrators of a coup) systematically denied."[123] In a dialogue with Brad Roth through the blog *Opinio Juris*, d'Aspremont took issue with Roth's disagreement about the emergence of a norm against recognizing putschists. He argued that "one cannot turn a blind eye to the contemporary systematic practice whereby putschists almost always fail to secure recognition—unless they commit themselves to organize free and fair elections—and

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119. Pippan, *supra* note 94, at 34.

120. *See generally* Christian Pippan, *International Law, Domestic Political Orders, and the "Democratic Imperative": Has Democracy Finally Emerged as a Global Legal Entitlement?* (The Jean Monnet Program, Working Paper No. 02/10, 2010) (arguing that there is no one set form of democracy).

121. Jean d'Aspremont, *1989–2010: The Rise and Fall of Democratic Governance in International Law*, *in* 3 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 72 (James Crawford & Sarah Nouwen eds., 2012) [hereinafter d'Aspremont, *Governance*]; *see also* d'Aspremont, *supra* note 116, at 464 ("[I]n political discourse . . . coups d'etat . . . are dubbed illegal."); Pippan, *supra* note 94, at 35 (stating that a government is no longer representative of the people once it has been taken over); Roth, *supra* note 8, at 430 n.137 (discussing d'Aspremont's arguments on recognition of coup governments).

122. *See, e.g.*, d'Aspremont, *supra* note 116, at 456 n.19 ("The Member States of the San José and European Union group maintained the irreversible characteristic of democratic processes during the Madrid Summit on May 18, 2002.").

123. *Id.* at 455–56.

undergo a wide range of sanctions."[124] D'Aspremont has fallen just short of declaring this rule a binding norm of international law. In his view, while "[i]t is true that in political discourse and the practice referred to above, coups d'état, as well as the accession to power through these means, are dubbed illegal," it is "doubtful whether the illegality in this case clearly indicates an illegality with regard to international law."[125]

On the other hand, Christian Pippan is less hesitant to declare the legally binding character of the norm of nonrecognition of coup governments.[126] While conceding that "the stubborn refusal to allow for the holding of free and fair elections . . . will normally not suffice to render the responsible government illegitimate under international law,"[127] he believes that such legal consequences do emerge when "a legitimate democratic government, which reflects the will of the people as expressed in free and fair elections, falls prey to an unconstitutional attack by self-appointed military or civilian elites."[128]

Scholarly judgments on the matter aside, there is much evidence from state practice and the workings of the UN Credentials Committee that suggests that governments are obligated to refuse to recognize coup regimes that displace democratic governments.

1. The UN Credentials Committee as Arbiter of Government Legitimacy

Since the early days of the United Nations, the Credentials Committee has transformed from a procedural body into a quasi-legal arm of the United Nations that determines which government has the legitimate right to represent a state in the event of competing claims.[129] It is now through the actions of that body that the primary

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124. D'Aspremont, supra note 47.

125. D'Aspremont, *supra* note 116, at 464.

126. *See generally* Pippan, *supra* note 94, at 35 ("The recognition practice of states and international organizations has confirmed time and again that the international community normally proceeds from the presumption that the effective government of a state, regardless of its political character, constitutes a legitimate expression of self-determination by the people concerned.").

127. *Id.*

128. *Id.*

129. *See, e.g.*, Jhabvala, *supra* note 69, at 618–19 ("The Assembly's rules pertaining to credentials, which are rules 27 through 29 of the Rules of Procedure, have been used to deal with questions of representation arising from revolutionary changes of government or from other challenges."); Klein, *supra* note 15 (describing the UN Secretary-General's deference to the Credentials Committee on the question about why the United Nations barred the coup government from representing Honduras at the United Nations).

legal consequences of committing a coup against a democratic government can be identified.[130]

The Committee's authority originally derives from a few short rules in the Rules of Procedure of the General Assembly.[131] Rule 28 states, in full, that:

> A Credentials Committee shall be appointed at the beginning of each session. It shall consist of nine members, who shall be appointed by the General Assembly on the proposal of the President. The Committee shall elect its own officers. It shall examine the credentials of representatives and report without delay.[132]

This credential, once granted, attests "that the person or persons named are entitled to represent their State at the seat of or at the meetings of the Organization."[133] In the event of an objection to a particular representative of a state, that representative should be, according to Rule 29, "seated provisionally with the same rights as other representatives until the Credentials Committee has reported and the General Assembly has given its decision."[134] It was not lost on early observers that these scant rules provided little guidance to the Committee on what criteria it should base credentialing decisions.[135] More critically, it was not even clear that the Committee should decide issues of representation in the event of competing claims.[136]

In light of these sparse guidelines, there was an early call for the "United Nations [to] lay down guiding principles which would allow the various organs of the United Nations and of the specialized agencies . . . to adopt a uniform policy" on representation and credentialing "in cases where two or more authorities each claim to be the only regular government of a Member State."[137] In response, the General Assembly delegated the problem to the Ad Hoc Political

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130. *See* Jhabvala, *supra* note 69, at 619 ("[T]he General Assembly's Rules of Procedure on credentials questions have been stretched to apply to questions relating to representation as well.").

131. Rules of Procedure of the General Assembly, r. 28, U.N. Doc. A/520/Rev.15 (2008), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/520/rev.17&Lang=E.

132. *Id.*

133. Statement by the Legal Counsel Submitted to the President of the General Assembly at Its Request, U.N. GAOR, Annexes, 25th Sess., agenda item 3, U.N. Doc. A/8160 (1970), *reprinted in* 1970 U.N. JURID. Y.B. 169.

134. *Id.* at 170.

135. *See generally* U.N. Educ., Scientific and Cultural Org. [UNESCO], Records of the General Conferences: Resolutions, U.N. GAOR, Annexes, 5th Sess., agenda item 61 at 3, U.N. Doc. A/1344 (July 1950) [hereinafter UNESCO Resolutions] (seeking to adopt general criteria for determining the credentials of disputed governments).

136. *See* Jhabvala, *supra* note 69, at 619–20 (discussing the use of other Rules of Procedure to decide such issues).

137. *Id.* at 629.

Committee,[138] which ultimately was unable to come up with any guiding criteria beyond its recommendation that "the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case."[139]

Nevertheless, credentialing quickly subsumed the issue of representation.[140] Throughout the United Nations' history, questions of whom or what entity could legitimately represent a state before the United Nations were treated as credentialing matters.[141] This was the case both when regimes were perceived as illegitimate but faced no viable opposition, such as in the case of apartheid South Africa,[142] and when multiple governments sought to represent a state.[143] As any recommendation by the Credentials Committee must ultimately be approved by the General Assembly, "[a]pproval of the credentials of a representative by the General Assembly . . . necessarily implies that the General Assembly . . . considers the government which issued the credentials as the legitimate government of the Member State to be represented in the Assembly."[144] Both the act of granting credentials and the Committee itself have gained legal significance beyond what the Rules of Procedure imply, as a credential to represent a state in the United Nations now represents the United Nations' position on the legitimacy of that government.[145]

The potential significance of the credentialing process was not lost on the founders of the Manhattan school, who explicitly endorsed the use of credentialing as a way "to enhance the acceptance of the right to political participation."[146] Gregory Fox, who along with Thomas Franck and Michael Reisman, is one of the intellectual founders of the Manhattan School,[147] argued that when a government refuses to cede power after the election of a rival in a UN-monitored election or displaces a democratically elected government through a

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138. *Id.* at 630.

139. G.A. Res. 396 (V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775, at 24–25 (Dec. 14, 1950).

140. Jhabvala, *supra* note 69, at 617.

141. Nkambo Mugerwa, *Subjects of International Law*, *in* MANUAL OF PUBLIC INTERNATIONAL LAW 266, 283 (M. Sorensen ed., 1968).

142. *See, e.g.*, G.A. Res. 2862, U.N. GAOR, 26th Sess., Annexes, at 15, U.N. Doc. A/8625 (Dec. 20, 1971) (opposing the credentials proposed by the Credentials Committee); G.A. Res. 2636, U.N. GAOR, 25th Sess., Annexes, at 6, U.N. Doc. A/8142 (Nov. 13, 1970) (same).

143. *See* Mugerwa, *supra* note 141, at 283 (discussing the United Nations' approach to disputes by competing authorities).

144. Jhabvala, *supra* note 69, at 621 (citing HANS KELSEN, THE LAW OF THE UNITED NATIONS 947 n.4 (1964)).

145. *See id.* at 618 (discussing the need for the development of a framework so that the United Nations can properly address the representation issues often presented by revolutionary governments).

146. Fox, *supra* note 101, at 603.

147. *See* Roth, *supra* note 8, at 426 n.125, 427 n.128 (providing citations and descriptions of works by these authors that are considered seminal in the field).

coup, "the election results . . . [should] be used by the General Assembly as a basis for seating the opposition representatives."[148] Fox argued that in such a scenario, "[t]he General Assembly will inevitably be seen as supporting or undermining participatory rights. Even infrequent accreditation disputes therefore create decisions of great precedential weight."[149] History has borne out Fox's hope that UN credentialing would take on a more significant role in promoting democratically legitimate governments.

2. The Credentials Committee and the Norm of Nonrecognition of Coup Governments

Since the rise of the Manhattan school after the end of the Cold War, democratic governments have remained vulnerable to coups throughout much of the developing world.[150] Such coups have been met almost universally with international condemnation and a refusal to recognize the new coup regime.[151] The credentials process at the United Nations has reflected this preference for democratic governments and the illegitimacy of coup regimes that displace them. Specifically, the United Nations has refused to credential representative of coup regimes from Cambodia, Haiti, Sierra Leone, Honduras, and the Ivory Coast because of the illegitimacy of regimes that forcibly displace democratically elected governments.

i. Two Coups in Cambodia Demonstrate This Norm of Nonrecognition.

The disparity between the two credentialing disputes involving competing Cambodian regimes in the 1970s and the 1990s exemplifies the shift in norms regarding recognition of democratically illegitimate governments. As discussed in Part IV.A.2.i, the dispute in the 1970s occurred while the effective control doctrine held sway, though even then the outcome was determined by political factors related to the Cold War. However, in the 1990s dispute, which occurred after the emergence of the Manhattan school, the primary factor was democratic legitimacy.

In 1993, Prince Norodom Ranaridd became Prime Minister of Cambodia by winning a clear plurality of the vote in a UN-monitored

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148. Fox, *supra* note 101, at 603.

149. *Id.*

150. *See* Jean d'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. INT'L. L. & POL. 878, 901–03 (2007) (discussing nations that experienced coups following the Cold War).

151. *Id.* The exceptions, as noted by d'Aspremont, invariably involve coup regimes that take steps to persuade the international community that their coup had a democratic basis and that the new regime will restore democratic processes. *Id.*

election.[152] Hun Sen, the previous Prime Minister who had just lost the election, secured a position as co-Prime Minister under the threat of starting a civil war.[153] Unsatisfied with his position as co-leader, however, Sen orchestrated a coup against Ranaridd in 1997.[154] During the next UN session, both the Ranarridd government and the Sen government applied for credentials.[155] The coup regime gained control of Cambodia and gained further legitimacy by securing the support of the constitutional leader of the country.[156] Nevertheless, the Credentials Committee refused to grant Sen credentials for that session.[157] In stark contrast to the debate of the 1970s, effective control was not the focus. Rather, the Committee's focus was on the democratic legitimacy of the two governments. The Credentials Committee only granted credentials to the Sen government after he won a UN-monitored election, "curing" the coup.[158]

ii. Reaction to Recent Coups Confirm the Trend

Another example of this norm at work was in Haiti in the early 1990s.[159] In a UN-monitored election in 1990, Jean-Bertrand Aristide became the first democratically elected President of the country, only to be deposed through a coup the next year by one of his generals.[160] The United Nations quickly denounced the coup as "unacceptable," and appealed "to the States Members of the United Nations to take measures in support" of the Organization of American States' effort to support the Aristide government.[161] Not only did the United Nations refuse to recognize the coup government, the UN Security Council authorized the use of military force to reinstall Aristide as president.[162]

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152. Ratliff, *supra* note 73, at 1259–60.

153. *Id.*

154. *Id.* at 1260.

155. *Id.*

156. *See id.* (discussing the appointment of Hun Sen to the position of representative to the United Nations by Cambodia's constitutional monarch).

157. *See* Credentials Comm., Rep. on the Credentials of Reps. to the 52d Sess. of the G.A., ¶ 5, U.N. Doc. A/52/719 (Dec. 11, 1997) [hereinafter Credentials Comm. Rep.] ("[T]he Committee . . . decided to defer a decision on the credentials of Cambodia.").

158. Ratliff, *supra* note 73, at 1261; DUNOFF, RATNER & WIPPMAN, *supra* note 3, at 164–65.

159. *See* S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994) (creating a multinational force to respond to the coup in Haiti).

160. DUNOFF, RATNER & WIPPMAN, *supra* note 3, at 166.

161. The General Assembly passed Resolution 46/7. G.A. Res. 46/7, ¶¶ 2, 4, U.N. Doc. A/Res/46/7 (Oct. 11, 1991); *see also* Felicia Swindells, Note, *U.N. Sanctions in Haiti: A Contradiction Under Articles 41 and 55 of the U.N. Charter*, 20 FORDHAM INT'L L.J. 1878, 1915 n.242 (1996) (describing how the General Assembly adopted a series of resolutions, including Resolution 46/7, in an effort to settle the dispute).

162. S.C. Res. 940, *supra* note 159, ¶¶ 4–8.

In 1997, Sierra Leone's Armed Forces Revolutionary Council led a coup against democratically elected President Ahmed Tejan Kabbah, and installed Johnny Paul Koroma as President.[163] This coup was met with stark denunciation from the international community.[164] The United Nations continued to credential the previous regime and refused to recognize the coup-installed government.[165] Furthermore, the Security Council unanimously authorized an oil embargo against the state and encouraged the militaries represented by the Economic Community of West African States to intervene on Kabbah's behalf.[166]

A more recent and particularly telling example of the norm against the recognition of coup governments was the United Nations' response to the 2009 coup in Honduras.[167] This episode is particularly notable because of the seemingly proconstitutional forces at work in the establishment of the coup government,[168] and yet the United Nations' unequivocal rejection of the coup government's legitimacy.[169]

In the months leading up to the coup, President Manuel Zelaya had been attempting to change the constitution to allow him to seek another term in office in a Chavez-like consolidation of power.[170] The Honduran military, in accordance with an order by the supreme court with the support of the congress, usurped power from Zelaya in an effort to thwart Zelaya's attempt to circumvent existing constitutional rules and pave the road to his indefinite power.[171] Despite Zelaya's alliance with antidemocratic regional figures such as Venezuela's

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163. Roth, *supra* note 8, at 429; *Troops Loyal to Coup Attacked in Sierra Leone*, CNN WORLD (June 19, 1997), http://articles.cnn.com/1997-06-19/world/9706_19_sierra.leone_1_coup-leaders-ahmed-tejan-kabbah-kenema?_s=PM:WORLD.

164. S.C. Pres. Statement 1997/42, U.N. Doc. S/PRST/1997/42 (Aug. 6, 1997); S.C. Pres. Statement 1997/36, U.N. Doc. S/PRST/1997/36 (July 11, 1997); S.C. Pres. Statement 1997/29, U.N. Doc. S/PRST/1997/29 (May 27, 1997).

165. *See* S.C. Pres. Statement 1997/42, U.N. Doc. S/PRST/1997/42 (Aug. 6, 1997) (describing the coup as an overthrow of the democratically elected government); S.C. Pres. Statement 1997/36, U.N. Doc. S/PRST/1997/36 (July 11, 1997) (same); S.C. Pres. Statement 1997/29, U.N. Doc. S/PRST/1997/29 (May 27, 1997) (same); *see also* Credentials Comm., Rep. on the Credentials of Reps. to the 52d Sess. of the G.A., ¶ 5, U.N. Doc. A/52/719 (Dec. 11, 1997) (showing that the Credentials Committed accepted Sierra Leone's credentials).

166. S.C. Pres. Statement 1998/5, U.N. Doc. S/PRST/1998/5 (Feb. 26, 1998).

167. *See* Situation in Honduras: Democracy Breakdown, GA Res. 63/301, U.N. GAOR, 63d Sess., 93d plen. mtg., agenda item 20, U.N. Doc. A/RES/63/301 (July 1, 2009) [hereinafter Resolution on the Situation in Honduras] (providing background on the situation).

168. *See* Elisabeth Malkin, *Honduran President Ousted in Coup*, N.Y. TIMES (June 28, 2009), http://www.nytimes.com/2009/06/29/world/americas/29honduras.html?pagewanted=all (discussing the involvement of the Honduran legislature in accepting a new President).

169. Resolution on the Situation in Honduras, *supra* note 167, ¶ 3.

170. Malkin, *supra* note 168.

171. *Id.*

Hugo Chavez[172] and the legal credibility added to the coup by the congress and supreme court, [173] the United Nations responded forcefully against the coup.[174] The Credentials Committee continued to recognize Zelaya and denounced the coup. [175] In addition, the General Assembly adopted a resolution calling "firmly and unequivocally upon States to recognize no Government other than that of the Constitutional President, Mr. José Manuel Zelaya Rosales." [176] Every single member state heeded the General Assembly's call not to recognize the coup government, as did other UN bodies such as the UN Human Rights Council.[177] The Secretary-General of the United Nations explained the swift action by stating that "when a leader [is] elected constitutionally, through a transparent election process, then his authority and office should be protected and guaranteed. This is the principle of the international community and the United Nations. For that, all the Member States of the United Nations have supported President Zelaya."[178]

A recent credentials battle between competing governments from the Ivory Coast further elucidates the Credentials Committee's growing role as a promoter of democratically legitimate regimes. The incumbent President, Laurent Gbagbo, lost an election to challenger Alassane Ouattara, but refused to cede the presidency. [179] The Credentials Committee had already granted Gbagbo's regime credentials for the ongoing UN Session.[180] However, in a dramatic demonstration of its disapproval of Gbagbo's action, the Committee revised its report to the General Assembly to include a

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172. *Id.*

173. *See id.* (discussing how the coup occurred with the permission of the supreme court).

174. *See* Klein, *supra* note 15 (describing the United Nations' strong support for Zelaya).

175. *Id.*

176. Resolution on the Situation in Honduras, *supra* note 167.

177. Press Release, G.A. 63d Sess., 93d plen. mtg., General Assembly, Acting Unanimously, Condemns Coup d'État in Honduras, Demands Immediate, Unconditional Restoration of President (June 30, 2009), *available at* http://www.un.org/News/Press/docs/2009/ga10842.doc.htm; *UN Human Rights Council Unanimously Condemns Human Rights Abuses in Honduras Coup*, EMERGENCY COMMITTEE AGAINST COUP HOND. (Oct. 2, 2009), http://committeeagainsthondurascoup.blogspot.com/2009/10/un-human-rights-council-unanimously.html.

178. Ban Ki-Moon, UN Secretary-General, Press Conference by Secretary-General Ban Ki-Moon at United Nations Headquarters, U.N. Doc. SG/SM/12458/Rev.1* (Sept. 17, 2009), *available at* http://www.un.org/News/Press/docs/2009/sgsm12458.doc.htm.

179. *Ivory Coast: U.N. Recognizes New President*, N.Y. TIMES (Dec. 23, 2010), http://www.nytimes.com/2010/12/24/world/africa/24briefs-Ivory.html.

180. Credentials Comm. Rep., *supra* note 157, ¶ 7.

recommendation to credential Oauttra's representatives,[181] and the General Assembly unanimously approved the revised credentials.[182]

iii. State Practices Suggest a New Norm of Customary International Law

It can be difficult to determine when states act out of obligation to law or merely out of political preference, but a number of factors suggest that adherence to this norm of nonrecognition stems, in part, from a sense of legal obligation. First, rejection of such coup governments occurs against the backdrop of the rise of the Manhattan school's democratic entitlement, which asserts a legal obligation.[183] Democracy is increasingly viewed not simply as one viable expression of popular sovereignty, but rather as an entitlement.[184] Second, the swift and universal condemnation exhibited in the recent Honduras and Ivory Coast cases suggest that such rejection was a pro forma reaction against a patently illegal act, rather than a decision subject to politically motivated derivation. Third, these condemnations are not simply expressions of disfavor, but rather coordinated actions designed to undermine the very legitimacy of the coup governments themselves.[185] Fourth, the stark contrast between these denunciations and the nearly universal plaudits for revolutions against undemocratic regimes in Libya and Syria is instructive. The international norm being expressed is not against coups, but rather against coups that displace democratic governments.[186]

Finally, the willingness of states to conform to the will of the Credentials Committee further implies that states act out of a sense of legal obligation.

Standing in the United Nations and recognition decisions by the Credentials Committee do not directly inform customary

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181. *Id.*

182. *UN Accepts Credentials of New Cote d'Ivoire Envoy*, CHINA DAILY, http://www.chinadaily.com.cn/world/2010-12/24/content_11750335.htm (last updated Dec. 12, 2010).

183. *See* DUNOFF, RATNER & WIPPMAN, *supra* note 3, at 74–85 (defining customary international law).

184. *See supra* Part III.B.

185. d'Aspremont, *supra* note 116, at 455–56.

186. The contrasting reaction of states and the United Nations to coups against oppressive and nondemocratic regimes, such as was witnessed early on during the 2011 revolution in Libya, make clear that the same norm of nonrecognition does not exist when nondemocratic regimes are displaced. *See* Mark John, *Factbox: International Recognition of Libya's Rebel Movement*, REUTERS (Aug. 22, 2011), http://www.reuters.com/article/2011/08/22/us-libya-rebels-recognition-idUSTRE77L42T20110822 (listing the more than thirty states that had already recognized the Libyan rebel movement by the time it invaded Tripoli, including some of the largest Western states such as Germany and the United States).

international law.[187] However, the Committee influences state behavior and conceptions of what governments may legally be recognized. The existence of *opinio juris* is suggested both by the consistency of the Committee in adhering to this norm and of states in following the Committee's lead in refusing to recognize coup governments.

B. *Proposal for a Clear Standard of Nonrecognition Before the Credentials Committee*

The Credentials Committee should adopt a clear rule against recommending credentials for any government that displaces a democratically elected government through a coup. This rule should apply whether or not there are competing claims for credentials from the previous government, and should only be cured by subsequent elections that confer democratic legitimacy to the coup government.

Creating clear criteria for noncredentialing of certain governments before the United Nations would provide multiple benefits to the United Nations and to the development of democracy-favoring international law. First, the adoption of any formal requirement for credentialing would add credibility to a committee that has taken on a far more significant policy role than the United Nations' founding documents portended. The disconnect between the role that the Committee plays in arbitrating government legitimacy before the United Nations and the utter lack of formal standards for making such determinations has been a concern of member states since the early days of the United Nations.[188] While no effort to add meat to the barebones requirements of Rule 28 has ever succeeded,[189] this rule would be an ideal place to start because it is at once substantive and minimally controversial. It is substantive in that it would provide a clear and firm rule that is likely to have a direct impact on multiple governments in the coming years (forgive this author's pessimism on the likelihood of future coups), and yet minimally controversial in that it codifies an existing unwritten policy.[190]

Second, this policy would add clarity to a process of credentialing that is open to criticism as being a mostly black box. When the United Nations refused to credential the coup government in Honduras, prodemocracy activists were dismayed at the apparent disregard the

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187. *See id.* (demonstrating that numerous countries went against UN decisions in recognizing the National Transitional Council in Libya).

188. *See* UNESCO Resolutions, *supra* note 135, at 5 (identifying the need for standards in the context of the recognition dispute in China).

189. *See generally* Ratliff, *supra* note 73, at 1218–20 (discussing revisions to the UN Rules of Procedure).

190. *See supra* Part IV.A.i.

United Nations had for the facts on the ground in Honduras, in that the new government had control and had demonstrated its intention to adhere to the constitution.[191] When questioned about this topic, the Secretary-General obliquely referred the question to the Credentials Committee, deferring responsibility for the decision as well as failing to articulate the important principles underlying the United Nations' position.[192] By having a clear policy on the matter, both pro- and antidemocratic forces will be on notice of the kinds of means that will be tolerated in internal struggles, at least insofar as those means impact the victor's ability to represent the state before the United Nations.

Third, and perhaps most importantly, this policy would codify the contours of the norm of nonrecognition and add further credibility to its status as customary international law. The binding nature of state recognition stems from an axiomatic commitment to self-determination,[193] and changing norms surrounding popular sovereignty have given rise to the legal assertions of the Manhattan school. The proposed rule effectively consolidates the gains toward legalizing the aspirational democratic entitlement. Thus, it could be an important step in furthering the Manhattan school's aspiration of establishing democracy as a universal entitlement.

V. CONCLUSION

Since the rise of the Manhattan school and its democratic entitlement, and the decline of the effective control doctrine, recognition of governments has been infused with a distinctly legal tenor. One can look to the legal basis of recognition of states as a model for the legal implications of the recognition of governments. While the broadest assertions of a democratic entitlement have not completely infected recognition-of-government practices, there is a norm of nonrecognition of coup governments that displace legitimate democracies. This is the natural result of evolving norms of popular sovereignty. As international law generally, and human rights law in particular, shifts from a priority of protecting governments to a priority of protecting people, recognition of democratic governments has gained greater legal significance. One can look to the role that self-determination plays in providing a legal foundation for state recognition as a model for the role that popular sovereignty plays in providing a legal basis of government recognition. There is an identifiable rule against the reversal of democracy through coups.

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191. Klein, *supra* note 15.
192. *Id.*
193. *See supra* Part II.

Specifically, when a coup government displaces a democratically elected one, states and the UN Credentials Committee refuse to recognize the coup government. As such, one can justifiably conceive of a declaratory school of recognition of governments, in which recognition practices are not simply political acts but are reflective of underlying legal realities. This norm should be codified as a formal rule for credentialing at the United Nations. Doing so would add legitimacy to the Credentials Committee, allowing it to more effectively arbitrate the legitimacy of governments that represent states at the United Nations. It also would provide much needed clarity in the rules of the Committee, perhaps setting a precedent for an expansion of the formal rules for credentialing. Finally, it would add to the impetus of states to consider the democratic legitimacy of governments, rather than merely political considerations, in determining whom to recognize, furthering the establishment of an actual democratic entitlement.

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