

Responsibility for Coups d'État in International Law

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In political discourse, it is commonplace that coups d'état, as a means to gain power, are deemed unacceptable and, accordingly, are widely condemned. Recent practice has confirmed this tendency.¹ Despite the consensus concerning the international prohibition of coups d'état in political discourse, particularly when it leads to the overthrow of a democratic government, much uncertainty surrounds the legal consequences of this means of accession to power in the international legal order. It is the aim of this Article to demonstrate that the impact of coups d'état in political discourse outweighs their actual consequences in terms of responsibility in international law. This Article will argue that—leaving aside the hypothesis of effective control by a foreign state—coups d'état, despite being systematically condemned in political

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1. See, e.g., Barry Bearak, *Mayor Declares a Coup in Madagascar*, N.Y. TIMES, Feb. 1, 2009, at A6, available at <http://www.nytimes.com/2009/02/01/world/africa/01madagascar.html> (discussing Madagascar); *Mauritania: United States Halts Aid After Coup*, N.Y. TIMES, Aug. 8, 2008, <http://query.nytimes.com/gst/fullpage.html?res=9502EED6153EF93BA3575BC0A96E9C8B63&scp=3400&sq=Reuters&st=nyt>.

discourse, do not engage the responsibility of any state because they cannot be attributed to any international legal subject.

Part I involves some introductory remarks on the position of international legal scholarship on this question. Part II will examine the practice and the current state of international law in order to demonstrate that a coup d'état committed against a democratically elected government boils down to a violation of international law. Once it has established that it is not unreasonable to maintain that a coup constitutes a violation of international law, Part III will seek to show that it is nonetheless impossible to attribute such a violation to any state. Although Part IV concludes that the impossibility to attribute the coup to any state makes it inconceivable to engage the international responsibility of any legal subject, the Article then argues that coups can constitute preparatory actions to a subsequent internationally wrongful act. The final Part of this Article will seek to demonstrate that the impossibility of holding any state responsible under international law for a coup d'état underpins the idea that coups d'état are not necessarily a deplorable means to change government. Indeed, it will be shown that coups d'état may occasionally bring about a positive break with the existing order, and generate a desirable regime change.

In particular, in states where a tyrannical government endlessly clings to power, coups may lead to a welcomed metamorphosis of the political regime. This may also be true with respect to states where governments that were originally democratically elected quickly turned to authoritarian measures in order to remain in power. Accordingly, it is the ultimate aim of this Article to illustrate the parallel between the absence of consequences in terms of responsibility and of the potential positive effect of some coups d'état in practice.

It must be noted that the issue of state responsibility for a coup d'état, which is examined here, is distinct from that of the international criminal responsibility of the coup's author, for coups are not yet considered an international crime from the viewpoint of international criminal law. This argument was nonetheless tried by the Prosecutor of the Special Court for Sierra Leone in the Taylor case,² but was correctly rejected by the Court. For the purposes of international criminal law, only those "crimes" allegedly committed *during* a coup d'état can

2. See Prosecutor v. Taylor, Case No. SCSL-03-01-PT, Second Amended Indictment (Special Ct. Sierra Leone May 29, 2007), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=Irn0bAAMvYM=&tabid=107>.

constitute a crime within the meaning of international criminal law.³ The question of individual criminal responsibility for a coup is not addressed in this Article.

I. INTRODUCTORY REMARKS: COUPS IN INTERNATIONAL LEGAL SCHOLARSHIP

While the form of states' political regimes and the manner in which power is transferred therein have long been seen as a purely internal matter falling outside the ambit of international law, the end of the Cold War kindled a great enthusiasm for the principle of democracy. Thomas Franck was probably the first to broach the question of democracy in the post-Cold War legal order in 1992 in his groundbreaking article *The Emerging Right to Democratic Governance*.⁴ Franck argued that the legitimacy of governments is no longer confined to an appraisal through purely national criteria; rather, it must be evaluated through the universal criterion of democracy.⁵ Other scholars quickly followed suit,⁶ and the ensuing doctrinal strand endorsing such a theory has been identified as the "democratic entitlement school" or the "democratic entitlement theory."⁷ This school of thought contends that a "democratic entitlement" has emerged in the international legal order. In sharp contrast with the "agnosticism"⁸ that prevailed before,⁹ this idea of a democratic entitlement represents "a revolutionary transformation of the full array of

3. See, e.g., Prosecutor v. Brima, Case No. SCSL-2004-16-PT, paras. 73, 76 (Special Ct. Sierra Leone App. Chamber, Feb. 22, 2008), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=cXQsdyBfVgg=&tabid=173>.

4. Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AMER. J. INT'L L. 46, 48 (1992); see also Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992).

5. Fox, *supra* note 4, at 542; see also BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW ch. 10 (1999) (criticizing the democratic entitlement school); SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY AND THE CRITIQUE OF IDEOLOGY 37-42 (2003).

6. See generally Christina M. Cerna, *Universal Democracy: An International Legal Right or the Pipe Dream of the West?*, 27 N.Y.U. J. INT'L L. & POL. 289 (1995); James Crawford, *Democracy and International Law*, 64 BRIT. Y.B. INT'L L. 113 (1993); see also Obiora Chinedu Okafor, *The Concept of Legitimate Governance in the Contemporary International Legal System*, 64 NETH. INT'L L. REV. 33 (1997).

7. See Gregory H. Fox & Brad R. Roth, *Introduction: the Spread of Liberal Democracy and Its Implication for International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 10, 10 (Gregory H. Fox & Brad R. Roth eds., 2000).

8. MARKS, *supra* note 5, at 31.

9. LASSA FRANCIS LAWRENCE OPPENHEIM, 1 INTERNATIONAL LAW: PEACE: A TREATISE 403 (1st ed. 1905) ("The Law of Nations prescribes no rules as regards the kind of head a state may have. Every state is, naturally, independent regarding this point, possessing the faculty of adopting any Constitution according to its discretion.").

international norms, from norms governing recognition of States and governments to those governing the use of force.”¹⁰ Indeed, proponents of the democratic entitlement theory assert that the legitimacy of each government is to be measured by international standards, including democracy. From the standpoint of the democratic entitlement theory, there is no doubt that a coup against a democratically elected government is not acceptable, insofar as the legitimacy of governments who have seized power through the coup simply cannot be reconciled with any democratic standard. The emergence of a principle of democracy—whatever its precise ambit may be—cannot be without consequences on the effects of coups d'état. However, strangely enough, the aforementioned authors have failed to spell out the precise consequences of this alleged illegality in terms of responsibility.

The democratic entitlement theory has not been limited to American liberal scholarship, and it has permeated the legal scholarship of other authors around the world. In Europe and in Africa, for instance, numerous authors have also embraced the idea that the legitimacy of governments is no longer a purely internal matter and ought to be gauged according to the criterion of democracy.¹¹ Some of those authors have expressly inferred, from the emergence of a principle of democracy, that coups d'état have become illegal.¹²

Asserting the international illegality of a coup d'état does not, however, reveal anything with respect to the problems of international responsibility under international law. Indeed, as any violation of international law involves only the responsibility of the subject to whom the violation is attributable,¹³ the aforementioned illegality of coups

10. Fox & Roth, *supra* note 7, at 10-11.

11. See LINOS-ALEXANDRE SICILIANOS, L'ONU ET LA DÉMOCRATISATION DE L'ÉTAT (2000); Rafãa Ben Achour, *Le Droit International de la Démocratie*, 4 CURSOS EUROMEDITERRÁNEOS BANCAJA DE DERECHO INTERNACIONAL 329 (2000); Sayeman Bula-Bula, *Mise Hors-la-Loi ou Mise en Quarantaine des Gouvernements Anticonstitutionnels par l'Union Africaine?*, 11 AFR. Y.B. INT'L L. 23 (2003); Pierre Klein, *Le Droit aux Élections Libres en Droit International: Mythes ou Réalités*, in LE DROIT INTERNATIONAL À L'ÉPREUVE 93; see also Jean d'Aspremont, *La Licéité des Coups d'Etat en Droit International*, in COLLOQUE DE BRUXELLES: L'ÉTAT DE DROIT EN DROIT INTERNATIONAL 123 (2009).

12. This is found particularly in the case of Rafãa Ben Achour, according to which “*toute action perpétrée contre un régime issu d'élections libres et honnêtes constitue un fait illicite international* [any action perpetuated against a regime born of free and honest elections is an internationally wrongful act].”; Achour, *supra* note 11, at 359; see also SICILIANOS, *supra* note 11, at 205-06. Klein, for his part, does not seem to make this exclusion. See Klein, *supra* note 11, at 108. On the idea of a regional illegality, see Roland Adjovi, *Le Togo, un Changement Anticonstitutionnel Savant et un Nouveau Test pour l'Union Africaine*, ACTUALITÉ ET DROIT INTERNATIONAL, Feb. 2005, available at <http://www.ridi.org/adi/articles/2005/200502adi.htm>; Bula-Bula, *supra* note 11.

13. See G.A. Res. 56/83 annex, art. II, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

necessarily raises the issue of determining the legal subject who must be held responsible for it. Even if it is established that a coup is inconsistent with the standards that may now be imposed by international law, the consequences of such a finding in terms of responsibility remain undefined. It is noteworthy that this issue has not been tackled in international legal scholarship, despite all the attention that has been devoted to the question of democracy. It is precisely this gap in the literature that this Article aims to fill.

II. ILLEGALITY OF COUPS IN INTERNATIONAL LAW

It must be preliminarily acknowledged that the condemnation of coups d'état is not unprecedented, as coups have long been repudiated, even at a time when there was no concern for democracy and the rule of law. It is not entirely surprising that states have long agreed to protect themselves against unconstitutional usurpations of power, for this can be understood as a reflex of self-protection that is almost instinctive. For instance, article 29 of the "Treaty of Union, League and Perpetual Confederation," which was developed in 1826 between several North and South American Countries, stipulated that a "dramatic change in the nature of [a] government" could lead to the suspension of a Member State.¹⁴ One may also recall that in the beginning of the twentieth century, the Central American States established conventional mechanisms to impose sanctions for coups d'état.¹⁵ During the Cold War, coups d'état were relatively tolerated; occasionally each of the blocs saw in coups a convenient means to change governments of the opposite ideology. This, however, changed with the end of the Cold War. As explained above, from then on it became rare for states to remain indifferent toward such a schism in the political and juridical order of another state, especially when it led to the overthrow of a democratic government. Indeed, the reinforcement of the criteria on the legitimacy of governments premised on the origin of power—and more particularly on the democratic origin of power¹⁶—explains why coups d'état against democratic governments are condemned, as well as why the recognition of overthrown democratic governments is generally not questioned and

14. Treaty of Union, League and Perpetual Confederation art. 29, July 15, 1826, *reprinted in* JAMES BROWN SCOTT, *THE INTERNATIONAL CONFERENCES OF AMERICAN STATES, 1889-1928* xxiv (1931).

15. *See, e.g.*, Additional Treaty to the Treaty of Peace Concluded at the Central American Conference art. 1, Dec. 20, 1907, 2 S. TREATY DOC. No. 61-357, p. 2397 (1910).

16. *See generally* Jean d'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. INT'L L. & POL. 877 (2006).

the recognition of putschists systematically denied.¹⁷ In the following paragraphs, we first look at the practice and political discourse since the early 1990s before turning to the examination of the relevant rules of international law applicable to coups.

A. *The Practice and the Political Discourse*

It is important to make a distinction between condemnations by states on the one hand and those by international organizations on the other.

1. States

Since the end of the Cold War, it has been common for democratic states to proclaim that the overthrow of a democratic government is, *in abstracto*, unacceptable¹⁸ based on the notion that democracy is an irreversible process.¹⁹ This idea is generally expressed in the aftermath of a coup d'état, where coups d'état are condemned because of the infringement of the principle of democracy that they entail.²⁰ It is

17. See generally STEFAN TALMON, *RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE* (1998).

18. See, e.g., JEAN D'ASPREMONT, *L'ÉTAT NON DEMOCRATIQUE EN DROIT INTERNATIONAL* 280 (2008) (citing 1996 DOCUMENTS D'ACTUALITÉ INTERNATIONALE [D.A.I.] 702 (noting the speech of the French President before the two chambers of the Congolese Parliament on June 18, 1996)); *id.* at 286 (citing 2001 D.A.I. 652 (discussing the common statement of the United States, Ghana, Mali, and Senegal issued June 28, 2001)); *Response from an Italian Minister to a Parliamentary Question on the Situation in Venezuela*, 12 ITAL. Y.B. INT'L L. 301 (2002).

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. D'ASPREMONT, *supra* note 18, at 286 n.1463 (citing 2002 D.A.I. 487, 487-88).

20. See, e.g., G.A. Res. 48/27, U.N. Doc. A/RES/48/27 (Dec. 10, 1992); G.A. Res. 48/17, U.N. Doc. A/RES/48/17 (Nov. 11, 1992); D'ASPREMONT, *supra* note 18, at 18 n.62 (citing 1993 D.A.I. 534 (reproducing the October 21, 1993 statement of the President of the UN Security Council regarding the military coup d'état in Burundi)); see also *Cronicas*, 3 SPANISH Y.B. INT'L L. 1, 145 (1992) (reproducing the statement of the President of the European Union (EU) regarding the military rebellion in São Tomé e Príncipe on July 18, 2003); D'ASPREMONT, *supra* note 18, at 18-19 n.62 (citing 1993 D.A.I. 115 (reproducing the statement of those member states of the European Community (EC) desiring the reestablishment of the democratic government in Haiti); 1994 D.A.I. 463 (reproducing the July 25, 1994 communiqué of the President of the EU regarding the coup d'état in Gambia); 1997 D.A.I. 556 (reproducing the May 29, 1997 statement of the EU regarding the coup d'état in Sierra Leone)); *id.* at 151 n.724 (citing 2002 D.A.I. 861 (reproducing the final communiqué of the Economic Community of West African States (ECOWAS) Extraordinary Summit of September 29, 2002 in Accra, which refused to recognize the constitutional legitimacy of the government that replaced a democratically elected former government)); *id.* at 286 n.1464 (citing 2000 D.A.I. 98 (reproducing the communiqué from the Heads of State and Commonwealth Governments Summit of November 1999 concerning the coup d'état in Pakistan)); Ismail Wolff, *The Silk Revolution; Thai Coup*, INT'L HERALD TRIB., Sept. 27, 2006, at 8 (condemning the coup d'état in Thailand in 2006); Seth Mydans, *Post-Coup Thailand Still Waiting for Democracy*, INT'L HERALD TRIB., Nov. 3, 2006, at 2.

important to note that they are also occasionally condemned for the violations of the constitutional order of the particular state that they produce.²¹ These condemnations are accompanied with the desire²² (or the demand) for a return to democracy.²³ Against this backdrop, it is not surprising that states also voice their enthusiasm at the return to democratic order after a coup d'état²⁴ or that they express their support for democratic leaders who have lost power following a coup d'état.²⁵ It is also remarkable to note that the promise by putschists to hold elections quickly after their seizure of power generally downplays the above-mentioned condemnations.²⁶

21. S.C. Res. 1072, U.N. Doc. S/RES/1072 (Aug. 30, 1996). D'ASPREMONT, *supra* note 18, at 18 n.62 (citing 1991 D.A.I. 437 (reproducing the statement of President George H.W. Bush concerning the fall of the Soviet Union); 1994 D.A.I. 546 (reproducing the communiqué of the President of the EU of August 24, 1994 condemning the dissolution of the Parliament and Government of Lesotho)); *id.* at 286 n.1466 (citing 1994 D.A.I. 453 (reproducing the speech of the Mexican ambassador to the United Nations at the vote of the General Assembly on U.N. resolution 940); 2004 D.A.I. 287, 287-90 (discussing the various reactions to the "resignation" of President Aristide in February 2004)); *see also* African Union [AU], *Decision*, AU Dec. No. AHG/Dec.142 (xxv) (July 14, 1999), *available at* <http://www.africa-union.org/root/au/Documents/Decisions/hog/9HoGAssembly1999.pdf>; AU, *Decision*, AU Dec. No. AHG/Dec.141 (xxxv) (July 14, 1999), *available at* <http://www.africa-union.org/root/au/Documents/Decisions/hog/9HoGAssembly1999.pdf>.

22. D'ASPREMONT, *supra* note 18, at 276 n.1386 (citing 1993 D.A.I. 360 (reproducing the July 9, 1993 statement of the heads of state of the G7 from Tokyo)).

23. *See* G.A. Res. 48/17, *supra* note 20; D'ASPREMONT, *supra* note 18, at 36 n.177 (citing 1994 D.A.I. 574 (reproducing the September 10, 1994 statement of the Rio Group regarding Haiti, adopted during its VIII Summit)); *id.* at 19 n.62 (citing 1997 D.A.I. 556).

24. *See, e.g.*, D'ASPREMONT, *supra* note 18, at 287 n.1469 (citing 1991 D.A.I. 451, 451-52 (reproducing the joint statement of twelve member states of the EC, issued on August 22, 1991, regarding the failure of the coup d'état in the former Soviet Union); 1998 D.A.I. 24 (reproducing the final communiqué of the Heads of State and Commonwealth Governments Summit of October 1997 in Edinburgh); 1998 D.A.I. 278 (reproducing the statement of the President of the U.N. Security Council of February 26, 1990 regarding the situation in Sierra Leone); 2001 D.A.I. 19 (reproducing the communiqué of the Thirty-First Forum on the Pacific Islands)).

25. *See id.*, *supra* note 18, at 287 n.1470 (citing 1998 D.A.I. 187 (reproducing the final communiqué, of December 19, 1997, from the seventh meeting of the ministers of foreign affairs of the ECOWAS Committee of Five); 1998 D.A.I. 692 (reproducing the final communiqué, of July 3, 1998, from the reunion of ministers of foreign affairs and defense concerning the situation in Guinea-Bissau)); *see also* Jean-Philippe Remu, *Le putsch de Sao-Tome l'est deroule sur un arriere-plan d'apres negociations petrolieres*, LE MONDE, July 19, 2003, at 4.

26. *See* D'ASPREMONT, *supra* note 18, at 17 n.63 (citing 1999 D.A.I. 971 (reproducing the statement of Pakistani President General Pervez Musharraf of October 17, 1999); 2002 D.A.I. 415 (reproducing the speech of President Musharraf to the nation on April 5, 2002); 200 D.A.I. 205 (reproducing the communiqué, of January 24, 2000, of the government of the Ivory Coast following the December 24, 1999 coup d'état)); *see also* Remy, *supra* note 25; Jean-Claude Pomonti, *Démocratisation sans échancier pour la Birmanie*, LE MONDE, 2 September 2003, at 3. The reactions following the coup d'état in Thailand in September 2006 are likewise noteworthy. *See* Thomas Fuller, *No Democracy for a Year, Thai Coup Leader Warns*, INT'L HERALD TRIB., Sept. 21, 2006, at 7.

These systematic condemnations are commonly accompanied by various sanctions. For example, the level of diplomatic relations with the new government is reduced.²⁷ This measure is even advocated by a few international organizations, particularly by the *Organisation Internationale de la Francophonie* (OIF)²⁸ and by the Commonwealth.²⁹ We will return to this shortly. For the rest of this discussion, it should be noted that economic sanctions are often resorted to as well.³⁰

2. International Organizations

When they do not take an official political position against the overthrow of a democratic government by a coup d'état,³¹ international organizations usually resort to sanctions against the member state concerned. There are a number of organizations that have formally organized the sanction of an overthrow of a democratic government of one of their members. To this end, some have expressly amended their constitutional treaties. Others are satisfied by simply adopting the political instruments needed to secure the imposition of sanctions against

27. See d'Aspremont, *supra* note 11, at 207-09.

28. See Organisation Internationale de la Francophonie [OIF], Declaration de Bamako § 3.1 (Nov. 3, 2000), available at http://apf.francophonie.org/IMG/pdf/decla_bamako.pdf (calling for the reduction of intergovernmental contracts with authorities emplaced by a coup d'état).

29. See Commonwealth of Nations, *Millbrook Commonwealth Action Programme on the Harare Declaration*, at 3-4 (Nov. 12, 1995), available at http://www.thcommonwealth.org/shared_asp_files/GFSR.asp?NodeID=141096; see also D'ASPREMONT, *supra* note 18, at 208 n.975 (citing 1996 D.A.I. 97 (reproducing the final communiqué of the Heads of State and Commonwealth Governments Summit of November 1995 in New Zealand)).

30. See, e.g., *Contemporary Practice of the United States Relating to International Law*, 94 AMER. J. INT'L L. 348, 355 (2000) (discussing U.S. sanctions against Pakistan). President Clinton decided, as a result of the large latitude that he enjoyed, to authorize the U.S. Department of Agriculture to continue its program of purchasing Pakistan's food and other agriculture commodities. *Id.* As for the remainder of relations with Pakistan, sanctions were not lifted. Article 508 in the *Foreign Operations, Export Financing, and Related Programs Appropriations Act*, H.R. 3057, 109th Cong. art. 508 (2006), was invoked. See also SEAN D. MURPHY, 1 UNITED STATES PRACTICE IN INTERNATIONAL LAW: 1999-2001, at 20 (2002); *Chronologie des Faits Internationaux*, 37 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 1, 1071-74 (1991); *NZ Suspends Aid and Sports Contacts with Fiji as State of Emergency Declared*, N.Z. HERALD, Dec. 6, 2006, available at <http://www.nzherald.co.nz/news/print.cfm?objectid=10414072> (discussing sanctions adopted by the United States and New Zealand after the coup in the Fiji Islands).

31. G.A. Res. 48/27, *supra* note 20; G.A. Res. 46/7, U.N. Doc. A/RES/46/7 (Oct. 11, 1991); S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994); S.C. Res. 917, U.N. Doc. S/RES/917 (May 6, 1994); D'ASPREMONT, *supra* note 18, at 288 n.1476 (citing 1997 D.A.I. 738 (discussing the decision of the Twentieth Summit of the heads of state of the ECOWAS, held August 28 and 29, 1997 to adopt embargo measures against the junta in Sierra Leone); 1991 D.A.I. 437; 1993 D.A.I. 534; 1994 D.A.I. 574); French Ministry of Foreign Affairs, *Recounting of Previous Summits*, http://www.diplomatie.gouv.fr/en/article_imprim.php?id_article=8676 (last visited Apr. 5, 2010) (quoting French president Jacques Chirac's remarks at the Second Franco-African Summit).

one of its members, thus leading to the overthrow of a democratic government.³²

The member states of the Organization of American States (OAS) have, for example, agreed on a procedure of consultation in the event of “any occurrences giving rise to the sudden or irregular interruption” of democracy in a member country.”³³ The OAS then went even further. In 1992, article 9 of its charter was amended in order to allow for the suspension of the participation of work from various organs of a member whose elected government had been overthrown by a coup d'état.³⁴ Convened at the Summit of the Americas in Quebec in April 2001, the OAS member countries additionally maintained that “any unconstitutional alteration or interruption of the democratic order in a state of the Hemisphere constitutes an insurmountable obstacle to the participation of that state's government in the Summit of the Americas process.”³⁵ They agreed on this occasion “to conduct consultations in the event of a disruption of the democratic system of a country that participates in the Summit process” and “instruct[ed their] Foreign Ministers to prepare, in the framework of the next General Assembly of the OAS, an Inter-American Democratic Charter to reinforce OAS instruments for the active defense of representative democracy.”³⁶ The same idea is expressed in the Inter-American Democratic Charter, article 19 of which stipulates as follows:

[A]n unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, constitutes, while it persists, an insurmountable obstacle to its government's participation in sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization, the specialized conferences, the commissions, working groups, and other bodies of the Organization.³⁷

32. See d'Aspremont, *supra* note 11, at 132-40, 168-80.

33. Organization of American States [OAS], *Representative Democracy*, AG/RES. 1080 (XXI-O/91) (June 5, 1991).

34. OAS Charter (as amended), art. 9, available at http://www.oas.org/dil/treaties_A-42_Charter_of_the_Organization_of_American_States.htm (last visited Jan. 17, 2010).

35. OAS, *Declaration of Quebec City*, Apr. 22, 2001, available at <http://www.summit-americas.org/Documents%20for%20Quebec%20City%20Summit/Quebec/Declaration%20of%20Quebec%20City%20-%20Eng%20-%20final.htm>.

36. *Id.*

37. OAS, *Inter-American Democratic Charter*, art. 19 (Sept. 11, 2001), available at http://www.educadem.oas.org/documentos/dem_eng.pdf.

Article 21³⁸ provides for the suspension of the participation in the OAS of a state whose democratic government has been overthrown, while still maintaining its obligations in accordance with the OAS Charter.³⁹

In addition to the OAS, some Central American states, namely Costa Rica, Guatemala, El Salvador, Honduras, and Panama, have agreed on a Treaty on Democratic Security in Central America, article 8 of which provides that in order to strengthen democracy, the parties must “reaffirm their obligation to refrain from providing political, military, financial or any other support to individuals, groups, irregular forces or armed bands that threaten the unity and order of the State or that advocate the overthrow or destabilization of the democratically elected government of any other of the Parties.”⁴⁰

The various above-mentioned mechanisms are still beset by some legal uncertainties because they have not all been ratified by the respective member countries and, as a result, are not all in force. It is therefore not certain whether they all constitute legally binding instruments.⁴¹ Moreover, their application has been considered difficult in practice as well.⁴²

38. *Id.* art. 21.

39. *See* *Haiti Divise l'Organisation des Etats Américains*, LE MONDE, June 8, 2004, at 6 (noting that the Caribbean Community (Caricom) qualified the departure of the former President Aristide as “precipitated” and considered it an attack on the constitutional order, leading to its request for an inquiry as provided for in the Inter-American Democratic Charter). The OAS has finally arrived at a compromise in recognizing the Haitian government-in-transition. The OAS has reclassified the departure of President Aristide as a “resignation,” and further stated, “*l'altération du régime constitutionnel avait commencé avant le 29 février 2004* [the alteration of the constitutional regime had begun before February 29, 2004].” *Haiti: reconnaissance du gouvernement de transition par l'OEA*, LE MONDE, June 11, 2004, at 7.

40. Framework Treaty on Democratic Security in Central America art. 8, OEA/Ser.G CP/INF.3893/96 (Dec. 15, 1995), available at <http://www.summit-americas.org/Hemispheric%20Security/Franework3893-96.htm>.

41. This is particularly the case of the Inter-American Democratic Charter, which only requests providing “promotion” without referring to several receptive measures in the internal juridical order. OAS, *Promotion and Strengthening of Democracy: Follow-Up to the Inter-American Democratic Charter*, AG RES. 1957 (XXXIII-O/03) (June 10, 2003), available at http://www.oas.org/juridico/English/ga03/agres_1957.htm; see also Jean d'Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, 19 EUR. J. INT'L L. 1075 (2008) (discussing the definition of “legal acts” and the problem of soft law mechanisms).

42. Their application is furthermore revealed as difficult. This was proved during the crises in Haiti. *See* OAS, *Support for Strengthening Democracy in Haiti*, A.G. Res. 1959 (XXXIII-O/03) (June 10, 2003), available at http://scm.oas.org/doc_public/ENGLISH/HIST_03/AG02290E10.DOC; OAS, *Restoration of Democracy in Haiti*, M.R.E. Res. 3/92 (May 17, 1992); OAS, *Democratic Reinstatement in Peru*, M.R.E. Res. 2/92 (May 18, 1992); OAS, *Support for the Restoration of Democracy in Peru*, M.R.E. Res. 1/92 (Apr. 12, 1992); OAS, *Apoyo a la Democracia en Haiti* [Support for Democracy in Haiti], M.R.E. Res. 2/91 (Oct. 8, 1991), available at <http://www.oas.org/columbus/docs/HaitiMRERes291Spa.pdf>; OAS, *Apoyo al Gobierno Democrático de Haiti* [Support for the Democratic Government of Haiti], M.R.E. Res.

The Commonwealth, during the Auckland Summit, also condemned the method of overthrowing a democratic government,⁴³ a position that was later reiterated.⁴⁴ The OIF, at the Bamako Summit, did

1/91 (Oct. 3, 1991), available at <http://www.oas.org/columbus/docs/HaitiMRERes191Spa.pdf>; see also *The Word 'Laws' in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86, Inter-Am. Ct. H.R. (ser. A) No. 6, paras. 32-38 (May 9, 1986); *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5, para. 76 (Nov. 13, 1985); OAS, *Situation in Venezuela*, C.P. Res. 811 (1315/02) (Apr. 13, 2002), available at <http://www.oas.org/consejo/resolutions/res811.asp>; OAS, *Resolución Sobre la Situación en Guatemala*, C.P. Res. 605 (945/93) (May 25, 1993); OAS Secretary-General, *Annual Report of the Secretary General 1996-1997*, at 9; *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 677, 689-90 (2000); *Chronique des faits internationaux*, 106 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 1, 761 (2002); *Chronique des faits internationaux*, 104 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 1, 769 (2000) [hereinafter *2000 Chronique*]. We have only relied on the mechanism instituted by the above-mentioned Resolution 1080. For an analysis on some of these crises, see Hugo Caminos, *The Role of the Organization of American States in the Promotion and Protection of Democratic Governance*, 106 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 141 (2002); Stephen J. Schnably, *Constitutionalism and Democratic Government in the Inter-American System*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, *supra* note 7, at 155.

43. Commonwealth of Nations, *supra* note 29.

44. See COMMONWEALTH OF NATIONS, COOLUM DECLARATION (2002), available at http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B5D88C133-679E-4F04-88E3-688B14E59749%7D_coolumdeclaration.pdf. The practice of the Commonwealth is plentiful on this topic. See *Chronologie des Faits Internationaux d'Intérêt Juridique*, 41 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 1, 969 (1995); D'ASPREMONT, *supra* note 18, at 208 n.975 (citing 1996 D.A.I. 97); *La pendaison de neuf opposants nigériens suscite une vague d'indignation dans le monde*, LE MONDE, Nov. 13, 1995, at 1 (discussing the suspension of Nigeria during the 1995 Auckland summit); see also Alison Duxbury, *Rejuvenating the Commonwealth: The Human Rights Remedy*, 46 INT'L & COMP. L.Q. 355, 374-75 (1997). Formally, the suspension was not an application of the *Millbrook Commonwealth Action Programme*, adopted several days later; however, it certainly prefigured measures that had been envisaged. During the subsequent Edinburgh summit in 1997, sanctions relating to the economic cooperation and the freedom of movement of members of the Nigerian military junta were adopted against Nigeria. *Chronique des Faits Internationaux*, 102 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 1, 170 (1998). It is curious that these sanctions were adopted *after* the suspension of Nigeria. Sanctions are normally only resorted to if sanctions remain without effect. In the absence of "written constituent rules" it is useless to appreciate the legality of the act of the Commonwealth on this issue. The same goes for the subject matter on the suspension of Pakistan after General Musharraf took power in 2000. *D.A.I.*, 2000, p. 98; *2000 Chronique*, *supra* note 42, at 211; *Chronologie des Faits Internationaux d'Intérêt Juridique*, 45 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 1, 981 (1999); Chipaux Françoise, *L'armée décrète l'état d'urgence et s'empare du pouvoir exécutif*, LE MONDE, Oct. 16, 1999. It has been confirmed by the Heads of State of Commonwealth Governments meeting in Coolum in 2002. D'ASPREMONT, *supra* note 18, at 28 n.116 (citing 2002 D.A.I. 336 (reproducing the Coolum Declaration)). Similarly, Zimbabwe was suspended because "les conditions du scrutin [électoral] n'avaient pas suffisamment permis aux électeurs d'exprimer librement leur pensée [the conditions of the electoral vote did not sufficiently allow voters to freely express their thoughts]." *Id.* at 307 n.1578 (quoting 2002 D.A.I. 9); *Chronologie des Faits Internationaux d'Intérêt Juridique*, 48 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 1, 852 (2002); L'ÉTAT DU MONDE, 2003, at 139 (2003); see also Robert Mugabe, *la caricature*, LE MONDE, Feb. 20, 2003. Finally, in December 2006, the

the same thing.⁴⁵ The latter was satisfied, however, to put an accent on constitutional legitimacy even if coups d'état against democratic governments were more severely sanctioned.

Members of the Organization of African Unity (OAU), who convened in Algiers in July 1999, also proclaimed that coups d'état were no longer acceptable.⁴⁶ Many congratulated themselves,⁴⁷ particularly the United Nations General Assembly⁴⁸ and the Non-Aligned Movement.⁴⁹ It must nevertheless be stressed that the OAU never limited condemnation

Commonwealth suspended the Fiji Islands from the Organization "until the restoration of democracy" in this Member State. *See* Commonwealth of Nations, Fiji Suspended from the Commonwealth (Sept. 1, 2009), <http://www.thecommonwealth.org/news/213088/010909fijisuspended.htm>.

45. OIF, *supra* note 28. The condemnation of the coup d'état in Guinea Bissau was the first implementation of the "Bamako mechanism." However, it reflected the concern of overseeing the reestablishment of a *constitutional* government. Although it is not a matter of sanction, it is in the same category of ideas that the threat of sanctions was formulated, in accordance with the Bamako mechanism, by the Member States meeting in Ouagadougou in November 2004 against the Ivory Coast. *Chronique des Faits Internationaux*, 109 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 1, 207 (2005); Stephen Smith & Claire Tréan, *Le Sommet de la francophonie menace la Côte d'Ivoire d'une mise en quarantaine*, LE MONDE, Nov. 27, 2004. The coup d'état in Togo in February 2005 seems nevertheless to have been condemned in order to preserve democracy. Jean-Pierre Tuquoi, *Fauré Gnassingbé, le fils préféré*, LE MONDE, Feb. 8, 2005. The Permanent Council of the Francophones, meeting on February 9, 2005, in an extraordinary session, suspended the participation of the representatives of Togo and the multilateral francophone cooperation with that country because of its violation of constitutional principles, even if one may doubt that Togo was a democratic state before the coup d'état. *Id.*

46. AU, *supra* note 21.

47. Cairo Declaration, U.N. Doc. SN106/4/00 Rev. 4, Apr. 3-4, 2000; D'ASPROMONT, *supra* note 18, at 307-08 n.1582 (citing 1999 D.A.I. 981 (reproducing the speech of the French President of November 4, 1999 on the twentieth anniversary of the opening of the French Institute of International Relations); 2000 D.A.I. 780 (reproducing the speech of the French Minister of Foreign Affairs given during the eighth Conference of Ambassadors); Hubert Vedrine, Minister of Foreign Affairs, France, Opening Statement at the Eighth Conference of Ambassadors (Aug. 29, 2000), *available at* <http://www.delegfrance-cd-geneve.org/declarations/declafrancaises/autoritesfrancaises/vedrine-confamb29082000.pdf>.

48. *See* G.A. Res. 55/96, U.N. Doc. A/RES/47/1 (Feb. 28, 2001) ("Welcoming measures, such as decision AHG/Dec.141 (XXXV) adopted in 1999 by the Assembly of Heads of State and Government of the Organization of African Unity, resolution AG/RES.1080 (XXI-091) adopted in 1991 by the General Assembly of the Organization of American States and the Moscow Document on the Human Dimension adopted in 1991 by the Conference on the Human Dimension of the Conference for Security and Cooperation in Europe, which commit Member States to taking certain steps in the event of an interruption of democratic government, as well as the Commonwealth Declaration adopted at the Commonwealth Heads of Government Meeting, held at Harare in 1991, which commits members to fundamental democratic principles . . .").

49. *See* MOVEMENT OF THE NON-ALIGNED COUNTRIES, FINAL DOCUMENT OF THE XIV MINISTERIAL CONFERENCE (2004), *available at* <http://www.nam.gov.za/media/040820.pdf>; MOVEMENT OF THE NON-ALIGNED COUNTRIES, FINAL DOCUMENT OF THE XIII MINISTERIAL CONFERENCE (2000), *available at* <http://www.nam.gov.za/xiiiinconf/final1.htm#FINAL%20DOCUMENT>.

to only coups d'état directed against democratic governments, despite it having highlighted that the Algiers Declaration rested on a "collective of common values and principles for democratic alteration."⁵⁰ This organization principally put an accent on the constitutional legitimacy of a government, which is not entirely the same thing. The Charter of the African Union, which has been created as its replacement, did not alter that finding,⁵¹ nor did the project of the Charter on democracy, elections, and governance, which is currently under consideration.⁵²

It must be noted that in its report to the Secretary General of the United Nations (U.N.), the High-Level Panel responsible for the examination of reform of the U.N. suggested that the U.N. is endowed with a mechanism of "protection of democratically elected [g]overnments from unconstitutional overthrow."⁵³ This suggestion is significant, predominantly within the framework of an organization that has displayed a certain indifference towards the form of political regime of its member states. It remains to be seen if this suggestion will someday be taken into consideration.⁵⁴

These few examples suffice to demonstrate that there are quite a number of international organizations that sanction the overthrow of a government, particularly when the latter benefits from some democratic legitimacy. The United Nations General Assembly rejoiced at this development,⁵⁵ as did the Human Rights Commission.⁵⁶ It is even more noteworthy that the Security Council also referred to the decision of the OAS in relation to coups d'état.⁵⁷

50. See D'ASPREMONT, *supra* note 18, at 23 n.85 (citing 2002 D.A.I. 828 (reproducing the statement of the OAS regarding the principles that should guide democratic elections in Africa)).

51. See Bula-Bula, *supra* note 11.

52. See Nthambeleni Gabara, *Calls To Speed Up African Charter*, BUA NEWS (Zaire), Mar. 8, 2010, <http://buaneews.gov.za/news/10/10030817051001>.

53. U.N. High-Level Panel on Threats, Challenges & Change, *A More Secure World: Our Shared Responsibility*, ¶ 94, U.N. Doc. A/59/565 (Dec. 2, 2004).

54. Reference was not made during the 2005 World Summit, although the reform of the United Nation was at the core of the agenda. See World Summit, Sept. 14-16, 2005, 2005 World Summit Outcome, U.N. Doc. A/60/L.1 (Sept. 15, 2005).

55. G.A. Res. 55/96, *supra* note 48.

56. See U.N. Comm'n on Human Rights Res. 2000/47, U.N. Doc. No. E/CN.4/2000/47 (Apr. 25, 2000).

57. See S.C. Res. 1497, ¶ 13, U.N. Doc. S/RES/1497 (Aug. 1, 2003) (urging "the LURD and MODEL to refrain from any attempt to seize power by force, bearing in mind the position of the African Union on unconstitutional changes of government as stated in the 1999 Algiers Decision and the 2000 Lomé Declaration").

B. State of the Law

It 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, however, doubtful whether the illegality in this case clearly indicates an illegality with regard to international law. First, these statements classically boil down more to a disapprobation than to an expression of opinion on the question of law. Moreover, the illegality to which this type of condemnation makes allusion concerns less the contravention of international law than a violation of the constitutional law of the state concerned. The existence of quasi-conventional sanction mechanisms also does not automatically imply that the sanctioned phenomenon—here the coup d'état—constitutes an unlawfulness with regard to general international law. First, we can sanction—as long as this does not constitute a countermeasure—a conduct that is not intrinsically unlawful. Second, it is possible to put into place a special regime that derogates from general international law and renders illegal a given behavior within the ambit of this special regime.⁵⁸

Even though we cannot subsequently infer from the above-mentioned declarations and quasi-conventional sanction mechanisms some clear indications on the internationally illegal character of coups d'état, it remains undeniable, as is demonstrated by the democratic entitlement school mentioned earlier, that there exist nowadays rules of international law that relate to the manner in which governmental power can be transferred at the domestic level. Indeed, the end of the Cold War and the sweeping fallout of that event on the international plane have impinged significantly on international law and some of its most fundamental principles.⁵⁹

58. See U.N. Int'l Law Comm'n, *Report*, ¶ 251, *delivered to the General Assembly*, U.N. Doc. A/61/10 (May 1, 2006-June 9, 2006 & July 3, 2006-Aug. 11, 2006). See generally Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT'L L. 483 (2006).

59. The most radical liberal view on this question is probably offered by Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 54-55 (1992) (presenting and defending the two Kantian arguments for the international human rights imperative). There are, however, milder forms of the democratic entitlement theory. See Franck, *supra* note 4, at 46 ("Democracy . . . is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes."); Cerna, *supra* note 6, at 329 ("At a time when international organizations are routinely under attack for not solving all the world's problems we should pause to marvel at the giant step that the recognition of democracy as an international human right portends for the peoples of the world."). For an overview of how participatory rights emerged in international law, see generally Fox, *supra* note 4, which traces the emergence of participatory rights in international law through the

Even if one does not agree with all the legal consequences that have commonly been associated with the emergence of democracy in the international legal order,⁶⁰ it can be argued that living up to some democratic standards corresponds with an international customary obligation. Indeed, contemporary practice shows that, to a large degree, states consider the adoption of the main characteristics of a democratic regime as amounting to an international obligation, and they act accordingly toward nondemocratic states.⁶¹ It is of particular relevance that many nondemocratic States do not oppose the principle of democracy, and even claim that they are themselves in the midst of progress towards the establishment of democracy.⁶² In that sense, nondemocratic states, with a view of strengthening the legitimacy of their government, try to portray their political regime in a democratic fashion rather than choosing to dispute the role that democracy plays in the international order.

Nonetheless, this customary legal obligation to adopt a democratic regime must not be exaggerated. First, the scope *ratione materiae* of the principle of democracy in international law is limited, as the obligation rests on only an electoral and procedural understanding of democracy.⁶³

development of treaties and principles derived from UN-sponsored election monitoring guidelines and arguing that this process signals an emerging universal right to political participation. For a basic account of the arguments for and against the democratic entitlement theory, see generally Fox & Roth, *supra* note 7, at 11. See also d'Aspremont, *supra* note 11. For earlier analyses, see generally Ben Achour, *supra* note 11; Klein, *supra* note 11; Sicilianos, *supra* note 11.

60. For one criticism of the liberal theories of democracy, see d'Aspremont, *supra* note 11.

61. *Id.*

62. For one example, consider the recent events in Pakistan. Carlotta Gall et al., *Rebuffing U.S., Musharraf Calls Crackdown Crucial to a Fair Vote*, N.Y. TIMES, Nov. 14, 2007, at A1 (“Dressed in a dark business suit rather than his military uniform, General Musharraf spoke in a confident tone, saying the decree was justified because the Supreme Court had questioned the validity of his re-election, and because of the seriousness of threats from terrorists.”). Musharraf has since stepped down from military leadership. See, e.g., David Rohde & Carlotta Gall, *In Musharraf’s Shadow, a New Hope for Pakistan Rises*, N.Y. TIMES, Jan. 7, 2008, at A3 (discussing President Musharraf’s decision to step down as army leader and serve as Pakistan’s civilian President). Also relevant are the developments in Myanmar. See, e.g., Seth Mydans, *Myanmar Claims First Step Toward Democracy*, INT’L HERALD TRIB., Sept 4, 2007, at 1; see also LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* 8–9 (1999) (explaining that while the electoral concept of democracy has expanded to address criticisms, it might still fail to address political marginalization that excludes significant segments of the population from exercising their democratic rights).

63. Gregory H. Fox, *The Right to Political Participation in International Law, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, *supra* note 7, at 48-49. But see Barry Gills et al., *Low Intensity Democracy*, in *LOW INTENSITY DEMOCRACY: POLITICAL POWER IN THE NEW WORLD ORDER* 3, 21 (Barry Gills et al. eds., 1993) (criticizing a “minimalist” approach to democracy); DIAMOND, *supra* note 62, at 8–9; cf. J. ROLAND PENNOCK, *DEMOCRATIC POLITICAL*

States are customarily obliged to abide by democracy to the sole extent that their effective leaders (or the parliamentary body that oversees their executive mandate) are chosen through free and fair elections.⁶⁴ Likewise, this customary obligation, while being *erga omnes*,⁶⁵ is certainly not of a jus cogens character, as it is underscored by the existence of numerous persistent objectors to that customary rule.⁶⁶

It would also be a mistake to consider the obligation to be democratic utterly groundbreaking. The development of a customary norm in this area is unsurprising, given that international law has long regulated some aspects of states' political regimes. Through human rights law, the international community has regulated the way in which power is exercised and has prohibited some types of political regimes—for example, apartheid⁶⁷ and, to a lesser extent, fascism.⁶⁸ Moreover, the obligation to organize free and fair elections is not entirely new in the international legal order, as a similar obligation is already embedded in the International Covenant on Civil and Political Rights,⁶⁹ which has been

THEORY 3–15 (1979); Richard Burchill, *The Developing International Law of Democracy*, 64 MODERN L. REV. 123, 128 (2001) (book review); Russell A. Miller, *Self-Determination in International Law and the Demise of Democracy?*, 41 COLUM. J. TRANSNAT'L L. 601, 603–05 (2003) (criticizing Francis Fukuyama and Thomas Franck for adopting “anemic” definitions of democracy in order to proclaim democracy’s triumph).

64. See d’Aspremont, *supra* note 11.

65. *Id.* at 291.

66. The People’s Republic of China and several states in the Middle East can probably be considered persistent objectors to that rule. See, e.g., Andrew J. Nathan, *The Tiananmen Papers*, 80 FOREIGN AFF. 2 (2001) (introducing excerpts from THE TIANANMEN PAPERS (Andrew J. Nathan & Perry Link eds., 2001)).

67. See International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243; International Convention on the Elimination of All Forms of Racial Discrimination, art. 3, Mar. 7, 1966, 660 U.N.T.S. 195 (“States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.”); see also G.A. Res. 1791, U.N. Doc. A/RES/1791 (Dec. 11, 1962); G.A. Res. 1598, U.N. Doc. A/RES/1598 (Apr. 13, 1961); S.C. Res. 288, U.N. Doc. S/RES/288 (Nov. 17, 1970); S.C. Res. 277, U.N. Doc. S/RES/277 (Mar. 18, 1970); S.C. Res. 253, U.N. Doc. S/RES/253 (May 29, 1968); S.C. Res. 232, U.N. Doc. S/RES/232 (Dec. 16, 1966); S.C. Res. 221, U.N. Doc. S/RES/221 (Apr. 9, 1966); S.C. Res. 217, U.N. Doc. S/RES/217 (Nov. 20, 1965); S.C. Res. 216, U.N. Doc. S/RES/216 (Nov. 12, 1965).

68. See G.A. Res. 36/162, U.N. Doc. A/RES/36/162 (Dec. 16, 1981) (discussing “[m]easures to be taken against Nazi, Fascist and neo-Fascist activities and all other forms of totalitarian ideologies and practices based on racial intolerance, hatred and terror”).

69. International Covenant on Civil and Political Rights [ICCPR], G.A. Res. 2200A, U.N. Doc. A/6316 (Dec. 16, 1966); see also Andreas Mavrommatis, *The International Covenant on Civil and Political Rights and Its Role in Promoting Democracy*, in HUMAN RIGHTS AND DEMOCRACY FOR THE 21ST CENTURY 255 (Kalliopi Koufa ed., 2000) (discussing the interaction between the ICCPR and democracy).

ratified by 161 States.⁷⁰ It must be pointed out, however, that even if the international legal order enshrines a principle of procedural democracy applicable to the political regime of states, there is no corresponding requirement of democracy applicable to the structure and the functioning of the international legal system as a whole. This is not totally astonishing, given the inapplicability of the classical domestic blueprints of governance to the international system.⁷¹

If there is an obligation for states to live up to some democratic standards, one may be inclined to infer from it that coups are necessarily internationally illegal because those that they bring to power are not democratically elected. This would be true as long as the obligation to be democratic encompasses a prohibition on coups. Although this conclusion is not self-evident, it does not seem unreasonable to hold that coups constitute a violation of the rules of international law pertaining to democracy, at least when they are committed against a democratically elected government.

While against this backdrop one may argue that coups are per se illegal, it should not be forgotten that violations of other international obligations can be committed during coups. This is especially true with respect to rules pertaining to the protection of human rights. However, it is important to acknowledge that all coups d'état do not necessarily lead to violations of human rights, as illustrated by the 2006 coup d'état in Thailand.⁷² The violation of human rights will have to be demonstrated on the basis of a case-by-case approach.

Once it has been established that a coup d'état, at least when it leads to overthrowing a democratic government, constitutes an infringement of the standards that are now imposed by international law for the transfer of power at the domestic level, it is still necessary to attribute that violation to a legal subject if one desires to hold a legal subject internationally responsible. The following Part aims at demonstrating that, under the current international rules on attribution, it is not possible

70. See OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATION OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 12 (2004), available at <http://www2.unhcr.org/English/bodies/docs/status.pdf>; see also Katie Lee, *China and the International Covenant on Civil and Political Rights: Prospects and Challenges*, 6 CHINESE J. INT'L L. 445 (2007) (evaluating the prospects for the ICCPR's ratification by the Chinese government and determining that China will likely be receptive to prerequisite domestic legislative reforms); James C. McKinley, Jr., *Cuba Signs Two Treaties on Rights*, N.Y. TIMES, Mar. 1, 2008, <http://www.nytimes.com/2008/03/01/world/americas/01cuba.html> (discussing Cuba's accession to the ICCPR).

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

72. See Mydans, *supra* note 20; Wolff, *supra* note 20.

to attribute coups d'état to any state. It is important to stress that the ensuing analysis leaves aside the hypothesis of foreign control on the coup d'état.⁷³

III. THE IMPOSSIBILITY OF ATTRIBUTING THE COUP D'ÉTAT TO THE STATE

This Article argues that, external to a situation of control by a foreign state exercised over the authors of the coup, violations of international law committed by authors of coups d'état are not easily attributable to the state weathering this sort of change in government. It is submitted here that there exists an inextricable impossibility in holding a coup d'état as wrongful, which originates from secondary norms governing the international responsibility of states as conceived today in positive international law.⁷⁴ More precisely, it is doubtful that a coup d'état constitutes an act of the state. Some will be tempted to defend the contrary by highlighting that coups d'état are generally committed by armed forces, or by a group of individuals already exercising certain official functions. This is certainly true. However, we must underscore that in order to attribute the coup d'état to the state, the authors of the coup must have acted *in the capacity of* organs of the state. We doubt in this regard that in overthrowing the power in place and in repudiating the existing order, the authors of the coup are acting in their capacity as an organ.⁷⁵ It is far from certain that a group acting to repeal the constitutional order from which it derives its power can be considered as acting as an organ of the state concerned. It is argued here that the authors of a coup d'état cease to act in their capacity as an organ of the state and simply act as individuals.

It is of no avail to invoke in this situation the rule pertaining to acts committed *ultra vires*.⁷⁶ A coup d'état that they commit cannot by any means be considered an act—even *ultra vires*—attributable to the state. The rule of attribution *ultra vires* allows the attribution to the state of an organ that has overstepped the limits of its mandate. However, in the case of a coup d'état, because the authors of that coup do not act in the

73. Compare Prosecutor v. Tadić, Case. No. IT-94-1, Appeals Chamber Judgment, ¶¶ 99-106 (July 15, 1999), with Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91, at 142-45 (Feb. 26).

74. See G.A. Res. 56/83, *supra* note 13, arts. 4-11.

75. See *id.* art. 5.

76. See *id.* art. 7 ("The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.").

capacity of an organ of the state, the question on the limit of their powers as an organ is simply no longer at stake.

Because we cannot consider the authors of a coup d'état as acting in the capacity of organs of the state, some might still be tempted to resort to the so-called rule of attribution entitled "triumphant rebel" established by article 10 of the Articles on the Responsibility of States for International Wrongful Acts (Articles on State Responsibility).⁷⁷ This provision constitutes one of the rare exceptions that allows for the attribution of an individual act to a state of which the former is not the organ. Even if this provision is by no means declarative of customary law,⁷⁸ it is not useless to pause briefly on the argument that is grounded on the presumption of a "triumphant rebel." Under this principle, some could consider that a coup d'état constitutes a form of "rebellion" precisely because it aims to fracture an existing regime. In this sense, the violation of international law, regardless of what the coup d'état entails, can, according to this rule, retroactively constitute an act of the state. This interpretation, if it is at first impression attractive, is still perplexing. Even if the two are occasionally confused in contemporary political discourse,⁷⁹ we doubt that authors of a coup d'état can in fact be described as an "insurrectional movement" within the meaning of article 10 on the Articles on State Responsibility. The commentary of the International Law Commission is, in this regard, very eloquent. Although it recognizes the difficulty of defining in abstracto and a priori what constitutes an "insurrectional movement" in the sense of this understanding, it returns to the criteria used in international humanitarian law by the Second Additional Protocol to the Geneva Conventions.⁸⁰ At present, it is well-known that article 1, paragraph 2, of this instrument excludes from its scope the application of "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence[,] and other acts of a similar nature," as not being armed conflicts.⁸¹ A coup d'état falls beyond the threshold required by the Additional Protocol to the Geneva Conventions.

77. See *id.* art. 10; see also U.N. Int'l Law Comm'n, *supra* note 58, ¶¶ 112-55. See generally Frédéric Dopagne, *La Responsabilité de l'État du Fait des Particuliers: Les Causes d'Imputation Revisitées par les Articles sur la Responsabilité de l'État pour Fait Internationalement Illicite*, 34 REVUE BELGE DE DROIT INTERNATIONAL 490 (2001).

78. See Jean d'Aspremont, *State Responsibility and Rebellion*, 58 INT'L & COMP. L.Q. 427, 428 (2009).

79. See Letter from Mahamat Ali Adoum, Ambassador of Chad to the U.N., to Ricardo Alberto Arias, President of the U.N. Sec. Council (Feb. 3, 2008) (U.N. Doc. No. S/2008/69).

80. JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 118 (2002).

81. See *id.*

All things considered, even if we must apply a less rigid criterion and free ourselves from categories corresponding to international humanitarian law—which would not be inconceivable—it is doubtful that authors of a coup d'état can be considered an “insurrectional movement” under article 10 of the Articles on State Responsibility. This is not possible simply because, in practice, they usually exercise official functions or occupy a position in the administration of the state from which they take advantage when seizing power.

The foregoing also applies to breaches of human rights that could have been perpetrated on the occasion of a coup d'état: the rule contained in article 10 of the Articles on State Responsibility neither allows the attribution of the unlawfulness of a coup d'état to the state whose government is henceforth replaced, nor permits the possible breaches of human rights committed by the authors of the coup d'état during the course of their unconstitutional seizure of power to be attributed to the state.

In light of these conclusions, it ultimately seems very difficult to attribute the coup d'état to the state that has sustained an unconstitutional change in government. Failing to assert that a coup d'état can be an act of the state whose government is overthrown, it is impossible to establish the subjective element of the international wrongful act on which the regime of state responsibility rests.⁸² The coup d'état cannot be considered an internationally wrongful act, and no state incurs international responsibility.

Such an absence of responsibility in the situation of a coup is not completely devoid of all sense. The attribution of a coup d'état to the state whose democratic government will be consequently overthrown leads to an absurd situation in which the state whose democratic government has been overthrown will be at the same time a victim of an unconstitutional change of its government and the author of an internationally wrongful act. Moreover, this finding at the level of state responsibility seems to underscore the idea that, on the whole, international law, as an instrument of regulation, can by no means determine the conduct of individuals whose intentions are precisely to completely reject the order in place.⁸³ We will return to this shortly.

82. G.A. Res. 56/83, *supra* note 13, art. 2.

83. See generally Charles Leben, *Les Révolutions en Droit International: Essai de Classification et de Problématique Générale*, in *RÉVOLUTIONS ET DROIT INTERNATIONAL* 1, 17-18 (1990).

IV. COUPS D'ÉTAT AS PREPARATORY ACTIONS TO INTERNATIONALLY WRONGFUL ACTS

That a coup d'état is not, in itself, an internationally wrongful act because of the rules of attribution does not mean that it is without any consequences whatsoever in terms of the obligations of the state concerned. It is not, for example, inconceivable that it has some effect on the law of treaties.⁸⁴ Similarly, it may be that a coup d'état affects the stability of a state in the region and constitutes, in this capacity, a threat against peace and international security within the meaning of the system of collective security.⁸⁵ It is hardly necessary to dwell on this for the purposes of the present contribution. It is more important to note that in regard to responsibility—which is only of interest to us here—the coup d'état, failing itself to be unlawful, may constitute a preparatory action of a subsequently wrongful act. In essence, this does not change much because no formal consequence can be attached to the preparatory actions for the sake of the responsibility of the state. However, this idea helps one understand the place of coups d'état in the scheme of the international responsibility of states.

84. We can, for example, ask ourselves whether a coup d'état against a democratic regime can constitute a “fundamental change in circumstances” within the meaning of article 62 of the Vienna Convention on the Law of Treaties. The question appeared to have been posed following the April 1967 coup d'état in Greece, when the European Community considered that the nonrespect of democracy by Greece had rendered the application of the Accord “impossible.” See, e.g., Jean Siotis, *La ‘revolution nationale’ en grece et les institutions internationales*, 1 *REVUE BELGE DE DROIT INTERNATIONAL* 207 (1968). The European Parliament, for its part, unanimously adopted on May 11, 1967, a resolution wherein it expressed its shock as to the suspension of democratic and parliamentary life in Greece and noted that the “practical functioning” of the Treaty of Association of July 1, 1961, between Greece and the European Community, was found to be prevented in fact up to the moment where a Hellenic parliamentary delegation could sit again in the mixed Parliamentary Commission. Charles Rousseau, *Chronique des Faits Internationaux*, 71 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 1, 1111 (1967). The precision leads one to believe that the cause of the suspension proceeded from the impossibility of performance, article 61 of the Vienna Convention on the Law of Treaties, which seems to be far-fetched considering no object indispensable for the execution of the treaty had permanently disappeared. Some consider that this is more a matter of a “fundamental change of circumstances” capable of justifying the suspending of the Accord by the Community. Aristidis Calogeropoulos-Stratis, *L'évolution de L'accord D'association Entre la Grèce et la Communauté Économique Européenne*, *REVUE HELLÉNIQUE DE DROIT INTERNATIONAL* 302, 319 (1974). Generally, it is difficult to determine if the coup d'état really constituted a cause for suspension or the termination of the treaty in this instance where, on the facts, economic relations were hardly affected by the coup d'état. Only the application of the institutional measures of the Accord were effectively suspended. *Id.* at 319.

85. See Jean d'Aspremont et al., *Article 39*, in *LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE* 1131 (Mathias Forteau ed., 3d ed. 2005).

The distinction between a wrongful act and a preparatory action has been clearly formulated by the International Court of Justice in its case relating to the Gabčíkovo-Nagymaros project:

A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which “does not qualify as a wrongful act . . .”⁸⁶

To understand the preparatory but not wrongful character of a coup d'état against a democratic government, it must be recalled that contemporary international law seems to enshrine an international obligation to be democratic. If the coup d'état leads to an overthrow of a democratic government and to the establishment of a government that refuses to subject itself to free and fair elections, the state that they govern from then on ceases to be democratic. In other words, from the instant the political regime of a state becomes noncompliant with the conditions of democracy imposed by international law, the state falls out of compliance with its international obligation to be democratic.

The foregoing means that a potential infringement of the international obligation to be democratic does not proceed from the coup d'état itself. The breach stems from the subsequent actions of the coup's new government, which refuses to subject itself to free and honest elections. In this sense, there is simply no breach of the international obligation to be democratic before the new government clearly voices its refusal to organize democratic elections. In other words, it can only be after the coup d'état that the breach of the obligation to be democratic materializes, and it is not the coup itself that constitutes the breach. This conclusion seems, to some extent, to be underpinned by the fact that, in contemporary practice, the promise by putschists to subject themselves to future free and fair elections generally helps ease international condemnations and sanctions.⁸⁷

It must be acknowledged that the materialization of a breach of the obligation to be democratic is not always easy to appreciate, especially because it happens that the authors of the coup do not expressly refuse to abide by an electoral process, but simply suspend civil liberties and

86. The Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, at 54 (Sept. 25) (citation omitted); see also U.N. Int'l Law Comm'n, *Report, delivered to the General Assembly*, U.N. Doc. A/51/10 (May 6, 1996–July 26, 1996); U.N. INT'L L. COMM'N, 2-2 1993 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 61 (1993).

87. See D'ASPROMONT, *supra* note 18, at 17 n.63 (citing 1999 D.A.I. 971; 2002 D.A.I. 415; 200 D.A.I. 205).

deprive political opponents of their political freedom. However, by suspending political liberties, the new government prevents the possibility of free and fair elections, thereby indirectly bypassing any requirement of subjecting itself to a democratic process.

If we construe coups d'état as a preparatory action to the subsequent violation of the obligation to be democratic, there is hardly any problem of accountability that arises. If the authors of a coup d'état—as explained above—were not acting as an organ at the moment of the coup, they have become—as long as they have gained effective power—an organ of the state and, accordingly, act in that capacity when they refuse to subject themselves to free and honest elections. Contrary to the coup itself, the breach of the obligation to be democratic does not trigger any problem of attribution, as it is attributable to the state. The state can thus be held responsible for breach of the international obligation to be democratic.

If, as has just been explained, we can assert that a state in which the government has acquired power to the detriment of a democratic government and refuses to adhere to democratic elections has committed a wrongful act, despite the international obligation to be democratic, it can also be defended that a coup d'état constitutes a preparatory action to such an act. In this sense, the coup d'état, although itself not unlawful, is what makes possible the subsequent breach of the obligation to be democratic.⁸⁸ This shows that, in the end, even if it is not a wrongful act in itself, a coup d'état against a democratic government constitutes a phenomenon that is not entirely without consequences.

V. FINAL REMARKS: THE POTENTIAL BENEFITS OF COUPS D'ÉTAT

Some might be disappointed by the conclusion reached here, according to which a coup d'état against a democratic government cannot constitute an internationally wrongful act within the meaning of the law of international responsibility. This Article ultimately argues that, leaving aside the hypothesis of foreign control of the putschists, the impossibility of holding a state responsible according to the secondary rules of attribution dovetails with a simple factual truth: a coup d'état can prove to be a *positive break from the existing order* and can bring about a desirable change in regime. It is naturally difficult to deny that in contemporary times the “disorder” that a coup d'état can generate can become quite harmful in several regards, particularly because of the civil

88. The author of the present contribution has defended this elsewhere. See d'Aspremont, *supra* note 11, at 287-88.

unrest or the insecurity of international investments that a coup usually gives rise to.⁸⁹ These negative side effects do not, however, suffice to automatically fend off the beneficial effect of some overthrows of government. As previously mentioned, a coup d'état can prove to be a source of change desired by the population itself as much as by the international community.⁹⁰ This is particularly true in the case of a regime where the power—even if it originally stemmed from a democratic election—is being exercised in a manner unanimously perceived as illegitimate⁹¹ and where, over time, the government has gradually evaded its obligation to subject itself continuously to a democratic process and has become authoritarian or tyrannical. In such a situation, a break in the political regime by a coup would not necessarily be inopportune. It is in this sense that the absence of consequences for coups d'état in terms of responsibility does not inevitably constitute a regrettable finding.

If certain coups d'état can thus turn out positively, an important caveat must immediately be formulated. The positive or beneficial character of a coup boils down to a finding that escapes any a priori categorization, especially in legal terms. As a result, this Article argues that it does not behoove international lawyers to determine which among the coups d'état are those that will be “good” and those that will be “bad.” In other words, the fact that the rules of attribution prevent the state concerned from being held internationally responsible also reflects

89. Sicilianos, *supra* note 11, at 215.

90. See *United Kingdom Materials on International Law 1984*, 55 BRIT. Y.B. OF INT'L L. 405, 418 (1984) (“Revolutions and *coups* vary widely in character. In some cases a change of government through non-democratic means may be for the good, as the people of a country rise up against tyrannical rulers. In others, a small group seize by force what they could never have achieved by democratic means, and proceed to deny their own people what we would regard as elementary rights. In either case, there may be an offence against the previous constitutional order of the state concerned. But there is not thereby necessarily any offence against international law.”); see also Anatole Ayissi, *Illusoire interdiction des coups d'Etat*, 51 MANIÈRES DE VOIRE, May-June 2000 (“*Il existe dans la vie de certaines sociétés politiques, des moments tragiques de rupture douloureuse de l'ordre établi que l'on pourrait bien qualifier de 'coup d'État' salutaire. . . . Le coup d'État n'est pas un mal. Il est un symptôme.* [There exists during the life of certain political societies, tragic moments of painful breakup of the established order that one might well call a salutary ‘coup d'état.’ . . . The coup is not an evil. It is a symptom.]”); Bula-Bula, *supra* note 10, at 33. For a more recent example, see the enthusiasm following the 2006 coup d'état in Thailand. See Thomas Fuller, *World Briefing—Asia: Thailand: Assets Inquiry for Deposed Leader*, N.Y. TIMES, Sep. 23, 2006, <http://www.nytimes.com/2006/09/23/world/asia/23briefs-007.html?fta=y>; Seth Mydans, *News Analysis: A Question of Means and Ends in Thailand*, N.Y. TIMES, Sep. 24, 2006, <http://www.nytimes.com/2006/09/24/world/asia/24iht-thai.2916324.html>.

91. See d'Aspremont, *supra* note 16, at 887 (distinguishing between the exercise of legitimacy and original legitimacy).

the limits of the role of international lawyers. Failing to understand that international lawyers are not those entrusted with the task of drawing a distinction between “good” and “bad” overthrows of governments comes down to indulging in the projection in international law—and particularly in the law of responsibility—of one’s desire for a more regulated international society. It is also surrendering to the “monist-fantasy,” according to which fundamental rules of internal law would cease to be a simple fact for international law.⁹² The foregoing ultimately means that secondary rules of international law concerning attribution, because they make it impossible to hold a state responsible for a coup d’état and demote the coup to a simple preparatory action, remind us of the modesty with which we must construe the limits of potential regulations by primary rules of international law: Primary rules of international law simply cannot regulate everything, and certainly not unconstitutional changes in governments.

92. See generally Case Concerning Notthebohm (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6); Payment in Gold of Brazilian Federal Loans Contracted in France (Fr. v. Braz.), 1929 P.C.I.J. (ser. A) No. 21 (July 12); Payment of Various Serbian Loans Issued in France (Fr. v. Serb.), 1929 P.C.I.J. (ser. A) No. 20 (July 12).