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Articles

Representation, Recognition, Resistance: Rival Governments Before the International Court of Justice

JACK MCNALLY*

Following a coup d'état or during times of internal conflict, multiple entities may emerge, each claiming to be the putative government of the State and competing for international recognition to that effect. However, only one government can be competent to represent the State in its foreign affairs. This anomaly raises issues for the international dispute settlement system, requiring international courts and tribunals to determine the government entitled to represent the State in active legal proceedings. This Article considers how the International Court of Justice (ICJ) should approach these questions of recognition and representation. It first establishes that the Court has the jurisdiction to make procedural decisions as to the entity competent to represent the State in ICJ proceedings. However, notwithstanding this established power to decide, a survey of practice demonstrates that international courts and tribunals, including the ICJ, have developed a series of judicial avoidance techniques to avoid answering questions of recognition and representation, likely out of an awareness of the adverse normative implications that may arise from such a decision. The adoption of such techniques, while warranted in some specific circumstances, is not an approach the Court will be able to adopt indefinitely. In circumstances where the use of avoidance techniques is unfavorable or has gone on for too long, the Court should proceed to apply the substantive law of recognition—namely, the effective control test—to determine the government competent to represent the State in the proceedings. It concludes

that the Court should not avoid applying established law, nor should it avoid exercising its power to render procedural orders on the representation of States with rival governments to the extent necessary to facilitate the administration of justice and to prevent the frustration of its jurisdiction.

INTRODUCTION

On the morning of December 11, 2019, Aung San Suu Kyi took her place at the lectern in the Great Hall of Justice—the seat of the International Court of Justice (ICJ or "the Court")—and opened her home State of Myanmar's oral argument in the provisional measures proceedings in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* ("*Rohingya Genocide Case*").[1] Suu Kyi served as the head of Myanmar's delegation and its agent in the proceedings lodged by Gambia, which concern allegations that Myanmar is engaged in an ongoing genocide of the ethnic minority Rohingya people. Just over a year later, mere days after dispatching Myanmar's preliminary objections to the Hague, Suu Kyi was detained as part of a successful coup d'état orchestrated by Myanmar's military, the Tatmadaw.[2]

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1. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Verbatim Record, 12–20 (Dec. 11, 2019), https://www.icj-cij.org/public/files/case-related/178/178-20191211-ORA-01-00-BI.pdf [https://perma.cc/LNQ2-DVV5]. *See generally* ANTHONY WARE & COSTAS LAOUTIDES, MYANMAR'S 'ROHINGYA' CONFLICT (2018); Rep. of the Indep. Int'l Fact-Finding Mission on Myan., U.N. Doc. A/HRC/39/64 (Sept. 12, 2018).

2. Hannah Beech, *Myanmar's Leader, Daw Aung San Suu Kyi, Is Detained Amid Coup*, N.Y. TIMES (Jan. 31, 2021), https://www.nytimes.com/2021/01/31/world/asia/myanmar-coup-aung-san-suu-kyi.html [https://perma.cc/T4WK-NPU6].

The military government, known as the State Administration Council (SAC), now exercises de facto control over Myanmar.[3] In 2021, a rival government, the National Unity Government (NUG), led by Suu Kyi and other members of her National League for Democracy, formed in opposition to the military government, which it claims is illegitimate due to its extra-legal origin.[4] Each claims to be Myanmar's legitimate government and has sought international recognition to that effect.[5]

This Gordian knot of rival governments has generated a range of issues concerning Myanmar's international legal personality. Thus far, commentators have focused on Myanmar's representation at the United Nations (U.N.) General Assembly (UNGA)[6] and on debates over whether other States and multilateral organizations should "recognize" the NUG as the "legitimate" government of Myanmar, with

3. *Myanmar: Closed Consultations,* SEC. COUNCIL REP. (Sept. 15, 2022), https://www.securitycouncilreport.org/whatsinblue/2022/09/myanmar-closed-consultations.php [https://perma.cc/ELE6-KHSE].

4. *See, e.g.*, *Union Minister for Foreign Affairs Zin Mar Aung – Press Statement on ICJ*, Nat'l Unity Gov't of the Republic of the Union of Myan. (Feb. 21, 2022), https://gov.nugmyanmar.org/2022/02/21/union-minister-for-foreign-affairs-zin-mar-aung-press-statement-on-icj/ [https://perma.cc/NU8W-5SYF]; Sebastian Strangio, *Myanmar Coup Opponents Announce National Unity Government,* THE DIPLOMAT (Apr. 19, 2021), https://thediplomat.com/2021/04/myanmar-coup-opponents-announce-national-unity-government/ [https://perma.cc/Q5QU-UCDP].

5. *Myanmar Politicians Defy Coup, Say They Are True Government*, ASSOCIATED PRESS (Feb. 5, 2021), https://apnews.com/article/myanmar-coup-politicians-a576dcd73070070877e8d567ec5e8a5c [https://perma.cc/YB6S-5VWC]; John Liu & Rory Wallace, *Six Months after Myanmar Coup, Battle for Diplomatic Recognition*, AL JAZEERA (Aug. 1, 2021), https://www.aljazeera.com/news/2021/8/1/six-months-after-myanmar-coup-battle-for-diplomatic-recognition [https://perma.cc/BK7R-9ZAN].

6. *See, e.g.*, SPECIAL ADVISORY COUNCIL FOR MYAN., BRIEFING PAPER: MYANMAR'S REPRESENTATION IN THE UNITED NATIONS (Aug. 11, 2021), https://specialadvisorycouncil.org/wp-content/uploads/2021/08/SAC-M-Briefing-Paper-Myanmars-Representation-in-the-UN-ENGLISH.pdf [https://perma.cc/9AK4-77UV]; Patrick Phongsathorn, *Show Us Your Credentials: The Battle for Myanmar at the UN*, THE DIPLOMAT (Sept. 13, 2021), https://thediplomat.com/2021/09/show-us-your-credentials-the-battle-for-myanmar-at-the-un/ [https://perma.cc/H7QK-J4HG]; Rebecca Barber et al., *Myanmar's Credentials at the UN*, PASSBLUE (Sept. 12, 2021), https://www.passblue.com/2021/09/12/myanmars-credentials-at-the-un/ [https://perma.cc/4W2T-F324]; Rick Gladstone, *Quandary at the UN: Who Speaks for Myanmar and Afghanistan?*, N.Y. TIMES, Feb. 11, 2021, at A10; Frederica Paddeu & Alonso Gurmendi Dunkelberg, *Recognition of Governments: Legitimacy and Control Six Months After Guaidó*, OPINIO JURIS (July 18, 2019), https://opiniojuris.org/2019/07/18/recognition-of-governments-legitimacy-and-control-six-months-after-guaido/ [https://perma.cc/2QX3-2VEH]; Marc Weller, *Myanmar: Testing the Democratic Norm in International Law*, EJIL: TALK! (Mar. 30, 2021), https://www.ejiltalk.org/myanmar-testing-the-democratic-norm-in-international-law/ [https://perma.cc/G888-44TF].

the exclusive power to speak on behalf of and exercise the functions of the State.[7] However, little attention has been directed to the novel question that arises in the context of international dispute settlement:[8] Who can speak for Myanmar at the ICJ?

Until now, this question has not necessitated substantial analysis. Issues of rival governments have not "had any appreciable impact on the Court's work and practice."[9] The Court has not devised a legal test to assist; the considerations it may take into account in determining the government entitled to represent the State are decidedly unclear. However, recent events highlight the impetus for more comprehensive thought. Both the NUG and SAC have, at various times, controlled the proceedings in the *Rohingya Genocide Case*[10] and both regimes

7. SPECIAL ADVISORY COUNCIL FOR MYAN., BRIEFING PAPER: RECOGNITION OF GOVERNMENTS (2021), https://specialadvisorycouncil.org/wp-content/uploads/2021/08/SAC-M-Briefing-Paper-Recognition-of-Governments-ENGLISH.pdf [https://perma.cc/94TT-9QHR]; Tess Bridgeman, *A Dangerous Bet on Recognition in Venezuela*, JUST SEC. (Jan. 25, 2019), https://www.justsecurity.org/62357/dangerous-bet-recognition-venezuela/ [https://perma.cc/G7KN-VA78]. The Australian Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade, held an inquiry into Australia's response to the coup in Myanmar, which is one of the few extended treatments of this question from a governmental perspective. JOINT STANDING COMM. ON FOREIGN AFFS., DEF. & TRADE, PARLIAMENT AUSTL., AUSTRALIA'S RESPONSE TO THE COUP IN MYANMAR: INTERIM REPORT FOR THE INQUIRY INTO CERTAIN ASPECTS OF THE DEPARTMENT OF FOREIGN AFFAIRS AND TRADE ANNUAL REPORT 2019–20, at 5–22 (2021) [hereinafter *Australia's Response to the Coup in Myanmar*]; *see also* Résolution portant sur la nécessité de reconnaître le Gouvernement d'unité nationale de Birmanie [Resolution on the Need to Recognize the National Unity Government of Burma], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] (Oct. 7, 2021).

8. However, note that this question has been subject to some general treatment by Niko Pavlopoulos in a post on EJIL: TALK!. Niko Pavlopoulos, *Contested Governments and State Representation before International Courts and Tribunals*, EJIL: TALK! (Sept. 29, 2021), https://www.ejiltalk.org/contested-governments-and-state-representation-before-international-courts-and-tribunals/ [https://perma.cc/E6L2-JC88]; *see also* Sean Bain, *Myanmar: With Military Lacking Legitimacy and Control, Elected Reps Seek Recognition as Government*, OPINIO JURIS (May 11, 2021), http://opiniojuris.org/2021/05/11/myanmar-with-military-lacking-legitimacy-and-control-elected-reps-seek-recognition-as-government/ (suggesting that the question requires further research) [https://perma.cc/DR2X-JUTF]; Marko Milanović, *Two Questions on Coups and Representation before International Courts*, EJIL: TALK! (May 12, 2021), https://www.ejiltalk.org/two-questions-on-coups-and-representation-before-international-courts/ [https://perma.cc/PRP4-HWGM].

9. ROBERT KOLB, THE INTERNATIONAL COURT OF JUSTICE 159 (Alan Perry trans., 2013).

10. In a speech, the NUG Minister of Federal Union Affairs stated that the NUG intended to "apply diplomatic strategy, including . . . an ICC and ICJ strategy" as part of its campaign to apply external pressure on the Tatmadaw. Lian H. Sakhong, NUG Minister of Fed. Union Affs., Living with the Pandemic and the Coup, Address to the Australian National University (July 16, 2021); *see also Press Statement (1/2021)*, Nat'l Unity Gov't of the Republic of the

have submitted compliance reports in accordance with the Court's order on provisional measures.[11] Further, a substantial re-organization of Myanmar's representation at the Court took place between the provisional measures and preliminary objections phases of the proceedings.[12]

A lack of clarity as to the government entitled to represent the State in international litigation is not an issue limited to Myanmar. Similar problems have arisen in relation to the international representation of Venezuela. Until recently, Venezuela had two rival governments competing for international recognition: the Maduro and Guaidó regimes. The former has held power since 2013, whereas the latter arose in 2019 as an interim government following the 2018 general election, the result of which was widely regarded as fraudulent.[13] The

Union of Myan. (May 30, 2021) ("The National Unity Government is taking every step to cooperate with the International Court of Justice . . . ."); Glob. Just. Ctr., *Q&A: Preliminary Objections in* The Gambia v. Myanmar *at the International Court of Justice* (Feb. 2021), https://www.globaljusticecenter.net/files/20210203_ICJpreliminaryObjections_QA.pdf [https://perma.cc/2XDW-2RYA] (noting that a key question is "whether a military-led government will continue to engage with and defend the case"); *Myanmar's Shadow Govt Formed by Ousted Leaders Pledges to Comply with ICJ*, DAILY STAR (May 31, 2021), https://www.thedailystar.net/southeast-asia/news/myanmars-shadow-govt-formed-ousted-leaders-pledges-comply-icj-2102285 [https://perma.cc/UX2A-9GK7] (noting that the NUG sees it as one of its duties, "as lawful government of Myanmar, to ensure continuity of representation before the ICJ").

11. SPECIAL ADVISORY COUNCIL FOR MYAN., *supra* note 6, at 2 n.9; *see also Myanmar Submits Report to UN Court on Rohingya Genocide*, DHAKA TRIBUNE (May 24, 2021), https://www.dhakatribune.com/world/2020/05/24/myanmar-submits-report-to-un-court-on-rohingya-genocide [https://perma.cc/P2SX-LF5N].

12. The SAC has removed Aung San Suu Kyi as agent and replaced her with Ko Ko Hlaing, Union Minister for International Cooperation, and Thi Da Oo, Union Minister of Legal Affairs and Attorney General. In addition, much of Myanmar's legal team was reorganized. The NUG has also flagged its intention to appoint an agent, if the ICJ will allow it. *See Myanmar Junta Reorganizes Legal Team for ICJ Rohingya Genocide Case*, THE IRRAWADDY (June 24, 2021), https://www.irrawaddy.com/news/burma/myanmar-junta-reorganizes-legal-team-for-icj-rohingya-genocide-case.html [https://perma.cc/FT78-DDWX]; Andrew Nachemson, *Justice in the Balance as UN Considers Recognition Question*, FRONTIER MYANMAR (Sept. 2, 2021), https://www.frontiermyanmar.net/en/justice-in-the-balance-as-un-considers-recognition-question/ [https://perma.cc/U9YH-C2X6] (quoting the NUG's Minister for International Cooperation, who states "[i]f the ICJ will allow us to represent Myanmar by appointing an agent at the case, then that is what we also will do" and discussing the changes to Myanmar's representation); *Myanmar Military Restructures Panel to Defend Rohingya Genocide Case at ICJ*, THE WIRE (June 25, 2021), https://thewire.in/world/myanmar-military-tatmadaw-icj-rohingya-genocide-rakhine [https://perma.cc/4BA4-PHNK].

13. *See generally* Joe Parkin Daniels, *Venezuela: Who is Juan Guaidó, the Man Who Declared Himself President?*, THE GUARDIAN (Jan. 23, 2019), https://www.theguardian.com/world/2019/jan/15/juan-guaido-venezuelan-opposition-leader-challenging-maduros-

Guaidó regime was initially recognized as the legitimate government of Venezuela by large swathes of the international community.[14] However, many of these decisions by States to recognize Mr. Guaidó as the interim president of Venezuela were downgraded or reversed,[15] and the interim government was dissolved by the democratically-elected National Assembly of Venezuela in December 2022.[16] During the

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rule [https://perma.cc/2BJF-DSKA]; Ana Vanessa Herrero, *Venezuela Opposition Declares Maduro Illegitimate, and Urges Defections*, N.Y. TIMES (Jan. 15, 2019), https://www.nytimes.com/2019/01/15/world/americas/guaido-maduro-venezuela.html [https://perma.cc/6ZJE-2QGN]; Evan Ellis, *The Struggle for Control of Occupied Venezuela*, CTR. FOR STRATEGIC & INT'L STUDS. (Jan. 23, 2019), https://www.csis.org/analysis/struggle-control-occupied-venezuela [https://perma.cc/4DZZ-R7JV].

14. *See generally* Helmut Philipp Aust, *Die Anerkennung von Regierungen: Völkerrechtliche Grundlagen und Grenzen im Lichte des Falls Venezuela* [*The Recognition of Governments: Foundations and Limits of International Law in Light of the Venezuela Case*], 80 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [HEIDELBERG J. INT'L L.] 73 (2020) (Germany); Claudia Zilla, *Venezuela, die Region und die Welt: Stationen für möglichen Ausweg aus der Krise* [*Venezuela, the Region and the World: Steps for a Possible Way Out of the Crisis*], (SWP-Aktuell, 14/2019) Stiftung Wissenschaft und Politik - SWP- Deutsches Institut für Internationale Politik und Sicherheit [Foundation for Sci. & Pol. -SWP- Ger. Inst. for Int'l & Sec. Affs.] (2019); Donald R. Rothwell, *The Barely-Noticed Momentous Change to Australian Foreign Policy*, THE INTERPRETER (Feb. 14, 2019), https://www.lowyinstitute.org/the-interpreter/barely-noticed-momentous-change-australian-foreign-policy [https://perma.cc/MNV4-R3WH]; Katie Rogers, '*You Shouldn't Be Here': U.S. Pushes U.N. to Pull Venezuela Envoy's Credentials*, N.Y. TIMES, Apr. 11, 2019, at A9; Scott R. Anderson, *What Does It Mean for the United States to Recognize Juan Guaidó as Venezuela's President?*, LAWFARE (Feb. 1, 2019), https://www.lawfareblog.com/what-does-it-mean-united-states-recognize-juan-guaid%C3%B3-venezuelas-president [https://perma.cc/Y9T3-WQYT]; Sebastián Mantilla Blanco, *Rival Governments in Venezuela: Democracy and the Question of Recognition*, VERFASSUNGSBLOG (Jan. 28, 2019), https://verfassungsblog.de/rival-governments-in-venezuela-democracy-and-the-question-of-recognition/ [https://perma.cc/9EBQ-YTF4].

15. For instance, the Lima Group and the European Union each reversed or otherwise downgraded their de facto recognition of Mr. Guaidó as the interim president of Venezuela in January 2021. Michael Stott, *EU Drops Recognition of Juan Guaido's as Venezuela's Interim President*, FIN. TIMES (Jan. 6, 2021), https://www.ft.com/content/aa372f3a-a1ac-41da-848a-46355fc3ec4f [https://perma.cc/8TA5-CX4L]. Brazil re-established diplomatic relations with the Maduro Government in 2023. *Nueva era de diálogo: Brasil reestablece relaciones diplomáticas con Venezuela* [New era of dialogue: Brazil reestablishes diplomatic relations with Venezuela], EL ARGENTINO DIARIO [THE DAILY ARG.] (Jan. 15, 2023), https://elargentinodiario.com.ar/mundo/15/01/2023/nueva-era-de-dialogo-brasil-reestablece-relaciones-diplomaticas-con-venezuela/ [https://perma.cc/K6WV-ZPP6].

16. Isayen Herrera and Genevieve Glatsky, *Juan Guaidó Is Voted Out as Leader of Venezuela's Opposition*, N.Y. TIMES (Dec. 30, 2022), https://www.nytimes.com/2022/12/30/world/americas/venezuela-opposition-juan-guaido.html [https://perma.cc/W6CX-PYJ8]. The National Assembly voted to dissolve the Guaidó Government and instead appointed a five-member commission to manage the State's assets held in other

period in which rival governments existed in Venezuela, the State was the respondent to a contentious ICJ proceeding instituted by Guyana,[17] raising questions as to the government entitled to represent the State.

Thus far and in both cases, the Court has declined to engage with questions related to the parties' representation, generating uncertainty as to whether the Court has the power to resolve such questions and, if so, what approach it should adopt. This lack of certainty prompted Judge *ad hoc* Kress, in his Separate Opinion on Preliminary Objections in the *Rohingya Genocide Case*, to observe that:

> I have been left wondering whether it might be appropriate for the Court to reflect on how it deals with factual and legal difficulties in identifying the government of a given State for the purposes of representation in proceedings before the Court, with a view to exploring possible improvements in this regard in the future.[18]

It is therefore clear that a lacuna has developed at the intersection of recognition, representation, and international dispute settlement; a lacuna that, to invoke the late British barrister and academic

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jurisdictions. Mayela Armas, *Venezuela Opposition Removes Interim President Guaido,* REUTERS (Dec. 30, 2022), https://www.reuters.com/world/americas/venezuela-opposition-removes-interim-president-guaido-2022-12-31 [https://perma.cc/4AHL-GHF5]. At the time this Article was being prepared for press, it remained unclear whether that Commission, or some other body, would attain the status of a "rival government" in the eyes of the international community. For instance, a spokesperson for the United States National Security Council advised that the Venezuelan opposition would continue to be recognized by the United States "regardless of what form it takes." *Id.*; Tracy Wilkinson, *U.S. Looks for Opportunity in Demise of Guaidó, Whom it Recognized as 'Interim President' of Venezuela*, L.A. TIMES (Jan. 5, 2023), https://www.latimes.com/world-nation/story/2023-01-05/guaido-ouster-venezuela-united-states-opportunities [https://perma.cc/P8K4-38M8] ("Washington will work with whatever entity replaces Guaidó and the so-called interim government . . . ."). A U.S. Department of State official told reporters in January 2023 that "[t]he National Assembly is currently in the midst of making internal decisions regarding its own leadership, so [the United States is] going to wait and see how that plays out." Dave Lawler, *U.S. No Longer Recognizes Guaidó as Venezuela's President, Biden Official Confirms,* AXIOS (Jan. 4, 2023), https://www.axios.com/2023/01/04/us-stops-recognizing-juan-guaido-venezuela [https://perma.cc/Q84X-U3LA]. Given the present lack of clarity as to whether a rival government exists in opposition to that led by President Maduro following the dissolution of the interim government, in this Article I refer out of convenience in the past tense to the time at which rival governments undoubtedly existed in Venezuela, being the period 2019–2022.

17. Arbitral Award of 3 October 1899 (Guy. v. Venez.), Jurisdiction, 2020 I.C.J. 455 (Dec. 18). These proceedings remain on foot.

18. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Judgement, ¶ 5 (July 22, 2022) (separate opinion by Kress, J.), https://www.icj-cij.org/public/files/case-related/178/178-20220722-JUD-01-02-EN.pdf [https://perma.cc/F3GF-G2ZL].

Sir Ian Brownlie's characterization of recognition in general, is "a *tertium quid*, which stands, like a bank of fog on a still day, between the observer and the contours of the ground which calls for investigation."[19] To dispel some of this fog, in this Article I investigate the legal and procedural bases on which the Court may resolve questions regarding the recognition and representation of rival governments. While any international court or tribunal—whether formed by treaty or contract—may be called upon to quell similar questions of recognition and representation,[20] the ICJ, by virtue of its constitution and role as "the principal judicial organ of the United Nations,"[21] occupies a sui generis status in the international system vis-à-vis other standing and ad hoc international courts and tribunals.[22] It is for this reason that this Article confines itself to consideration of the issue of rival governments before the World Court. However, the insights within this Article are relevant to questions concerning rival governments before other international courts and tribunals.

Surveying the past practice of the ICJ, its predecessor, the Permanent Court of International Justice (PCIJ), as well as that of other

19. Ian Brownlie, *Recognition in Theory and Practice*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY 107, 107 (Ronald St. J. Macdonald & Douglas Millar Johnston eds., 1983).

20. While outside the scope of this thesis, the International Criminal Court may have to deal with such a question in relation to Myanmar, with the NUG declaring that it has, in the name of the State of Myanmar, accepted the jurisdiction of that court over international crimes committed in Myanmar since 2002 pursuant to the Rome Statute of the International Criminal Court art. 12, ¶ 3, July 17, 1998, 2187 U.N.T.S. 3. *Press Release (13/2021)*, Nat'l Unity Gov't of the Republic of the Union of Myan. (Aug. 20, 2021). *See generally* Antonia Mulvey, *Symposium on the Current Crisis in Myanmar: New Communication to the International Criminal Court Calls for Justice for Victims and Survivors of Crimes Committed by Myanmar's Military over Past Two Decades*, OPINIO JURIS (Aug. 29, 2021), http://opiniojuris.org/2021/09/29/symposium-on-the-current-crisis-in-myanmar-new-communication-to-the-international-criminal-court-calls-for-justice-for-victims-and-survivors-of-crimes-committed-by-myanmars-military-over-pas/ [https://perma.cc/JZ33-FAW4]; Communication from Legal Action Worldwide to the Prosecutor of the International Criminal Court, Regarding the Declaration by the National Unity Government of Myanmar Accepting the Court's Jurisdiction (Sept. 13, 2021), https://www.legalactionworldwide.org/wp-content/uploads/Rohingya-LAW-Press-Release-1-2.pdf [https://perma.cc/MU6H-7FPU]; FORTIFY RIGHTS, ENDING IMPUNITY IN MYANMAR: CAN THE NATIONAL UNITY GOVERNMENT OF MYANMAR DELEGATE JURISDICTION TO THE INTERNATIONAL CRIMINAL COURT? A LEGAL ANALYSIS (Aug. 2021), https://www.fortifyrights.org/downloads/Ending%20Impunity%20in%20Myanmar%20-%20Fortify%20Rights%20-%20August%202021.pdf [https://perma.cc/3XVV-V5PM].

21. Statute of the International Court of Justice art. 1, June 26, 1945, 33 U.S.T. 993 [hereinafter Statute of the ICJ]; U.N. Charter art. 92.

22. Karin Oellers-Frahm, *Article 92*, *in* 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1897, 1911 (Bruno Simma et al. eds., 2012).

international courts and tribunals,[23] I argue that the Court has a demonstrated power under international procedural law to determine the representation of rival governments. However, a formalist application of procedural law does not explain the behavior of international courts and tribunals, which have exhibited patterns of resistance in eschewing determination of questions of representation and recognition. Conscious of the serious normative implications that may arise from engaging with questions of high politics,[24] with which the concept of recognition is intimately entwined, I find that the ICJ and other international courts and tribunals have developed a series of "avoidance techniques," much like Alexander Bickel's "passive virtues,"[25] to facilitate this resistance. I conclude that while the adoption of such avoidance techniques may be a sensible approach to the extent they minimize the harmful normative impacts that arise from the determination of highly political questions, the Court, mindful of its status and institutional function as an arbiter of international justice, should not shy away from assessing the indicia of government and making subsequent procedural orders on the representation of the parties when necessary to prevent the frustration of its jurisdiction. In so doing, I argue that the Court should apply long-standing principles of international law and make assessments of governmental status by applying the effective control test, which provides that the government competent to represent the State in its international affairs is the government with

23. This precedent may influence the Court, though will not bind it. *See* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, 1998 I.C.J. 275, ¶¶ 29–31 (June 11); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Preliminary Objections, 2008 I.C.J. 412, ¶¶ 52–53 (Nov. 18); Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), Judgment, 1992 I.C.J. 351, ¶¶ 403–05 (Sept. 11); Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Merits, 2010 I.C.J. 639, ¶¶ 67–69 (Nov. 30); Vladyslav Lanovoy, *The Authority of Inter-State Arbitral Awards in the Case Law of the International Court of Justice*, 32 LEIDEN J. INT'L L. 561, 563 (2019). *See generally* Thomas Buergenthal, *Lawmaking by the ICJ and Other International Courts*, 103 PROC. ANN. MEETING AM. SOC'Y INT'L L. 403 (2009); Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L DISP. SETTLEMENT 5 (2011).

24. These implications are discussed in greater detail in Section IV.B and include the fragmentation of the international system, compromising the institutional legitimacy of the Court, and providing valuable legitimacy to one of the rival governments seeking to control the proceedings. For Hirschl's conception of "mega-politics," see generally Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93 (2008).

25. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 201 (2d ed. 1986); Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 77 (1961).

control over the instrumentalities of the State.[26] However, in light of the negative normative implications that may arise from such an approach, the question of who may represent the State with rival governments is likely to depend less on the Court's procedural and legal authority and more on its willingness to decide.

This Article proceeds as follows. In Part I, I outline why the issue of rival governments creates a problem for the Court. In Part II, I consider whether the Court has the jurisdiction to decide such questions of representation, detailing the procedural powers on which the Court may rely. In Part III, I survey the practice of the ICJ and other international courts and tribunals, creating a taxonomy of the avoidance techniques that have been adopted to resist making assessments of governmental status. In Part IV, I turn to the substantive law that the Court could apply to questions of recognition and the normative implications that would arise if it were to resolve such questions. The final Part concludes.

I. RIVAL GOVERNMENTS IN INTERNATIONAL LAW

Changes of government, regardless of how they occur or the legality of their origin, are generally of no great consequence or consternation in international law, as a change of government does not interrupt the legal continuity of the State.[27] The "new" government will inherit the rights, obligations and duties of its predecessor,

26. *See infra* Part IV.

27. As the saying goes, "The King is dead, long live the King!" HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 70 (1836) ("[I]nternal revolution, merely altering the municipal constitution and form of government, the state remains the same; it neither loses any of its rights, nor is it discharged from any of its obligations.") (citing 2 HUGO GROTIUS, ON THE LAW OF WAR AND PEACE ch. 9, ¶ 8 (J Barbeyrac trans., 1738)); PHILLIP C. JESSUP, A MODERN LAW OF NATIONS: AN INTRODUCTION 43 (1948); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 34 (2d ed. 2006) [hereinafter CRAWFORD, CREATION OF STATES]; KRYSTYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 24 (1968); TI-CHIANG CHEN, THE INTERNATIONAL LAW OF RECOGNITION WITH SPECIAL REFERENCE TO PRACTICE IN GREAT BRITAIN AND THE UNITED STATES 97 (1951); JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 141 (8th ed. 2019) [hereinafter CRAWFORD, BROWNLIE'S PRINCIPLES]; FRANK P. MORELLO, THE INTERNATIONAL LEGAL STATUS OF FORMOSA 74 (1966); M.J. PETERSON, RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE, 1815–1995, 20 (1997); BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 129 (2000); HANS KELSEN, GENERAL THEORY OF LAW AND STATE 221 (2009); GILLIAN D. TRIGGS, INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PRACTICES 251 (2d ed. 2011); ROBERT JENNINGS & ARTHUR WATTS, 1 OPPENHEIM'S INTERNATIONAL LAW 146 (9th ed. 2008).

including the status of a "government"[28] and, therefore, the ability to represent the State.[29] As ICJ President Joan E. Donoghue noted in the oral hearing on preliminary objections in the *Rohingya Genocide Case*, "the parties to a contentious case before the Court are States, not particular governments. The Court's judgments and its provisional measures orders bind the States that are parties to a case."[30] Accordingly, as legal academic Jochen A. Frowein observes, "there must be a special reason for the issue of recognition of a new government to arise at all."[31]

Such a "special reason" arises where a government accedes by extra-legal or extra-constitutional means, and the deposed government persists in claiming to be the "legitimate" government of the State. This issue morphs from an internal political dispute to an issue of international law because States "are abstract collective entities unable to accomplish anything except through designated human agents."[32] Governments are those agents, "possessing the *jus repraesentationis omnimodae*, i.e., the plenary and exclusive competence in international law to represent its State in the international sphere."[33] Given that the

28. Moore called this the "principle of the continuity of states." 1 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 249 (1908); *see also* 1 LOUIS CAVARÉ, LE DROIT INTERNATIONAL POSITIF [POSITIVE INTERNATIONAL LAW] 372 (2d ed. 1961); Bolivar Railway Claim (Gr. Brit. v. Venez.), Merits, 9 R.I.A.A. 445, 447 (Mixed Claims Comm'n 1903); Dreyfus (Fr. v. Chile), *in* BARON DESCAMPS & LOUIS RENAULT, RECUEIL INTERNATIONAL DES TRAITÉS DU XXE SIÈCLE [INTERNATIONAL COLLECTION OF 20TH CENTURY TREATIES] 398 (1903) (Fr.-Chile Arb. Trib., July 7, 1901); George W. Hopkins v. United Mexican States (U.S. v. Mex.), 4 R.I.A.A. 41, 45 (U.S./Mex. Gen. Claims Comm'n 1926); Aguilar-Amory and Royal Bank of Can. Claims (Gr. Brit. v. Costa Rica) 1 R.I.A.A. 369, 379–80 (Oct. 18, 1923) [hereinafter Tinoco Arbitration].

29. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 284–85 (1952).

30. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Verbatim Record, 11 (Feb. 21, 2022), (President Donoghue), https://www.icj-cij.org/public/files/case-related/178/178-20220221-ORA-01-00-BI.pdf [https://perma.cc/6UAY-WP3N].

31. Jochen A Frowein, *Recognition*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 14 (Anne Peters ed., Dec. 2010); *see also* KELSEN, *supra* note 29, at 279 ("Recognition of government . . . comes into consideration only in case of a new government, that is to say, a government established by revolution or *coup d'état*. In case of changes in the government established in conformity with the constitution, as a rule, no recognition is required or granted.").

32. PETERSON, *supra* note 27, at 1; *see also* ROTH, *supra* note 27, at 8.

33. STEFAN TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE 115 (1997); *see also* CHEN, *supra* note 27, at 103–04; CRAWFORD, BROWNLIE'S PRINCIPLES, *supra* note 27, at 141; 1 JENNINGS & WATTS, *supra* note 27, at 148; PETERSON, *supra* note 27, at 20 (arguing that the principle of

exercise of such competence is an exclusive right of the government, it follows that there can only be one government capable of representing the State.[34] Accordingly, the existence of rival governments creates a prima facie recognition issue, requiring the international community to determine "which of the two rival authorities qualifies as the State's government in international law."[35] This issue confronts every subject of international law, most notably States and international organizations, each of whom are required to make their own individual recognition decisions for the purpose of identifying the government with which they will share diplomatic relations. In this Article, I focus on the distinct issues facing the international dispute settlement system.

A. The Issue for International Dispute Settlement

The government of a State plays an essential and fundamental role in international dispute settlement. As the PCIJ remarked in *German Settlers in Poland*, "States can act only by and through their agents and representatives."[36] States have the power to organize these agents and representatives as they see fit.[37] It follows that where a

government monopoly over the exercise of the State's international functions was "well established by 1815.").

34. Jansen v. Mexico (U.S. v. Mex.) 29 R.I.A.A. 159, 184–85 (Mixed Comm'n 1868) ("[T]here can be but one government in the same state at the same time."); TALMON, *supra* note 33, at 105, 189; TRIGGS, *supra* note 27, at 259; MORELLO, *supra* note 27, at 96. This principle is also well-recognized in domestic law. *See, e.g.*, N.Y. Chinese TV Programs v. UE Enters., 954 F.2d 847 (2d Cir. 1992); Gdynia Ameryka Linie Zeglugowe Spolka Akcyjna v Boguslawski, [1952] 2 All E.R. 470, 480 (Eng.) (Lord Reid).

35. TALMON, *supra* note 33, at 183; *see also* ROTH, *supra* note 27, at 253; 1 JENNINGS & WATTS, *supra* note 27, at 178.

36. Settlers of German Origin in the Territory Ceded by Germany to Poland, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6, at 22 (Sept. 10); *see also* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, 2011 I.C.J. 70, ¶ 37 (Apr. 1) ("[I]n international law and practice, it is the Executive of the State that represents the State in its international relations and speaks for it at the international level . . . ."); Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Uganda), Jurisdiction and Admissibility, 2006 I.C.J. 6, ¶ 46 (Feb. 3) (arguing that "it is a well-established rule of international law that the Head of State, the Head of Government, and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions").

37. Affaire des navires Cape Horn Pigeon, James Hamilton Lewis, CH White et Kate and Anna [Case concerning the Ships "Cape Horn Pigeon," "James Hamilton Lewis," "CH White," and "Kate and Anna"] (U.S. v. Russ.) 9 R.I.A.A. 51 (1902); International Court of Justice, Rules of Court (Apr. 14, 1978) art. 42, ¶ 2, 2021 I.C. Acts & Docs. 117 [hereinafter

change of government occurs, the incoming government has the right to reorganize its legal team[38] and agent(s),[39] and to alter its legal

ICJ Rules]; Shabtai Rosenne, *International Court of Justice: Practice Directions on Judges ad hoc; Agents, Counsel and Advocates; and Submission of New Documents*, 1 LAW & PRAC. INT'L CTS. & TRIBUNALS 223, 226 (2002) ("[I]t has been axiomatic in the law of international organizations that the organization has no say as regards the person chosen by any Government to represent it in any organ of the organization . . . ."); Franklin Berman, *Article 42*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1078, 1078 (Andreas Zimmermann et al. eds., 2d ed. 2012). *But see infra* Section III.B.1.

38. Though not undertaken by a new government, Pakistan reorganized its legal team following the provisional measures phase of the proceedings in Jadhav (India v. Pak), Order, 2017 I.C.J. 231 (May 18), and Jadhav (India v. Pak), Merits, 2019 I.C.J. 418 (July 19). Shailaja Neelakantan, *Kulbhushan Jadhav Case: Under-Fire Pakistan Government to Get New Lawyers for ICJ Case*, TIMES OF INDIA (May 19, 2017), https://timesofindia.indiatimes.com/india/kulbhushan-jhadav-case-under-fire-pakistan-government-to-get-new-lawyers-for-icj-case/articleshow/58745668.cms [https://perma.cc/VL2K-E8V9]. Kenya similarly reorganized its legal team in its dispute against Somalia in the period between the submission of its rejoinder and the oral hearings on the merits. *See* Maritime Delimitation in the Indian Ocean (Som. v. Kenya), Application Requesting the Court to Authorize Kenya to File New Documentation and Evidence, ¶ 8 (Feb. 22, 2021), https://www.icj-cij.org/public/files/case-related/161/161-20210222-OTH-01-00-EN.pdf [https://perma.cc/UK6Q-2R2E]; Maritime Delimitation in the Indian Ocean (Som. v. Kenya), Judgment, 2021 I.C.J. 206, ¶ 13 (Oct. 12); Aggrey Mutambo, *ICJ Postpones Kenya-Somalia Case to November to Allow Nairobi Seek New Legal Team,* EAST AFRICAN (Sept. 6, 2019), https://www.theeastafrican.co.ke/tea/news/east-africa/icj-postpones-kenya-somalia-case-to-november-to-allow-nairobi-seek-new-legal-team-1426530 [https://perma.cc/NH3A-REGZ].

39. Such a practice is a necessity, considering that "[s]ometimes, the agent is the very Head of State, Prime Minister, or the Minister for Foreign Affairs." Marco Longobardo, *States' Mouthpieces or Independent Practitioners? The Role of Counsel before the ICJ from the Perspective of the Legal Value of their Oral Pleadings*, 20 LAW & PRAC. INT'L CTS. & TRIBUNALS 54, 57 (2021). For instance, Touré Aminata Djibrilla Maïga, then-Minister for Foreign Affairs of Niger in the transitional government of the Supreme Council for the Restoration of Democracy, is listed as agent in the *compromis* seising the ICJ of the dispute between Burkina Faso and Niger. Compromis, Frontier Dispute (Burk. Faso/Niger) (July 20, 2010). However, following the election of the Issoufou Government, Maïga's successor, Mohamed Bazoum, replaced her as agent. Frontier Dispute (Burk. Faso/Niger), Judgment, 2013 I.C.J. 44, at 47 (Apr. 16). Similar changes occurred in relation to Burkina Faso's agent in that case.

strategy,[40] possibly by discontinuing the proceedings entirely.[41] For instance, following the election of the U.S.-backed Chamorro Government, Nicaragua discontinued its claim in Military and Paramilitary Activities,[42] a case that had been instituted against the United States by the Ortega/Sandinista Government, in exchange for an aid package.[43]

However, where more than one government seeks to represent the State before the ICJ, it becomes necessary to determine the government entitled to exercise control over the proceedings. As political scientist Professor M.J. Peterson has argued, "[n]o legal system can function properly without identifying its various types of legal person and the agents (if any) entitled to act on their behalf."[44] To this end, failing to identify the government entitled to represent the State may

40. *See, e.g.*, CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 404 (2004) (noting that a non-responding respondent State may change its position if "there is a shift at the domestic level, such as a new government"). Antonio Remiro Brotóns, counsel for Spain in Fisheries Jurisdiction (Spain v. Can.), Judgment, 1998 I.C.J. 432 (Dec. 4), noted that while Aznar's Partido Popular [People's Party], which defeated the González Government that had instituted the proceedings, "did not dare to drop the action . . . it assumed it as a burden inherited from the Socialist government and either did not know how or did not want to make the most of it." Antonio Remiro Brotóns, *The International Legal Consultancy of Governments from the Outside*, *in* THE LEGAL PRACTICE IN INTERNATIONAL LAW AND EUROPEAN COMMUNITY LAW: A SPANISH PERSPECTIVE 489, 516 (Carlos Jimenez Piernes ed., 2007); *see also* Vojin Dimitrijević & Marko Milanović, *The Strange Story of the Bosnian Genocide Case*, 21 LEIDEN J. INT'L L. 65, 77 (2008) (noting that the Federal Republic of Yugoslavia "decided to change fundamentally its approach to the Genocide case . . . a total change in litigation strategy" following a "period of political flux").

41. 2 HUGH THIRLWAY, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE 1879 (2013).

42. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Order, 1991 I.C.J. 47 (Sept. 26).

43. *See* Fernando Lusa Bordin, *The* Nicaragua v. United States *Case: An Overview of the Epochal Judgments*, *in* NICARAGUA BEFORE THE INTERNATIONAL COURT OF JUSTICE: IMPACTS ON INTERNATIONAL LAW 59, 79–80 (Edgardo Sobenes Obregon & Benjamin Samson eds., 2018); Mark A Uhlig, *US Urges Nicaragua to Forgive Legal Claim*, N.Y. TIMES, Sept. 30, 1990, at 8; SCHULTE, *supra* note 40, at 205–07. This case is not the only example of a new government withdrawing action before the ICJ instituted by a previous government. For instance, Malaysia discontinued its application for revision of the ICJ judgment issued in relation to its sovereignty dispute with Singapore following a change of government, in what was seen as a "surprise move." *See* Abdul Ghafur Hamid & Khin Maung Sein, *Malaysia*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ASIA AND THE PACIFIC 458, 466 (Simon Chesterman, Hisashi Owada & Ben Saul eds., 2019); Application for Revision of the Judgment of 23 May 2008 in the Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.), Order, 2018 I.C.J. 284 (May 29).

44. PETERSON, *supra* note 27, at 1.

result in a "procedural halt,"[45] preventing the Court from exercising its essential function of settling disputes[46] and undermining the status of the Court as an arbiter of international justice. In such cases, as Professor Robert Kolb notes, "the Court [is] caught, as the organs of the United Nations often are, in the crossfire between rival groups both of them claiming to be the subject government."[47]

The interests of the States party to the dispute also necessitate the resolution of this procedural question. Not only do all parties have an interest in the efficient resolution of disputes, but the exercise of control over the proceedings is also tantamount to the State's sovereignty as a subject of international law.[48] As former ICJ judge Sir Hersch Lauterpacht noted:

> [I]t is a fundamental rule of international law that every independent state is entitled to be represented in the international sphere by a government which is habitually obeyed by the bulk of the population of that state and which exercises effective control within its territory.

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45. Air Canada v. Bolivarian Republic of Venez, ICSID Case No. ARB(AF)/17/1, Procedural Order No. 7, ¶ 28 (May 28, 2019) [hereinafter Air Canada Procedural Order No. 7] (cited in Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Venez., ICSID Case No. ARB/13/11, Procedural Resolution No. 2, ¶ 33 (Aug. 29, 2019)).

46. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, ¶ 41 (May 24); Border and Transborder Armed Actions (Nicar. v Hond.), Jurisdiction and Admissibility, 1988 I.C.J. 69, ¶ 52 (Dec. 20); Military and Paramilitary Activities (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 I.C.J. 392, ¶ 94 (Nov. 26). For commentary, see Gerald Fitzmaurice, *Hersch Lauterpacht: The Scholar as Judge*, 37 BRIT. Y.B. INT'L L. 1, 41 (1961); Pieter Koojimans, *The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy*, 56 INT'L COMPAR. L.Q. 741, 749 (2007); Robert Y. Jennings, *The Role of the International Court of Justice* 68 BRIT. Y.B. INT'L L. 1, 4 (1992); Joe Verhoeven, *À propos de la fonction internationale de juger et droit international public* [*About the International Function of Judging and Public International Law*], *in* FONCTION DE JUGER ET POUVOIR JUDICIAIRE: TRANSFORMATIONS ET DÉPLACEMENTS [JUDICIAL FUNCTION AND JUDICIAL POWER: TRANSFORMATIONS AND DISPLACEMENTS] 447, 466 (Philippe Gérard, François Ost & Michel van de Kerchove eds., 1983); GLEIDER I. HERNÁNDEZ, THE INTERNATIONAL COURT OF JUSTICE AND THE JUDICIAL FUNCTION 291 (2014); Rotem Giladi & Yuval Shany, *The International Court of Justice*, *in* ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS 161, 164–65 (Yuval Shany ed., 2014); MALCOLM N. SHAW, 1 ROSENNE'S LAW AND PRACTICE OF THE INTERNATIONAL COURT: 1920–2015, at 163 (5th ed. 2016).

47. KOLB, *supra* note 9, at 159.

48. HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 87, 142 (1st ed. 1947); CHEN, *supra* note 27, at 103–04 ("As the government is the sole organ through which a State expresses its will, the refusal to recognise and to deal with it would deprive the State of the means of exercising its international rights . . . ."); SATYAVRATA RAMDAS PATEL, RECOGNITION IN THE LAW OF NATIONS 2–3 (1959).

> *To deny that right to a state is to question its independence*.[49]

There is a distinct possibility that, without the ability to appoint an agent, and without control over the State's conduct of the proceedings, the State may become bound by obligations that the putative government may otherwise have sought to avoid. These obligations arise both from any judgment rendered, which is final and binding notwithstanding the identity of the government representing the State,[50] as well through the conduct of its agent(s) and counsel, who may give unilateral undertakings during the course of proceedings or otherwise act in a way that generates the *opinio juris* necessary for the crystallization of new rules of customary international law.[51] While the binding nature of these obligations is not dependent on the legality or origin of the putative government,[52] dealings by an international court or

49. LAUTERPACHT, *supra* note 48, at 87 (emphasis added).

50. Statute of the ICJ, *supra* note 21, arts. 59–60; U.N. Charter art. 94; *see also* Tinoco Arbitration, *supra* note 28 (finding that a successor government was legally responsible for the obligations incurred by an unconstitutional predecessor that had been denied international recognition, but that had "established itself in such a way that all within its influence recognized its control").

51. Georges Pinson (Fr. v. United Mex. States), Decision No 1, 5 R.I.A.A. 327, 355 (Oct. 19, 1928) ("les agents doivent être considérés . . . non comme de simples avocats, ayant liberté d'énoncer toute sorte d'opinions personnelles, quand bien même ces opinions seraient en contradiction avec l'opinion de leur Gouvernement, mais comme les représentants officiels de ce dernier" ["the agents should be considered . . . not merely as lawyers, having freedom to express all kinds of personal opinions, even if these opinions would be in contradiction with the opinion of their Government, but as the official representatives of the latter"]); Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belg. v. Spain), Preliminary Objections, 1964 I.C.J. 6, at 23 (July 24); Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Merits, 1926 P.C.I.J. (ser. A) No. 7, at 13 (May 25); Mavrommatis Palestine Concessions (Greece v Gr. Brit.), Jurisdiction, 1924 P.C.I.J. (ser. A) No. 2, at 15 (Aug. 30); Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), Judgment, 1932 P.C.I.J. (ser. A/B) No. 46, at 96 (June 7); Pulp Mills on the River Uruguay (Arg. v. Uru.), Provisional Measures, 2006 I.C.J. 113, ¶¶ 82–85 (July 13); Rosenne, *supra* note 37; 3 SHAW, *supra* note 46, at 1156 (the agent "engage[s] the responsibility of the Government that he or she is representing"); Longobardo, *supra* note 39, at 65–70 ("[T]here is no doubt that the Court takes [counsel's] words as the official position of the litigating States, rather than as private opinions."); James Crawford, Alain Pellet & Catherine Redgwell, *Anglo-American and Continental Traditions in Advocacy before International Courts and Tribunals*, 2 CAMBRIDGE J. INT'L & COMPAR. L. 715, 724 (2013); EVA KASSOTI, THE JURIDICAL NATURE OF UNILATERAL ACTS OF STATES IN INTERNATIONAL LAW 142–78 (2015).

52. Tinoco Arbitration, *supra* note 28 (finding that a successor government was legally responsible for the obligations incurred by an unconstitutional predecessor that had been denied international recognition, but that had "established itself in such a way that all within its influence recognized its control"); *see also* Application of the Convention on the Prevention

tribunal with a government of contested efficacy could have normative implications on the legitimacy of and respect for international law and the Court, above and beyond the right of the State to procedural fairness and natural justice.

In addition, leaving the question of representation open is likely to also impact the ability of the other State party to the dispute to obtain a fair trial, requiring that State "to answer to several potentially different positions that the competing governments might have in the proceedings."[53] Accordingly, not only is the identification and determination of the government entitled to represent the State important on a normative basis to ensure the provision of procedural fairness to the States party to the proceedings, but it is also necessary to prevent the frustration of the Court's jurisdiction and to enable it to settle legal disputes of which it is seised.

B. The Nature of the Adjudicative Task

In determining the government entitled to represent the State in judicial proceedings, the Court is not required to decide, as a matter of substantive law, which entity is the "legitimate" government of the State. I refer to such a determination as a "substantive decision." Rendering such a substantive decision would result in a final determination as to the legal rights, status, or legitimacy of a government vis-à-vis its rival, as if the Court were seised to determine such a dispute on the merits. The making of such a substantive decision sits uncomfortably with the Court's role and jurisdiction. If one accepts that the question of the State's internal governance is within the remit of the internal affairs of the State, then it follows that the Court, which is concerned "with the application of rules of law,"[54] not with the internal political disputes of States,[55] is unlikely to possess the requisite jurisdiction *ratione materiae* to finally determine the government of the State.

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and Punishment of the Crime of Genocide (Gam. v. Myan.), Verbatim Record, 11 (Feb. 21, 2022), (President Donoghue), https://www.icj-cij.org/public/files/case-related/178/178-20220221-ORA-01-00-BI.pdf [https://perma.cc/6UAY-WP3N].

53. Réka A. Papp, *Representation of States in Investment Arbitrations Involving Governments Competing for International Recognition*, *in* INVESTMENTS IN CONFLICT ZONES 246, 265 (Tobias Ackermann & Sebastian Wuschka eds., 2020).

54. Fr. v. Switz., 1932 P.C.I.J. at 162.

55. Such a view derives from U.N. Charter art. 2, ¶ 7. *See also* Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24–25; Council of the League of Nations, *Report of the International Committee of Jurists Entrusted by the Council of the Legal of Nations with the Task of Giving an Advisory Opinion upon the Legal*

Instead, the question for the Court is strictly procedural in nature, aimed at identifying the entity the Court should listen to for the purpose of progressing the dispute, which I refer to as an "assessment of governmental status." Such an approach requires the Court to apply principles of substantive international law, but the decision to which the Court comes does not have legal effect beyond the mechanics of the proceedings. As one International Centre for the Settlement of Investment Disputes (ICSID) Annulment Committee reasoned:

> [T]he Committee cannot decide, with effect *erga omnes*, which is [the State's] legitimate representative. The Committee's task in this case has a much more limited scope, as it is a matter of determining who can speak on behalf of [the State] . . . . the question that the Committee must ask is the following: *who should the Committee listen to in the following procedural steps? . . . Thus raised, the question is purely of a procedural nature . . . .*[56]

Aspects of the Aaland Islands Question, *in* 3 LEAGUE OF NATIONS OFFICIAL JOURNAL SPECIAL SUPPLEMENT 5–7 (1920).

56. Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Venez., ICSID Case No. ARB/13/11, Procedural Resolution No. 2, ¶¶ 31–32 (Aug. 29, 2019) (emphasis added); *see also* ConocoPhillips Pertozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Venez., ICSID Case No. ARB/07/30, Order on the Applicant's Representation, ¶ 29 (Apr. 3, 2020):

> [T]here is no question that Venezuela is the proper identity of the State applying for annulment in these proceedings. The Parties do not seriously dispute that the Committee, which is neither a political body nor the deliberative organ of an International Organization, cannot hear—and decide—a political question, such as the legitimate government of Venezuela.

ConocoPhillips Pertozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Venez., ICSID Case No. ARB/07/30, Decision on Rectification, ¶ 25 (Aug. 29, 2019); ConocoPhillips Pertozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Venez., ICSID Case No. ARB/07/30, Recommendation of Lord Phillips, ¶ 90 (July 10, 2020):

> [I]n all these cases, the decision on representation has been treated as resolving a procedural, not substantive issue. The Tribunals and Committees have not purported to determine who, as a matter of law, is entitled to represent Venezuela. They have been concerned with the procedural question of whom they will permit to make representations on behalf of Venezuela.

Kimberly-Clark Dutch Holdings, B.V., Kimberly-Clark S.L.U., and Kimberly-Clark B.V.B.A. v Venez., ICSID Case No. ARB(AF)/18/3, Order on Venezuela's Representation (Oct. 15, 2019) (cited in ConocoPhillips Pertozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Venez., ICSID Case No. ARB/07/30, Recommendation of Lord Phillips, ¶ 38 (July 10, 2020) ("the question before the Tribunal is not who the proper party to this arbitration is. It is merely which lawyers can represent Venezuela's interests in this arbitration . . . . In other words it is a procedural issue.")); Venezuela Holdings, B.V.,

To this end, the Court's procedural role can be thought of as conceptually similar to the prescription of provisional measures; while the prescription of such measures involves the application of the substantive principles of international law related to the dispute in question, it does not prejudge any decision on jurisdiction or the merits. Separating out procedural and substantive decisions on recognition may appear an abstract exercise. Both decisions involve the application of the substantive law of recognition.[57] Further, even if an international court or tribunal is loathe to emphasize that it is making a decision of a procedural nature, which does not bear on the legal status of the rival governments in question, it is likely that such a determination will have normative implications—such as those concerning both the legitimacy of the court and the rival governments—that bear great resemblance to those that may be expected of a substantive decision, further blurring the lines between the two.[58] Ultimately, while the distinction between the two types of decision-making may appear somewhat contrived, it is significant as it enables the dispute to fall within the Court's jurisdiction.

II. REPRESENTATION: INTERNATIONAL PROCEDURAL LAW

With the nature of the Court's adjudicative task established, the inquiry now turns to the procedural bases that may enable the Court to make an order as to the representation of the parties. The procedural basis for the Court's power to decide depends on when the dispute as to the proper representative of the State arises. First, where there are rival governments at the time at which the application instituting proceedings is lodged, the question is whether the seisin of the Court is valid and the proceedings properly instituted. This question could have arisen if President Maduro made good on his threat to institute proceedings against the United States to contest the latter's sanctions on Venezuelan businesses during the time in which rival governments existed in the State.[59] Second, if the change of government occurs

Mobil Cerro Negro Holding, L.L.C., and Mobil Cerro Negro, Ltd. v. Venez., ICSID Case No. ARB/07/27, Decision on the Respondent's Representation in this Proceeding, ¶ 70, (Mar. 1, 2021).

57. As to the principles of the substantive law of recognition, see *infra* Section III.A.

58. I return to this point in greater detail in Section IV.B.

59. Ministerio del Poder Popular para Relaciones Exteriores [Ministry Popular Power for Foreign Affs.], *Venezuela interpondrá demanda ante instancias jurídicas internacionales por medidas coercitivas unilaterales contra Conviasa* [*Venezuela Will Pursue Lawsuits in International Courts to Counter Ccoercive Unilateral Measures Against Conviasa*] (Media

when the proceedings are ongoing, the question is which of the rival governments is entitled to represent the State in the ongoing proceedings, requiring the Court to make a procedural order as to the representation of the State. In this Part, I discuss each of these questions in turn before considering whether the political nature of representation disputes may undercut the Court's power to decide. I resolve that the Court has the power to decide procedural questions relating to the representatives of a State at varied stages throughout the proceedings, and that the political nature of representation questions poses no legal impediment to the Court determining such questions.

A. Seisin of the Court

In its contentious jurisdiction, the ICJ may only hear inter-State disputes.[60] It therefore follows that only States may seise the Court. Given that the seisin is a diplomatic act,[61] the Rules of the ICJ (the "Rules") require that applications instituting proceedings bear the signature of the applicant State's diplomatic representative to the Netherlands, or some other person with "full powers."[62] Consequently, if the Court receives an application to institute proceedings from a person not competent to represent the State, such as a representative of a newly-emerged rival government, then the application would be of a fundamentally private character. In such cases the seisin would be invalid and the Court would be unable to entertain the case, not for any deficiency in the basis of jurisdiction invoked, but rather because of a

Release, Feb. 11, 2020) ("Vamos a buscar justicia internacional con una demanda contra el gobierno de Donald Trump . . . [por] el daño que se pretende hacer contra Conviasa y las empresas de Venezuela . . . ." ["We will seek international justice through a lawsuit against the government of Donald Trump . . . [for] the harm it intends to inflict on Conviasa and Venezuelan businesses . . . ."]), https://mppre.gob.ve/2020/02/10/venezuela-interpondra-demanda-instancias-juridicas-internacionales-conviasa/ [https://perma.cc/EU27-8LEP].

60. Statute of the ICJ, *supra* note 21, arts. 34(1), 35(1), *discussed in* Legality of the Use of Force (Serb. & Montenegro v. Neth.), Preliminary Objections, 2004 I.C.J. 1011, ¶¶ 45–46 (Dec. 15); Judgments of the Administrative Tribunal of the International Labour Organization upon Complaints Made against the United Nations Educational, Scientific and Cultural Organization, Advisory Opinion, 1956 I.C.J. 77, at 85 (Oct. 23).

61. 3 SHAW, *supra* note 46, at 1177.

62. ICJ Rules, *supra* note 37, art. 38, ¶ 3. The persons with "'full powers" are the Head of State, Head of Government and Foreign Minister. Vienna Convention on the Law of Treaties art. 7(2)(a), May 23, 1969, 1155 U.N.T.S. 331, *applied in* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Preliminary Objections, 1996 I.C.J. 595, ¶ 44 (July 11). *See* discussion in Longobardo, *supra* note 39, at 58–59.

failure to, as a matter of procedure, appropriately seise the Court.[63] In this Section, I first consider the power of the Registrar of the ICJ[64] to dismiss an invalid application, before turning to the separate question of whether the Registrar is under a duty to, *proprio motu* (or, of its own motion), inquire into the efficacy of the government purporting to institute proceedings.

1. Power to Dismiss an Invalid Application

The standard practice of the Registrar upon the receipt of an application instituting proceedings is to communicate the application to the respondent State and any other concerned party.[65] At that point, the Registrar opens a new folio in the Court's General List.[66] The Registrar is under a "statutory duty" to perform these acts,[67] and the Court will not be formally seised of the matter until this duty has been performed.[68] However, this duty is only enlivened when a *valid* application is made.[69] In determining whether an application is valid, the Registrar must be satisfied that the requirements of the Statute of the International Court of Justice ("Statute") and the Rules have been

63. Maritime Delimitation and Territorial Questions (Qatar v. Bahr.), Jurisdiction and Admissibility, 1995 I.C.J. 6, ¶ 41 (Feb. 15) ("the Court is unable to entertain a case so long as the relevant basis of jurisdiction has not been supplemented by the necessary act of seisin"); *see also* KOLB, *supra* note 9, at 179 (remarking that validly seising the Court is a "condition precedent to the Court being able to decide on the jurisdiction question"); 2 THIRLWAY, *supra* note 41, at 1629 ("[i]f it has not been seised, the 'on'-switch has never been pressed, so the machine cannot do anything at all"); *cf.* Nottebohm (Liech. v. Guat.), Merits, 1953 I.C.J. 111, at 122 (Nov. 18).

64. The Registrar is the administrative head of the Court, with wide-ranging authority to manage the Court's business, and internal and external affairs; "[t]he staff [of the Court] are under his authority, and he alone is authorized to direct the work of the Registry, of which he is the Head." Instructions for the Registry, INT'L CT. JUST. art. 1 [hereinafter Registry Instructions], https://www.icj-cij.org/sites/default/files/documents/instructions-for-the-registry-en.pdf [https://perma.cc/X8V4-ZZPT]; *see also* Statute of the ICJ, *supra* note 21, art. 21; ICJ Rules, *supra* note 37, arts. 22–29.

65. Statute of the ICJ, *supra* note 21, arts. 40(1)–(2); ICJ Rules, *supra* note 37, arts. 38(4), 39(1), 42; *see also* Registry Instructions, *supra* note 64, art. 9.

66. ICJ Rules, *supra* note 37, art. 26(1)(b); Registry Instructions, *supra* note 64, art. 5(1).

67. 2 SHAW, *supra* note 46, at 854; 3 SHAW, *supra* note 46, at 1214, 1216; *see also* 2 THIRLWAY, *supra* note 41, at 1764.

68. KOLB, *supra* note 9, at 179.

69. INTERNATIONAL COURT OF JUSTICE, HANDBOOK, at 50, U.N. Sales No. 1162, (2018) ("The Registrar, after verifying that the formal requirements of the Statute and the Rules have been complied with, transmits [the application] to the other party and to the Members of the Court . . . .").

met.[70] Professor Malcolm N. Shaw argued that this process creates "an independent and autonomous power . . . from which there is no appeal" for the Registrar to reject deficient applications.[71]

Beyond the thousands of clearly deficient or otherwise invalid applications received each year from private parties,[72] the Registrar has once rejected an application on grounds analogous to the issue of rival governments.[73] In February 2017, Mr. Softić, agent of Bosnia and Herzegovina in the *Bosnian Genocide* case,[74] applied for revision of the judgment in that case.[75] However, he had not been given "fresh" authentication by a competent person with the requisite "full powers" for the purpose of the revision proceedings, which are functionally distinct from the primary proceedings.[76] The Registrar, on the direction

70. Sienho Yee, *Article 40*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 37, 1021, 1064.

71. 3 SHAW, *supra* note 46, at 1213; *see also* KOLB, *supra* note 9, at 956; *cf.* 2 THIRLWAY, *supra* note 41, at 1766.

72. KOLB, *supra* note 9, at 267 n.381; Pierre-Marie Dupuy & Cristina Hoss, *Article 34*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 37, 662, 668–69 & n.43.

73. This is not, however, the only instance of an application instituting proceedings being rejected. Registrar Valencia-Ospina did so in relation to an application by the Government of the Federal Republic of Yugoslavia, which he considered to be so deficient in terms of its identification of the Court's jurisdiction that it could not properly constitute an "application" for the purposes of the Statute and Rules. Letter from the Registrar of the International Court of Justice to the Government of the Federal Republic of Yugoslavia (Feb. 18, 1994), *reproduced* in 3 SHAW, *supra* note 46, at 1213–14 (citing MILAN BULAJIĆ, ALTERNATIVE YUGOSLAVIA TRIBUNAL 209 (1995)). One might supplement this finding with the practice of the PCIJ, wherein the Registrar rejected an application on behalf of the Government of Euzkadi (now Basque Country) on the grounds that it did not represent a State. KOLB, *supra* note 9, at 267.

74. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Merits, 2007 I.C.J. 43 (Feb. 26). *See generally* Dimitrijević & Milanović, *supra* note 40.

75. Press Release, Ronny Abraham, President of the International Court of Justice, Document Entitled "Application for Revision of the Judgment of 26 February 2007 in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia)" I.C.J. Press Release 2017/12, (Mar. 9, 2017).

76. A debate arose as to whether a fresh commission of agency was required, or whether an application for revision could be seen as a continuation of the underlying case, with the original commission of the agent persisting. The President decided in favor of the former. *See* discussion in Juliette McIntyre, *Revisiting the International Court of Justice Procedure for the Revision of Judgments*, 42 MICH. J. INT'L L. 479, 505, 515 (2021); Andreas Zimmermann & Robin Geiß, *Article 61*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 37, 1651, 1666; Dapo Akande, *Application for Revision of the International Court of Justice's Judgments: The Curious "Case" for Revision of the Bosnian Genocide Judgment*, EJIL: TALK! (Mar. 13, 2017), https://www.ejiltalk.org/applications-for-revision-of-the-

of the Court's President, consulted with the three-person collective constituting the Presidency of Bosnia and Herzegovina,[77] with each member holding varying views as to Mr. Softić's capacity to represent the State.[78] Accordingly, noting that "no decision [had] been taken by the competent authorities," the President held that the Court had not been properly seised and instructed the Registrar to reject the application.[79]

From this approach, it is evident that the Registrar has the power to reject an application from a rival government that does not control the instrumentalities of the State on the basis that such an application is invalid pursuant to the Court's Rules. Notwithstanding this procedural power, one commentator has argued that "a judicial pronouncement on the issue . . . would arguably have been more appropriate than a simple press release."[80] While the *Bosnian Genocide* case was likely one of "clear non-compliance" with the procedural rules,[81] and, therefore deserving of summary dismissal, the better view is that even if the Registrar can reject an application in cases of rival governments, they ought to transmit the application to the Court for a substantive review. Not only is the Court better suited to this task as a judicial organ—as opposed to the Registrar, whose role is more administrative than legal in nature—but its power to reject invalid

international-court-of-justice-judgments-the-curious-case-for-revision-of-the-bosnian-genocide-judgment/ [https://perma.cc/542T-6PBU]; *cf.* David Scheffer, *Some Realities Behind the Application for Revision concerning Bosnia and Herzegovina v Serbia*, JUST SEC. (Mar. 10, 2017) https://www.justsecurity.org/38733/realities-application-revision-bosnia-herzegovina-v-serbia/ [https://perma.cc/MYX7-PAVV]. Note also the view of Milanović that the Court's approach may have been a product of realpolitik, influenced by the fact that "the case actually had zero prospects for success." Marko Milanović, *The Strangest ICJ Case Got Even Stranger, Or the Revision That Wasn't*, EJIL: TALK! (Mar. 13, 2017), https://www.ejiltalk.org/the-strangest-icj-case-got-even-stranger-or-the-revision-that-wasnt/ [https://perma.cc/B553-3NJH].

77. USTAV BOSNE I HERCEGOVINE [CONSTITUTION OF BOSN. & HERZ.] Dec. 14, 1995 (rev. 2009), art. 5.

78. Abraham, *supra* note 75. However, "the Bosnian case is one of governmental schizophrenia" rather than rival governments. Milanović, *supra* note 8*; see also* Dimitrijević & Milanović, *supra* note 40, at 71–72.

79. Abraham, *supra* note 75; *see also* Dupuy & Hoss, *supra* note 72, at 669; Yee, *supra* note 70, at 1063.

80. Serena Forlati, *Revision of Judgment: International Court of Justice*, *in* MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL PROCEDURAL LAW ¶ 21 (Hélène Ruiz Fabri ed., 2019); *see also* Milanović, *supra* note 76.

81. Yee, *supra* note 70, at 1065.

applications—whether *in limine litis*,[82] *proprio motu*,[83] or following a challenge at the provisional measures and/or preliminary objections phases[84]—is less controversial.

2. Inquiries *Proprio Motu*

Given that the Registrar may reject applications that do not conform with the requirements within the Statute and the Rules, a separate question arises as to what level of due diligence the Registrar is required to undertake, *proprio motu*, to assure the propriety of the application in cases where the efficacy of the applicant government is in doubt. In relation to this question, Kolb has argued that "[t]here is no substance whatsoever . . . in the suggestion . . . that the Registrar should first ensure that the Court has jurisdiction before performing [their] statutory duty."[85] The practice of the Court tends to support Kolb's view. For instance, following the 2009 coup d'état in Honduras, with then-President Zelaya replaced by the Congressional President, Mr. Micheletti,[86] the Court received an application from the Micheletti-aligned Honduran Ambassador to the Netherlands

82. Legality of the Use of Force (Serb. & Montenegro v. Neth.), Preliminary Objections, 2004 I.C.J. 1011, ¶ 29 (Dec. 15); Legality of the Use of Force (Yugoslavia v. Spain), Provisional Measures, 1999 I.C.J. 761, ¶ 34 (June 2); Legality of the Use of Force (Yugoslavia v. U.S.), Provisional Measures, 1999 I.C.J. 916, ¶ 28 (June 2); Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Uganda), Jurisdiction and Admissibility, 2006 I.C.J. 6, ¶ 25 (Feb. 3); Mavrommatis Palestine Concessions (Greece v. Gr. Brit.), Jurisdiction, 1924 P.C.I.J. (ser. A) No. 2, at 16 (Aug. 30).

83. Though note that such a power is likely to be exercised only in exceptional cases. Anglo-Iranian Oil Co. (U.K. v. Iran), Preliminary Objections, 1952 I.C.J. 93, at 116 (June 22) (individual opinion by President McNair) (citing Factory at Chorzów (Ger. v. Pol.), Jurisdiction, 1927 P.C.I.J. (ser. A) No. 9, at 32 (July 26)), *applied in* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Preliminary Objections, 2008 I.C.J. 412, ¶ 68 (Nov. 18) (citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Judgment, 2007 I.C.J. 43, ¶ 122 (Feb. 26)); Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.), Merits, 1972 I.C.J. 46, ¶ 13 (Aug. 18); Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. 253, ¶ 23 (Dec. 20) (joint dissenting opinion by Onyeama, J., Dillard, J., Jiménez de Aréchaga, J. & Waldock, J.).

84. See ICJ Rules, *supra* note 37, arts. 79–79*ter*.

85. 2 SHAW, *supra* note 46, at 854 (arguing that this conclusion is consonant with the existence of the principle of *forum prorogatum*).

86. *See generally* PAUL BEHRENS, DIPLOMATIC INTERFERENCE AND THE LAW 171–72 (2016); 2 THIRLWAY, *supra* note 41, at 1764–66.

instituting proceedings against Brazil.[87] The Zelaya Government Minister for Foreign Affairs responded, arguing that the application was "a private initiative because the new government allegedly had no representative powers."[88] Nonetheless, the Registrar transmitted the application to Brazil on the basis that the application had been signed by a competent person with the requisite full powers.[89]

Accordingly, it appears that the Registrar will not, to borrow a term from corporate law, "pierce the veil" of the State and make inquiries *proprio motu* where the application meets the formal requirements, even if there is controversy to which the Registrar is actually or ostensibly alive as to the legal capacity of the government instituting proceedings. This conclusion is supported by the practice of the Registrar of the PCIJ, who raised no concern when, during the 1936–1939 Spanish Civil War, the Republican Government of Spain instituted proceedings by *compromis* with Belgium in the *Borchgrave* case.[90] There, the Registrar did not seek to communicate with the Nationalist Government of General Franco, which held effective control, instead communicating with "*le ministre d'Etat à Valence*," the Republican

87. Certain Questions concerning Diplomatic Relations (Hond. v. Braz.), Application Instituting Proceedings by the Republic of Honduras against the Federative Republic of Brazil, (Oct. 28, 2009), https://www.icj-cij.org/public/files/case-related/147/15935.pdf [https://perma.cc/6PQH-FBHH]. This situation raises the interesting quirk that the national recognition decisions of the Netherlands and, accordingly, which government the Netherlands accredits diplomats from, could prove influential in the Registrar's decision to treat an application instituting proceedings as valid. For instance, consider if, during the period in which rival governments existed in Venezuela, Dutch government chose to, following the practice of the United States, only accredit Venezuelan diplomats from the Guaidó regime. Edward Wong & Nicholas Casey, *Venezuela's Dueling Diplomats Lobby Nations to Pick Side in Conflict*, N.Y. TIMES (Feb. 1, 2019), https://www.nytimes.com/2019/02/01/world/americas/venezuela-maduro-guaido-diplomats.html [https://perma.cc/2BJF-DSKA].

88. Dupuy & Hoss, *supra* note 72, at 669.

89. Certain Questions concerning Diplomatic Relations (Hond. v. Braz.), Order, 2010 I.C.J. 303, at 303 (May 12). It should, however, be noted that in this case "it is not known with certainty whether the [application instituting proceedings] created a proper contentious proceeding before the Court." Juan J. Quintana, *Procedure before the ICJ: A Note on the Opening (or Not) of New Cases*, 9 LAW & PRAC. INT'L CTS. & TRIBUNALS 115, 116–17 (2010).

90. Borchgrave (Belg./Spain), Preliminary Objections, 1937 P.C.I.J. (ser. A/B) No. 72, at 158–59 (Nov. 6); *see* discussion in PATEL, *supra* note 48, at 83.

Minister of State in-exile,[91] who retained control over the State's foreign affairs.[92]

Contrary to the views of some commentators, the transmission of the application instituting proceedings does not constitute an "implicit finding as to the recognition of the new government and its power to file an Application."[93] The better view is that the transmission of the application constitutes the mere fulfilment of the Registrar's "statutory duties" pursuant to the Rules and the Statute to, inter alia, open a new file in the Court's General List and notify the relevant parties that the proceedings have been instituted.[94] Such an action "does not bind the Court, nor does it prejudge the rights of the parties or the attitude of the Court";[95] the substance of the procedural question is reserved for the Court to decide during the proceedings.

B. During the Proceedings

There is no explicit rule that provides the Court with the authority to order a change in the representation of the State or to otherwise decide between rival governments while the proceedings are on foot. While one commentator has argued that "adjudicative bodies appear to possess the power to resolve for their respective purposes a representation controversy,"[96] this question calls for deeper examination. In this Section, I first evaluate the procedural bases on which the

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91. *See* Le greffier a l'agent espagnole [The Registrar to the Spanish Agent], *in* Borchgrave, 1937 P.C.I.J. at 160:

> Dans la letter en date du 5 mars 1937 que, par votre obligeante entremise, j'ai addressee à S. Exc. Le ministre d'État à Valence, j'ai porté à sa connais-sance qu'en vue de se renseigner sur des questions se rattachant à la procedure, le Président de la Cour envisageait, aux termes de l'article 37, alinéa I, du Réglement, de convoquer les agents des Parties en l'affaire Borchgrave. [In the letter dated March 5, 1937, which, through your kind intermediary, I addressed to H. Exc. The Minister of State in Valencia, I brought to his knowledge that in order to obtain information on questions relating to the procedure, the President of the Court envisaged, under the terms of Article 37, paragraph I , of the Rules, to summon the agents of the Parties in the Borchgrave case.].

92. *See* LAUTERPACHT, *supra* note 48, at 93; Hersch Lauterpacht, *Recognition of Governments: I*, 45 COLUM. L. REV. 815, 822 (1945); PATEL, *supra* note 48, at 83.

93. Dupuy & Hoss, *supra* note 72, at 669.

94. That is, to transmit the application to the respondent State and open a folio in the Court's General List. Statute of the ICJ, *supra* note 21, art. 40(1)–(2); ICJ Rules, *supra* note 37, arts. 26 ¶ 1.b, 38 ¶ 4, 39 ¶1, 42; Registry Instructions, *supra* note 64, arts. 5(1), 5(9); *see also* 2 SHAW, *supra* note 46, at 854; 3 *id.* at 1214, 1216 (describing these as "statutory duties"); 2 THIRLWAY, *supra* note 41, at 1764.

95. 2 SHAW, *supra* note 46, at 854.

96. Pavlopoulos, *supra* note 8.

Court may make such a decision before turning to the separate question of whether the Court may have an independent duty to raise the question *proprio motu*.

1. Procedural Basis to Decide

The Court "possesses inherent jurisdiction to control all aspects of the proceedings" by virtue of Article 48 of its Statute.[97] As former ICJ Registrar Santiago Torres Bernárdez and Professor Makane Moïse Mbengue argue, "should a situation not specifically be provided for in the Statute or Rules, it would still be possible for the Court to deal with it through Article 48."[98] Separately, the ICJ has held that it

> possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand *to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated*, and on the other, to provide for the orderly settlement of all matters in dispute . . . . Such inherent jurisdiction . . . derives from the mere existence of the Court as a judicial organ established by the consent of States, *and is conferred upon it in order that its basic judicial functions may be safeguarded*.[99]

97. 2 SHAW, *supra* note 46, at 606–07; 3 *id.* at 1487–88. Article 48 provides: "The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence." Statute of the ICJ, *supra* note 21, art. 48.

98. Santiago Torres Bernárdez & Makane Moïse Mbengue, *Article 48*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 37, 1351, 1370.

99. Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. 457, ¶ 23 (Dec. 20) (emphasis added) (citations omitted)*; see also* M/V Louisa (St. Vincent v. Spain), Judgment, 2013 ITLOS Rep. 4, ¶¶ 28–30 (May 28) (separate opinion by Cot, J.); Northern Cameroons (Cameroon v. U.K.), Preliminary Objections, 1963 I.C.J. 15, at 103 (Dec. 2) (separate opinion by Fitzmaurice, J.); Legality of the Use of Force (Serb. & Montenegro v. Port.), Judgment, 2004 I.C.J. 1214, ¶ 10 (separate opinion by Higgins, J.); Mavrommatis Palestine Concessions (Greece v. Gr. Brit.), Jurisdiction, 1924 P.C.I.J. (ser. A) No. 2, ¶ 15 (Aug. 30); Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, at 182–83 (Apr. 11); Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer, Advisory Opinion, 1926 P.C.I.J. (ser. B) No. 13, ¶¶ 38–41 (July 23); Chester Brown, *Inherent Powers in International Adjudication*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 829, 838–42 (Cesare P.R. Romano, Karen J. Alter & Yuval Shany eds., 2013) [hereinafter Brown, *Inherent Powers*]; Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 76 BRIT. Y.B. INT'L L.195, 211–22 (2005); KOLB, *supra* note 9, at 988.

Accordingly, the Court has the inherent power to make the procedural orders necessary to facilitate its judicial function. However, the scope of this inherent power is not unlimited. The Statute and Rules give the parties the exclusive competence to appoint agents and counsel of their choosing.[100] These provisions could be regarded as *clauses contraires*,[101] acting as a constraint on the Court's power to make an order on representation. However, when read in good faith and in conjunction with the Court's Practice Directions,[102] which prohibit States from appointing agents or counsel who have served on the Court's bench or in senior roles of the Registry in the last three years,[103] the better view is that State's right to select its representatives is not an unqualified one.

It follows that, while the constitution of a State's legal team is generally a question for that State alone, in cases where the Court is called to determine a question of representation that creates an impasse to its resolution of the proceedings on the merits, the Court is entitled to invoke its Article 48 powers and its inherent jurisdiction to make an order on the representation of the parties. If one accepts that the Court's essential function is to "'decide', that is, to bring to an end, such disputes as are submitted to it,"[104] and that the Statute seeks to protect the exercise of this function,[105] then it follows that the Court must have the ability to resolve this question of procedure to the extent necessary to prevent the frustration of its jurisdiction. To find otherwise would, in effect, defeat the jurisdiction of the Court by preventing it from identifying the government with which it should be communicating to advance the proceedings, a manifestly inadequate outcome. This conclusion is broadly consonant with the approach taken by various ICSID tribunals in relation to interventions by the Guaidó

100. *Supra* notes 36–41 and accompanying text.

101. *See* Brown, *Inherent Powers*, *supra* note 99, at 239–42 (citing Certain Norwegian Loans (Fr. v Nor.), Preliminary Objections, 1957 I.C.J. 9, at 45 (July 6) (separate opinion by H. Lauterpacht, J.) ("Clearly the Court cannot act otherwise than in accordance with its Statute.")).

102. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

103. Practice Direction VII–VIII, INT'L CT. JUST. (Feb. 7, 2002), https://www.icj-cij.org/practice-directions [https://perma.cc/LL9P-3G3Q]. *See generally* Rosenne, *supra* note 37.

104. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Judgment, 2007 I.C.J. 43, ¶ 116 (Feb. 26).

105. LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, ¶ 102 (June 27).

regime,[106] which used the similar "gap filling" procedural mechanism in the ICSID Convention[107] to make orders regarding the representation of the parties,[108] "insofar as the clarification of the point is absolutely necessary for the continuation of the proceedings."[109]

106. *See generally* Krystle Baptista, *New Actors in Investment Arbitration: The Legitimate Government*, *in* TRANSNATIONAL ACTORS IN INTERNATIONAL INVESTMENT LAW 73 (Anastasios Gourgourinis ed., 2021); Manuel Valderrama, *Two's a Crowd: Navigating Competing Governments in International Arbitration: A Venezuelan Case Study*, *in* 40 UNDER 40 INTERNATIONAL ARBITRATION 489 (Carlos González-Bueno ed., 2021); Héctor Fernández, *Representation of Venezuela in Investment Arbitration*, KLUWER ARB. BLOG (Jan. 16, 2021), http://arbitrationblog.kluwerarbitration.com/2021/01/16/representation-of-venezuela-in-investment-arbitration/ [https://perma.cc/TLU6-YJVP]; Sara Ewad, *When Two Presidents Collide: The Issue of Recognition in Ongoing Legal Battles between Nicolás Maduro and Juan Guaidó*', JUSMUNDI (Apr. 28, 2021), https://blog.jusmundi.com/when-two-presidents-collide-the-issue-of-recognition-in-ongoing-legal-battles-between-nicolas-maduro-and-juan-guaido/ [https://perma.cc/T7EH-Q9FN]; Tom Jones & Sebastian Perry, *Guaidó Calls on ICSID to Take Sides*, GLOB. ARB. REV. (May 2, 2019), https://globalarbitrationreview.com/guaido-calls-icsid-take-sides [https://perma.cc/CL3L-YQQC]; David M. Orta et al., *Investment Treaty Arbitration in the Americas*, *in* ARBITRATION REVIEW OF THE AMERICAS 33 (2020).

107. Convention on the Settlement of Investment Disputes and Nationals of Other States art. 44, March 18, 1965, 22 U.S.C. §§ 1650–1650a, 575 U.N.T.S. 8359.

108. *See, e.g.*, ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Venez. ICSID Case No. ARB/07/30, Order on the Applicant's Representation, ¶ 30 (Apr. 3, 2020); ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Venez., ICSID Case No. ARB/07/30, Recommendation of Lord Phillips, ¶¶ 89–90 (Jul. 10, 2020); ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Venez., ICSID Case No. ARB/07/30, Order on the Applicant's Request for Reconsideration Dated 3 August 2020 on the Issue of Venezuela's Legal Representation, ¶¶ 36–37 (Nov. 2); Kimberly-Clark Dutch Holdings, B.V., Kimberly-Clark S.L.U., and Kimberly-Clark B.V.B.A. v. Venez., ICSID Case No. ARB(AF)/18/3, Order on Venezuela's Representation, ¶ 41 (Oct. 15, 2019); Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Venez., ICSID Case No. ARB/13/11, Procedural Resolution No 2, ¶ 34 (Aug. 29, 2019); Air Canada Procedural Order No. 7, *supra* note 45, ¶¶ 59–60; Mobil Cerro Negro Holding, L.L.C., & Mobil Cerro Negro, Ltd. v. Venez., ICSID Case No. ARB/07/27, Decision on the Respondent's Representation in this Proceeding, ¶¶ 43, 47, (Mar. 1, 2021). *See generally* Hugh Carlson, Anton Chaevitch & Elizabeth Snodgrass, *Three Notable Issues from the Venezuela Experience*, *in* INTERNATIONAL ARBITRATION IN LATIN AMERICA: ENERGY AND NATURAL RESOURCES DISPUTES 329, 342–44 (Riofrio Piché & Vollbrecht Sperandio eds., 2021); Sébastien Manciaux, *The Representation of States before ICSID Tribunals*, 2 J. INT'L DISP. SETTL. 87 (in relation to ICSID representation disputes generally).

109. Valores Mundiales, ICSID Case No. ARB/13/11, Procedural Resolution No. 2, ¶ 34; *see also* Mobil Cerro Negro, ICSID Case No. ARB/07/27, Decision on the Respondent's Representation in this Proceeding, ¶ 45.

2. A Duty to Decide?

Given the interests of the Court in correctly identifying the parties and in the resolution of disputes,[110] a question arises as to whether the Court may have the *duty* to inquire into the question of representation *proprio motu*. In Arbitral Award of 3 October 1899, proceedings instituted by Guyana against Venezuela before the emergence of the Guaidó regime,[111] the Court appears to have communicated exclusively with the Maduro government even after the emergence and widespread recognition of the Guaidó regime.[112] Further, at all relevant times President Maduro was referred to as the President of Venezuela in the Court's procedural orders,[113] in its judgment,[114] and during oral argument.[115] Mr. Guaidó acknowledged the Court's decision on jurisdiction,[116] but at no point up to that time had he or his *Procurador*

110. *See, e.g.*, Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47, at 53 (July 13).

111. Arbitral Award of 3 October 1899 (Guy. v. Venez.), Application Instituting Proceedings (Mar. 29, 2018), https://www.icj-cij.org/public/files/case-related/171/171-20180329-APP-01-00-EN.pdf [https://perma.cc/EV6K-CMG4].

112. Arbitral Award of 3 October 1899 (Guy. v. Venez.), Memorandum of the Bolivarian Republic of Venezuela on the Application Filed before the International Court of Justice by the Cooperative Republic of Guyana on March 29, 2018, ¶ 4 (Nov. 28, 2019), https://www.icj-cij.org/public/files/case-related/171/171-20191128-WRI-01-00-EN.pdf [https://perma.cc/YB6P-YCY7] (referring to a document signed by President Maduro as "the Memorandum of Venezuela"); Arbitral Award of 3 October 1899 (Guy. v. Venez.), Letter from Venezuela's Minister of People's Power for Foreign Affairs (July 24, 2020), https://www.icj-cij.org/public/files/case-related/171/171-20200724-OTH-01-00-EN.pdf [https://perma.cc/69QL-CWF3]. See also Guyana's reply, wherein it refers to the Maduro Government Foreign Minister as the "Foreign Minister of the Bolivarian Republic of Venezuela." Arbitral Award of 3 October 1899 (Guy. v. Venez.), Views of Guyana on the Letter from Venezuela's Minister of People's Power for Foreign Affairs dated 24 July 2020, at 1 (Aug. 3, 2020), https://www.icj-cij.org/public/files/case-related/171/171-20200803-OTH-01-00-EN.pdf [https://perma.cc/U837-4EDP].

113. Order of 8 March 2021, Arbitral Award of 3 October 1899 (Guy. v. Venez.), at 189 (Mar. 8, 2021), https://www.icj-cij.org/public/files/case-related/171/171-20210308-ORD-01-00-EN.pdf [https://perma.cc/W8FZ-MW8N].

114. Arbitral Award of 3 October 1899 (Guy. v. Venez.), Jurisdiction, 2020 I.C.J. 455, ¶¶ 5, 8, 56 (Dec. 18).

115. Arbitral Award of 3 October 1899 (Guy. v. Venez.), Verbatim Record, at 12 (President Yusuf), 41–42 (Paul S. Reichler, Counsel for Guyana), 62–63 (Alain Pellet, Counsel for Guyana) (June 30, 2020), https://www.icj-cij.org/public/files/case-related/171/171-20200630-ORA-01-00-BI.pdf [https://perma.cc/Q4WB-2NJG].

116. Official Statement from President (E) Guaidó on the Decision by the International Court of Justice (ICJ) on the Territorial Controversy over the Essequibo (Dec. 19, 2020), https://presidenciave.com/presidency/official-statement-from-president-e-guaido-on-the-

Especial sought to intervene in the proceedings or to represent Venezuela before the Court. After a long period of non-participation in the proceedings, the Court confirmed that, on June 6, 2022, Venezuela's Vice President, Delcy Eloína Rodríguez Gómez, had appointed co-agents to represent Venezuela in the proceedings.[117]

From the above, it is clear that the Court does not find it necessary to determine the question of representation *proprio motu* and will only do so when there is an actual conflict brought before it—a conclusion supported by the practice of the PCIJ in *Borchgrave*.[118] While this approach accords with the principle of continuity of States,[119] its wisdom is questionable. Remaining agnostic as to the propriety of the government may, if that government is ineffective, severely disadvantage not only that State's defense, but any attempt at enforcement. A better approach may be that where the Court is clearly put on notice of a controversy as to the efficacy or status of a government representing a State, then the Court ought to invite argument on that point to ensure the integrity of the proceedings.[120]

C. Admissibility and Political Disputes

A final potential barrier to the ability of the Court to settle questions relating to rival governments may arise from the inherently political nature of questions of recognition. As Lauterpacht opined, "there is probably no subject in the field of international relations in which law and politics appear to be more closely interwoven,"[121]

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decision-by-the-international-court-of-justice-icj-on-the-territorial-controversy-over-the-essequibo/ [https://perma.cc/UV7N-V547].

117. Arbitral Award of 3 October 1899 (Guy. v. Venez.), Order of 13 June 2022, at 2 (June 13, 2022), https://www.icj-cij.org/public/files/case-related/171/171-202206613-ORD-01-00-EN.pdf [https://perma.cc/2ARF-PBGV].

118. *See supra* notes 82–84 and accompanying text.

119. 1 MOORE, *supra* note 28, at 249.

120. For instance, through questioning during the course of oral argument, through exercise of its powers pursuant to Article 48 of the Statute.

121. LAUTERPACHT, *supra* note 48, at v; *see also* MANUEL DIEZ DE VELASCO VALLEJO, INSTITUCIONES DE DERECHO INTERNACIONAL PÚBLICO [INSTITUTIONS OF PUBLIC INTERNATIONAL LAW] 284 (16th ed. 2007) ("son, en definitiva, criterios de política exterior y no normas juridico-internacionales los que influyen en la decisión de reconocer o no" [ultimately, it is foreign policy criteria and not international legal norms that influence the decision to recognise or not]); PATEL, *supra* note 48, at 1, 23; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Preliminary Objections, 1996 I.C.J. 595, 658, ¶ 37 (July 11) (dissenting opinion by Kreća, J.) (discussing "recognition, which is in practice an eminently political act"); TALMON, *supra* note 33, at 176

raising questions as to the propriety of the determination of such a question by international courts and tribunals. This concern has been cited in various ICSID cases involving Venezuela,[122] with the Guaidó representatives arguing that ICSID tribunals and committees do not have the jurisdiction *ratione materiae* to answer the question of representation as it is a political, rather than legal, question.[123]

However, any such objection lodged in relation to a procedural question of representation is likely to fail. At every instance, the Court has rejected objections that seek to fetter its jurisdiction on the basis that the dispute has political aspects or motivations, or that political implications may arise from its decision.[124] Beyond showing its

(arguing that recognition decisions are "motivated by political rather than legal considerations"); CRAWFORD, BROWNLIE'S PRINCIPLES, *supra* note 27, at 138; MALCOLM N. SHAW, INTERNATIONAL LAW 378, 400 (9th ed. 2021); SHIRLEY V. SCOTT, INTERNATIONAL LAW IN WORLD POLITICS: AN INTRODUCTION 24 (3d ed. 2017); ROTH, *supra* note 27, at 152; JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 3 (1987) (noting that there is a popular belief that "recognition and non-recognition . . . is simply politics masquerading as law"); JOHN G. HERVEY, THE LEGAL EFFECTS OF RECOGNITION IN INTERNATIONAL LAW AS INTERPRETED BY THE COURTS OF THE UNITED STATES 51–52 (1928); THOMAS D. GRANT, THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION 22 (1999).

122. *See, e.g.*, ConocoPhillips Pertozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Venez., ICSID Case No. ARB/07/30, Order on the Applicant's Representation, ¶ 29 (Apr. 3, 2020).

123. *See, e.g.*, *id.* ¶ 27; Mobil Cerro Negro Holding, L.L.C., and Mobil Cerro Negro, Ltd. v. Venez., ICSID Case No. ARB/07/27, Decision on the Respondent's Representation in this Proceeding, ¶ 35, (Mar. 1, 2021). The law/politics dichotomy in international dispute settlement has been subject to long-standing debate. *See* DIEZ DE VELASCO VALLEJO, *supra* note 121, at 284; CHARLES DE VISSCHER, THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC [THEORIES AND REALITIES IN INTERNATIONAL LAW] 96 (4th ed. 1970); EDWARD MCWHINNEY, JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES: JURISDICTION, JUSTICIABILITY AND JUDICIAL LAW-MAKING ON THE CONTEMPORARY INTERNATIONAL COURT 40–43 (1991); Andrew Coleman, *The International Court of Justice and Highly Political Matters*, 4 MELB. J. INT'L L. 29, 59 (2003); Patrick M. Norton, *The Nicaragua Case: Political Questions before the International Court of Justice*, 27 VA. J. INT'L L. 459, 474 (1987); Martii Koskenniemi, *The Function of Law in the International Community: 75 Years After*, 71 BRIT. Y.B. INT'L L. 353, 355 (2009); HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 165 (2011).

124. *See, e.g.*, Military and Paramilitary Activities (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 I.C.J. 392, ¶¶ 95–96 (Nov. 26) (citing Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. 4 (Apr. 9)); Customs Regime between Germany and Austria (Ger. v. Austria), Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 41, ¶ 153 (Sept. 5) (dissenting opinion by Adatci, J., Kellog, J., Hurst, J., Van Eysinga, J. & Wang, J.) ("The Court is not concerned with political considerations nor with political consequences. These lie outside its competence."); Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶¶ 27–28 (July 22); Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Preliminary

characteristic sensitivity to political issues,[125] there is nothing to indicate that the Court would treat objections related to the admissibility of questions of representation any differently.

D. Conclusion

The potential politicization of any representation controversy is a natural result of the "globalization of judicial politics and the judicialization of international politics."[126] However, and contrary to the refrain of Mr. Guaidó, the mere fact that questions of representation are inherently political "can be no argument for a court of law to abdicate its judicial task."[127] Instead, an analysis of the Court's procedure and practice demonstrates that, regardless of when the issue of representation arises, the Court's Rules and inherent powers provide it with a clear basis to determine questions relating to the representation of the

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Objections, 2021 I.C.J. 9, ¶ 95 (Feb. 3); Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, 1973 I.C.J 166, ¶ 14 (July 12); Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, 1948 I.C.J. 57, at 61 (May 28); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 13 (July 8); Border and Transborder Armed Actions (Nicar. v. Hond.), Jurisdiction and Admissibility, 1988 I.C.J. 69, ¶¶ 51–52 (Dec. 20); Questions of Interpretation and Application of the 1971 Montréal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Provisional Measures, 1992 I.C.J. 3, at 56 (Apr. 14) (dissenting opinion by Weeramantry, J.); Aegean Sea Continental Shelf (Greece v. Turk.), Judgment, 1978 I.C.J. 3, ¶ 41 (Dec. 19); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 36 (July 9)*; cf.* Nuclear Tests (Austl. v. Fr.), Jurisdiction and Admissibility, 1974 I.C.J. 253, at 296–97 (Dec. 20) (separate opinion by Gros, J.); South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Preliminary Objections, 1962 I.C.J. 319, at 466–67 (joint dissenting opinion by Spender, J. & Fitzmaurice, J.). *See generally* Alain Pellet, *Strengthening the Role of the International Court of Justice as the Principal Judicial Organ of the United Nations*, 3 LAW & PRAC. INT'L CTS. & TRIBUNALS 159, 172 (2004); HERNÁNDEZ, *supra* note 46, at 70.

125. ROBERT KOLB, THE ELGAR COMPANION TO THE INTERNATIONAL COURT OF JUSTICE 126 (2014)*; see also* Helmut Steinberger, *The International Court of Justice*, *in* JUDICIAL SETTLEMENT OF DISPUTES: INTERNATIONAL COURT OF JUSTICE, OTHER COURTS AND TRIBUNALS, ARBITRATION AND CONCILIATION 193, 209 (Max Planck Inst. for Compar. Pub. & Int'l L. ed., 1974).

126. KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS 335 (2014); *see also* Karen J. Alter, Emilie M. Hafner-Burton & Laurence R Helfer, *Theorizing the Judicialization of International Relations*, 63 INT'L STUDS. Q. 449 (2019); Ran Hirschl, *The Judicialization of Politics*, *in* THE OXFORD HANDBOOK OF POLITICAL SCIENCE 121 (Robert E. Goodin ed., 2011).

127. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 58 (July 9)*; see also* Marcella David, *Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court*, 40 HARV. INT'L L.J. 81, 124 (1999).

parties to prevent the frustration of its jurisdiction. Nonetheless, the Court's practice in *Borchgrave*, *Arbitral Award of 3 October 1899*, and *Diplomatic Relations* demonstrate a reluctance by both the Registrar and the Court to extend this procedural power to inquire into questions of representation *proprio motu*. While a restrained approach by the Registrar is likely better suited to its administrative—as opposed to judicial—role, an approach of acquiescence by the Court would appear inconsistent with its interest in ascertaining the parties and preserving the integrity of the proceedings. A more active approach to determining procedural questions of representation is likely to better reflect the Court's institutional responsibilities and adjudicative function. Such an active approach has not, however, been adopted by the Court, nor by other international courts and tribunals, which have been reluctant to make decisions concerning questions of recognition and representation. This reluctance is the focus of the next Part.

III. RESISTANCE: AVOIDANCE TECHNIQUES

In this Part, I argue that international courts and tribunals, notwithstanding their established power to rule on questions of recognition and representation, demonstrate patterns of resistance, adopting a series of "avoidance techniques" to avoid making assessments of governmental status based on the application of principles of international law so as to avoid confrontation with the varied normative implications that may arise therefrom.[128] As a result, the Court's approach to questions of recognition and representation may come to depend less on its procedural power and application of substantive law, and more on assessments of *realpolitik*. This Part first briefly describes the primary features of avoidance techniques, before surveying the practice of international courts and tribunals to determine how these techniques have been used thus far. I conclude by evaluating these techniques with reference to their legal bases and normative implications, and offer suggestions for their future use.

A. Theories of Judicial Restraint

While "international courts are rarely upfront about it,"[129] in cases involving high or mega-politics, there appears to be a trend

128. *See infra* Section IV.B.

129. Salvatore Caserta & Pola Cebulak, *Resilience Techniques of International Courts in Times of Resistance to International Law*, 70 INT'L & COMPAR. L.Q. 737, 746 (2021).

toward exercising restraint by adopting avoidance techniques,[130] which allow the Court to "dispose of cases or issues within cases where a decision seems unnecessary, inappropriate, or perhaps too controversial."[131] Analysis of these techniques has roots in the scholarship of Alexander Bickel, who argued that the U.S. Supreme Court had "developed an almost inexhaustible arsenal of techniques and devices,"[132] which he termed "passive virtues,"[133] adopted by that Court to "avoid a direct collision with the political branches" of government.[134] This theory has, at least in part, been applied to the international dispute settlement system, with scholars suggesting that denials of jurisdiction, standing and the existence of a dispute,[135] findings of *non liquet*,[136]

130. This terminology has roots in Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 159, 169 (1993). Caserta and Cebulak, *supra* note 129, call them "resilience techniques," inspired by Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, *Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT'L J.L. CONTEXT 197, 208 (2018). *See also* J.L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT'L L. 733, 759 (1999) ("mediating techniques"). On avoidance techniques generally, see Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141, 222 (2001); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 953 (2005); Giladi & Shany, *supra* note 46, at 176.

131. William J. Davey, *Has the WTO Dispute Settlement System Exceeded its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and its Use of Issue-Avoidance Techniques*, 4 J. INT'L ECON. L. 79, 96 (2001); *see also* Outi Korhonen, *On Strategizing Justiciability in International Law*, 10 FINN. Y.B. INT'L L. 91, 97 (1999).

132. BICKEL, *supra* note 25, at 70.

133. *Id.* at 201*; see also* Bickel, *supra* note 25, at 40.

134. Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 4 WIS. L. REV. 683, 706 (2016).

135. Felix Fouchard, *Allowing 'Leeway to Expediency, Without Abandoning Principle'? The International Court of Justice's Use of Avoidance Techniques*, 33 LEIDEN J. INT'L L. 767, 771 (2020); Davey, *supra* note 131, at 96; Antonio F. Perez, *The Passive Virtues and the World Court: Pro-Dialogic Abstentation by the International Court of Justice*, 18 MICH. J. INT'L L. 399, 410 (1997); Madsen, Cebulak & Wiebusch, *supra* note 130, at 214; Anna John, *Inarticulate and Unconscious: Non-Justiciability before the International Court of Justice*, 20 LAW & PRAC. INT'L CTS. & TRIBUNALS 77, 88 (2021); Manuel Casas, *Functional Justiciability and the Existence of a Dispute: A Means of Jurisdictional Avoidance?*, 10 J. INT'L DISP. SETTL. 599, 599 (2019); Korhonen, *supra* note 131, at 91.

136. Fouchard, *supra* note 135*,* at 778; Perez, *supra* note 135*,* at 430.

judicial economy,[137] and deferential standards of review[138] are techniques adopted by international courts and tribunals to avoid confrontations with political organs and powerful State actors.

By exercising restraint in adopting avoidance techniques, the Court may demonstrate sensitivity to the political nature of the dispute[139] and an awareness of the fact that it is but one part of a "wider community of actors responsible for interpreting and applying international law."[140] Such restraint allows the Court to minimize the backlash arising from assessments of governmental status and entanglements with issues of high politics,[141] thereby protecting its external legitimacy, independence, and institutional prerogatives.[142] In so doing, the theory posits that the Court may facilitate Socratic dialogue in the international system,[143] signaling—through its inaction—to the political organs of the U.N. and States that they may be better suited to resolve questions of recognition and representation. The effect in adopting such techniques is that those extra-judicial solutions may render moot the tricky and potentially destructive questions of recognition and representation before the Court, in effect cutting the Gordian knot.

137. Marc Weller, *Modesty Can Be a Virtue: Judicial Economy in the ICJ Kosovo Opinion?*, 24 LEIDEN J. INT'L L. 127, 127 (2011); Davey, *supra* note 131, at 96; Fulvio Maria Palombino, *Judicial Economy and the Limitation of the Scope of the Decision in International Adjudication*, 23 LEIDEN J. INT'L L. 909, 909 (2010).

138. Fouchard, *supra* note 135, at 781; *see also* Jed Odermatt, *Patterns of Avoidance: Political Questions before International Courts*, 14 INT'L J.L. CONTEXT 221, 227 (2018); Madsen, Cebulak & Wiebusch, *supra* note 130, at 213–14 (2018).

139. Caserta & Cebulak, *supra* note 129, at 739.

140. As evident from the above discussion on fragmentation. *See supra* Section III.B.1; *see also* Odermatt, *supra* note 138, at 234.

141. Coleman, *supra* note 123, at 75.

142. Madsen, Cebulak & Wiebusch, *supra* note 130, at 212; Odermatt, *supra* note 138, at 222; Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 10 (2016); Caserta & Cebulak, *supra* note 129, at 739; Perez, *supra* note 135, at 443 ("[t]he ICJ's own institutional survival may well depend on its occasional willingness to exercise restraint"); Dunoff, *supra* note 130, at 757 (arguing that avoidance techniques can "conserve scarce political capital, encourage wider political processes, and help maintain the judiciary's legitimacy and influence"). *But see* Lyndel V. Prott, *Avoiding a Decision on the Merits in the International Court of Justice*, 7 SYDNEY L. REV. 433, 451 (1976) ("[f]or the Court to use procedural means to avoid deciding difficult cases must cause deep concern"); Timothy William Waters, *Misplaced Boldness: The Avoidance of Substance in the International Court of Justice's Kosovo Opinion*, 23 DUKE J. INT'L & COMPAR. L. 267, 326 (2013).

143. Perez, *supra* note 135, at 401–05*; see also* Bickel, *supra* note 25; BICKEL, *supra* note 25, at 70–71.

B. Cutting the Gordian Knot

In this Section, I propose a taxonomy of avoidance techniques adopted by international courts and tribunals in relation to questions of recognition and representation, encompassing five species of approach: orders to stay the proceedings; maintenance of the status quo; deference to the view of an international body or to the international community; silence or acquiescence; and permitting the dual representation of the State. I evaluate each in turn, considering whether they are suitable approaches for adoption by the Court.

1. Pausing the Proceedings

The first avoidance technique is to pause or stay the proceedings, leaving the question of representation open. In addition to its adoption by the *PDVSA v. PETROPAR* arbitral tribunal constituted under the rules of the International Chamber of Commerce,[144] wherein the proceedings were stayed and hearings cancelled upon the request of the claimant, the ICJ took this approach on two occasions. First, in *Diplomatic Relations*,[145] the Court ordered that, in light of the conflicting claims of the Micheletti and Zelaya governments "no other action would be taken in the case until further notice."[146] Following regular elections in Honduras that ended the coup, the new Honduran Government discontinued the proceedings.[147] Accordingly, the President of the Court ordered that the case be removed from its General List.[148] Second, in the *Bosnian Genocide* case, the Court delayed the commencement of oral hearings in the merits phase in light of an intragovernmental conflict concerning the appointment of a co-agent who then attempted to discontinue the proceedings,[149] an issue once again caused by the tripartite structure of the Presidency.

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144. Petróleos de Venezuela S.A. (PDVSA) v. Petróleos Paraguayos (PETROPAR). The order is suppressed. *See* Tom Jones & Sebastian Perry, *ICC Panel Stays PDVSA Case After Guaidó Intervenes*, GLOB. ARB. REV. (Mar. 27, 2019), https://globalarbitrationreview.com/icc-panel-stays-pdvsa-case-after-guaido-intervenes [https://perma.cc/R6G5-S3PW]. At the time of writing, it does not appear that this stay has been lifted and the proceedings remain suspended. *See* REPUBLIC OF PARAGUAY, OFFERING MEMORANDUM 148–49 (Jan. 20, 2021).

145. *See infra* Section III.A.2.

146. Certain Questions concerning Diplomatic Relations (Hond. v. Braz.), Order, 2010 I.C.J. 303, at 304 (May 12).

147. *Id.*

148. *Id.* at 305*; see also* 2 THIRLWAY, *supra* note 41, at 1879.

149. *See* Dimitrijević & Milanović, *supra* note 40, at 74.

Some commentators have additionally noted that uncertainty as to the government of Myanmar may have delayed the preliminary objections hearings in the *Rohingya Genocide Case*,[150] and that a stay until such a time as the issue of rival governments atrophies may be appropriate.[151] While the NUG continues to assert its status as the government of Myanmar on the basis of democratic legitimacy, it was beyond doubt at the time at which the preliminary objections phase commenced in the *Rohingya Genocide Case* that there was only one effective government, being that led by the SAC. The Court's approach in allowing the reorganization of Myanmar's legal team in those proceedings over the objections of the NUG may demonstrate some level of implicit acceptance of this fact.

As the experience of the ICJ in *Diplomatic Relations* and the *Bosnian Genocide* case indicates, effective governments tend to emerge relatively quickly following an extra-legal change in government, vitiating the need for the ICJ to make a substantive decision on recognition. Staying the proceedings until such a time as an effective government has emerged is therefore likely to be an appropriate avoidance technique to adopt, and is consonant with the view of the late Professor Hugh Thirlway, who argued that "in circumstances in which it is not clear which [rival government] is entitled to represent the State internationally, caution seems to counsel delay."[152] This technique is also consistent with best legal practice: If one accepts that an expectation of permanence is a core element of the effective control test,[153] then it follows that it is impossible to discern that permanence without the benefit of time. Equally, acting too soon to apply substantive law to the question of representation may constitute premature recognition,[154] which is likely to violate the fundamental *grundnorm* against intervention in the domestic affairs of a State.[155] Further, if the Court intervenes too quickly to make an order on the representation of the parties, then there is a risk that the changing political situation in the State with respect to rival governments may lead to a further change

150. Grant Shubin, *Symposium on the Current Crisis in Myanmar: Untangling Myanmar's Credentials Battle and the Implications for International Justice*, OPINIO JURIS (Sept. 28, 2021), http://opiniojuris.org/2021/09/28/symposium-on-the-current-crisis-in-myanmar-untangling-myanmars-credentials-battle-and-the-implications-for-international-justice/./ [https://perma.cc/EKU8-5AAA]; SPECIAL ADVISORY COUNCIL FOR MYAN., *supra* note 6, at 2.

151. Nachemson, *supra* note 12 (quoting Professor Sarah Williams).

152. 2 THIRLWAY, *supra* note 41, at 1766.

153. LAUTERPACHT, *supra* note 48, at 141; *see infra* Section IV.A.

154. LAUTERPACHT, *supra* note 48, at 94–95; *see also* PETERSON, *supra* note 27, at 39–44.

155. U.N. Charter art. 2, ¶ 7.

in government, necessitating further changes in representation. As one ICSID committee noted, "[t]he Committee cannot see how the procedural interests of [the State] would be served by having a swing-wing representation dependent on the vagaries of the quest of power in [the State]."[156]

However, two qualifications should be made as to the propriety of this technique. First, where an issue requires immediate decision, such as the provisional measures phase in the *Rohingya Genocide Case*, the Court likely has no option but to proceed with the representative on record or make an assessment of governmental status. A failure to do so could lead to the frustration of the basis of the proceedings and, accordingly, the Court's jurisdiction. Second, the length of the stay must not be so long as to constitute "prolonged recognition" of an established government, turning an otherwise "acceptable temporary expedient" into an outright refusal to "acknowledge the new government's authority."[157] Such prolonged recognition may not only further destabilize the proceedings,[158] but may also contravene the duty of international organizations to recognize effective governments.[159] Accordingly, in determining whether and how long to stay the proceedings, the Court must not only consider questions of urgency but also strike a balance between the equally offensive risks of premature and prolonged recognition. No clear yardstick exists to measure whether recognition may be premature or prolonged, further complicating the task before the Court. It suffices to say that where the Court is faced with a government that is clearly effective, even if politically unpalatable, continuing to stay the proceedings is likely to be an inappropriate course of action.

2. Rebuttable Presumption of the Status Quo

Nearly all ICSID tribunals dealing with the question of Venezuela's representation have adopted a rebuttable presumption that the counsel/agent of record retains the right to represent the State unless the challenging government can prove that a change in representation

156. ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. & ConocoPhillips Gulf of Paria B.V. v. Venez., ICSID Case No. ARB/07/30, Order on the Applicant's Request for Reconsideration Dated 3 August 2020 on the Issue of Venezuela's Legal Representation, ¶ 38 (Nov. 2, 2020).

157. PETERSON, *supra* note 27, at 45.

158. ROTH, *supra* note 27, at 127; LAUTERPACHT, *supra* note 48, at 157.

159. Frowein, *supra* note 31 ¶ 22; LAUTERPACHT, *supra* note 48, at 141–42; KELSEN, *supra* note 29, at 284–85.

is warranted.[160] Such a technique can be characterised as a "safety valve"[161] or "escape device,"[162] preventing the Court from having to make an assessment of governmental status unless the circumstances are exceptional. To prove that a change in representation is warranted, the challenging government has usually been required to demonstrate that it has been invested with the status of a government under domestic law[163] and that it exercises effective control as a matter of international law.[164] Recognition by the broader international community has generally been dismissed as an irrelevant factor,[165] in no small part due

160. Los Andes C.A. & Owens Illinois from Venez. C.A. Glass Factories v. Venez., ICSID Case No. ARB/12/21, Communication from the Committee May 3, Annulment Proceeding, ¶ 33 (Nov. 22, 2019) (also known as "Favianca"); Agroinsumos Ibero-Americanos, S.L., Inica Latinoamericana, S.L., Proyefa Internacional, S.L., & Verica Atlántica, S.L. v. Venez., ICSID Case No. ARB/16/23, Procedural Order No. 13, (Jan. 13, 2020) (cited in ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. & ConocoPhillips Gulf of Paria B.V. v. Venez., ICSID Case No. ARB/07/30, Lord Phillips Recommendation, ¶¶ 40, 91, 98 (July 10, 2020)); Venoklim Holding, B.V. v. Venez., ICSID Case No. ARB(AF)/17/4, Procedural Order No. 2 (Nov. 13, 2020) (cited in Mobil Cerro Negro Holding, L.L.C., & Mobil Cerro Negro, Ltd. v. Venez., ICSID Case No. ARB/07/27, Decision on the Respondent's Representation in this Proceeding (Mar. 1, 2021)); Mobil Cerro Negro Holding, L.L.C., & Mobil Cerro Negro, Ltd., ICSID Case No. ARB/07/27, Decision on the Respondent's Representation in this Proceeding, ¶ 50 (Mar. 1, 2021); Kimberly-Clark Dutch Holdings, B.V., Kimberly-Clark S.L.U. & Kimberly-Clark B.V.B.A. v. Venez., ICSID Case No. ARB(AF)/18/3, Order on Venezuela's Representation (Oct. 15, 2019); Valores Mundiales, S.L. & Consorcio Andino, S.L. v. Venez., ICSID Case No. ARB/13/11, Procedural Resolution No. 2 (Aug. 29, 2019); *see* Tom Jones & Sebastian Perry, *ICSID Committee Rebuffs Guaidó*, GLOB. ARB. REV. (May 10, 2019) https://globalarbitrationreview.com/icsid-committee-rebuffs-guaido; [https://perma.cc/XLN8-2R4L]; Lisa Bohmer & Vladislav Djanic, *In Now-Public Decision, an ICSID Ad Hoc Committee Finds That It Has the Power to Decide the Question of Venezuela's Representation, and Rules in Favor of the Maduro Government*, INV. ARB. REP. (Apr. 3, 2020) https://www.iareporter.com/articles/in-now-public-decision-an-icsid-ad-hoc-committee-finds-that-it-has-the-power-to-decide-the-question-of-venezuelas-representation-and-rules-in-favor-of-the-maduro-government/ [https://perma.cc/38YG-BARH]; Cosmo Sanderson, *Maduro Wins ICSID Representation Fight with Guaidó*, GLOB. ARB. REV. (Mar. 4, 2020) https://globalarbitrationreview.com/maduro-wins-icsid-representation-fight-guaido [https://perma.cc/9JBV-RB3W].

161. Odermatt, *supra* note 138, at 227.

162. Casas, *supra* note 135, at 601.

163. Valores Mundiales, S.L. & Consorcio Andino, S.L. v. Venez., ICSID Case No. ARB/13/11, Procedural Resolution No. 2, ¶ 43 (Aug. 29, 2019).

164. Mobil Cerro Negro Holding, L.L.C. & Mobil Cerro Negro, Ltd. v. Venez., ICSID Case No. ARB/07/27, Decision on the Respondent's Representation in this Proceeding, ¶ 56 (Mar. 1, 2021).

165. *Id.* ¶ 60; Valores Mundiales, S.L. & Consorcio Andino, S.L. v. Venez., ICSID Case No. ARB/13/11, Procedural Resolution No. 2, ¶ 49 (Aug. 29, 2019) (finding that a "mere count of acknowledgements that both parties have been able to obtain" is not satisfactory to make out the burden required).

to the fact that these national recognition decisions are inherently political, rather than legal, in nature and therefore do not assist international courts and tribunals in undertaking the strictly legal inquiry before them.[166]

A version of this approach could be thought to have been employed in the *Bosnian Genocide* case, wherein following the proceedings on provisional measures and preliminary objections, there was an "ambush attempt to discontinue the case" by the then-Chairman of the Presidency of Bosnia and Herzegovina, Zivko Radsić, who "appointed a Co-Agent for the Genocide case without consulting the other two members of the Presidency."[167] The co-agent then attempted to discontinue the case, and the Former Republic of Yugoslavia accepted the discontinuance, leading to a rapid exchange of letters between the Registrar, the original agent and the newly appointed co-agent.[168] The Court was therefore put in the position where it may have been called to determine which agent could validly represent Bosnia and Herzegovina. After delaying the commencement of the oral proceedings in the merits phase to consider this question,[169] the Court found that the conflicting views of the agents and of the government meant that "Bosnia and Herzegovina had not demonstrated its will to withdraw the Application in an unequivocal manner"[170] and, accordingly, it held that the case was not to be discontinued and would proceed with the representatives on record, thereby maintaining the status quo.

The adoption of a rebuttable presumption of the status quo is a largely sensible solution, serving as a "quick and easy way to deal with the sensitive and complicated issue of [S]tate representation."[171] This

166. As Chief Justice Taft held in the Tinoco Arbitration, *supra* note 28, at 381:

> [W]hen recognition *vel non* of a government is by such nations determined by inquiry, not into its de facto sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their nonrecognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned.

Note also the view of Judge Weeramantry, who observed that "there are many factors relevant to a political decision which a political organ can and would take notice of, but which a judicial organ cannot and would not." Questions of Interpretation and Application of the 1971 Montréal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Provisional Measures, 1992 I.C.J. 3, at 58 (Apr. 14) (dissenting opinion by Weeramantry, J.).

167. Dimitrijević & Milanović, *supra* note 40, at 74.

168. *See generally* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Merits, 2007 I.C.J. 43, ¶¶ 18–26 (Feb. 26).

169. *Id.* ¶ 25.

170. *Id.* ¶ 24.

171. Papp, *supra* note 53, at 274.

technique is also consonant with international law's "presumption in favor of the established government, even after its rival has established effective control over the bulk of the population and territory."[172] Such a principle derives from the norm against premature recognition, which, in Lauterpacht's view, was the reason the "lawful" Republican Government was entitled to continue to represent the State of Spain at the PCIJ in the *Borchgrave* case during the Spanish Civil War, notwithstanding General Franco's dominance.[173]

The burden of proof required is clearly high, evidenced by the fact that Mr. Guaidó was never able to successfully discharge it.[174] However, such a high burden is consistent with the procedural principle that the government that "intends to mutate the current procedural representation must prove the presupposition on which [it] founded [its] request."[175] More generally, the rebuttable presumption ensures continuity and order in the State's representation,[176] thereby minimizing the potential for the State to suffer from "swing-wing representation,"[177] as well as protecting the parties' interest in procedural fairness by allowing the dispute to proceed efficiently.[178]

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172. ROTH, *supra* note 27, at 151, 182; *see also* M.J. Peterson, *Recognition of Governments*, *in* ROUTLEDGE HANDBOOK OF STATE RECOGNITION 205, 209–10 (Gëzim Visoka, John Doyle & Edward Newman eds., 2020); HERVEY, *supra* note 121; LAUTERPACHT, *supra* note 48, at 93–94, 354:

> [S]o long as the party or parties which challenge its authority have not asserted themselves to the point of being themselves entitled to recognition, the established government, however weakened, is entitled to continued recognition. Effectiveness is presumed to exist so long as the lawful government has not been definitively displaced by a rival authority.

But see ROTH, *supra* note 27, at 318 (noting that this presumption has been disregarded where "support for the opposition faction . . . has cut across ideological and geostrategic lines").

173. LAUTERPACHT, *supra* note 48, at 93 n.3.

174. Cosmo Sanderson & Tom Jones, *ICSID Committee Challenged in Venezuela Row*, GLOB. ARB. REV. (Apr. 17, 2020), https://globalarbitrationreview.com/icsid-committee-challenged-in-venezuela-row [https://perma.cc/6LSW-4LK8].

175. Valores Mundiales, S.L. & Consorcio Andino, S.L. v. Venez., ICSID Case No. ARB/13/11, Procedural Resolution No. 2, ¶ 40 (Aug. 29, 2019).

176. Mobil Cerro Negro Holding, L.L.C., and Mobil Cerro Negro, Ltd. v. Venez., ICSID Case No. ARB/07/27, Decision on the Respondent's Representation in this Proceeding, ¶ 53 (Mar. 1, 2021).

177. ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. & ConocoPhillips Gulf of Paria B.V. v. Venez., ICSID Case No. ARB/07/30, Order on the Applicant's Request for Reconsideration Dated 3 August 2020 on the Issue of Venezuela's Legal Representation, ¶ 38 (Nov. 2, 2020).

178. Venezuela Holdings, B.V., Mobil Cerro Negro Holding, L.L.C., and Mobil Cerro Negro, Ltd. v. Venez., ICSID Case No. ARB/07/27, Decision on the Respondent's Representation in this Proceeding, ¶¶ 64–65 (Mar. 1, 2021).

There are, however, practical difficulties in the application of the rebuttable presumption. In relation to the *Rohingya Genocide Case*, a group of lawyers has argued that such a presumption ought to apply in favor of the NUG.[179] It is uncertain how the presumption could apply, considering both Suu Kyi and her Deputy Agent are under arrest,[180] and given that the NUG is a post-coup invention rather than a continuation of the "old" government. In such cases, or if the government seeking control over the proceedings provides evidence that may *prima facie* discharge its evidentiary burden, the Court may be forced to make an assessment of governmental status.

3. Deference

A third technique involves adopting a deferential approach, similar to that taken by common law courts, which defer to the executive branch of the State to decide recognition questions on their behalf.[181] Such an approach was encouraged by the Guaidó regime, which argued that the decision as to Venezuela's representation should not be made by individual arbitral tribunals but rather by the ICSID itself[182] or based on the recognition of his regime by other States.[183] The former approach was partially adopted by the ICSID Committee

179. Legal Action Worldwide, *supra* note 20.

180. Bain, *supra* note 8.

181. In relation to Venezuela, see, for example, OI European Grp. B.V. v. Bolivarian Republic of Venez., No. 16-cv-01533, 2019 WL 2185040 (D.D.C. May 21, 2019); Rusoro Mining Ltd v. Bolivarian Republic of Venez., No. 18-7044 (D.C. Cir. May 1, 2019); Maduro Bd. of the Central Bank of Venez. v. Guaidó Bd. of the Central Bank of Venez. [2020] EWHC 1721 (Comm). On the general U.S. position, see Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Goldwater v. Carter, 444 U.S. 996 (1979). On the U.K. position, see Republic of Somalia v. Wodehouse Drake [1993] 1 All ER 1. On the Australian position, see Anglo-Czechoslovak and Prague Credit Bank v. Janssen [1943] V.L.R. 185; Van Heyningen v. Netherlands-Indes Gov. [1949] St. R. Qd 54; Chow Hung Ching v. The King (1949) 77 C.L.R. 449.

182. Letter from Jose Ignacio Hernández, Procurador Especial de la República Bolivariana de Venezuela [Special Prosecutor of the Bolivarian Republic of Venezuela] to Meg Kinnear, Secretary-General of the International Centre for the Settlement of Investment Disputes (Apr. 29, 2019) (cited in Valores Mundiales, S.L. & Consorcio Andino, S.L. v. Venez., ICSID Case No. ARB/13/11, Procedural Resolution No. 2, ¶¶ 1–2 (Aug. 29, 2019)); see also discussion in Valores Mundiales, S.L. & Consorcio Andino, S.L. v. Venez., ICSID Case No. ARB/13/11, Procedural Resolution No. 2, ¶ 11 (Aug. 29, 2019); Mobil Cerro Negro Holding, L.L.C., & Mobil Cerro Negro, Ltd. v. Venez., ICSID Case No. ARB/07/27, Decision on the Respondent's Representation in this Proceeding, ¶¶ 34, 62 (Mar. 1, 2021).

183. Valores Mundiales, S.L. & Consorcio Andino, S.L. v. Venez., ICSID Case No. ARB/13/11, Procedural Resolution No. 2, ¶¶ 48–49 (Aug. 29, 2019).

in *Air Canada*.[184] The latter approach was adopted by two tribunals in investment treaty cases involving Yemen,[185] which held that international recognition, both by States severally and by bodies like the U.N.,[186] of the Hadi government in-exile was enough to overcome its lack of effectiveness vis-à-vis its rival, the Sana'a government.[187] That approach has, however, been rejected by a number of ICSID tribunals in relation to the question of Venezuela's representation, with one tribunal relevantly finding that third State recognition will only be of any consequence where it is "accompanied by material acts of the exercise of power."[188]

A middle ground approach was adopted by the ICJ in the *Bosnian Genocide* case, which considered that then-President Izetbegović was competent to institute proceedings notwithstanding the Federal Republic of Yugoslavia's preliminary objections to his legitimacy.[189] In so doing, the Court placed weight on his recognition by the U.N. as

184. Air Canada Procedural Order No. 7, *supra* note 45, ¶ 28.

185. PATRICK DUMBERRY, REBELIONS AND CIVIL WARS: STATE RESPONSIBILITY FOR THE CONDUCT OF INSURGENTS 106–07 (2021) (citing Beijing Urban Constr. Grp. Co. Ltd. v. Yemen, ICSID Case No. ARB/14/30, Procedural Order No. 2 (Nov. 8, 2016)); Mobil-Telephony Sabafon v. Yemen, UNCITRAL Arbitral Tribunal, PCA Case No. 2010-03, Procedural Order No. 11 (May 2, 2018).

186. *See, e.g.*, S.C. Res. 2216 (Apr. 14, 2015).

187. *See generally* DUMBERRY, *supra* note 185, at 106–07; Reza Mohtashami, *Protecting the Legitimacy of the Arbitral Process: Jurisdictional and Procedural Challenges in Public-Private Disputes*, *in* EVOLUTION AND ADAPTION: THE FUTURE OF INTERNATIONAL ARBITRATION 619–27 (Jean Engelmayer Kalicki & Mohamed Abdel Raouf eds., 2019); Luke Eric Peterson, *Award Looms in UNCITRAL Investment Arbitration against Yemen; in Unpublished Ruling, Arbitrators Decided Who Is Rightful Legal Representative of State*, INV. ARB. REP. (Dec. 23, 2019), https://www.iareporter.com/articles/award-looms-in-uncitral-investment-arbitration-against-yemen-in-unpublished-ruling-arbitrators-decided-who-is-rightful-legal-representative-of-state/ [https://perma.cc/LB9S-78QP].

188. Valores Mundiales, S.L. & Consorcio Andino, S.L. v. Venez., ICSID Case No. ARB/13/11, Procedural Resolution No. 2, ¶ 49 (Aug. 29, 2019).

189. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), The Response of the Government of the Federal Republic of Yugoslavia to the Request for the Indication of Provisional Measures of Protection Submitted by the Government of the "Republic of Bosnia and Herzegovina," ¶ 1 (Apr. 1, 1993) https://www.icj-cij.org/sites/default/files/case-related/91/13277.pdf [https://perma.cc/6C5T-QUAG]; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Preliminary Objections of the Federal Republic of Yugoslavia, ¶ A.2.3 (June 26, 1995), https://www.icj-cij.org/sites/default/files/case-related/91/8618.pdf [https://perma.cc/PF85-ES7K].

the Head of State and his participation in various treaty negotiations.[190] A similar approach was taken by the European Commission of Human Rights in *Cyprus v. Turkey*, with the Commission finding that evidence of the participation of the Greek Cypriot Government in the Council of Europe and at the U.N. as well as its recognition by States was enough to overcome Turkey's objection that it was not entitled to represent the State of Cyprus.[191] Conversely, in *Diplomatic Relations*, the Registrar proceeded to transmit the application instituted by the Micheletti Government notwithstanding the fact that that the UNGA had unanimously resolved not to recognize that government,[192] indicating a preference for delay over deference.

One scholar has argued that some of this practice establishes that "*de jure* recognition is what matters to determine which entity should be considered as the "government" of the respondent State in the specific context of on-going arbitration proceedings."[193] However, the experience of Mr. Guaidó at various ICSID tribunals clearly contradicts this assertion. While use of a deferential technique would be convenient, minimizing the need for the Court to weigh into controversial questions of politics, it is one that the ICJ should not adopt for two key reasons. First, given there is no collective process of recognition in international law,[194] there is no immediately obvious body to which the Court could defer. The ICSID Tribunal in *Air Canada* struggled with this question, simply deferring to "an appropriate decision-making body,"[195] without clarifying what that body may be. In the absence of any practice from the Court, the most convenient answer would appear to be deference to the U.N. Credentials Committee,

190. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia) Preliminary Objections, 1996 I.C.J. 595, ¶ 44 (July 11); *see also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Order of 8 April 1993, 1993 I.C.J. 3, ¶ 13 ("the Court has been seised of the case on the authority of a Head of State, treated as such in the United Nations"). See also Bosnia and Herzegovina's argument in the oral proceedings on provisional measures. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Verbatim Record, 38–39 (Apr. 2, 1993, 3 p.m.), https://www.icj-cij.org/sites/default/files/case-related/91/091-19930402-ORA-01-00-BI.pdf [https://perma.cc/NM8X-LQK9] (Francis A. Boyle) ("His Excellency, President Izetbegović, is still recognized by the United Nations as the legitimate Head of State of the Republic of Bosnia and Herzegovina. . . . That should indicate to you the legitimacy of my Government to represent the State of Bosnia and Herzegovina.").

191. Cyprus v. Turk., Case Nos. 6780/74, 6780/75 (May 26, 1975) 125, 129–30.

192. G.A. Res. 63/301, (July 1, 2009).

193. DUMBERRY, *supra* note 185, at 107.

194. *See infra* Section IV.B.1.

195. Air Canada Procedural Order No. 7, *supra* note 45, ¶ 64.

which settles representation disputes at the UNGA.[196] Such a view finds support in GA Resolution 396(V), which recommended that specialized agencies and organs of the U.N. adopt the Committee's view when questions of representation arise.[197] However, these arguments have no basis in practice or law. Not only is Resolution 396(V) routinely ignored by specialized agencies,[198] but the UNGA simply does not have the capacity to bind the Court.[199]

Second, notwithstanding the fact that Resolution 396(V) cannot bind the Court, voluntary deference to the UNGA would be similarly inappropriate and inconsistent with the ICJ's role as the "principal judicial organ" of the U.N.[200] While the Court's position as an organ of the U.N. system necessarily infers a level of proximity between its goals and the goals of the broader Organization,[201] the

196. *See generally* ROSALYN HIGGINS ET AL., 1 OPPENHEIM'S INTERNATIONAL LAW: UNITED NATIONS 305–09 (2017); ROSALYN HIGGINS, DEVELOPMENT OF INTERNATIONAL LAW BY THE POLITICAL ORGANS OF THE UNITED NATIONS 158–64 (1963); Dan Ciobanu, *Credentials of Delegations and Representation of Member States at the United Nations*, 25 INT'L & COMPAR. L.Q. 351 (1976); Siegfried Magiera, *Article 9*, *in* 1 THE CHARTER OF THE UNITED NATIONS, *supra* note 22, 446, 453–60.

197. G.A. Res. 396 (V), ¶ 3 (Dec. 14, 1950).

198. PETERSON, *supra* note 27, at 133–36; Lorenzo Arditi, *The Role of Practice in International Organizations: The Case of Government Recognition by the International Monetary Fund*, 17 INT'L ORG. L. REV. 531, 537–39; (2020); JOSEPH GOLD, MEMBERSHIP AND NONMEMBERSHIP IN THE INTERNATIONAL MONETARY FUND: A STUDY IN INTERNATIONAL LAW AND ORGANIZATION 66–67 (1974). In relation to Myanmar, a number of specialized agencies have left the question of representation open and deferred to the UNGA. *See Report on Credentials: Second Report of the Credentials Committee*, ILO Doc. ILO.109/Record No. 3B, ¶¶ 18–19 (June 7, 2021) (International Labor Organization); *Committee on Credentials: Report*, WHO Doc. A74/56, ¶ 7 (May 26, 2021) (World Health Organization); Int'l Atomic Energy Agency [IAEA], *Examination of Delegates' Credentials: First Report of the General Committee*, IAEA Doc. GC(65)//29, ¶ 3 (Sept. 20, 2021) (International Atomic Energy Agency). *But see* Larry D. Johnson, *What's Wrong with This Picture? The UN Human Rights Council Hears the Military Junta as the Legitimate Government of Myanmar*, EJIL: TALK! (Mar. 31, 2021) https://www.ejiltalk.org/whats-wrong-with-this-picture-the-un-human-rights-council-hears-the-military-junta-as-the-legitimate-government-of-myanmar/ [https://perma.cc/6LXG-B3QB].

199. ROTH, *supra* note 27, at 257; 1 THIRLWAY, *supra* note 41, at 4 (noting that the Court is "not subject to any direction or control by any of the other principal organs"); 1 SHAW, *supra* note 46, at 109–18; Simon Chesterman & Karin Ollers-Frahm, *Article 92 UN Charter*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 37, 208, 215; Giorgio Gaja, *Standing: International Court of Justice (ICJ)*, *in* MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL PROCEDURAL LAW ¶ 18 (Hélène Ruiz Fabri ed., 2018).

200. U.N. Charter art. 92; Statute of the ICJ, *supra* note 21, art. 1. See the discussion in Simon Chesterman & Vera Gowland-Debbas, *Article 1*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 37, 279.

201. Giladi & Shany, *supra* note 46, at 166, 185.

Court's status as a judicial organ requires it to act "only on the basis of law," endowing it with independence from the political organs of the U.N.[202]—an independence that the Court, as an independent organ of the U.N., ought to preserve.[203] Should it fail to do so, its credibility and legitimacy may be compromised.[204] Accordingly, deference to an inherently political organ, such as the UNGA Credentials Committee, which makes recognition decisions "based on political expediency rather than law,"[205] would be inconsistent with both this independence and the Court's function as an arbiter of law.[206] Instead, the Court's practice rightfully demonstrates a reluctance toward adopting deferential approaches. The better approach may be to treat the recognition decisions of other States or of international organizations as indicia of effective control, but not determinative of governmental status in and of themselves.

4. Silence or Acquiescence

In its judgment on preliminary objections in the *Rohingya Genocide Case*, the Court adopted an approach of silence or acquiescence in that it allowed the SAC—the effective government of Myanmar—to reorganize the State's legal team and control the State's conduct of the proceedings over the protest of the NUG without providing any explanation as to the basis on which this permissive approach was adopted. The Court, in its judgment, dispensed with questions of representation in short shrift. In its only reference to the change of government in Myanmar, the Court noted in its recitation of the procedural history that "by a letter dated 12 April 2021, Myanmar informed the Court of the appointment of H.E. Mr. Ko Ko Hlaing, Union Minister

202. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 23 (June 21); *see also* 2 HIGGINS ET AL., *supra* note 196, at 1183; Max Sørensen, *The International Court of Justice: Its Role in Contemporary International Relations,* 14 INT'L ORG. 261, 261 (1960).

203. Vera Gowland-Debas & Mathias Forteau, *Article 7 UN Charter*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 37, 135, 152; Questions of Interpretation and Application of the 1971 Montréal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Provisional Measures, 1992 I.C.J. 3, at 58 (Apr. 14) (dissenting opinion by Weeramantry, J.).

204. *See generally* Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271 (2003).

205. MORELLO, *supra* note 27, at 51; *see also* TALMON, *supra* note 33, at 176.

206. Dapo Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?*, 46 INT'L & COMPAR. L.Q. 309, 342 (1997).

for International Cooperation of Myanmar, as Agent and H.E. Ms Thi Da Oo, Union Attorney General of Myanmar, as Alternate Agent, in place of H.E. Ms Aung San Suu Kyi and H.E. Mr. Kyaw Tint Swe."[207]

This fleeting reference to a representation dispute that has generated significant academic commentary perhaps raises more questions than it answers. It appears that the Court has silently accepted that the SAC is entitled to represent Myanmar in the dispute and has proceeded accordingly without fanfare or announcement. Whether this approach amounts to an assessment of governmental status is unclear, as the Court has failed to provide any detail as to the factors it considered in determining whether the Tatmadaw was competent to represent Myanmar. Indeed, the Court even declined to name the person who purported to exercise the State's authority by terminating Aung San Suu Kyi's commission as agent and appointing new agents in the proceedings. Instead, the Court has adopted the avoidance technique of silence and acquiescence.

The Court's approach is both legally and normatively problematic. Each State is entitled to a degree of procedural fairness and due process in the rendering of judgment.[208] To this end, States should be able to understand with sufficient clarity the legal bases and factual matrix leading to the Court's decision. If the Court fails to provide that detail, questions may arise as to whether that procedural fairness has been afforded. Further, and more generally, the Court has a responsibility, not only as a judicial body, but also due to its sui generis role in the international system, to act with the highest degree of transparency, such that its reasoning may be exposed to scrutiny and to assist in the development of customary international law. By acting in an opaque, rather than transparent, way, the Court threatens the confidence of States and their polities in its legitimacy as an arbiter of international law. These criticisms were best encapsulated by Judge *ad hoc* Kress, Myanmar's ad hoc judicial appointee to the bench for the dispute,[209] who observed in his Separate Opinion that the majority's preliminary objections judgment

> fails to explain the grounds that led the Court to act upon the replacement described in paragraph 8 of the

207. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Judgment, ¶ 8 (July 22, 2022), https://www.icj-cij.org/public/files/case-related/178/178-20220722-JUD-01-00-EN.pdf [https://perma.cc/7D3W-A5ZB].

208. *See generally* Filippo Fontanelli & Paolo Busco, *The Function of Procedural Justice in International Adjudication*, 15 LAW & PRAC. INT'L CTS. & TRIBUNALS 1 (2016); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1998).

209. Judge *ad hoc* Kress was appointed prior to the military coup.

> Judgment. That lack of explanation could give the impression that the replacement was a matter of course. This, however, was not the case, as can be seen, for example, from the fact that on 1 February 2022 the "National Unity Government" announced that it had appointed H. E. U Kyaw Moe Tun, the Permanent Representative of Myanmar to the United Nations in New York, as the Agent of Myanmar in the case. Nor was the replacement self-explanatory from a legal perspective, as the laconic formulation of paragraph 8 of the Judgment might suggest.
>
> In my opinion, under such circumstances, for the Court to proceed in the way that it did is less than satisfactory.[210]

In fairness to the Court, it was not asked by either State to address this issue; no submissions were made. However, as I have endeavored to explain, in situations where there is significant debate as to the right of the government to represent a State party to a dispute before it, the Court ought to adopt a more considered approach and inquire into such questions *proprio motu*. It therefore follows that an approach of silent acceptance should not be adopted by international courts and tribunals.

5. Dual Representation

The *raison d'être* of this Article lies in the argument that only one government can represent the State.[211] This conclusion was recently challenged by the ICSID Annulment Committee in *ConocoPhillips*,[212] which adopted an interpretation of the status quo rule to permit Venezuela to be represented by two governments simultaneously. The facts and judgment in this case are complex and have been discussed elsewhere.[213] For the purposes of this Article, it suffices to say that the

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210. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Judgment, Declaration of Judge *ad hoc* Kress, ¶¶ 4–5 (July 22, 2022).

211. *See supra* Part II.

212. ConocoPhillips Pertozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Venez., ICSID Case No. ARB/07/30, Order on the Applicant's Representation (Apr. 3, 2020).

213. *See* Lisa Bohmer, *Tribunal Agrees to Correct Errors in Conoco v Venezuela Award, Thus Stripping $227 Million Off of $8.3 Billion Previously Awarded*, INV. ARB. REP. (Aug. 30, 2019), https://www.iareporter.com/articles/tribunal-agrees-to-correct-errors-in-conoco-v-

adoption of an approach of dual representation is likely to be problematic in most circumstances. President Maduro and Mr. Guaidó, as a matter of logic and law, cannot both have possessed concurrent authority to instruct counsel on behalf of the State. Further, such an approach is likely to prejudice the State's defense and give the other State party to the proceedings an advantage due to the "risk of contradiction in the arguments [of the State] and the manner in which they will be presented."[214] This risk of contradiction is particularly high given the major differences in political outlook that rival governments are likely to hold. For instance, the SAC and NUG hold deeply inconsistent views regarding the Rohingya genocide and how Myanmar's legal defense should be conducted.[215]

On a normative basis, dual representation does not generate any greater benefit than more standard avoidance techniques. By leaving "the political issue of determining Venezuela's legitimate government 'wholly at large,'"[216] international courts and tribunals, far from *avoiding* involvement in politics, in fact make inherently political decisions by allowing both representatives to persist. Doing so provides a veneer of legitimacy to a rival government that does not exercise effective control, which, even if not providing legal recognition or

venezuela-award-thus-stripping-150-million-off-of-8-3-billion-previously-awarded [https://perma.cc/EL3V-PB3J]; Lisa Bohmer, *ICSID Declines Disqualification Proposal Arising Out of "Solomonic Solution" to the Problem of Venezuela's Representation*, INV. ARB. REP. (July 28, 2020), https://www.iareporter.com/articles/icsid-declines-disqualification-proposal-arising-out-of-solomonic-solution-to-the-problem-of-venezuelas-representation [https://perma.cc/8VYK-ZPLX]; Sebastian Perry, *Maduro Government Fails to Dislodge Conoco Committee*, GLOB. ARB. REV. (July 28, 2020), https://globalarbitrationreview.com/maduro-government-fails-dislodge-conoco-committee [https://perma.cc/Q4SU-UKZ9]; Cosmo Sanderson, *Conoco Faces Bid to Annul US$9 Billion Venezuela Award*, GLOB. ARB. REV. (Dec. 11, 2019), https://globalarbitrationreview.com/conoco-faces-bid-annul-us9-billion-venezuela-award. [https://perma.cc/4YBW-WK59]. Dual representation was rejected by other tribunals. *See* Air Canada Procedural Order No. 7, *supra* note 45, ¶ 68; Kimberly-Clark Dutch Holdings, B.V., Kimberly-Clark S.L.U., and Kimberly-Clark B.V.B.A. v. Venez., ICSID Case No. ARB(AF)/18/3, Order on Venezuela's Representation, ¶ 49 (Oct. 15, 2019); Mobil Cerro Negro Holding, L.L.C., and Mobil Cerro Negro, Ltd. v. Venez., ICSID Case No. ARB/07/27, Decision on the Respondent's Representation in this Proceeding, ¶ 65 (Mar. 1, 2021); *see also* ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Venez., ICSID Case No. ARB/07/30, Recommendation of Lord Phillips, ¶¶ 123–24 (July 10, 2020).

214. ConocoPhillips Pertozuata B.V., ConocoPhillips Hamaca B.V. & ConocoPhillips Gulf of Paria B.V. v. Venez., ICSID Case No. ARB/07/30, Order on the Applicant's Representation, ¶ 26 (Apr. 3, 2020).

215. *See supra* notes 10–12 and accompanying text.

216. Sebastian Perry, *Maduro Government Fails to Dislodge Conoco Committee*, GLOB. ARB. REV. (July 28, 2020), https://globalarbitrationreview.com/maduro-government-fails-dislodge-conoco-committee [https://perma.cc/5BFV-B89G].

legitimacy, may be of great normative or political weight to that rival government. In short, such an avoidance technique is unlikely to be an appropriate one for the ICJ to adopt.

C. Conclusion

As Professor Erin F. Delaney has noted, "courts around the world have taken the Bicklean suggestion to heart. Avoidance is everywhere."[217] International courts and tribunals are not immune to this practice. In this Part, I have outlined five such techniques that are readily discernible in the context of rival governments: deference, delay, dual representation, the rebuttable presumption of the status quo, and silence or acquiescence. Some of the techniques they have adopted—deference, silence or acquiescence, and dual representation—are, though convenient, incompatible with the Court's role as an independent arbiter of international law. Others—delay and the rebuttable presumption of the status quo—are eminently sensible innovations that the Court should consider adopting; the former in cases where the existence of the rival governments is relatively new, and the latter in cases where delay is no longer feasible and the Court must proceed to resolve the substantive dispute between the parties. The particular avoidance technique to be adopted by the Court will depend on the circumstances of the dispute before it. In any case, it is unlikely that one singular technique can act as the panacea for questions of recognition and representation. Instead, international courts and tribunals may rely on a combination of techniques, or none at all, to approach the adjudicative task.

While the use of such avoidance techniques may be "doctrinally questionable," their capacity to minimize some of the more harmful effects arising from assessments of governmental status makes them "normatively defensible."[218] Nonetheless, avoidance techniques create independent concerns of their own, which must be weighed in determining whether they are indeed a normatively defensible approach. First, adopting avoidance techniques may make the Court look weak by demonstrating its limitations as an institution,[219] diminishing its image of independence by giving the impression that it is abdicating

217. Delaney, *supra* note 142, at 3.

218. Casas, *supra* note 135, at 620.

219. Odermatt, *supra* note 138, at 222; Waters, *supra* note 142, at 326.

its responsibility.[220] This perceived weakness may, in turn, lead to losses of relevance and credibility by demonstrating that the Court is out of touch,[221] and may propagate existing power structures.[222] Such implications may erode the Court's position as a forum for international dispute settlement and encourage States to appear before other, more decisive institutions.

Second, avoidance techniques do not necessarily shield the Court from the implications arising from an assessment of governmental status. A decision to avoid decision may have just as much of a legitimizing effect in favor of the government of record as an assessment of governmental status would. Similarly, there is *always* going to be criticism of the Court founded in allegations of politics from the party that fails in their application, with a potentially delegitimizing effect. Indeed, the use of traditional avoidance techniques at jurisdiction and admissibility phases have led to some of the most serious losses of legitimacy in the Court's history. For instance, the Court's widely criticized decision to decline jurisdiction in *South West Africa* delegitimated the Court in the eyes of much of the Third World and caused irreparable harm to the Court's institutional legitimacy for decades.[223] Equally, as the reaction to the decision in *Military and Paramilitary Activities* demonstrates, in some instances the rejection of avoidance techniques may enhance the Court's legitimacy. To this end, any potential impact on the legitimacy of the Court should not necessarily be a reason for the Court to adopt the use of avoidance techniques; determining whether to do so is likely to be a fact-dependent inquiry.

Third, the espousal of avoidance techniques may be incompatible with the Court's essential functions. The Court's judicial function

220. Odermatt, *supra* note 138, at 227; *see also* Sergio Verdugo, *How Judges Can Challenge Dictators and Get Away with It: Advancing Democracy While Preserving Judicial Independence*, 59 COLUM. J. TRANSNAT'L L. 554, 574 (2021).

221. Fouchard, *supra* note 135, at 771; Shana Tabak, *Aspiring States*, 64 BUFFALO L. REV. 499, 553 (2016).

222. Andrea Bianchi, *Choice and the Awareness of Its Consequences: The ICJ's "Structural Bias" Strikes Again in the Marshall Islands Case*, 111 AJIL UNBOUND 81, 86 (2017); John, *supra* note 135, at 116.

223. James Crawford, *"Dreamers of the Day": Australia and the International Court of Justice*, 14 MELB. J. INT'L L. 17, 31–35 (2014); Michla Pomerance, *Case Analysis: The ICJ and South West Africa (Namibia): A Retrospective Legal/Political Assessment*, 12 LEIDEN J. INT'L L. 425, 430–31 (1999); JOHN DUGARD, THE SOUTH WEST AFRICA/NAMIBIA DISPUTE: DOCUMENTS AND SCHOLARLY WRITING ON THE CONTROVERSY BETWEEN SOUTH AFRICA AND THE UNITED NATIONS 292 (1973); Ingo Venzke, *Public Interests in the International Court of Justice: A Comparison between Nuclear Arms Race (2016) and South West Africa (1966)*, 111 AJIL UNBOUND 68, 72 (2017).

is likely to be compromised not only by the delay inherent in the use of avoidance techniques, which undermines the interest of the parties in the efficient resolution of disputes, but also because avoidance techniques are necessarily extra-judicial, not being concerned with the "proper application of the law, *comme il faut*."[224] Additionally, in adopting avoidance techniques reliant on considerations of realpolitik and in privileging the interests of States, the Court may "discount the good effects that a particular judicial outcome has elsewhere."[225] The most immediately obvious effect that is lost as a result of the use of avoidance techniques is the Court's institutional role to develop the system of international law,[226] depriving the broader international system the benefit of certainty and clarity that would arise from a decision concerning the recognition of governments.

Last, while the use of avoidance techniques may reduce the negative implications of assessments of governmental status in the short-term, these implications will continue to confront the Court until such a time as the Socratic dialogue of judicial restraint theorized by Bickel takes effect.[227] Given the lack of a system of collective recognition and the failure of the UNGA and other bodies to take action on representation contests,[228] this Socratic dialogue is, at least at present, a distant dream—undermining a core function of avoidance techniques. Accordingly, it may fall to the Court to make assessments of governmental status to overcome the paralysis of the international system.

In sum, the adoption of avoidance techniques is a sensible and welcome innovation in international dispute settlement, allowing for international courts and tribunals to effectively mitigate the varied implications arising from assessments of governmental status. However, and equally, avoidance techniques have normative implications of their own, which may be just as significant as those arising from an assessment of governmental status. Accordingly, avoidance

224. Casas, *supra* note 135, at 614–15.

225. Korhonen, *supra* note 131, at 96.

226. Robert Y. Jennings, *The Internal Judicial Practice of the International Court of Justice*, 59 BRIT. Y.B. INT'L L. 31, 33 (1988); Armin von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 26 LEIDEN J. INT'L L. 49, 55–57 (2013); José E. Alvarez, *What are International Judges for? The Main Functions of International Adjudication*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 159, 168–70 (Cesare P.R. Romano, Karen J. Alter & Yuval Shany eds., 2013); Brown, *Inherent Powers*, *supra* note 99, at 232–35; HERNÁNDEZ, *supra* note 46, at 89–90.

227. BICKEL, *supra* note 25, at 70–71.

228. *See infra* note 260 and accompanying text.

techniques are unlikely to be a complete solution for the issues of representation and recognition, or the "panacea curing the structural shortcomings inherent in the international law system."[229]

The choice to pursue avoidance techniques is likely to be a product of "principle and pragmatism,"[230] requiring the Court to undertake a balancing exercise. This balancing exercise may result in the adoption of avoidance techniques in some situations, such as where the issue of representation is incredibly controversial or where the change in government has only recently occurred, and proceeding to make an assessment of governmental status based on principles of international law in others, such as where the Socratic dialogue of judicial restraint has failed to yield results, where avoidance has gone on too long and risks compromising the integrity of the Court, or where decision becomes necessary due to the urgency of the proceedings or the nature of the dispute. The wisest approach may be for the Court to, in the first instance, adopt a "tiered approach" to avoidance techniques before proceeding to an assessment of governmental status. It may initially delay the proceedings in the hope that the competition between the rival governments will naturally atrophy. Where delay is no longer an option, the Court may proceed to adopt the rebuttable presumption of the status quo. In cases where evidence is put on to challenge that presumption, the adoption of avoidance techniques may no longer be feasible and instead the Court must proceed to an assessment of governmental status. When such circumstances arise, the Court will be required to use its established procedural power and apply the substantive law of recognition to the facts. The subject matter of that law is the focus of the next Part.

IV. RECOGNITION: SUBSTANTIVE LAW

This Part concerns the substantive law that should be applied by the Court in circumstances where the use of avoidance techniques is no longer feasible or desirable. Having established that the Court *can* decide on questions concerning recognition and representation, the question becomes *how* the Court should decide. It is at this point that the Gordian knot is at its tightest. The most obvious approach, which

229. Karin Oellers-Frahm, *Multiplication of International Courts and Tribunals and Conflicting Jurisdiction: Problems and Possible Solutions*, 5 MAX PLANCK Y.B. U.N. L. 67, 102 (2001).

230. Delaney, *supra* note 142, at 8; *see also* Odermatt, *supra* note 138, at 224; Fouchard, *supra* note 135, at 787 ("strategic wisdom"); BICKEL, *supra* note 25, at 50 ("principle and expediency").

I discuss in Section IV.A, is for the Court to apply substantive law, namely the test of effective control, and undertake an assessment of the status of each entity to determine the government entitled to represent the State. However, such an assessment may produce uncomfortable results, generating negative externalities, which I discuss in Section V.B. I conclude that, notwithstanding these negative normative implications, which by and large explain the Court's adoption of avoidance techniques, the Court should not demur from applying the effective control test where it is required to make a procedural decision on the entity competent to represent the State in proceedings before it.

A. The Law of Recognition

The law of recognition is applied by various subjects of international law. Most notably, States are required to, as a necessity, render their own national recognition decisions for the purposes of determining, inter alia, the right of the foreign government and its representatives to sovereign immunity, *locus standi* before the courts of the recognizing State, the accreditation of its diplomatic representatives, and access to its property and sovereign wealth in the recognizing State. Such decisions on representation must also be made by multilateral fora that receive competing claims to credential the representatives of a State, such as before the U.N. and its specialized agencies, as well as other multilateral organizations such as the Association of South-East Asian Nations (ASEAN).[231] Such decisions are often infected with considerations of politics and national interest; they are not made in strict accordance with principles of international law. At this point, it suffices to say that these national and international recognition decisions are functionally distinct from questions related to recognition before international courts and tribunals. While the former may in some way influence the latter, the latter have their own independent legal and normative considerations upon which the former do not necessarily bear.

Unlike national recognition decisions, on which literature and writing abounds, there is a dearth of guidance as to how the Court should resolve questions concerning the recognition of

231. Which, notably, has been forced to consider the question of Myanmar's representation for the purposes of ascertaining the government competent to represent Myanmar at ASEAN meetings. *See, e.g.*, *Myanmar Military Barred from ASEAN Foreign Ministers' Meeting*, AL JAZEERA (Feb. 3, 2022), https://www.aljazeera.com/news/2022/2/3/myanmar-military-barred-from-asean-foreign-ministers-meeting [https://perma.cc/X5Y9-JPMC].

governments.[232] Not only is there "little case law from international tribunals to guide thinking" on the recognition of governments,[233] but debates over the nature of recognition have, as legal philosopher Hans Kelsen once noted, "neither in theory nor in practice been solved satisfactorily."[234] Notwithstanding these debates, scholars tend to agree that the "principle of effective control is the one fundamental criterion for recognition, and is undisputed."[235] Popularized by the *Tinoco Arbitration*, wherein presiding arbitrator U.S. Chief Justice Taft found that an effective post-revolutionary government was competent to bind the State,[236] Lauterpacht defined the principle as "[e]ffectiveness of power, accompanied by a sufficient degree of stability and a reasonable prospect of permanence"[237] over most or all the territory of the

232. As opposed to questions concerning the recognition of States, the other "branch" of the law of recognition, with which this article is not concerned.

233. Dapo Akande, *Dispute Concerning Honduran Government Crisis Heads to the International Court of Justice*, EJIL: TALK! (Oct. 30, 2009), https://www.ejiltalk.org/dispute-concerning-honduran-government-crisis-heads-to-the-international-court-of-justice/ [https://perma.cc/NV6T-S6JS]; *see also* International Law Association Committee on Recognition and Non-Recognition in International Law, Resolution 3/2018, ¶ 6 (finding that "[w]here competing regimes have sought recognition as a State's government, the various approaches taken have not reflected firmly established criteria for assessing governmental legitimacy").

234. Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 605, 605 (1935); *see also* CRAWFORD, CREATION OF STATES, *supra* note 27, at 19. These debates primarily concern the tension between declaratory and constitutive theories of recognition. In view of the latter, recognition by the international community is required as an element of statehood or governmental status; in the former, recognition is not required in order for a State or government to have legal status. Declaratory theory has largely won the debate. As Crawford noted, "[s]ubstantial state practice supports the declaratory view . . . . Taken to its logical conclusion . . . the constitutive view is as a matter of principle impossible to accept." CRAWFORD, BROWNLIE'S PRINCIPLES, *supra* note 27, at 136–37.

235. Anne Schuit, *Recognition of Governments in International Law and the Recent Conflict in Libya*, 14 INT'L COMM. L.R. 381, 389 (2012); *see also* JOE VERHOEVEN, LA RECONNAISSANCE INTERNATIONALE DANS LA PRATIQUE CONTEMPORAINE: LES RELATIONS PUBLIQUES INTERNATIONALES [INTERNATIONAL RECOGNITION IN CONTEMPORARY PRACTICE: INTERNATIONAL PUBLIC RELATIONS] 553–55 (1975); DIEZ DE VELASCO VALLEJO, *supra* note 121, at 284; KELSEN, *supra* note 29, at 279; CRAWFORD, BROWNLIE'S PRINCIPLES, *supra* note 27, at 142; GRANT, *supra* note 121, at 36; James Crawford, *Criteria for Statehood in International Law*, 48 BRIT. Y.B. INT'L L. 93, 103 (1976) (describing the *Tinoco* test as the "*locus classicus*" of declaratory theory); TRIGGS, *supra* note 27, at 259; PATEL, *supra* note 48, at 68; LAUTERPACHT, *supra* note 48, at 98; ROTH, *supra* note 27, at 318–20; 1 JENNINGS & WATTS, *supra* note 27, at 150–51. *But see generally* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT (1994).

236. Tinoco Arbitration*, supra* note 28, at 381.

237. LAUTERPACHT, *supra* note 48, at 141. The test has been formulated in different ways, though all largely yield the same legal effect. *See, e.g.*, Trygve Lie, *Letter Dated 8 March*

State.[238] This test is a relatively simple one, requiring the Court to conduct a factual inquiry to determine the entity exercising "*de facto* control over all or most of the [S]tate territory."[239] It is this simplicity that had led to States embedding the effective control test in their national recognition decisions in the form of the Estrada Doctrine, which allows States to remain agnostic as to the origin of a foreign government and simply deal with the government in control of the instrumentalities of that State.[240]

However, while "the effective control doctrine is probably accepted as the most reliable guide to the recognition of governments,"[241] other standards do exist.[242] Some scholars have argued in favor of an emerging norm of democratic or constitutional legitimacy,[243] which

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1950 from the Secretary-General to the President of the Security Council Transmitting a Memorandum on the Legal Aspects of the Problem of Representation in the United Nations, 1, U.N. Doc. S/1466 (Mar. 9, 1950); Draft Res. 396(V), U.N. Doc. A/AC/38/L.21/Rev.1 (Dec. 14, 1950); Frowein, *supra* note 31, ¶ 15; KELSEN, *supra* note 29, at 288.

238. Stefan Talmon, *The Constitutive Versus the Declaratory Theory of Recognition: Tertium non datur?*, 75 BRIT. Y.B. INT'L L. 101, 142 (2005); CRAWFORD, BROWNLIE'S PRINCIPLES, *supra* note 27, at 142.

239. CRAWFORD, BROWNLIE'S PRINCIPLES, *supra* note 27, at 142; *see, e.g.*, Hilary Charlesworth, *The New Australian Recognition Policy in Comparative Perspective*, 18 MELB. U. L. REV. 1, 34 (1991) (also noting that the government should "have some form of political existence and the capacity to perform its international obligations").

240. *Declaration of Señor Don Genaro Estrada, Secretary of Foreign Relations of Mexico, Published in the Press on September 27 1930, Relating to the Express Recognition of Governments*, 25 AM. J. INT'L L. 203 (1931). *See generally* Phillip C. Jessup, *The Estrada Doctrine,* 25 AM. J. INT'L L. 719 (1931). On the application of the Doctrine by adopting States, see generally Issei Nomura, *Recognition of Foreign Governments*, 25 JAPANESE ANN. INT'L L. 67 (1982); Anthony Bergin, *The New Australian Policy on Recognition of States Only*, 42 AUSTL. J. INT'L AFFS. 150 (1988); Charlesworth, *supra* note 239; Scott Davidson, *Recognition of Foreign Governments in New Zealand*, 40 INT'L & COMPAR. L.Q. 162 (1991); Colin Warbick, *The New British Policy on Recognition of Governments,* 30 INT'L & COMPAR. L.Q. 568 (1981); Clive R. Symmons, *United Kingdom Abolition of the Doctrine of Recognition of Governments: A Rose by Another Name?*, PUB. L. 249 (1981); RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 203 (AM. L. INST. 1986).

241. 1 SHAW, *supra* note 46, at 388; s*ee also* ROTH, *supra* note 27, at 26, 136; CRAWFORD, CREATION OF STATES, *supra* note 27, at 107.

242. *See generally* PETERSON, *supra* note 27, at 51.

243. *See, e.g.*, Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 91 (1992); Thomas M. Franck, *Legitimacy and the Democratic Entitlement*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 25 (Gregory H. Fox & Brad R. Roth eds., 2000). Other scholars have mixed views. *See generally* Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments,* 48 INT'L & COMPAR. L.Q. 545 (1999); Jean d'Aspremont, *The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks*, 22 EUR. J. INT'L L. 549 (2011); Jean d'Aspremont,

would require that recognition be granted only to governments that come to power by constitutional or legal means.[244] States often use legitimacy in their national recognition decisions to avoid being seen as providing implicit approval to unpalatable foreign governments,[245] subjecting the question of recognition to political considerations. While this test has been espoused most recently in relation to the widespread recognition of the ineffective but "legitimate" former Guaidó regime of Venezuela,[246] and has been advocated by supporters of the NUG,[247] this practice is varied and tests of legitimacy have been roundly rejected by ICSID tribunals considering questions of recognition in relation to Venezuela.[248]

In determining the law most likely to be applied by the Court, the vast weight of international law and the widespread understanding of recognition as a declaratory rather than constitutive act[249] supports the use of the effective control test. While, as discussed in Part III, the procedural basis on which the Court may make a decision on

Legitimacy of Governments in the Age of Democracy, 38 INT'L L. & POL. 877 (2006); Christina M. Cerna, *Democratic Legitimacy and Respect for Human Rights: The New Gold Standard*, 108 AJIL UNBOUND 222 (2015); Obiora Chinedu Okafor, *Democratic Legitimacy as a Criterion for the Recognition of Governments: A Response to Professor Erika de Wet*, 108 AJIL UNBOUND 228 (2015); Brad R. Roth, *Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, 11 MELB. J. INT'L L. 393 (2010); Erika de Wet, *From Free Town to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition*, 108 AJIL UNBOUND 201 (2015).

244. SHAW, *supra* note 121, at 388.

245. KELSEN, *supra* note 27, at 283.

246. *See supra* note 12 and accompanying text.

247. *See, e.g.*, *Australia's Response to the Coup in Myanmar*, *supra* note 7, at 15–22; *"National Unity Government" Takes Aim at Military Rule in Myanmar*, SYDNEY MORNING HERALD (Apr. 16, 2021), https://www.smh.com.au/world/asia/national-unity-government-takes-aim-at-military-rule-in-myanmar-20210416-p57jyf.html, [https://perma.cc/SA7A-T7JL]; Michael Haack & SiuSue Mark, *Why the Biden Administration Should Recognize Myanmar's Shadow Government*, WASH. POST (July 15, 2021), https://www.washingtonpost.com/opinions/2021/07/15/washington-should-recognize-national-unity-government-in-myanmar/ [https://perma.cc/7FW6-M8SF].

248. *See, e.g.*, Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Venez., ICSID Case No. ARB/13/11, Procedural Resolution No. 2, ¶¶ 45–47 (Aug. 29, 2019); Mobil Cerro Negro Holding, L.L.C., and Mobil Cerro Negro, Ltd. v. Venez., ICSID Case No. ARB/07/27, Decision on the Respondent's Representation in this Proceeding, ¶ 55 (Mar. 1, 2021); ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Venez., ICSID Case No. ARB/07/30, Order on the Applicant's Request for Reconsideration Dated 3 August 2020 on the Issue of Venezuela's Legal Representation, ¶ 37 (Nov. 2, 2020).

249. CRAWFORD, BROWNLIE'S PRINCIPLES, *supra* note 27, 135, 155; ANTONIO CASSESE, INTERNATIONAL LAW 73 (2d ed. 2005); P.K. MENON, THE LAW OF RECOGNITION IN INTERNATIONAL LAW: BASIC PRINCIPLES 18–26 (1994). For discussion, see Talmon, *supra* note 238.

representation may depend on the time at which the representation controversy arises, it is not the case that the legal test to be applied by the Court is subject to change depending on the timing of the representation controversy. On the other hand, the adoption of a test of legitimacy by the Court at this time may be problematic for a number of reasons. First, adopting a test of legitimacy "would mean to contest the right of every existing government to rule,"[250] constituting an interventionist approach that is likely to "raise the spectre of neo-colonialism."[251] Indeed, concerns over the implications of such an interventionist approach, which would appear to be a complete negation of the *grundnormen* of sovereign equality and territorial integrity,[252] are a key reason why attempts to adopt collective approaches to recognition involving tests of legitimacy have failed at the UNGA.[253] Second, a test of legitimacy would be out of step with the Court's past practice, which has not only found that there is no set structure of governance that a State is required to adopt,[254] but which has resisted inquiring into questions concerning domestic law.[255] Third, a test of legitimacy is practically unworkable and inconsistent with the Court's obligation to produce judgments that are capable of compliance. To paraphrase former U.N. Secretary-General Trygve Lie, the obligations of the Court's decisions can "only be carried out by governments which in fact [possess] the power to do so."[256] To this end, affording a government the right to represent the State when it cannot comply with the Court's judgment would, in effect, render the proceedings pointless.

While a legal test centered around effective control may sit uncomfortably with ideals of democratic governance and popular sovereignty, the task of developing consensus in favor of such norms lies

250. CHEN, *supra* note 27, at 113. Such a concern dates back to the days of Samuel von Pufendorf, who argued that

> [j]ust as a king owes his sovereignty and majesty to no one outside his realm, so he need not obtain the consent and approval of other kings or states, before he may carry himself like a king and be regarded as such . . . it would entail an injury for the sovereignty of such a king to be called in question by a foreigner.

SAMUEL VON PUFENDORF, 2 DE JURE NATURAE ET GENTIUM [OF THE LAW OF NATURE AND NATIONS], ch. 3, ¶ 689 (Basil Kennett trans., 1729) (1672).

251. JAMES CRAWFORD, CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW 292 (2014).

252. U.N. Charter art. 2, ¶¶ 1, 7.

253. *See* ROTH, *supra* note 27, at 13; PETERSON, *supra* note 27, at 67.

254. Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶ 94 (Oct. 16).

255. *See, e.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Preliminary Objections, 1996 I.C.J. 595, ¶ 44 (July 11).

256. Lie, *supra* note 237, at 6.

with States, not with the Court.[257] Until the time at which such a norm crystalizes, the most sensible and legally principled approach for the Court to apply in any assessment of governmental status is likely to be the effective control test; regardless of whether the government in question originated by extra-legal means. This approach is, however, likely to be controversial, generating significant normative implications, to which I now turn.

B. Implications of an Assessment of Governmental Status

Given the interwoven nature of recognition and politics, the mixed practice of States, and the controversies concerning the law of recognition, making an assessment of governmental status through the application of the effective control test is likely to generate implications for the Court and the broader system of international dispute settlement. These implications potentially include the fragmentation of the system of international law, compromising the legitimacy of the Court, and either affording legitimacy to or undercutting the legitimacy of the rival governments in question. In this Section, each implication is discussed in turn. Notwithstanding the fact that the Court is called upon to quell issues of *procedure* rather than *substance*, these implications arise as the underlying issue of recognition is, to adopt Ran Hirschl's conceptualization, mega-political: a matter of "outright and utmost political significance that . . . define[s] and divide[s] polities."[258]

1. Fragmentation

If the Court applies the effective control test, there is a risk that the Court may come to a different result than the political organs of the U.N., which may apply other tests, such as that of legitimacy.[259] This process could lead to odd results, such as one government being able to vote on resolutions at the UNGA on behalf of the State while the other is permitted to argue before the Court in contentious proceedings.

257. *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 268, ¶ 8 (July 8) (Declaration of President Bedjaoui) ("The Court will at least have had the merit of pointing out these imperfections [in international law] and calling upon international society to correct them.").

258. Hirschl, *supra* note 24, at 94.

259. It may be a misnomer to describe the considerations of the political organs of the United Nations as constituting a "test." States gathered at the UNGA are entitled to apply a legal test of their choosing (such as effective control or democratic legitimacy), or none at all; they may exclusively give regard to considerations of realpolitik.

This concern is not a new one and naturally results from the absence of a process of collective recognition,[260] as well as the decentralized structure of decision-making in the international system.[261] Indeed, as the Indian Representative to the Security Council argued in 1950, there was "a danger that different organs of the United Nations may decide [the representation question] by their own majorities in their own ways,"[262] a danger that has never been resolved. While such a situation is likely to be rare, it is not unprecedented, with different governments representing the same State in various inter-State fora during disputes over governmental status in Cambodia (1979–1991), Afghanistan (1980–1989), and China (1950–1971).[263] Nonetheless, such fragmentation could generate uncertainty and conflict in the international system.

Conversely, the approach taken by the Court is likely to reduce fragmentation informally—at least among international courts and

260. *See* PATEL, *supra* note 48, at 79; P.K. Menon, *The Problem of Recognition in International Law: Some Thoughts on Community Interest*, 59 NORDIC J. INT'L L. 247, 260–64; LAUTERPACHT, *supra* note 48, at 138 (arguing that "there is no reason why, once collective recognition based on the principle of consent of the governed has become a rule of international law, the international organization of States should not develop organs and procedures for achieving that object"); J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 132 (9th ed. 1984); GRANT, *supra* note 121, at 121–48; DUGARD, *supra* note 121, at 41–80; Hans Martin Blix, *Contemporary Aspects of Recognition*, 130 RECUEIL DES COURS [COLLECTION OF LESSONS] 586, 689 (1970). Some argue in favor of the ICJ performing this function. *See* MORELLO, *supra* note 27, at 51; LAUTERPACHT, *supra* note 48, at 169, 172 ("[T]he development of the procedure of recognition might, in theory, take the form of exercise of that function by the highest judicial authority."). *But see* ROTH, *supra* note 27, at 253 (arguing that the credentialling process at the U.N. General Assembly "serves necessarily as a process of collective legal recognition").

261. *See* Prosecutor v. Tadić, IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 11 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (dicta), https://www.icty.org/x/cases/tadic/acdec/en/51002.htm [https://perma.cc/X2Y4-VYSG]; *see also* Crawford, *supra* note 223, ¶ 354; 2 SHAW, *supra* note 46, at 538; Christian Leathley, *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?*, 40 N.Y.U.J. INT'L L. & POL. 259, 261–62 (2007); Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT'L L. 267, 273 (2001).

262. U.N. Doc. S/1447, at 2 (January–May 1950), *reproduced in* ROTH, *supra* note 27, at 257.

263. *See* TALMON, *supra* note 33, 179–84; PETERSON, *supra* note 27, at 132–33. *See generally* Colin Warbick, *Kampuchea: Representation and Recognition*, 30 INT'L & COMPAR. L.Q. 234 (1981); Ramses Amer, *The United Nations and Kampuchea: The Issue of Representation and its Implications*, 22 BULL. CONCERNED ASIAN SCHOLARS 52 (1990); 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 (1999); Samuel S. Kim, *The People's Republic of China in the United Nations: A Preliminary Analysis*, 26 WORLD POL. 299 (1974).

tribunals—by providing strong, persuasive precedent.[264] Two precedential impacts are of note. First, on a micro level, such a pronouncement could influence other international courts and tribunals on specific questions of recognition. For instance, the ICSID Tribunal in *Air Canada* decided to reserve opinion on the question of Venezuela's representation until a decision is made by the "appropriate decision-making body."[265] It is hard to think of a more "appropriate" body than the Court. Second, on a macro level, the approach taken by the Court may, given the uncertainty in the applicable law, create a "blueprint" for recognition, which may then be applied by courts, tribunals and international organizations that are called upon to determine questions of recognition. Accordingly, even if the Court makes a narrow order on representation, one that is procedural and not substantive in nature, that decision may have wider, even if not *erga omnes*, macro and micro effect among the community of international courts, tribunals, and organizations. Ultimately, although the application of the effective control test may generate clarity in the international law of recognition, the risk of fragmentation within the international system is a serious one to which the Court must be alive.

2. Institutional Legitimacy of the Court

Legitimacy is "crucial for all international courts."[266] Without it, their judgments go disrespected, their interpretations of law are ignored, and their relevance becomes a "site of contestation."[267] To this

264. CRAWFORD, *supra* note 251, ¶ 368. For discussions on the question of the precedential value of ICJ decisions, see also Guillaume, *supra* note 23, at 18–21; Alain Pellet, *The Case Law of the ICJ in Investment Arbitration,* 28 ICSID REV. 223, 231–36 (2013); HIGGINS ET AL., *supra* note 196; Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 INT'L & COMPAR. L.Q. 791, 797 (2006); KOLB, *supra* note 9, at 1204.

265. Air Canada Procedural Order No. 7, *supra* note 45, ¶ 64.

266. ALAN E. BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 301 (2007).

267. Theresa Squatrito, *International Courts and the Politics of Legitimation and De-Legitimation*, 33 TEMP. INT'L & COMPAR. L.J. 298, 299, 302 (2019) (citing THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990)); *see also* Harlan Grant Cohen, Andreas Follesdal, Nienke Grossman & Geir Ulfstein, *Legitimacy and International Courts: A Framework*, *in* LEGITIMACY AND INTERNATIONAL COURTS 1, 2–3 (Nienke Grossman, Herlan Grant Cohen, Andreas Follesdal & Geir Ulfstein eds., 2018); BOYLE & CHINKIN, *supra* note 266, at 300–01; Emilia Justyna Powell, *Two Courts Two Roads: Domestic Rule of Law and Legitimacy of International Courts*, 9 FOREIGN POL'Y ANALYSIS 349, 349 (2013). It is for this reason that the Court "is constantly attempting to ensure its legitimacy." Deepak Mawar, *The Perils of Judicial Restraint: How Judicial Activism Can Help Evolve the International Court of Justice*, 9 GOETTINGEN J. INT'L L. 425, 437 (2019).

end, the Court's authority hinges on its reputation,[268] which may be compromised where the Court is accused of acting in a political way,[269] or if its decisions do not reflect the expectations of States.[270] This potential backlash is of particular concern given that the Court is "totally dependent upon the consent of states,"[271] who may take umbrage at the Court making an assessment of governmental status that favors a government they do not recognize or otherwise view as illegal or illegitimate. This risk is particularly attenuated where the Court finds that the government entitled to represent the State is different from that recognized by the majority of States, or by other principal organs and specialized agencies of the U.N. It follows that if the Court were to, for example, recognize the SAC in Myanmar, such a decision may become a *cause célèbre*, compromising the Court's institutional legitimacy. Such controversy may, in turn, reduce the likelihood that States will turn to the Court to resolve disputes and may engender distrust in the system of international law.[272] Equally, if the Court were to recognize a government lacking effective control, its institutional legitimacy may be damaged where compliance is not forthcoming from the government with control over the instrumentalities of the State. As Judge Oda noted in *Armed Activities on the Territory of the Congo*, a lack of post-judgment compliance is likely to "impair the dignity of [the international court or tribunal] and raise doubt as to [its] judicial role."[273]

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268. *See, e.g.*, Malcolm N. Shaw, *The International Court of Justice: A Practical Perspective*, 46 INT'L & COMPAR. L.Q. 831, 843 (1997).

269. *See* BOYLE & CHINKIN, *supra* note 266, at 305–08; Yuval Shany, *Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions*, *in* LEGITIMACY AND INTERNATIONAL COURTS, *supra* note 267, at 354, 358–59; Tulio Treves, *Aspects of Legitimacy of Decisions of International Courts and Tribunals*, *in* LEGITIMACY IN INTERNATIONAL LAW 169, 178 (Rüdiger Wolfrum & Volker Röben eds., 2008); Shotaro Hamamoto, *Legitimacy of International Adjudication*, *in* MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL PROCEDURAL LAW, ¶¶ 38–41 (Héléne Ruiz Fabri ed., 2020).

270. *See* HERNÁNDEZ, *supra* note 46, at 137; John, *supra* note 135, at 109; Neil B. Nucup, *Infallible or Final?: Revisiting the Legitimacy of the International Court of Justice as the "Invisible" International Supreme Court*, 18 LAW & PRAC. INT'L CTS. & TRIBUNALS 145, 150 (2019) (arguing that the ICJ's "institutional linkages compel the ICJ to act in a way that is not only legally, but also politically," favourable); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 36 (2005).

271. Coleman, *supra* note 123, at 37; *see also* Giladi & Shany, *supra* note 46, at 175.

272. *See* Mawar, *supra* note 267, at 451; Bianchi, *supra* note 222, at 86; *see also* Posner & Yoo, *supra* note 270.

273. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Provisional Measures, Order of 1 July 2000, 2000 I.C.J. 111, 131, ¶ 6 (July 1) (Declaration of Oda, J.); *see also* Posner & Yoo, *supra* note 270, at 72.

Conversely, proceeding to make a procedural decision on the representation of governments could enhance the legitimacy of the Court.[274] For instance, following the Court's bold decision to assert jurisdiction over Nicaragua's claims in *Military and Paramilitary Activities*, the United States withdrew from the Court's compulsory jurisdiction.[275] While this withdrawal would tend to support the risks in making decisions on questions of high or mega-politics, in reality the Court's approach enhanced its institutional legitimacy in the eyes of much of the Global South by demonstrating that it was willing to assert jurisdiction against the wishes of a superpower.[276] Accordingly, the question of whether and to what extent the decision of the Court is likely to impact its institutional legitimacy is likely to be highly fact-dependent and the result of that inquiry may not be immediately obvious. To this end, while concerns over institutional legitimacy are a key risk arising from the application of the effective control test, such risks must be weighed carefully against the risks of indecision and the potential benefits of deciding.

3. Popular Legitimacy of the Rival Governments

An application of the effective control test may have serious impacts on the legitimacy, or lack thereof, of the rival governments in question. While ICSID tribunals have argued that their decisions on representation have "no other legitimizing function or effect,"[277] such an overly formalistic conception of the role of international dispute settlement—treating the system as if it exists in a vacuum, devoid of

274. *See* Odermatt, *supra* note 138, at 222. *See generally* Salvatore Caserta, *Regional International Courts in Search of Relevance: Adjudicating Politically Sensitive Disputes in Central America and the Caribbean*, 28 DUKE J. INT'L & COMPAR. L. 59 (2017).

275. See generally the discussion in W. Michael Reisman, *Has the International Court Exceeded its Jurisdiction?*, 80 AM. J. INT'L L. 128 (1986). *See* Natalie S. Klein, *Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case*, 21 YALE J. INT'L L. 305, 316–17 (1996); Sean D. Murphy, *The United States and the International Court of Justice: Coping with Antinomies*, *in* THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS 46, 66–67 (Cesare P.R. Romano ed., 2012); *see also Text of US Statement on Withdrawal from Case before the World Court*, N.Y. TIMES, Jan. 19, 1985, at 4–5.

276. Cohen, Follesdal, Grossman & Geir, *supra* note 267, at 33 (suggesting that the Court's assertion of jurisdiction "turned out to be much more popular with states than the opposite"); Keith Highet, *Between a Rock and a Hard Place: The United States, the International Court, and the Nicaragua Case*, 21 INT'L L. 1083, 1096–97 (1987).

277. *See, e.g.*, Mobil Cerro Negro Holding, L.L.C., and Mobil Cerro Negro, Ltd. v. Venez., ICSID Case No. ARB/07/27, Decision on the Respondent's Representation in this Proceeding, ¶ 70 (Mar. 1, 2021); *see also* Papp, *supra* note 53, at 275.

impact beyond the resolution of the immediate legal question as between the parties—is blind to the immense normative power of international courts and tribunals. Indeed, as Professor Karen J. Alter has argued, international courts and tribunals may "empower[] those actors who have international law on their side, increasing their out of court political leverage. [International courts and tribunals] then alter political outcomes by giving symbolic, legal, and political resources to compliance constituencies."[278]

This risk is heightened in cases concerning issues of high politics, such as questions of recognition and representation, where there is a concern that the "very thin base of public knowledge" regarding international courts[279] could lead to decisions on representation being "confused with approval of the government's conduct"[280] or the moral character of that government. Such confusion may be aided by political actors warping the Court's decision, blurring the line between decisions of procedure and substance.[281] There are countless examples of this phenomenon in action, from the street parties held in Kosovo following the Court's advisory opinion on its declaration of independence from Serbia,[282] to the public celebrations in Mauritius following

278. KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS 19 (2014); *see also* HERNÁNDEZ, *supra* note 46, at 282; Giladi & Shany, *supra* note 46, at 185. As Shirley V. Scott opines, "[i]nternational courts and tribunals have political, cultural, and social effects, whether intended or not, positive or negative, beyond their impact on international law." SCOTT, *supra* note 121, at 91. Members of the Court have proven themselves to be alive to this fact. For instance, in Threat and Use of Nuclear Weapons, Judge Weeramantry (in dissent) forcefully disagreed with the idea that an advisory opinion on nuclear weapons would be devoid of practical effect, arguing that the Court's decision in *South West Africa* "helped to create the climate of opinion which dismantled the structure of apartheid" in South Africa. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 429, at 550 (July 8) (dissenting opinion by Weeramantry, J.).

279. Mark A. Pollack, *The Legitimacy of the European Court of Justice: Normative Debates and Empirical Evidence*, *in* LEGITIMACY AND INTERNATIONAL COURTS, *supra* note 267, at 143, 173 (describing the European Court of Human Rights).

280. Arditi, *supra* note 198, at 551. As I have explained above in Section I.B, a procedural determination as to the entity entitled to represent the State in proceedings before the Court should not be taken as a determination of the legal rights, status, or legitimacy of a government vis-à-vis its rival.

281. Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMPLE L. REV. 61, 63, 68 (2013).

282. *See generally* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22); *Serbia and Kosovo React to ICJ Ruling*, BBC NEWS (July 22, 2010), https://www.bbc.com/news/world-europe-10733676 [https://perma.cc/8FFN-UA29]; Adam Tanner & Reed Stevenson, *Kosovo Independence Declaration Deemed Legal*, REUTERS (July 23, 2010),

the *Chagos Advisory Opinion*[283] and in Iran following the preliminary objections judgment in *Anglo-Iranian Oil Co*.[284] These historical examples demonstrate the great normative, public, and legitimizing functions of the Court's decision-making, even where those decisions are non-binding.

Such a concern has been raised by commentators in relation to both Myanmar and Venezuela, with the Special Advisory Council for Myanmar arguing that "recognition carries an unquantifiable symbolic importance . . . . any international recognition may provide political or strategic advantage and a morale boost to one side over another."[285] Indeed, while the Court has not made such a decision in the past, the legitimizing power of any potential ICJ decision on representation is said to have weighed heavily in the NUG's decision to seek control over the proceedings.[286] Conversely, the effect of recognition of the SAC by principal organs of the U.N., commentators have argued, would be to give "a green light for continued repression,"[287] "sanction[ing] undemocratic overthrows of government as somehow acceptable."[288] Accordingly, there is a real risk that a decision on representation could be regarded by the public as constituting implicit support of that regime by the World Court, lending the recognized

https://www.reuters.com/article/us-serbia-kosovo-idUSTRE66L01720100723 [https://perma.cc/HRW3-M932].

283. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95 (Feb. 25); *see* Jorge Contesse, *The Rule of Advice in International Human Rights Law*, 115 AM. J. INT'L L. 367, 367 (2021).

284. Anglo-Iranian Oil Co. (U.K. v. Iran), Preliminary Objections, 1952 I.C.J. 93 (July 22); *see* DOREEN LUSTIG, VEILED POWER: INTERNATIONAL LAW AND THE PRIVATE CORPORATION 1886–1981, at 182 (2020).

285. SPECIAL ADVISORY COUNCIL FOR MYAN., *supra* note 7, at 2; *see also* Nachemson, *supra* note 12 (quoting Emma Palmer); REBECCA BARBER, THE POWERS OF THE UN GENERAL ASSEMBLY TO PREVENT AND RESPOND TO ATROCITY CRIMES: A GUIDANCE DOCUMENT 52 (2021) (on recognition decisions by the U.N. generally); Barber et al., *supra* note 6; Phongsathorn, *supra* note 6; Shubin, *supra* note 150. In relation to Venezuela, see JARED GENSER, IN RE UNITED NATIONS CREDENTIALS COMMITTEE: CHALLENGE TO THE UNITED NATIONS CREDENTIALS OF NICOLÁS MADURO TO REPRESENT THE GOVERNMENT OF VENEZUELA 2 (Legal Opinion, Feb. 1, 2019).

286. Nachemson, *supra* note 12; Azeem Ibrahim, *ICJ Opportunity for Myanmar's National Unity Government*, ARAB NEWS (June 30, 2021), https://www.arabnews.com/node/1886261 [https://perma.cc/C5FC-TC3P].

287. Barber et al., *supra* note 6; *see also* Rebecca Barber, *Will the Taliban Represent Afghanistan at the UN General Assembly?*, EJIL: TALK! (Sept. 1, 2021), https://www.ejiltalk.org/will-the-taliban-represent-afghanistan-at-the-un-general-assembly [https://perma.cc/ZG6D-5GXG] (making a similar point in relation to the credentialling of the Taliban regime in Afghanistan).

288. Phongsathorn, *supra* note 6; *see also* Shubin, *supra* note 150.

government the legitimacy that comes with the Court's normative influence, institutional power, and international status.

This risk raises the concern that any decision on representation could deliver the *coup de grâce* in internal struggles between governments for control,[289] casting aspersions over the propriety of the Court making an order on representation. However, this potential internal legitimizing effect is not necessarily a reason for the Court to restrain itself. First, as a matter of pragmatism, any internal legitimizing effect of a procedural decision by the ICJ among citizens of the State in question is likely to pale in comparison to the immediate control exerted by the effective government. As Peterson has argued, "[o]utside aid is helpful, but will not determine the outcome unless massive in comparison with the resources of local competitors."[290] Accordingly, the power of the Court to provide internal legitimacy to one of the governments seeking to exercise control is unlikely to make a substantial difference where a regime exercises effective control over people and territory.

Second, the Court has frequently[291] been used by parties for "propagandizing or legitimizing purposes rather than with expectation of settlement,"[292] and States often resort to international dispute

289. LAUTERPACHT, *supra* note 48, at 91–96. Similar arguments have been made regarding national recognition decisions. *See* PETERSON, *supra* note 27, at 168–69; ROTH, *supra* note 27, at 1.

290. PETERSON, *supra* note 27, at 169.

291. *See generally* Richard B. Bilder, *International Dispute Settlement and the Role of International Adjudication*, 1 EMORY J. INT'L DISP. RES. 131, 161 (1987); Karin Oellers-Frahm, *Use and Abuse of Interim Protection before International Courts and Tribunals*, *in* 2 COEXISTENCE, COOPERATION AND SOLIDARITY: LIBER AMICORUM RÜDIGER WOLFRUM 1685, 1688 (Holger P. Hestermeyer et al. eds., 2012) (suggesting that Armed Activities on the Territory of the Congo was instituted for publicity reasons, rather than as a bona fide attempt to settle a political dispute); Paolo Palchetti, *Activity of the International Court of Justice in 2008*, 18 IT. Y.B. INT'L L. 201, 211 (2008) (suggesting Georgia, in Application for the International Convention on the Elimination of All Forms of Racial Discrimination, "might have used its unilateral application for political purposes which are connected to the broader conflict following Russian military intervention of August 2008"); Rene Lefeber, *To Rule or Not to Rule*, 8 LEIDEN J. INT'L L. 243, 243–44 (1995); Tulio Treves, *The Political Use of Unilateral Application and Provisional Measures Proceedings*, *in* VERHANDELN FÜR DEN FREIDEN/NEGOTIATING FOR PEACE: LIBER AMICORUM TONO EITEL 463 (Jochen Abraham Frowein et al. eds., 2003); Christine Gray, *The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force After Nicaragua*, 14 EUR. J. INT'L L. 867 (2003).

292. William D. Coplin & J. Martin Rochester, *The Permanent Court of International Justice, the International Court of Justice, the League of Nations, and the United Nations: A Comparative Empirical Survey*, 66 AM. POL. SCI. REV. 529, 538 (1972). Indeed, the United States levelled this criticism against Nicaragua. *See* U.S. Dep't of State, *Statement on the US*

settlement for "domestic political purposes or to convey information to wider audiences" rather than to engage in bona fide attempts to settle an active dispute.[293] To this end, the use of the Court for political purposes or legitimizing effect is a relatively standard phenomenon, which should not act as a bar to it engaging with questions of recognition and representation. Nonetheless, it would be prudent for the Court to exercise caution in issuing a procedural decision on representation, remaining cognizant of the potential legitimizing effect of such a decision, which could embroil the Court in great controversy.

C. Conclusion

It is abundantly clear that the law of recognition is vexed, "influenced by a series of political factors that make it difficult to apprehend according to legal guidelines."[294] While the effective control test is likely to be the most sensible option for the Court to apply, identification of the relevant law is complicated by a lack of practice, and the risks of doing so are intensified by the significant political, social, legal, and institutional consequences that may accompany any decision. In an ideal world, these implications would be of no great consternation for the Court. However, because the Court is an institution dependent on the idiosyncrasies of States, these implications may attract vituperation and compromise the Court's efficacy. It is therefore

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Withdrawal from the Proceedings Initiated by Nicaragua from the Proceedings Initiated by Nicaragua in the International Court of Justice, 24 I.L.M. 246, 247 (1985); *see also* Hemi Mistry, *"The Different Sets of Ideas at the Back of Our Heads": Dissent and Authority at the International Court of Justice*, 32 LEIDEN J. INT'L L. 293, 309 (2019); Bilder, *supra* note 291, at 161 ("[N]ations seem often to have a largely 'political' or 'propaganda' purpose in mind in resorting to the Court, in the sense that they usually hope, by legitimating their claim, to bring the force of adverse international community opinion to bear on the other party's actions.").

293. Songying Fang, *The Strategic Use of International Institutions in Dispute Settlement*, 5 Q.J. POL. SCI. 107, 110 (2010); *see also* Todd L. Allee & Paul K. Kuth, *Legitimizing Dispute Settlement: International Legal Rulings as Domestic Political Cover* 100 AM. POL. SCI. REV. 219 (2006); Shirley V. Scott, *Australia's Decision to Initiate Whaling in the Antarctic: Winning the Case versus Resolving the Dispute*, 68 AUSTL. J. INT'L AFFS. 1, 8–9 (2014); Gary L. Scott & Karen D. Csajko, *Compulsory Jurisdiction and Defiance in the World Court: A Comparison of the PCIJ and the ICJ*, 16 DENVER J. INT'L L. & POL'Y 377, 388 (1988); Marie Lemey, *Incidental Proceedings before the International Court of Justice: The Fine Line between "Litigation Strategy" and "Abuse of Process"*, 20 LAW & PRAC. INT'L CTS. & TRIBUNALS 5, 20 (2021).

294. DIEZ DE VELASCO VALLEJO, *supra* note 121, at 284 ("Ello indica que el reconocimiento de gobiernos, más que el de Estados, está influido por una serie de factores politicos que hacen dificil su aprehensión según pautas jurídica [This indicates that the recognition of governments, more than that of States, is influenced by a series of political factors that make it difficult to apprehend them according to legal guidelines].").

natural that the Court might feel some level of discomfort in attempting to resolve an issue of high politics, such as the recognition and representation of governments "that the states themselves [have] been unable to settle."[295]

However, while the varied risks of decision are cause for concern, they are omnipresent risks that arise naturally because of the Court's sui generis role in the international system. If the Court were to resist decision on the basis that a procedural order may cause backlash, fragmentation, or have a legitimizing effect, then the Court would be stuck in a constant state of paralysis, reduced to but a hollow core. Instead, the Court must balance both the constraints inherent in its constitution as a principal organ of the U.N. dependent on the will of States and its function as an arbiter of international law. In the current climate of skepticism, nativism, and unilateralism,[296] such a balancing exercise is likely to demand caution in approaching recognition decisions. However, the Court should not eschew making a procedural decision on the government competent to represent the State in proceedings before it to the extent required to affect the administration of justice.

CONCLUSION

Coups have consequences for international dispute settlement. They give life to otherwise mundane questions of procedure, turning international courts and tribunals into key battlegrounds for rival governments seeking legitimacy and control—battles obscured by the fog of war caused by the radical indeterminacy of international law.[297] In this Article, I have sought to generate some modicum of clarity as to the rules, law and normative considerations governing one of these battlefields: the ICJ. By surveying the practice of international courts and tribunals, I have demonstrated that the Court clearly has the power to resolve procedural questions relating to the representation of a State with rival governments.

However, and despite one's best efforts, the fog seems to thicken when one considers the Court's resistance to apply the law of recognition and representation, instead seeming to pay greater mind to

295. Marc Weller, *Modesty Can Be a Virtue: Judicial Economy in the ICJ Kosovo Opinion?*, 24 LEIDEN J. INT'L L. 127, 133 (2011).

296. James Crawford, *The Current Political Discourse Surrounding International Law*, 81 MOD. L. REV. 1, 22 (2018).

297. Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization*, 8 THEORETICAL INQUIRIES L. 9, 21 (2007).

considerations of *politic* (as opposed to *politics*). Application of Bicklean theories of judicial restraint demonstrates that international courts and tribunals have adopted avoidance techniques to minimize the impact of the normative implications arising from making assessments of governmental status. While some of these techniques are sensible approaches consistent with both international law and the Court's judicial character, they cannot be practiced in perpetuity. In cases where avoidance is no longer possible, or is normatively problematic, the Court must decide on questions of recognition and representation to the extent required to prevent the frustration of its jurisdiction and to facilitate its most essential role: the peaceful settlement of international disputes. In such circumstances, I have argued in favor of the application of long-standing principles underlying the law of recognition, namely, the test of effective control. The application of this test may, however, result in uncomfortable outcomes, which may generate negative normative implications. Further research into whether an emerging norm of democratic governance may be crystallizing in light of recent recognition practice would be welcome.

In concluding, the decision as to whether to adopt avoidance techniques is likely to be a fact-dependent exercise. One approach may be for the Court to adopt the tiered approach discussed in Part III. In such circumstances, the Court would only proceed to make an assessment of governmental status through application of the effective control test in cases where sensible avoidance techniques have first been adopted. In so doing, the Court is able to strike a balance between delay, which may compromise its judicial function, and the negative normative implications that may result if the Court made a more immediate assessment of governmental status, which could result in considerable embarrassment to the Court. However, whether the Court *will* choose to follow such an approach is decidedly unclear. Such a decision depends on whether the Court chooses to recognize, as many have encouraged, an emerging norm to democratic governance. It depends on whether the competition between the rival governments in question atrophies, as it often does, as the initial outrage fades and the world moves on. And, perhaps most importantly, it depends on the strength of the Court's arm and its willingness to act. Ultimately, it is for the Court to eschew resistance in favor of settling questions of recognition and representation, and, in so doing, to chart a course through Brownlie's *tertium quid*, lifting the fog, if only for a second, to reveal the ground on which these battles must be fought.