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WHO SPEAKS FOR THE STATE?

This panel was convened at 9:00 a.m. on Thursday, April 4, 2024 by its moderator, Larry D. Johnson, who introduced the speakers: Kristina Daugirdas, Robert Young, Diem Huong Ho, and Duncan Pickard.

Introductory Remarks

Who speaks for the state is a critical question in international relations. Statements by government representatives have normative force—capable of binding the state in numerous ways, from norm formation to staking out a litigation position. Governments choose their representatives carefully, and typically vet positions and even statements in advance. Indeed, the stability of international relations hinges on the assumption that state representatives act with governmental authority. The stakes of disputes over who speaks for the state are thus high.

Several such contestations have emerged in recent years, in a variety of international fora. At the United Nations General Assembly, the Credentials Committee has repeatedly deferred determining regarding who represents Afghanistan and Myanmar, but it has left in place representatives previously accredited so they continue to vote and represent the countries in question. In the wake of these deferrals, other UN bodies—including even the International Court of Justice (ICJ)—have taken decisions at variance with the Assembly's attitude, leading to inconsistent approaches within the UN system. Such questions have also arisen in investment arbitration, as in recent suits against Venezuela where multiple counsel teams have contested the authority to represent the respondent government (on behalf of the rival governments of Maduro and Guaidó).

This contribution explores the panel's discussion of these cases and others, teasing out the norms, institutions, and politics of deciding contests over representation. Specifically, it covers who speaks for the state in law- and policymaking (Part I), the UN General Assembly (Part II), the ICJ (Part III), and international arbitration (Part IV). Section V briefly concludes.

Remarks by Robert Young*

I. Law- and Policymaking

Several years ago, I spoke on a panel about cyberspace and international law at the Canadian Council on International Law,[1] alongside other government officials. I began with the usual *pro*

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[1] *Legal Grey Zones? Evolving Areas of Military Operations: Space, Cyber, and Evolving Technologies | Zones grises légales? Aspects en émergence des opérations militaires: opérations spatiales, cyber et technologies en évolution*, CCIL Annual Conference 2018, *at* https://www.ccil-ccdi.ca/_files/ugd/1092ea_736c81e381fa4261b472c94d89ef1007.pdf

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forma disclaimer that many of us have made, i.e., that I was speaking in my personal capacity, not representing the government, or my employer, and so on.

It just so happened that my boss, the Legal Adviser at our foreign ministry, was sitting in the front row. Many of you will know Alan Kessel, the long-serving head of the Legal Branch at Global Affairs Canada. Alan is a veteran diplomat. He can keep a poker face whenever he wants. He did not do so that day.

From his expression alone, it was clear to me that he did not agree with my disclaimer. He found his moment to take me aside to say in essence: "Rob, you are speaking on matters that have been entrusted to you. You are here. You are being paid. You work for us. You have got your requisite grey suit on. The program says you are from Global Affairs Canada. You are speaking for Canada."

This was a humbling and startling thought! The old expression *L'état, c'est moi*[2] became in effect, "*L'état, c'est toi*, Robert"—you are the state!

I am not going to make a disclaimer today because I remember that lesson. I know that Alan is at this conference, so please let him know that the experience did stick with me.

I will leave it to others on the panel to speak about the jurisprudence on who speaks for the state.

What I want to share with you is a view from inside a state on some of the current challenges in how we determine who speaks for the state, especially in relation to cyber and digital and emerging technology developments.

I will start the discussion with this proposition: In the early twenty-first century, the technological tools at our disposal mean that the question of ascertaining who speaks for the state has actually become more complex.

We know there is jurisprudence on this. We know there is some common understanding of the legal significance of utterances by state officials and so on. But I would put it to you that it has become more complex. Why is that?

A traditional representative of a state, such as a foreign minister, responsible for expressing views on international law, today has—at least in our case—seven or eight different channels by which she communicates. She has one or more official websites. She has an X account. She has Instagram. And she is not the only one to have them. In Canada as in many other states, a large and growing number of officials—whether elected or public servants—have various email and social media accounts, and thus multiple different channels by which they communicate.

Now, in an ideal world this would be a well-tuned orchestra within each state, and everyone would be playing together. Anyone who has worked inside a state knows that this is not always exactly the case.

And so, we have different voices with different and more nodes or portals through which a state can express its views. The technology has changed not only in the sense of multiplication—more speakers, more representatives, with more channels. In addition, there has been change in the tempo of technology, and the speed by which public communications are expected. This has meant that some of the more traditional controls within a state—approval processes, interdepartmental consultation processes—have been eroded. Those have been broken down by the technology, meaning that there is an expectation or a desire on the part of government representatives to articulate views quickly. And that, I think, makes it more challenging.

If, for example, a minister of the interior, in speaking about malicious cyber activity, decides to opine on whether that activity by a foreign state is unlawful at international law, do we give as much weight to that as we would if the foreign minister had said it? The question is: with all of

[2] *Le saviez-vous? L'Etat c'est moi*, Site Archives du Ministère des Armées, *at* https://www.ccil-ccdi.ca/_files/ugd/1092ea_736c81e381fa4261b472c94d89ef1007.pdf; *Louis XIV: L'État, c'est moi*, L'Histoire en citations, *at* https://www.histoire-en-citations.fr/citations/louis-xiv-l-etat-c-est-moi.

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these voices, all of these articulations of views, do we count them all, and do we give them all the same weight?

I think this raises important questions. What do I mean by that? Can you marshal the different views and positions from a variety of sources within a state? Can you marshal those, say, in a negotiation of a dispute? Can a state marshal those various sources to show its long-standing view? Or on the contrary, consider a litigation matter. Can another state marshal all those views as evidence, in effect saying: we know what your position is because you have said it through seventeen tweets and social media posts, so we will hoist you on your own petards?

And there are other questions we have to ask about this growing array of communications, from a variety of public representatives, on different channels, with different levels of consultation—and different levels of level advice. How do they count when we are assessing customary law? How do they count as state practice? How do they count as *opinio juris*? These are important questions, notably in terms of the weight we give them in ascertaining who speaks for the state.

The upshot of all this, I think, is that for states, it is more important than ever to have well-oiled processes—it is very challenging because of the technological developments—well-oiled processes by which they decide who will speak for the state and how views are articulated.

I can talk about our experience in Canada, in producing our public statement—International Law Applicable in Cyberspace—published in April 2022.[3] You may know that in the UN processes addressing cyber and international security (groups of governmental experts and open-ended working groups), the practice has developed of states publishing positions setting out their views on how international law applies.[4]

There is an interesting bracket that I will not open (for long). Rather unusually, outside of litigation, states are proactively setting out their views in this particular area of international law, namely cyberspace. The most recent example is the Common African Position on the Application of International Law in Cyberspace, developed by the African Union and published earlier this year.[5] This represents the views of fifty-plus states which managed in less than a year to consult and consolidate their views and publish these.[6] This collective product raises interesting questions about state practice and *opinio juris*. I will close that bracket now.

Back to the main point, what these developments in cyberspace and international law mean, I would suggest, is that states have to be well coordinated internally, or they risk not having their interests and views advanced effectively externally.

Our case in point: developing Canada's statement on international law and cyberspace, which we published in April 2022, took several years of interdepartmental discussions and negotiations. It was not without challenges, though well worth the effort. We led it from the legal department

[3] Government of Canada, International Law Applicable in Cyberspace (Apr. 2022), *at* https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/peace_security-paix_securite/cyberspace_law-cyberespace_droit.aspx?lang=eng; *see also* Michael Schmitt, *Canada Takes on International Law in Cyberspace*, EJIL:TALK! (July 14, 2022), *at* https://www.ejiltalk.org/canada-takes-on-international-law-in-cyberspace.

[4] UNIDIR, A Compendium of Good Practices Developing a National Position on the Interpretation of International Law and State Use of ICT, at 5–12 (May 9, 2024), *at* https://unidir.org/wp-content/uploads/2024/05/UNIDIR_A_Compendium_of_Goo d_Practices_Developing_a_National_Position_on_the_Interpretation_of_International_ Law_and_State_Use_of_ICT.pdf.

[5] Mohamed Helal, *Common African Position on the Application of International Law to the Use of Information and Communication Technologies in Cyberspace, and All Associated Communiqués Adopted by the Peace and Security Council of the African Union* (Ohio State Legal Studies Research Paper No. 823, Feb. 2, 2024), *available at* https://ssrn.com/abstract=4714756.

[6] Mohamed Helal, *The Common African Position on the Application of International Law in Cyberspace: Reflections on a Collaborative Lawmaking Process*, EJIL:TALK! (Feb. 5, 2024), *at* https://www.ejiltalk.org/the-common-african-position-on-the- application-of-international-law-in-cyberspace-reflections- on-a-collaborative-lawmaking-process.

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at the foreign ministry. We did so deliberately. The nature of developments in cyberspace meant that many parts of the Government of Canada had equities at play that engaged international law issues. Lack of coordination on who spoke for Canada risked disparate public signals being misapprehended as representing the settled views of Canada. Thus, we embarked on the multi-year interdepartmental collaborative process to produce a national position.

In this process our foreign ministry deliberately took a "big tent" approach, leading a very inclusive process. This was not the shortest route, as there were diverse views at times. The result, however, was that the various departments and agencies involved saw their equities represented in the final published statement. And I would say that to this day, different parts of the Canadian government have, if you like, followed the script, respecting the agreed positions on how international law applies in cyberspace, as reflected in Canada's statement.

To conclude: technology has changed how states speak, and this in turns makes it more important than ever for states to be well-coordinated and deliberate in how they develop and share their views. Beyond advancing states' interests, I think this helps in the international law space, providing clarity on each state's views and on the perennial question of who speaks for the state.

* * * *

A thought on legitimacy, going back to the question and the issue of who can states appoint or how free are states to name who will represent them.

It is a much longer discussion, but when states choose to include in their representation members of civil society, that will raise questions of legitimacy for sure. There were two examples cited, the initial Rome Conference for the International Criminal Court, where there was big civil society participation, and the landmines ban treaty, which some of us still refer to as the Ottawa Treaty. In both of those cases, one can ask questions about legitimacy, because of the high representation of civil society experts in the process. I would say though that over time, if we look at the very high rates of ratification by states subsequently of those two instruments, I think that speaks to the legitimacy of the process overall. This tends to affirm that states ought to be free to designate the representatives from government or elsewhere and try to develop better positions and more thorough analysis.

Remarks by Kristina Daugirdas*

II. Representation in International Organizations

When more than one government purports to speak and act for a state, other states must choose which government they will recognize. Over time, they have articulated various policies to guide that choice; unsurprisingly, these eponymous policies reflect diverging judgments about which side the "good guys" are on—and which side should be supported. Pursuant to the Tobar Doctrine, states should deny recognition to governments that came to power through unconstitutional means, while the Brezhnev Doctrine rejected the legitimacy of any government that ousted a socialist government.[1] The Estrada Doctrine opposed using recognition as a tool to influence internal power struggles.[2] Because states make their own independent decisions about recognition, they can agree to disagree about the proper choice in any given situation.

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[1] Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, 48 Int'l & Comp. L. Q. 545, 569–70 (1999).

[2] *Id*. at 567

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But when international organizations are confronted with multiple governments claiming to represent a member state, they must find a way to make collective decisions about who sits behind the nameplate, who takes the floor to set out that state's views, and who casts votes on behalf of the state. There are various criteria that might guide that choice: (1) advancing the purposes for which the organization was created; (2) achieving uniform results within the various bodies that make up a single international organization—and across different international organizations; and (3) achieving consistent results across different cases involving recognition.

The stakes of international organizations' decisions regarding representation can be significant. States jealously guard their prerogatives to make independent decisions about recognition—and it is widely agreed that states are not in any way formally bound by organizations' decisions regarding representation. And yet these decisions matter because they have both symbolic and material consequences. Being accepted as the representative of a member state at the United Nations and other international organizations communicates legitimacy and status. In some cases, representation unlocks access to financial and other resources the organization might supply. Representation does not inevitably lead to widespread recognition by individual states, but it can help to pave the way.[3]

The United Nations' handling of rival claims illustrates various ways that questions of representation might be—and have actually been—resolved. The United Nations first confronted this issue early in its history. When the UN Charter was being negotiated, Chiang Kai-shek led the Nationalist government in Beijing, which it called the Republic of China (ROC). But the Nationalist government controlled only a portion of China's territory; since 1928 it had been battling the proclaimed People's Republic of China (PRC) led by Mao Zedong. By 1949, the Republic of China's forces had retreated to Taiwan and the PRC sought to represent China at the United Nations.[4] UN Secretary-General Trygve Lie sought the advice of the organization's lawyers. The resulting memorandum provided an answer, leaning on the United Nations' character as an organization that "aspires to universality" instead of being a club for like-minded states—and also on Article 4 of the UN Charter:

> This Article requires that an applicant for membership must be able and willing to carry out the obligations of membership. . . . Where a revolutionary government presents itself as representing a State, in rivalry to an existing government, the question at issue should be which of these two governments in fact is in a position to employ the resources and direct the people of the State in fulfilment of the obligations of membership. In essence, this means an inquiry as to whether the new government exercises effective authority within the territory of the State and is habitually obeyed by the bulk of the population.[5]

In the case of Chinese representation, the test proposed by the UN legal office favored the PRC, which did exercise effective control on the ground.

The effective-control test holds some appeal. First, in focusing on fulfilling the obligations of membership, the test links representation to the efficacy of the organization in fulfilling its purposes. Lie's successor, Dag Hammarskjold, saw concrete advantages to this approach. Tasked a few years later with securing the release and repatriation of American personnel imprisoned in

[3] The United States hoped to achieve this effect by supporting an effort to accept credentials from Venezuela's Juan Guaidó rather than Nicolás Maduro in various international organizations. Federica Paddeu & Alonso Gurmendi Dunkelberg, *Recognition of Governments: Legitimacy and Control Six Months After Guaidó*, Opinio Juris (July 18, 2019), *at* https://opiniojuris.org/2019/07/18/recognition-of-governments-legitimacy-and-control-six-months-after-guaido.

[4] UN Doc. A/1123 (Nov. 21, 1949) (attaching communications from the PRC's foreign minister).

[5] Letter Dated 8 March 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, at 5–6, UN Doc. S/1466 (Mar. 9, 1950)

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mainland China, he quipped: "If you want to negotiate with somebody, it is rather useful to have them at the table."[6] Second, while evaluating effective control is not a mechanical exercise, its application promises relatively uniform results within and across international organizations. Third, the test serves rule-of-law values by supplying a transparent basis for making decisions and achieving consistent results in the sense of treating like cases alike.

But the United Nations' member states were not persuaded. In December 1950, the General Assembly adopted Resolution 396 (V), in which it recommended that:

> [W]henever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes the subject of controversy in the United Nations, the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case.[7]

Thus, the General Assembly reserved discretion to make a judgment call about *how* to advance that goal in individual cases, rejecting the view that it would always be by accepting representation by the government exercising effective control. And, indeed, at the time some member states made the case that accepting the PRC as the representative of China would not advance this goal. The General Assembly was considering the question of recognition not long after North Korea invaded South Korea on June 25, 1950.[8] The Security Council had authorized a unified command under U.S. leadership to help South Korea repel the armed attack.[9] That autumn, the PRC forces launched a major attack to support North Korea[10]—which meant that "one of the rival governments [was] engaged in large-scale hostilities against the United Nations itself."[11] Under these circumstances, some argued that "rewarding" and legitimizing the PRC with representation at the United Nations would undermine rather than advance the organization's purposes, and that representation ought to be withheld to encourage compliance with the Charter's norms.

How does the General Assembly's test compare to that proposed by the UN legal office? Both tests can claim to advance the purposes for which the organization was created. The General Assembly sought to achieve uniform results across organizations by recommending that its "attitude . . . be taken into account in other organs of the United Nations and in the specialized agencies."[12] But the General Assembly's test does not guarantee consistent results across cases because the principles and purposes of the Charter might be advanced by dealing with the government in control on the ground or by selecting the government whose actions and aspirations more closely aligned with those principles and purposes. The General Assembly's substantive approach to choosing between rival governments has been "uneven and politicized."[13] Moreover, the process and rationale for making the choice is cloaked in secrecy. The question of representation is initially considered by the General Assembly's Credentials Committee, which is composed of nine members selected at the beginning of each session.[14] The Committee meets behind closed doors and

[6] Brian Urquhart, Hammarskjold 95 (1972); *see also id*. at 96 ("It seemed unlikely, to say the least, that an organization that had excluded and rejected the government of the largest nation on earth would have much success in prevailing on that government to release hostile airmen who had landed in China and had already been convicted as spies.").

[7] GA Res. 396 (V), para. 1 (Dec. 14, 1950).

[8] John Lewis Gaddis, The Cold War: A New History 40 (2005)

[9] SC Res. 84 (July 7, 1950).

[10] Gaddis, *supra* note 8, at 45–48.

[11] Oscar Schachter, *Problems of Law and Justice*, 1951 Ann. Rev. UN Aff. 190, 204 (1952).

[12] *Id.*, para 3.

[13] Felice Morgenstern, Legal Problems of International Organizations 57 (2024).

[14] Larry D. Johnson, *Expert Backgrounder: How Can the Taliban Be Prevented from Representing Afghanistan in the United Nations?*, Just Security (Aug. 18, 2021), *at* https://www.justsecurity.org/77806/expert-backgrounder-how-can-the-taliban-be-prevented-from-representing-afghanistan-in-the-united-nations.

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rarely explains the basis for its decisions.[15] The General Assembly endorses the Credentials Committee's decisions without debate.

Over time, the General Assembly added another option for coping with rival claims for representing a state: declining to formally decide. In some cases, this approach has left an empty seat—and a member state unrepresented.[16] More often, this approach favors the status quo ante because of a procedural rule providing that "any representative to whose admission a Member has made objection shall be seated provisionally with the same rights as other representatives until the Credentials Committee has reported and the General Assembly has given its decision."[17] Someone who had been previously accredited could continue to sit behind the nameplate until the General Assembly made an affirmative decision that they ceased to represent a member state. The General Assembly has followed this playbook in recent years with respect to both Afghanistan and Myanmar, effectively rejecting the credentials of the Taliban and the military junta respectively by repeatedly deferring a decision.[18]

Although lawyers tend to view such manifestly political decision making with disdain or even alarm, the chances of moving away from the General Assembly's current approach to one that is more predictable and transparent (both in substance and in process) appear slim. The main alternative on offer—the effective-control test—will sometimes produce results that states find intolerable. Even when it comes to states' individual approaches to recognition, which need not be negotiated multilaterally, states have often found it difficult to consistently match their practice to their articulated principles.[19]

Remarks by Diem Ho*

III. International Court of Justice

The question of "who speaks for Myanmar" arose not only before the Credentials Committee, as discussed above, but also before the International Court of Justice (ICJ or Court) in the case between The Gambia and Myanmar under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).

To recall the context, in November 2019, The Gambia instituted proceedings against Myanmar, alleging breaches of the Genocide Convention, and requested provisional measures from the Court. In December 2019, the Court held public hearings on provisional measures, during which Myanmar was represented by the country's ruling party at the time—the National League for Democracy (NLD) led by Aung Sang Suu Kyi. In January 2020, the Court issued provisional measures, ordering Myanmar, among other things, to submit a compliance report every six months until a final decision on the case is rendered by the Court.[1] These reports are due every year in May and in November. On January 20, 2021, the NLD government filed preliminary objections to The Gambia's claims. Twelve days later, on February 1, 2021, the military coup happened,

[15] *Id.*

[16] *Id.*

[17] UN General Assembly Rules of Procedure, Rule 29, *at* https://www.un.org/en/ga/about/ropga/credent.shtml.

[18] The latest credentials report is contained in UN Doc. A/78/605, which was adopted without a vote by General Assembly Resolution 78/124 on December 18, 2023.

[19] Murphy, *supra* note 1.

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[1] Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Gamb. v. Myan.), Provisional Measures, Order, 2020 ICJ Rep. 3, 32, para. 86(4) (Jan. 23).

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overthrowing the NLD. In April 2021, The Gambia filed its response to Myanmar's preliminary objections. In May 2021, when Myanmar was due to submit its compliance report, the Court, however, did not transmit any report to The Gambia. Almost two years into the proceedings, the Court has faced competing claims to represent Myanmar from the democratically elected government that was thrown out, now known as the National Unity Government (NUG), and the new military government, known as the Tatmadaw. The former publicly declared that it sought to appoint its permanent representative to the United Nations as agent of Myanmar. On the other hand, the Embassy in Brussels, which had handled the designation of Myanmar's agent during the provisional measures phase, decided to act in accordance with the instructions of the Tatmadaw and informed the Court of a change in the appointment of Myanmar's agent. In July 2021, the Court accepted the junta's agent appointment and the proceedings resumed. The Court also transmitted the compliance report of the junta to The Gambia. In February 2022, the Court held oral hearings on preliminary objections, where Myanmar was represented by the Tatmadaw-appointed agent.

As the principal judicial organ of the UN, the ICJ should take into account the approach of the General Assembly with respect to a particular representation.[2] But, one might ask, what was the General Assembly's approach here? There was no clear decision or approach by the General Assembly that the Court could take into account. By the time the issue arose at the Court, neither the Credentials Committee nor the General Assembly had taken a decision on the question of Myanmar's representation at the UN. In December of the same year, the Credentials Committee deferred that question.

From a practical perspective, waiting for the General Assembly is hardly an attractive option for the Court. The case needs to move forward; to this end, the Court may have recourse to its "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."[3] The General Assembly might take a long time to reach a decision—in fact, a decision on Myanmar's representation at the UN is still pending at the General Assembly—but in the interest of efficiency, the Court could not, and indeed was not required to, wait for the General Assembly.

There are likely two considerations for the Court's acceptance of the junta's agent appointment.

First, there are the overall due process rights of the state. The Court will have wanted to ensure that the state is in a position to fully and effectively represent itself—this obviously entails access to evidence held in the territory of the state and by its organs. As Sir 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."[4] The junta was in effective control in Myanmar.

Second, the ultimate perpetrator of the alleged genocidal acts is the Tatmadaw, not the NUG. It was the Tatmadaw that conducted the "clearance operations" in October 2016 and August 2017 in northern Rakhine State, during which, according to the UN Fact-Finding Mission, soldiers killed and raped and committed other acts of sexual violence against members of the Rohingya group—the main facts that gave rise to The Gambia's claims under the Genocide Convention. Although it is not known whether the Court's decision to allow the military junta to represent Myanmar in this case was actually motivated by this consideration, it makes eminent sense for the perpetrators of

[2] GA Res. 396(V), para. 3 (1951).

[3] Nuclear Tests (Austl. v. Fr.), Judgment, 1974 ICJ Rep. 253, 259, para. 23 (Dec. 20).

[4] Hersch Lauterpacht, Recognition in International Law 87 (1947).

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the alleged genocidal acts to appear before the Court in a case that is seeking to hold those very same perpetrators accountable. This can also increase the legitimacy of the Court's final judgment.

The Court's decision—though it may seem remarkable if one sees it as departing from the General Assembly's approach (which is arguably unclear)—is not really a departure from its rather consistent practice. The Court has generally avoided dealing directly with the question of who represents the state in prior cases before it. One thing that is nonetheless clear from the Court's past approach is that its acceptance of the Tatmadaw's claim to represent Myanmar does not amount to a recognition that the military regime is the "legitimate" government of Myanmar. At the oral hearing on preliminary objections, the then-president of the Court stated: "I note that 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."[5] Representation and recognition are separate issues, and the Court does not have jurisdiction to deal with the latter.

The Court's approach was notably criticized by Judge *ad hoc* Kress (Myanmar's appointee) in his declaration attached to the judgment on preliminary objections. He considered that, by failing to "explain the grounds that led [it] to act upon the replacement described in paragraph 8 of the Judgment," the Court "could give the impression that the replacement was a matter of course."[6] In doing so, he quoted the General Assembly's Resolution 75/287 dated June 18, 2021, which condemned the coup and called upon the military to release Aung Sang Suu Kyi and other members of the NUG—whom it referred to as "government officials."[7] Indeed, some have argued that the General Assembly thereby took the position that the deposed NLD government continues to be the government of Myanmar even after the coup. As discussed above, however, with the Credentials Committee's repeated deferrals of the question of Myanmar's representation, the better view remains that General Assembly never adopted a clear approach. In any event, calling Aung Sang Suu Kyi and other members of the NUG "government officials" does not *per se* amount to a formal recognition that they are the government of Myanmar for the purpose of representing it at the UN.

The question, nevertheless, remains whether the Court's acceptance of the junta's appointed agent could have downstream implications on the Tatmadaw's recognition and legitimacy given the Court's international status and normative influence. I would argue that this should not act as a bar to the Court's consideration of the question of representation, however. The Court is a judicial body, not a political institution and must carry out its judicial function to resolve disputes before it. Of course, in doing so, the Court should be prudent in approaching the issue of representation, which, in the case of Myanmar, the author submits it was.

Remarks by Duncan Pickard*

IV. International Arbitration

Courts and tribunals have encountered rival claims to government representation in international arbitration with some frequency in recent years. The varied approaches that actors in the arbitration

[5] CR 2022/1, at 11 (President Donoghue)

[6] Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Gamb. v. Myan.), Preliminary Objections, Judgment, 2022 ICJ Rep. 538, 540, para. 4 (July 22, dec., Kress, J. *ad hoc*).

[7] *Id.* at 539–40, para. 3.

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system have taken demonstrate the complexity of resolving government representation disputes and options available to third-party neutrals.

To put the recent developments in context, it is important to note that challenges arising out of rival claims to government representation are not new in international arbitration. One early precedent is the 1903 *Bolivar Railway* dispute. That case arose out of the expropriation of a railway by the revolutionary government in Venezuela, which at the time of the arbitration had assumed control of the country. The key question for the umpire was whether the revolutionary government's actions were attributable to the state before the government took power. He answered in the affirmative: "The nation is responsible for the obligations of a successful revolution from its beginning, because, in theory, it represented *ab initio* a changing national will . . . . Success demonstrates that from the beginning it was registering the national will."[1] Similar issues arose in the 1923 *Tinoco* arbitration, before the Mexico–United States claims commission, and beyond.[2]

More recently, rival claims to government representation have arisen in cases involving three states in particular: Venezuela, Yemen, and Myanmar. These examples highlight very significant issues in arbitral practice, especially in disputes involving state-owned entities.

I begin with Venezuela, which has seen the most cases involving these issues. A series of commercial and investment treaty claims filed against the Bolivarian Republic raised procedural questions given the rival claims of Juan Guaidó and Nicolás Maduro to lead the Venezuelan government. The crux of the problem was that, in many cases, both sides had appointed legal counsel. Which side would be heard?

In at least eight cases, an International Centre for Settlement of Investment Disputes (ICSID) tribunal or annulment committee decided to maintain the status quo and keep the legal representative of the Maduro government following Guaidó's swearing-in ceremony in January 2019. Interestingly, however, they took different approaches in arriving at that conclusion.

In *Heemsen* and *Longreef*, a tribunal and an annulment committee, respectively, found that they were not competent to hear Guaidó's application, with the effect of leaving in place Maduro's representatives. Other tribunals applied a presumption in favor of the status quo, finding a lack of support for displacing Maduro and noting procedural challenges in having two different counsel teams. The tribunal in *Mobil Cerro Negro*, for example, made the "procedural decision" of leaving Maduro's representatives in place for the "only purpose of assuring the proper conduct of the proceedings and protecting the rights of defence of the parties."[3] The *Air Canada* tribunal noted the "practical difficulties" of allowing both counsel teams to appear (as the Guaidó representative had proposed), "particularly in the event of disagreements between the Counsel."[4]

The annulment committee in *Valores Mundiales* applied an "effective control" test to side with Maduro's representative:

> From the point of view of international law, the one who represents the State—insofar as a subject of international law—is the government, that is, the subject or subjects that effectively control the territory. Consequently, the request for a change of representation must be supported by individual events of exercise of power that allow to demonstrate effective control of territory.[5]

[1] Bolivar Railway, Opinion of Umpire (1903), IX RIAA 445, 453 (2006).

[2] *See, e.g.*, Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 185–92 (1953); James Crawford, Brownlie's Principles of Public International Law 141–45 (9th ed. 2019).

[3] Mobil Cerro Negro Holding Ltd. et al. v. Venezuela, ICSID Case No. ARB/07/27, Decision on the Respondent's Representation in this Proceeding, para. 45 (Mar. 1, 2021).

[4] Air Canada v. Venezuela, ICSID Case No. ARB(AF)/17/1, Procedural Order No. 7 (Decision on Respondent's Representation), para. 135 (May 28, 2019).

[5] Valores Mundiales et al. v. Venezuela, ICSID Case No. ARB/13/11, Procedural Resolution No. 2, para. 42 (2019). Annulment committees took the same approach in *Fábrica de Vidrios Los Andes v. Venezuela*, *Kimberly-Clark*

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It is important to note, though, that at least one arbitral tribunal has rejected the effective control test in the context of Yemen. The UN Commission on International Trade Law (UNCITRAL) tribunal in *Mobile-Telephony Sabafon*, under the South Africa–Yemen bilateral investment treaty, held that the widespread international recognition of the Hadi government can overcome its lack of effective control while in exile.[6]

The outliers on Venezuela are the *ConocoPhillips* tribunal (on rectification) and *ad hoc* committee (on annulment). In that case, both the Guaidó and Maduro representatives submitted annulment applications. With no objection from the claimant, the *ad hoc* committee allowed both counsel teams to appear. Lord Phillips, the former president of the UK Supreme Court, in a recommendation to ICSID after a challenge to one of the committee members, noted the low potential for conflict in this situation:

> Each would be striving towards the same end. . . . If the two law firms put aside their differences as to which represented the lawful government of Venezuela and cooperated in their efforts to procure the annulment of the Award, it was possible that no conflict would result.[7]

An International Criminal Court (ICC) tribunal took a similar approach, albeit in a different procedural posture. In that case, PDVSA, the Venezuelan state-owned energy company, had brought a claim against Paraguay's state-owned energy company. The Paris-seated tribunal allowed the Guaidó representative to intervene following the respondent's consent.[8]

Turning to Myanmar, two disputes involving that country promise to bring the two entities that claim to represent the state—the National Unity Government (NUG) and the military, known as the Tatmadaw—in direct conflict with each other. The first involves whether the NUG or the Tatmadaw is the rightful recipient of revenues from the Yadana offshore gas field in the Andaman Sea, a significant source of income for the Tatmadaw. In March 2023, the NUG announced that was sending a "formal demand letter" to the Thai company operating the project directing it to deliver "all future payments from the operation of the Yadana Project . . . to an account that the [NUG] shall designate."[9] This is a unique public case of rival claims to government representation in a commercial context.

The second dispute is an investment arbitration between a subsidiary of Telenor, the Norwegian telecommunications company, and Myanmar under of the Myanmar-Singapore bilateral investment treaty. In that case, Telenor seeks compensation for losses arising out of Tatmadaw-ordered internet shutdowns during the February 2021 coup.[10] The NUG comprises many civilian leaders whom the Tatmadaw had sought to oust in the coup, and all of whom were strongly opposed to the internet shutdowns. The Tatmadaw's and NUG's rival claims raise questions of whether the shutdowns can be attributed to the state for purposes of the treaty arbitration. And although there is no

v. Venezuela, and *Agroinsumos Ibero-Americanos v. Venezuela*. *See US Courts Diverge from ICSID Annulment Committee on Venezuela's Representation in International Disputes*, IAReporter (May 23, 2019).

[6] *See Award Looms in UNCITRAL Investment Arbitration Against Yemen; In Unpublished Ruling, Arbitrators Decided Who Is Rightful Legal Representative of State*, IAReporter (Dec. 23, 2019).

[7] ConocoPhillips Petrozuata B.V. et al. v. Venezuela, ICSID Case No. ARB/07/30, Recommendation of Lord Phillips (July 10, 2020).

[8] *See ICC Tribunal Recognizes Guaidó's Intervention and Stays Proceedings in PDVSA v. PETROPAR*, Kluwer Arbitration Blog (May 25, 2019).

[9] NUG, Press Statement on Yadana Project (Mar. 20, 2023). I and others at Debevoise provided legal advice to a member of the NUG, and separately to Legal Action Worldwide (LAW) in relation to a communication to the prosecutor of the International Criminal Court under Article 15 of the Rome Statute regarding the declaration by the NUG accepting the Court's jurisdiction under Article 12(3). The views expressed in this Article are my own and should not be attributed to Debevoise, the NUG, or LAW.

[10] *See Revealed: Telecoms Company Lodges Treaty Arbitration Against Myanmar*, IAReporter (Nov. 13, 2023).

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public indication that the Tatmadaw or the NUG have appointed counsel to represent Myanmar in that case, the procedural posture could raise issues similar to the Maduro-Guaidó disputes in Venezuela's investment treaty cases.

As a final note, it is instructive to compare the challenges that the arbitration system faces when adjudicating rival claims to government representation with how national courts reckon with the same problem, including in arbitration-related cases. U.S. and English courts, for example, have simplified their task by choosing to defer to the executive's reasonable decisions on which claim to recognize. That is the approach that the UK Supreme Court took in siding with Guaidó in a dispute over which Venezuela-appointed entity could instruct the Bank of England with respect to the country's gold deposits there.[11] The appeals court in the District of Columbia did the same with respect to Venezuela's counsel in enforcing the treaty award in *Rusoro Mining v. Venezuela*, with reference to the Biden administration's statements in support of Guaidó.[12]

Even in this possibly simpler context, however, there is room for nuance. For example, the presumption of U.S. government sanctions against the Bolivarian Republic is that Maduro still leads its government. These courts' approach could also lead to a situation where counsel representing the interests of one rival entity appears in the arbitral proceedings and another in national court litigation related to that same arbitration.

Remarks by Larry D. Johnson*

V. Conclusions/Remarks

All of my thanks go to our four panelists who have provided excellent and thought-provoking presentations. I think I can speak for all of us that this discussion has been very insightful and worthy of further reflection. Far be it from me to summarize or connect the dots. But I would just add a few of my own brief thoughts on this issue.

It sounds to me from the discussion that the answer to question "who speaks for the State" must involve the further question: "For what purpose?" There has always been both in international law and in UN law and practice a tension when addressing the question between the need to bring values and judgements into any discussion of who to invite or allow to "sit at the table" in a multilateral setting and the "effective control" test of using objective criteria (control of territory, population, resources, international relations, etc.) to decide who should be considered as representing a state, regardless of how a state obtained that "effective control." Naturally, lawyers often opt for the second approach as it tends to favor stability, clarity, and consistency, which lawyers love. But the concept of representation almost always brings in terminology such as "rightful," "entitled," "legitimate," "lawful," i.e., a value-oriented approach.

So does "might make right"? Does dealing with an odious regime as the representatives of a state really provide legitimacy? It sounds like the foundational concept that you cannot reward an aggressor with territory that it has just unlawfully grabbed by military force. While values (Purposes and Principles of the Charter) may be useful in choosing between rivals as to who speaks for a state at a multilateral meeting or dangling representation acceptance as a tool to entice

[11] "Maduro Board" of the Central Bank of Venezuela v. "Guaidó Board" of the Central Bank of Venezuela, [2021] UKSC 57.

[12] Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, No. 18-7044 (D.C. Cir. May 1, 2019) (order dismissing Maduro's request to bar Guaidó's representatives from appearing).

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compliance with international obligations, to what extent can it be used for another purpose—deciding on international responsibility of a state or holding a state accountable, such as in International Court of Justice (ICJ) proceedings or arbitrations? A further UN question arises if the highest policy organ in the UN has opted for a "values" based test when deciding between rival regimes, but the highest judicial organ in the UN has ignored that political organ's guidance and opted for an "effective control" test without explanation or even acknowledging it has even done so. Yet they are both part of the same political organization (and funded by all member states) How does that work? It does not.

So perhaps this discussion of tensions that have existed for some time and continue to be before us, will provoke a serious look at how to deal with who speaks for the state in different contexts. Do we want the Taliban at the table in UN meetings, welcoming its head of state, etc. when it is continuing to violate egregiously the Convention on the Elimination of All Forms of Discrimination Against Women every day without remorse? Do we offer the Taliban a place at the table if they only came back into compliance? Yet at the same time, do we not want the Taliban at another table—the "defendant's" table—in legal proceedings when they are called to account for those violations? Can we have it both ways?

So far, certainly the ICJ has been remiss in addressing the question squarely, which was put before it by one of its judges (see Judge Kress's "whistleblowing" Declaration in the Gambia-Myanmar Genocide case Preliminary Objections Judgment of July 22, 2022). So those interested in the issue should in my view take inspiration from our outstanding panelists and conclude that it is a timely and necessary issue to be addressed and with which to wrestle. If not one of you, then who?

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