

THE CONCEPT OF LEGITIMATE GOVERNANCE IN THE CONTEMPORARY
MUNICIPAL AND INTERNATIONAL LEGAL SYSTEMS: AN INTERDISCIPLINARY
ANALYSIS

by

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ABSTRACT

All over today's world, there exists a crisis of legitimate governance concerning the acquisition and (ab)use of governmental power. Given the undesirable consequences of this crisis, is it possible, as a first step in the struggle to eliminate it, to construct a workable normative (rather than descriptive) model for the evaluation of governance as legitimate or illegitimate?

Do reasonably determinate rules exist within international law which collectively provide a barometer for the assessment of governance as illegitimate? If so, does the concept of legitimate governance as reflected by these rules address the widespread inequities in the socio-economic relations of power within and without municipal polities? If not, is such a concept of political legitimacy not defective? Are there normative or other consequences that flow from a determination that a regime is illegitimate? What is the character of the process by which such a determination is made by the international community? And is that community itself a legitimate evaluator of municipal governance?

I have utilised knowledge from within and without law; sought to integrate the operation of international and municipal norms; gone beyond doctrine to explore the forces outside of law that constrain the operation of law; and adopted an evaluative view of the concept of legitimacy.

I conclude that there are norms in contemporary international law which constitute useful criteria for the evaluation of municipal governance. I have, however, lamented the disregard with which international law has treated the need for socio-economic equity within and between states, when such equity is an imperative for political legitimacy. I also argue that the process

of international legitimation needs re-alignment in the service of legitimacy norms. I conclude by exposing the crisis of legitimacy that faces the present system of global governance, arguing that if that system is to remain credible, and therefore effective, in the regulation of municipal governance, then it must be overhauled to critically reduce the selectivity and partiality which it now often displays.

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DEDICATION

In dedication, I offer this poem to my family (my father Okwuegbunam, my mother Lechi, my brothers Ogo and Okey, and my sisters, Adaobi, Ojiugo, and Chibuzo); and to all those who currently suffer under illegitimate rule.

hope:

heights attained
as fluid fantasies
descend
need not melt
into the blues
such withering heights
nourished and fed
by the milk of hope
could flash on
unchequered
into lucid fruition

CHAPTER ONE

THE CONCEPTUAL FRAMEWORK AND METHODOLOGY

A. THE CONCEPTUAL FRAMEWORK:

(i). The Problem of Illegitimate Governance:

Everywhere in the contemporary world, in developed as well as developing nations, in Africa and the Americas, in Europe, Australia and Asia, there is today a crisis of legitimate governance of one sort or the other. A crisis around the (ab)uses of power¹ and about the manner in which power is acquired. A crisis about the ways in which governmental authority may legitimately enure to the governor(s)². A crisis about the ways in which a government which has legitimately come to power may conduct the business of governance, especially as it affects power-minorities, particularly poor people, ethnic minorities, and women, within the relevant polity. A crisis about the duty of the members of a polity in the face of a government which has come to power by force of arms and/or in the face of laws which are manifestly antithetical to the relevant sense of rightness. A crisis around the role of international law and organisation in the securement of legitimate governance the world over, and in the defence of popularly constituted regimes against the onslaught of military coups and other forms of totalitarian approaches to power politics.³

¹ This may be referred to as "the right to rule in a particular way".

² This may be referred to as "the right to hold office" or "the bare right to rule". This is distinguished from the question of the legitimacy of an entire political system which I refer to as "systemic legitimacy".

³ This concerns the question of "the legitimacy of global governance".

In Africa, the governed are intensely agitated by the prevalent irresponsibility of those who govern, many of whom have conducted themselves in the fashion of despots and tyrants. Even in the cases where "elections" have been held, they have either been annulled or have been rigged to an extent that has rendered their results so incredible as not to serve any genuine purpose whatsoever.

In Nigeria, for instance, despite a relatively minor pre-existing crisis, ever since the 27th of August 1985, when a group of military officers led by General Ibrahim Babangida seized control of the polity in a palace coup, that otherwise richly endowed country has been in a state of pernicious ferment which has devastated all facets of the life of its citizens and has left them dazed by gross poverty, suffering and political subjugation. The subsequent election of Chief Moshood Abiola as President of the Nigerian Federation on the platform of the left of centre Social Democratic Party of Nigeria in an election which has been widely acclaimed as the freest and fairest in Nigerian history and its "cancellation" by the Babangida-led ruling junta has heightened the intensity of the crisis of legitimate governance which faces that country.

The mass upheaval which followed the so-called annulment of the results of that election was characterised by general strikes, civil disobedience, threats of secession from a significant number of ethno-cultural groups, and the "surprising" declaration by a Lagos High Court that the Interim Government installed and teleguided by the grossly unpopular military junta was illegal.⁴ Even now the popularly elected Nigerian leader is in jail awaiting the completion of his trial for "treason" orchestrated by the new ruling military junta led by the Defence Minister

⁴ For a scholarly account of the epic legal battle which led this outcome, see G. Fawehinmi, June 12 Crisis: The Illegality of Shonekan's Government (Lagos: Nigerian Law Publications, 1993).

in the Babangida regime, General Sani Abacha.

In Togo, the repressive regime of General Eyadema continues to debilitate and ruin that country amidst a conspiracy of international "silence" akin to the lukewarm attitude exhibited by the world community in relation to the Nigerian problem. In Zaire, a similar situation exists. In Liberia, factional fighting over the control of the machinery of governance has led to the total collapse of law and order in that unfortunate country. In the Sudan, Somalia, Rwanda, Burundi, Angola, Algeria, and Cameroun, pro-democracy movements and agitations, as well as demands for ethno-cultural autonomy, continue to be brutally suppressed by unpopular and totalitarian regimes.

In nearly all African states, the gap between the rich and the poor continues to widen and deepen under the onslaught of avaricious rulers more interested in stuffing their own enrichment than in the basic well-being of their peoples, and of foreign banks and governments who put greater premium on their financial and other gains from this sort of despicable conduct than on the misery and suffering that such behaviour visits on the ordinary peoples of these countries. Life expectancy continues to drop steadily, the rate of infant mortality continues to rise, and malnutrition and disease have reached alarming proportions. Put simply, life has become even more brutish.

In most states on the two American continents, there is at present an intense or simmering crisis of legitimate governance, whether relating to the question of mass participation in governance or to the issue of the socio-economic well-being of the people. In Haiti, the United States of America, exercising the mandates of both the Organisation of American States and the United Nations, has only just recently restored to power the legitimate government of

that country ousted in 1991 by a neo-fascist alliance led by General Roaul Cedras.⁵ Even now, that country continues to face a crisis of legitimate governance in the sense of its obvious dilemma about the ways in which the popular government of President Jean-Bertrand Aristides may proceed in its ambitious mission of righting historic systemic injustices in the distribution of socio-economic resources in that nation.

Even in the relatively more stable liberal democracies of these continents there is still a crisis around the issue of the extent to which the state or any government may regulate and mediate intra-group relations and the thrust of such regulation. Should a government not protect the poor from the oppression of the owners of the means of production when it already protects the interests of the owners of capital and private property? Should the welfare state be maintained? Is it meaningful to speak of democracy in the atmosphere of severe socio-economic inequities which still blot the otherwise commendable terrains of these liberal democratic states?

In Europe and Australia, there are similar dissatisfactions with both sides of the legitimacy coin : the political and the socio-economic. In western Europe, despite the relative merit of its liberal democratic political traditions, there is still widespread discontent over the nature of the state's social policies and about the desirability of the welfare state. In recent years, conservative parties have come to power in some of those states and have sought to obliterate the gains of the socialist and social-democratic "revolution" which swept through the relevant states in the years that immediately followed the second world war. This has resulted in intense debates and disagreements about the role of the state in the socio-economic sphere of

⁵ See for e.g A.C. Helton, "Haiti Policies: Messy and at Times Unlawful" (1994) 16 National Law Journal A.21. See also M. Lennox, "Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy" (1993) 45 Stanford Law Review 687.

the business of governance. Indeed, many now raise the question of the deepest involvement of the liberal democratic state in the perpetuation of gross inequities in socio-economic relations. If this is true, is it a legitimate path for any government to trod?

In Eastern Europe, the crisis of legitimate governance is quite deep and intense. In that part of the continent there is a crisis about the choice of a political arrangement, about the question of democracy as well as about the demolition of the socio-economic comforts which nearly a century of communism had striven to entrench in their various polities. How are the new liberal democratic regimes of this area to explain away the declining quality of life to their people when liberal democratic capitalism made its triumphant entry into these former communist fortresses proclaiming the advent of political and socio-economic utopia?

In Asia, the crisis is similar to that in Eastern Europe. In China for instance, the Tiananmen Square massacre was only one example of the repressive character of that country's communist leadership. Even though China has definitely made tremendous advances under communist rule in the area of the securement of socio-economic equity, advances which would perhaps have been unlikely under the western capitalist system, the repression of political freedoms in that country has generated an intense amount of anti-state sentiments and thrown the polity into sustained ferment. Even though South Korea has been a capitalist economy, it also suffers from a similar crisis of legitimacy as China. Political repression is rife in that country and gross poverty also exists alongside phenomenal wealth.

It is against this unhappy background that this thesis was conceived. The thesis began life in my mind one year after I started to teach law at the University of Nigeria. At the time, I was involved in the civil rights movement in Nigeria; a movement which had the declared objective

of banishing dictatorship from the land. With a strong background in international law, human and peoples' rights, jurisprudence, legal theory, and constitutional law, and fortified by a keen awareness of history and politics, I could not but become intensely agitated by the apparent historical failure of municipal structures, political and legal, to provide a solution to the endemic problem of dictatorship and misrule in many countries of the South. I was also aware that all was not well in the countries of the North.

This agitation reached a crescendo between June 1993 and August 1994, after the purported annulment of the June 12 presidential polls in Nigeria by the then ruling junta. This in turn led to an intense political and socio-economic crisis in the country which still rages on over two years thereafter. From that period onwards, I began to give serious thought to the ways in which an external barometer could be utilised in the evaluation of the legitimacy of the assumption and the (ab)use of political power. I was concerned that because of the stranglehold of dictatorships on their peoples, severe but legitimate external pressure is required to catalyse the process of the empowerment of such peoples in the hope of putting an end to such pernicious forms of governance.

I also realised that to have a chance of success, the application of such external pressure must be firmly rooted in a credible legal structure. The solution as I saw it then, and as I still see it now, lies in the application of international law to this problem. For, it is only the law of nations that can, from the external, provide obligatory norms and rules which bind and require governments to assume and use political power in certain ways.

Having already written a thesis on self-determination in municipal and international law, in fulfillment of the requirements for an earlier masters degree, I was conversant with the

requirements of international law relating to colonialism, apartheid, genocide, and popular participation in governance. It was this information and awareness, coupled with further research into the requirements of certain other norms of international law, that enabled me design the present enquiry, and to begin my search for the concept of legitimate governance in the contemporary municipal and international legal systems. It is a search which has not just blossomed into the present masters thesis, but which has also informed the direction of my imminent doctoral work regarding the concept of legitimate statehood in contemporary international law. The major research problems that I tackle in this thesis are therefore as follows: is there any test or standard for the evaluation of governments and their laws to determine whether or not they are legitimate; how are legitimate laws to be ascertained; is the question of legitimate governance to be assessed descriptively or normatively; at what levels of enquiry can the concept of legitimate governance be analysed; is a concept of legitimate governance that does not consider and deal with the widespread inequities in the socio-economic relations of power within a given polity not defective? Are there legitimacy norms in the international legal system which might provide some evaluative criteria against which municipal governmental and legal regimes might be measured? What are these norms? Are they reasonably determinate? Where can they be found? What are the ideological questions that arise from the structure of the international system, a system that is designed to interpret such norms? Are these emergent norms different from those that governed inter-state relations in the recent past? What is the process and effect of the power of legitimation of governance which is thought to reside within the international community? Have the previously well-established rules governing such legitimation given way to new rules in the event that new norms of governmental legitimacy are

shown to have emerged? If international norms are to govern the legitimacy question, is the very legitimacy of the present system of global governance not crucial to the conceptualisation and operation of such a normative model? These are the principal questions that are asked and considered in detail in this thesis in the hope that a reasonably workable model for the regulation of the legitimacy of the municipal political unit can be fashioned out from the mass of conflicting proposals that exist in both pre-modern and modern socio-political thought.⁶

(ii). An Integrated Hypothesis of Legitimate Governance:

In this thesis, I argue that while a perfect model of evaluating the legitimacy of a government or its laws cannot, for obvious reasons, be designed, there has emerged in the international system, despite all its problems, a limited mesh of transnational values which provide remarkable normative and evaluative criteria for the assessment of the legitimacy of a municipal government and its laws. This is the integrated hypothesis of legitimate governance which is a substantially novel approach to the issue. In putting forward this argument I have organised my work into this introductory chapter, three major chapters, and a conclusion. In the present chapter, I set down the conceptual framework and methodology of the thesis.

In chapter 2, I consider the municipal concept of legitimate governance and its

⁶ See for e.g M. Weber, Law in Economy and Society, ed. by G. Roth and C. Wittich (Berkeley: University of California Press, 1978); R. Rogowski, Rational Legitimacy: A theory of Political Support (Princeton: Princeton University Press, 1974); D. Held, "Power and Legitimacy in Contemporary Britain" in G. McLennan, D. Held and S. Hall, eds., State and Society in Contemporary Britain: A Critical Introduction (New York: Polity Press, 1984); R. Barker, Political Legitimacy and the State (Oxford: Oxford University Press, 1990); J. Rawls, A Theory of Justice (Cambridge: Cambridge University Press, 1971); E.W. Orts, "Positive Law and Systemic Legitimacy: A Comment on Hart and Habermas" (1993) 6 Ratio Juris 245; and M. Seward, Co-optive Politics and State Legitimacy (Aldershot: Dartmouth, 1992).

relationship with the intensely problematic questions of the entitlement of citizens to repudiate legal obligation and the validity of laws. In my stride I consider the question of the necessity for governance and submit that whilst a minimum of governance cannot be dispensed with in human society as is evident from the literature, its inevitable presence in any polity raises an even more problematic question about the limits of governmental power and the legitimate manner in which power might be acquired or lost.

I also argue that the problem of legitimate governance can only be fruitfully confronted as a normative question. I consider and reject the descriptive theories of legitimacy proposed by the legendary Max Weber and the scholars who align themselves with that paradigm.⁷ This is because the descriptive approach fails to consider the internal dimensions of the behaviour of the population whose support confers legitimacy on the government. It confines itself to the external aspect of the phenomenon. The lack of resistance to a regime in power does not necessarily mean that it is supported by its people. Moreover, the majority of the population may clearly support an action of the government which may, upon independent evaluation, be found to be grossly immoral or intolerable as when over ninety percent of a polity support genocide against the minority. My normative paradigm is somewhat similar to that proposed by Jurgen Habermas,⁸ David Held,⁹ Michael Seward,¹⁰ and Eric Orts¹¹ but goes beyond them especially

⁷ See M. Weber, supra. See also R. Rogowski, supra; P.H. Brietske, "Law, Legitimacy and Coercion: One View From Law and Economics" (1991) 25 Valparaiso Law Review 343; and J. Rothschild, "Political Legitimacy in Contemporary Europe" in B. Denitch, ed., Legitimation of Regimes: International Framework for Analysis (London: SAGE, 1979).

⁸ See J. Habermas, Legitimation Crisis, trans. T. McCarthy (Boston: Beacon, 1975).

⁹ See D. Held, supra.

¹⁰ See M. Seward, supra.

in its internationalist thrust.

Thereafter, I evaluate the concept of legitimate governance at three levels of enquiry: the right to hold political office, the right to rule in a particular way (whether positively or negatively defined), and the legitimacy of the political system itself (i.e systemic legitimacy). All three levels of enquiry are conflated in the pre-existing literature in one combination or the other.¹² I then go on to argue that any theory of political legitimacy that does not confront and attempt to solve the problem of gross socio-economic inequities in most of today's polities is on that score inadequate. This is because the political choice and accountability which must be present in any polity before its government can satisfy the legitimacy test is empty and unreal without a minimum of socio-economic well-being. This perspective is largely absent in the existing literature relevant to the current subject, which largely comes out of the liberal tradition.¹³ Even the work that has been done by marxian and counter-liberal scholars has not focused on this particular issue.¹⁴

In the end, I suggest that there are certain core norms of international law (peremptory norms or *jus cogens*) which have emerged as criteria against which governance must be evaluated. Indeed, the application of these norms cannot be avoided by any country by attempting to enter into treaties which exclude their operation. Even though these criteria are to

¹¹ See E. Orts, *supra*.

¹² This is the case even in the writings of Habermas, Orts, Seward and Held.

¹³ See for e.g R. Barker, *supra*; E. Orts, *ibid*; and D. Held, *ibid*.

¹⁴ See for e.g H. Habermas, *supra*. Even though the work of Michael Seward is not marxist, he includes the promotion of want-satisfaction as one of his criteria for the determination of the legitimacy of governance. He fails however to make a case for socio-economic equity as a precondition for the legitimacy of governance. See M. Seward, *supra*.

an extent indeterminate in the way in which they may be interpreted, they are not infinitely indeterminate.¹⁵ Indeed, meaning has been produced over the years from their content which will be extremely useful in the evaluation of municipal regimes.

To make this point, however, is not to deny completely the fact that the process of evaluation requisite for the characterisation of governance as legitimate or otherwise is value-laden. I recognise that the different cultures, histories, experiences and values which define the diversity of the world society may justifiably reflect upon a people's choice of political system or way of life. For example, the way in which the norm in favour of political participation in governance concretizes in Uganda may differ in particulars from the way in which it concretizes in Canada. Clearly, the Western conception of the said norm is not the only one possible. Nevertheless, I am convinced of the existence of a limited core of normative requirements which flow from our very humanity and which are universally shared even in today's post-modern world. Where in the world has colonialism, apartheid or genocide ever been favoured by any peoples as something which ought to occur when they themselves will become the victims?

Though Thomas Franck has predicted the emergence of a right to "democracy" in contemporary international law, he neither asserted its emergence¹⁶ nor considered the presence of other legitimacy norms in the global system such as the rules which proscribe colonialism,

¹⁵ For a clear exposition of the indeterminacy of norms in the municipal legal context, see J. C. Bakan, "Constitutional Arguments, Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall Law Journal 23; and C.M. Yablon, "The Indeterminacy of Law: Critical Legal Studies and the Problem of Legal Explanation" (1985) 6 Cardozo Law Review 917.

¹⁶ See T. M. Franck, "The Emerging Right to Democratic Governance" (1992) 86 American Journal of International Law 46.

apartheid and genocide. Jordan Paust has come closest to making some of the arguments that I now make, but perhaps the brevity of his paper did not permit him to explore either the detailed mechanics of the application of the said legitimacy norms or to consider the socio-economic dimension of the matter.¹⁷ He also fails to discuss the presence of other legitimacy norms aside from the norm in favour of free and genuine political participation of the people of a given country in the business of governance.

I go on to consider the questions of the repudiation of legal obligation and the validity of laws as they relate to the concept of legitimate governance. Even though a lot of work has been done in this area,¹⁸ I have not come across any work that draws the logical connection between the illegitimacy of a government as determined by norms of international law and the invalidity of its laws. In the main, I argue that the obligation to obey the law is moral rather than legal, and prima facie; and that since the prescription of the law is only one reason to consider in deciding whether or not to obey the law, and since going by the test I have proposed, a legitimate government can only come into being by popular mandate, an illegitimate regime has no right to the allegiance or obedience of its citizenry.

I also argue that once it is conceded that under any circumstance whatsoever a people

¹⁷ See J. Paust, "International Legal Standards Concerning the Legitimacy of Governmental Power" (1990) 5 American University Journal of International Law and Policy 1063.

¹⁸ See for e.g. H. Hart, The Concept of Law (Oxford: Oxford University Press, 1961); H. Hart, "Positivism and the Separation of Law and Morals (1958) 71 Harvard Law Review 593; L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71 Harvard Law Review 630; M. Hartney, "Dyzenhaus on Positivism and Judicial Obligation" (1994) 7 Ratio Juris 44; C. Synopwich, "Social Justice and Legal Form" (1994) 7 Ratio Juris 72; and D. Dyzenhaus, Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy (Oxford: Oxford University Press, 1991).

may be entitled to repudiate their legal obligation, then it becomes unarguable that the regime in power has lost its right to make law, and that as such its legislation is invalid: the essence of law being its obligatory character . If at the outset, a law is so illegitimately enacted that it ought not to be obeyed, then it is an abuse of language to describe it as a law. Thus, by another route I arrive at the position taken by Professor Lon Fuller in his famous debate with Professor Herbert Hart on the question of the grudge informer.¹⁹

In chapter 3, I consider the concept of legitimate governance in traditional and contemporary international law. I expand on the traditional conception of, and attitude to legitimate governance in international law and how these were reinforced by other doctrinal concepts of the law of nations such as the traditional versions of the concepts of the sovereignty of states, territorial integrity, non-intervention and recognition of governments.

I tell the story of how the norms of the traditional body of the law of nations was deeply involved in the politics and economics of the subjugation of the governed by those who exercise political power. I also tell the story of how the political elite the world over constructed certain of international law's doctrines and rules in furtherance of imperialist and oppressive ends. I then contend that even though the corpus of the norms of international law is still laden with oppressive aims and outcomes, the contemporary law of nations has now developed a core of normative prescriptions which are undoubtedly humanist, progressive and anti-oppressive. I elucidate the nature of the said norms and deduce a contemporary concept of legitimate governance from them.

I argue, however, that these norms are inadequate as norms of governmental legitimacy

¹⁹ See L. Fuller, supra. For a report of this case, see (1951) 64 Harvard Law Review 1005.

as they do not address the nature of socio-economic relations of power within the state. Even the norms which seem to have been designed to perform this role have either not attained the rank of the norms of political legitimacy or are mere token norms which are not designed to address the gravamen of the matter. In this way the lack of success met by the "new international economic order" proposals of the countries of the south can be effectively analysed and understood.

The dominant political ideology of today's world, liberal democratic theory, in its support of international capital, avoids addressing this oppressive side of social relations the maintenance of which is historically necessary for the sustenance of capitalist socio-economic relations. This phenomenon is invariably reproduced in international legal scholarship which flows out of this tradition and which at present constitutes the dominant type of legal scholarship.²⁰ The recent emergence of critical approaches to international legal scholarship, epitomised by the work of David Kennedy,²¹ Karen Knop,²² and Maivan Lam,²³ is an attempt to remedy this inadequacy

²⁰ This school of thought is referred to as the liberal school of international affairs. For a scholarly analysis of the nature and thrust of scholars of this persuasion, see M. Zacher and R.A. Mathew, "Liberal International theory: Common Threads, Divergent Strands" in C. W. Kegley, ed., Controversies in International Relations Theory: Realism and the Neoliberal Challenge (New York: St. Martin's, 1995). See also F. Teson, "The Kantian Theory of International Law" (1992) 92 Columbia Law Review 53.

²¹ See for e.g, D. Kennedy, "Primitive Legal Scholarship" (1986) 27 Harvard International Law Journal 1; and D. Kennedy, "A New Stream of International Legal Scholarship" (1988) 7 Wisconsin International Law Journal 1.

²² See for e.g, K. Knop, "The 'Righting' of Recognition: Recognition of States in Eastern Europe and the Soviet Union" (1992) Canadian Council on International Law Proceedings 36

²³ See for e.g, M. Lam, "Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination. (The Nations Within: Ethnic group Demands in a Changing World)" (1992) 25 Cornell International Law Journal 603.

in the traditional ways in which the law of nations has been studied but none of such writing has focused directly on the present question.

In chapter four, I examine the process and effect of international legitimation, as well as the legitimacy of the present system of global governance. I consider the process of international (de)legitimation of governments and governance and the effect of such (de)legitimation. I argue that the present conception of the process of international legitimation which asserts that it is a discretionary political act flies in the face of the concretisation of a peremptory right to self-determination in the contemporary law of nations. If a people have a right to self-determination, then the recognition and legitimacy of the product of their self-determination, their legitimate government, cannot be a completely discretionary or political matter given the serious consequences which flow from either recognition or non-recognition in today's highly interdependent and increasingly integrated world. Such a people must have a right to the recognition of that government as their alter ego, and as a legitimate government within the community of nations.

I further argue, in agreement with Thomas Franck,²⁴ that there is a power of legitimation amongst nations but unlike Franck I contend that this power must be grounded in, and limited by, the right of all people to self-determination and the other legitimacy norms which I point out in this thesis. If properly conceived and operationalised this power has progressive potential as a bulwark against some, if not most, of the manifestations of illegitimate governance in the world community.

²⁴ See T.M Franck, The Power of Legitimacy Amongst Nations (New York: Oxford University Press, 1990).

In the end, I consider the legitimacy of the international system itself and conclude that though the present system of global governance has its merits, it requires structural reform and normative redirection if it is to continue to attract the allegiance of the world community. I argue that the international system must address the demands of nations of the South for greater equity in the nature of world socio-economic relations and heed the cries of the people of those nations for political freedom and socio-economic justice, lest it collapse under the stress of its ongoing crisis of legitimacy.

As Thomas Franck has convincingly demonstrated, a legal system loses legitimacy or compliance pull as the gap between its normative prescriptions and the coherence of their actual application to real life situations widens.²⁵ When, as has happened at present, the great majority of the world's peoples and nations perceive that the rules of the law of nations are for the most part differentially applied in largely similar situations with little or no coherence, then the international system is in a crisis of legitimacy. Since a system which continually experiences such crisis must either be held together by brute force or collapse in good time, there is an emergent need to find a solution to the said crisis.

All in all, the thrust of my integrated view of the problem of legitimate governance is that international law has in fairly recent years begun to abandon a posture which gave little heed to human concerns in favour of more humanist doctrine; no longer merely the law of the earth, it is becoming more and more the law of human beings. In its stride it has developed a core of norms which form the normative foundations for a progressive concept of legitimate governance

²⁵ See T.M. Franck, "Legitimacy in the International System" (1988) 82 American Journal of International Law 705.

that may fruitfully serve as a barometer for measuring the legitimacy of municipal governance.

[iii]. The Value of the Research:

The major benefit of this research effort is that it provides a workable framework for the evaluation of governance to ascertain its legitimacy. A framework that is workable because it is grounded in concrete legal norms which, though indeterminate to some extent, are not infinitely indeterminate. In this way it goes further than previous work which has been done in this area which provide either extremely vague and unauthoritative criteria or criteria which do not have even a modicum of universal application.

The present criteria are text-based and are therefore relatively more determinate than non text-based criteria. They are legally authoritative as they are contained in treaties which are one of the primary sources of positive international law. They currently enjoy global acceptance in a reasonably consistent way even though there is still a lot of room for coherence and consistency in the way in which meaning is produced from their content.

In the horrendous atmosphere of mass poverty, totalitarianism and neo-imperialism that currently exists in one form or another in so many parts of the world, there is a great need for a workable paradigm for the evaluation of municipal political regimes and for their sanction as illegitimate and therefore undeserving of recognition as the genuine representatives of the people of the given polity within the comity of nations. This is one credible way in which the international community can justify its intrusion into the otherwise domestic domain of states.

I make a plausible argument for the repudiation of legal obligation in such regimes which are invariably infested by "wicked legal systems". As a logical consequence of the enurement

of the right to repudiate legal obligation in these states, I also argue that such illegitimate regimes automatically lose their right to make valid law. The right to issue directives in due form which ought to be obeyed being the essence of law-making authority, any government which ought not to be obeyed loses its capacity to make valid laws. This is a crucial argument in non-revolutionary struggles within law for the empowerment of oppressed peoples the world over.

In this thesis, I also warn about the crisis of legitimacy which currently faces the present system of global governance and the pernicious consequences that may result from its non-satisfactory resolution. Much of the population of today's world depends on the promise of a reasonably just system of global governance for their hope for political emancipation and socio-economic justice. On the whole, the thrust of this thesis is promethean and critical, seeking to construct a framework for the advancement of a progressive conception of political and socio-economic relations.

B. THE METHODOLOGY OF THE RESEARCH:

The methodology applied in the production of this thesis is largely trans-systemic and transdisciplinary. Even though I was all along conscious of the basic identity of the thesis as a piece of legal scholarship, the very nature of the research questions I address necessitated an interdisciplinary approach. The legitimacy of a political regime and its laws are eminently meta-legal and extra-legal questions. They arise at the interface between law and the other social sciences, especially politics, economics and sociology.

The approach adopted consists therefore of traditional legal research, as well research in

the social sciences. I conducted research into the sources of international law in search of legitimacy norms and analysed them in the hope of fashioning out a concept of legitimate governance from them. I have also examined the literature in this area consisting of treatises, law review articles and reference material. It was not necessary to do any fieldwork as examinations of the non-legal social science material that I utilise suffice for the purposes of achieving the aims of my research.

At another level I take a rather monist (trans-systemic) approach in that I construct an integrated theory of governmental legitimacy which is transnational in nature. I apply the normative prescriptions of the international legal system in my search for a pragmatic but normative theory of legitimate governance. The international-municipal divide is thus transcended in my methodological paradigm.

In this thesis, I have consciously decided to adopt the normative or evaluative method of enquiry despite danger of a regression into the insensitivity of foundationalism. I have rejected the descriptive (neo-weberian) approach to the problem of the legitimate governance as defective in that it merely offers a picture of the external aspect of the problem without exposing the more important internal aspect. It also fails to provide a framework for the evaluation of the legitimacy of actions or laws that enjoy the support of a very large majority of a population but which may be grossly abusive of the minority.

Within the descriptive paradigm a genocidal law supported by 90% of the population of a given country which seeks to eliminate 2% of the population is necessarily legitimate! The same holds true for a racist government which is elected to office based on the support of 50.1% of the population. If, at the outset, I constrained my analysis in such a way as to lead inevitably

to similar consequences would I not have exposed it and my conclusions to a welter of successful and critical objections. I therefore take the normative approach, fortified by the inadequacies of the alternative, while still conscious of limits of normativity. The avoidance of foundationalism does not imply a total abandonment of the search for foundations but merely demands that we re-conceive the ends of our quest for standards. That is the reason for the non-absolute and "pragmatic" normativity of my method.

Lastly, I have also adopted a critical/ socio-legal posture. I have perceived international legal doctrine and the machinery for its execution from a critical perspective situated in the wealth of meaning produced within the fields of politics, economics and sociology. I have gone beyond the relatively infertile confines of "pure" international legal scholarship to seek out the identity of the actors of the international system responsible for the development of the norms of that legal system: their backgrounds, objectives and biases. This has served as a powerful tool to understand the normative history of international relations and the reasons for the perpetuation of the historic conditions which have bred the crisis of legitimate governance which currently faces the members of the community of nations.

Thus, the methodology I have applied is all at once legal, interdisciplinary, monist, normative and critical. All five approaches have together served very well the ends which I intended to achieve at the conception of my research project. All five are intertwined in the path I have trod as I strove to fashion out my thesis.

CHAPTER TWO

THE MUNICIPAL CONCEPT OF LEGITIMATE GOVERNANCE

A. THE CRUX OF THE ARGUMENT:

This chapter tackles a highly problematic and controversial subject: the question of the legitimacy of the exercise of governmental power and its relationship to the duty or obligation to obey law. When is a political authority or government legitimate? When is the particular way in which governance is carried on legitimate? And when is a political system legitimate? What is the critical element that characterises any legitimate system of governance, or any valid claim to legitimate political authority? Or is it pointless to consider these questions in view of what John Dunn has referred to as "the hideous preponderance of force in human history and the sycophantic ideologies which this has generated".¹ I argue that the present project is far from pointless. It is essential to the development of pro-humanist doctrine and the thrashing and deconstruction of non-progressive premises in legal discourse.² Anti-fascist and non-fascist legal discourse are sources of hope to the millions of people the world over who have suffered at the hands of tyrants and potentates, and an anchor for whatever progressive jurisprudence that

¹ J. Dunn, Political Obligation in a Historical Context (Cambridge: Cambridge University Press, 1980) at 48.

² See R. Gordon, "Law and Ideology" (1989) 3 Tikkun 14, 17 : for an enquiry into the nature of these processes.

may develop in the basically "wicked legal systems"³ of much of today's world. For the alternative is to leave the field of the discursive play of legal reasoning totally open to ideologies of brutality and naked coercion, and to fall prey to the tragedy that befell otherwise decent jurists and legal scholars in the classically wicked legal orders imposed in Nazi Germany, Vichy France and Apartheid South Africa et al: the tragedy of collaboration through silence.

In Part B, I argue that while governance in itself is not a pernicious phenomenon and ought not to be rejected or despised, the admittance of the necessity for governance creates an even more problematic situation, i.e., the dilemma of how to secure individual liberties in the social context of a community, given the propensity of people to abuse political power and the necessity for an effective government to be invested with enough power to secure the liberties of the weak from the threats and attacks of the strong. In Part C, I consider the concept of legitimate governance as an attempt to solve or at least minimize this problem of the abuse of governmental or political power. In my stride I urge a quasi-normative conception of the question of legitimate governance as opposed to the merely descriptive neo-weberian conception. I also evaluate the question of legitimate governance at three levels of enquiry: the question of the right to hold political office (the bare right to rule), the question of the right of the government to rule in a particular manner (whether positively or negatively defined), and the

³. This phrase has been popularised by David Dyzenhaus' seminal enquiry into the duty of judicial officers in apartheid South Africa. See D. Dyzenhaus, Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy (Oxford: Oxford University Press, 1991). See also D. Dyzenhaus, "The Legitimacy of Law: A Response to Critics" (1994) *Ratio Juris* 80. For a critical and convincing critique of the first study based on its failure to improve upon the positivist paradigm for dealing with the hard case question, see J.C. Bakan, "Some Hard Questions About the Hard Cases Question" (1992) 42 *University of Toronto Law Journal* 504.

question of the legitimacy of an entire political system itself (systemic legitimacy⁴). In the end I make a case for a municipal-international, and thus integrated, conception of the municipal concept of legitimate governance. The integration of the municipal and international systems reveals certain imperative, external, vertical and substantial constraints on the character of any legitimate municipal government. In Part D, I consider the relationship between legitimate governance and the problem of legal obligation: when is a citizen entitled to repudiate his legal obligation? Indeed, is there any such thing as legal obligation? This then leads to the related question, which I consider in Part E, whether there is a link between the legitimacy of a government and the intrinsic validity of its laws, and also whether there is therefore a link between the illegitimacy of a government and the law-quality of its "laws". I argue that once it is admitted that at any point whatsoever citizens might have a right to repudiate their obligation to obey law then it follows necessarily that such "laws" lack the intrinsic value of lawness - the normative quality of law or law's "oughtness" - and cannot therefore retain their legal validity or law-quality. Quite consciously I will avoid the related and much-debated question of the legitimacy of judicial review and decision-making, as it is basically beyond the focus of the present enquiry.

B. THE NECESSITY FOR GOVERNANCE:

In the Hobbesian state of nature, life was brutish, violent and short. The human being

⁴. I do not use this expression in the same way as Eric Orts who conflates the right to hold office and the right to rule in a particular way and baptizes them "systemic legitimacy". See E. Orts, "Positive Law and Systemic Legitimacy: A Comment on Hart and Habermas" (1993) 6 Ratio Juris 245, 267 .

was thus portrayed by Hobbes as intrinsically evil and selfish with no motivations other than to ensure his/her survival at the expense of his neighbours. As a result of this innate wickedness, groups of human beings could only survive together in peace by surrendering all their autonomy and liberties to an all powerful Leviathan⁵ who required absolute power to maintain order amongst potentially anarchical and self-destructive individuals to save them from themselves. This resort to an unduly wicked portrait of man to justify the phenomenon of governance is neither borne out by empirical observation or deep reflection.⁶ For pre-state societies were anything but Hobbesian horrors.⁷

This cynical view has, however, so tainted the phenomenon of governance in modern societies as to lead to the popular view that "the state" which is the modern vehicle of governance is merely a necessary evil, a remedium peccati, which is justifiable only because the inherent wickedness of humanity makes it imperative that people be held back by fear; and this is both explicit and implicit in the writings of Hobbes, Montesquieu, Robespierre and Martin Luther.⁸ The prevalence of this cynical view of the modern state (with the notable exception of classical marxist theory) has not, however, been without some justification. In all too many instances worldwide, corrupt, despotic, tyrannical and irresponsible politicians and soldiers daily

⁵ T. Hobbes, Leviathan (Buffalo, N.Y.: Prometheus Books, 1988).

⁶ See R. Cohen, "Introduction" in R. Cohen and J. Toland, eds., State Formation and Political Legitimacy (New Brunswick, N.J.: Transaction Books, 1988) at 1.

⁷ Ibid.

⁸ See N. Bobbio, Democracy and Dictatorship (Minneapolis: University of Minnesota Press, 1989) at 127-128.

reinforce the perception of the state as merely a big scam.⁹

Despite this widespread cynicism about the state as evil, about governance as unjust, it is remarkable that very few writers have advocated a society without any form of governance at all. Some of course have advocated either the death or withering away of the modern state because of its many iniquities or its redundancy, some have advocated the enthronement of new forms of governance or have romanticized older forms of governance, but few have advocated a zero-governance option. This result is somewhat predictable, for the human race has demonstrated a remarkably high degree of aggregation. We are social beings who thrive as groups and sustain ourselves as an interdependent group. This is a clearly observable phenomenon and is present in varying degrees even in other animals, and in plants. Groups, however, do not necessarily exist in harmony. All human societies have exhibited varying forms and degrees of social regulation in pursuit of interpersonal harmony. Social regulation thus arises from the tension between the very individuality of the human being, his/her physical and mental autonomy, and his/her drive for interdependent social existence. In this way, a mass of conflicting autonomies are sought to be harmonized in such a way as to benefit all members of the group. And even though it is dubious as to the extent to which this is achieved or even achievable in practice, that is the imperative for governance in human polities. Thus, in this

⁹ A poll conducted by the French newspaper Le Monde as far back as the late 1970's showed that as much as 42% of the people felt that the state was unjust and an astronomical 73% felt that they were impotent in the face of the state and had no influence at all over it! This phenomenon is what some neo-marxian and marxian scholars later dubbed "the legitimation crisis" facing world capitalist states. See A. Wolfe, The Limits of Legitimacy: Political Contradictions of Contemporary Capitalism (New York: The Free Press, 1977) at 323-324.

logical way it is correct to deduce, as has David Fromkin, that "the propensity to government ... inheres in the genetic makeup of the human species".¹⁰ The function of government in civil society is thus to enable human beings to operate with minimal friction as a group.¹¹ It is also thought in some other circles that this function also extends to the regulation of organized production in order to satisfy the socio-economic needs of each individual.¹² Barry Bennet has, however, persuasively urged a more balanced view of the function of the state (as functionality is the major justification advanced for governance within the political paradigm of the modern state) in favour of one which accords more recognition to the state's role as a generator or facilitator of justice, freedom and legality, since greater economic production and efficiency do not necessarily result in greater social well-being.¹³

In the face of the apparently irrefutable arguments advanced by pro-governance theorists, it would seem absurd that anyone would suggest the abolition of all or most known forms of governance. This, however, is precisely the central tendency of what is widely characterized

¹⁰ D. Fromkin, The Question of Government (New York: Charles Scribner's Sons, 1975) at 91.

¹¹ Ibid. See also J. Locke, Two Treatises of Civil Government (London: Dent, 1924) at 180.

¹² See for e.g., H.S. Ferns, The Disease of Government (London: Maurice Temple Smith, 1978) at 116. This is also a major component of the classical marxist theory of the state and of those critical theories that have emerged from the neo-marxian tradition. See for example J.C. Bakan "What's Wrong with Social Rights?" in J.C. Bakan and D. Schneiderman, ed., Social Justice and the Constitution (Ottawa: Carleton University Press, 1992).

¹³ B. Barry, "Cost Benefit Analysis, the Market and Political Legitimacy" (1988) 23 *University of San Francisco Law Review* 23, 58-60.

as anarchist writing. Anarchism pervades both sides of the capitalist-marxist divide but is certainly a central theme of classical communism which envisages a stateless society as a final result of the interim "dictatorship of the masses".¹⁴

The state is thus depicted in anarchist theory as the chief source of war and evil and as essentially opposed to individual and community autonomy and rejected on those grounds.¹⁵ Some, however, admit of the necessity for governance whilst rejecting the modern state as destructive of human potential.¹⁶ To this extent then, anarchism is not a rejection of the necessity for governance but of a particular type of polity. It therefore does not essentially dispute my contention that governance in all human societies is imperative. In any case, extreme anarchists have been rightly criticised for their failure to offer an alternative to governance, an accusation they have never satisfactorily answered.¹⁷ For as Odelia Funke has argued quite convincingly, while research from the biological sciences, especially human ethology, does not positively establish that dominance or governance is inevitable, at the same time it has not been

¹⁴ See for e.g., K. Marx, Communist Manifesto (New York: Pathfinder Press, 1970) and K. Marx, Capital (London: Dent, 1930). For a non-anarchist and non-communist rejection of the modern state, see P. Hirst, Associative Democracy: New Forms of Economic and Social Governance (Cambridge: Polity Press, 1994).

¹⁵ An exposition of this thesis is contained in R. Barker, Political Legitimacy and the State (Oxford: Oxford University Press, 1990) at 45.

¹⁶ J. Burnheim, Is Democracy Possible? The Alternative to Electoral Politics (Cambridge: Polity Press, 1985) at 20.

¹⁷ See R. Dahl, Democracy and Its Critics (New Haven: Yale University Press, 1989) at 44.

possible to demonstrate that the anarchist claim is valid.¹⁸ The benefit of doubt ought therefore to be resolved in favour of the proposition that governance is necessary in human societies if social existence is to be both possible and orderly. This is not, however, the same as saying that all forms of governance are to be tolerated in society merely because law and order is desirable.¹⁹ Therefore, unlike the ancient Borno scholar, Ibn Ahmed Fartua, I do not argue that any people with a bad king are better than one with no king at all.²⁰ My argument is that some other social regulatory mechanism must replace the king, if life is to be peaceable and just for such peoples.

C. THE CONCEPT OF LEGITIMATE GOVERNANCE:

(i) Towards a Normative Evaluation:

"Without justice what in reality would kingdoms be but bands of robbers?"²¹

The afore-mentioned and now classical statement is a succinct expression of one of the most complex and important questions in human history: the question of legitimate political

¹⁸ O. Funke, "Anarchy and Dominance" in A. Somit and R. Wildermann, eds., Hierarchy and Democracy (n.a.: Die Deutsche Bibliothek, 1991) at 160.

¹⁹ Professor H.W.R. Wade contends otherwise. To him, justice is, and ought to be subsidiary to order as the end of law and of governance. See H.W.R. Wade, "The Concept of Legal Certainty: A Preliminary Skirmish" (1940) 4 *Modern Law Review* 183 at 185-186.

²⁰ Noted in R. Cohen and J. Toland, eds., supra. The Kanem-Borno Empire was a very extensive empire in the north-eastern tip of what is today Nigeria. It has a great history of Islamic-Arabic learning which survives up to this day.

²¹ Saint Augustine, De Civitate Dei IV, 1-15 noted in N. Bobbio, supra, at 82.

authority, and this question, as Rodney Barker has noted, is certainly the principal question of politics.²² In contemporary times, the central role that the idea of political legitimacy plays in politics and socio-legal discourse is "due principally to the seminal work of Max Weber who created for it a central place in the study of government".²³ Indeed, Irving Horowitz put it more precisely when he declared that "in the study of legitimacy we are the children of Max Weber; just as in the study of revolution we are the offspring of Karl Marx".²⁴ Weber's efforts were certainly not in vain, for the mass of literature and pro-legitimacy rhetoric that has been produced in recent times the world over eloquently testifies to the topicality and significance of his theoretical survey. But the debate on legitimacy does not merely have theoretical value.²⁵ The problem of legitimacy is closely connected to the question of the source and character of political obligation, because obedience is thought to be owed only to commands of a legitimate power. Where the obligation to obey the law ends, the right to resistance begins. Thus, the limits of obedience and the existence of the right to resist any

²² R. Barker, Political Legitimacy and the State (Oxford: Oxford University Press, 1990) at 4. See also H. Eckstein, Support for Regimes: Theories and Tests (Princeton: Centre for International Studies, Princeton University, 1979) at 3.

²³ Ibid., at 46.

²⁴ I. Horowitz, "The Norm of Illegitimacy - Ten Years Later" in B. Denitch, ed., Legitimation of Regimes: International Framework for Analysis (London: SAGE, 1979) at 23. John Schaar has been even more impressed by Weber. According to him, "Max Weber pretty thoroughly did our work for us here. His exposition of the three grounds upon which claims to legitimate authority can be used, has the same status in social science as an older trinity has in Christian theology." See J.H. Schaar, Legitimacy in the Modern State (New Brunswick, N.J.: Transaction, 1981) at 15.

²⁵ N. Bobbio, supra, at 85-86.

government depend on the criterion of legitimacy assumed.²⁶

Weber saw political legitimacy as a measure of the belief in the right of the leader(s) to rule, no matter how that belief is secured.²⁷ The belief of the governed in the right of their governor(s) to govern may be due to the presence of one of three elements: tradition, charisma and rationality/legality.²⁸ Despite these three elements or legitimation categories, what is important to the present enquiry is that all are merely belief-based. In other words, at its best, Weber's legitimacy theory posits that a political power is legitimate if the citizens believe so. He does not extend his enquiry beyond that point. Once it is observed externally that the members of a polity believe that their governor(s) have a right to govern, then such governor(s) have legitimate political authority. This is the so-called descriptive mode of social science enquiry which is supposedly value-neutral and "scientific". This method and its inevitable conclusions and limitations have in one form or the other been reproduced in a number of other works.²⁹ In Joseph Rothschild's view, legitimacy relates to the perception by the public of the

²⁶ Ibid.

²⁷ For Max Weber's magistral work, see M. Weber, Law in Economy and Society, ed. G. Roth and C. Wittich (Berkeley: University of California Press, 1978); and E. Shils and M. Rhenstein, eds., Max Weber on Law in Economy and Society, 4th ed. (New York: Simon and Schuster, 1967) at 3-9.

²⁸ I am not concerned here with the claims made for legitimation by a regime but with the evaluation of such claims.

²⁹ See for instance, P.H. Brietzke, "Law, Legitimacy and Coercion: One View from Law and Economics" (1991) 25 Valparaiso Law Review 343 ; L.T. Farley, Plebiscites and Sovereignty: The Crisis of Political Illegitimacy (Boulder: Westview Press, 1986); R. Rogowski, Rational Legitimacy: A Theory of Political Support (Princeton: Princeton University Press, 1974); and H.J. Wechsler, Offerings of Jade and Silk: Ritual and Symbol in the Legitimation of the Tang Dynasty (New Haven: Yale University Press,

appropriateness of a government and a belief in that public that the regime has a right to exercise political authority.³⁰ The problem with the descriptive method such as Weber's and Rothschild's is that whilst it makes some minimal concession to the rationality and autonomy of the individual, it takes as given the coincidence or harmony between the external index of belief (which is usually the absence of an agitation against the government) and the internal index of belief which is more difficult to assess in the presence of social plurality, raw coercion, and other variables which stifle the expression of the human spirit.

Ronald Rogowski's rational legitimacy approach comes closer to recognizing and addressing this problem than most descriptive legitimacy theories.³¹ By prescribing an objective test for the rationality of the individual who evaluates a regime rationally and "elects" to believe in its legitimacy and thus to support it, Rogowski attempts to grapple with the problem of the preponderant absence of genuine "free will" and "rational decision-making" amongst the vast majority of the members of a polity. Rationality to Rogowski thus implies that the action of the individual actor is the most efficient joining of means to ends in the light of the information available to the actor.³² The difficulty with Rogowski's construct is that "rational

1985).

³⁰ J. Rothschild, "Political Legitimacy in Contemporary Europe" in B. Denitch, ed., supra, at 38.

³¹ R. Rogowski, supra, at 30-31. But his theory still lacks a sense of why there exists the purported "belief" in the legitimacy of the system. For a similar but general attack on the descriptive method, see A. Hyde, "The Concept of Legitimation in the Sociology of Law" (1983) Wisconsin Law Review 379 .

³² Ibid.

individuals" can certainly confer "legitimacy" on a regime run by Adolf Hitler's incarnation. For to efficiently join means to ends is merely to take the best option available to the individual in a given polity. Most "rational individuals" when faced with "wicked legal systems" or political orders usually choose (and very rationally, too) to act as if they supported the government so long as the policies of the government do not immediately threaten or immolate their own persons or interests. In this way, they will of course exhibit external indices of "belief" in the legitimacy of the order whilst perhaps their deepest but repressed convictions are opposed to that order. Rogowski would have us accept such wicked orders as therefore legitimate!³³

Thus, I argue that the support that must certainly be present in any valid claim to legitimacy made by any government cannot constitute mere passive toleration whether based on rational self-interest or otherwise but has something to do with the perception of the relevant public of the intrinsic³⁴ right of such a government to rule.³⁵ I use the loose expression "has something to do with" at this early stage because the relationship between the public's belief and this intrinsic quality is highly problematic and will be elucidated to the best of my ability at a later stage. This is one normative approach to the question of legitimate governance. The normative approach insists that the question of legitimate governance cannot merely be studied as a descriptive phenomenon. The normative approach is somewhat evaluative and hinges

³³ Rogowski perhaps escapes stronger criticism by emphasizing the prima facie nature of his hypothesis!

³⁴ As used here, this term does not imply permanence, immutability or essentialism.

³⁵ See H. Eckstein, supra, at 5.

strongly on criteria external to the belief that is assessed. These criteria are often moral or at least value-impregnated, but they vary from the Christian religion's Laws of God,³⁶ through the procedural naturalism of Lon Fuller³⁷ and the feminist movement's anti-patriarchal theory,³⁸ to the cost-benefit analysis of the Capitalist Right.³⁹

Even the very expression "legitimacy", which is derived from the Latin "lex", suggests that the former refers to a normative concept, i.e., that it has the quality of "oughtness". In this sense, to say that something is legitimate is to attribute some "good quality" to it. Accepted as such, whether it is the public's attribution of "good quality" to governance or "good quality" as intrinsic in the particular right to or mode of governance, the concept of legitimate governance has a normative component.⁴⁰ Political legitimacy to many normative theorists is the quality of oughtness that is perceived by the public to inhere in a regime. That government which is

³⁶ See for e.g., T.S. Macdermott, Summa Theologica: A Concise Translation (London: Eyre & Spottiswoode, 1989).

³⁷ L. Fuller, The Morality of Law (New Haven: Yale University Press, 1969).

³⁸ See for e.g., S. Boyd, "(Re)Placing the State: Family, Law and Oppression" (1994) 9 *Canadian Journal of Law and Society* 39 .

³⁹ For an excellent expose on this ideological school in the context of the United States of America, see B. Bennet, supra.

⁴⁰ See E. Berg, "The Meaning of Legitimacy" in D. Anckar, H. Nurmi and Matti Wiberg, eds., Rationality and Legitimacy (Helsinki: The Finnish Political Science Association, 1988) at 20. John Schaar suggests that older dictionaries support the normative conception. See J. Schaar, supra at 19-20. In the German language, there exists a marked distinction between Macht (mere force or illegitimate power) and Herrschaft (legitimate power). See N. Bobbio, supra, at 87.

viewed as morally proper for a society is legitimate.⁴¹ This raises problems of the harmony of modern society and the obvious diversity of moral convictions of all human society. Whose morality is to confer legitimacy on a government that affects everyone? This problem is not solved by arguing, as liberal theorists often do, that the government once elected, represents the entirety of society (or at least the majority); for even in the most democratic states governments are known to be partisan. Liberal democratic regimes at their utmost popularity assume power with the mandate of a mere section of the population of a given polity, and that mandate is necessarily circumscribed by its demographic limitations except of course a political fiction is employed to attribute support to the rest of the society in question.

This problem has led a committed normative theorist like Michael Seward to declare that "there can be no immanent principles of political legitimacy",⁴² even while convinced that "we need moral criteria by which to judge the legitimacy of state actions or non-actions (as far as it is possible), separate in certain respects from citizen's perception of the way they are governed".⁴³ I share this conviction and in the last bit of this part I will argue that such criteria do in fact exist within a vertical normative edifice which imposes upon municipal political actors and which is traceable partly to the will of the dominant sections of the world's peoples and partly to a certain shifting moral "consensus" amongst the national elite who invariably dictate the will of the community of nations.

⁴¹ J. Schaar, *ibid.*

⁴² See M. Seward, *Co-Optive Politics and State Legitimacy* (Aldershot: Dartmouth, 1992) at 33.

⁴³ *Ibid.*, at 36.

In taking this position I recognize, as did Jeffrey Isaac, that there is some truth in the proposition that "the world is irremediably elusive and that there is no necessary correspondence between it and our representations of it", but at the same time like that scholar, I argue that "this does not require us to abandon the search for foundations in political life, only to rethink what such enquiry can hope to accomplish".⁴⁴ This is neither a regression to essentialism nor a submission to foundationalism. Put succinctly, it is an approach that adopts the evaluative and normative perspective but it is not absolute normativity that is embraced but a "pragmatic normativity" with a shifting content. A normativity that is tentative and limited. A normativity that is observable to the extent that the norms of the international legal system are determinable.⁴⁵ I argue therefore that the legitimacy of any municipal political leadership can be tolerably (and never perfectly) assessed in the contemporary world situation from an external normative standpoint (which is observable and functionally determinable within an outer parameter that is not so wide as to empty its contents of any meaning, but which is wide enough to accommodate a significant cross-moral community of agreement the world over, while still retaining its normative, if prescriptive character). Indeed, as I demonstrate elsewhere, nations today (even those led by the most despicable tyrants) do in fact significantly orient their conduct,

⁴⁴ J.C. Isaac, Arendt, Camus and Modern Rebellion (Cambridge, Mass: Yale University Press, 1992) at 107.

⁴⁵ I recognize that the norms of any legal order are usually malleable and therefore indeterminate but such norms are not wholly or infinitely indeterminate. For two thorough expositions of the problem of normative indeterminacy in the context of domestic legal systems, see J.C. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought", (1989) 27 Osgoode Hall Law Journal 23 and C.M. Yablon, "The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation", (1985) 6 Cardozo Law Review 917 .

or perhaps rhetoric towards these norms of legitimate governance. Even though tyrants are by no means suited to participate in the process of norm-creation in the world system (and I deal with this problem elsewhere), by proclaiming commitment to the principles of legitimate governance, they have indirectly strengthened the said principles and reinforced their normativity. Only passing mention will be made in this paper of the identity and content of these norms as a further adumbration is beyond the scope of this paper. Thus in the present enquiry, I will utilize a quasi-normative and evaluative model⁴⁶ in my search for "answers".

(ii) Three Levels of Enquiry:

Before now I have conflated three distinct but not unrelated levels of enquiry. I have merged into one generic concept of legitimate governance three separate sub-concepts of legitimate governance, namely: the bare question of the right of the government to rule (i.e. the right to political office); the question of the right of a government which holds office legitimately or otherwise to rule in a particular manner; and the question of the legitimacy of the political system within which the government acquired political office (i.e. systemic legitimacy).⁴⁷ This has been deliberate. I conflated the three separate questions in order to

⁴⁶ This evaluative paradigm is somewhat similar in approach to David Held's seventh reason for obedience to governments which is that people obey because they perceive that with all possible information obedience ought to be given. See D. Held, "Power and Legitimacy in Contemporary Britain", in G. McLennan, D. Held and S. Hall, eds., State and Society in Contemporary Britain: A Critical Introduction (New York: Polity Press, 1984) at 302.

⁴⁷ I am however more occupied with the first two in this work and I only treat the third tangentially.

make the explanation of my preference for the normative approach easier and clearer, since this last question relates in equal measure to all three sub-concepts of legitimate governance. I shall now examine them seriatim.

What makes a claim to political office legitimate? Is it simply because the claimant is already in office? Or is it because he is perceived by the public to have a right to office? Or is it because he has an immanent right to political office. I argue that whilst there are evaluative external criteria for judging the legitimacy of a government which is entitled to command the obedience of the citizenry, this is not a requisite for every exercise of political power. In this way the distinction between legitimate governance and illegitimate governance is preserved. The defining characteristic being the quality of "legitimacy" which we have urged ought to be a basically normative element. Political legitimacy is the genuine acknowledgement by the governed of the right of the governors to govern. A legitimate government is therefore one to whom obedience results principally from a feeling of obligation, a feeling that is present because the relevant people believe that their government has moral authority to exercise political power.⁴⁸ The legitimacy of a government or regime can thus be observed by the contrast between its authority and its resort to naked coercion. The relevant and critical question at this point seems to be: aside from a small margin of obedience which must, in our imperfect world be secured by coercion, to what extent does it become necessary to resort to naked coercion and repression to effect the government's policies and achieve its ends?⁴⁹ For according to De

⁴⁸ Rodney Barker's definition is similar but I have added the normative and external factor which he rejects. See R. Barker, supra, at 11.

⁴⁹ J. Schaar, supra, at 27.

Jouvenel:

"To follow an authority is a voluntary act. Authority ends where voluntary assent ends. There is in every state a margin of obedience which is won only by the use of force or the threat of force: It is this margin which breaches liberty and demonstrates the failure of authority."⁵⁰

Essentially therefore, the ultimate answer to the question of political legitimacy, just like the answer to most other questions, eludes certainty. It is thus in reality a matter of degree what is legitimate and what is not, for absolute legitimacy in the sense of the total absence of socio-political coercion exists nowhere in the real life world.⁵¹ This absolute standard of voluntariness is still, however, useful as a barometer for measuring the validity of any claim to legitimate political authority. In Jurgen Habermas' view, there is an unbreakable link between perceived legitimacy (i.e. the belief in the right to office) and moral legitimacy.⁵² Perceived and truly widespread legitimacy does not just arise by accident; by and large, it corresponds to some innate moral legitimacy. Thus, perceived legitimacy is based on the perception of validity-claims stemming from a certain conception of what constitutes moral legitimacy, even though this reception is usually imperfect.⁵³

Problems arise for Habermas' theory, however, once the content of his universal

⁵⁰ Noted ibid.

⁵¹ See A. Hyde, supra, at 400. Rodney Barker has even argued convincingly that the legitimacy of a government at the micro-political level also varies with sections of the population based on gender, class, ethnicity and other political and/or socio-economic factors. See R. Barker, supra, at 107-126.

⁵² See Seward, supra, at 37.

⁵³ Ibid.

principles of moral legitimacy are sought to be observed. Even Habermas himself does not know what they are for he urges discourse as the path to the discovery of these truth-dependent principles:⁵⁴ the task of critical theory being to clarify and vindicate rational standards against which beliefs in legitimacy, i.e. perceived legitimacy, can be tested and to conceptualize a modern form of life which deserves and receives the reflective allegiance of its members.⁵⁵ I have already argued that similar principles are present in the contemporary world system but in non-absolute, imperfect and non-universal forms.

The desirable but apparently unattainable absolute standard of legitimacy based on universally voluntary acceptance of governance is conceptually grounded in the libertarian conception of the human being as basically autonomous; and that being autonomous, any obligation ascribable to any person must of necessity be with his consent. This notion of either actual, tacit or hypothetical consent is the product of the seminal writing of social contractarian theorists such as Jean Jacques Rousseau, John Locke, John Rawls, and even Thomas Hobbes.⁵⁶

The theory of the social contract posits that political legitimacy is derived from the consent of the people who it is that create a government or a society and who operate it via their

⁵⁴ Ibid at 36.

⁵⁵ See W. Connolly, "Introduction" in W. Connolly, ed., Legitimacy and the State (Oxford: Basil Blackwell, 1984) at 12.

⁵⁶ See J.J. Rousseau, The Social Contract, trans. H.J. Tozer (London: George Allen and Unwin, 1895); J. Locke, Two Treatises of Civil Government (London: Dent, 1924); J. Rawls, A Theory of Justice (Cambridge: Cambridge University Press, 1971); and T. Hobbes, supra.

representatives.⁵⁷

To John Rawls, who modified classical social contract theory in a largely well-acclaimed manner, a claim to political office is legitimate if it accords with the just principles for the basic structure of society, which are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association, i.e., the principles of justice as fairness. A society which satisfies these principles comes as close as ever can to being an absolute voluntary scheme (which is utopian).⁵⁸ This is a most brilliant proposition especially when appreciated as a simple question: would X government's claim of a right to office be accepted by rational persons in their society if they were all equal in all senses and if they all had their own self-interest at heart?

A criticism that may be addressed to the Rawlsian thesis is that because it is human beings that invariably will have to ask and answer the above question and because one person's conception of rationality and self-interest usually differs from that of his neighbours, the question lends itself to a great number of plausible answers in competition with each other! As it stands it occupies too wide a field and is unacceptably indeterminate. A combination of this question and a text will limit this unrestrained indeterminacy. And that is one chief value of our pragmatic normative paradigm. It utilises textual sources which though not free from indeterminacy are still significantly determinate. The difference to the ordinary Haitian between

⁵⁷ See P. Riley, Will and Political Legitimacy (Cambridge: Harvard University Press, 1982) at 1.

⁵⁸ J. Rawls, supra, at 11-13.

the Cedras-led junta and the legitimate government of President Jean-Bertrand Aristides is proof positive of the utility of the said set of criteria. The Rawlsian question can then be situated within the context of this paradigm to make for greater determinacy. The idea is to significantly reduce (and not to eliminate) the malleability of the Rawlsian question.

Michael Seward has proposed four universal intermediate (but non-absolute) principles and argues that if these are sufficiently operationalized in any political system, then its government would be, in the perception of most people with enough relevant information and upon reflection, a morally legitimate government. These are:

1. Genuine and formal opportunity for citizens or their representatives to participate in government's decision-making.
2. Genuine and formal procedures for citizens or their representatives to hold decision-makers accountable for their decisions and non-decisions.
3. Policy outcomes should promote the efficient use of resources in implementation in order to promote want-satisfaction.
4. Policy outcomes should promote substantive equality between citizens.⁵⁹

To this may be added the requirement that policy outcomes should promote environmentally sustainable practices.

This leads to the question of the right of a government which is in legitimate occupation of office qua the government, to rule in a particular way. In other words, once in office, does

⁵⁹ Seward, supra, at 46-59. We will evaluate these criteria at a later stage of this paper. Hannah Pitkin is cited approvingly by George Klosko as having offered similar criteria. See G. Klosko, The Principle of Fairness and Political Obligation (Lanham: Rowman and Littlefield, 1992) at 69-70.

the government have an untrammelled right to pursue any policy of whatever sort it wants? Even when it is backed by 98% of the population is it legitimate governance to pursue a policy of genocide against 2% of the population? Is it legitimate, for instance, for the United States government, backed by a majority of Americans, to legislate the death penalty when nearly everyone killed under such a statute belongs to a certain cultural group within that country? Will it be legitimate for the British government to legislate the jailing of all British citizens of African descent merely because such a measure is supported by 90% of the population? Will it be legitimate governance if the Canadian Reform Party is elected to office and passes a law banning the immigration of Chinese to Canada while it allows Africans to immigrate thereto? Was it legitimate for Adolf Hitler who got into office by "popular" mandate in Germany to legislate the Holocaust?

These questions call to mind the obvious and inevitable limitations of modern day majoritarian democratic theory as theories of legitimate governance.⁶⁰ And these limitations are not overcome by constitutional guarantees of human rights - only made less threatening. For, as Joel Bakan has convincingly argued, constitutional norms in their characteristic abstract formulations are so malleable as to be always open to the often abusive and tendentious interpretation of the dominant group within a polity. The meaning of a constitutional norm is critically constrained by the socio-economic balance of forces and often results in outcomes which do not favour the oppressed group.⁶¹ The problem is even more complicated if the

⁶⁰ See J.S. Fishkin, Tyranny and Legitimacy: A Critique of Political Theories (Baltimore: John Hopkins University Press, 1979) at 3-6.

⁶¹ See J.C. Bakan, supra.

descriptive Weberian approach is adopted. Is the belief of the majority in the legitimacy of a government which commits highly discriminatory acts against a minority (as happened in the Southern U.S.A. for many years against the African-American population) conclusive of the question of the legitimacy of that governmental policy, and by extension, its right to rule in that manner? In today's world, would such governments or ways of governance be adjudged legitimate? Certainly not under the paradigm we propose but certainly yes under the Weberian model!

In our examples, there is a clear dichotomy between the perception of the majority and the perception of the minority. Is the majority's perception to prevail merely because of their numbers which may in fact have been predetermined by constituency gerrymandering or other factors? Is the apparent majority of voters the real majority of people?⁶² With such a high rate of voter passivity in even the most participatory polities it is hard to conclude that a majority of the votes cast reflects the actual opinions of the absolute majority. Even if it does, though, our objection is that there is no reason, other than the tyranny of a mob, why this should legitimate oppression and injustice in the treatment of the minority. And there is no convincing reason why any government should have a right to rule in this way. The recent referendum which authorized the government of California to refuse education, health care, etc, to illegal

⁶² In the early part of this century one Francis Preston was said to have won an election in Virginia, U.S.A. only because his elder brother, an army officer, brought 60 soldiers to threaten voters at the polling station. In the 1982 general elections in Chicago, U.S.A., over 10% of the votes cast were bribed, forged or otherwise fraudulent. And this was in the U.S.A. which is thought to be the most democratic state in the world! See J.A. Gardner, "Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution" [1990] 52 University of Pittsburgh Law Review 189, 191.

immigrants and their children is a reminder that such questions are not merely theoretical. It remains to be seen whether such a policy does not violate the constitution of the United States of America and international human rights standards.

Similar problems arise if the question of systemic legitimacy is deeply probed, for a government which has a right to office might use its overwhelming majority to change the entire system of governance and to entrench itself as a quasi-dictatorship as has happened in Fujimoro's Peru. Is such a political system legitimate? While this system is clearly illegitimate under the terms of its own mandate as it goes outside the government's electoral or constitutional mandate (except of course to an evaluator who subscribes to the "might is right" approach), it is not so clear if the capitalist system in Zaire which has ravaged the people of that country for ages or the communist system in China are legitimate. It is not intended in this paper to provide a detailed answer to this question but suffice it to say that at a later stage of this paper I will provide an insight into the minimum criteria for legitimate political systems, that is for systemic legitimacy, and for the legitimacy of governmental policies, even though I will not here adumbrate upon their content in any detail. It is useful to note at this stage that for most citizens often times legitimacy refers not so much to power's origins, but its ends!⁶³ Both are, however, equally important to my theoretical scheme.

(iii) Legitimate Governance and the Open Society:

⁶³ As Lasswell and Kaplan have noted, while power is not the supreme value of human society, it may be used to maximise or minimise other values. See H.D. Lasswell and A. Kaplan, Power and Society: A Framework for Political Inquiry (New Haven, Connecticut: Yale University Press, 1950).

If the legitimacy of a government, of a governmental policy, or of a political system depends to a large extent on widespread belief in their legitimacy, and since the existence of such belief is in practice nearly always determined by an election or referendum, how does theory explain the gross inequalities in the quantum and quality of socio-economic opportunities open to various segments of the polity? Is there real electoral choice amongst the electorate when the socio-economic system is skewed in favour of a certain section of the people and therefore severely limits the free choice of a significant number of the majority of potential political participants? Since the essence of modern legitimate governance is full voluntary participation in the business of governance by all members of the polity, is it convincing to talk of legitimate political arrangements without a matching level of socio-economic equity? Is it possible that an African-American or Hispanic in the Bronx, no matter how hardworking, brilliant or well-intentioned can get to the White House? How many of the poor or female population of America can spend nearly twenty-eight million dollars like one U.S. Republican Senator just to upset the candidate of the Democratic Party ? Dr. Karl Popper's otherwise seminal construction of an "open society" therefore falters on this score.⁶⁴ It is not difficult to imagine how really open a society is in terms of access to and participation in political power when it is characterised by gross socio-economic inequalities.

In the substantively grossly unequal context in which political power is sought in liberal democracies, only the privileged few can seek and attain political power or meaningfully engage in the process of governance. In this way the consent of the people is effectively "organised"

⁶⁴ See K. Popper, The Open Society and Its Enemies (London: Routledge and Kegan Paul, 1966).

so as to favour the inevitable wielding of political power around the centres of socio-economic privilege. The "closure" of liberal democratic states is thus subtle. Oppression of the underclass is no longer maintained by the application of raw force (which in itself is a commendable improvement on totalitarian societies), but by the hegemony⁶⁵ of the socio-economically privileged; the invariable retention and provision of political and ideological leadership by the members of this relatively small sub-set within the polity. The rest of the people are in theory free to participate in the governance of their country, but remain in reality powerfully constrained by systemic forces from realising the promise of this potential.

This is the failure of liberal democratic theory which regards formal equality as an automatic window to substantive equality, and tends to close its eyes to the real life world of the game of economics and politics. Even the most liberal democracies, are not nearly as open as is generally believed. The now dominant western construct of liberal democracy which all too often fails to acknowledge the socio-economic prerequisites for the attainment of a genuinely open society is therefore of dubious legitimacy in view of the normative content of the evaluative paradigm we will soon propose. The so-called free-market which makes meagre concessions to the socio-economic imperative for genuine and popular governance is in reality not "free".

⁶⁵ Drawing from Plekhanov and Lenin, Antonio Gramsci, Italian philosopher and activist and icon of the western marxist movement, transformed the notion of hegemony from a mere strategy for the overthrow of capitalism to a conceptual tool useful in the understanding of the nature of liberal democratic\capitalist states. For some of his political writing, see A. Gramsci, Pre-Prison Writings, ed. R. Bellamy and Trans. V. Cox (Cambridge: Cambridge University Press, 1994). See also T. Nemeth, Gramsci's Philosophy: A Critical Study (Sussex: Harvester Press, 1980). For an analysis of the Gramscian concept of hegemony, see R. Simon, Gramsci's Political Thought (London: Lawrence and Wishart, 1982) at 21-28.

It merely replaces the domination of economic activity by the state with that of the huge corporation which enjoys the unequal advantages of price-making and has unequal access to privileged information.⁶⁶ And while corporations may compete with one another on fairly equal terms all other economic actors simply have to accept the results of their competitive action.

The question is: have liberal theories of legitimate governance sufficiently focused on this other side of the legitimacy coin?⁶⁷ Should a government be free to rule in a way which further diminishes the chances of any other economic actor from surviving and thus securing the wherewithal for meaningful political participation? Should the Canadian government for instance, be free to dismantle that country's welfare structure when this will lead inevitably to the further diminishing of the capacity of a majority of its people to effectively participate in politics and governance? Should the anti-poor elements of Newt Gingrich's "Contract with America" be permitted in a society which prides itself as open? Must formal equality be sustained at the cost of perpetuating and reproducing large images of the "inner cities" and festering slums inhabited by the wretched of the polity? Should any meaningful concept of legitimate governance not confront and attempt to at least patch up this hiatus? I think so. For the alternative is to empty the concept of meaning and at the outset sow the seeds of its implosion, as more and more people realise the historical futility of the present anaemic and one-sided approach to the problem

⁶⁶ P. Hirst, Democracy and Its Limits (Cambridge: Polity Press, 1990) at 71-72.

⁶⁷ As Professor Tawney noted in agreement with Professor Pollard, oppression is not any less oppressive when its strength is derived from superior wealth, than when it relies on a preponderance of physical force. See R.H. Tawney, Equality (London: George Allen and Unwin, 1964) at 228.

of legitimate governance.

(iv) An Integrated Approach:

The criterion for evaluating legitimate governance which I urge here is doubly integrated. It integrates political participation with socio-economic equity while at once integrating the question of the legitimacy of the municipal order with external criteria (international legal norms) from which the content of our pragmatic normativity will be distilled. This will only receive summary treatment here as a fuller attempt is being made elsewhere to elucidate the said principles. In other words, international standards for the acquisition, retention and loss of legitimate political power which are accepted by nearly every country in the international system are regarded as the fountainhead of the content of our pragmatic normative criteria. It is noteworthy at the outset that the right to democratic governance is a fundamental component of this international criterion because virtually every country in the world proclaims itself a democracy. Military regimes do seize power but they lack a distinctive popular legitimacy and often claim that they are cleansing the state in order to restore a rightful democracy. Other regimes have made pretensions to establish some higher or real form of democracy, and strange formulations have emerged such as "guided democracy", "people's democracy" or the "people's democratic dictatorship" as the Chinese People's Republic officially terms itself in the preamble to its constitution.⁶⁸

⁶⁸ G. Perry and M. Morain, "Introduction: Problems of Democracy and Democratisation" in G. Perry and M. Morain, eds., Democracy and Democratisation (London: Routledge, 1991) at 2.

Thus, one of the primary criteria that is evident from international standards is the presence of genuine opportunity for political participation by all and sundry. This is a normative criterion which proclaims the oughtness of the electoral or participatory process. Non-discrimination, and therefore equality, is another fundamental prescription. These two criteria are present in Michael Seward's "intermediate principles" and along with anti-apartheid, anti-genocide, anti-ethnocide and socio-economic egalitarianism are the core of our pragmatic normative criteria for the evaluation of legitimate governance.⁶⁹ The more any political system or claim to office lacks any of the prohibited features the more it is legitimate, the more it has them the more illegitimate it is. While some of these principles are wide in scope, they are not so wide as to totally obscure meaning and are useful in the assessment of legitimate political authority. One unhappy result of these normative criteria is that there are very few countries in the world today which meet all of them. Today's municipalities and powers are therefore only approximately legitimate: their position along the continuum of legitimacy depending on the extent to which they satisfy these criteria. But there is a critical point beyond which to describe a regime as legitimate would be an obvious absurdity. It is the task of the judicial and quasi-judicial political organs of the international system to fashion this out and to enforce it in the ways open to them in the present system of global governance. And to say this is to admit that there is still an inevitable degree of indeterminacy in the adopted set of criteria.

⁶⁹ See generally, the International Covenant on Civil and Political Rights, 19th December 1966, 6 I.L.M. 368; the International Covenant on Economic, Social and Cultural Rights, 19th December 1966, 6 I.L.M. 360; the Universal Declaration on Human Rights, 10th December 1948, U.N. Doc.A/810/71; the African Charter on Human and People's Rights, 19th January 1981, 21 I.L.M. 59; and the Genocide Convention, 9th December 1948, 78 U.N.T.S. 277.

D. LEGITIMATE GOVERNANCE AND THE REPUDIATION OF

LEGAL OBLIGATION

"There is a twofold sense in which it is true that law cannot be built on law. First of all, the authority to make law must be supported by moral attitudes that accord to it the competency it claims. Here we are dealing with morality external to law which makes law possible. But this alone is not enough. We may stipulate that in our monarchy [or government] the accepted "basic norm" designates the monarch himself as the only possible source of law. We still cannot have law until our monarch [or government] is ready to accept the internal morality of law itself."⁷⁰

This seminal and salutary enunciation of the now famous "procedural naturalism" of Professor Lon Fuller is epitomatic of the general thrust of neo-naturalism and most other normative approaches to the question of legal obligation. These approaches essentially insist that there is a critical, highly consequential and direct relationship between legitimate governance and the obligation to obey law; that, unless compatible, with moral order, law risks, and deserves, rejection, and that without law, moral order conducive to an open society cannot be sustained. While even the most doctrinaire positivists now recognize that law and authority are best justified, i.e. legitimated, when they rightly determine for their subjects what good citizens ought to do, or at least make such determinations more accurately than was possible without the help of the government, the exact nature of legal obligation and the existence and extent of the duty

⁷⁰ L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71 Harvard Law Review 630, 645. Emphasis supplied. David Dyzenhaus relies heavily on Fuller's work but draws his own "internal morality" from the essential principles of the common law tradition. See D. Dyzenhaus, *Hard Cases*, supra. He however follows the neo-naturalist tradition by advocating judicial resistance to "wicked legal systems".

of fidelity to law is still intensely controversial and problematic.

The frustrations of legal philosophers with the search for a solution to this difficulty cuts across the naturalist-positivist divide, and has led to the development of "desperate" philosophical answers which seek to harmonise the propositions of the two major camps involved in this great debate: legal moralism and legal positivism. For instance, Mortimer Sellers has recently declared in one breath that some governments should and do have absolute authority to make and enforce whatever laws and decisions they determine to be the most effective in finding truth and encouraging right action and in the next breath that nevertheless citizens may retain the right (or even have a duty) sometimes to resist or disobey the government's determinations. Now, nothing can be more contradictory than to argue that a valid absolute claim does not entail a corresponding absolute duty of adherence! And Sellers agrees! For, to that brilliant theorist, this is the everpresent paradox of republican authority: the government's absolute, untrammelled and unlimited right to rule does not entail a citizen's duty to obey the directives of the relevant government. It suffices to note that if a government is entitled to rule it is intrinsically competent to compel obedience. If it is not entitled to rule then it is not entitled to command obedience.⁷¹

Legal positivism is even less accommodating of the thesis that the authority of a government can never be absolute and ought to be challenged by the repudiation of legal obligation. Positivists have always denied that it is necessary for them to supply a reasonably general answer to questions such as the duty of citizens or judges to obey the law in or outside

⁷¹ See M. Sellers, "Republican Authority" (1992) 5 Canadian Journal of Law and Jurisprudence 257.

"wicked legal systems" and have often declared that it is in fact impossible and therefore redundant to attempt to tackle such questions.⁷² At its moral best, legal positivism concedes that the validity of law in itself is one thing, its morality another; and that while this is not to suggest that the duty of fidelity to law is an absolute one, a strong doctrine of obedience to the law is not in itself bad. In defence of legal positivism, Michael Hartney has however characterised the positivist/anti-positivist debate thus:

"Positivism claims that only source-based standards count as laws. Anti-positivism holds instead that law includes not only source-based standards but also moral principles."⁷³

This is not, however, a correct and composite expression of the said debate and rhetorically suppresses the essential weakness of the positivist stance. It portrays positivism in its best light and anti-positivism in its worst light. The critical point is the duty of a citizen or a judge either in a hard case or generally, within a wicked legal system. Is s/he bound to obey the "laws" of that order? And if s/he is not do such laws retain their law-quality? If as positivists often suggest, the citizen ought sometimes to disobey the law, of what use is it to continue to characterise the said directives as law when obedience to them ought not arise? This is a question which Shiner, Hartney and other positivists seek to escape by drawing an often tenuous distinction between absence of the duty to obey law and the invalidity of law qua law. Indeed, Hartney faintly suggests that a judge in a wicked legal system may in fact be under a moral duty to collaborate with the regime in power if the judge perceives that as the best way to end the order! This is only a faint glimpse of positivism in its worst light: a legal positivism

⁷² See R. Shiner, "The Morality of Legal Positivism" (1994) 7 Ratio Juris 41, 43.

⁷³ M. Hartney, "Dyzenhaus on Positivism and Judicial Obligation" (1994) 7 Ratio Juris 44.

which "licensed a South African jurisprudence which passed up the opportunity to counter the iniquities of apartheid".⁷⁴ While the question of the validity of laws will be examined in the next part of this chapter, it is still salutary at this point to state that that question and the question of the repudiation of legal obligation are inextricably bound up with each other. For as Lasswell and Kaplan have convincingly argued:

"Laws are not made by legislators alone, but by the law abiding as well: a statute ceases to embody a law ... in the degree to which it is widely disregarded."⁷⁵

The claim to a right to disobey a government in power or its laws has been described differently as being expressed in civil disobedience or disaffection (i.e. disputing the correctness or justice of a particular policy or action, whilst not challenging the authority of the state as such), Revolution (i.e., the total repudiation of the right of the government to govern - and perhaps the transfer of allegiance to another existing, emergent or hypothetical political arrangement), and Anarchism (i.e., the denial of the rightfulness of any government whatsoever

⁷⁴ C. Sypnowich, "Social Justice and Legal Form" (1994) 7 Ratio Juris 72, 73. Dworkin's solution to this question (which Joel Bakan has called "the hard cases question") is that a judge who is faced with such a question must adhere to the principle of "integrity": the judge must decide the case in a manner which is coherent in view of the requirements of the public standards of the society in which the adjudication takes place. See R. Dworkin, Law's Empire (Cambridge, Mass.: Belknap Press, 1986). See also D. Dyzenhaus, supra. While in substantial agreement with Dworkin, Dyzenhaus asserts, unlike the former, that for law to enjoy legitimacy, certain internal moral checks must characterise it. Joel Bakan has, however, contended that neither Dworkin nor Dyzenhaus has fashioned a theoretical paradigm which is likely to generate outcomes which are more just than those produced by the application of the positivist paradigm. For the full text of this well argued critique, see J.C. Bakan "Some Hard Questions About the Hard Cases Question" supra.

⁷⁵ See H.D. Lasswell and A. Kaplan, supra, at 75.

and of all laws).⁷⁶ For our purposes we will merge the first and second types and characterise them as civil disobedience/the repudiation of legal obligation; but we will ignore the third which is really irrelevant to our thesis. In this sense, civil disobedience may either be constituted by the general repudiation of an entire government as illegitimate and therefore the denial of the bindingness of its laws, or the repudiation of particular laws or policies of a regime. One of my arguments is that civil disobedience and the refusal to obey any law whatsoever passed by a regime is clearly justified if it is demonstrated that that regime has no right to hold office. But how is this to be demonstrated? How is the illegitimacy of a claim to office to be demonstrated and what are the standards of adjudication? This problem was confronted in Part C of this chapter.

Thus, subject to borderline cases, any regime that fails the test proposed there is thought to be illegitimate. Citizens of a state with such a regime are in this view under no obligation to obey it or any of its laws. Since legitimacy is at some point a matter of degree, problems will arise in borderline cases but not in cases such as the governments imposed by military juntas in Nigeria and Haiti⁷⁷ or in the case of Fujimoro's Peruvian administration. Indeed, in Nigeria, few if any doubt the illegitimacy of the Abacha junta or of its predecessor (the so-called Interim National Government led by an acknowledged stooge of the Military elite, Chief Ernest

⁷⁶ See R. Barker, *supra*, at 162-164. The Form chosen is usually indicative of the extent of disenchantment with a government or political system. See S.M. Delue, Political Obligation in a Liberal State (Albany, N.Y.: State University Press of New York, 1989).

⁷⁷ The Haitian Junta has been ousted by a U.S. led UN Military Operation, and legitimate rule was restored to that country on October 15, 1994.

Shonekan) which was in fact declared illegal by a Lagos High Court on grounds which though they are couched in legal reasoning reveal a disposition towards the present thesis.⁷⁸

Much more problematic, however, is the question of the justification for civil disobedience to particular law(s) of a regime which is admitted to have a legitimate right to office. I argue that it is obvious that if the regime's own laws or the basic norm upon which it acquired legitimate power provide an avenue for such civil disobedience then such avenue suffices to justify such conduct and to ensure that a right to repudiate the particular law enures to the aggrieved citizens. If, however, this is not the case, as mostly happens, then serious problems arise for conceptual analysis. How can a citizen justifiably affirm a government in one breath and reject one or more of its laws in the next breath? How can a citizen affirm the right of the government to compel his obedience and at the same time claim a right to disobey a particular law? What will happen as positivists usually ask, if everyone picks and chooses which laws to obey and which not to obey? Will the requirements of legality in the given legal system not then become intolerably uncertain?⁷⁹ Is Mortimer Sellers' rationalisation of this paradox

⁷⁸ For details of this epic legal battle which culminated in the overthrow of that regime by Shonekan's "Defence Minister" General Sani Abacha, who in reality had always been the de facto ruler, see G. Fawehinmi, June 12 Crisis: The Illegality of Shonekan's Government (Lagos: Nigerian Law Publications, 1993). Chief Gani Fawehinmi is a leading Nigerian human rights lawyer and socio-political activist. He has been illegally detained over fifty times in the worst conditions for his over thirty-five years of human rights activism. He is singularly responsible for the "substantive-rights" revolution in Nigerian jurisprudence and continues to battle the incumbent illegitimate Nigerian military junta. Chief Fawehinmi argued the application based on which the Shonekan regime was declared illegal by a Lagos High Court.

⁷⁹ Indeed, to Professor H.W.R. Wade, legal certainty is more important an aspiration than legal justice. In his view, if justice is sought to be done in an atmosphere of legal uncertainty, then injustice will likely result. With respect, I

based on the so-called justification-right thesis adequate? Is it that there is no such thing as legal obligation? Or is it that there is instead a prima facie moral obligation to obey the laws of a legitimate regime?⁸⁰

I agree with Heida Hurd that if there is any obligation to obey law at all, then it cannot be a legal obligation. For law itself cannot generate uniquely legal obligations.⁸¹ The obligation to obey law must be both extra-legal and meta-legal. To insist that law itself creates a duty of fidelity to itself is an incurable tautology;⁸² especially when couched as a proposition that there is a legal duty to obey a legal norm! It may well be argued that a law may create a legal obligation by the creation of liability for those who disobey any law within the legal order, but even such a law must itself be grounded in moral obligation for there is nothing else a priori

do not subscribe to this view. It wrongly assumes that certainty is actually attainable in the application of legal rules to particular situations or events. In any case, as competing values, justice is a more important end than certainty, for while it may often be tolerable to have just outcomes in an atmosphere of uncertainty, it is clearly intolerable, I think, to achieve certainty without justice. After all, is the purpose of law not its social utility and social engineering? See H.W.R. Wade, supra, at 187-197. For the social utilitarian and social engineering ends of the law, see respectively, J. Bentham, An Introduction to the Principles of Morals and Legislation, ed. J.H. Burns and H.L.A. Hart (London: Methuen, 1982), and R. Pound, An Introduction to the Philosophy of Law (New Haven, Connecticut: Yale University Press, 1922).

⁸⁰ See J. Tussman, Obligation and the Body Politic (New York: Oxford University Press, 1960) at 5.

⁸¹ See H.M. Hurd, "Challenging Authority" (1991) 100 Yale Law Journal 1611, 1677. See also T. Henderich, Violence for Equality: Inquiries in Political Philosophy (London: Routledge, 1989) at 106.

⁸² See W. McBride, "The Fetishism of Illegality and the Mystifications of 'Authority' and 'Legitimacy'" (1984) 18 Georgia Law Review 863.

which makes it obligatory to obey the prescription of the said law.

While William McBride and a minority of scholars doubt the existence of even a prima facie moral duty to obey the law and often describe such propositions as "grandiose claims" which are more popular because they are "less obviously silly"⁸³ than claims of a legal obligation to obey law,⁸⁴ I argue at the risk of being considered silly (even if less obviously so) that there indeed exists a moral duty, prima facie and tentative, to obey the laws of a legitimate regime. In this way I avoid a descent into what McBride himself has described as "the fetishisation of illegality" as poignantly as I confront "the fetishisation of legality".⁸⁵ Whether it is the tacit consent of classical social contract theory, the hypothetical social pact of John Rawls, the associative obligations of Ronald Dworkin,⁸⁶ the minimum content of natural law of H.L.A. Hart⁸⁷ or the grundnorm of Hans Kelsen,⁸⁸ extra-legal and meta legal foundations have always been known to ground legal obligation. And these foundations have

⁸³ Ibid, at 865-870.

⁸⁴ Tom Campbell's distinction between legal and political obligation is thus a bit tenuous and unconvincing since he admits that law of itself has no moral authority. See T. Campbell, "Obligation: Societal, Political, and Legal" in P. Harris, ed., On Political Obligation (London: Routledge, 1990) at 121.

⁸⁵ W. McBride, supra.

⁸⁶ See R. Dworkin, Law's Empire (Cambridge, Mass.: Belknap Press, 1986).

⁸⁷ H. Hart, Concept of Law (Oxford: Clarendon Press, 1994).

⁸⁸ H. Kelsen, General Theory of Law and State (Cambridge, Mass: Harvard University Press, 1945). For the most comprehensive critique of the Kelsenian theory of revolution available, see T. Mahmud, "Jurisprudence of Successful Treason: Coup D'etat and Common Law" (1994) 27 Cornell International Law Journal 49.

been moral in character and could not be otherwise, for the very social nature of human society implies moral obligation without which interdependence would be impossible and social existence therefore anarchical.⁸⁹

This moral obligation is, however, neither absolute nor conclusive as I have already pointed out.⁹⁰ It is a prima facie and therefore rebuttable obligation. A prima facie obligation to obey the law is only owed to a legitimate government i.e., a regime with a right to office. It is an obligation that may be regarded as one reason to be taken into account in deciding how to act, or how to react to law.⁹¹ The obligation to obey law must be a moral one, else the means of societal regulation (law) would have been elevated without justification to the end of society (which is societal regulation and harmony).⁹² Even if this general proposition is criticised⁹³ and the example of a car which confronts a red traffic light in the middle of the desert at midnight when there is no car within a hundred miles of this car and there is not a single soul about, is given as a justification for the criticism of the theory of a prima facie obligation to obey the law, the theory does not collapse for all that the example shows is that in this case it would be absurd to obey the traffic light and wait for the green light to come on.

⁸⁹ See also P. Harris, "The Moral Obligation to Obey Law" in P. Harris, ed., supra, at 163.

⁹⁰ See E.A. Harris, "From Social Contract to Hypothetical Agreement: Consent and the Obligation to Obey the Law" (1992) 92 Columbia Law Review 651, 651 footnote 1.

⁹¹ See P. Harris, supra, at 155.

⁹² Ibid, at 164-165.

⁹³ For an example of this criticism by Donald Regan and M.B.E. Smith, see ibid, at 158.

It does not rebut the thesis that the moral obligation to stop at the red traffic light is one of the reasons to be taken into account in deciding whether to stop or to proceed immediately. It must, however, be emphasized that even this prima facie obligation is not owed to an illegitimate regime and only accrues to a legitimate government.⁹⁴

Therefore in some cases, civil disobedience to particular laws is rightful even if

⁹⁴ To deserve such obedience, a government, in Legal Rawlsianism must satisfy the principles of justice as fairness and to Hart, it must satisfy his minimum principles of natural justice. See R. Flathman, Political Obligation (New York: Atheneum, 1972) at 286-287. For a critique of legal Rawlsianism, see M. Weiss, "A Jurisprudence of Blindness: Rawls' Justice and Legal Theory" (1993) 42 Drake Law Review 565. To Dworkin, the basis of such obligation is due to integrity in the law. Denise Reaume has criticised this thesis on the basis that integrity merely implies that the system is based on a coherent principle or set of principles (a feature that is possible even in wicked legal systems) and that to Dworkin, a wicked legal system cannot produce a prima facie obligation to obey law. As such, if integrity in a wicked legal system does not produce even the weakest obligation to obey the law, it has no independent value as a generator of obligation to obey law. See D. Reaume, "Is Integrity a Virtue: Dworkin's Theory of Legal Obligation" (1989) 39 University of Toronto Law Review 380, 380-400. Moreover, as Sandra Berns has convincingly argued, integrity cannot really be that much of a virtue if, as has been demonstrated, it can justify obedience to a wicked legal system. See S.S. Berns, "Integrity and Justice or When is Injustice Mandated by Integrity?" (1991) 18 Melbourne University Law Review 258. For social contractarian thought, such a government must be based on the consent of the people and for its liberal democratic variant, it is majority rule. Nancy Hirschmann has, however, doubted whether women ever participated in the said natural contractual arrangement! See N. Hirschmann, Rethinking Obligation: A Feminist Method for Political Theory (Ithaca: Cornell University Press, 1992). It has already been shown that neither of these theories suffice. The pragmatic normative theory which urges an integrated approach is preferred. Milner Ball's argument that there is an obligation not to the law but to the neighbour, while a good general exposition of the social nature of the obligation to obey law fails to descend from this general attitude into a more practicable proposition and is on that score inadequate. See M.S. Ball, "Obligation: Not to the Law but to the Neighbour" (1984) 18 Georgia Law Review 891, 914-920. His declaration that when the political system itself is the source of injury, its legal system cannot grant much relief to the aggrieved citizen and ought to be overthrown is valid and supportable. See M.S. Ball, *ibid*, at 914. See also; T.E. Carbonneau, "Balzacian Legality: A Proposal for Natural Law Juridical Standards of Legitimacy" (1981) 27 Loyola Law Review 1, 1-39.

proscribed by the law of the regime in power. Indeed, if such a law is clearly illegitimate in the sense that it goes against the letter of the international standards of legitimate governance already proposed as a pragmatic normative test for municipal political legitimacy, then it means that it goes against the restrictions on the right to rule in a particular way imposed by the said international standards and is therefore illegitimate. The converse point being therefore that disobedience to the said law would be rightful. Thus, if a law is passed by the United States government authorising the physical elimination of its illegal immigrant population, it will be a clearly illegitimate law as it in effect prescribes genocide. Its normative prescription that all illegal immigrants ought to be killed is thus illegitimate. Civil disobedience to such a law will therefore be valid.

This, however, belies the question of the reaction of the government to such a challenge to its authority. The courts might punish persons involved in civil disobedience for contempt.⁹⁵ They might be arrested by the police and thereafter jailed. They may even be killed. And all these may be legal under the general legal system! To Rawls, a citizen involved in such disobedience within a nearly just system ought to accept with equanimity the punishment which results.⁹⁶ This is a form of the so-called socratic approach.⁹⁷ The conscientious objector is required to openly and stoically accept the punishment of the otherwise legitimate government

⁹⁵ See the Canadian case of MacMillan Bloedel Ltd. v. Simpson especially the statement of Esson, C.J.S.C in (1994) 87 B.C.L.R.[2d] 154. See also Everywoman's Case (1990) 54 B.C.L.R. [2D] 273.

⁹⁶ See J. Rawls, supra, at 333-391. See also P. Hengren, Path of Resistance: The Practice of Civil Disobedience (Philadelphia: New Society Publishers, 1993).

⁹⁷ See R. Flathman, supra, at 315-316.

(and not of the wicked/illegitimate government). This view which was popularised by the Reverend Martin Luther King, Jr.⁹⁸ in the heydays of the African-American Civil Rights Movement is thought to be a misreading of Socrates' acceptance of the drinking of poison required of him by the laws of Athens when he, as a conscientious objector, disobeyed that law. To Professor Frances Olsen, this view is neither implicit nor explicit in Socrates' action.⁹⁹ I accept Olsen's view, and while acknowledging that it might lead to serious problems of order in a society which is not governed legitimately, it does not and can not lead to such serious problems in a society governed legitimately in accordance with the standards proposed here. For, try as we may, it is difficult to escape the conclusion that certain ways of rule are intrinsically bad (at least as a social function), for as the late Dr. King once declared, "an unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself".¹⁰⁰ While this does not exhaust the possibilities of injustice or oppression, it certainly covers most of it. This then is my sub-thesis: that when positive law contrasts to a significant extent with prevalent morality, it is likely in the final analysis to be shred of its obligatory character: its "oughtness". But since discussions of political obligations that ignore the debate about the nature of law must remain incomplete, I shall turn to a

⁹⁸ See M.L. King, "Letter from Birmingham City Jail" in R.A. Goldwin, ed., On Civil Disobedience: American Essays Old and New (Chicago: Rand McNally, 1969).

⁹⁹ See F. Olsen, "Socrates on Legal Obligation: Legitimation Theory and Civil Disobedience" (1984) 18 Georgia Law Review 891, 929-966.

¹⁰⁰ See M.L. King, supra, at 66. See also, L.D. Wardle, "The Gap Between Law and Moral Order: An Examination of the Legitimacy of the Supreme Court Abortion Decisions" (1980) Brigham Young University Law Review 811.

necessarily short discussion of the relationship between legitimate governance and the validity of laws.

E. LEGITIMATE GOVERNANCE AND THE VALIDITY OF LAWS:

" ... although bad laws, if they exist, should be repealed as soon as possible, ... but till then let them, if not too intolerable, be borne with."¹⁰¹

Implicit in my arguments in Parts C and D of this chapter is that a law depends ultimately for its validity upon the presumed authority of those who made it. If they lacked the authority (i.e. legitimate power) to make the law, the law ought not to be obeyed,¹⁰² and is therefore invalid as a normative proposition. Abraham Lincoln's aforementioned statement does not appear consistent with this proposition for it assumes that an intolerable law, a law which is indisputedly intolerable, retains legal validity; and that the only question that can be asked about it is whether or not it ought to be obeyed. I argue here that a law is a normative proposition, and being a norm it possesses an intrinsic and essential "oughtness" to it. This character of "oughtness" is, however, lost when law ought not to be obeyed, i.e., when the citizen has a moral right to disobey an illegitimate law or government. Intrinsic in the right to hold political office is the right to make law; to signify how the duty of obedience owed by the governed to the holder of political office ought to be expressed. It follows therefore that a government which doesn't have a moral right to the obedience of the governed, does not have a right to make law.

¹⁰¹ A. Lincoln, "The Perpetuation of Our Political Institutions" in R.A. Goldwin (ed.) supra, at 5.

¹⁰² See G.C. Christie, Law, Norms and Authority (London: Duckworth, 1982) at 139.

Few will dispute this proposition as it stands, but problems arise when the question of how and when a government acquires or retains a right to the obedience of the governed is involved. Thus, while most scholars will agree upon deep reflection that if a government lacks a right to obedience then it lacks the capacity to make valid law, few will agree readily about the conditions under which a government can be said not to have a right to the obedience of the governed; and whether this is at all possible.

For positivists, the validity of law is one thing, fidelity to it is another. For Hans Kelsen,¹⁰³ effectivity confers legitimacy: if raw force brings forth an effective regime then that regime is automatically legitimate and can therefore make valid law. For Herbert Hart, however, who admits of a right to disobedience - a right to repudiate the prima facie obligation to obey law - it is surprising and contradictory that he maintains that no matter how immoral a law is, it is still a law.¹⁰⁴ Indeed, the father of positivism, John Austin, appears to fall into the same confusion in his criticism of Blackstone's proposition that human law which conflicts with God's law is invalid. His interpretation of this proposition is that it means that no human law which conflicts with divine law is obligatory or binding and that no human law which conflicts with the divine law is law.¹⁰⁵ He thus recognises that law's bindingness is critical

¹⁰³ See H. Kelsen, supra.

¹⁰⁴ See Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harvard Law Review 593, 618.

¹⁰⁵ Noted ibid, at 185. Emphasis supplied. It is noteworthy that whilst Jewish and Christian theology have doctrines which support the law of the state [dina de-Malkhuta dina and Give unto caesar what is caesar's respectively] but they still evaluate legal validity against moral standards. See S. Shilo, "Equity as a Bridge Between Jewish and Secular Law", (1991) 12 Cardozo Law Review 738.

for its law - quality while still arguing for a pure separation of law and moral authority. The only way in which this argument can be validly maintained is if there is such a thing as a legal obligation to obey law. For once the obligation to obey law is shown to be extra-legal, then the Austinian proposition implodes. And we have already demonstrated the futility of arguing that law's obligatory character stems from legal sources! Once it is conceded that a right to disobey law has accrued or does enure to the governed, then it is logically absurd to argue that that directive which now lacks a normative character retains its lawness. Opposition to this conclusion will thus have to make do with attacking its premises.

The positivist view of immutable legal validity in the face of the accrual of a right to disobey the law is all the more illogical when the matter of the grudge informer¹⁰⁶ in the context of Nazi Germany which led to the famous Hart-Fuller debate¹⁰⁷ is considered. A woman who during her husband's service in the Second World War developed interest in other men and subsequently desired to be rid of her husband reported him to the Nazi regime for speaking against Hitler in private. The husband was thereafter convicted and sentenced to death but was sent to the warfront instead. After the war she was tried for this action and convicted because the Nazi statute under which she acted "was contrary to the sound conscience and sense of justice of all decent human beings". Now, this is a most indeterminate expression. But few will deny the extreme repugnance of the woman's conduct. Professor Hart himself is at pains to admit this but considers that a retrospective statute ought to have been passed to deal with the

¹⁰⁶ Judgement of July 27, 1949, Oberlandesgericht, Bamberg, 5 Siddentsche Juristen-Zeitung, 207 - Germany 1950; Or (1951) 64 Harvard Law Review 1005.

¹⁰⁷ See (1958) 71 Harvard Law Review 593-672 for the full text of this famous debate.

woman instead of confusing the validity of the Nazi statute with the question of the obligation to obey it. He then criticises Professor Fuller for supporting the decision by arguing that the statute was invalid. Fuller's reply is instructive: Why would it be necessary for the Court to first admit the validity of the statute and then go on to refuse to "obey" it by not applying it? Was it not much simpler and more sensible for the Court to refuse its legal validity? In any case would the passing of the retrospective statute not lead to the same result? The result of legal invalidity? Would the new invalidating statute not be a legislative judgement directed at one person only? What would then be achieved by according validity to the law and then crushing it immediately thereafter: in setting up a strawman in order to demolish it? Ought not the strawman be left lying on the floor as it is?

Eric Ort's theory of "critical legality" is an attempt to avoid this pitfall; to evaluate law from its internal nature and not its external nature or form. He has proposed three basic principles which must be present in the substance of law if that law is to have intrinsic validity.¹⁰⁸ A valid law must recognise all members of the society as persons once such people have rational capacity.¹⁰⁹ A valid law must be enacted and implemented through rational and deliberative processes which manifest popular participation.¹¹⁰ While these are commendable criteria for assessing the validity of laws, it does not exhaust the existing categories. The pragmatic-normative method of analysis we have adopted is wide enough as to be nearly

¹⁰⁸ See E.W. Orts, "Positive Law and Systemic Legitimacy: A Comment on Hart and Habermas" (1993) 6 Ratio Juris 245, 258.

¹⁰⁹ Ibid.

¹¹⁰ Ibid., at 268-269.

exhaustive and is only problematic as to one premise - which is the exact critical point at which a government can be said to lack a right of obedience. Once that point is passed, the conclusion necessarily follows.

F. SUMMARY OF THE ARGUMENT:

In this chapter, I argue that governance is an imperative in human society and that legitimate governance is the pre-condition for the existence of an obligation to obey the law. I also argue that when once it is admitted (and this often happens) that there is no obligation to obey a government and that as such there is no obligation to obey its law, then such laws are automatically invalid as having been shed of their law-quality, of their normative quality, of their "oughtness". A law's autumn (when a law sheds its lawness) is usually at the onset of the illegitimate government which issues impugned law but legitimacy can also be lost mid-stream and particular laws may be illegitimate even though the government has a legitimate right to hold that political office. Whether this is so, I argue, will depend on whether the international standards for legitimate governance have been violated or not. And whilst like all other legal norms, these standards are not totally determinate, they are not also infinitely indeterminate. Indeed, they are in the context of today's world, as determinate as any specific legislation in the domestic legal arena. Their utility as evaluative criteria is therefore apparent.

CHAPTER THREE

THE CONCEPT OF LEGITIMATE GOVERNANCE IN THE INTERNATIONAL LEGAL SYSTEM

A. THE CRUX OF THE ARGUMENT:

The scourge of illegitimate governance in its many forms is, and always has been, globally endemic, constituting, in a contemporary sense, the single most important impoverishing and destabilising element in our "global neighbourhood".¹ If, in the view of nations, the major mandates of the law and common institutions of nations, as expressed in the Charter of the United Nations, are to promote social progress and better standards of life in larger freedom, to maintain international peace and security, and to be a centre for the harmonisation of the actions of nations in the attainment of these common ends, then it is meet that international legal scholarship cast and maintain its powerful gaze upon this intensely pernicious phenomenon. It is also important that such scholarly enterprise be directed at the elucidation of the existing international regulatory framework for the control and perhaps elimination of such conduct; as well as at the construction of such a paradigm where none already exists.

I have argued elsewhere that an international regulatory framework, existing or anticipated, is a most valuable normative paradigm for the evaluation of the legitimacy or otherwise of municipal governance.² I argue here that such a paradigm is already in place in the international

¹ I have borrowed this expression from the recently released report of the Commission on Global Governance co-chaired by Shridath Ramphal and Ingvar Carlson. See Our Global Neighbourhood: Report of the Commission on Global Governance (Geneva: Commission on Global Governance, 1995).

² See Chapter 2 of this thesis.

legal and institutional system in a form from which meaning can be generally produced within a reasonably satisfactory ambit of textual indeterminacy.

To this end, I have organised my arguments into five major parts. In the next part of this chapter, I make a case for a normative approach to the question of the legitimacy of governmental power. In accordance with my argument in chapter 2 of this thesis, I take a quasi-normative and evaluative approach to the question of legitimate governance, arguing that the alternative neo-weberian descriptive approach to the question, which equates the legitimacy of governance with mere widespread belief in the legitimacy of an institution, norm or rule, does not provide an external gaze on the object of enquiry and leads to certain normatively unacceptable results.

Following that, I examine the concept of legitimate governance in traditional international law; the threshold of traditionality being fixed with some flexibility at the end of world war II. I argue that in general, traditional international law was most insensitive to the cause of the normative legitimacy of political power, and accepted the mere effectiveness of a regime, however obtained, as conclusive of the legitimacy question. Thus, even though both traditional and contemporary international law devalue the socio-economic imperative for legitimate governance, the former did, in addition, legitimise the non-popular acquisition and exercise of governmental power.

In the next part, I reconstruct the norms in favour of legitimate governance in the international system: their identity, their scope, their interpretive environment. I argue that post-1945 international law has developed a core of norms, which may or not functionally operate as law, against which it is possible to conceptually and operationally measure the legitimacy of

the assumption and exercise of governmental power. Thus, even within the admittedly imperfect normative edifice which has been constructed by international law, there exists, at the very least, the possibility of the evaluation of governance by assessors who are somewhat external to the polity, and who apply criteria external to the very conduct in question. At the most, despite the often justified critique of such norms as indeterminate and incoherent, it can be said that these norms are by and large already functional in the contemporary international system: being no more incoherent than municipal norms. In either scenario, there will be a certain "power of legitimacy amongst nations"³ which can be a useful tool in the normative restraint of municipal regimes: a tool which like municipal law has the capacity to wear either the comforting smile of justice or the sinister grin of inequity.

B. TOWARDS A NORMATIVE EVALUATION:

In the evaluation of the legitimacy of municipal as well as global regulatory institutions and rules, I adopt a normative approach. The prescriptive character of the identified norms in favour of legitimate governance informs their choice as evaluative criteria for the current assessment exercise. The descriptive approach, which in the final analysis accepts the ipse dixit of the apparent majority in a polity as conclusive of the legitimacy question, is rejected for reasons which bear further discussion here.

In the recent history of humankind, the dominant approach to the question of political

³ See T.M. Franck, The Power of Legitimacy Amongst Nations (New York: Oxford University Press, 1990) (hereinafter "Power of Legitimacy").

legitimacy has been quite understandably Weberian/descriptive, for Max Weber⁴, whose seminal writing created for the concept a central role in the study of governance, has undoubtedly been the single most influential scholar in this field.⁵ Weber saw political legitimacy as a measure of the belief of the concerned polity in the right of their leadership to lead, no matter how that belief was secured.⁶ Such belief may be due to the presence of one of three belief-based elements: namely tradition, charisma and rationality/legality. In fidelity to the descriptive method of social science enquiry which is supposedly value-neutral and scientific, Weber did not extend his enquiry beyond this point. Once it is observed that the members of a polity believe that their leadership have a right to lead or to lead in a particular way, then such leaders have legitimate political authority.⁷

The problem with this otherwise valuable paradigm is that while it makes some minimal concessions to the rationality of the individual, it takes as given the coincidence or harmony between the external index of belief (usually the mere absence of rebellion) and the internal

⁴ See M. Weber, Law in Economy and Society, ed. G. Roth and C. Whittich, (Berkeley: University of California Press, 1978).

⁵ See I. Horowitz, "The Norm of Illegitimacy-Ten Years Later" in B. Denitch, ed., Legitimation of Regimes: International Framework for Analysis (London: SAGE, 1979) at 23; and J.H. Schaar, Legitimacy in the Modern State (New Brunswick, New Jersey: Transaction, 1981) at 15.

⁶ See E. Shils and M. Rhenstein, eds., Max Weber on Law in Economy and Society, 4th ed. (New York: Simon and Schuster, 1967) at 3-9.

⁷ See P.H. Brietzke, "Law, Legitimacy and Coercion: One View from Law and Economics" (1991) 25 Valparaiso Law Review 343; L.T. Farley, Plebiscites and Sovereignty: The Crisis of Political Illegitimacy (Boulder: Westview, 1986); R. Rogowski, Rational Legitimacy: A Theory of Political Support (Princeton: Princeton University Press, 1974); H.J. Weschler, Offerings of Jade and Silk: Ritual and Symbol in the Legitimation of the Tang Dynasty (New Haven: Yale University Press, 1985); and J. Rothschild, "Political Legitimacy in Contemporary Europe" in B. Denitch, ed., supra, at 38.

index of belief which is more difficult to assess in the presence of raw coercion, social plurality and factors that stifle the free expression of the human spirit. And not even Ronald Rogowski's "rational legitimacy" paradigm transcends this problem.⁸ For, if as he defines it, rational legitimacy is conferred upon a regime when the citizens of the relevant polity take actions which do not constitute rebellion, which actions are the most efficient joining of means to ends in the light of the information available to them, then it is conceivable that legitimacy may be conferred on a despot or a "wicked legal system". Afterall, to most efficiently join means to ends is merely to take the option in a given situation which best promotes the ends of the actor; which is usually the actor's survival.

The normative/evaluative method, on the other hand, seeks to transcend the ipse dixit of the majority within a society, and evaluate even their clearly expressed support for a government or a method of governance. It insists on evaluative criteria external to the belief assessed, criteria which are admittedly value-impregnated.⁹ Within this model therefore, the mere fact that 99% of the members of a given society support a particular government or governmental policy does not ipso facto confer legitimacy on the government or policy. It may well be that such government or policy is indeed legitimate, but within this preferred model, the mere fact of

⁸ See R. Rogowski, supra, at 30-31.

⁹ Such criteria may vary from the christian laws of God, through the procedural naturalism of Lon Fuller, and the feminist movement's anti-patriarchy, to the cost-benefit analysis of capitalism. See respectively, T.S. Macdermott, Summa Theologica: A Concise Translation (London: Eyre and Spottiswoode, 1989); L. Fuller, The Morality of Law (New Haven: Yale University Press, 1969); S. Boyd, "(Re)Placing the State: Family, Law and Oppression" (1994) 9 Canadian Journal of Law and Society 39; and B. Bennet, "Cost Benefit Analysis, the Market and Political Legitimacy" (1988) 23 University of San Francisco Law Review 23 at 58-60.

majority support does not in and of itself confer legitimacy.¹⁰ However, as I shall demonstrate later, an analysis which is based upon this approach is reasonably concrete when the object of evaluation is municipal governmental power, but becomes rather fluid when the object becomes the very global system which has generated the normative content of the evaluative framework.

In the literature of traditional international law, there was very little discussion of the role of legitimacy in the international system; and yet legitimacy has been convincingly identified by Professor Thomas Franck as critical to the functioning and survival of meaningful global regulation and normative restraint.¹¹ Absent any general coercive machinery for the enforcement of international legal norms and rules, the phenomenon of state obedience to the greater proportion of the norms and rules of international law can only be explained by the voluntary compliance-pull or legitimacy of such regulatory requirements.

Professor Franck has however recently produced a magistral body of literature on the subject infused with his characteristic incisive scholarship, as well as his often well received metaphoric turn of expression. He makes a powerful case for a largely belief-based neo-weberian, and therefore descriptive, approach to the study of legitimacy in the international system. According

¹⁰ A similar approach is evident in the work of Jurgen Habermas, David Held and Michael Seward. See J. Habermas, Communication and the Evolution of Society, trans. T. McCarthy, (Boston: Beacon, 1979); J. Habermas, Legitimation Crisis, trans. T. McCarthy, (Boston: Beacon, 1975); D. Held, "Power and Legitimacy in Contemporary Britain" in G. McLennan, D. Held and S. Hall, State and Society in Contemporary Britain: A Critical Introduction (New York: Polity, 1984) at 302; and M. Seward, Co-optive Politics and State Legitimacy (Aldershot: Dartmouth, 1992) at 33.

¹¹ See T.M. Franck, "Why a Quest for Legitimacy" (1988) U.C. Davis Law Review 535; T.M. Franck, "Legitimacy in the International System" (1988) 82 American Journal of International Law 705 (hereinafter "International System"); T.M. Franck, "Fairness in the International Legal and Institutional System" (1993-III) 240 Recueil des Cours 13 (hereinafter "Fairness"); and T.M. Franck, Power of Legitimacy, *supra*.

to him:

"Legitimacy [in the international system] is the property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."¹²

In answer to his mellifluous question: "why do powerful nations obey powerless rules?", Franck concludes that certain rules tend to exert voluntary compliance-pull on states, and being therefore legitimate¹³, are generative of the obedience of states. In his view, such legitimate rules enjoy the common and critical characteristics of determinacy, symbolic validation, coherence and adherence.¹⁴ Determinacy refers to the ability of the textual source of a rule to convey a reasonably clear message of what conduct is permissible and what is not. Symbolic validation, which is reinforced by ritual and pedigree, refers to signals issued in connection with a rule as a cue to secure compliance with its commands such as the grant or withdrawal of recognition to a new regime as a signal to the global polity that the method by which that regime assumed power is either acceptable or unacceptable. Coherence refers to non-selectivity in the application of a rule to a situation which it addresses. Adherence refers to the connection of a rule to some rational principle of broader application which customarily makes sense to its target audience such that the rule is situated within a pyramid of secondary rules about how rules are made, interpreted and applied, rather than being merely an ad hoc reciprocal arrangement.

In Professor Franck's view therefore, institutional and rule legitimacy may be best observed

¹² See T.M. Franck, Power of Legitimacy, supra, at 24. See also T.M. Franck, International System, supra, at 706; and D.D. Caron, "Governance and Collective Legitimation in the New World Order" (1993) 6 Hague Yearbook of International Law 29 at 30-31.

¹³ See T.M. Franck, International System, ibid.

¹⁴ Ibid, at 711-756.

and appreciated along a continuum and within a web of varying degrees of legitimacy. The extent to which individual states obey a rule or support a government or conduct of governance determines the legitimacy of the rule, government or conduct. Thus, for each such rule, government or conduct, there will be many "legitimacies". For, if rule X is for instance believed by states A, B, C and D to have come into being in accordance with right process, but States 1 and 2 do not share this belief, rule X will be legitimate for states A, B, C and D but will be illegitimate for states 1 and 2. And the degree of legitimacy attributable to rule X will be a function of the extent to which the belief of states A, B, C, and D is shared within the society of states. The more of such states the rule is able to attract to voluntary compliance, the more legitimate the rule.

David Caron¹⁵ and Ernst Haas have also adopted the descriptive approach. Indeed Haas has opined that the legitimacy of an international legal norm or rule refers to the extent to which states subject themselves to its commands; mere ratification rather than actual voluntary compliance-pull being the determinant of norm or rule legitimacy.¹⁶ It appears though that he perceives ratification as an operational index of the potential for, or existence of, voluntary compliance-pull.

Despite the power of the Franckian approach, his neo-weberian, if descriptive stance is open to the same sort of objections that I raised at the beginning with respect to the weberian paradigm. Central to these objections are: whether the mere belief of those addressed by an

¹⁵ See D.D. Caron, supra.

¹⁶ See E. Haas, Human Rights and International Action (Stanford: Stanford University Press, 1970) at 47. See also E. Haas, When Knowledge is Power (Berkeley: University of California Press, 1990).

international legal rule or institution is sufficient in all situations to confer legitimacy on the said rule or institution; and whether right process as opposed to outcomes is the exclusive generator of voluntary compliance-pull and thus legitimacy. While Professor Franck has constructed a role for outcomes in his preferred paradigm, that role is a minimal one. This is a logical result of his construction of international society as a "secular community" (i.e one devoted to the achievement of such aims as health, economic development and world peace), as opposed to a "moral community" (i.e one devoted to the provision of equivalent life-chances for all persons in the world).¹⁷

Clearly, this is a normative choice. For there is nothing intrinsically amoral or even secular in the provision of health, for instance. There is also nothing intrinsically non-secular in the provision of equivalent life-chances. Why is the latter not worthy of devotion in a secular community? Again, Professor Franck makes a further and even more important normative choice when he declares in Austinian fashion that fairness (as justice) is one thing, legitimacy another.¹⁸ This may well be true, but by what alchemy is justice to be isolated from voluntary compliance-pull (i.e legitimacy)? Is not another view of legitimacy plausible which exposes equity/justice as critical aspects of legitimacy?

Fernando Teson has, within the liberal tradition, sought to apply the normative approach to the issue of legitimate governance in the international system. He is of the view that if the thrust of the Franckian viewpoint is that rules or institutions are legitimate merely because they are

¹⁷ See T.M. Franck, *Power of Legitimacy*, supra, at 51.

¹⁸ See T.M. Franck, *Fairness*, supra, at 41-44; and T.M. Franck, *International System*, supra, at 209.

adhered to by states, as well as that states tend to obey legitimate rules and institutional arrangements, then Professor Franck is saying in effect that states obey rules and institutions that they obey.¹⁹ The objection taken by Teson is a manifestation of the primary objection of normative theorists to the descriptive paradigm preferred by Franck: namely, the absence of an external gaze upon the object of evaluation leading to a situation in which the said object is essentially self-legitimizing.

It is conceivable that Franck's answer to the derivative question why states follow the rules that they follow, would be that the rules which are followed essentially exhibit the qualities of determinacy, adherence, coherence and symbolic validation. The crucial question then would be why states tend to follow rules that satisfy this particular set of criteria and not any other? Why is it that the coincidence of coherence, adherence, determinacy and symbolic validation necessarily invests a rule or institution with voluntary compliance-pull? What is that catalyst or unifying element which transforms this coincidence into a thing of normative worth?

Does coherence, for instance, not go to justice? Is the like treatment of like cases, and the unlike treatment of unlike cases not a manifestation of a classic notion of justice as fairness and equity dating back to the beginning of history? Is the object of rule adherence not to ensure a minimum of coherence and thus to ensure justice? Is the utility of determinate expression not its potential to ensure coherence and therefore justice? Why does one rule come to enjoy pedigree amongst a cross section of the community and another does not?

The tendency to justice, I suggest, is that mysterious, if unruly, element that transforms

¹⁹ See F. Teson, Book Review (1992) 37 McGill Law Journal 666 (hereinafter "Review"); and F. Teson, "The Kantian Theory of International Law" (1992) 92 Columbia Law Review 53 (hereinafter "Kantian Theory").

seemingly ordinary features into a normatively valuable amalgam. Justice, I suggest, is critical to legitimacy, even in the international system.²⁰ For if we live and have always lived in an international system which, as Franck himself has stated²¹, is severely in need of equity, and in which inequity is the primary cause of systemic instability, conflict and misery²², and if fairness and unfairness are in his view capable of exerting positive or negative effects on the compliance-pull of rules and institutions, it will also be true that the negative pull of unfairness in the present world scene should critically constrain the emergence of rules which can be described as "legitimate but unfair". In this scenario, justice will tend to reflect legitimacy and injustice will tend to reflect illegitimacy. Detailed requirements for meeting the justice of every case are of course unavailable, but will be continually and dialectically worked out. In the meantime, it suffices to argue that whatever the identity of justice, it plays a role in the evaluation of institutional and rule legitimacy amongst nations. The mere ipse dixit of a majority of nations will not always suffice to generate legitimate rules and institutions.

C. THE TRADITIONAL CONCEPT OF LEGITIMATE GOVERNANCE:

(i) Three Levels of Enquiry:

As I have demonstrated elsewhere, the legitimacy of governmental power may be fruitfully studied at three levels of enquiry: namely, the right of a government or regime to hold

²⁰ See F. Teson, Review, ibid, at 667-668.

²¹ See T.M. Franck, Fairness, supra, at 25-28. See also I.L. Head, "The Contribution of International Law to Development" (1987) 25 Canadian Yearbook of International Law 29.

²² See Agenda for Development, Report of the United Nations Secretary-General, 6th May 1994, U.N. Doc. A/48/935.

office, the right of a government or regime which legitimately holds office to rule in particular ways, and legitimacy of the macro-political order, i.e systemic legitimacy; a category which is distinguished from that of ruling in particular ways by the broad doctrinal foundations upon which the system is based.²³ This framework for analysis is also extant in the study of legitimacy in the international system, and has been partially utilised by David Caron who has recognised the first two categories i.e the right to hold office and the right to take certain actions, but failed to isolate the third level of enquiry.²⁴ In the present thesis, I shall utilise all three levels, even though I pay far more attention to the first two.

As Professor Fernando Teson has demonstrated, traditional international law focused on the rights and duties of states and rejected the contention that the rights of states derive from the rights of the individuals englobed by the state.²⁵ In this radically statist conception of the law of nations founded on the absolutist conception of state sovereignty,²⁶ legitimacy and sovereignty are conceived of as purely a function of the practical control of the population of a state by the regime under scrutiny and have no bearing on whether or not the regime

²³ See Chapter 2, part C(ii).

²⁴ See D.D. Caron, *supra*, at 30.

²⁵ See F. Teson, Kantian Theory, *supra*, at 53.

²⁶ This version of the doctrine of state sovereignty is not cast in stone and gained ascendancy only in the past 300 years, i.e since the Peace of Westphalia of 1648. For a more detailed treatment of this concept, see L.W. Goodman, "Democracy, Sovereignty, and Intervention" (1993) 9 American University Journal of International Law and Policy 27; M.E. Turpel and P.Sands, "Peremptory International Law and Sovereignty" (1988) 17 Connecticut Journal of International Law 364; J.K. Bleimaier, "The Future of Sovereignty in the 21st Century" (1993) 6 Hague Yearbook of International Law 17; and M.K. Malone, "The Rights of Newly Emerging Democratic States Prior to International Recognition and the Serbo-Croatian Conflict" (1992) 6 Temple International and Comparative Law Journal 81.

represents the relevant population.²⁷ International law was a law of potentates, made by potentates, for the benefit of potentates.²⁸ The international system was anything else but a people-centred system. Thus, in the view of those who constructed that legal regime, justice and legitimacy were conceptually separate: domestic orders may well strive for justice, but the ends of global regulation ought to be limited to the achievement of order and compliance.²⁹

Hans Kelsen was therefore squarely on point, within the normative context of traditional international law, when he opined that:

"The government brought into permanent power by a revolution or coup d'état is according to international law the legitimate government of the state... Hence according to international law, victorious revolutions or successful coup d'état are to be interpreted as procedures by which a national legal order can be changed."³⁰

Indeed, this attitude has been carried on, albeit in continually receding measure, in the development of contemporary, i.e post-world war II, international law.³¹ It is not therefore at all surprising that traditional international law conceived of the right to office as a pure function

²⁷ Ibid.

²⁸ See J. Crawford, "Democracy and Human Rights" (1993) 64 British Yearbook of International Law 113 at 119.

²⁹ Ibid.

³⁰ See H. Kelsen, General Theory of Law and State (Cambridge, Massachusetts: Harvard University Press, 1945) at 221. Underlining supplied. See also Y. Liang, "Notes on Legal Questions Concerning the United Nations" (1951) 45 American Journal of International Law 689, 695; T. Farer, "Panama: Beyond the Charter Paradigm" (1990) 84 American Journal of International Law 503 at 510; A.G. Pazzanita, "Legal Aspects of Membership in the Organisation of African Unity: The Case of the Western Sahara" (1985) 17 Case Western Reserve Journal of International Law 123.

³¹ See L.B. Sohn, Rights in Conflict: The United Nations and South Africa (New York: Transnational, 1994) at 128-129. See also J. Salmon, "Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?" in C. Tomuschat, ed., Modern Law of Self-Determination (Dordrecht: Martinus Nijhoff, 1993) at 262.

of the effectiveness of a regime within the relevant polity. How a regime came to acquire the said political office was considered well beyond the gaze or cognition of the law of nations.

Flowing also from this insensitivity to the popular legitimacy of the assumption of office by an effective regime is the general aversion of traditional international law to the scrutiny of the ways in which an effective regime exercises governmental power. With a few ad hoc exceptions, that legal regime failed to normatively address the question of the wanton abuse of governmental power and considered that an effective regime ipso facto represents the wishes of those it purports to govern. As James Crawford has argued, under this regime, it was assumed that the executive branch of government has comprehensive power to make treaties. While this attitude may not present serious problems especially with respect to a popularly sanctioned executive, the policy of extending the protective bulwark of state sovereignty even to the most despicable of despotic regimes, appears to be a most absurd appreciation and interpretation of the essence of governance.

That a despotic or colonial regime which represents no one but itself could in that normative scheme bind the relevant state and its people forever by concluding an appropriate international agreement no matter that the said regime entered into the arrangement against the manifest will of those it purports to govern is another manifest example of the anti-people posture of a legal regime supposedly devoted to governance.³² Even though good reasons exist for the policy of holding successor governments liable for obligations assumed by their predecessors in office, the lack of limitation with which this rule was applied is certainly open to objection, more so

³² See the Tinoco Arbitration (Great Britain v Costa Rica) (1923) 1 R.I.A.A. 369. See also Short v Islamic Republic of Iran (1987) 82 I.L.R. 149.

in the current era where concepts such as ius cogens are now widely accepted. In today's regime would a legitimate successor regime be bound by the law of nations to accept obligations arising under a treaty concluded by a departed unpopular regime if the said obligations require the latter regime, for example, to forcibly expel a group of recent immigrants on purely racial grounds, or to capture and export members of an endangered species?

As in the case of the right to hold office and the right to rule in particular ways, the legitimacy of a macro political system was also traditionally beyond the reach of international regulation. At customary international law, a state was totally free in the exercise of its sovereignty to choose any macro system of governance whatsoever, be it liberal democratic, socialist, colonial, fascist, nazi or apartheid in nature. The International Court of Justice was therefore right in the context of the rules of the traditional law of nations, when it held that under customary international law, every state was entirely free to choose its political, social, economic and cultural systems.³³ While this is a correct statement of the position at traditional customary international law, it is not, I argue, a correct appreciation of contemporary international law, customary or otherwise.

(ii) The Traditional Concept of Legitimate Governance and the Open Society:

If traditional international law did not concern itself with the popular legitimacy of a government, it certainly was not cognisant of the need for equitable resource distribution within and amongst nations to ensure that there was genuine opportunity for everyone in the relevant

³³ See the Case Concerning Military and Paramilitary Activities in and Around Nicaragua (Nicaragua v United States) (merits) [1986] I.C.J. Rep. 14 at 108.

polity to participate in the business of selecting the leaders of the polity and of governance: be it a municipal or an international community. As a law which was primarily designed to justify and then reify the political despotism and socio-political inequities that characterised the world in general, and Europe in particular, it could not but be insensitive to the cause of achieving political egalitarianism and socio-economic equity.³⁴ Thus, the regime established under that legal order fails even the inadequate liberal democratic test for a polity which enjoys legitimate governance; a society characterised by Karl Popper as an "open society."³⁵

D. THE EMERGENT CONCEPT OF LEGITIMATE GOVERNANCE:

(i). Three Levels of Enquiry:

While, as I have argued in part C above, traditional international law was clearly insensitive to the popular legitimacy of governments and the propriety of the exercise of municipal governmental power, similar arguments cannot now be made in the case of contemporary international law without eliciting intense controversy amongst international legal scholars, who after all are, in Tom Farer's metaphoric analogy, "the accountants of the international decision-making process".³⁶ And this in itself is evidence of a valuable normative shift in the character of the law of nations.

³⁴ See R. Falk, "Historical Tendencies, Modernising and Revolutionary Nations and the International Legal Order" (1962) *Howard Law Journal* 128 at 133-135.

³⁵ See K. Popper, The Open Society and its Enemies (London: Routledge and Kegan Paul, 1966).

³⁶ See T. Farer, "Harnessing Rogue Elephants: A Short Discourse on Intervention in Civil Strife" in R. Falk, ed., The Vietnam War and International Law (Princeton: Princeton University Press, 1968) at 1093.

In this part of this thesis, I will continue to utilise the tripartite framework for analysis described in part C. Here, I argue that there are present in the contemporary international legal order a number of norms, which though by no means exhaustive of the possibilities for normative regulation of the legitimacy of the exercise of municipal governmental power, are still of immense value in the evaluation and characterisation of governance as legitimate or illegitimate.³⁷ These norms are not limited to norms which require popular participation in the business of governance so heavily emphasised in existing literature.

The direction of the gaze of international law to events within the borders of states in order to determine the sort of governance which is legitimate and which is not, is justified, in spite of the sovereignty of states, by the diminished scope of their exclusive domestic jurisdiction. The opposing argument being that in the face of the long established rule of non-intervention in the internal affairs of states, how can other states, bonded by the United Nations system, dictate within a state's territorial borders, who is deserving of political authority and who is not?

In this context article 2(7) of the U.N. Charter which is an epitome of the non-intervention doctrine bears reproduction in extenso. It provides that:

"Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."³⁸

³⁷ Michael Reisman has expressed a similar point of view in a contemporary paper which, though characteristically seminal and articulate, did not focus on some normative criteria for the evaluation of municipal governance which are currently present in the international system. See W.M. Reisman, "Sovereignty and Human Rights in Contemporary International Law" (1990) 84 American Journal of International Law 866.

³⁸ Underlining supplied.

Thus, at the very least, the U.N. can intervene if a matter is not essentially within the domestic jurisdiction of the relevant state. The U.N. may thus, to use Lauterpacht's concept of intervention, make a peremptory demand for positive conduct or abstention in such matters.³⁹ The crucial question then is, whether a state is entirely free to choose its political system under the law of the United Nations?⁴⁰ For example, can a state (in reality the ruling elite), "choose" a genocidal system⁴¹ or fascist dictatorship? And whose choice is involved, the princes or the people? The answer will depend largely on the construction of Article 2(7) and the meaning of the phrase "essentially within the domestic jurisdiction of any state".

Though the phrase "essentially within the domestic jurisdiction" is not free from ambiguity, it has been tolerably well defined by a number of publicists, in the U.N. General Assembly, and in case law. The Lotus Case⁴² decided as far back as 1927, that a state cannot lawfully overstep the limits placed upon its jurisdiction by its international legal obligations. This implies that the demarcation of the limits of a state's domestic jurisdiction is a dynamic,

³⁹ See L. Oppenheim, International Law: A Treatise, ed. H. Lauterpacht, (London: Longman, 1955).

⁴⁰ The Nicaragua case at first glance seems to suggest this. See Case Concerning Military and Paramilitary Activities in and Around Nicaragua (Nicaragua v United States) (merits) [1986] I.C.J. Rep. 14 at 108, paragraph 205. The decision should however, be confined to its narrow ratio decidendum because it was also made clear in that decision that had the court been able to identify any strictly binding legal obligation assumed by Nicaragua with respect to the enthronement of democratic rule in that country, it would not hesitate to hold Nicaragua bound by such obligation. See ibid, at 131-132. Moreover the question of the lawfulness of a modality for the enforcement of the democratic entitlement differs from that of the existence of such entitlement.

⁴¹ See for example the Convention on the Prevention and Punishment of Genocide, 9th December 1948, U.N. Doc. A/810 71, which established that the treatment of national populations falls within the purview of international regulation. See J.K. Bleimaier, supra, at 22.

⁴² See The Lotus Case (France v Turkey) (1927), P.C.I.J. Ser. A, No. 10 at 18.

relative and residual question, determined by international law, and forever contracting or even expanding as international law develops. This position was also maintained in both the Tunis-Morocco Nationality Decree Case⁴³ and the Peace Treaties Case.⁴⁴

Professor Quincy Wright has offered a statement of this principle, so authoritative and articulate, as to deserve reproduction in extenso. According to him:

"Domestic jurisdiction is therefore the residuum of sovereignty remaining outside of a state's international obligations. The sphere of domestic jurisdiction cannot be determined directly, but only indirectly through ascertaining the international obligations applicable in a given situation."⁴⁵

The ever-increasing permeability of national boundaries and the resultant expansion of international and trans-national regulation has resulted in a diminishing barrier between matters of legitimate and lawful international concern and those confined by the domestic jurisdiction of the individual state.⁴⁶ Indeed, notable scholars such as W. Michael Reisman

⁴³ See Tunis-Morocco Nationality Decrees, Advisory Opinion, (1923), P.C.I.J. Ser. B, No. 4 at 24.

⁴⁴ See Bulgaria, Hungary and Rumania Peace Treaties Case [1950] I.C.J. Rep. 65 at 71.

⁴⁵ See Q. Wright, International Law and the United Nations (Westport: Greenwood, 1969) at 67. See also J.R. Brierly, "Matters of Domestic Jurisdiction" (1925) 6 British Yearbook of International Law 8; D.R. Gilmour, "The Meaning of 'Intervene' Within Article 2(7) of the United Nations Charter - An Historical Perspective" (1967) 16 International and Comparative Law Quarterly 330; J.D. van der Vyver, "Sovereignty and Human Rights in Constitutional and International Law" (1991) 5 Emory International Law Review 321, 426; C.G. Fenwick, "The Scope of Domestic Questions in International Law" (1925) 19 American Journal of International Law 143; L. Preuss, "Article 2 Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction" (1949-I) 74 Recueil des Cours 553, 567; and C.H.M. Waldock, "The Plea of Domestic Jurisdiction Before International Legal Tribunals" (1954) 31 British Yearbook of International Law 110.

⁴⁶ See O. Schachter, "Towards a Theory of International Obligation" in S. Schwebel, ed., The Effectiveness of International Decisions (Dobbs Ferry, New York: Oceana, 1971) at 12. See also The Trail Smelter Arbitration (United States v Canada) 3 R.I.A.A. 1905. For a recent critique of this important matter, see K. Mickelson, "Rereading Trail Smelter" (1993) 31

have felt able to declare that no serious scholar still supports the contention that internal human rights such as the right to popular participation in governance are essentially and entirely within the domestic jurisdiction of any state, and hence insulated from the gaze and regulatory attention of international law.⁴⁷

The attitude of the political organs of the United Nations, especially the General Assembly, has also been consonant with this position. In a long line of arguably quasi-judicial determinations, the Assembly has held that the denial of political participation within any country, and the guarantee and protection of other human rights are not within that state's domestic jurisdiction.⁴⁸ And this is an approach that also rejects Professor Watson's articulate but unconvincing argument in favour of state auto-interpretation of the limits of their exclusive domestic domain.⁴⁹ The International Court's decision in the International Status of South West Africa Case⁵⁰ is further authority for this view.

And if there are still scholars who believe that human rights issues, especially issues of legitimate governance, remain within the domaine reserve of states, they will do well to consider the net effect of Articles 55 and 56 of the UN Charter which together impose a constitutional

Canadian Yearbook of International Law 219.

⁴⁷ See W.M. Reisman, supra, at 869. See also U.O. Umozurike, Self-Determination in International Law (Hamden, Connecticut: Archon, 1972) at 91.

⁴⁸ See The Spanish Affair (1946), The Matter Concerning the Treatment of Ethnic Indians in the Union of South Africa (1940-1994); and The Case of the Russian Wives, reproduced in L.B. Sohn, supra, at 44-95.

⁴⁹ See J.S. Watson, "Auto-Interpretation, Competence and the Continuing Validity of Article 2(7) of the U.N. Charter" (1977) 71 American Journal of International Law 60.

⁵⁰ See International Status of South West Africa, Advisory Opinion, [1950] I.C.J. Rep. 128.

duty on the UN and all its member-states to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". If the domaine reserve of states is determined by the sum total of their sovereign powers minus the extent of their international obligations as reflected in the U.N. Charter and in the other sources of international law already examined, then it seems quite clear that that domain no longer encapsulates the question of the right of all peoples to political participation and legitimate governance, as well as the question of the observance of the other legitimacy norms prescribed by the international system.

(a). The Right to Hold Office:

The right of a regime to hold office is now regulated by the law of nations. The law of nations currently proscribes the assumption of municipal governmental power in contravention of the right to political participation of the people of a given political unit, whether or not the "usurpers" of office are colonial or indigenous elements. The violators of the entitlement of all peoples to political participation in the conduct of the business of governance may therefore be either foreign or indigenous: both types of violative conduct being variants of the norm in favour of the self-determination of all peoples.⁵¹

The anti-colonial rule, which dates back to the United Nations Declaration on the Granting

⁵¹ See for instance U.O. Umozurike, supra; O. Eze, Human Rights in Africa: Some Selected Problems (Lagos: N.I.I.A., 1984); and R. Sureda, The Evolution of the Right to Self-Determination: A Study of United Nations Practice (Leiden: Sifhoff, 1973).

of Independence to Colonial Peoples,⁵² proscribes the extension of foreign rule to a territory or people without their freely expressed consent. Not only does the rule enjoy long pedigree as a norm of both customary and treaty international law, it is undoubtedly a norm *ius cogens*. This norm has also been reiterated in a number of international legal instruments⁵³, as well as in some decisions of international tribunals.⁵⁴ According to Hector Gros Espiell, modern international law condemns the foreign occupation of another territory as well as the imposition of a government on a people by foreign elements,⁵⁵ and this widely accepted position has also been recently reiterated by Frederic Kirgis. The anti-colonial norm is one of the many faces of the right of all peoples to self-determination, and even today remains the most undisputed of its faces.⁵⁶ The "internal" dimension of the right to self-determination, i.e the right of an already independent people to freely select their leadership, is however a highly contentious issue.

⁵² See the Declaration on the Granting of Independence to Colonial Peoples, 14th December 1960, A/Res/1514(XV).

⁵³ See the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Amongst States in Accordance with the Charter of the United Nations, 24th October 1970, 9 I.L.M. 1292; the African Charter on Human and Peoples Rights, 26th June 1981, 21 I.L.M. 59, art.20; the International Covenant on Civil and Political Rights, 16th December 1966, 6 I.L.M. 368, art.1; and the International Covenant on Social, Economic, and Cultural Rights, 16th December 1966, 6 I.L.M. 360, art.1.

⁵⁴ See the South West Africa Cases (Liberia v South Africa; Ethiopia v South Africa) [1966] I.C.J. Rep. 6; 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. Rep. 16 at 66-69; and Western Sahara, Advisory Opinion, [1975] I.C.J. Rep. 12.

⁵⁵ See H.G. Espiell, The Right to Self-Determination: Implementation of United Nations Resolutions (New York: United Nations, 1980) at 6.

⁵⁶ F.L. Kirgis, "The Degrees of Self-Determination in the United Nations Era" (1994) 88 American Journal of International Law 304.

Writing as far back as 1966, Professor Innis Claude recognized that "popular consent" is broadly acknowledged as the legitimizing principle in contemporary political life.⁵⁷ Whether or not this was true of that era, many scholars have today recognized the necessity for and the emergence of a people-centred conception of international legal regulation.⁵⁸ Indeed, Grossman and Bradlow have recently argued that "human rights performance [is] an essential attribute for political legitimacy and respectability at the international level."⁵⁹

And as Tom Farer has asked, is "democracy" not the principal human right, or is it not one of the principals of that realm?⁶⁰ The better view appears to be that it is in its broadest meaning, a principal human right and not the principal human right as such. The right to political participation is an acknowledgement that both individuals and peoples are essentially

⁵⁷ I. Claude, "Collective Legitimation as a Political Function of the United Nations" (1966) 20 *International Organization* 367. Michael Reisman agrees. See W.M. Reisman, "Sovereignty and Human Rights in Contemporary International Law" (1990) 84 *American Journal of International Law* 866 at 867-868. See also A. Rosas, "Internal Self-Determination" in C. Tomuschat, ed., *supra*, at 227-242; A. Rosas and J. Helgesen, eds., Human Rights in a Changing East-West Perspective (London: Pinter, 1990); C. Tomuschat, "Democratic Pluralism: The Right to Political Opposition" in A. Rosas and J. Helgesen, eds., The Strength of Diversity: Human Rights and Pluralist Democracy (Dordrecht: Martinus Nijhoff, 1992); and H. Caminos, "Effects of the New World Order on the Third World" (1993) *American Society of International Law Proceedings* 41.

⁵⁸ See J. Frowein, "The European Community and the Requirement of a Republican Form of Government" (1984) 82 *Michigan Law Review* 1311. See also J. Crawford, "Democracy and International Law" (1993) 64 *British Yearbook of International Law* 113.

⁵⁹ See C. Grossman and B.D. Bradlow, "Are We Being Propelled Towards a People-Centred Transnational Legal Order?" (1993) 9 *American University Journal of International Law and Policy* 1 at 17.

⁶⁰ See T. Farer, "The Human Right to Participate in Government: Towards an Operational Definition" (1988) 82 *American Society of International Law Proceedings* 505. See also G.H. Fox, "The Right to Political Participation in International Law" (1994) 17 *Yale Journal of International Law* 539.

entitled to control their own destinies and participate in decisions that fundamentally affect their lives.⁶¹ In this sense, it is a basic requirement of any society which aims at guaranteeing its members a minimum of human dignity and development. In the same sense then, it is a principal human right.

Professor Franck has asserted that a tide of democratic change is sweeping through the world.⁶² In 1992, he had opined that "[d]emocracy is on its way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes."⁶³ His view of the emerging international norm of political legitimacy was however, at this time, quite unusually non-inclusive. In his view, "people almost everywhere now demand that government be validated by western style parliamentary, multi-party democratic processes."⁶⁴ As that distinguished scholar himself later realized, that view of democracy or legitimate governance, even though of strong western pedigree, does not capture the "overlapping consensus" of the "diverse peoples of the world".⁶⁵

However, he has offered another view of the matter which, though a bit more indeterminate

⁶¹ C. Grossman, "The Human Right to Participate in Government: Towards an Operational Definition" (1988) 82 American Society of International Law Proceedings 505 at 510.

⁶² See T.M. Franck, "The Emerging Right to Democratic Governance" (1992) 86 American Journal of International Law 46. See also D.A. Rustow, "Democracy: A Global Revolution?" (1990) 69 Foreign Affairs 75; and M. Pomerance, Self-Determination in Law and Practice: The New Doctrine in the United Nations (The Hague: Martinus Nijhoff, 1982). For a contrary view, see L. Hannikainen, Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status (Helsinki: Finnish Lawyers, 1988).

⁶³ Ibid, at 46.

⁶⁴ Ibid, at 49. Underlining supplied.

⁶⁵ Ibid.

and not entirely satisfactory to the average American, is more widely acceptable in our diverse world. According to him:

"The term 'democracy' as used in international rights parlance, is intended to connote the kind of governance which is legitimated by the consent of the governed. Especially essential to the legitimacy of governance is evidence of consent to the process by which a populace is consulted by its Government."⁶⁶

A similar definitional attitude was enthusiastically endorsed by the United Nations World Conference on Human Rights. The Conference unanimously rejected a narrow representative notion of democracy but defined it as "full participation of people in all aspects of their lives."⁶⁷

The indeterminacy of the preferred definition of legitimate governance in international law and the apparent vagueness and plurality of meaning which it exhibits has led at least one commentator to question whether the idea it encapsulates "expresses any shared ideal", the meaning of which can be established with a minimum of conceptual controversy?⁶⁸ Suffice it to say that whilst that definition exhibits some measure of indeterminacy, it is not of an infinite type. With a bit of unavoidable controversy, it is perfectly possible to establish a broad idea of what full participation of the people in the business of governance does not mean. And any plausible interpretation that falls within the remaining spectrum will have intrinsic worth, and is deserving of wearing the toga of legitimate governance. Indeed, certain scholars have already

⁶⁶ T.M. Franck, "Fairness", *supra*, at 102.

⁶⁷ See Vienna Declaration and Program of Action, 25th June 1993, 32 I.L.M. 1661, paragraph 8. See also S. Marks, "Nightmare and Noble Dream: The 1993 World Conference on Human Rights" (1994) 53 Cambridge Law Journal 54 at 58.

⁶⁸ See H.J. Steiner, "Political Participation as a Human Right" (1988) 1 Harvard Human Rights Yearbook 77.

succeeded in conceiving these kinds of broadly divergent but acceptable operational options.⁶⁹

Jordan Paust is notable amongst other scholars who are much more optimistic than Professor Franck about the existence of a right to democratic governance in international law. Professor Paust has argued stridently in favour of an existing entitlement to democratic governance and has even called for international penal sanctions for those who suppress democracy; which conduct he referred to as the crime of "politicide".⁷⁰ In support of this point, Paust, Franck and other scholars have cited a host of instruments.⁷¹

Thus, it is safe to argue that a universal right to political participation exists in positive international law (as well as in customary law) which requires that people be free to choose their own leaders and to hold such leaders accountable for their conduct of the business of governance. The Haitian affair is recent proof positive that given the "right" circumstances this

⁶⁹ See J. Donnelly, "The Human Right to Participate in Government: Toward an Operational Definition" (1988) American Society of International Law Proceedings 505 at 507. See also A. Wilde, *ibid*, at 508; C. Grossman, *ibid*; L. Garber, *ibid*, at 512; and K. Sharpe, *ibid*, at 515.

⁷⁰ See J. Paust, "International Legal Standards Concerning the Legitimacy of Governmental Power" (1990) 5 American University Journal of International Law and Policy 1063. See also M. Halberstam, "The Copenhagen Document: Intervention in Support of Democracy" (1993) 34 Harvard International Law Journal 163.

⁷¹ See Charter of the United Nations, 26th June 1945, 3 Bevans 1153, art. 1; the Universal Declaration on Human Rights, 10th December 1948, U.N. Doc. A/810/71; The Declaration on Principles of International Law Concerning Friendly Relations Among States in Accordance with the Charter of the United Nations, 24th October 1970, 9 I.L.M. 1292; the International Covenant on Civil and Political Rights, 16th December 1966, 6 I.L.M. 368; The United Nations General Assembly Declaration on the Enhancing of the Effectiveness of the Principle of Periodic and Genuine Elections, 21st February 1991, A/Res/45/150; the Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter, 21st November 1990, 30 I.L.M. 190; the Copenhagen Document, 29th June 1990, 29 I.L.M. 1305; the International Covenant on Economic, Social and Cultural Rights, 16th December 1966, 6 I.L.M. 360; the African Charter on Human and Peoples' Rights, 26th June 1981, 21 I.L.M. 59; and the American Convention on Human Rights, 22nd November 1969, 9 I.L.M. 673.

requirement of the law of nations can be effectively vindicated.

To state this position is not, however, to deny that the mere right to political participation is an insufficient guarantee of the actual participation of every citizen in governance. Nor is it, in itself, a political or societal end.⁷² It being merely a means to an end, the important question remains: political participation to what end; framed by what values?⁷³ It is very difficult in a work such as this, and regarding an issue such as the present one, to be so prescriptive as to pour definite content into the normative shell presented by the entitlement of all peoples to popular participation in governance as guaranteed by contemporary international law. It is important, however, to state that if true and sustainable 'democracy' is envisaged for those who are entitled to claim this entitlement, then the right to popular participation must be re-conceived in other than purely liberal democratic terms. To achieve real and widespread political participation, to the extent that every citizen can be said to have an input into how his/her polity is organised and governed, such citizens must be socio-economically empowered. And governance, even if conducted via a system which ensures a good measure of mass political

⁷² I therefore think that Stanley Aronowitz is mistaken when he suggests that the critical task before the U.S. Socialist Movement is to give socialism a decent burial and replace it with 'radical democracy' which he defines as popular participation in decisions that affect our lives. See S. Aronowitz, "The Situation of the Left in the United States" (1994) 23 Socialist Review 5, 27. For further insights into the nature of this new concept of radical democracy, see C. Mouffe, "Liberal Socialism and Pluralism: Which Citizenship?" in J. Squires, ed., Principled Positions: PostModernism and the Rediscovery of Value (London: Lawrence and Wishart, 1993) at 69; and C. Mouffe, "Democracy, Citizenship and the Political Community" in C. Mouffe, ed., Dimensions of Radical Democracy: Pluralism, Citizenship, Community (London: Verso, 1992).

⁷³ See B. Epstein, "Response" (1994) 23 Socialist Review 107, 108.

participation,⁷⁴ must be animated by the goal of equalising life-chances for all citizens. I maintain this position despite Neil MacCormick's convincing suggestion that the pursuit of the said goal may threaten the legal guarantees of individual liberties and freedoms that are a necessary (if insufficient) condition for the operation of a true democracy.⁷⁵ Navigating the waters of this inevitable antinomy places democratic theory between this Scylla and Charibdis: the Scylla of equalising life-chances for all citizens and the Charibdis of trampling on the liberties of some citizens in a bid to achieve that goal. How can both values be promoted without the one compromising the other?

It appears from historical experience and theoretical analysis that the best possible resolution of this antinomy has been achieved by social democratic theory and practice. By 'social democracy' is meant, that version of (some say alternative to) socialist thought that essentially posits the following tenets, ably stated by MacCormick thus:

1. That social justice cannot be realised through free market institutions premised on the classical rights of liberal individualism as protected by the classical liberals' minimal state.
2. That it is therefore necessary for state and other collective agencies to take an active role in economic affairs with a view to securing fair shares and opportunities for all citizens.

⁷⁴ See C.B. MacPherson, The Life and Times of Liberal Democracy (Oxford: Oxford University Press, 1977) at 94.

⁷⁵ See N. MacCormick, Legal Right and Social Democracy (Oxford: Oxford University Press, 1982).

3. That the civil rights and liberties proclaimed by classical liberalism are, however, of fundamental importance to human beings, as moral persons, and ought to be qualified only so far as necessary to the securing of fair shares and fair opportunities.

4. That because of the importance of classical rights and liberties, and because these require recognition of private property, no proposal for a completely collectivised or state reorganisation of, or revolution in, post-liberal societies is either acceptable or desirable.⁷⁶

I must emphasise though, that the social democratic content that I have attempted to pour into the framework of the right to popular participation in governance is indicative of my personal normative preference. Nowhere in the corpus of contemporary international law is there a requirement that municipal regimes adhere to this modus vivendi. Thus, while the right to popular participation is a minimum or framework norm, the right to be governed in a social democratic manner is at best my conception of the aspirational norm that is imperative for the vindication of the said framework norm.

(b). The Right to Rule in a Particular Way:

As to the right of a regime which already legitimately occupies office to enact certain laws or take certain actions, James Crawford has noted that "at the international level the point

⁷⁶ See N. MacCormick, ibid, at 1. See also A. Przeworski, Capitalism and Social Democracy (Cambridge: Cambridge University Press, 1985) at 241-244.

of human rights is not merely to relate the individual to public power, but to protect him or her from abuses of public power, including abuses supported by the majority."⁷⁷

Happily, the international legal system is replete with norms which define the scope of permissible conduct for municipal regimes. While some of these norms may not be opposable to some regimes because of the rule that states must, in general, consent to the application of any international legal rules to them, many of them are widely thought to enjoy the status of ius cogens and are therefore applicable to all states, irrespective of their consent.⁷⁸

For as Ingrid De Lupis has asked, "Is it reasonable to presume that a state in 1974, can validly enact legislation on slavery or genocide and claim that since it is not party to the conventions on these matters it is free to do as it pleases in its 'reserved domain'?"⁷⁹

I think not. For many of the relevant norms are widely thought to be norms ius cogens which are peremptory in character, and therefore binding on all states irrespective of their consent. Such norms overreach the sovereignty of all states.

The norm proscribing the commission of the crime of genocide, which is in essence constituted by any physical violence or other actions or policies perpetrated against any ethnic, cultural or racial group with intent to destroy the said group in whole or in part, has for long been recognised as part of both treaty and customary international law as well as a norm ius

⁷⁷ See J. Crawford, supra, at 115.

⁷⁸ See for example I.D. De Lupis, International Law and the Independent State (London: Gower, 1987) at 129.

⁷⁹ See I.D. De Lupis, supra.

cogens. The concept has been entrenched in the so-called Genocide Convention⁸⁰ and the decision to adopt the said Convention is partly traceable to the horror of the Holocaust, and the pioneering work of Raphael Lemkin who is reputed to have coined the term from the ancient Greek word "genos" which meant race or ethnicity.⁸¹

In a recent indication of provisional measures, the International Court of Justice has reiterated the importance of the observance of the norm proscribing genocide by states and even non-state entities. The Court ordered that:

"The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should ... ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organisations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the muslim population of Bosnia and Hercegovina or against any other national, ethnical, racial or religious group;..."⁸²

⁸⁰ See the Convention on the Prevention and Punishment of the Crime of Genocide, 9th December 1948, 78 U.N.T.S. 277.

⁸¹ See M. Lippman, "The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later" (1994) 8 Temple International and Comparative Law Journal 1 at 3. On the nature of this crime, see also L. Bruun, "Beyond the 1948 Convention-Emerging Principles in Customary International Law" (1993) 17 Maryland Journal of International Law and Trade 193; and D. Kresock, "Ethnic Cleansing' in the Balkans: The Legal Foundations of Foreign Intervention" (1994) 27 Cornell International Law Journal 203.

⁸² See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Hercegovina v Yugoslavia (Serbia and Montenegro)), Order of 8th April 1993, 32 I.L.M. 888. See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Hercegovina v Yugoslavia (Serbia and Montenegro)), Order of 13th September 1993, 32 I.L.M. 1599; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, [1951] I.C.J. Rep. 15; and the United Nations Security Council Resolution on the Bosnian Serb Attack on Srebrenica, 16th April 1993, 32 I.L.M. 931. For detailed discussions of this concept, see M.C. Bassiouni, "International Law and Human Rights" in M.C. Bassiouni, ed., International Criminal Law (Dobbs Ferry, New York: Transnational, 1986); and L.C. Green, "International Criminal Law and the Protection of Human Rights" in B. Cheng and E.D. Brown, eds., Contemporary

The dominant conception of genocide does not, however, include the phenomenon of "cultural genocide", otherwise referred to as "ethnocide" that is as pernicious in effect as the other manifestations of genocide. Cultural genocide is thought to include any systematic activity or policy designed to wholly or partly eliminate an ethnic group's culture, artifacts, architecture, religion, language and social institutions.

Despite the exclusion of this aspect of the concept of genocide from the definition in the genocide convention, notably at the insistence of countries which had a long history of such conduct against their indigenous and enslaved peoples, there is little doubt today that any regime which indulges in cultural genocide will be open to international condemnation as perpetrating a 'crime against humanity', the definition of which is wide enough to accommodate such conduct.⁸³ Accordingly, this broader notion of genocide is, I argue, an international legal standard against which the exercise of municipal governmental power must be measured.

Another international legal norm which is of utility in this respect is the norm proscribing the enslavement of any individual or people. Article 6 of the Charter of the Nuremberg Tribunal⁸⁴ described such conduct as a crime against humanity but the proscription of slavery and slave related practices by the transnational law of Europe dates back to the 1860's, but has,

Problems in International Law (London: Stevens, 1988).

⁸³ See P. Burns, "Crimes Against Humanity" (1994) Criminal Law Forum 131; and M.C. Bassiouni, "Crimes Against Humanity: The Need for a Specialised Convention" (1994) 31 Columbia Journal of Transnational Law 457 at 485. However, whether or not the definition of a 'crime against humanity' applies to peacetime conduct remains controversial.

⁸⁴ See The Charter of the Nuremberg Tribunal (Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and the Charter of the International Military Tribunal), 8th August 1945, 82 U.N.T.S. 279 (hereinafter "Charter of the Nuremberg Tribunal").

like most other rules of that legal regime, been adopted as part of the universal law of nations. This norm of international criminal law is undoubtedly part of both contemporary customary and treaty international law. It is also a norm ius cogens.⁸⁵

If a government in its actions and in the formulation of governmental policy violates the tenets of the anti-enslavement norm, that government will be open to international opprobrium and sanction for the violative conduct and/or policy. Accordingly, the anti-enslavement norm is a criterion for the normative evaluation of the exercise of governmental power along the legitimacy continuum. Professor Cheriff Bassiouni has identified some 79 international legal instruments and documents that have contributed to the outlawry of slavery and the elevation of the anti-enslavement norm to the status of a peremptory requirement in the international legal order.⁸⁶ The international legal system has also developed norms which prohibit discrimination based on race, religion, ethnicity and gender as well as norms which seek to provide a positive normative bulwark for the protection of racial, ethnic, religious and cultural minorities. In Malone's view, the non-discrimination norm has probably attained the rank of a peremptory

⁸⁵ See U.O. Umozurike, "The African Slave Trade and the Attitudes of International Law Towards It" (1971) 16 Howard Law Journal 334, 338.

⁸⁶ See M. C. Bassiouni, "Enslavement as an International Crime" (1991) 23 New York University Journal of International Law and Politics 445 at 454. Also see M.C. Bassiouni, "The Crimes of Slavery and the Slave Trade" in M.C. Bassiouni, ed., International Criminal Law (Dobbs Ferry, New York: Transnational, 1986); and M.C. Bassiouni and V.P. Nanda, "Slavery and Slave Trade: Steps Towards Eradication" (1972) 12 Santa Clara Law Review 424. Amongst the more notable of these instruments are the Universal Declaration on Human Rights, 10th December 1948, U.N. Doc. A/810/71, art.4; the International Covenant on Civil and Political Rights, 19th December 1966, 6 I.L.M. 360, art.8; the African Charter on Human and Peoples' Rights, 19th January 1981, 21 I.L.M. 59, art.5; the American Convention on Human Rights, 22nd November 1969, 9 I.L.M. 673, art.6; and the Slavery Convention, 25th September 1926, 60 L.N.T.S. 253.

norm of general international law.⁸⁷ To Van der Vyer, that norm is a source of an obligation erga omnes for all states.⁸⁸ Professor Michael Reisman has isolated some six international legal instruments which proscribe the said conduct and yet more remain.⁸⁹

Universal guarantees of the rights of the above-mentioned minorities is scant in the corpus of the contemporary law of nations. There are, however, some eminent examples of international standards for the treatment of such minorities as distinct from the norm prohibiting any form of discrimination against them. The most notable of such standards being the right of minority peoples to self-determination.⁹⁰ The African Charter and the ICCPR both guarantee this right to all peoples, including minority peoples. Furthermore, article 27 of the ICCPR provides that:

"In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or

⁸⁷ See M.K. Malone, supra, at 88.

⁸⁸ See J.D. Van der Vyver, supra. See also the Barcelona Traction, Light and Power Co., Ltd [1970] I.C.J. Rep. 3 at 32.

⁸⁹ See W.M. Reisman, Sovereignty, supra, at 868. See also the United Nations Declaration on Elimination of All Forms of Racial Discrimination, 21st November 1963, A/Res/1904(XVIII), 3 I.L.M. 164; International Convention on the Elimination of All Forms of Racial Discrimination, 7th March 1966, 660 U.N.T.S. 195; International Convention on the Suppression and Punishment of the Crime of Apartheid, 30th November 1973, A/Res/3068(XXVIII), 13 I.L.M. 50; Convention Against Discrimination in Education, 14th December 1960, 429 U.N.T.S. 32; Convention on Equal Remuneration for Men and Women Workers for Equal Work of Equal Value, 29th June 1951, 165 U.N.T.S. 303; Convention on the Elimination of All Forms of Discrimination Against Women, 18th December 1979, A/Res/34/180, 19 I.L.M. 33; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 25th November 1981, A/Res/36/55, 21 I.L.M. 205; International Covenant on Civil and Political Rights, 16th December 1966, 6 I.L.M. 368 (hereinafter "ICCPR"); and the African Charter on Human and Peoples' Rights, 19th January 1981, 21 I.L.M. 59 (hereinafter "African Charter").

⁹⁰ See for example F.L. Kirgis, supra; H.G. Espiell, supra; and U.O. Umozurike, Self-Determination in International Law (Hamden: Archon, 1972).

to use their own language."

The recent United Nations Declaration on the Rights of Minorities contains provisions to the same effect.⁹¹ Thus non-institutionalised discrimination or oppressive conduct against any of the protected groups may violate international legal standards, some of which are of higher juridical standing than others.

The conduct of municipal regimes may also be assessed against environmental and socio-economic standards prescribed by the international legal order. Amongst others, the Convention on Biological Diversity⁹² prescribes environmental standards which, even though not binding on most states as yet, are useful barometers for the evaluation of the conduct of municipal regimes with respect to the lands and natural resource reserves of their indigenous and minority peoples. Such peoples often bear the brunt of devastating abuses of power by municipal regimes controlled by the dominant groups in society intent only upon their own nourishment at the cost of carrying out "environmental genocide" against the said peoples through the slow but steady degradation and ravishing of their homeland; a homeland to which they are intensely bonded.

⁹¹ See the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 3rd February 1993, A/Res/47/135, 32 I.L.M. 912. See also the International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 27th June 1989, reproduced in B. Weston, R. Falk and A. D'Amato, eds., Basic Documents in International Law and World Order (St. Paul, Minnesota: West, 1990); and the International Labour Organisation Convention (No. 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 26th June 1957, 328 U.N.T.S. 247.

⁹² See the Convention on Biological Diversity, 31 I.L.M. 822. See also the Stockholm Declaration on the Human Environment, 5-16th June 1972, U.N. Doc. A/CONF. 48/14, 11 I.L.M. 1416; and the Rio Declaration on Environment and Development, 31 I.L.M. 874. For an discussion of the Bio-diversity Convention, See M. Chandler, "The Biodiversity Convention: Selected Issues of Interest to the International Lawyer" (1993) *Colorado Journal of International Environmental Law and Policy* 141.

The provision in the African Charter that "all peoples shall have the right to a general satisfactory environment favourable to their development" is thus a commendable one.⁹³

The International Covenant on Economic, Social and Cultural Rights⁹⁴ contains what I consider to be the core of international socio-economic standards for the evaluation of the actions and policies of municipal governments. Under that convention, states which are party to it are merely required to take steps towards the progressive achievement of the said standards. This makes the requirements of the instrument aspirational in nature and not immediately binding. Nevertheless, its provisions provide a normative yardstick for the assessment of municipal governance, a sort of ideal towards which all municipal regimes are bound to work. The European Social Charter, the African Charter and the American Convention on Human Rights are three regional legal instruments which also require similar standards of governance.⁹⁵

(c). Systemic Legitimacy:

Does contemporary international law concern itself with the regulation of the nature of macro political structures, prescribing how an entire political system may be set up and how it may not? I think so. For the contemporary law of nations did not close its eyes to the horrors

⁹³ See African Charter, *supra*, art. 24.

⁹⁴ See the International Covenant on Economic, Social and Cultural Rights, 16th December 1966, 6 I.L.M. 360 (hereinafter "ICESCR").

⁹⁵ See the European Social Charter, 18th October 1961, 529 U.N.T.S. 89, arts. 1-19; the African Charter, arts. 15-18 and 22; and the American Convention on Human Rights, 22 November 1969, 9 I.L.M. 673, art. 26.

of the apartheid system in the Republic of South Africa and Namibia. Indeed, even though it was done in a somewhat retrospective fashion, contemporary international law did not close its eyes to the scourge of Nazism and Fascism.

Post-1945 international law squarely asserted the illegitimacy of the nazi regime in Hitler's Germany as well as the illegitimacy of the fascist regimes of General Mussolini in Italy and General Franco in Spain. The trial and punishment of some of the major actors in the said regimes for their conduct while carrying out the apparently "lawful" requirements of the said systems adequately symbolises the displeasure with which the systems in question are viewed under the public law of nations.⁹⁶ In any case, a Nazi political system is, *inter alia*, an institutionalised arrangement for the design and perpetration of the crime of genocide, and on that score alone is outlawed by international law. Fascist regimes are to say the very least an aggravated and institutionalised contravention of the right of the subjugated population to self-determination, and are also clearly unlawful.

The Apartheid regimes that for decades constituted the administrative systems of South Africa (and prior to independence in each of Rhodesia and Namibia) were undoubtedly a contravention of international law.⁹⁷ Apartheid, a most extreme form of institutionalised and systemic racial discrimination accompanied by the most hideous kind of racist economic, social

⁹⁶ See Charter of the Nuremberg Tribunal.

⁹⁷ See L.B. Sohn, Rights in Conflict: The United Nations and South Africa (New York: Transnational, 1994); A.J. Goldberg, "The Status of Apartheid Under International Law" (1985) 13 Hastings Constitutional Law Quarterly 1 at 3; and K.D. Kaunda, "Humanism and Apartheid" (1993) 37 St. Louis University Law Journal 835, 837.

and cultural violence, was specifically outlawed by conventional international criminal law.⁹⁸

Thus, while the international court of justice was quite correct in stating in the Nicaragua Case⁹⁹ (as a statement of the traditional position) that at customary international law, a state was entirely free to choose its own social, economic and political system, that position does not appear to represent the current state of international law. It is now fairly well settled, I think, that a state cannot, whatever the plenitude and amplitude of its sovereignty, choose a political system which entrenches mass murder or genocide for instance as a pattern of governance or a modus vivendi.

(ii). The Emergent Concept of Legitimate Governance and the Open Society:

If it is reasonable to assume that the essence of the development of international legal standards for the evaluation of the legitimacy of municipal governments and their exercise of governmental power is the achievement of truly open societies the world over where every member of any given polity shall have the opportunity to fully develop and realise his or her potential, then any such facilitative regulatory framework ought to emphasise the achievement of socio-economic equity both within individual nations and in the world community; our global neighbourhood.¹⁰⁰

⁹⁸ See The Convention on the Suppression and Punishment of the Crime of Apartheid, 30th November 1973, 1015 U.N.T.S. 244.

⁹⁹ See Case Concerning Military and Paramilitary Activities in and Around Nicaragua (Nicaragua v United States) (Merits) [1986] I.C.J. Rep. 14 at 108.

¹⁰⁰ Phillippe Sands has however questioned this notion of an existing global community. According to that scholar, "the very term 'community of states' seems increasingly self-contradictory. Notions of community suggest a sense of deep, horizontal comradeship among groups and individuals, growing out of its members' ability to imagine communion amongst

This is not however the case with the corpus of contemporary international law, which has seriously overemphasised the development of civil and political rights to the detriment of socio-economic rights. The point not being that such norms are not at all present in the international legal system, but that even by the standards of international law, they are present in severely weak forms, creating only the weakest of aspirational obligations. Indeed, when it is appreciated that such an important participant in the game of nations, as the United States has not ratified the ICESCR,¹⁰¹ then the severity of the constraints which impede the development of these types of normative standards becomes even clearer.

Why has this been so? Why is it that the norm in favour of popular participation in governance has achieved strong standing in international law while norms in favour of socio-economic equity, the so-called social and economic rights, remain immature as advanced forms of leges in statu nascendi? And yet the enjoyment of one is bound up with the enjoyment of the other? The reason seems to be the domineering influence of western liberal democratic states on the development of the rules and norms of international law.¹⁰² Liberalism, with its

themselves. Traditional notions of Sovereignty, Territory and State lie uncomfortably with the very idea of community, since they establish a territorial and proprietary notion of international relations which belies a sense of common interest and common action." See P.J. Sands, "The Environment, Community and International Law" (1989) 30 Harvard International Law Journal 393.

¹⁰¹ See C.De La Vega, "Protecting Economic, Social and Cultural Rights" (1994) 15 Whittier Law Review 471; and P. Alston, "U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy" (1990) 84 American Journal of International Law 365.

¹⁰² For an adumbration of the liberal idea of international relations, see M.W. Zacher and R.A. Mathew, "Liberal International Theory: Common Threads, Divergent Strands" in C.W. Kegley, ed., Controversies in International Relations Theory: Realism and The Neoliberal Challenge (New York: St. Martin's 1995).

assumptions about the superiority of civil and political rights over social and economic rights, and its edification of "formal equality" to the detriment of "substantive equality" has deeply permeated both the theory of international law and the practice of its law-making fora.¹⁰³

Moreover, since it is mostly the citizens of developing states who severely need socio-economic rights, and since their often economically handicapped governments can not by and large afford to vindicate such rights without assistance, the lot would have fallen on these same western liberal nations to provide the necessary resources, in fulfilment of the right to development stridently asserted by the developing world. Socio-economic rights have therefore remained stunted as formal entitlements required by the international legal system.

As a conceptual ideal, a society which passes an evaluation based on the skewed paradigm currently presented by the law of nations, will certainly not be a truly open society. As most liberal democracies have begun to find out, a minimum of socio-economic equity must accompany civil and political rights for them to be useful. It is therefore disheartening to note as I have, that whilst formally binding norms have undoubtedly emerged in international law which seek to address and perhaps redress the stark inequalities in formal opportunities for political participation, no such norms have emerged seeking to redress or even address the stark inequalities in the allocation of socio-economic value within and without¹⁰⁴ municipal legal orders.

¹⁰³ See C.C. Ferguson, "Redressing Global Injustices: The Role of Law" (1981) Rutgers Law Review 410.

¹⁰⁴ See I.L. Head, "The Contribution of International Law to Development" (1987) 25 Canadian Yearbook of International Law 29; and I.L. Head, "South-North Dangers" (1989) 68 Foreign Affairs 71.

States which domestically espouse and promote egalitarian principles of distributing socio-economic value are content to support the entrenchment of popular rule in other lands while balking at the idea of supporting egalitarianism in the socio-economic sphere in those other places. This attitude, I argue is a disservice to the realisation of sustainable systems of popular rule, for the right to political participation and the right to be free from foreign rule, genocide, enslavement and environmental devastation, are emptied of meaning in the absence of a more equitable distribution of resources. The rhetoric of sovereignty need not continue to obscure the fact that our world is increasingly taking on the character of a 'global neighbourhood', where the welfare of neighbours is the concern of each inhabitant.

D. SUMMARY OF THE ARGUMENT:

In this chapter, I have argued that the contemporary international system is replete with norms in favour of legitimate governance, and that such norms constitute a useful corpus of evaluative criteria with which to assess the legitimacy or otherwise of municipal governance. In my stride, I have preferred and utilised the normative approach to the question of legitimate governance as opposed to the descriptive method. My normativity is however a quasi-normativity founded in the textual affirmations of the norms of international law, especially those that are thought to have attained the rank of ius cogens.

I also noted the traditional insensitivity of international law to the question of normative legitimacy of municipal regimes, and contended that whilst the contemporary international legal regime shares with its forbear an aversion for the regulation of the socio-economic equity of municipal orders (which, as I suggest, is an imperative for a truly participatory political order),

the former has managed to overcome the latter's remarkable insensitivity to the political legitimacy of municipal governance.

The chapter is therefore an exposition of the possibility of a conceptual and operational measurement of the tendency of a particular municipal polity to normative legitimacy within the ambit of the admittedly less than adequate normative edifice constructed by the law of nations for that purpose. It is also a demonstration of the potential for the external evaluation of municipal governance on a scale that is also external to the object of evaluation.

CHAPTER FOUR**THE GLOBAL PROCESS OF LEGITIMATION AND THE LEGITIMACY OF GLOBAL GOVERNANCE****A. THE CRUX OF THE ARGUMENT:**

I have argued in chapter three of this thesis that the international legal order presently harbours a corpus of norms against which the legitimacy of municipal governance may be profitably evaluated. In this chapter, I argue that since the said corpus of norms are useful only to the extent that the norm-applying institutions of the international society truly fulfil their mandate, it is apposite to examine and evaluate the process and effects of international legitimation as well as the legitimacy of global governance: how the entire machinery operates and how to bend it to the service of normative legitimacy, justice and equity. To this end, I have organised this chapter into two major parts.

In the next part of this chapter, I argue that the current process of international legitimation requires an overhaul in order to formally collectivise it, strengthen it, and ensure that it actually complements and reinforces the norms in favour of legitimate governance within the global legal system. I also argue that the exercise of the power of (de)legitimation, whether collectively or individually, has certain remarkable normative and practical effects on the behaviour and character of states, and on the peoples within them.

In the following part, I contend that the legitimacy of both the institutions and rules of global governance are essential to the long-term viability and effectiveness of the present process of global governance. I suggest that because of the threat to systemic legitimacy currently posed by incoherent application of norms and the domination of the UN system by a few great powers,

there is an urgent need to reorganise that system in order to ensure its legitimacy. Accordingly, I recommend ways of strengthening institutional and rule legitimacy in the global legal system, which is the operative environment within which the requirements of the norms in favour of legitimate governance are interpreted and applied. I also argue that the very legitimacy or otherwise of international legal rules and institutional arrangements can also be usefully evaluated with the aid of the same norms.

B. THE PROCESS AND EFFECT OF INTERNATIONAL (DE)LEGITIMATION:

(i). The Process of (De)Legitimation:

Having identified and clarified legitimacy norms in the international legal system which may be fruitfully utilised to evaluate the legitimacy of municipal and even international governance, it is important to examine the process by which their application is decided and their interpretation settled, for often times the very act of characterising a situation as one thing or the other, or of determining the meaning of a textually-expressed norm, will involve a choice of meaning, a choice of values; a political and ideological choice.¹ This is because of the characteristic vagueness of principles and norms of legitimacy, which leaves the way open to the process of their application to determine their essential character in any given situation.²

Legitimation or delegitimation in the international system refers to the acceptance or

¹ See J.A. Salmon, "Some Observations on Characterisation in Public International Law" in A. Cassese, ed., UN Law/ Fundamental Rights: Two Topics in International Law (Alphen aan den Rijn, The Netherlands: Sijthoff and Noordhoff, 1979) at 7.

² See I. Claude, "Collective Legitimation as a Political Function of the United Nations" (1966) 20 *International Organisation* 367 at 370.

rejection by states of the propriety of a government, governmental conduct, or an international rule or institutional arrangement, according to set or ascertainable principles: what Inis Claude saw as the denial of dejure status to a defacto governmental or regional regime so as not to sanctify its might as right.³ Such acceptance or rejection, which may be indicated by, but is not limited to, the grant or withdrawal of recognition, must in turn accord with the basic tenets of legitimate governance already outlined in chapter three of this thesis. The process of international (de)legitimation which has traditionally been a function of relevant political institutions may be collective or decentralised. Decentralised (de)legitimation, which has been the traditional process of (de)legitimation, occurs in a unilateral fashion, in fits and starts, as each nation decides the course of action that it desires to take.⁴

Centralised or collective legitimation is done within the framework of international institutions. In David Caron's view, collective legitimation refers to the capacity of an international organisation to take decisions which influence the global image of the legitimacy of a government or its actions and ideas.⁵ It also includes the capacity of states within international organisations to (de)legitimate international rules and institutional arrangements. The value of the collective method is to synchronise, ease and hasten the legitimation process, to avoid a situation where there is a multiplicity of "legitimacies", where a government is, for

³ Ibid, at 369.

⁴ See J.G. Starke, Introduction to International Law (London: Butterworths, 1989) at 130. See also I. Brownlie, Principles of International Law (Oxford: Clarendon Press, 1979); M. Lachs "Recognition and Modern Methods of International Cooperation" (1959) 25 *British Yearbook of International Law* 258.

⁵ See D.D. Caron, "Governance and Collective Legitimation in the New World Order" (1993) 6 *Hague Yearbook of International Law* 29 at 30-31.

instance, legitimate in the eyes of some of its peers and illegitimate in the eyes of others.

Hersch Lauterpacht identified three cases in the 19th century where an international community utilised this method: namely, in the cases of the recognition of Greece and Belgium by multilateral treaties and the recognition of Albania by an international conference.⁶ John Dugard has furthermore identified the use of the said method in the Stimpson Doctrine of 1932 and the practice of the League of Nations, where admission to that body, which was effected by the support of a two-third majority was viewed by aspirant states as collective recognition of their statehood.⁷ A similar argument may be made in the case of the legitimization of governments.

Despite Professor Ebere Osieke's powerful contention otherwise, and the initial intendment of the creators of the U.N system, the admission of a state to the U.N or the acceptance of the credentials of the representatives of a government by the U.N General Assembly has in contemporary times come to signify the legitimacy of that state or government in the eyes of the majority of states. The decision of the World Court that such admission is entirely a political question is at best a statement of the law as the court saw it in the 1940's.⁸

⁶ See H. Lauterpacht, Recognition in International Law (Cambridge: Cambridge University Press, 1947) at 68.

⁷ See J. Dugard, Recognition and the United Nations (Cambridge: Grotius, 1987). See also L.M. Friedlander, "The Admission of States to the League of Nations" (1928) *British Yearbook of International Law* 84 at 85.

⁸ See Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, [1947-8] I.C.J. Rep. 57 at 58. Moreover this decision does not stand up to the later practice of the UN of recognising non-traditional types of governments as the legitimate governments or representatives of the relevant state despite the existence of defacto but illegal regimes in those states. See for example A/Res/32/9E, 4th November 1977, which recognised the United Nations Council for Namibia as the "government" of that country, and A/Res/s-9/2, 4th May 1978 which recognised The South West Africa People's Organisation (SWAPO) as the

Both the collective and the decentralised model were, however, traditionally premised upon the standard of effectivity of a government, governmental conduct or international rule or institution. In each case, effectivity conferred legitimacy.⁹ This principle, which is traceable to Vattel, has been stated by Hersch Lauterpacht thus:

"It 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 authority within its territory. To deny that right to a state is to question its independence. For this reason states are not normally concerned with the changes in the composition or in the form of government which occur in other countries... This applies to changes taking place both in conformity with and in violation of the constitutional laws of the state in question."¹⁰

Consequently under traditional international law, (de)legitimation was generally considered a discretionary political act and there was no legal duty as such to recognise or de-recognise a government.¹¹ Hersch Lauterpacht had, however, contended as far back as 1947 that there was a quasi-judicial function in the grant or withdrawal of recognition because states cannot and are not entitled to claim the right to serve exclusively the interests of their national policies regardless of the principles of international law.¹² This quasi-judicial duty consists in

sole and authentic representatives of Namibians.

⁹ See H. Kelsen, General Theory of Law and State (Cambridge, Massachussets: Harvard University Press, 1945).

¹⁰ See H. Lauterpacht, supra, at 87.

¹¹ See C.H. Alexandrowicz-Alexander, "The Quasi-Judicial Function in the Recognition of States and Governments" (1952) 46 American Journal of International Law 631; S.K. Hornbeck, "Recognition of Governments" (1950) 44 American Society of International Law Proceedings 181; and I. Claude, supra, at 372.

¹² See H. Lauterpacht, supra, at 6. Kelsen agrees. See H. Kelsen, "Recognition in International Law: Some Theoretical Observations" (1941) 35 American Journal of International Law 605.

the discretionary evaluation of the facts upon which recognition is demanded according to a set of criteria.

Despite the quasi-judicial function involved in the (de)recognition or (de)legitimation of governments or governance, traditional international law did not assign any role in the process to formal judicial bodies. The discretionary character of the said function prevented this approach, for the judicial function is concerned with the interpretation of legal rules and the imposition of binding decisions on relevant juristic entities. Indeed, Hersch Lauterpacht who so fervently asserted the quasi-judicial character of the (de)recognition function, also argued stridently in support of the traditional exclusion of judicialism from this area of the law of nations.¹³

Has not the contemporary law of nations altered its traditional posture with respect to this area of the law? I argue that since traditional international law, including the law of recognition, which was premised on the legitimacy of effectivity rather than the effectivity of legitimacy has significantly altered its posture in the opposite direction, the law of recognition, ipso facto the core of the law of legitimation, must be deemed to have altered its posture in equal measure. It behooves international legal scholars, as the accountants of the international normative process¹⁴, to recognise and articulate this change towards normative legitimism in the law of recognition, for it is no longer true that "legitimism has no application in the contemporary

¹³ See H. Lauterpacht, supra, at 69-70.

¹⁴ See T. Farer, "Harnessing Rogue Elephants: A Short Discourse on Intervention in Civil Strife" in R. Falk, ed., The Vietnam War and International Law (Princeton: Princeton University Press, 1968) at 1093.

practice of states concerning the recognition of new governments."¹⁵

Indeed, the move towards normative legitimism dates back to the work of Hugo Grotius who was convinced that a group which claims to be the government of a state in defiance of the internal law of the state was not entitled to international recognition as its lawful government.¹⁶ The doctrine of legitimism which originally meant dynastic or monarchical legitimism¹⁷ has now divorced itself of its rather unfortunate ancestry and has come to be centred around the concept of popular legitimism.

The way towards the re-interpretation of the law of recognition in the service of the emergent concept of legitimism is cleared by the rule, so well stated by Georg Schwarzenberger, that recognition remains a discretionary matter only in so far as the recognising state (or international organisation) is not otherwise limited by customary international law or by its treaty obligations.¹⁸ And in his view, nothing in international law prevents states from binding themselves in law to recognise only popularly sanctioned regimes.¹⁹

Such international legal obligations are, I argue, already present in the international system. As Professor John Dugard has pointed out, the traditional doctrine of effectivity which has guided the law of recognition for ages has on occasion been overlooked in United Nations'

¹⁵ See B.N. Mehrish, India's Recognition Policy Towards the New Nations (Delhi: Oriental, 1972) at 13-14.

¹⁶ See T. Chen, The International Law of Recognition (London: Stevens, 1951).

¹⁷ Ibid, at 105.

¹⁸ See G. Schwarzenberger, A Manual of International Law, Vol.I (London: Stevens, 1960) at 62-63.

¹⁹ Ibid, at 71.

practice in the service of the norm in favour of the self-determination of peoples, which has become an important criterion to be considered in the decision to recognise a state or a government.²⁰

In this view he has the support of Professor J.E.S. Fawcett, who as far back as 1968, introduced the idea of self-determination as a criterion for the recognition of governments;²¹ as well as that of James Crawford, who does not however go as far. Crawford limits his position by excluding independent states and restricting such use of the right to self-determination to the case of its denial to "Self-determining units", particularly those classified as non-self-governing units.²² While I agree with Dugard that there is no compelling reason why this limitation should be imposed, it is significant to note that Crawford has at least joined in the introduction of the language of rights in the rhetoric of recognition.²³

The right to self-determination of all peoples as well as the norm prohibiting racial discrimination are widely thought to enjoy the status of *ius cogens*.²⁴ So also is the proscription of genocide and enslavement. The fundamental character of peremptory norms is that they are norms from which no derogation is permitted. Any treaties entered into or acts done by or

²⁰ See J. Dugard, *supra*, at 79.

²¹ See J.E.S. Fawcett, *The Law of Nations* (London: Allen Lane, 1968); J.E.S. Fawcett, "Security Council Resolutions on Rhodesia" (1965-66) 41 *British Yearbook of International Law* 102 at 112.

²² See J. Crawford, *The Creation of States in International Law* (Oxford: Clarendon, 1979) at 84-106.

²³ For an account of this process, see K. Knop, "The 'Righting' of Recognition: Recognition of States in Eastern Europe and the Soviet Union" (1992) *Canadian Council on International Law Proceedings* 36 at 37.

²⁴ See for example J. Dugard, *supra*, at 151-152.

within a state which contravene any such norm is null and void. In keeping with this character,

I agree with Dugard that:

"The modern law of non-recognition may be formulated in the following terms. An act in violation of a norm having the character of jus cogens is illegal and is therefore null and void...states are under a duty not to recognise such acts."²⁵

If, as I argue in this thesis, the recognition of a government means that that government is deemed, for the purpose of international relations, to be the legitimate representative of the people englobed by the relevant state, then the (de)recognition of a municipal regime is (de)legitimizing.²⁶ On what basis therefore should the international community, especially in the exercise of its power of collective legitimation via the instrumentality of the United Nations, accord such (de)legitimizing (de)recognition to a regime, rule or institution other than on the basis of the vindication of its constitutional norms?

Aside from the controversy over whether or not China was to be represented at the United Nations by the government of the Peoples Republic of China (the mainland) or that of Taiwan, in the traditional practice of the United Nations General Assembly, which is the town-meeting of our global neighbourhood, no issue of (de)recognition or (de)legitimation arose as relates to the acceptance of the credentials of the representatives of states in the assembly. In 1974, however, the credentials of the representatives of South Africa's apartheid regime were effectively rejected. This was the first time the right of self-determination of a people undoubtedly informed a collective international decision to de-recognise and thus de-legitimate

²⁵ See J. Dugard, supra, at 135. See also H.J. Richardson, "The Obligation to Withdraw Recognition from Pretoria as the Government of South Africa" (1987) 1 Temple International and Comparative Law Journal 153 at 155-167.

²⁶ See H.J. Richardson, ibid, at 161.

a regime.²⁷ And this was a perfectly lawful and viable action taken in vindication of the contravened peremptory norm of international law, and was sanctioned under the Rules of Procedure of the Assembly. The said rules provide an opportunity for states to challenge the credentials of the representatives of other states.²⁸ Contrary to widespread belief, the credentials process has always been tied up with the dominant theory of recognition. Now that the basis of recognition has altered to accord with the shift in international law towards legitimism, the credentials process ought to alter to reflect this change. Thus, especially in clear cases of the violation of a peremptory norm of international law, as in the case of Namibia, South Africa, Haiti, Myanmar and Nigeria, the illegitimate government in effective power ought to be de-accredited.²⁹

In order to reduce the possibility of the abuse of power by the relevant organ of the UN, it is suggested that such de-accreditation ought to be subject to judicial review by the ICJ to ensure that the action was taken pursuant to a contravention of a peremptory norm, especially if the decision was taken in the Security Council, or if taken in the General Assembly, was obtained by less than 80% of the total number of states present and voting.³⁰ The ICJ's decision

²⁷ See L.B. Sohn, Rights in Conflict: The United Nations and South Africa (New York: Transnational Press, 1994) at 128-129.

²⁸ See H.J. Richardson, supra, at 163-168.

²⁹ Ibid.

³⁰ Teson appears to support this general approach. See F. Teson, "The Kantian Theory of International Law" (1992) Columbia Law Review 53 at 99-100.

in the recent Bosnia Case,³¹ recognises the pre-eminence of the collective power of the UN to legitimate or de-legitimate governments, but is not authority for the view that that court cannot in suitable cases, review the exercise of this power.

In order to ensure that more issues which may lead to de-accreditation get either to the Assembly or the Council, and are actually placed on the agenda of the relevant political organ, I adopt the brilliant suggestion of the Commission on Global Governance that international civil society be empowered by the constitution of a Council of Petitions made up of eminent persona designata. This council shall receive relevant petitions from accredited non-governmental organisations in the present regard and shall have the power to place suitable petitions on the agenda of any of the political organs of the United Nations.³² This falls shy of the ambition of the securement of direct individual access to international tribunals and political organs, but is clearly an improvement on the current position.³³

(ii) The Effects of (De)Legitimation:

Even though the grant or withdrawal of recognition to a government and its accreditation or de-accreditation as the representative of the people of the relevant state are the principal

³¹ See Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Hercegovina v Yugoslavia (Serbia and Montenegro)), Order of 8th April 1993, 32 I.L.M. 888 at 894 or [1993] I.C.J. Rep. 3 at 10 (hereinafter "The Bosnia Case No.1").

³² See A Call to Action: Summary of Our Global Neighbourhood (Geneva: Commission on Global Governance, 1995) at 14-16.

³³ It has been noted that individuals, via Non-Governmental Organisations, already have access to the Inter-American Court of Human Rights, the European Court of Human Rights and the European Court of Justice, as amici curiae; and that the European Court of Justice grants limited standing to individuals. Not so for the World Court. See D. Shelton, "The Participation of NGO's in International Judicial Proceedings" (1994) 88 American Journal of International Law 611.

modes of legitimation or delegitimation in the international legal and institutional system, the argument as to whether recognition is constitutive or declaratory³⁴ is well beyond the scope of the present enquiry. Whichever is the case, the (de)legitimation function will still be present in the process; usually enabling its object to blossom to maturity or eventually decline in significance in the eyes of the international legal order. The process and outcomes of (de)legitimation may, however, have any of the following kinds of effect on both the object and the agent of (de)legitimation, as well as on the international system itself: it may have a normative, jurisprudential, political or socio-economic effect on the object; and/or a normative effect on both the agent and the international system.

The legitimation of a government, type or policy of governance, or an international rule or institutional arrangement may have a normative effect on the object. It may serve to reinforce the rule or norm of international law that is involved. The extent to which this is achieved will depend on the size and representativeness of the majority with which the legitimation was secured in the relevant international organ, or the number of states which separately endorse the legitimation³⁵. In this way such legitimations may aid, modify, and even regulate the process of congealing, which via a learning process, resulting in a mutually reciprocal equilibrium, transforms certain political declarations into binding obligations in the international legal order; for as Professor Franck has convincingly argued, international law is no more than "congealed politics."³⁶ Similar arguments may be made for de-legitimizations. And a good example is the

³⁴ For an adumbration of these two opposing viewpoints, see H. Lauterpacht, supra.

³⁵ See I. Claude, supra, at 375.

³⁶ See T.M. Franck and M.M. Munansangu, The New International Economic Order: International Law in the Making? (New York: UNITAR, 1982) at 2.

way in which decolonisation was achieved.

International (de)legitimations may also have some jurisprudential effects both within and without municipal orders. They may result in the treatment of the legislative, administrative and judicial institutions of the government and their decisions as invalid in the courts of other states and in the eyes of international law or the treatment of such institutions and their decisions as authoritative.³⁷

They may result in the grant, withdrawal or refusal of jurisdictional immunities, sovereign or diplomatic, from the representatives of a relevant regime or the grant of such immunities.³⁸ They may result in the denial or acceptance of the authority of the government to sue in the name of the relevant state in municipal as well as in international tribunals.³⁹ They may also affect the right of the regime to bind the relevant state in the conclusion of treaties. The Apartheid regime in pre-independent Namibia and the Cedras-led junta in Haiti could not for most purposes conclude valid international agreements on behalf of the Namibian and Haitian peoples, and at most were entitled to negotiate their own dethronement. International delegitimations also clear the way for all kinds of non-military unilateral or collective foreign assistance to local elements opposed to the regime; as well as for UN-authorized therapeutic

³⁷ See H. Lauterpacht, *supra*, at 90. See also 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. Rep. 16.

³⁸ *Ibid.* See also J.G. Starke, Introduction to International Law (London; Butterworths, 1989).

³⁹ See the Bosnia Case No.1, *supra*.

military action.⁴⁰

There may also be political and socio-economic effects in the case of a (de)legitimation. The relevant governmental regime may or may not be enabled to become a full member of the international community of governments in the sense of being enabled to enjoy the rights and privileges appertenant thereto. The regime may be open to diplomatic sanctions imposed unilaterally by states or authorised by the U.N. Such sanctions may be designed to either frustrate the regime's attempts to govern or punish the individual members of the regime personally.⁴¹ The duly authorised representatives of an illegitimate regime may also be refused accreditation as the authentic representative of the people of the relevant state in the organs of the U.N and in international diplomatic conferences such as the Third Law of the Sea Convention in which Namibia and South Africa were not represented by the illegal defacto regimes in power in those two states.

The socio-economic effects that readily come to mind are the control of the assets of the relevant State in foreign countries and the socio-economic damage often caused by the imposition of economic sanctions on some de-legitimated regimes. The control of the foreign assets of the state in question will properly lie with the lawful representatives of the people of that state and damage to the economy of the state is unavoidable in the event of the imposition of disciplining measures of an economic nature. The experience of the Cedras-led junta eloquently illustrates

⁴⁰ See for example the text of Security Council Resolution S/Res/940, 31st July 1994 in which the council authorised an armed invasion of Haiti to effect the departure from power of the illegitimate and de-legitimated Cedras-led junta.

⁴¹ See for example the resolutions imposed on Haiti and Haitian military rulers during the Cedras-era. See S/Res/841, 16th June 1993; S/Res/873, 13th October 1993; and S/Res/917, 6th May 1994.

this point.

Lastly, the legitimating function of non-formally binding instruments issued from a relevant international organisation or body may in practice augment the limited powers of the said organisation or body.⁴² In this sense the body will perform the quasi-judicial function of producing norms or rules which though they are formally non-binding, functionally behave as law: rules or norms which may inter alia serve as weak substitutes for stronger action.⁴³ Often times, such norms go on to have profound effects both on the character of the international legal and institutional system, and on the ordinary day to day lives of individuals; a good example being the delegitimation of colonial rule by the U.N General Assembly.

E. THE LEGITIMACY OF GLOBAL GOVERNANCE:

(i). The Necessity for Legitimacy in the Global System:

Professor Franck's question "why do powerful nations obey powerless rules?" captures the imperative necessity for an explanation for rule compliance in the international system that transcends coercion. An explanation which must, in view of the nature of that system, be based on some notion of the voluntary compliance-pull of the rules and institutional arrangements of that legal order, which is otherwise referred to as their "legitimacy".⁴⁴ Why is it that, absent

⁴² See D.D. Caron, supra, at 32-33.

⁴³ See R. Falk, "On the Quasi-Legislative Competence of the General Assembly" (1966) 60 *American Journal of International Law* 782 at 783; G.J.H. Van Hoof, Rethinking International Law (Deventer: Kluwer Law and Taxation, 1983); and O. Schachter, "United Nations Law" (1994) 88 *American Journal of International Law* 1 at 3.

⁴⁴ See T.M. Franck, The Power of Legitimacy Amongst Nations (New York: Oxford University Press, 1990) at 3; T.M. Franck, "Legitimacy in the International System" (1988) 82 *American Journal of International Law* 705 at 705-711; and L. Henkin, How Nations Behave:

a recognised Sheriff with all the trappings of a municipal police force, nations by and large obey most of the rules of international law? Why is it that the thousands of ordinary rules of international law, such as those relating to trade, investment, immigration, refugees, the seas, shipping, air transport, diplomatic and sovereign immunity, and treaty-relations, are for the most part observed by states; at least to the same extent that rules are observed in sheriff-enforced municipal systems? Why do some rules enjoy far greater adherence than others?

It is to the credit of Professor Franck's pioneering work that this issue has lately become very topical in the discourse of international law as an issue of legitimacy.⁴⁵ In his usual metaphoric manner, he had as far back as 1988, suggested that "[The] blackholes in the normative fabric [of the international legal system] may be due to a lack of legitimacy in the rules and institutional processes by which they are made, interpreted and applied."⁴⁶

I certainly agree; as far as legitimacy is conceived as a matter of the degree of the compliance-pull exerted by the norms and processes of a system; a continuum along which rules and institutions may make progress, but can never exhaust. And Franck is neither unaware of the need to treat legitimacy as on a graduated scale,⁴⁷ nor of the imperative need for social justice and equity in the global system. He is also cognisant of the capacity of injustice or inequity to pull towards rule disobedience.⁴⁸

Law and Foreign Policy (New York: Columbia University Press, 1979).

⁴⁵ See T.M. Franck, "Why a Quest for Legitimacy?" (1988) U.C. Davis Law Review 535.

⁴⁶ Ibid.

⁴⁷ See T.M. Franck, "Fairness in the International Legal and Institutional System" (1993-III) 240 Recueil des Cours 13 at 26.

⁴⁸ See T.M. Franck, Fairness, supra, at 41-44.

The legitimacy, i.e the voluntary compliance-pull, of international rules or institutional processes is thus critical to the sustenance of the generally non-vertical normative edifice of the international system. Without it the system cannot survive. Without it obedience to international legal rules would be severely minimised. Without it the international system we have now, imperfect as it is, would be replaced by a Hobbesian environment. The survival of the international system as we presently know it is, therefore, within a minimal margin of deviation, heavily dependent on the sustenance of the legitimacy of its rules and institutional arrangements. And this is the imperative necessity for legitimacy in the global system.

(ii). Institutional Legitimacy in the Global System:

According to Edward Carr:

"The ideal, once embodied in an institution, ceases to be an ideal and becomes the expression of a selfish interest, which must be destroyed in the name of a new ideal. This constant interaction of irreconcilable forces is the stuff of politics. Every political situation contains mutually incompatible elements of utopia and reality, of morality and power."⁴⁹

This dialectical interaction between utopia and reality, between normative idealism and national interest,⁵⁰ exposes in my view the janus-faced nature of institutional arrangements, the concurrent possibility of justice and evil within every human system.

If this is true, why does international law often deny its prescriptive duality and its concurrent capacity to do good and evil? Is it not because of the imperative need to legitimate itself, to convincingly apologise for its lack of even-handedness and its selectivity; to achieve

⁴⁹ Reproduced in D.D. Caron, "The Legitimacy of the Collective Authority of the Security Council" (1993) 87 American Journal of International Law 552.

⁵⁰ I use the expression "national interest" in the narrow sense. For a useful distinction between the narrower and wider views of the meaning of this expression, see L. Henkin, *supra*, at 331.

authority through the denial of the infamous part of its pedigree. To achieve universal adherence in a multi-cultural and diverse world, the law of nations requires to present itself as value-neutral, instead of value-laden; as designed to serve equitably the interests of all states.⁵¹ And this requires the denial of the duality of the international institutions and processes from which international law emerges and within which it is applied. Attempts are also made to deny the domination and hegemony of certain groups within these institutions; the "manufacturing" of the consent of other states to the rules and other outcomes that emerge from the said bodies.⁵²

Given, however, that international law is not necessarily more guilty of this failing than municipal law, and yet municipal law is widely accepted as a valuable, if imperfect, social-mediator,⁵³ I do not entirely agree with Koskeniemmi that international lawyers should view their professional integrity not as a demand for rigorous legal analysis but rather as a commitment to reaching the most just solution in the particular disputes he or she is faced

⁵¹ See M. Koskeniemmi, From Apology to Utopia: The Structure of International Legal Argument (Helsinki: Finnish Lawyers, 1989)

⁵² This is somewhat different from the Gramscian type of hegemony (the insidious inculcation of the values of the dominant group in non-dominant elements of the society resulting in a later "consensus" within the relevant polity of the two groups). The Gramscian form of hegemony is, however, by no means absent from the international system. In the present sense, consent is largely manufactured by gun-boat diplomacy and economic inducement. For a contemporary study of the gramscian type, see N. Chomsky and E. Herman, "Manufacturing Consent: The Political Economy of the Mass Media" in N. Chomsky and E. Herman, Manufacturing Consent : The Political Economy of the Mass Media (New York: Pantheon Books, 1988).

⁵³ See for instance, J.C. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall Law Journal 23; C.M. Yablon, "The Indeterminacy of Law: Critical Legal Studies and the Problem of Legal Explanation" (1985) 6 Cardozo Law Review 917; and D. Kennedy, "Towards a Critical Phenomenology of Judging" (1986) 36 Journal of Legal Education 518.

with.⁵⁴ I argue that international lawyers need not substitute rigorous legal analysis with the search for justice, what is required is to transcend mere doctrinal analysis; to climb on its shoulders in the search for justice. It is, therefore, a valuable enterprise to examine ways of enhancing the normative legitimacy of international norm/rule producing institutions.

The United Nations is the pre-eminent forum for norm/rule creation and application in the present global system; but to what extent is that institutional arrangement legitimate in the sense of perception by states in conformity with the legitimacy norms of the international system: the same norms that have already been exposed as facilitative of a normative evaluation of the legitimacy of municipal government and governance?

In spite of the presence of China and Russia, the UN is at present dominated by three western countries,⁵⁵ the first two nations being rather preoccupied with internal problems. Yet the United States, the undisputed superpower of the world, has on occasion accused the UN of "double standards" and of being "perverted by politicisation".⁵⁶ The hegemony exercised by the developing world within the General Assembly has not always allowed even the world's sole superpower to have its way. And this is some, albeit minimal, counterweight to absolutist western dominance of the international decision-making process. However, since the charter gives to the Security Council and not to the General Assembly the authority to enact most compulsory resolutions, this examination will concentrate on how to reform the Council towards the enhancement of its legitimacy, and I will attempt to do so despite the contention of scholars

⁵⁴ See M. Koskeniemi, *supra*.

⁵⁵ See D.D. Caron, *Governance*, *supra*, at 32.

⁵⁶ See T.M. Franck, "Of Gnats and Camels: Is there a Double Standard at the United Nations?" (1984) 78 *American Journal of International Law* 811.

such as Rudiger Wolfrum that the UN is legitimate as it now is.⁵⁷

The Security Council has recently been cited for illegitimacy in its composition and modus operandi. The council, which is an executive body, is said to be, at least in practice, the final arbiter of what it can do and what it cannot.⁵⁸ It is also said to have become a rubber stamp for U.S. foreign policy ambitions, as well as an outdated conception where though veto powers may still be exercised by Britain and France, Japan and Germany do not possess permanent seats.⁵⁹ Because of these failings, the Council is widely thought to require reforms. There is, however, no general agreement about the direction the reforms should take. Most writers agree though that any reform must be designed in such a way as to at once enhance the legitimacy and effectivity of the Council.⁶⁰

The issue of the desirability of a UN which is accused of being essentially a rubber stamp of U.S. foreign policy concerns both rule and institutional legitimacy. I demonstrate the undesirability of the selectivity which flows from this situation in my treatment of rule legitimacy, but suffice it here to state that a rubber stamp Security Council or General Assembly is no better than a rubber stamp U.S. Congress through which the Executive rams all its decisions because it possesses military and financial clout. If the people of the U.S. would have none of that, why should the rest of us?

⁵⁷ See R. Wolfrum, "The Security Council: Its Authority and Legitimacy (1993) American Society of International Law Proceedings 316.

⁵⁸ See B. Weston, "Security Council Resolution 678 and Persian Gulf Decision-Making: Precarious Legitimacy" (1991) 85 American Journal of International Law 516 at 517.

⁵⁹ See D.D. Caron, "Strengthening the Collective Authority of the Security Council" (1993) American Society of International Law Proceedings 303 at 305-307.

⁶⁰ Ibid, at 307.

As to the issue of "the ultimate guardian of UN legality" raised by the practice of the Council of determining the scope of its own powers,⁶¹ Professor Franck has noted that in both the majority and minority decisions in the Lockerbie Case⁶² that there are indications to the effect that there are inevitable limits to the discretion of the Council to discharge its functions under the UN Charter and that these limits cannot be left exclusively to the Council to auto-regulate or interpret. The court also noted that in extreme cases, it may exercise judicial review over such council determinations. The assumption of this judicial function is imperative, if the UN is to continue to enjoy even the current level of adherence: a sine qua non for its legitimacy. The ICJ, in Franck's view, may have achieved the status of the ultimate guardian of UN legality by a deft use of language: holding that it had found that the Council had acted intra vires. The implication of this holding being that it could have found otherwise: that it had the jurisdiction to determine what is intra vires the Council, and what is not.⁶³

⁶¹ Articles 2(7), 39, 41 and 42 of the Charter of the United Nations, appear to jointly confer auto-interpretive powers on the council in certain cases, but also see article 92 which makes the ICJ the principal judicial organ of the UN and conferred on it powers to interpret the charter. Article 36(1) of the Statute of the International Court of Justice, provides in addition that the world court may hear and determine all disputes related to the interpretation or application of any treaty including the UN Charter.

⁶² Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v United States; Libya v United Kingdom), Order of 14 April 1992, [1992] I.C.J. Rep. 3.

⁶³ See T.M. Franck, The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality?" (1992) 86 American Journal of International Law 519 at 522-52. For similar views, see B. Rashkow, "The Security Council: Its Authority and Legitimacy" (1993) American Society of International Law Proceedings 310; V. Gowland-Debbas, "The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case" (1994) 88 American Journal of International Law 643; and L.D. Roberts, "United Nations Security Council Resolution 687 and its Aftermath: The Implications for Domestic Authority and the Need for Legitimacy" (1993) 25 New York University Journal of International Law and Politics 593 at 623-625.

I agree with Franck's assessment especially in view of the fact that under the UN Charter, any exercise of the Council's powers must accord with the purposes and principles of the Charter. A contravention of this limitation will obviously be a ground for an objection, whether legal or political. And since the world court did hold in the same case that there is no dispute which is intrinsically political or legal, there is no reason why such a dispute cannot be characterised by the court as legal, and dealt with as such. Moreover, under article 33(3) of the UN Charter, a "legal dispute" merely refers to a dispute which is designated as one which should be settled by the application of legal norms. The legal nature of a dispute does not therefore hinge on any intrinsic quality.⁶⁴

It must be noted, however, that this is not the traditionally accepted view. Michael Reisman has for instance declared that the ICJ ought to make it its practice to defer to the Council's decisions so as not to impede the latter's primary jurisdiction to maintain international peace, and doubted if the court did in fact take any position at all on this issue in the Lockerbie Case.⁶⁵ With due respect to that distinguished scholar, I am unable to see how a suitably circumscribed power of review will impede the maintenance of world peace. I am prepared, though, to concede that since the San Francisco conference did not entrust ultimate binding power over such interpretations to the world court, any judicial review may, under the current legal system, have only persuasive effect. The Charter should, however, be reformed to confer bindingness on the court's reviews.

⁶⁴ See V. Gowland-Debbas, *ibid*, at 653-663.

⁶⁵ See M. Reisman, "The Constitutional Crisis in the United Nations" (1993) 87 *American Journal of International Law* 83 at 90.

The veto power vested in the five permanent members of the Council has also come under intense condemnation. Most states who do not enjoy the veto power now perceive that power as a relic of the past which can only serve as an instrument of great power domination. Aside from this, they also make the point that the veto remains in the hands of some countries which do not now enjoy the same power in world affairs that they did at the time the UN Charter was being drafted. And yet, the 5 veto-powers are thought to control between 83% and 98% of the power to effect positive action in the Council.⁶⁶

The best-case scenario would involve doing away entirely with the veto, but in view of the intense resistance of the permanent members to this approach, and the fact that any amendment of the UN Charter requires their sanction, the more practicable option is to provide for a way of overriding the veto, either within or without the council. World court judicial review and General Assembly review are two plausible options. The provision of an alternative voting procedure to terminate the effect of Council decisions is a way which has been suggested to deal with the new phenomenon of the use of the veto to block the reversal of Council's decisions when once made.⁶⁷ Thus, one permanent member could unilaterally decide to hold the other fourteen members of the council to ransom over the termination of sanctions against a country it unduly desires to punish.

Another option is to expand access to the veto to make it more representative of the regions and cultures of the world. In this situation, any resolution that is not passed will not have reflected the will of the world community. This option will be an incentive for bridge building

⁶⁶ See L.D. Roberts, supra, at 616-617.

⁶⁷ See D.D. Caron, strengthening, supra, at 308-309.

across the regions and cultures of the world towards the achievement of more inclusive, and therefore more legitimate, decisions: decisions which in turn will enhance the institutional legitimacy of the council and the UN.

Roberts' contention that greater inclusiveness by the expansion of voting rights will significantly decrease the ability of the Council to act during a crisis, by expanding opportunities for non-aligned states to obstruct legitimate actions to combat threats to peace, assumes rather too much.⁶⁸ It wrongly assumes that the Council currently acts during most crisis situations. In this connection, he will do well to be reminded of Nigeria, Myanmar, Algeria, Peru, Northern Ireland, Togo, Liberia and a multitude of others where the Council has not and will not act. Are they not crisis situations? Furthermore, it wrongly assumes, and rather condescendingly too, that decisions blocked by non-aligned countries will always be deserving of the Council's attention while decisions blocked by the permanent members will always be undeserving. Experience however suggests otherwise; and that is why his argument is unconvincing.

Generally speaking, however, there is need to reform the statist structure of the UN which is one of the greatest stumbling blocks in the way of the creation of a UN structure responsive to the needs of the world's peoples. There is need for a movement not towards the total elimination of the modern state as the primary vehicle of international intercourse, but towards the creation of a people-centred international system which would allow a greater role in the formulation of the rules of international law to international civil society, and the representatives of peoples.

⁶⁸ See L.D. Roberts, *supra*, at 621.

The Commission on Global Governance's proposal for a right of petition for accredited members of international civil society is a viable way of moving towards the preferred system.⁶⁹ Other methods being the creation of an upper chamber of directly elected representatives of peoples as a part of the General Assembly, the de-accreditation of despotic regimes in the General Assembly, and the creation of a Chamber for Peoples in the world court with jurisdiction to hear disputes brought by groups against governments.

The reason it is imperative to enhance the legitimacy of the Council and the UN, is that, aside from the normative costs of illegitimacy outlined in the next subsection, illegitimacy may lead to certain institutional ills and undesirable outcomes. It may lead to the failure to pass much needed resolutions because of suspicions of the real aims of the proponents, usually one of the western powers. It may lead to the refusal to adopt a strongly worded resolution capable of achieving its objective. It may also lead to difficulties in the securement of domestic support by states to take the measures necessary to give effect to the mandate of the resolution and/or the slow or half-hearted implementation of the resolution, as for example, in the slow mobilisation of troops, non-payment of the required cost of the operation, or the sabotage of trade sanctions.⁷⁰

(iii). Rule Legitimacy in the Global System:

Though the phenomenon of rule or norm illegitimacy is intertwined with the behaviour of the institutional arrangements from which rules and norms emerge, i.e the legitimacy of the

⁶⁹ See Our Global Neighbourhood: Report of the Commission on Global Governance (Geneva: Commission on Global Governance, 1995).

⁷⁰ See D.D. Caron, Strengthening, *supra*, at 304-305.

process of rule or norm creation, it is not thereby circumscribed. It also reflects the behaviour of the rules or norms themselves when applied in different situations even by ordinarily legitimate institutions, as well as the desirability of the emergence or continued existence of certain rules.

In the first connection, it is important to ask whether the given rule or norm displays coherence. Does it treat like situations in a like manner and unlike situations in an unlike manner? Or does it display a critical measure of selectivity? In the interaction between text (the textual affirmation of the rule or norm) and context (the specific situation calling for rule or norm application), do critically different outcomes result from critically similar situations?

In the second connection, it is important to discover the extent to which a given rule enjoys the acceptance of states. Is it facilitative of equity and fairness? Aside from the basic question of its non-selective application, to what extent is it accepted by states as just? Aside from the legitimacy of the process from which the rule emerged, does it at the minimum accord with the socially determined notion of "just deserts"⁷¹ widely held across the international society, which notions, I have argued, are deducible from, but not limited to, the body of legitimacy norms present in the international system? The concern of the developing world with the legitimacy of certain rules and norms of traditional international law such as those related to the control of their natural resources and colonial rule, and the subsequent mortification of some of the rules which militated against the interest of that community, is evidence of the normative effect that may be exerted within the international legal order by an intense sense of inequity.

If a rule or norm is selectively applied, then that rule or norm will tend towards illegitimacy,

⁷¹ See T.M. Franck, Fairness, supra, at 41-44.

because of what Professor Franck has characterised as its lack of coherence.⁷² If it is not, then the rule or norm will tend towards legitimacy. I will demonstrate this position with the analytical aid of the behaviour of the norm in favour of popular participation in governance, and my analysis will be presented under the following sub-heads: the partiality of (re)cognition, the partiality of non-intervention and the threat to systemic legitimacy. Again, if a rule or norm is unfair, it will tend towards illegitimacy. If it is not, then it will tend towards legitimacy.⁷³ This last point has however already received sufficient consideration in part B of chapter three of this thesis, and will not therefore be adumbrated here.

(a). The Partiality of (Re)Cognition:

The troubling decline of rule legitimacy (as well as the decline of normative restraint⁷⁴) in the international system may be illustrated by the disparities and contrasts which are clearly observable in the way in which the United Nations has responded to three similar situations that have arisen in recent times around the world. Myanmar (formerly Burma), Haiti, and Nigeria⁷⁵ have for all critical purposes experienced the same type of gross violations of the right of their peoples to legitimate governance: in particular, their respective rights to popular participation in governance. Each has received a different response from the U.N., graduating upwards in scale of reaction from inaction in Nigeria, through very limited condemnatory action in

⁷² See T.M. Franck, *International System*, *supra*, at 738.

⁷³ See T.M. Franck, *Fairness*, *supra*.

⁷⁴ See R. Falk, "The Decline of Normative Restraint in the International System" (1985) 10 *Yale Journal of International Law* 263.

⁷⁵ For relevant factual background, see for example *The Vancouver Sun*, 17th June 1993, at D3; and M. Lennox, "Refugees, Racism, and Reparations: A Critique of United States' Haitian Immigration Policy" (1993) 45 *Stanford Law Review* 687.

Myanmar, to decisive therapeutic action in Haiti. Why was this so? Why did the U.N. exhibit differing levels of cognitive, recognitive, and interventionary tendencies in each of these cases? How did this drama of U.N. implication in the process of the subjugation of the Myanmerian and Nigerian people play out?⁷⁶

Upon the annulment of the Nigerian presidential polls by the then ruling junta led by General Ibrahim Babangida, Britain and the United States issued terse unilateral statements condemning the move.⁷⁷ They were alone internationally in this action and never sought to place the matter on the agenda of any of the U.N. political organs. The Secretary-General of the U.N., an African, also failed to exercise his powers both within and without the U.N. Charter so to place a matter on the agenda of any of the political organs of the world body.⁷⁸ A similar cycle occurred when General Abacha, the present ruler, declared himself Head of State and dissolved all remaining democratic structures.⁷⁹

Similarly, the matter was neither brought to the Human Rights Committee of the U.N. under the State-to-State Complaints procedure of the International Covenant on Civil and Political

⁷⁶ Despite my contention here that the treatment of the three situations has been unjustifiably partial, I do not intend to convey the impression of hostility to the efforts that were made to liberate Haiti from the clutches of dictatorship. What I am concerned with is why the people of Myanmar and Nigeria were not similarly liberated.

⁷⁷ See The Daily News, (25 June 1993) 12.

⁷⁸ See Charter of the United Nations, art. 99. See also the Power of the Secretary-General to investigate any such situation and Report to the Political Organs of the U.N. under the Declaration on Fact-Finding, 9th December 1991, A/Res/46/59, 31 I.L.M. 235.

⁷⁹ See The Vancouver Sun, (19 November 1993) A12.

Rights⁸⁰, nor was it brought to the African Commission on Human and Peoples' Rights under a similar State-to-State procedure; and yet Nigeria is bound by the African Charter on Human and People's Rights⁸¹ as well as by the said international covenant. There was thus in the institutions set up to verify complaints and implement the social sanctions of the international system, a total lack of even mere cognition of the Nigerian crisis⁸².

There was also a recognition of the legitimacy and dejure authority of the illegal junta(s) that have ruled Nigeria since the annulment of the election results. Chief Ernest Shonekan, a principal usurper of democracy, was welcomed to the 48th Session of the U.N. General Assembly on 7th October, 1993 and implicitly recognised as the dejure leader of the government of Nigeria.⁸³ He was also recognized as such by Britain and the United States despite their earlier rhetoric on the right of the Nigerian people to democracy, and was not challenged by any leader on his arrival at the 1993 Commonwealth Conference of Heads of States and Governments. All other states reacted in the same way, and similar arguments apply to General Abacha's coup d'etat.

In contrast, the problem in Myanmar was placed on the agenda of the U.N. on at least

⁸⁰ International Covenant on Civil and Political Rights, 16th December 1966, 6 I.L.M. 368, art. 41.

⁸¹ The African Charter on Human and Peoples' Rights, 26th June 1981, 21 I.L.M. 59, art.47.

⁸² Recently however, Britain brought an unsuccessful motion in the U.N. Commission on Human Rights to sanction Nigeria for gross violations of human rights. Still nothing has been done at the General Assembly or Security Council level about the annulment of the results of the June 12 elections.

⁸³ See U.N. Doc. A/48/PV.21. They were not bound to do so. See G.H. Fox, supra, at 597-603; and L.B. Sohn, supra, at 128-131.

four major occasions, and the General Assembly did pass at least three resolutions condemning the usurpation of popular will in that country.⁸⁴ In much sharper contrast, however, was the Haitian question. The matter featured in the political organs of the U.N. very frequently, resulting in at least 96 condemnations⁸⁵ and considerations. Only Libya spoke out against U.N. military action, but at least it did speak.⁸⁶ In the case of Nigeria, there was resounding silence. The world body had suddenly gone deaf and blind; demonstrating a selective and partial cognitive ability.

In contrast as well, despite being exiled to the United States, Jean-Bertrand Aristides was recognized in U.N. resolutions and in state practice as the de jure president of Haiti. General Cedras and the rest of his junta were never recognized as the legitimate government of Haiti, but dealt with as usurpers of political authority. Myanmar seems however, to share Nigeria's experience in this respect.⁸⁷ That this treatment of the people of Myanmar and Nigeria was unjustifiably partial, is manifest from the treatment of the Haitian crisis.

(b). The Partiality of Non-Intervention:

In the context of the selective and partial cognition and recognition practised by the U.N. and the international community as regards the Nigerian crisis, it is not surprising that whereas

⁸⁴ See A/Res/48/150, 20th December 1993; A/Res/47/144, 18th December 1992; and A/Res/46/132, 17th December 1991.

⁸⁵ See for e.g., A/Res/46/7, 11th October 1991; A/Res/46/138, 17th December 1991; A/Res/47/143, 18th December 1992; and S/Res/867/93, 23rd September 1993.

⁸⁶ See U.N. Doc. A/48/989, 13th September 1994.

⁸⁷ Would Nigeria and Myanmar have been treated differently if its people had a voice of their own (as opposed to the voice of their illegitimate rulers) in the Political Organs of the U.N.? For a proposal for a gradual denudation of state-centred international system, see R. Falk, Human Rights and State Sovereignty (New York: Holmes and Meier, 1981).

the U.N. intervened forcefully in Haiti, subsequent upon the imposition of damaging socio-political and economic sanctions, it did no such thing in Nigeria. After much quiet and overt diplomatic initiatives to persuade the Cedras-led junta to hand over power to the legitimate government of Haiti; a process in which Dante Caputo, the notable Argentine diplomat (acting as the Secretary-General's representative), did play a critical role, the U.N. Security Council ordered a U.S. invasion of Haiti. This invasion was to precede the installation of a Multinational Force (MNF)⁸⁸ in that country which was designed to serve as the core of the U.N. Mission in Haiti (UNMIH).⁸⁹ A successful "peaceful" invasion was launched just after a mission led by former U.S. President Jimmy Carter, had secured a deal under which General Cedras and his junta surrendered power to Aristides some weeks later. The U.N. then indulged itself in self-congratulatory resolution-passing,⁹⁰ while saying and doing nothing about Nigeria.

Despite strident calls by the leaders of the democratic resistance in Nigeria and Myanmar for the imposition of sanctions on Nigeria until the junta handed over to the elected leadership, the U.N. neither said nor did anything. Not even socio-political sanctions were authorized and

⁸⁸ See S/Res/841, 16th June 1993 (Imposed oil and arms embargo on Haiti and froze its fund from 00.01 EST on 23rd June 1993.); S/Res/873, 13th October 1993 (extended the effect of the measures imposed on Haiti until the Cedras junta agreed to "abdicate"); and S/Res/917, 6th May 1994 (imposed further visa, trade, monetary and traffic restrictions on Haitian military leaders and officers, and on Haiti).

⁸⁹ See S/Res/940, 31st July 1994. This resolution authorized the use of force to restore Aristides to office after the Cedras junta had repeatedly refused to surrender power under the Governor's Island Agreement, 3rd July 1993, U.N. Doc. S/26063 and the related Pact of New York, U.N. Doc. S/26297. Before the invasion the Security Council had called for the urgent departure of the junta. See especially S/Res/944, 29th September 1994.

⁹⁰ S/Res/948, 15th October 1994, expressed great satisfaction with the mission, while S/Res/964, 29th December 1994 expressed satisfaction with the performance of the Multinational Force in Haiti.

yet Haiti was invaded and Cedras coerced into submission. Indeed, in the case of Myanmar, it had broken an agreement with the U.N. signed on 7th October, 1988, to hand over power to an elected government, and had instead proceeded to jail and torture thousands of democratic elements in that country. Suu Kyi, the dejure president of Myanmar,⁹¹ who had won 80% of the votes in May 1990, was immediately placed under house arrest, and remained in that situation for nearly six years.⁹² She was released only in July 1995. In the case of Nigeria, the military junta had broken its own promise to hand over power to Moshood Abiola, the dejure President of Nigeria who had won 60% of the votes and defeated his opponent in 20 out of the 30 states of Nigeria. What differed between the Haitian situation on the one hand and the Nigerian and Myanmar situations on the other hand? And is there any intrinsic reason why the Haitian people should be aided in the restoration of legitimate governance while the Nigerian people continue to suffer unaided? I think not-at least not in normative terms.

(c).The Threat to International Systemic Legitimacy:

In the preceding sections of this part of the thesis, I have tried to show how the U.N. and the international community has selectively (and therefore) partially applied the norms in favour of legitimate governance within states. The point is not just that these norms have been partially applied resulting in outcomes which benefit some while reinforcing and reifying the oppressive conditions of others, a point of intrinsic value in itself,⁹³ but also that this sort of grossly unfair

⁹¹ See The Toronto Star, (20 May 1993) B7.

⁹² See Calgary Herald, (7 March 1993) A10.

⁹³ See O. Schachter, "The Nature and Process of Legal Development in International Society" in R. St. J. McDonald and D.M. Johnston, ed., The Structure and Process of International Law (Dordrecht: Martinus Nijhoff, 1986) at 751.

and starkly inconsistent behaviour denudes the legitimacy of the global system of governance by reducing the tendency of states to voluntary-compliance with international normative requirements. Since such voluntary compliance is the major reason why the international system is workable in the first place, any decline in legitimacy will be reproduced in the tendency of the global system to instability.

In the old days, international law used to be regarded as "an attorney's mantle, artfully displayed on the shoulders of arbitrary power" and "a decorous name for a convenience of the chancelleries".⁹⁴ Is this accusation not still true of a text which when applied to similar contexts, produces radically opposite outcomes? I think not; for the problem I point out is not really with the formal status of international law as law, but with its actual functional behaviour as law. Does it determine the outcome of decision-making? Is it crucial to that process? As presently set-up, the system of global governance is not critically constrained by the law of nations.⁹⁵ International law is only one of a number of elements that are considered before decisions are made, and it is not now considered to be critical to what decisions are made and what are not.⁹⁶ This position is lamentable, for even though all legal systems exhibit this form of extra-legal determinacy, there is still a critical minimum beyond which any system cannot fall, if it is to remain generally tolerable.⁹⁷

⁹⁴ See T.M. Franck, *Legitimacy*, *supra*, at 706.

⁹⁵ See D.D. Caron, "The Legitimacy of the Collective Authority of the Security Council" (1993) 87 *American Journal of International Law* 552.

⁹⁶ See M. Koskeniemi, *supra*. See also H. Charlesworth, "Subversive Trends in International Law" (1992) 886 *American Society of International Law Proceedings* 125.

⁹⁷ See K. Kress, "Legal Indeterminacy" (1989) 77 *California Law Review* 283.

The failure of the UN to issue even a mere condemnation in its political organs and its wholehearted reception of the very usurpers of the democratic mandate given by the Nigerian people to Moshood Abiola is even more unfortunate than its failure to invade Nigeria which might perhaps be logistically costly, strategically risky and economically unwise in the view of the very western powers who are the major providers of resources for such enforcement actions. This might still surprise most people, but there is intrinsic normative value in even mere verbal condemnation and "non-effective sanctions" when done at the UN level. Indeed, Oscar Schachter did moot this point when he argued that verbal condemnations by the UN even without sanctions may not be entirely cost-free to the alleged violator. Such condemnations, especially when backed by socio-political ostracism of some kind, reinforces the relevant existing normative requirement, the violation of which has occasioned the U.N. reaction, and sends a clear message to the violator that that sort of conduct is intolerable to its peers in the international system.

Such a message is not sent, however, when "the butchers of Tiananmen and the butcher of Hama" are embraced "so that the United Nations can repel the butcher of Baghdad".⁹⁸ Neither is any such message sent when those who imprison their own people in an iron web of dictatorship, and who 'murder' their expressed will are selectively embraced or exiled, on grounds which are not in the least normative; grounds which are at best arbitrary and at worst selfish. Herein lies the greatest threat to legitimacy and stability, not in the failure to invade. Granted that "in the real life of which law is a part, evil abounds in all shapes and sizes, and one has to assign priorities", and without intending to diminish the value of the Haitian

⁹⁸ See W.M. Reisman, "Some Lessons from Iraq: International Law and Democratic Politics" (1991) 164 Yale Journal of International Law 203.

intervention, one is tempted to ask whether the situation that existed in Haiti was more of a threat to world peace than that that exists in Nigeria? What, other than the selfish political interest of one great power, makes Haiti more of a priority than Nigeria and Myanmar? Why should the toga of UN authority and international interest be adorned by forces intent only on giving effect to their own narrow and selfish interests? Should international law and organization be involved with the reinforcement of this sort of hedonistic conception of the function of law in the global system?

F. SUMMARY OF THE ARGUMENT:

I have argued in this chapter that even though under traditional international law the process of international legitimization of governance was founded on the doctrine of effectivity rather than legitimism, under the contemporary law of nations, there is (and ought to be) a remarkable shift towards a legitimism-driven process. I have also argued that the process of international (de)legitimation may have normative, jurisprudential, political, or socio-economic effects on the object of (de)legitimation, as well as impact normatively on both the agent of (de)legitimation and the international system itself.

Furthermore, I contend that given the absence of a municipal-style enforcement system in the international legal order, the legitimacy, or voluntary compliance-pull of the rules and institutions of the global system is an imperative for its long-term viability and utility. I stress the present necessity for reform of the UN system with a view to enhancing its representativeness and empowering international civil society, so as to enhance its pull towards voluntary compliance, otherwise referred to as legitimacy. I also demonstrate with the aid of

three case studies, the selective and incoherent application of rules in the international system and the threat to systemic legitimacy which this continues to engender.

All in all, the imperative for legitimacy in the process of international (de)legitimation, and in the behaviour of the rules of international law is demonstrated. And the futility of desiring a world where normative restraint exists, but in which normative legitimacy is absent, is thereby exposed.

CHAPTER FIVE**CONCLUSIONS****A. RESTATING THE RESEARCH PROBLEM:**

In chapter one of this thesis, I noted that the major research problems presented by the thrust of this thesis are whether there is any test or standard for the evaluation of governments and their laws to determine whether or not they are legitimate; how is a legitimate regime to be determined; and how are legitimate laws to be ascertained? Is the question of legitimate governance to be assessed descriptively or normatively? What is the meaning of governmental legitimacy? At what levels of enquiry can the concept of legitimate governance be analysed? Is a concept of legitimate governance that does not consider and deal with the widespread inequities in the socio-economic relations of power within a given polity not defective?

Are there legitimacy norms in the international legal system which might provide some evaluative criteria against which municipal governmental and legal regimes might be measured? What are these norms? Are they reasonably determinate? Where can they be found? What are the ideological and discursive paradigms within which these norms are interpreted and meaning assigned to their prescriptions? Are there emergent norms different from those that governed inter-state relations in the recent past? What is the process and effect of the international power of legitimation of governance?

In the event that new norms of governmental legitimacy are shown to have emerged, have the previously well-established non normatively-driven rules governing such legitimation given way to new normatively driven rules ? If international legal norms are to govern the legitimacy

question, is the very legitimacy of the present system of global governance not crucial to the conceptualisation and operation of such a normative paradigm? These are the principal questions that are asked and considered in detail in this thesis in the hope that a reasonably workable model for the regulation of the legitimacy of the municipal political unit can be fashioned out from the mass of conflicting proposals that exist in both pre-modern and modern socio-political thought.¹

B. RESTATING THE OUTCOMES:

In this thesis I have argued that whilst a perfect model of evaluating the legitimacy of a government or its laws is not designable for obvious reasons, there has emerged in the international system, despite all its problems, a limited mesh of transnational values which provide remarkable normative and evaluative criteria for the assessment of the legitimacy of a municipal government and its laws; as well as the assessment of the legitimacy of international legal rules and processes.² This is the integrated hypothesis of legitimate governance which is

¹ See for e.g M. Weber, Law in Economy and Society, ed. by G. Roth and C. Wittich (Berkeley: University of California Press, 1978); R. Rogowski, Rational Legitimacy: A theory of Political Support (Princeton: Princeton University Press, 1974); D. Held, "Power and Legitimacy in Contemporary Britain" in G. McLennan, D. Held and S. Hall, eds., State and Society in Contemporary Britain: A Critical Introduction (New York: Polity Press, 1984); R. Barker, Political Legitimacy and the State (Oxford: Oxford University Press, 1990); J. Rawls, A Theory of Justice (Cambridge: Cambridge University Press, 1971); E. W. Orts, "Positive Law and Systemic Legitimacy: A Comment on Hart and Habermas" (1993) 6 Ratio Juris 245; and M. Seward, Co-optive Politics and State Legitimacy (Aldershot: Dartmouth, 1992).

² The major limitation to this thesis is the well-recognised position that it is not altogether possible, or even desirable, for all of the world's peoples, nations and states to subscribe to an absolute and static concept of political legitimacy. The divergent histories, moralities, cultures and experiences of such groups makes a search for a non-dynamic and absolute concept of legitimate governance futile. What is possible, however, is the distillation of core sub-concepts

a substantially novel approach to the issue. In putting forward this argument I have organised this thesis into this introductory chapter, three major chapters, and a conclusion.

In chapter one, I set down the conceptual framework and methodology of the thesis. In chapter two, I considered the municipal concept of legitimate governance and its relationship with the intensely problematic questions of the entitlement of citizens to repudiate legal obligation and the validity of laws. In my stride I considered the question of the necessity for governance and submit that a minimum of governance cannot be dispensed within human society. As is evident from the literature, its inevitable presence in any polity raises an even more problematic question about the limits of governmental power and the legitimate manner in which power might be acquired or lost.

I have also argued that the problem of legitimate governance may better be fruitfully confronted as a normative question. I considered the descriptive theories of legitimacy proposed by the great social scientist Max Weber and the scholars who align with that paradigm³, but I was, unfortunately, unable to totally accept it. This is because the descriptive approach fails to consider the internal dimensions of the behaviour of the population whose support confers legitimacy on the government. It confines itself to the external aspect of the phenomenon. The

of legitimate governance with which most states are in substantial agreement. Such agreement being gleaned from their participation in international legal regimes which contain textual affirmations of international legal norms. In practical terms, this is about the extent to which theory can seek to construct a universal moral code without becoming essentialist or foundationalist.

³ See M. Weber, *supra*. See also R. Rogowski, *supra*; P.H. Brietske, "Law, Legitimacy and Coercion: One View From Law and Economics" (1991) 25 Valparaiso Law Review 343; and J. Rothschild, "Political Legitimacy in Contemporary Europe" in B. Denitch, ed., *Legitimation of Regimes: International Framework for Analysis* (London: SAGE, 1979)

lack of resistance to a regime in power does not necessarily mean that it is supported by its people. Moreover the majority of the population may clearly support an action of the government which may upon independent evaluation be found to be grossly immoral or intolerable as when over ninety percent of a polity support genocide against the minority. In the end the normative paradigm I adopted was somewhat similar to that proposed by Jurgen Habermas, David Held, Michael Seward, and Eric Orts⁴ but substantially differs from them especially in its internationalist and quasi-normative thrust.

I also evaluated the concept of legitimate governance at three levels of enquiry: the right to hold political office, the right to rule in a particular way [whether positively or negatively defined], and the legitimacy of the political system itself [i.e systemic legitimacy]. All three levels of enquiry are much conflated in the pre-existing literature in one combination or the other.⁵ I went on to argue that any theory of political legitimacy that does not confront and attempt to solve the problem of gross socio-economic inequities in most of today's polities is on that score anaemic and inadequate, as the political choice and accountability which must be present in any polity before it's government can be regarded as legitimate is empty and unreal without a minimum of socio-economic well-being. This is a feature of the great majority of the literature on the subject, most of which come out of the liberal democratic tradition.⁶ Even the writing that has emerged from the marxian and counter-liberal traditions do not make this point

⁴ See J. Habermas, Legitimation Crisis, trans. T. McCarthy (Boston: Beacon, 1975); D. Held, supra.; M. Seward, supra.; and E. Orts, supra.

⁵ This is the case even in the writings of Habermas, Orts, Seward and Held.

⁶ See for e.g R. Barker, supra; E. Orts, ibid; and D. Held, ibid.

in this context.⁷

In the end, I felt able to submit that there are certain core norms of international law (peremptory norms or *jus cogens*) which have emerged as criteria against which governance may be evaluated. Indeed, the application of these norms cannot be avoided by any country by attempting to enter into treaties which exclude their operation. Even though these criteria are to an extent indeterminate in the way in which they may be interpreted, they are not infinitely indeterminate.⁸ Indeed, meaning has been produced over the years from their content which will be extremely useful in the evaluation of municipal regimes.

In a recently published and much acclaimed essay, Thomas Franck has touted the imminent emergence of a right to democracy in contemporary international law, but stopped short of asserting the emergence of such right.⁹ The focus of his work has also prevented him from considering the presence of other legitimacy standards in the global system: such as the rules against colonialism, apartheid and genocide. Jordan Paust has come closest to making the argument that I now make, but the focus and brevity of his paper perhaps inhibited his

⁷ See for e.g. H. Habermas, *supra*. Even though the work of Michael Seward is not marxist, he includes the promotion of want-satisfaction as one of his criteria for the determination of the legitimacy of governance. He fails however to make a case for socio-economic equity as a pre-condition for the legitimacy of governance. See M. Seward, *supra*.

⁸ For a clear exposition of the indeterminacy of norms in the municipal legal context, see J. C. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall Law Journal 23; and C.M. Yablon, "The Indeterminacy of Law: Critical Legal Studies and the Problem of Legal Explanation" (1985) 6 Cardozo Law Review 917.

⁹ See T. M. Franck, "The Emerging Right to Democratic Governance" (1992) 86 American Journal of International Law 46.

exploration of the details of the matter, especially the socio-economic dimension.¹⁰ The absence, in this otherwise seminal enquiry, of an analysis of other legitimacy standards aside from the norm in favour of free and genuine political participation of the people of a given country in the business of governance, may also be similarly explained.

I went further on to consider the questions of the repudiation of legal obligation and the validity of laws as they relate to the concept of legitimate governance. Even though a lot of work has been done in this area,¹¹ I did not come across any work that draws the logical automatic connection between the illegitimacy of a government and the invalidity of its laws in the manner in which I did in this thesis. In the main, I argue that the obligation to obey the law is moral rather than legal, and prima facie; and that since the prescription of the law is only one reason to consider in deciding whether or not to obey the law, and since going by the test I have proposed, a legitimate government can only come into being by popular mandate, an illegitimate regime has no right to the allegiance or obedience of its citizenry.

I also argue that when once it is conceded that under any circumstance whatsoever a people may be entitled to repudiate their legal obligation, then it becomes unarguable that the regime in power has lost its right to make law, and that as such its laws are invalid, for the essence of

¹⁰ See J. Paust, "International Legal Standards Concerning the Legitimacy of Governmental Power" (1990) 5 American University Journal of International Law and Policy 1063.

¹¹ See for e.g H. Hart, The Concept of Law (Oxford: Oxford University Press, 1961); H. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harvard Law Review 593; L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71 Harvard Law Review 630; M. Hartney, "Dyzenhaus on Positivism and Judicial Obligation" (1994) 7 Ratio Juris 44; C. Synopwich, "Social Justice and Legal Form" (1994) 7 Ratio Juris 72; and D. Dyzenhaus, Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy (Oxford: Oxford University Press, 1991).

law is its obligatory character . And if at the outset a law ought not to be obeyed then it is an abuse of language to describe it as law. Thus, by another route I arrive at the position taken by Professor Lon Fuller in his famous debate with Professor Herbert Hart on the question of the grudge informer.¹²

In chapter 3, I considered the concept of legitimate governance in traditional and contemporary international law. I adumbrated the traditional conception of, and attitude to, legitimate governance in international law and how these were reinforced by other doctrinal concepts of the law of nations such as the traditional versions of the concepts of the sovereignty of states, territorial integrity, non-intervention and recognition of governments.

I told the story of how the norms of the law of nations were deeply imbricated in the politics and economics of the subjugation of ordinary citizens within the confines of states; of how the political elite the world over constructed these doctrines in furtherance of neo-imperialist and oppressive ends. I then contended that even though the norms of international law are still laden with oppressive outcomes, there has emerged in the contemporary law of nations a core of normative prescriptions which are undoubtedly humanist, progressive and anti-oppressive. I elucidate the nature of the said norms and deduce a contemporary concept of legitimate governance from them.

I have also argued, however, that these norms are inadequate as norms of governmental legitimacy as they mostly do not regulate the nature of socio-economic relations of power within the state. Even the norms which seem to perform this role have either not attained the rank of the norms of legitimate governance, or are mere token norms which are not designed to

¹² See L. Fuller, supra. For a report of this case, see (1951) 64 Harvard Law Review 1005.

immediately bind the international community. In this way, the lack of success which the "new world economic order" proposals of the countries of the South have met can be effectively explained and understood.

The dominant political ideology of today's world, liberal democratic theory, influenced as it is by international capital, understandably avoids addressing this oppressive side of social relations the maintenance of which is historically necessary for the sustenance of capitalist socio-economic relations. This phenomenon is invariably reproduced in international legal scholarship which flows out of this tradition and which at present constitutes the dominant type of legal scholarship.¹³ The recent emergence of critical approaches to international legal scholarship, epitomised by the work of David Kennedy,¹⁴ Karen Knop,¹⁵ and Maivan Lam,¹⁶ is an attempt to remedy this inadequacy in the traditional ways in which the law of nations has been studied but none of such writing has focused directly on the present question.

In chapter four, I examined the process and effect of international legitimation, as well

¹³ This school of thought is referred to as the liberal school of international affairs. For a scholarly analysis of the nature and thrust of scholars of this persuasion, see M. Zacher and R.A. Mathew, "Liberal International theory: Common Threads, Divergent Strands" in C. W. Kegley, ed., Controversies in International Relations Theory: Realism and the Neoliberal Challenge (New York: St. Martin's, 1995). See also F. Teson, "The Kantian Theory of International Law" (1992) 92 Columbia Law Review 53.

¹⁴ See for e.g., D. Kennedy, "Primitive Legal Scholarship" (1986) 27 Harvard International Law Journal 1; and D. Kennedy, "A New Stream of International Legal Scholarship" (1988) 7 Wisconsin International Law Journal 1.

¹⁵ See for e.g., K. Knop, "The 'Righting' of Recognition: Recognition of States in Eastern Europe and the Soviet Union" (1992) Canadian Council on International Law Proceedings 36

¹⁶ See for e.g., M. Lam, "Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination. (The Nations Within: Ethnic group Demands in a Changing World)" (1992) 25 Cornell International Law Journal 603.

as the legitimacy of the present system of global governance. I considered the process of international (de)legitimation of governments and governance and the effect of such (de)legitimation. I argued that the present conception of the process of international legitimation which asserts that it is a discretionary political act flies in the face of the concretisation of a peremptory right to self-determination in the contemporary law of nations. If a people have a right to self-determination, then the recognition and legitimacy of the product of their self-determination, their legitimate government, cannot be a completely discretionary or political matter given the serious consequences which flow from either recognition or non-recognition in today's highly interdependent and increasingly integrated world. Such a people must have a right to the recognition of that government as their alter ego, and as a legitimate government within the comity of nations.

I further argued, in agreement with Thomas Franck,¹⁷ that there is a power of legitimation amongst nations. Unlike Franck however, I contend that this power must be grounded in, and limited by, the right of all people to self-determination and the other legitimacy norms which I point out in this thesis. If properly conceived and operationalised this power has progressive potential as a bulwark against some, if not most, of the manifestations of illegitimate governance in the world community.

Finally, I consider the legitimacy of the present system of global governance, and conclude that though the present system of global governance has its merits, it requires structural reform and normative redirection if it is to continue to attract a reasonable measure of the

¹⁷ See T.M Franck, The Power of Legitimacy Amongst Nations (New York: Oxford University Press, 1990)

allegiance of the world community. I argue that the international system must address the demands of nations of the South for greater equity in the nature of world socio-economic relations and heed the cries of the peoples within those nations for political freedom and socio-economic justice, lest it collapses under the stress of its ongoing crisis of legitimacy.

For, as Thomas Franck has convincingly demonstrated, a legal system loses legitimacy or compliance pull as the gap between its normative prescriptions and the coherence of their actual application to real life situations widens.¹⁸ When, as has happened at present, the great majority of the world's peoples and nations perceive that the rules of the law of nations are for the most part differentially applied in largely similar situations with little or no coherence, then the international system is in a crisis of legitimacy. And a system in such a crisis must either be held together by brute force or it is sure to collapse in good time.

All in all, the thrust of my integrated view of the problem of legitimate governance is that international law has in fairly recent years begun to abandon its anti-humanist bent in favour of more humanist doctrine: no longer merely the law of the earth, it is becoming more and more the law of human beings. In its stride it has developed a core of norms which form the normative foundations for a progressive concept of legitimate governance that may fruitfully serve as a barometer for measuring the legitimacy of municipal governance.

¹⁸ See T.M. Franck, "Legitimacy in the International System" (1988) 82 *American Journal of International Law* 705.

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