

INTERNATIONAL LAW AND PRACTICE

Two Governments and One Legitimacy: International Responses to the Post-Election Crisis in Côte d’Ivoire

YEJUN RIM*

Abstract

This article examines international responses to the post-election crisis in Côte d’Ivoire, where two distinct governments were established due to contradiction between the election results proclaimed domestically and those certified by the internationally entrusted authority observing the election. Between two competing authorities, the international community stood firmly in favour of the internationally recognized president-elect as ‘legitimate authority’ while acting against the opponent whom they considered to hold ‘illegitimate authority’. Considering the principle of democracy as the underlying rationale grounding the international responses, this article identifies three mechanisms that incorporate and thus promote the principle of democracy: international election monitoring as setting mechanism, international representation as consolidating mechanism, and international intervention as enforcing mechanism. In accordance with these analyses, the current stage of democracy in international legal discourse is queried, particularly the democratic entitlement of a government in relation to determination of its international legitimacy.

Key words

Côte d’Ivoire post-election crisis; democratic entitlement; international election monitoring; international legitimacy; international representation

I. INTRODUCTION

From early December 2010 to April 2011, Côte d’Ivoire found itself in the extraordinary position of being a state with two governments, one established by the ‘self-proclaimed president-elect’ and the other by the ‘internationally recognized president-elect’. Inconsistency between the election results proclaimed by the domestic constitutional organ and those certified by the internationally entrusted authority resulted in there being two separate governments within the state, and confrontation between the two authorities engulfed Côte d’Ivoire in post-election violence. International responses towards the situation were prompt and decisive,

* Ph.D. candidate in International Law, Graduate Institute of International and Development Studies, Geneva, Switzerland; Legal Researcher, Legal Research Institute at Korea University Law School, Seoul, S. Korea [ye.rim@graduateinstitute.ch]. The author wishes to thank Professor Marcelo G. Kohen and Professor Jean d’Aspremont for their valuable comments on an earlier draft of this article.

and can be divided into three stages. First, the international community confirmed the result certified by the internationally entrusted authority, disregarding the domestic proclamation. Second, international and regional organizations replaced the representation appointed by the ‘illegitimate’ authority with representatives of the ‘legitimate’ authority. Third, in addition to imposing sanctions, the Security Council finally authorized a military operation to protect civilians, which resulted, however, in ousting the ‘illegitimate’ government. This article reveals the underlying rationale grounding these responses, and demonstrates the three mechanisms used for the promotion of democracy. Meanwhile, it also addresses the current stage of democracy in international legal discourse, particularly as concerns the democratic entitlement of government in relation to determination of its international legitimacy.

2. FACTUAL BASIS: FOUR MONTHS OF POST-ELECTION CRISIS

2.1. Competing authorities after the presidential election

Côte d’Ivoire fell into turmoil after the second round of elections held on 28 November 2010, when then-incumbent president Laurent Gbagbo refused to concede his defeat to the opposition candidate, former prime minister Alassane Ouattara. It was the long-awaited election designed to reunite Côte d’Ivoire, which had been factually divided into a government-controlled southern region and a rebel-controlled northern region since the outbreak of civil war in 2002. The election was framed under the 2007 Ouagadougou Political Agreement in which leaders of both regions agreed to create conditions contributing to free and democratic elections.¹ Although postponed several times due to ongoing political instability,² Côte d’Ivoire’s presidential elections were finally achieved in 2010 under the strong support of the international community.³

The first round was held on 31 October with massive and relatively peaceful participation. The two candidates who had garnered the most votes, Mr Gbagbo and Mr Ouattara, ran in the second round on 28 November; however, the expected transition to peace was hindered as victory claims competed.⁴ On 2 December, the president of the Côte d’Ivoire Independent Electoral Commission (IEC) announced the provisional result of the election: candidate Ouattara had garnered more votes than Gbagbo.⁵ However, Gbagbo refused the provisional result and appealed the decision to the Constitutional Council, the highest juridical organ charged with deciding the outcome in cases of electoral dispute and responsible for proclaiming

1 See Letter Dated 13 March 2007 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/2007/144 (2007), Ann.

2 See N. Cook, *Côte d’Ivoire’s Post-Election Crisis*, CRS Report for Congress, 15 March 2011, at 49–63.

3 UN Doc. S/RES/1765 (2007), para. 1.

4 See, in detail, Cook, *supra* note 2, at 58–9; Human Rights Council (HRC), ‘Report of the U.N. High Commissioner for Human Rights on the Situation of Human Rights in Côte d’Ivoire’, UN Doc. A/HRC/16/79 (2011), paras. 3–9.

5 La Commission électorale indépendante, Second tour de l’élection du président de la République de Côte d’Ivoire, Scrutin du 28 novembre 2010, Résultats provisoires par centre de coordination, 2 décembre 2010, available at www.ceici.org/elections/docs/EPR2010_2T_RESULTATS_VALEURS_02122010.pdf.

the definitive results.⁶ The Constitutional Council performed its review and then declared the IEC proclamation 'null and void', assigning victory to Gbagbo with the cancellation of polling in departments where most votes were cast in favour of Ouattara.⁷ On the same day, however, the Special Representative of the UN Secretary-General (hereinafter, SRSG) for Côte d'Ivoire, Young-Jin Choi, published an official statement certifying the outcome as proclaimed by the IEC, with Ouattara the winner, and referring to the decision of the Constitutional Council that overturned the provisional result as having 'no factual basis'.⁸

Gbagbo relied on constitutionality based on the decision of the Constitutional Council, which then swore him in for a new term.⁹ Meanwhile, Ouattara asserted his presidency based on the IEC's provisional result under the certification of the SRSG, and notified the Constitutional Council of his own swearing-in as president. The two candidates were separately inaugurated as president-elect, forming their respective governments and taking steps to exercise executive authority over state institutions.¹⁰ Hitherto unfamiliar terms entered the discussion, with an 'internationally recognized president' distinguished from an incumbent whose status was confined to 'self-proclaimed president'.¹¹ This extraordinary situation continued for four months until, finally, Gbagbo was arrested by forces loyal to Ouattara under the support of the international community on 11 April, and was eventually resolved with a single constitutionally sworn president on 5 May 2011.¹²

2.2. International response

2.2.1. Endorsing the legitimate authority and removing international representation

International response to the post-election crisis in Côte d'Ivoire was fairly prompt and decisive. On 7 December, the Economic Community of West African States (ECOWAS) published a communiqué endorsing the result declared by the IEC and certified by the SRSG, recognizing Ouattara as president-elect of Côte d'Ivoire, and suspended Côte d'Ivoire's participation until further notice.¹³ The Peace and Security Council of the African Union (AU), on 9 December, also adopted the decision 'to suspend the participation of Cote d'Ivoire in all AU activities, until such a time

6 Constitution of Côte d'Ivoire (La Constitution du 23 juillet 2000), Art. 94.

7 Le Conseil constitutionnel, Portant proclamation des résultats définitifs de l'élection présidentielle du 28 novembre 2010, Decision No. CI-2010-Ep-34/03-12/CC/SG (3 décembre 2010).

8 Y. J. Choi, SRSG, UNOCI, 'Statement on the Certification of the Result of the Second Round of the Presidential Election Held on 28 November 2010', 3 December 2010, paras. 12, 14, First Statement, available at www.un.org/en/peacekeeping/missions/unoci/elections.shtml.

9 T. Cocks and L. Coulibaly, 'Ivory Coast's Gbagbo Sworn in Despite Poll Row', *Reuters*, 4 December 2010.

10 Cook, *supra* note 2, at 3; HRC, *supra* note 4, at 6–7; J. James, 'Ivory Coast Crisis as Presidential Rivals Both Sworn In', *BBC News*, 4 December 2010.

11 In media analysis, the two governments have been distinguished in similar terms. Among many examples are 'the government of the self-proclaimed President Laurent Gbagbo'; see CNN Wire Staff, 'Ouattara Supporter Killed in Abidjan', *CNN News*, 4 January 2011; 'Alassane Ouattara, the Internationally Recognized President-Elect'; see Unnamed, 'U.N.: Gbagbo Blocking Mass-graves Probe', *UPI*, 2 January 2011.

12 The Constitutional Council ratified Ouattara as president, reversing its earlier decision, adding that 'all decisions contrary to this one are null and void', and invited him to take an oath in front of an official audience. A. Aboa and T. Cocks, 'Ivory Coast Top Court Declares Ouattara President', *Reuters*, 5 May 2011.

13 ECOWAS, Final Communiqué, ECW/CEG/ABJ/EXT/FR./Rev.2, 7 December 2010, paras. 7, 9.

the democratically-elected President effectively assumes State power'.¹⁴ Through a series of subsequent communiqués, the ECOWAS and AU reiterated their position respecting Ouattara's status as 'non-negotiable' in accordance with the expressed will of the people.¹⁵

The UN Security Council published a statement on the following day.¹⁶ Its initial approach was somewhat passive, reserving an independent assessment of the election result and making an indirect endorsement 'in view of' the ECOWAS and AU's recognition of Ouattara as president-elect of Côte d'Ivoire.¹⁷ Although several media outlets reported that the Security Council had 'recognized' Ouattara as winner of the Côte d'Ivoire presidential run-off,¹⁸ the statement was carefully framed, since referring to a competing result might constitute interference in the internal affairs of a sovereign state. Likewise, the Human Rights Council also reserved its own decision and relied upon 'the resolutions and declarations adopted by international, regional and sub-regional organizations'.¹⁹ Nevertheless, the position of the Security Council was generally interpreted as implicit recognition of Ouattara and strengthened his claim to head the internationally legitimate government.²⁰ Meanwhile, more practical and also substantive influential approaches were taken at the UN General Assembly. On 22 December, the Credentials Committee reassembled in concern over events in Côte d'Ivoire, and amended its previous report that accredited delegations authorized by Gbagbo.²¹ The report of the Committee was then approved at the General Assembly on 23 December 2010 by consensus,²² and no further reservations from states were officially delivered.²³ The decision was welcomed by the Secretary-General as reflecting 'the united position of the international community with respect to the legitimacy of the new Government led by President Ouattara'.²⁴

14 AU, Communiqué of the 252nd Meeting of the Peace and Security Council, PSC/PR/COMM.1(CCLII), 9 December 2010, para. 4.

15 See ECOWAS, Final Communiqué, ECW/CEG/ABJ/EXT/FR./Rev.0, 24 December 2010, para. 7; AU, Communiqué of the 259th Meeting of the Peace and Security Council, PSC/AHG/COMM(CCLIX), 28 January 2011, para. 2.

16 See Press Release, UNSC, UN Doc. SC/10102 (7 December 2010); UN SCOR, 65th yr, 6437th mtg, UN Doc. S/PV.6437 (2010).

17 Press Release, UNSC, UN Doc. SC/10105 (8 December 2010). Also, careful consideration was apparent in subsequent resolutions in this regard, e.g., UN Doc. S/RES/1962 (2010), para. 1.

18 F. Yang, 'UN Security Council Recognizes Ouattara as Winner of Côte d'Ivoire Presidential Runoff', *Xinhua*, 9 December 2010; UN Official Media, 'Ouattara Backed by Security Council as President of Côte d'Ivoire', *UN Radio*, 9 December 2010.

19 See HRC, Res. S-14/1, UN Doc. A/HRC/RES/S-14/1 (2011). However, in a later resolution, the Human Rights Council wrote a relatively explicit phrase that they welcome the recognition made by the regional organization. 'Alassane Ouattara as President of Côte d'Ivoire', HRC, Res. 16/25, UN Doc. A/HRC/RES/16/25 (2011), para. 2.

20 E.g., Unnamed, 'UN Urges Recognition of Ouattara as Ivory Coast Leader', *BBC News*, 20 December 2010.

21 'Report of the Credentials Committee', UN Doc. A/65/583/Rev.1 (2010), para. 7. As the November report had not yet been taken up by the plenary of the Assembly, the Committee was able to simply revise the previous report, UN Doc. A/65/PV.73 (2010), at 1.

22 UN Doc. A/RES/65/237 (2010).

23 Press Release, UNGA, UN Doc. GA/11043 (23 December 2010); see Cook, *supra* note 2, footnote 38.

24 Press Release, Secretary-General, UN Doc. SG/SM/13331, AFR/2086, GA/11044 (28 December 2010).

Only a handful of states remained in support of Gbagbo's position.²⁵ Several governments issued the *persona non grata* to representatives accredited under the authority of Gbagbo's government²⁶ and announced that they would accept ambassadors named by President Ouattara.²⁷ The Council of the EU accordingly adopted a conclusion on Côte d'Ivoire, clarifying that they supported 'the will of the Ivorian people expressed by its decision to elect Alassane Ouattara as President, an outcome subsequently certified by the UN', and would 'only consider legitimate those institutions and bodies who place themselves under his authority'.²⁸ ECOWAS also straightforwardly urged 'all member States of ECOWAS to facilitate the accreditation of ambassadors and other representatives of Alassane Ouattara to their countries', while directing the president of the ECOWAS Commission to admit the government of Ouattara to all meetings of ECOWAS as an exploration of all avenues for providing Ouattara's government with the necessary legal and diplomatic means to exercise its authority.²⁹ These international responses endorsing Ouattara's legitimate authority to represent Côte d'Ivoire strengthened the external effectiveness of his government. By contrast, the external effectiveness of Gbagbo's government to exercise sovereignty was progressively infringed upon and removed,³⁰ ultimately also impacting its internal effectiveness.

2.2.2. *Imposing sanctions and supporting military actions*

Despite international pressures against Gbagbo and support for Ouattara, confrontation between them continued, and Côte d'Ivoire was engulfed in political violence.³¹ A peaceful solution was initially sought. The Summit of ECOWAS dispatched a special high-level delegation to Côte d'Ivoire to urge Gbagbo to resolve the situation by taking peaceful exile abroad.³² The Peace and Security Council of the AU also reaffirmed 'the necessity of a rapid peaceful solution which will allow for the preservation of democracy and peace'³³ and decided to establish a high-level panel for

25 E.g., Angola and Lebanon; N. Colombant, 'Despite Growing Pressure, Ivory Coast Incumbent Gbagbo Still Has Outside Allies', *VOA News*, 27 December 2010.

26 CNN Wire Staff, 'Britain, Canada Reject Gbagbo's Authority on Envoys', *CNN News*, 6 January 2011. In response, Gbagbo's government also announced that they would cut diplomatic ties with countries that recognized ambassadors named by Ouattara; X. Tong, 'Gbagbo's Government Revokes Accreditation of British and Canadian Ambassadors', *Xinhua*, 7 January 2011.

27 L. Thomas, 'France Says EU Recognizes Only Ouattara's Ambassadors', *Reuters*, 29 December 2010.

28 Council of the European Union, Press Release, 3065th Council Meeting, Foreign Affairs, 5888/1/11 REV 1 (en) (31 January 2011), Council's Conclusions on Côte d'Ivoire, at 13–14, para. 1.

29 ECOWAS, 'Resolution A/RES.1/03/11 of the Authority of Heads of State and Government of ECOWAS on the Situation in Côte d'Ivoire', A/RES. 1/03/11 (24 March 2011); Transmitted to the UN Security Council, UN Doc. S/2011/182 (2011), Ann.

30 E.g., Gbagbo's request to ban flights of UN and French military aircraft after Ouattara had departed to attend the meeting of the AU was rejected as 'illegitimate'; Unnamed, 'Ivory Coast's Laurent Gbagbo Bans UN and French Flight', *BBC News*, 10 March 2010; see also Cook, *supra* note 2, at 8.

31 On the factual analysis of the patterns of political violence against civilians, see S. Straus, "'It's Sheer Horror Here": Patterns of Violence during the First Four Months of Côte d'Ivoire's Post-Electoral Crisis', (2011) 110 *African Affairs* 481, at 481–9.

32 A. Quinn, 'Ivory Coast President Offered Exile in Africa: US', *Reuters*, 17 December 2011. Meanwhile, they also warned that there would be no alternative option but to take coercive measures if Gbagbo failed to heed this last demand; ECOWAS, *supra* note 15, para. 10.

33 AU, Communiqué of the 259th Meeting of the Peace and Security Council, SC/AHG/COMM(CCLIX) (28 January 2011), para. 5.

the resolution of the crisis.³⁴ The panel's proposal was further endorsed, calling for full co-operation in convening 'negotiations between the Ivorian parties to develop modalities for the implementation of the proposals'.³⁵ However, these attempts at peaceful resolution failed due to the strong resistance of Gbagbo and the political deadlock turned violent with spontaneous clashes between forces loyal to each leader, which escalated to attacks directed toward civilians in urban regions. International concerns over the deteriorating human rights situation in Côte d'Ivoire remained unabated. Human rights non-governmental organizations (NGOs) consistently reported human rights abuses committed by both sides' forces during the post-election crisis.³⁶ The UN Human Rights Council also expressed its grave concern about the violence and serious human rights violations in Côte d'Ivoire and decided to dispatch an independent international commission of inquiry to investigate the facts and circumstances surrounding the allegation of serious abuses and violations of human rights committed in Côte d'Ivoire.³⁷

Meanwhile, recognizing that the crisis in Côte d'Ivoire had become a major threat to peace and security in the region as well as a regional humanitarian emergency, the Authority of Heads of State and Government at ECOWAS adopted a special resolution on 24 March, requesting the Security Council 'to strengthen the mandate of the United Nations' Operation in Côte d'Ivoire (UNOCI)' and 'to adopt more stringent international targeted sanctions'.³⁸ Subsequently, on 30 March, the UN Security Council unanimously adopted Resolution 1975, which demanded an immediate end to the surge in violence against civilians in Côte d'Ivoire. The Council also specified targeted sanctions against Gbagbo and key figures of his government.³⁹ The resolution also stressed its full support and authorized the UNOCI 'to use all necessary means to carry out its mandate'.⁴⁰ In accordance with Resolution 1975, the European Union also imposed additional sanctions by renewing the previously adopted decision in view of the gravity of the situation.⁴¹ They specified further restrictive measures, including a prohibition on the purchase of bonds or securities from, and the provision of loans to, the 'illegitimate government' of Gbagbo.⁴²

34 Ibid., para. 6. AU, 'The High Level Panel for the Resolution of the Crisis in Côte d'Ivoire Concludes Its First Visit to Abidjan', 22 February 2011, Press Release.

35 AU, Communiqué of the 265th Meeting of the Peace and Security Council, PSC/AHG/COMM.1 (CCLXV), 10 March 2011, paras. 8–9.

36 E.g., Amnesty International (AI), 'Tens of Thousands at Risk in Côte d'Ivoire as Fighting Intensifies' Côte d'Ivoire Mission Report', AFR 31/001/2011 (22 February 2011), 1 March 2011; Human Rights Watch (HRW), 'Côte d'Ivoire: Leaders Should Prevent Abuses by Their Forces', 24 February 2011; 'Côte d'Ivoire: Crimes against Humanity by Gbagbo Forces', 15 March 2011.

37 See HRC, *supra* note 19; HRC, 16/25, UN Doc. A/HRC/REX/16/25 (2011).

38 ECOWAS, Final Communiqué, ECW/HSG/ABJ/39 (23–24 March 2011), para. 25; ECOWAS, *supra* note 29.

39 UN Doc. S/RES/1975 (2011).

40 Ibid., para. 6.

41 Council Decision (EU), 2010/656/CFSP (30 October 2010), OJ L 285/28.

42 Council Decision (EU), 2011/221/CFSP (6 April 2011), OJ L 93/20–24; Council Regulation (EU), No. 330/2011 (6 April 2011), OJ L 93/10–15.

In the meantime, on 28 March, the Republican Forces of Côte d'Ivoire (FRCI),⁴³ forces loyal to Ouattara, launched a campaign against pro-Gbagbo elements of the former Forces de Défense et de Sécurité (FDS). In view of the serious escalation of the humanitarian situation that accompanied the advance to the south,⁴⁴ the Secretary-General finally issued a statement on 4 April, instructing the UNOCI to take all necessary steps to protect civilians pursuant to paragraph 6 of SC Resolution 1975 (2011), with the support of the French forces pursuant to paragraph 17 of SC Resolution 1962 (2010).⁴⁵ Accordingly, UNOCI and French forces undertook military action in co-ordination with the FRCI against Gbagbo's forces. As a result, on 11 April, the former president Gbagbo was captured and placed in the custody of Ouattara's force, and thereby the four-month crisis ended.⁴⁶

3. THREE DISTINCTIVE FEATURES

3.1. Election-certification process

The first distinctive feature in the case of Côte d'Ivoire that needs close examination is the certification process of the election. In the general circumstance of national elections, the authority entitled to certify and endorse the result of the election is framed under the domestic legal order. Such is the case in Côte d'Ivoire, where the election structure is mainly constructed and implemented under the domestic authoritative entities in accordance with national law, with the IEC as the responsible body for tallying and aggregating the results, including the announcement of provisional results,⁴⁷ and the Constitutional Council entitled to decide and announce the final results.⁴⁸ In addition to the authority of these two most imperative organs in the election process, the presidential election of Côte d'Ivoire in 2010 designated a special certification process. Under SC Resolution 1765, authority to certify all stages of the election in accordance with 'international standards' was specifically entrusted to the independent and exclusive power of the SRSG.⁴⁹ Hence, the whole process of the presidential election in Côte d'Ivoire in 2010 was framed to be effective, although implemented by domestic authoritative organs, under the certification of the SRSG with the prepared criteria further approved by interested parties.⁵⁰

This certification of elections is exceptional compared to other practices under the traditional international electoral support framework of the United Nations,

43 On 27 March 2011, Force Nouvelle, a rebel force that had controlled the northern region since 2002, was officially recognized as the national military named FRCI; see Unnamed, 'Ivory Coast's Ouattara Says Rebels Are Legitimate Army', *Reuters*, 18 March 2011.

44 HRC, Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Côte d'Ivoire, UN Doc. A/HCR/17/49 (2011), para. 6.

45 Press Release, Secretary-General, UN Doc. SG/SM/13494, AFR/2157 (4 April 2011).

46 Since a significant number of soldiers who fought for Gbagbo had melted into the population, the report noted the militias and mercenaries were finally dislodged on 4 May; HRC, *supra* note 44, para. 7.

47 See *Pretoria Agreement on the Peace Process in the Côte d'Ivoire*, 6 April 2005, para. 9.

48 Constitution of Côte d'Ivoire, Arts. 35, 37, 38.

49 UN Doc. S/RES/1765 (2007), para. 6. Regarding the five criteria for certification standards, see Security Council, The Sixteenth Progress Report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, UN Doc. S/2008/250 (2008), para. 32.

50 'Panel in Côte d'Ivoire Accepts UN Election Certification Standards', *UN News Center*, 26 March 2008.

which mostly aims at technical and logistical assistance with a limited observation mandate.⁵¹ Even compared to the far-reaching electoral verification process evolved since the early 1990s through the UN Observer for the Verification of the Elections in Nicaragua (ONUVEN)⁵² and the UN Observer Group for the Verification of the Elections in Haiti (ONUVEH),⁵³ the Côte d'Ivoire certification process is notable in many aspects. Although not comprehensive in scale of involvement, it was decisive and hierarchically penetrative into a sphere traditionally governed by domestic authorities. While it has been carefully explained that certification is not intended to 'certify', but to 'ensure', all stages of the electoral process,⁵⁴ the credibility of the election as a whole, including its result, is framed to ultimately depend on the certification given by the SRSG, especially in the view of the international community. This certification process inevitably results in the inclusion of selecting or determining a winning candidate when there is a dispute regarding the result. Moreover, to some extent, this election certification would supersede the result declared by the domestic authority, as has been exemplified in Côte d'Ivoire.

Meanwhile, this framework has inevitably raised concern over undue involvement in domestic political elections, 'which are essentially within the domestic jurisdiction'.⁵⁵ In fact, the United Nations held back from monitoring political elections within an independent sovereign state until the 1980s in consideration of potential inconsistency with the bedrock principle of non-intervention, although they did actively respond to requests for referendum observation in the context of decolonization or trust territories.⁵⁶ In this context, Russia and China have expressed reservations about the framework for election certification on the grounds that it could infringe the sovereignty of a state.⁵⁷ Nonetheless, in terms of legality, the rationale for this extended mandate entrusted to the SRSG for election certification rests upon the legally binding resolution adopted under Chapter VII of the UN Charter, under the discretion of the Security Council in choosing this framework as a measure appropriate to resolve a threat to peace and security in accordance with the mandate granted under the Charter. Moreover, it may also be legitimized under the rationale that this framework came in response to a request made by the

51 For comprehensive historical analysis, see Y. Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (1994). For analysis on types of technical assistance, see S. Darnolf, 'International Election Support: Helping or Hindering Democratic Elections?', IPSA-ECPR Joint Conference, 16–19 February 2011, São Paulo, Brazil, at 6.

52 International election monitoring for the 1990 election in Nicaragua was referred to as the first case of a United Nations-supervised election within an independent member state; see T. Franck, 'The Emerging Right to Democratic Governance', (1992) 86 AJIL 46, at 71–2; see also D. Stoelting, 'The Challenge of UN-Monitored Elections in Independent Nations', (1991–92) 28 Stanford JIL 372, at 377–9.

53 ONUVEH has been referred to as 'the first instance in which the UN, acting at the request of a national government, intervened in the electoral process solely to validate the legitimacy of outcome', Franck, *supra* note 52, at 72–3; Stoelting, *supra* note 52, at 380–3.

54 See UNOCI, 'The Certification of Election in Côte d'Ivoire', available at www.onuci.org/pdf/faqcertificationen.pdf.

55 UN Charter, Art. 2(7).

56 See Stoelting, *supra* note 52, at 372–5.

57 Cook, *supra* note 2, at 2.

signatories of the 2005 Pretoria Agreement of the United Nations to participate in the organization of general elections.⁵⁸

The first round of the election was duly certified by the SRSG in accordance with the prepared criteria.⁵⁹ His certification was consistent with the IEC's provisional decision and was validated and proclaimed as final by the Constitutional Council, leaving no further substantive question regarding the certification process. In the second round, however, the SRSG published an official statement overturning the decision of the Constitutional Council as having no factual basis, while certifying Ouattara as the winner.⁶⁰ The question arises, then, whether the SRSG's authority to certify the electoral process includes overriding the final result proclaimed by the Constitutional Council, on the basis of his independent factual findings and methods.

Although the Constitutional Council's prompt announcement after the claim made by Gbagbo's camp, as well as a composition slanted in favour of the incumbent regime, may breed reasonable doubt of manipulation and thus of 'undermin[ing] the democratic process and prospects of unification' as criticized,⁶¹ still, as the highest judicial organ, the Council is entitled to provide constitutionality in its decisions, which are not susceptible to any recourse.⁶² Also, a presidential election falls, a priori, in the realm of domestic jurisdiction. It could perhaps be argued that the certification has no direct legal effect to cancel the decision made by the juridical organ, and that such action would infringe the sovereignty of the state, as claimed by Gbagbo.⁶³ Meanwhile, and more fundamentally, the scope of involvement in election observation and the precise scope of authority given to the international community are placed as a subject for and under the oscillating discourse on the principles of non-intervention and sovereignty.

As Côte d'Ivoire represents the first attempt at framing the election certification process, the scope of authority granted the certifier might be seen as lacking in structure. Indeed, the limitation to 'entrust' rather than 'certify' in the document explaining the meaning of the certification of the election by the UNOCI only serves to increase the confusion.⁶⁴ Meanwhile, the status of the SRSG as an independent and exclusive certifier being based on existing agreements and the legally binding SC resolution, his decision may be understood as separable from the domestic legal structure of the election and thus as beyond the domestic legal order. Thus,

58 Pretoria Agreement, *supra* note 47, para. 10.

59 Y. J. Choi, 'Statement of the Certification of the Final Result of the First Round of the Presidential Election Held on 31 October 2010', SRSG, UNOCI, 12 November 2010, paras. 16–18, available at www.onuci.org/IMG/pdf/doc3.pdf.

60 Two statements have been issued. For the first, see *supra* note 8. The second statement included a more detailed explanation of the methods for certification; see Y. J. Choi, 'Statement on the Second Round of the Presidential Election Held on 28 November 2010', SRSG, UNOCI, 8 December 2010, paras. 10–13, available at www.onuci.org/pdf/declarationyjchoieng.pdf, Second Statement.

61 T. J. Bassett, 'Winning Coalition, Sore Loser: Côte d'Ivoire's 2010 Presidential Elections', (2011) 440 *African Affairs* 469, at 470 – for critical analysis of the Constitutional Council's decision, see 477–9.

62 See Constitution of Côte d'Ivoire, Arts. 88, 98.

63 Cook, *supra* note 2, at 6; see Television Ivoirienne, 'Government Communiqué on the UN Operation in Côte d'Ivoire', via *BBC Monitoring Africa*, 18 December 2010; T. Cocks, 'Gbagbo Ally Accuses West of Wooing Ivorian Military', *Reuters*, 12 December 2010.

64 UNOCI, *supra* note 54.

in decisions made by the domestic juridical organs, including the Constitutional Council in this case, such a constitutionality within the domestic legal order would be a matter of fact rather than having a direct legal effect itself from the perspective of international law.⁶⁵ Although the legality of the decision of the SRSG to cancel the proclamation of the Constitutional Council has not been challenged, its implications for the subsequent framework of election monitoring deserve attention.

Indeed, the SRSG stated that his certification was based neither on IEC's provisional result nor on the Constitutional Council's final result; rather, he clarified his methods as conducted by UNOCI.⁶⁶ Therefore, perhaps the certification process is to be framed as complementarity that works to negate confrontation with the domestic authorities and thus is involved only when disputes among domestic authorities arise. Even if the election certification were consistent with the fundamental principles of international law under the complementarity principle, its implication for the scope of involvement in election monitoring as a precedent or evolving practice would remain imperative in a practical sense. Meanwhile, a series of challenging questions remained unanswered: whether such a certification process is to be developed as a comprehensive form of international election monitoring encompassed by an extended role for the United Nations; whether such comprehensive involvement is to be allowed only when the creditability of the result presented by the domestic authority has been challenged; and, finally, then, whether inefficiency will result if such a comprehensive involvement is to remain in the complementarity framework, even on a practical and pragmatic basis.

3.2. Legitimate authority in international representation

The second distinctive feature concerns the underlying rationale for the determination of legitimate authority for international representation. For the duration of the post-election conflicts, Côte d'Ivoire experienced the extraordinary situation of 'duality of governments'.⁶⁷ Gbagbo's government retained part of its internal effectiveness in its actual control of administration, while Ouattara's government endured as 'the Golf Hotel Republic'.⁶⁸ Constitutionality remained with Gbagbo – at least on a formal and procedural basis, given that the decision of the Constitutional Council had not been constitutionally challenged in due process in domestic legal parlance. Meanwhile, Ouattara achieved external effectiveness, being referred to as 'internationally recognized president-elect', while Gbagbo lost external effectiveness, not moving above the status of 'self-proclaimed president'. Indeed, the situation presented the extraordinary precedent of a state's having two competing entities claiming governmental authority, with one only partially de facto in his actual control of the administration but nationally de jure based on the constitutionality granted by the Constitutional Council, while the other was internationally de facto through the

65 As framed in international law, judgments of domestic juridical organs are to be treated as fact and do not per se constitute legal effect; see I. Brownlie, *Principles of Public International Law* (2008), 38–40.

66 See SRSG, *supra* note 60.

67 J. d'Aspremont, 'Duality of Governments in Côte d'Ivoire', *EJIL Analysis*, 4 January 2011.

68 R. Banegas, 'Post-Election Crisis in Côte d'Ivoire: The GBONHI War', (2011) 440 *African Affairs* 457, at 461. The Golf Hotel, in Ouattara's presence, was officially referred to as 'the headquarters of the legitimate Government of President Ouattara'; see Press Release, Secretary-General, UN Doc. SG/SM/13503, AFR/2160 (11 April 2011).

acceptance of his representation in the international community without having internal effectiveness, while remaining only potentially *de jure* via the theoretical democratic entitlement endowed by election victory.

Government is generally recognized as ‘the organizational machinery’ of the state, having the plenary and exclusive competence to represent a state in international relations.⁶⁹ From the externally focused perspective of international law, government is conceived in a much simplified form as a unified executive, disregarding subdivisions,⁷⁰ and a long line of precedents allow a state only one represented government at a time.⁷¹ Governmental status from the ontological perspective is to be decided primarily under the municipal system, and the ‘legitimacy’ attached to it is a matter that cannot be exclusively projected from outside. Within the international legal discourse, it is indeed a relatively recent phenomenon that ‘the attribute “legitimate” has been added to “government” with frequency’⁷² and whether there exist normative criteria for this attribute remains controversial.⁷³ Nevertheless, from the practical point of view, the international community cannot but interfere in the matter of governmental status in the situation of competing authorities, since they must determine the faction to treat as legitimate for continuing relations.⁷⁴ This external determination is generally reflected through the practices of accreditation proceedings, as well as through the practices of recognition of government, both of which avenues in turn indirectly influence the determination of ‘legitimate government’ even in the most plenary terms. Although it should be noted that the legitimacy implied in international representation does not construct the objective legal status of a government in question, its legal ramifications cannot be ignored.⁷⁵

Which authority, then, and under what rationale, is to be regarded as legitimate to represent a state? Traditionally, the predominant criterion applied through these avenues has been the effective control of the state.⁷⁶ Given that there has been no legal requirement for the form and structure of a government in international law, effectiveness has been the most imperative determining element, based on the factual power to exercise sovereignty from the external perspective,⁷⁷ without considering the existence of internal ‘democratic consent’⁷⁸ – and logically so,

69 S. Talmon, *Recognition of Governments in International Law* (1998), 115; S. Magiera, ‘Governments’, in EPIL (online version).

70 See J. Mclean, ‘Government to State: Globalization, Regulation, and Governments as Legal Persons’, (2003) 10 Ind. JGLS 173.

71 Talmon, *supra* note 69, at 105.

72 S. Talmon, ‘Who Is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law’, in I. Brownlie et al. (eds.), *The Reality of International Law* (1999), 499, at 500.

73 *Ibid.*, at 536; J. d’Aspremont, ‘Legitimacy of Governments in the Age of Democracy’, (2006) 38 JYUJILP 877, at 878–9.

74 H. Lauterpacht, *Recognition in International Law* (1947), 157.

75 The recognition of a government provides an opinion on the subjective legal status of that government; see Talmon, *supra* note 69, at 29–30. Regarding the legal relations derived from the recognition of government in exile, see 115–268; see also M. N. Shaw, *International Law* (2008), 453–5.

76 Lauterpacht, *supra* note 74, at 141; H. G. Schermers and N. M. Blokker, *International Institutional Law* (2003), 197–8. In the early 1950s, disputes arose regarding the criteria adopted in the representation question; see F. Jhabvala, ‘The Credentials Approach to Representation Questions in the U.N. General Assembly’, (1977) 7 Cal. W. ILR 615, at 632.

77 R. Higgins, *Problems and Process: International Law and How We Use It* (1994), 43.

78 S. D. Murphy, ‘Democratic Legitimacy and the Recognition of States and Governments’, in G. H. Fox and B. R. Roth (eds.), *Democratic Governance and International Law* (2000), 125.

considering the strict interpretation of principles derived from the fundamental rationale of sovereignty⁷⁹ and also given the pragmatic approach maintained by states. However, practices have evolved such that effectiveness alone is not a sufficient condition to determine legitimate authority, even if it may be a necessary precondition.

Practices regarding the recognition of governments involve much variation, being largely influenced by pragmatic and political considerations.⁸⁰ However, since effectiveness has to be supported by the reasonable prospect of permanence based on the obedience of the population, constitutional criteria also apply in determining legitimate authority.⁸¹ Meanwhile, the democratic legitimacy of a government has become a more common factor in recognition practices, even if 'the evidence of these notions is not uniform, and it derives exclusively from the practice of States that are themselves democratic'.⁸² At the multilateral level, careful consideration has been given to the interpretation of the country's Constitution⁸³ and to the constitutional character of the government.⁸⁴ Moreover, under the circumstance of foreign occupation or coup, constitutionality is situated above effectiveness in determining the legitimate authority.⁸⁵ Undeniably, political considerations often affect the determination of legitimate authority, as demonstrated by the inconsistent criteria applied in such disputes.⁸⁶ Indeed, since the general guideline adopted for the determination of the proper representative is the broadly framed 'Purpose and Principles of the Charter',⁸⁷ criteria for determining valid authority are not confined to effectiveness and constitutionality, but may be subject to evolution reflecting the ongoing development of international legal norms.⁸⁸

In the face of the ambiguous situation of Côte d'Ivoire, it was indeed inevitable that the international community choose which government to recognize as 'legitimate' and thus entitled to speak and act on behalf of Côte d'Ivoire.⁸⁹ As has

79 It has been remarked that state practices regarding recognition of governments dominated by the application of *de facto* or effective-control tests is 'the logical default position in an international system of sovereign states'; B. R. Roth, *Governmental Illegitimacy in International Law* (1999), 136.

80 See L. T. Galloway, *Recognizing Foreign Governments: The Practice of the United States* (1978), 128, especially the Appendix for governments' criteria for the recognition of other governments.

81 *Ibid.*, at 137–8.

82 Murphy, *supra* note 78, at 139.

83 E.g., in the case of Congo, the Credential Committee conducted a thorough interpretation of the constitutional law of the Congo; D. Ciobanu, 'Credentials and Representations of Member States at the United Nations', (1976) 25 ICLQ 351, at 371.

84 d'Aspremont, *supra* note 73, at 905–7.

85 On government in exile having lost its effectiveness in the territory of the state and its representation, see Talmon, *supra* note 69, at 173–84; B. R. Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine', (2010) 11 Melb. JIL 392, at 415–39. For the Credential Committee's practices of accreditation resorting to the criterion of constitutionality, see d'Aspremont, *supra* note 73, at 905.

86 For China, see, e.g., Y.-L. Liang, 'Notes on the Legal Questions Concerning the United Nations', (1951) 45 AJIL 690; for Cambodia, see, e.g., S. Ratliff, 'UN Representation Disputes: A Case Study of Cambodia and a New Accreditation Proposal for the Twenty-First Century', (1999) 87 *California Law Review* 1207; Murphy, *supra* note 78, at 143–51.

87 UN Doc. A/RES/396(V) (1950), para. 1.

88 See, e.g., G. H. Fox, 'The Right to Political Participation in International Law', (1992) 17 Yale JIL 539, at 596–606; M. Griffin, 'Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy through Its Accreditation Process, and Should It?', (1999–2000) 32 JYUJILP 725; d'Aspremont, *supra* note 67.

89 See Talmon, *supra* note 69, at 115.

been noted, neither of the traditionally considered criteria – constitutionality (or domestic legality) and effectiveness – provided satisfactory grounds for this determination. Nevertheless, soon after the certification by the SRSG, Ouattara’s presidency and his government were so recognized, confirmed by the accreditation of his representatives at the General Assembly.⁹⁰ The decision was swift, with the Credential Committee members gathering willingly to apply the result of the election, replacing the previous delegates as soon as Ouattara’s government submitted credentials for his delegations.⁹¹ Even though, in theory, approval of credentials is regarded as a formal authentication procedure,⁹² practices have evolved such that the proceedings result in substantively considering the competence or legitimacy of the authority issuing the credentials.⁹³ Moreover, this decision adopted at the General Assembly was indeed conclusive for the matter of international representation in that it would be applied in most inter-governmental organizations.⁹⁴ Of course, the careful distinction should be made that the replacement of international representation at the United Nations does not imply entitlement to representation at the bilateral level, which functions with the unilateral act of government recognition.⁹⁵ However, as some states have abandoned the policy of officially according recognition to governments of other states, although still according recognition obliquely,⁹⁶ the standpoint adopted at the General Assembly may fairly be regarded as reflecting ‘the united position of the international community’.⁹⁷

To some extent, the case may be furthered to strengthen the argument regarding the decline of effectiveness as a test for government status, which was traditionally seen as the imperative criterion both in the recognition of government and in the accreditation of representatives in inter-governmental organizations.⁹⁸ However, in some respects, effectiveness can be seen as contingent upon international legitimacy as determined by international representation. Along with the replacement of international representation, the external effectiveness of Gbagbo’s government was largely limited, being excluded from the benefits of international intercourse.⁹⁹ Loss of his external legitimacy and external effectiveness and the subsequent international pressure on his regime, later even referred to as an ‘illegitimate government’, resulted in curtailing his internal effectiveness also. The impact was heightened by

90 See sub-subsection 2.2.1, *supra*.

91 d’Aspremont, *supra* note 67.

92 See Scope of ‘Credentials’ in Rule 27 of the Rules of Procedure of the General Assembly, UN GAOR, 25th Sess., Agenda Item 3, at 1, UN Doc. A/8160 (1970).

93 Schermers and Blokker, *supra* note 76, at 197.

94 See UN Doc. A/RES/396(V) (1950).

95 See ‘Memorandum on the Legal Aspects of the Problem of Representation in the United Nations, Transmitted to the President of the Security Council by the Secretary-General (UN Doc. S/1466 (1950))’, (1950) 4:2 IO 356, at 356–60.

96 See, e.g., C. Warbrick, ‘The New British Policy on Recognition of Governments’, (1981) 30 ICLQ 568; S. Talmon, ‘Recognition of Governments: An Analysis of the New British Policy and Practice’, (1992) 63 BYIL 231. The UK also announced that they regard Ouattara as ‘legitimate president of Côte d’Ivoire’. Cf. recent case of Libya; see S. Talmon, ‘The Difference between Rhetoric and Reality: Why an Illegitimate Regime May Still be a Government in the Eyes of International Law’, *EJIL Analysis*, 3 March 2011; D. Akande, ‘Which Entity Is the Government of Libya and Why Does It Matter?’, *EJIL Analysis*, 16 June 2011.

97 See *supra* note 24.

98 Roth, *supra* note 85.

99 See Lauterpacht, *supra* note 74, at 143.

the sanctions imposed against the regime.¹⁰⁰ By contrast, Ouattara's government officially worked as a legitimate authority to represent and to exercise the sovereignty of Côte d'Ivoire in the international community.¹⁰¹ Indeed, this in turn strengthened his government's external and internal effectiveness as well as empowering its legitimacy.

What norm, then, has been projected in the determination of the legitimate authority in Côte d'Ivoire? The situation was complicated in that neither constitutionality (domestic legality) nor effectiveness sufficiently provided a clear answer. Instead, free and fair election results certified by the SRSG sustained the position of Ouattara's newly established government and bestowed his 'legitimacy of origin'¹⁰² in spite of his actual ineffectiveness in controlling the state. Here, electoral legitimacy provides the fundamental parameter in the international appraisal of Ouattara's government as legitimate to represent Côte d'Ivoire,¹⁰³ beyond the free and fair election as ensuring the right to political participation, which has already been spelled out in a number of legally binding human rights instruments.¹⁰⁴ This external assessment has been practically conveyed via replacement of international representation through accreditation proceedings, as the Côte d'Ivoire case has revealed. Indeed, this is the precise scenario described by Professor Fox in his 1992 article,¹⁰⁵ and this precedent may reinforce his argument for the accreditation process as an institutional enforcement mechanism to enhance the right to political participation.¹⁰⁶

The strong international support of Ouattara's electoral legitimacy over Gbagbo's effective territorial control might be interpreted as reflecting the international community's inclination on the promotion of democracy through ensuring free and fair elections, while also evincing 'the growing interest in using the credential process as a vehicle to promote democracy'.¹⁰⁷ Meanwhile, beyond the protection of political participation as a core participatory right within the human rights discourse, the further discursive echo is whether democracy itself constitutes the entitlement of a government to be legitimate, and whether it can be further discussed in legal terms under the international legal framework. It has already been two decades since Professor Franck carved the term 'democratic entitlement' into international legal discourse.¹⁰⁸ Whether governments recognize that 'their legitimacy depends

100 Financial restrictions and economic embargos against the regime resulted in weakening his rule internally; see Banegas, *supra* note 68, at 463.

101 On 14 December 2010, Ouattara sent a letter as the newly elected president of Côte d'Ivoire confirming the ICC's jurisdiction in Côte d'Ivoire, based on a declaration submitted in 2003, NR 0039-PR-du 14/12/2010.

102 See d'Aspremont, *supra* note 73, at 877–918. Prof. d'Aspremont makes a distinction between 'legitimacy of origin' and 'legitimacy of exercise', and asserts that election provides the one but not the other.

103 d'Aspremont, *supra* note 67.

104 J. Wouters et al., 'Democracy and International Law', Working Paper No 5 (June 2004), LIRGIAD, at 7–17.

105 Fox, *supra* note 88, at 603–4.

106 *Ibid.*, at 588–607; see also Griffin, *supra* note 88, at 726.

107 Griffin, *supra* note 88, at 725.

108 Prof. Franck maintains 'democracy as the key factor for determining the legitimacy of State in the international system' based on 'the existence of emerging normative expectations in the international system that states will be organized as democratic governments'. Although his essay was carefully tagged, 'the radical vision, while not yet fully word made law', he maintains his conviction that such value 'is rapidly becoming, in our time, a normative rule of the international system'; Franck, *supra* note 52, at 46 (emphasis added).

on meeting a normative expectation of the community of states' and whether democracy has become 'a global entitlement, one that increasingly will be promoted and protected by collective international process',¹⁰⁹ is addressed (or perhaps partly evidenced) here in actual practice. Still, considering that the concept of democracy itself still lacks universality in its comprehension, which is indeed 'the archetype of an essentially contested concept',¹¹⁰ it is undeniable that a fundamental limitation exists in approaching the issue of democratic entitlement as the normative expectation of the international community with concrete legal terms masking the substantively different perspectives on the content of the principle.¹¹¹ Additionally, the opposing view may question whether this argument is consistent with the current international legal order.¹¹² To what extent has the norm currently evolved? Even if a positive answer is optimistically derived, can electoral legitimacy alone satisfy the requirement for democratic governance?¹¹³

Still, the substantial issue of government attributes, whether legitimate or democratic, remains invisible until there is actual dispute over legitimate authority. Traditionally, if a new government is established through constitutional process, the legitimacy of that government is left largely unquestioned within the international sphere,¹¹⁴ as the prerequisite for such attention is the existence of dispute.¹¹⁵ While dispute over authority within a sovereign state inevitably brings about an external projection on the matter, whether it is appropriate in general circumstances to 'validate' the incumbent government is a grey area. Even so, whether 'legitimacy' implies the legal status of a government is another question, and one that perhaps strays too far from the fundamental grounds of international law to be a valid query in legal terms. It is still controversial whether and how far the international community can evaluate the features of an existing government within a sovereign state without compromising the principles of international law.

3.3. Determination of military operations

The third distinctive feature is related to the underlying rationale enabling the international community to undertake a military operation within Côte d'Ivoire.

¹⁰⁹ Ibid.

¹¹⁰ S. Marks, 'The "Emerging Norm": Conceptualizing "Democratic Governance"', (1997) 91 ASIL Proc. 372, at 372. Prof. Marks also sharply spoke on this, saying 'for democracy appeared to mean everything, and therefore nothing'; see also S. Marks, 'International Law, Democracy and the End of History', in Fox and Roth, *supra* note 78, at 532.

¹¹¹ See also D. Wippman, 'Defending Democracy through Foreign Intervention', (1997) 19 Houston JIL 659, at 663.

¹¹² Even earlier than Franck, regarding the assertion that a government should be in accordance with democratic principles to be lawful (E. Lauterpacht, *The Times*, 23 December 1989), harsh criticism was also made describing this trend in the literature as 'a new form of threat to international public order' and that such an 'adoption of a standard of democratic government would lead to endless intervention in the affairs of States'; I. Brownlie, *The Rule of Law in International Affairs* (1998), 59–61.

¹¹³ Noting the illiberal democracies, see d'Aspremont, *supra* note 73; see also J. d'Aspremont and E. D. Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise', (2011) 34 Fordham ILJ 190.

¹¹⁴ Murphy, *supra* note 78, at 139; Talmon, *supra* note 69, at 22–3.

¹¹⁵ Except in the cases of South Africa and Hungary, where the credential issue was dealt with without there being competing authorities.

Since the post-election crisis, a series of SC resolutions have been adopted for re-inforcement of military presence to enhance the protection of civilians.¹¹⁶ These culminated in Resolution 1975, which explicitly authorized the UNOCI 'to use all necessary means to carry out its mandate to protect civilians under imminent threat of physical violence' while stressing impartiality in implementing that mandate. It has been two decades since the Security Council comprehensively interpreted massive human rights abuses as constituting a threat to international peace and security,¹¹⁷ so, given the widespread concern over the humanitarian situation in Côte d'Ivoire, the adoption of such a resolution was to be anticipated.¹¹⁸ The phrasing of the resolution reflected that the grounding of the military action was circumscribed on the necessity of protecting civilians from violence and preventing the use of heavy weapons against them. Indeed, these limited aims were strongly underlined afterwards; for example, the Secretary-General's later statement emphasized that the UN forces had conducted operations within the scope of the mandate 'whose sole purpose was to protect innocent people' and therefore had not acted beyond the mandate.¹¹⁹

A logical first question, then, is whether the military operation was indeed conducted within the scope of the mandate – more precisely, whether the protection of civilians included and thus legitimized the action resulting in ousting Gbagbo's regime to install a democratically elected government led by Ouattara. Indeed, it is arguable that the military action that resulted in ousting Gbagbo's regime superseded a boundary established by the mandate of the protection of civilians.¹²⁰ Of course, as the Secretary-General pointed out, the deteriorating situation in the country, which 'plunged into violence with a heavy toll on the civilian population', could be seen as 'a direct consequence of Mr. Gbagbo's refusal to relinquish power and allow a peaceful transition to President Ouattara'.¹²¹ It had, in fact, been urged in Resolution 1975 that Gbagbo immediately step aside while recognizing Ouattara as the legitimate government;¹²² thus, regime change may be interpreted as the overall stated aim.¹²³ Yet, compared to the phrasing of the resolutions authorizing intervention in Haiti and Sierra Leone, which specifically authorized the use of force 'to facilitate the departure from Haiti of the military leadership [and] the prompt return of the legitimately elected President',¹²⁴ and demanded that 'the military junta

116 UN Doc. S/RES/1962 (2010); UN Doc. S/RES/1967 (2011); UN Doc. S/RES/1968 (2011).

117 See S. D. Murphy, 'The Security Council, Legitimacy and the Concept of Collective Security after the Cold War', (1994) 32 CJTL 201, at 203.

118 See *supra* notes 36 and 37. Meanwhile, the response was regarded as 'a watershed in the emerging doctrine of responsibility to protect' because the responsibility to protect framework facilitated the Security Council's decision to respond in a timely and decisive manner.

119 See Press Release, Secretary-General, UN Doc. SG/SM/13548 (6 May 2011).

120 S. Bureau, 'The Situation in Ivory Coast: Intervention to Protect or Regime Change Operation?', *International Law Notepad*, 11 April 2011, available at <http://internationalawnotepad.wordpress.com/2011/04/11/situation-ivory-coast-intervention-regime-change/#more-518>.

121 Press Release, *supra* note 45.

122 SC Res. 1975, *supra* note 39, paras. 1, 3.

123 C. Henderson, 'International Measures for the Protection of Civilians in Libya and Côte d'Ivoire', (2011) 60 ICLQ 767, at 772–3.

124 UN Doc. S/RES/940 (1994), para. 4.

take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically-elected Government and a return to constitutional order',¹²⁵ the wording of the Côte d'Ivoire resolution might be seen as too feeble to support the coercive actions taken.

Nonetheless, the mandate to protect civilians might be interpreted as including the removal of the 'fundamental cause' of the crisis by ousting Gbagbo and sitting the democratically elected president Ouattara. Additionally, and apart from the intent of the resolution, it may be true that the overthrow of the regime was an inevitable consequence of action to protect civilians. A separate possible argument is that the series of resolutions authorizing the UNOCI to take all necessary steps to fulfil its mandate in support of free and fair elections in Côte d'Ivoire implies the recognition of involvement of UNOCI beyond the protection of civilians. However, under this argument, the question of whether this mandate extends to ensuring that the democratically elected government is well established and settled within a sovereign state will trigger another fundamental issue regarding the boundary of international involvement justified under election observation; furthermore, whether the protection of civilians implies protecting their 'right to democratic government', as to do otherwise 'invariably [brings in its] wake the violation of all the other rights',¹²⁶ raises yet another fundamental question. And this, in turn, may extend the controversy to the liberal democratic discourses.¹²⁷ As Professor Bureau noted, while a 'lack of specific mandate' in drafting resolutions might be a purposeful move to obtain the support of all members, including China and Russia, it also causes 'endless debates within international society of how far the mandate to protect civilians extends'.¹²⁸

Despite the uncertain ground opened up by non-specific scope of mandate, the SC resolution provided, in and of itself, sufficient legal basis for coercive military action. Moreover, the presence of an already existing peacekeeping operation with a robust mandate consented to by then-president Gbagbo actually facilitated the intervention in accordance with the Security Council's resolution.¹²⁹ If the military action operated as an extension of the peacekeeping mandate of the UNOCI, the ensuing question is whether the military action taken against Gbagbo's side was consistent with the three basic principles of peacekeeping operation, particularly the principle of impartiality.¹³⁰ Indeed, it was a situation of civil war; thus, as was stressed in the resolution, the operation had to be implemented impartially. As a

125 UN Doc. S/RES/1132 (1997), para. 1.

126 W. M. Reisman, 'Humanitarian Intervention and Fledgling Democracy', (1994–95) 18 *Fordham ILJ* 794, at 795.

127 See, e.g., A.-M. Slaughter, 'International Law in a World of Liberal States', (1995) 6 *EJIL* 503; and also see critics, J. E. Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory', (2001) 12 *EJIL* 183.

128 Bureau, *supra* note 120.

129 The UNOCI was established by SC Res. 1528 (UN Doc. S/RES/1528 (2004)) under the request made by then-president of the Republic of Côte d'Ivoire Gbagbo; see also UNSC, UN Doc. S/2003/99 (2003); UN Doc. S/RES/1464 (2003).

130 The three basic principles are: (i) consent of the parties, (ii) impartiality, and (iii) the non-use of force except in self-defence. UN-DPKO, *United Nations Peacekeeping Operations: Principles and Guidelines* (2008), 31–5. Although there have been fluctuations and challenges, these principles have remained as 'the bedrock principles of peacekeeping'; see 'Report of the Panel on United Nations Peace Operations (Brahimi Report)', UN Doc. A/55/305–S/2000/809 (2000), para. 48; see also N. Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension', (2006) 11 *JCSL* 465, at 465–6. Regarding

representative from India warned, 'UNOCI should not become part of the political stalemate or be drawn into civil war' and should strictly follow its mandate to be 'peacekeepers not . . . agents of regime change'.¹³¹ Although the resolution included a phrase condemning Gbagbo's regime, it did not clearly indicate whether it allowed supporting one side.¹³² Moreover, although the adoption of the resolution was praised by a representative from Ouattara's government,¹³³ the intervention was implemented beyond the specific invitation of the (deemed) legitimate side; rather, it was grounded on the Council's determination that the situation posed a threat to peace and security in a humanitarian context where both factions were responsible for unleashing violence threatening the civilian population.¹³⁴

In this context, which included a series of air strikes against Gbagbo's force and residence,¹³⁵ the peacekeepers' support of Ouattara's force in the civil strife could not be seen as acting impartially. Consistently with its stance that Côte d'Ivoire's problems were internal and did not warrant external involvement, Russia harshly criticized the UN peacekeepers for taking sides in the conflict, labelling it 'a dangerous tendency'.¹³⁶ However, 'impartiality is not the same as neutrality or equal treatment of all parties in all cases for all time'¹³⁷ and, accordingly, Gbagbo's violation of the peace agreement (which included establishing reconciliation through the election process) would provide grounds for taking one side in the action.¹³⁸ Perhaps taking one side would be understood as an inevitable consequence to protect civilians in an expanded peacekeeping operation, which cannot strictly follow the basic principles framed in the 1950s.¹³⁹ Such a rationale lies, however, beyond concrete legality, as it reflects the inherent reliance of peacekeeping on evolving practices. Meanwhile, questions follow on whether the determination to favour one side in a civil war is relevant to the previously discussed legitimate authority in international representation. If the determination was made at the request of Ouattara's government and the operation was thus also based on an invitation requesting collective self-defence, is the request to be regarded as an invitation by a legitimate authority?¹⁴⁰ Here, infringement of impartiality reinitiates the

the principle of non-use of force, a series of attacks against the peacekeepers was reported, thus providing grounds for them to claim their action to be self-defence; see Press Release, *supra* note 68.

131 The representative for Brazil also stressed that the UNOCI should remain impartial so as not to become part of the conflict; see Press Release, UNSC, UN Doc. SC/10215 (30 March 2011).

132 Bureau, *supra* note 120.

133 See Oussoufou Bamba's statement after the adoption of the resolution; Press Release, UNSC, UN Doc. SC/10215 (30 March 2011).

134 See HRW, 'Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians during Offensive', *News*, 9 April 2011.

135 See media reports, S. Kouassi et al., 'Laurent Gbagbo's Forces Fired on by UN Attack Helicopters', *Guardian UK*, 4 April 2011; A. Laing, 'Ivory Coast: French Helicopters Launch Rockets at Gbagbo's Palace', *The Telegraph*, 8 April 2011; Unnamed, 'Ivory Coast: New Air Strikes near Gbagbo Residence', *BBC News*, 10 April 2011.

136 S. Gutterman, 'Russia Criticises UN Force Role in Ivory Coast', *Reuters*, 14 April 2011; see also Cook, *supra* note 2, at 2.

137 See Brahimi Report, *supra* note 130, at 9, para. 50.

138 See Bureau, *supra* note 120.

139 See Tsagourias, *supra* note 130, at 465.

140 Invitation provided by a government with effective control, even experiencing temporary loss of control, has been regarded as legitimate grounds for intervention. On this issue, see D. Wippman, 'Pro-Democratic Intervention by Invitation', in Fox and Roth, *supra* note 78, at 293–327.

substantive discussion on the criterion applied in the appraisal of international legitimacy of a government within a sovereign state.

Notwithstanding all of these controversies on the scope of the mandate prescribed in the resolution and the principle circumscribing the operation, the final question is whether this case will serve as a precedent for intervention authorized by the Security Council on the circumstance of the disruption of democracy, albeit as a secondary consideration for the determination of threat to peace and security under the principal context of humanitarian crisis. Unlike previous unilateral interventions under this title, which often were condemned by the international community,¹⁴¹ since the end of the Cold War, interventions based on the disruption of democracy within a sovereign state have been carried out based either on the authorization of the Security Council or on the invitation of a legitimate authority, and thus conducted within the collective security framework.¹⁴² Notable examples cited as interventions in this context are Haiti¹⁴³ and Sierra Leone,¹⁴⁴ each of which resulted from a military coup that overthrew the democratically elected government. International response to these situations has been widely referred to as ‘the beginning of a meaningful and not merely rhetorical [UN] commitment to support the principle of democracy’,¹⁴⁵ and thus they form a watershed for the manifestation of pro-democratic intervention.¹⁴⁶ However, even in the most remarkable incidents evidencing the evolution of pro-democratic intervention so far, the Council tended to contextualize the authorization of intervention over grave humanitarian concerns and the spillover effects in regional security, rather than concern for the interruption of democracy.¹⁴⁷ Therefore, even though the scope for the intervention in Côte d’Ivoire is seen as limited to the protection of civilians, discussion of pro-democratic intervention need not be automatically excluded unless the fundamental cause of the intervention lies within the principle of democracy.

Pro-democratic intervention is generally defined as the use of force through either multilateral or unilateral intervention in support of a democratic government

141 E.g., Grenada (1983) and Panama (1989); see S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2001), 102–6. States doubted ‘the propriety of any attempt by foreign states to influence domestic political process’; D. J. Scheffer, ‘Use of Force after the Cold War: Panama, Iraq, and the New World Order’, in L. Henkin et al. (eds.), *Right v. Might: International Law and the Use of Force* (1991), 123.

142 Consent of the legitimate government was regarded as the decisive factor for intervention. See, regarding Haiti, Chesterman, *supra* note 141, at 155; regarding Sierra Leone, see K. Nowrot and E. W. Schbacker, ‘The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone’, (1998) 14 *AUILR* 321, at 386.

143 UN Doc. S/RES/940 (1994); see J. Leininger, ‘Democracy and UN Peace-Keeping: Conflict Resolution through State-Building and Democracy Promotion in Haiti’, in A. von Bogdandy and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, Vol. 10 (2006), 495–9.

144 UN Doc. S/RES/1132 (1997). Decision (Final Communiqué) made by ECOWAS annexed in the letter (dated 8 September 1997) from the Permanent Representative of Nigeria to the United Nations Addressed to the President of the Security Council, UN Doc. S/1997/695 (8 September 1997), Annexes I and II.

145 Reisman, *supra* note 126, at 796; the other comment on the case of Haiti, ‘a high-water mark of council activism in the 1990s’, T. G. Weiss, *Military–Civilian Interactions: Humanitarian Crises and the Responsibility to Protect* (2005), 198; see also Roth, *supra* note 79, at 383–7; M. E. O’Connell, ‘Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy’, (1998) 36 *CJTL* 473, at 487–8.

146 Roth, *supra* note 79, at 406–8.

147 Chesterman, *supra* note 141, at 159–60.

that has been removed by unconstitutional means.¹⁴⁸ So far, international legal discourse has tended to follow a narrow definition of pro-democratic intervention based on existing practices, and cases referred to as precedents have, for the most part, originated from military coups that removed a democratically elected government that had operated with a certain level of effectiveness. In this regard, in so far as military operations were in fact conducted beyond the protection of civilians, aiming to restore democracy, the case is bound to be viewed as an extension of scope for pro-democratic intervention. The factually different situation of Côte d'Ivoire would slightly broaden the notion of pro-democratic intervention by including the establishment of democracy per se in a sovereign state by external interference: more precisely, pro-democratic intervention in Côte d'Ivoire may have been undertaken not to reinstall a removed government, but to realize the result of an election.

Nonetheless, the emphasis given to the protection of civilians and to not exceeding this mandate would tend to downplay the pro-democratic aspect of the intervention, while demonstrating the difficulties inherent in citing the principle as an impetus for intervention. Perhaps accompanying the controversies attached to the notion of democracy itself, based on the inherent limitation of its universality in genuine context and therefore its potential for abuse in the furthering of other political purposes, so far, restoration of democracy per se has not been seen to justify the use of force by other states on the issue of a sovereign state. The case of Côte d'Ivoire would seem to gauge as fairly low the level of the current consensus on taking action to promote the principle of democracy, at least as the sole grounds for initiating intervention, and on the right to intervene in a civil war.¹⁴⁹ In this regard, it is doubtful whether it is strong enough to serve as a precedent for pro-democratic intervention. Rather, it could perhaps more accurately be seen as demonstrating the tendency of the United Nations, which refrained from framing the military operation under the notion of pro-democratic intervention.

4. THREE MECHANISMS FOR DEMOCRACY

The case of Côte d'Ivoire has illustrated how democracy is promoted, preserved, and protected today. Throughout the examination of three distinctive features in the situation of Côte d'Ivoire, the principle of democracy was seen to be firmly rooted in the response of the international community. The realization of democracy in Côte d'Ivoire was strongly supported, first through the comprehensive international support for free and fair elections; second through the recognition of the democratically elected president as the legitimate authority to represent Côte d'Ivoire; and third through intervention that supported the military action taken against the illegitimate power to establish the democratically elected government, even if the

148 Wippman, *supra* note 140, at 293–327; J. I. Levitt, 'Pro-Democratic Intervention in Africa', (2006) 24 *Wisc. ILJ* 785, at 789.

149 The Nicaragua judgment is pertinent here: 'The Court . . . finds that no such general right of intervention, in support of an opposition within another State, exists in contemporary international law'; see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits and Judgment, [1986] ICJ Rep. 109, para. 209.

primary purpose was to protect civilians. All of these evidence the international community's adherence to the principle of democracy, while revealing the mechanisms for promoting this principle.

The first distinctive feature clearly revealed itself as the setting mechanism of democracy: the international monitoring of elections. Election as a method assuring political participation is the core procedural aspect of democracy. International election observation has been comprehensively developed from practices accumulated since the first generation of UN monitoring operations, mostly conducted in the course of decolonization in trust and non-self-governing territories.¹⁵⁰ Since the 1990s, with the remarkable proliferation of democratic movements, the frequency of electoral monitoring by the United Nations in even sovereign member states has increased, as holding genuine and periodic elections has been emphasized as a prerequisite for establishing democracy.¹⁵¹ Today, more than electoral assistance (i.e., logistical support and technical advice), direct organization and even certification are offered, as in the case of Côte d'Ivoire. Moreover, either direct or indirect election monitoring has become a crucial aspect of post-conflict reconstruction, with the holding of free and fair elections being frequently articulated into the peace agreement. Increasingly, post-conflict states voluntarily request election observation not only for reconciliation between competing factions, but also as a way to securely attain external legitimacy.¹⁵² Although the case of Côte d'Ivoire has left queries regarding the meaning of election certification – whether it posits beyond the national legal order – it demonstrates the international community's involvement through the mechanism of comprehensive support of national election in accordance with the principle of democracy, while clearly illustrating the international legitimacy attached to the democratic election result.

The second distinctive feature demonstrated the consolidating mechanism for democracy: the international representation framework. When there are two competing governments claiming the sole legitimacy to represent a state, the international community cannot but interfere with the matter of legitimacy of government. The international community is involved in recognizing and reinforcing the status of the legitimate authority, usually grounded on the authority guaranteed by the initial setting mechanism, democratic entitlement given through elections. International legitimacy based on the democratic entitlement of a government is fairly consolidated through the international representation mechanism. Already, this mechanism has been to some degree framed and evidenced. Within the inter-governmental organizations, democracy and stable institutions guaranteeing the continuation of that democracy have been set as a precondition for membership and state recognition.¹⁵³ Moreover, suspension of membership is specifically prescribed

150 See, generally, Beigbeder, *supra* note 51, at 119–47.

151 Stoelting, *supra* note 52, at 372; see, e.g., G. H. Fox, 'Election Monitoring: The International Legal Setting', (2000–01) 19 *Wisc. ILJ* 295; W. M. Reisman, 'International Election Observation', (1992) 4 *Pace Yearbook of International Law* 1.

152 See, e.g., T. M. Franck, 'Legitimacy and the Democratic Entitlement', in Fox and Roth, *supra* note 78, at 25–47.

153 Wouters et al., *supra* note 104, at 17–22; S. Wheatley, 'Democracy in International Law: A European Perspective', (2002) 5 *ICLQ* 225, at 234–5.

when democracy is disrupted through unconstitutional change of government.¹⁵⁴ Meanwhile, a number of precedents have accumulated where the United Nations has used the accreditation process in a substantive way for reinforcing the determination of the legitimate representation of a state. Indeed, within these international representative frameworks, states have reinforced the status of one competing claimant as the legitimate authority to represent a state, and these decisions tend to align with democratic entitlement.¹⁵⁵ Throughout this framework, the government considered to be the legitimate authority attains external effectiveness, and ultimately may achieve internal effectiveness as well.

The last feature is related to the enforcing mechanism for democracy, although, here, a careful approach is needed. Promotion of democracy has been a crucial agenda of the international community, being recognized as inextricably linked to human rights, development, and even peace per se,¹⁵⁶ and has been reinforced in many indirect ways, including those explored here. Yet, whether infringements of democracy within a sovereign state directly provide legitimacy to the international community to intervene with use of force under the purpose of restoration of democracy remains in doubt. So far, there are not enough instances clearly evidencing whether the disruption of democracy per se constitutes a threat to peace and security to trigger action under a Chapter VII resolution. To be sure, the innovative normative development of sanction mechanisms within regional organizations, and subsequent practices, may be noteworthy in regard to the evolving status of the consensus towards pro-democratic intervention.¹⁵⁷ Still, contextualizing military operations within the limited scope of civilian protection reveals current difficulties in addressing the principle of democracy as penetrating the greater boundary of the principle of non-use of force, as well as careful concern for election and governmental structures as essentially domestic matters under the principle of non-intervention. Nevertheless, it cannot be denied that emerging consensus on democratic governance and its inextricable connection to the human rights discourse, either as the right to democratic government as a core human right per se or as a means to realize the other core human rights, may pave the way for argument favouring a more active international involvement in the case of disruption of democracy within a sovereign state.

Throughout the situation of Côte d'Ivoire, the will of the people as revealed in the election has been supported by the international community: to be established, to be recognized, and then to be implemented. However, even though holding free and fair elections constitutes the first step for democracy, democratic election results

154 ECOWAS, Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, A/SP1/12/01 (December 2001, entered into force 2005), Art. 45(1); AU, African Charter on Democracy, Elections and Governance, 30 January 2007, Art. 25.

155 Although it would still be difficult to identify a general obligation to introduce democratic government in international law, Prof. Wheatley noted that there is 'a progressive and irreversible movement to a world community of democratic states'; Wheatley, *supra* note 153, at 233–4.

156 See B. Boutros-Ghali, *An Agenda for Democratization* (1996). Regarding the notion of democratic peace, see, e.g., M. W. Doyle, *Ways of War and Peace* (1997); J. L. Ray, *Democracy and International Conflict: An Evaluation of the Democratic Peace Proposition* (1995).

157 See Levitt, *supra* note 148.

are only a procedural aspect; practices have revealed that such entitlement does not guarantee the further substantive realization of democracy.¹⁵⁸ Moreover, democracy is not something that can be implanted, either by way of coercive measures or by way of being so educated, without the genuine consent and understanding of the people who are governing and establishing that democracy. Indeed, the notion of democracy *per se* refuses implantation if it means to be a real democracy, which can only be grown spontaneously through a bottom-up approach, and this necessitates a certain period of trial and (potentially harsh) error for democracy to bloom out until fully embedded. And perhaps international law already, cleverly, realizes an invisible restriction on inserting legal obligation into the notion of democracy, and this is why the legal discourse can only address the procedural aspect of democracy rather than substantively addressing the notion in legal terms.

5. CONCLUSION

International responses to the extraordinary situation of there being two competing governments in Côte d'Ivoire have reflected the current stage of consensus on and the mechanisms applicable to reinforce the principle of democracy. The sole international legitimacy granted to Ouattara's government in accordance with internationally certified democratic entitlement certainly strengthened his stance throughout the international representation framework, thereby enhancing his government's external and internal effectiveness while triggering direct international support. Specific mechanisms for democracy were thus manifested in the response towards Côte d'Ivoire, as well as their limitations and also their potential when applied to a specific situation.

Meanwhile, the case raised fundamental questions of whether the democratic feature of government and its legitimate attributes can be addressed in the language of international law. Although it is still unclear whether there is an obligation to construct 'democratic government', precedents are accumulating that illustrate the appraisal of international legitimacy's being largely inclined towards and based on democratic entitlement. The sole 'international legitimacy' attached to one of the competing governments ultimately reinforces its effectiveness, allowing it to achieve the attribute of effective control, as generally prescribed in legal discourse as prerequisite. And this would pave way for the argument that governmental status, appraised by both democratic origin and exercise, is not isolated from how it is recognized by the international community in accordance with its values and rules in the contemporary sphere, and ultimately condensed in international law. Indeed, the most fundamental presumption in all of these arguments is that it is undeniable that human rights, democracy, and legitimacy are today inextricable and strongly pursued by the international legal community, where all states and their governmental authorities are situated and thus measured.

¹⁵⁸ S. Marks, 'What Has Become of the Emerging Right to Democratic Governance?', (2011) 22 *EJIL* 507, at 515.