INTERNATIONAL LAW, POLITICS, AND THE RECOGNITION OF REVOLUTIONARY GOVERNMENTS

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Alvin Magid

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By

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AN ABSTRACT

Submitted to the College of Business and Public Service
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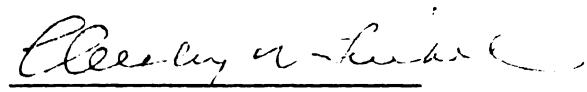
Approved 

ABSTRACT

A study of the recognition problem might enable the student of international affairs to evaluate the role of law and a presumed legal framework in the activities of states.

A consideration of the question, 'Is It Law?', involving three factors, the 'spiritual' (basic consensus among the states), 'institutional' (development of coercive supranational institutions), and "real political' (contemporary East-West conflict), points to the primitive, weak, and decentralized character of International Law.[1] The political nature of recognition supports this conclusion.

The refusal of states to relinquish discretion in recognition illustrates the limited capacity of International Law. To ensure the political nature of the recognition act, they have historically relied upon three criteria, legitimism, willingness and ability to fulfill international obligations, and de factoism.[2] Only de factoism approaches an objective, 'legalistic' principle; however, the refusal of states to admit rights to, and duties of, recognition has reduced it, too, to a political instrument.

In the Twentieth Century, even while creating certain international institutions, the states have been careful not to grant them instruments of coercion. Sovereignty has been written into their constitutions. Acting as sovereigns, the states have denied to these organizations a function in recognition. Collective, legal recognition has been categorically rejected.[3]

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[1]Chapter I.

[2]Chapters II and III.

[3]Chapter IV.

A study of recognition shows that law can assume only a weak role in an era of great ideological, military, and political conflict. Even in a relatively stable world environment it is doubtful whether states will voluntarily strengthen the international rule of law. The history of recognition demonstrates that, whatever the circumstances, states only reluctantly, if ever, acquiesce in International Law as a coercive agent.

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CHAPTER I

INTRODUCTION

The problem of the recognition of revolutionary governments has undoubtedly been significant historically in international relations. Perhaps more significant, however, has been its relevance to a broader question of the relative positions of law and politics on the international plane. A study of the recognition problem may enable the student of international affairs to evaluate the role of law and a presumed legal framework in the activities of states. But the actions of states in the narrower sphere of international recognition cannot be properly evaluated without a prior understanding of the broader problem and its implications. Thus, for example, a clearer understanding of the contemporary Chinese recognition question may be facilitated by an appreciation of the nature of international law.

While this writer will not attempt to evaluate present and formulate future policies in the current issue, he will at least seek to cut through a smokescreen of misinterpretation and confusion, in the hope that a clearer understanding of the problem of recognition will have been fostered. As recognition problems are perennial in the lives of states, the emphasis will be on their recurring rather than their present character.

A. International Law: Is It 'Law?'

States historically have at least conceded the existence of international law. Reaffirmations have been made periodically in municipal

court decisions, national constitutions, and in the charters and statutes of various international organizations. Chief Justice John Marshall could assert shortly after the founding of the American Republic that

> the law of nations is the great source from which we derive those rules . . . which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. . . . The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this [case]. . . .[1]

Mr. Justice Gray, delivering the majority opinion in the case of The Paquete Habana of 1900, noted, in part, that

> international law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations. . . .[2]

Similarly, British courts have on occasion referred to the role of international law. For example, Chief Justice Lord Coleridge perceived the law of nations as

> . . . that collection of usages which civilized states have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be a matter of evidence. Treaties and acts of state are

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[1]Herbert W. Briggs, The Law of Nations: Cases, Documents, Notes (New York: F. S. Crofts and Co., 1944), p. 36. ('Thirty Hogshead of Sugar vs. Boyle,' U. S. Supreme Court, 1815, 9 Cranch 191, 198.)

[2]Ibid., p. 33. ('The Paquette Habana Case,' U. S. Supreme Court, 1900, 175 U. S. 677.)

> but evidence of the agreement of nations . . . it is evidence of the agreement of nations on international points

to which, when . . .

> such points . . . arise, the English courts give effect, as part of English law . . .[1]

State constitutions, such as that of the Federal Republic of Germany, have also taken cognizance of the existence of international law. Thus, Article 25 of the Basic Law of May, 1949 declares that

> the general rules of public international law form part of the federal law. They take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.

Entrance of states into international organizations and adherence to their charters and statutes further suggests acknowledgment of the existence of international law.[2]

The above confirm that states have acknowledged a regulating phenomenon, termed 'international law,' in their external relations. Two related questions, both relevant to the problem of law and politics in recognition, must now be raised concerning this supposed regulating agent. First, do such rules constitute 'law', properly so-called? Second, if it is in fact law, does it regulate the act of recognition?

'Is It Law?' has long been debated among academicians and politicians. Even now it remains only unsatisfactorily answered. Several attitudes appear to be represented in the controversy. While many optimistically work toward a definitive answer, others

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[1]Ibid., p. 1. ('The Queen vs. Keyn.' Great Britain, Court for Crown Cases Reserved, 1876, 2 Exchequer Division 63, 153-154.)

[2]E. g., the Introduction to the Covenant of the League of Nations, the Preamble to the Charter of the United Nations, Article 1 of the Charter, Article 38 of the Statute of the International Court of Justice, and Article 38 of the Statute of the Permanent Court of International Justice.

incline to a dismissal of the problem as one inherently insoluble. As genuinely concerned with the issue as are their more optimistic colleagues, they nevertheless consider it a fruitless exercise.[1] Such despair seems to strengthen the claims of those who deny the existence of international law as law. For to avoid the problem entirely is to tacitly admit that one cannot say with any degree of authority just what is the nature of international law. On the other hand, those who maintain that what exists is genuinely law prolong the controversy. Consequently, the issue suffers interminable debate and insolubility.

Rather than attempt to answer the question that has hitherto defied solution, this writer will proceed from the admittedly negative end of establishing the nature of the controversy and its implications. In this way it is hoped that what will emerge will be a placing of international law, as it presently exists, in a relative position vis-a-vis international politics generally, and the problem of the recognition of revolutionary governments specifically.

Those who deny the existence of international law as law, or who emphasize its primitive existence, tend to consider the problem in the light of any one, or a combination, of three possible factors. For the purposes of this paper, they might be termed the 'institutional', 'spiritual', and 'real political' factors.

1. 'Institutional'

Critics of the appellation 'international law,' by assuming the 'institutional' line of debate, generally seek structure and hierarchy in law. Jeremy Bentham, for example, defined law as that

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[1]Glanville L. Williams, "International Law and the Controversy Concerning the Word 'Law'," British Yearbook of International Law, v. 22 (London: Oxford University Press, 1945), p. 163.

> . . . assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, the prospect of which it is intended should act as a motive upon those whose conduct is in question.[1]

More simply, its nature is that of an hierarchical relationship between a superior agency which dispenses the law, and an inferior one which is duty-bound to receive and acquiesce in it. The expectation of acquiescence is, of course, based on the prescription of sanctions and punishments dispensed as an assurance against violations. Hence, in the final analysis, law rests on the ability to coerce. "Every coercive law creates an offence, that is, converts an act of some sort, or other into an offence. It is only by doing so that it can impose obligation, that it can produce coercion."[2] Thus, it is rooted in the union of "command, duty, and sanction . . . [as]inseparably connected terms . . ."[3] and concepts.

It is somewhat ironic that Bentham, who argued against the existence of international law as law, should have coined the word 'international.'[4] This suggests that he and later his protege,

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[1]Charles Warren Everett, ed., Jeremy Bentham's The Limits of Jurisprudence Defined: Being Part II of an Introduction to the Principles of Morals and Legislation (New York: Columbia University Press, 1945), p. 88.

[2]Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (New York: Hafner Publishing Company, 1948), p. 331.

[3]Robert Campbell, ed., John Austin's Lectures on Jurisprudence, or the Philosophy of Positive Law, v. I (London: John Murray, 1869), p. 94.

[4]Bentham, op. cit., p. 327.

John Austin, were keenly aware of the existence of certain rules operating in the conduct of nations, or, more properly, states. Yet Bentham was unable to reconcile his traditionalist definition of law, especially applicable in the case of municipal law, to what he had observed in the relations between sovereign states. For him, international law was hardly legislation, but rather, customary or unwritten law which was ". . . but so many autocratic acts or orders, which in virtue of the more extensive interpretation which . . . [one is] disposed to put upon them, have somewhat the effect of general laws."[1] Rather than search for similarities between the traditional municipal and international concepts of law, he chose instead to dismiss in brief and sarcastic fashion the pretensions of students of international law:

> Written law . . . is the law of those who can both speak and write; traditionary law, of those who can speak but can not write, customary law, of those who neither know how to write, nor how to speak. Written law is the law for civilized nations: traditionary law, for barbarians: customary law, for brutes.[2]

Indisputably,

> a law is commonly understood to be such an exercise of power as . . . is in its nature indefinitely permanent in its efficacy. For it to be so it must direct itself to the persons and things that are its objects in sorts: because . . . individuals pass away and sorts only remain. By the Legislative power is understood the power of making Laws. At the same time the Legislative power is the name by which that power is commonly noticed which is looked upon as the supreme power in the state.[3]

Thus for Bentham, international law, necessarily impermanent, could not be defined as law in the true [or traditional] sense of the term.

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[1]Everett, op. cit., p. 243.

[2]Ibid., p. 244.

[3]Ibid., p. 98.

Austin, after having dismissed the laws of Nature as merely ". . . the standard (be they laws of the Deity, or a standard of man's imagining) to which . . . human or positive rules ought to conform,"[1] proceeded to build upon his mentor's teachings. Thus, he too, defined positive law as that which

> . . . is set, directly or circuitously, by a monarch or sovereign number, to a person or persons in a state of subjection to its author.[2]

He perceived that which is called 'international law' as a set of rules based on custom. Such rules, in the final analysis, possessed obligatory force by virtue only of a general concurrence of sentiments among sovereigns or a consensus of public opinion among their subjects. Consequently, however analogous they might be to human laws, they remained canons of positive international morality.[3] Only when transformed by a sovereign or legislature into law, or invoked as grounds for a juridical decision creating legal precedent, could the rules be considered positive law.[4] For Austin, the critic, it was sufficient to assert that

> . . . a law set or imposed by general opinion is a law improperly so called. . . . (It is a law formed by) some indeterminate (or unassignable) body or uncertain aggregate of persons (which) . . . indeterminate body opines unfavorably or favorably of a kind of conduct. . . .
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> The body of whose opinion the law is said to be set,

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[1]Campbell, op. cit., v. II, p. 591.

[2]Campbell, op. cit., v. I, p. 339.

[3]Ibid., pp. 189-190. In both there is a wish that conduct be forborne or pursued, a penalty for disobedience, and an expectation that conduct will be fairly consistent.

[4]Campbell, op. cit., v. II, p. 553; similar viewpoint in John Austin, The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence (New York: The Noonday Press, 1954), pp. 11-12.

> does not command, expressly or tacitly, that conduct of the given kind shall be forborne or pursued. For, since it is not a body precisely determined or certain, it cannot, as a body, express or intimate a wish. As a body, it cannot signify a wish by oral or written words, or by positive or negative deportment. The so-called law, or rule which its opinion is said to impose, is merely the sentiment which it feels, or is merely the opinion which it holds, in regard to a kind of conduct.[1]

An indeterminacy of origin reduced international law to a set of positive moral rules.[2] Prevalence of favorable opinion rather than reaction to command ensured the acquiescence of states. Even in cases where a strong, determinate state commanded the action of a weaker one, one could not properly speak of positive international law. Only if a permanently superior government existed, able to subject others to its commands, could one speak of a positive law of nations.[3] Without a superior, determinate body subjecting subordinating political states to legal commands, duties, and sanctions, international law remained a misnomer. The concept of the sovereign equality of states, implicitly rejecting the notion of an hierarchical structure in international relations, ensured that international law could not be law, properly so-called.

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[1]Campbell, op. cit., v. I, pp. 187-189.

[2]Georg Schwarzenberger, Power Politics: A Study of International Society (New York: Frederick A. Praeger, 1951), pp. 224-251 and Briggs, op. cit., p. 18, both distinguish between positive international law and positive international morality; P. E. Corbett, ed., Charles DeVisscher's Theory and Reality in Public International Law (Princeton: University Press, 1957), pp. 98-100 and Hersh Lauterpacht and C. H. M. Waldock, ed., James Leslie Brierly's The Basis of Obligation in International Law and Other Papers (Oxford: Clarendon Press, 1958), pp. 65, 67, distinguish between law and morality in international relations, but emphasize that morality is the ultimate source of obligation in international law; Williams, op. cit., p. 146 ff., suggests that one can even call rules of international law 'morality,' but admits that this would not be as strong and effective a word as 'law.'

[3]Campbell, op. cit., v. I, p. 189.

Significantly, subsequent criticism of Bentham and Austin has not completely rejected their arguments. On the contrary, those who would defend the existence of international law, properly so-called, readily concede

> . . . that the real difference between [it] . . . and state law in respect to enforcement lies not in any principle but in organization. The sentiment that the observance of state law ought not to be left to the chance of the individual being sufficiently public-spirited to observe it of his own accord has gradually become so prevalent in the state society, and the state law interferes with the individual's freedom of action at so many points, that in the course of centuries an organized system for the coercion of the recalcitrant has been built up. This has not yet happened in the international sphere. . . .[1]

In spite of this agreement, the controversy over the existence of international law as law persists. Why? For Bentham and Austin, law in its proper sense required the implementation of the command-obedience structure. This prerequisite could under no circumstances be compromised. Consequently, for them, the issue became one of extremes, i.e., either law, with its institutional prerequisites, or simply no law.

On the other hand, those who continue to insist that international law is still law, adopt a significantly different line of reasoning.[2] For them the issue is less a matter of extremes than of evolving stages. Failure to effectively institutionalize international law

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[1]Lauterpacht and Waldock, op. cit., p. 54. On pp. 201-202, there is the contention that the states' habitual observance of international law is proof of the existence of sanctions; Hans Kelsen, Principles of International Law (New York: Rinehart and Co., 1952), p. 21, suggests that obedience is enforced by an obligation, rather than by sanctions; Schwarzenberger, op. cit., p. 215 and Edwin D. Dickinson, What Is Wrong With International Law? (Berkeley: James J. Gillick, 1947), p. 5, tend to agree that there is a lack of effective sanctions and a reliance instead on the self-help principle.

[2]See, e. g., Lauterpacht and Waldock, and Kelsen, footnote 1 above.

demonstrates the weakness rather than the nonexistence of that law. Reliance upon the consent of states rather than a supreme supranational lawgiver as the creative force in the customary and conventional rule of law among states merely attests to its primitive character.

Thus, while Bentham and Austin perceived a more highly-developed institutional structure as the creative force of law, their critics concede to it only a strengthening role in progressive evolutionary development. That evolution toward a higher stage of coercive institutions has to rest on the earlier stage of customary rules to which states voluntarily agree to conform.[1] Yet even at this early stage, a delict in international law; i.e., a violation of an international norm, may be admissible and commonly accepted.[2] As it is possible, at least in principle. "to interpret the employment of force directed by one state against another either as sanction or delict,"[3] international law, like national law, must possess a coercive character. If, in fact, this character is primitive and only irregularly effective, the evidence is merely one of incomplete development.

2. 'Spiritual'

This factor is analogous to Austin's observation of opinion and consensus as the regulating agents in the relations between states.

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[1]T. C. Edgington, The Monroe Doctrine (Boston: Little, Brown and Co., 1904), p. 201. (Citing a quote by Lord Russell, "Speech to the American Bar Association, 1896," from American and English Encyclopedia of Law, v. 16, pp. 1124, 1125, note 3.)

[2]Kelsen, op. cit., p. 19.

[3]Ibid., p. 18. See p. 401, for his statement that international law is a coercive order with sanctions. (Compare with Kelsen, footnote 1, page 9). For an anti-Austin contention that sanctions do exist, see A. B. Keith, ed., Wheaton's Elements of International Law, v. I (London: Stevens and Sons, Ltd., 1929), pp. 6-7.

Twentieth Century students and critics of international law have tended to deprecate its role in the light of apparently insufficient consensus among states. Admittedly, such criticism has not gone to the negative extremes of both Bentham and Austin. Yet observation of this deficiency presents a serious challenge to international law at its present stage of development. Indeed, one is tempted to conclude that

> the bulk of international law in its present state is . . . a book law, it is customary law which is only found in textbooks on International Law; it is, as regards many points, controversial; it has many gaps; it is in many ways uncertain.[1]

It has generally been conceded that what is commonly termed 'international law' is institutionally weak and primitive. Consequently, any strength that can be attributed to it at its present early stage of development must necessarily rely upon consensus among the states. As at least one perceptive student of international law and international politics has concluded:

> Public opinion attributing a value to certain individual and social interests is the ultimate source of law in any society. Unless there is a relative consensus on some values, standards, or objectives, there cannot be a society nor can there be a legal system.[2]

Similarly,

> . . . international law rests upon values which transcend those of the particular nation and upon an experience which transcends that of the particular case[3]

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[1]L. Oppenheim, The League of Nations and Its Problems (London: Longmans, Green and Co., 1919), p. 43.

[2]Quincy Wright, Contemporary International Law: A Balance Sheet (New York: Doubleday and Co., 1955), p. 54.

[3]Quincy Wright, "The Chinese Recognition Problem," American Journal of International Law, v. 49, July 1955, p. 320.

The implication, of course, is that values, society, and law are interdependent concepts.[1]

What one observes, however, is a cohesiveness among societies organized as states, "in contrast with the weakness of the community sense in international society as a whole."[2] Emphasis upon the state as the highest center of human authority and guardian of the national values, accentuates the deficiencies of an international legal order not rooted in supreme common values and a sense of community loyalty.[3] As a result, states, "while their public declarations are generally in accord with the traditional rules of law," often pursue "foreign policies [which] are . . . at odds with them."[4] Their premium upon a competition of acts and attitudes fosters, consequently, a "very weak perception of the common good, [which] prevents us from speaking of an international community as something already established."[5]

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[1]For similar opinions, see Georges Kaeckenbeeck, "Divergences Between British and Other Views on International Law," Transactions of the Grotius Society, v. 4, 1919, pp. 214-215 and Lauterpacht and Waldock, op. cit., p. 250.

[2]Lauterpacht and Waldock, op. cit., p. 254.

[3]Percy E. Corbett, Law In Diplomacy (Princeton: Princeton University Press, 1959), p. 273ff.; for similar viewpoints, see Kurt Wilk, "International Law and Global Ideological Conflict: Reflections on the Universality of International Law," A.J.I.L., v. 45 no. 4, October 1951, p. 658 and University of Michigan Law School, International Law and the United Nations, Eighth Summer Institute of International Law and Comparative Law, June 1955 (Ann Arbor: University of Michigan Press, 1957), pp. 370-371.

[4]Corbett, op. cit., foreword, v.

[5]Corbett, ed., Charles DeVisscher's Theory and Reality in Public International Law, pp. 72, 98-100; Schwarzenberger, op. cit., contends that power, not common sentiment, is the driving force in international relations; Lauterpacht and Waldock, op. cit., pp. 252-253, submit that there is abundant evidence of a community sentiment.

It is to be emphasized that a community sense, while essential at the primitive stage, need not necessarily encourage a more rapid, or indeed, any further, development of the institutional apparatus of international law. For states may persist in a reluctance to encourage any organized system that would jeopardize their individual prerogatives and freedom of action. Certainly their attitude toward international control of recognition, to be seen below, reflects the jealousy of this prerogative to an extreme.

3. 'Real Political'

This writer perceives the 'real political' factor as that corrosive agent which, while the other two serve constructive purposes, thwarts the evolutionary development of international law. Attacking the 'spiritual' content at the same time it subverts any progress in the development of international institutions. Similarly, attacks on recent achievements in the latter weaken the role of the former as a foundation for the law.

Basic to the contemporary 'real political' factor is the East-West struggle. This struggle is manifested most commonly in political, economic, and military competition. However, its implication for law runs deeper to a fundamental philosophical conflict. Consequently, the challenge to international law presents itself at both levels of the struggle.

At the more subtle philosophical level, the conflict is one over the rule of law in human relationships. A fundamental tenet of Marxism construes law as an instrument of control, emanating from the oppressive behavior of an exploiting class. Hence, the existence of law presupposes a class system hierarchically organized. But for its extreme emphasis upon exploitative behavior, the Marxian system closely resembles the Benthamian-Austinian prerequisite.

Certainly the three share similar conclusions. For Marx and his followers, too, international law could not be law, properly so-called, as it is not rooted in a requisite vertical structure and centralized coercive agency on the international plane.[1] One could hope to attribute a Marxian definition of law to the international order, or more properly, disorder, only by insisting that the national constitutional autonomy and nonintervention principles of the presumed legal system guarantee a parochial domination of one class over others.[2] This line of reasoning, adopted by Soviet legal theorists attempting to reconcile the Marxian class definition with the existence of international law, proved futile, For example, while Pashukanis conceded the role of a decentralized international law in the relations of bourgeois and proletarian states, he failed to reconcile it with the theory of class law.[3] Korovin also rejected a thesis denying the existence of international law, but was hardly more successful in reconciling it with Marxist dogma. His contribution to legal thought was a denial of the existence of a general, universal international law. Rather, he perceived it as a multi-faceted phenomenon, differing in the relations of socialist-capitalist, capitalist-capitalist, and colonial-capitalist states. Thus, Korovin had formulated a theory of pluralistic international law.[4]

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[1]Hans Kelsen, The Communist Theory of Law (New York: Frederick A. Praeger, 1955), p. 148.

[2]Ibid., p. 149.

[3]Ibid., p. 154.

[4]Ibid., p. 157; William Beach Lawrence, ed., Wheaton's Elements of International Law (Boston: Little, Brown and Co., 1855), pp. 16-17, denies that there is a universal international law, since the world is not yet completely civilized; Alejandro Alvarez, American Problems in International Law (New York: Baker, Voorhis and Co., 1909), pp. 98-99, suggests that diversity in the world makes a diverse, rather than universal international law more useful.

Political exigencies, however, made it imperative that the Soviet leadership acknowledge the existence of international law, notwithstanding its incompatibility with both Marxism and an internationalism embodied in the Comintern.[1] Despite ideological pretensions and a post-revolutionary hostility to law generally, the Soviets had begun to acknowledge international law after suppression of communist outbreaks in Hungary and Germany had stemmed the international revolutionary tide. By the end of the 1920's, both the contemplation of an indefinite period of socialist-capitalist competitive coexistence preceding the advent of an international communist society and domestic considerations rendered the doctrine of pluralism useless. Thus,

> as soon as the Soviet government was aware that it could use the existing international law in its own interest and that it was of great importance to be recognized by other governments as the government of a state in its capacity as a subject of international law, it could not allow a doctrine which denied the existence of such a law as common to all states. The fact was too evident that international law, by imposing upon all the states the obligation to respect mutually their territorial integrity and political independence and prohibiting them from intervening in the domestic affairs of other states, protects its subjects and consequently also the Soviet state.[2]

International law was now harnessed to the task of ensuring the unobstructed consolidation of 'socialism in one country.'

At first glance, this appears to be a boon to the development of international law. In reality, however, this was not the case. For, as one student has observed,

> . . . Soviet legal theory is characterized by an outspoken reactionary tendency. This tendency manifests itself in the

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[1]Kelsen, op. cit., pp. 151-152.

[2]Ibid., p. 168.

> fact that the theory is obstinately keeping to that concept of an absolute sovereignty of the individual state which modern theory of international law is more and more rejecting. Soviet theory . . . identifies the cause of Soviet Russia with that of sovereignty.[1]

Moreover, Soviet Marxism insists on the ultimate 'withering away of the state' and the consequent destruction of law. Hence, the evolution toward that communist society logically precludes the progressive evolution of law. That the fulfillment of the Marxist prophecy may not transpire, for obvious political reasons, until after a prolonged interim period of socialism, cannot negate the significance of this fundamental belief. It ensures that law is but a tentative political instrument, doomed to ultimate destruction. Consequently, that which has been termed the 'spiritual' element in international law, consensus and general opinion, is present in an expediential rather than an emphathic form. One great bloc weakens it philosophically and politically, while the other, notwithstanding constructive philosophical pretensions, attacks it politically.[2] A Marxist definition and the contemporary power struggle assure it a weak, non-universal character.

Precisely "how much the . . . (Soviet and capitalist law) differswill depend (ultimately) on how far the field of this antagonism in policy extends and how sharp the antagonism is at any time.[3] Some have insisted that international conflict could be lessened if

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[1]Ibid., p. 159. (Quoted from Josef L. Kunz, Sowjet-Russland und das Volkerrecht, in "Zeitschr. f. Volkerrecht," xiii, 1926, p. 582); similar viewpoint in Wilk, op. cit., p. 251.

[2]See the many examples, including the US, UK, and USSR attitudes toward the Declaration on Human Rights, in Corbett, op. cit., p. 11ff.; and Corbett, ed., op. cit., p. 51ff.

[3]Wilk, op. cit., pp. 664-665.

states respected the international legal principle of nonintervention with respect to national ideologies.[1] Others optimistically believe that, whereas the ancient East-West religio-political cleavage ultimately brought progressive development, so, too, could the present split prove progressive in the long run.[2] Both speculations, however, are highly problematic, for ideology has assumed the character of an exportable commodity not to be confined within natural or artificial geographic boundaries; in the second instance, the intensity of conflict has been enhanced by a technological competition making the cleavage more inherently complex and potentially destructive than any preceding it.

Conclusion

The persistence of the controversy suggests that the question, 'Is It Law?', is inherently more complex than it might at first glance appear to be. As suggested, various factors or attempts to establish criteria for a definition of law have been considered, but with no definitive result. Yet the student of international law is rewarded for his study of the controversy with a clearer insight into the present state of that law. He observes that at best it is a primitive regulating agent in the relations of states.[3] Consequently, while he might conceivably argue that international law is law, observation

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[1]Quincy Wright, "International Law and Ideologies," A.J.I.L., v. 48 no. 4, October 1954, pp. 625-626.

[2]Arthur Nussbaum, A Concise History of the Law of Nations (New York: The Macmillan Co., 1947), p. 292.

[3]For opinions on the limited capacity of international law, see Schwarzenberger, op. cit., pp. 89-90; Wright, Contemporary International Law: A Balance Sheet, p. 10; University of Michigan Law School, op. cit., p. 342.

forces him to a conservative assessment of both its nature and role.[1] Too often a generous assessment has culminated in theoretical formulations detrimental to it.[2]

Legal theory can serve a constructive purpose only when rooted in objective political reality. An attempt to interpret law through the colored lenses of a theoretical postulate divorced from such reality cannot but create illusions as to the meaning and scope of the law. For example, one is often confronted with the statements: 'Absolute sovereignty is inadmissible'; 'the state is subordinate only to the law.'[3] Such cliches are often confusing and the object of grave misinterpretation. Implicit is an idea that states exist under the rule of law in an absolute sense. Nothing could be further from the truth. To insist upon such absolute statements is to incorrectly evaluate the development of international law and to misinterpret its role in the external relations of states.

Primitive, weak, and decentralized international law can operate only in a very circumscribed capacity. Exaggerating that capacity engenders false hopes and consequent contempt for inevitably recurrent failures.[4] Two points need to be emphasized: First, that law

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[1]For a similar view, see Lauterpacht and Waldock, op. cit., p. 305.

[2]E. g., Kelsen, Principles of International Law, pp. 403-404. His monistic theory of law, conceiving international and municipal law as parts of a totality, with the former most significant, opposes the pluralist view. The pluralist theory has been accepted by most legal scholars and appears to be most consistent with the nature of international law vis-a-vis both municipal law and international politics.

[3]See, e.g., Ibid., p. 442 and H. Lauterpacht, ed., Oppenheim's International Law: A Treatise. v. I (London: Longmans, Green and Co., 1948), pp. 118-120.

[4]For a similar view, see H. Lauterpacht, "The Principle of Non-Recognition in International Law," Legal Problems in the Far Eastern Conflict (New York: Institute of Pacific Relations, 1941). p. 143.

must be based upon the observation of factual state practice,[1] rather than upon agreement among eminent authorities as to what will be the content of legal principles;[2] second, that one must appreciate state consent, manifested in custom and convention, as the real source of international law.[3] That "there is a great gap between international law and international practice, . . . a disparity between law and actual conditions . . ."[4] suggests law created with little appreciation of political reality moulded by state consent. That states have historically refused to consent to an international law encompassing the entire range of international political activities[5] attests not to the failure of international law but to a present state of limited and primitive capacity, with respect to both scope of activity and practical effectiveness.

B. Recognition of Revolutionary Governments: Law and Politics

It has been suggested that awareness of the primitive and limited character of international law is essential for a comprehension

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[1]Pitman B. Potter, A Manual Digest of Common International Law (New York: Harper and Brothers, 1932), p. 11.

[2]John Eugene Harley, The League of Nations and the New International Law (New York: Oxford University Press, 1921), p. 8.

[3]For concurring views, see P. E. Corbett, "The Consent of States and the Sources of the Law of Nations," B.Y.I.L., v. 16, 1925, p. 25 and Keith, op. cit., p. 12; for opposing views, see Robert Phillimore, Commentaries Upon International Law, v. I (Philadelphia: T. and J. W. Johnson, 1854), pp. 64-69, who holds that positive law and the consent of states is second to Natural or Revealed Law, as applied by Reason, and Ti-Chiang Chen, The International Law of Recognition: With Special Reference to Practice in Great Britain and the United States (London: Stevens and Sons, Ltd., 1951), pp. 19-20, who contends that positivism, encouraging state sovereignty, cannot be reconciled with the rule of law.

[4]Wright, Contemporary International Law: A Balance Sheet, p. 52.

[5]For similar opinions, see Schwarzenberger, op. cit., pp. 89-90 and Potter, op. cit., p. 133.

of the role of law in international relations. Such an awareness assumes special importance in a consideration of the recognition problem. For it is here that the present nature of international law is most vividly illustrated. The problem is but a

> . . . reflection of the fundamental cleavage between those who regard the state as the ultimate source of international rights and duties and those who regard it as being under a system of law which determines its rights and duties under that law.[1]

Hence, the usefulness of recognition as a yardstick measuring the role of law in international relations.

Students of the recognition problem have, paradoxically, been most consistently influenced by the inconsistencies of state practice. As a result, they have occasionally concluded that

> . . . the older international law concerning recognition was somewhat unsatisfactory on all essential points . . . [and] was never codified in any serious sense of the word . . .

Hence, it could be said that

> . . . the states of the world today are completely free to recognize or refuse to recognize. . . .[2]

Implicit in the second point is an assumption that recognition is a political act. Of greater interest at this point, however, is the evidence presented in support of such a conclusion. Apparently recognition is political by virtue of technical irregularities in the law. This writer submits that, if the political thesis of recognition is correct, then the nature of recognition is to be found not in any technical inadequacies of the law, but rather, in its limited capacity.

In the final analysis, the controversy is essentially the same as that over the nature of international law. Germane to the problem

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[1]Chen, op. cit., pp. 3-4.

[2]Pitman B. Potter, "Communist China: Recognition and Admission to the United Nations," A.J.I.L., v. 50 no. 2, April 1956, p. 417.

are at least four areas of legal-political conflict, each apparently supported on both sides by evidence of state practice: (1) Definition and Purpose of Recognition; (2) Combined Legal-Political Recognition; (3) Criteria for Recognition; (4) De Facto and De Jure Recognition.

1. Definition and Purpose of Recognition

Perhaps the root of the legal-political controversy in recognition is an unresolved semantic question inherent in it.[1] What is meant by the term 'recognition' in international relations? Historically, two answers have been presented by students of the problem. On the one hand,

> recognition in international law [has been deemed] . . . the process by which a State admits the validity or existence of some act, fact, or situation by which its legal interests or claims are or may be affected.[2]

Thus, for the legalist,

> the guiding juridical principle applicable to . . . recognition is that international law, like any other legal system, cannot disregard facts and that it must be based on them provided they are not in themselves contrary to International Law.[3]

Kelsen sought to clarify such a definition by suggesting that

> the legal act of recognition, [as it] is the establishment of a fact, [and] not the expression of a will, . . . is cognition rather than re-cognition.[4]

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[1]For a similar view, see Louis L. Jaffe, Judicial Aspects of Foreign Relations: In Particular of the Recognition of Foreign Powers (Cambridge: Harvard University Press, 1933), p. 101.

[2]John Fischer Williams, "Some Thoughts on the Doctrine of Recognition in International Law," Harvard Law Review, v. 47, 1934, pp. 793-794.

[3]Hersh Lauterpacht, Recognition in International Law (Cambridge: Cambridge University Press, 1948), pp. 91-93.

[4]Hans Kelsen, "Recognition in International Law: Theoretical Observations," A.J.I.L., v. 35, no. 4, October 1941, p. 608.

Lauterpacht has written of the recognition of revolutionary governments that

> . . . [it] is a declaration, on the part of the recognizing State, that a foreign community or authority is in possession of the necessary qualifications of . . . governmental capacity.[1]

Thus, the purpose of recognition is to effect a harmony of reality and law. As states are bound by an international law originating in state life, so must they be prepared to appreciate the legal dynamics of that life. Consequently, recognition is concerned merely with perceiving and acknowledging objective facts in international relations. In a practical situation, it is manifested by a guiding principle that "we recognize any Government . . . which appear[s] capable of maintaining its power . . ."[2] The necessary union of fact and law logically imposes, where the former exists, both a legal duty to recognize, and a right to be recognized, upon old states and the new government, respectively. Consequently, recognition lends itself to the discretion of states only to the extent that it permits them to judge when the criterion of factual existence, with a reasonable expectation of permanence, has been met.[3]

On the other hand, there are those who perceive recognition as

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[1]H. Lauterpacht, ed., Oppenheim's International Law: A Treatise, v. I (London: Longmans, Green and Co., 1955), pp. 150-151.

[2]Francis Wharton, ed., A Digest of the International Law of the United States, Taken From Documents Issued by Presidents and Secretaries of State, and From Decisions of Federal Courts and Opinions of Attorneys-General, v. I (Washington, D.C.: Government Printing Office, 1886), p. 537. (Quoted from letter of Secretary of State Clayton to Mr. Donelson, July 8, 1849, MSS. Inst., Prussia.)

[3]Lauterpacht, Recognition in International Law, pp. 32-37.

> . . . nothing else than the declaration of other States that they are ready to deal with a certain individual or group of individuals as the highest organ of a particular State. . . ,[1]
>
> the operation by which another State accepts that [new] Government as representing the old State in international intercourse and continues or renews relations accordingly.[2]

Here states are also permitted to exercise discretion in their recognition policies. The discretion, however, is of a fundamentally different kind. For, in effect, it subordinates the objective test of effectiveness to the political interests of states. This is not to suggest, of course, that the objective test is completely discarded. Hardly so, for it constitutes a reality which states must consider. In the final analysis, however, the decision to 'recognize' a fact is identified with a national political interest either to be fostered or protected. Here the emphasis is upon subsequent intercourse, in diverse forms, rather than initial perceptions of fact. Consequently, recognition, in contrast to that of a strictly legal nature, assumes the more complex character of a political, diplomatic, and commercial activity. The political nature of the problem logically precludes consideration of legal rights to, and duties of, recognition.[3]

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[1]Arnold D. McNair, ed., Oppenheim's International Law: A Treatise, v. I (London: Longmans, Green and Co., 1928), p. 153; for similar views, see Lassa Oppenheim, International Law: A Treatise, v. I (London: Longmans, Green and Co., 1905), pp. 404-405 and Chesney Hill, "Recent Policies of Non-Recognition," International Conciliation, October 1933, p. 42.

[2]John Fischer Williams, "Recognition," Transactions of the Grotius Society, v. 15, 1930, p. 53.

[3]For part of an overwhelming list of publicists who hold that recognition is essentially a political problem, see Corbett, op. cit., p. 78; Corbett, ed., op. cit., p. 228; Oppenheim, International Law: A Treatise, v. I, pp. 404-406; Amos S. Hershey, The Essentials of International Public Law and Organization (New York: The Macmillan Co., 1930), p. 209; Herbert W. Briggs, "Relations Officieuses and

2. Combined Legal-Political Recognition

Several students of international law, aware of the theoretical controversy over the nature of recognition, have attempted to remedy the situation by a reconciliation of both points of view. The result, unfortunately, has been an equally confused and unsatisfactory theory of dichotomous recognition.[1] According to this theory, recognition is, in the first instance, a legal act, whereby states acknowledge the factual existence of the new government. This includes a right of the new government to expect, and a duty incumbent upon old states to grant, recognition. It permits an element of discretion only to the extent of passing judgment upon the effectivity of that regime's rule. In the second instance, recognition is political; i.e., it involves such actions as exchanges of diplomatic agents and the signing of treaties and commercial agreements. As this aspect of recognition is extralegal, it involves neither rights nor duties. It may be granted and suspended arbitrarily, in either case with conditions appended.

Intent to Recognize; British Recognition of Franco," A.J.I.L., v. 34, no. 1, January 1940, p. 57; International Law Opinions, v. I (Cambridge: Cambridge University Press, 1956), p. 131; Edwin M. Borchard, ed., Fiore's International Law Codified and Its Legal Sanction, or the Legal Organization of the Society of States (New York: Baker, Voorhis and Co., 1918), p. 146; Hill, op. cit., p. 42; H. A. Smith, Great Britain and the Law of Nations: A Selection of Documents Illustrating the Views of the Government in the United Kingdom Upon Matters of International Law, v. I (London: P. S. King and Son, Ltd., 1932), pp. 77-78; Julius Goebel, Jr., The Recognition Policy of the United States (New York: Columbia University Press, 1915), pp. 66-67; Peter Marshall Brown, "The Legal Effects of Recognition," A.J.I.L., v. 44, no. 4, October 1950, p. 619; Georg Schwarzenberger, International Law, v. I (London: Stevens and Sons, Ltd., 1957), p. 128; Josef L. Kunz, Die Anerkennung von Staaten und Regierungen im Volkerrecht (Stuttgart: Verlag von W. Kohlhammer, 1928), pp. 125-127.

[1]See, e.g., Hans Kelsen, General Theory of Law and State (Cambridge: Harvard University Press, 1946), pp. 223-224 and Philip C. Jessup, A Modern Law of Nations (New York: The Macmillan Co., 1948), pp. 45-46.

Admittedly, there have been instances in the history or recognition when such a theory has been tenable. For example, in 1915, Great Britain recognized the revolutionary Carranza Government as a de facto regime. It subsequently refused to enter into diplomatic relations with the de facto regime, because of that Government's hostile attitude toward British subjects and their property in Mexico.[1] However, the paucity of such cases tends to weaken the practical application of the theory. Moreover, it is highly debatable whether, in view of an irregularity of application, the de facto criterion, though of an objective nature, is a legal principle.[2] Even assuming that it is a legal principle, the dichotomous theory leaves much to be desired. As suggested above, the political theory of recognition does not completely discard the objective test. Rather, there appears to be an overlapping of the two, resulting in a submerging of the objective, in favor of subjective political considerations.[3]

3. Criteria for Recognition

Any one or combination from among three tests have been used historically in the formulation of recognition and non-recognition policies: de facto, or effective rule; willingness and ability to fulfill international obligations; constitutional legitimacy. Scholars have debated the significance of each, some suggesting, for example, that American recognition policy is rooted in a 'legalistic' de facto principle adopted in 1793.[4] Others have discerned a vacillation between

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[1]Lauterpacht, Recognition in International Law, pp. 344-345.

[2]See Chapter II.

[3]For a similar view, see Corbett, ed., op. cit., p. 228.

[4]Quincy Wright, "Non-Recognition of China and International Tensions," Current History, v. 34, no. 99, March 1958, p. 152. This view is similar to that of Lauterpacht, and differs only in that Wright implies, rather than explicitly supports, the legal thesis of recognition.

it and legitimist considerations, even in particular periods, depending upon the exigencies of individual situations.[1]

The criteria of constitutional legitimacy has generally been assailed by scholars[2] as an act of intervention into the domestic affairs of another state. This test was adopted, for diverse reasons, during the Civil War incumbency of Secretary of State Seward, and during the administrations of Wilson, Harding, Coolidge, and Hoover. Even during these periods, however, it was not adopted with consistency.

The test of willingness and ability to fulfill international obligations, applied by Great Britain throughout the Nineteenth Century, has been adopted regularly by the United States from the administration of Hayes to the present.[3]

Scholars have generally, with the exception of such 'pure de facto-ists' as Professor Lauterpacht, agreed that recognition is concerned essentially with the objective de facto and subjective international obligations principles.[4] In one sense, the two are

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[1]E.g. Taylor Cole, The Recognition Policy of the United States Since 1901 (Baton Rouge: Louisiana State University Press, 1928), pp. 99-100.

[2]See, e.g., Aquiles Navarrete Arias, Los Gobiernos de Facto ante el Derecho Internacional (Santiago, Chile: Imprenta "Rapid," 1939), pp. 85-86; Kunz, A.J.I.L., v. 38 no. 3, July 1944, p. 438; Lauterpacht, Recognition in International Law, p. 98.

[3]See Chapter II.

[4]See, e.g., Arias, loc. cit., pp. 85-86; Charles Bollini Shaw, El Reconocimiento en el Derecho Internacional Publico (Buenos Aires: Imprenta Lopez, 1936), p. 60; Inter-American Juridical Committee of the Inter-American Council of Jurists, Report and Draft Convention on Recognition of De Facto Governments, Rio de Janeiro, September 27, 1949 (Washington, D. C.: Pan American Union, 1950), pp. 19-20; Charles G. Fenwick, International Law (New York: Appleton-Century-Crofts, Inc., 1948), p. 161; Kunz, "The Position of Argentina," A.J.I.L. v. 38, no. 3, July 1944, p. 437.

inseparable, since it may be logical to assume that an effective government must fulfill international obligations. Therefore, governments, under normal circumstances, will be satisfied with a declaration by the new regime that such obligations will be faithfully met.[1]

However, the history of recognition is replete with examples of this test having been applied with great latitude by states.[2] It is somewhat surprising, therefore, that those Latin American scholars who have vigorously opposed the element of discretion in recognition, have, while condemning the legitimacy test, nevertheless supported the international obligations principle.[3] This is especially surprising in view of the fact that the latter has also frequently been used to undermine revolutionary regimes.

Only the de facto principle approaches a legal criterion; yet its irregular use casts serious doubt upon its being such. The legitimacy principle is clearly interventionist, while the international obligations test has in fact been utilized independently for political ends. A consistent vacillation between the three has tended to accentuate the political, rather than legal, character of recognition.

4. De Facto and De Jure Recognition

The controversy over this distinction has been encouraged by diverse state practices. At least three schools of thought, for purposes of convenience, the 'legitimist,' 'conditionalist,' and 'negativist'

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[1]Charles G. Fenwick, "The Recognition of De Facto Governments," A.J.I.L., v. 42, no. 4, October 1948, p. 865.

[2]See Chapters II and III.

[3]See footnotes 2 and 4, page 26, for sharp criticism of the international obligations test, see Amry Vandenbosch, "Recognition as an Instrument of Policy," The World Tomorrow, v. 15, no. 4, April 1932, p. 113.

schools, can be identified. For the 'legitimists' the problem is relatively simple. They hold that the revolutionary government may be recognized merely as the de facto authority in a state, while the de jure government is that which ought legally to rule.[1] Significantly, most of these writers expounded such a viewpoint in the period after the Bolshevik Revolution of 1917, an era in which recognition was an unusually politically-charged issue. In the United States, for example, the exiled Kerensky Government continued to be recognized as the de jure government of Russia. It was not until November, 1933, that the revolutionary Soviet Government was extended similar recognition.[2]

On the other hand, the 'conditionalists' reject the legitimist viewpoint by associating recognition with international, rather than constitutional law. They conceive de facto recognition as being qualified or incomplete, while de jure recognition is unconditional and full.[3] Provisional de facto recognition is revocable, if conditions attached to it go unfulfilled. Here, however, revocation is not to be exercised

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[1]Keith, ed., op. cit., p. 43. (Accepting the definition of Montague Bernard, Neutrality of Great Britain During the American Civil War, London, 1870, p. 108); John G. Hervey, The Legal Effects of Recognition in International Law As Interpreted by the Courts of the United States(Doctoral Dissertation in Political Science,(University of Pennsylvania, 1928), pp. 12-13. (Accepting the definition of Lord Justice Warrington, Luther vs. Sagor, 1921, L.R. 3 K.B. 532 at p. 551, and Wheaton, International Law, 1916, p. 36); N. D. Houghton, "The Nature and General Principles of Recognition of De Facto Governments," Southwestern Social Science Quarterly, v. 13, no. 2, September 1932, pp. 177-178.

[2]See Chapter III.

[3]Lauterpacht, Recognition in International Law, p. 329ff.; Hersh Lauterpacht, "De Facto Recognition, Withdrawal of Recognition, and Conditional Recognition," B.Y.I.L., v. 22, 1945, p. 171; Fenwick, International Law, 1948, pp. 174-175; Hershey, op. cit., p. 210. This qualified recognition has also been granted until permanence of the new regime is certain. (See Chapter III.)

arbitrarily, but only when the appended stipulations are ignored by the new government. De jure, irrevocable recognition will follow as a matter of course, upon satisfactory adherence to the conditions. For example, in 1924, the British Government recognized the Soviet Government as a de jure regime. Presumably the latter had fulfilled the conditions of the de facto recognition of 1921, by giving assurances that international obligations with regard to its predecessors' liabilities, confiscated foreign property, and cessation of revolutionary propaganda abroad, would be met.[1]

Two points of view apparently inhere in the 'negativist' school. One rejects completely any distinction between de facto and de jure recognition, holding that

> . . . recognition cannot be conditional. It is impossible to recognize a fact conditionally. Either it is a fact or it is not. The very essence of recognition is that the recognizing state thereby declares that it has satisfied itself that the recognized authority possesses the distinguishing marks of a state. To say that one recognizes that it has them, subject to their being subsequently proved, is a contradiction in terms. To say that one recognizes that it has them, subject to its conduct being satisfactory in other particulars, is sheer nonsense. It is like telling a pupil that her sum is right if she will promise to be a good girl.[2]

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[1]Lauterpacht, Recognition in International Law, p. 338ff.; also, see Chapter III, supra.

[2]Thomas Baty, So-Called "De Facto Recognition" (New Haven: Yale Law Journal Co., 1922), p. 470; for similar views see Cesar Sepulveda, La Toeria y la Practica del Reconocimiento de Gobiernos (Mexico: Ediciones de la Facultad de Derecho, U.N.A.M., 1954), p. 25; Jessup, op. cit., p. 48; Edwin M. Borchard, "The Unrecognized Government in American Courts," A.J.I.L., v. 26, no. 2, April 1932, p. 262; Herbert W. Briggs, ed., The Law of Nations; Cases, Documents, and Notes (New York: Appleton-Century-Crofts, 1952), pp. 128-129. (Quoted from a statement by Henry Clay, in Daniel Mallory, Life and Speeches of Henry Clay, v. I, 1843, p. 325); Wharton, op. cit., v. I, p. 530. (Quoted from letter of Secretary of State Van Buren to Mr. Moore in Colombia, June 29, 1829, MSS, Inst. Am. St.)

The other attempts to distinguish between legal and political applications of both de facto and de jure recognition,[1] holding that historically they have been seriously confused. Indeed,

> it seems not to be clear whether the qualifications suggested by de jure and de facto are qualifications of the act of recognition or of the Government recognized.[2]

In the first, or legal, instance, there is no distinction between the two, for recognition of a government is unconditional and gives rise to the same legal effects. On the other hand, political recognition, concerned with the degree and nature of mutual intercourse, may be conditional and gives rise to no legal effects. Consequently, when applied to political recognition, the term de jure is a misnomer.[3]

Conclusion

The preceding pages have offered some insight into the legal-political conflict in recognition. Attention has also been drawn to an analogous conflict in international law and its capacity vis-a-vis politics in international relations. Although resolution of these conflicts in the near future is rather unlikely, the contemporary student may still acquire some insight into both the application of recognition in state practice and its relation to the nature of international law. Perhaps then he will be able to differentiate between a frequently

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[1]See, e.g., Geobel, op. cit., pp. 66-67; Chen, op. cit., p. 261ff.; Herbert W. Briggs, "De Facto and De Jure Recognition: The Arantzazu Mendi," A.J.I.L., v. 33, no. 4, October 1939, p. 690; Kelsen, The General Theory of State and Law, pp. 225-226; Kelsen, Principles of International Law, pp. 275-277.

[2]Williams, Transactions of the Grotius Society, v. 15, 1930, p. 66.

[3]This differentiation between legal and political recognitions would seem to involve the same difficulties as those in the dichotomous theory of recognition. (See section on Combined Legal-Political Recognition.)

obscured theory rooted in morality and wishful thought, and another rooted in a base of empirical evidence. Significantly, prominent scholars on both sides of the controversy have insisted that the history of state practice sustains their respective theses.[1] Consequently, it is to this common denominator of positive international law, operating in the relations of states, that the student must turn.

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[1]See, e.g., Kunz, Die Anerkennung von Staaten und Regierungen im Volkerrecht, pp. 125-127 and Lauterpacht, Recognition in International Law, pp. 158-159, for the political and legal sides of the controversy, respectively.

CHAPTER II

THE RECOGNITION OF REVOLUTIONARY GOVERNMENTS IN AMERICAN HISTORY (A) THE NATION IN FLUX: 1793-1880

The practice of the United States has, on different occasions, incorporated the three criteria most significant in the history of international recognition. An insight into the nature of recognition, it is hoped, will be achieved by a study of their practical application in the history of American diplomacy.[1]

A. De Factoism

The United States' first significant experience with the recognition problem came as an aftermath to the French Revolution. An ally of France by virtue of treaties of alliance and commerce signed on February 6, 1778, the United States was indebted to it for assistance received during its own Revolution. Upon the overthrow of Louis XVI in late 1792 and his execution on January 21, 1793,

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[1]The primary end of this chapter is an insight into the nature and implications of recognition policies based on these criteria. Thus, American history is to be used as a means of identifying and elaborating upon that nature, rather than as an end in itself or as a basis for a critique of United States foreign policy. The chapter will deal essentially with the recognition of revolutionary governments in recognized states. In rare instances, however, e.g., the independence of the Latin American colonies, recognition of states must be considered for effects upon application of these criteria.

President Washington's administration was confronted with the question of recognition of France's revolutionary Convention government. The ensuing debate over recognition was led by contending political groups formed about two of the Republic's most eminent citizens and public servants, the Francophile Secretary of State, Thomas Jefferson, and the Anglophile Secretary of the Treasury, Alexander Hamilton. The issue, however, went deeper than sentimental attitudes toward European powers. For the realist Hamilton, a concern for the physical security of the young nation was preeminent.[1] Consequently, his belief that a neutral position, necessarily involving a unilateral renunciation of treaty obligations, was essential. Apprehensive lest recognition of the new regime be construed as an act of intervention by those European powers waging war against France,[2] he insisted on a policy that was shortly to be embodied in the Neutrality Act of 1794.

For Jefferson, on the other hand, sanctity of treaty obligations was not to be violated. Perhaps more significant, however, was an

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[1]Percy E. Corbett, Law In Diplomacy (Princeton: Princeton University Press, 1959), pp. 50-51. (Based on documents in "Pacificus," no. 2 and no. 3, Lodge, ed., The Works of Alexander Hamilton, v. 4 (New York: 1904), pp. 447-451, 456-457.)

[2]For a detailed study of the British attitude toward the French revolutionary regime, and the events that led to war with the latter, by an exponent of the political thesis in recognition, see Herbert Arthur Smith, Great Britain and the Law of Nations: A Selection of Documents Illustrating the Views of the Government in the United Kingdom Upon Matters of International Law, v. I (London: P. S. King and Son, Ltd., 1932), pp. 80-99; for a copy in French of the Convention's call for international revolution, which call constituted a breach of international obligations respecting nonintervention and the sovereign equality of states, see Robert Phillimore, Commentaries Upon International Law, v. 2 (Philadelphia: T. and J. W. Johnson and Co., 1855), p. 35.

abiding philosophical belief in the concepts of popular sovereignty and revolution.[1] Thus, Jefferson wrote to Gouverneur Morris, the American Minister in Paris, on November 7, 1792:

> It accords with our principles to acknowledge any Government to be rightful which is formed by the will of the nation, substantially declared. The late Government was of this kind, and was accordingly acknowledged by all the branches of ours; so any alteration of it which shall be made by the will of the nation, substantially declared, will doubtless be acknowledged in like manner. . . .[2]

In a letter of March 12, 1793 to Minister Morris, shortly after the execution of Louis, the Secretary of State elaborated upon the principle that was to guide his Government's official recognition policy:

> I am sensible that your situation must have been difficult during the transition from the late form of government to the re-establishedment of some legitimate authority, and that you may have been at a loss to determine with whom business might be done. Nevertheless, when principles are

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[1]Julius Goebel, Jr., "The Recognition Policy of the United States," Studies in History, Economics, and Public Law at Columbia University (New York: Columbia University Press, 1915), pp. 98-111, maintains that, while Hamilton was more attuned to political realities, it was Jefferson's political philosophical idealism that prevailed in the formulation of policy; Charles G. Fenwick, International Law (New York: Appleton-Century-Crofts, 1948), p. 163, suggests that Jefferson either took it for granted that the Convention would respect international obligations, was unaware of, or didn't take into account the revolutionary government's intervention into the domestic affairs of foreign states, or, in any event, was averse to defending autocracy supported even by International Law. This student must submit that, in view of the dates of the Jefferson-Morris correspondence, it is unlikely that by the latter part of January 1793 the Secretary was unaware of France's intention to violate International Law. Consequently, his advocacy of recognition suggests a desire to implement political principles favorable to a regime contemplating such illegal actions, with full awareness of the possibility of their being undertaken.

[2]John Bassett Moore, A Digest of International Law, v. I (Washington, D. C.: Government Printing Office, 1906), p. 120. (Quoted from Washington, ed., Jefferson's Works, v. 3, p. 489.)

> well understood their application is less embarrassing. We surely cannot deny to any nation that right whereon our own government is founded--that everyone may govern itself according to whatever form it pleases, and change these forms at its own will; and that it may transact its business with foreign nations through whatever organ it thinks proper, whether king, convention, assembly, committee, president, or anything else it may choose. The will of the nation is the only thing essential to be regarded.[1]

Jefferson's policy, rooted in a philosophical rather than practical political base, assisted those who were henceforth to mould American recognition practice along political, rather than legal lines. Such freedom of action appears to have originated in two observations that can be made of that first policy. First, its effect upon the legal thesis of recognition has been great, although somewhat misleading. When enunciated, the Jeffersonian policy was concerned neither with duties of, nor rights to, recognition.[2]

Yet scholars have sometimes seized upon this occasion as one initiating an objective de facto principle in recognition, based merely on consideration of effectiveness in the rule of governments.[3] A reading of the letters to Minister Morris suggests, however, that such a conclusion is not altogether tenable. For the Secretary of State appears rather to have devised a new content for the subjective, interventionist principle of legitimacy.[4] As one scholar has noted,

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[1]Ibid., p. 120. (Quoted from Ford, ed., Writings of Jefferson, v. 6, p. 199.)

[2]Concurring opinion in Stanley K. Hornbeck, "Recognition of Governments," Proceedings of the American Society of International Law, 1950, p. 182.

[3]See, e.g., Goebel, op. cit., p. 111.

[4]For concurring opinions, see Herbert W. Briggs, ed., The Law of Nations; Cases, Documents, and Notes (New York: Appleton-Century-Crofts, 1952), pp. 128-129; Louis L. Jaffe, Judicial Aspects of Foreign Relations: In Particular of the Recognition of Foreign Powers (Cambridge: Harvard University Press, 1933), p. 107.

the Jeffersonian doctrine appears to foster the substitution of ". . . a principle of 'democratic legitimacy' for the abhorred principle of dynastic legitimacy."[1] As revolution and diverse forms of government were to be acknowledged when effected by a 'will of the nation, substantially declared,' Jefferson was apparently less concerned with effective rule than with the means by which new regimes held power.

By definition, the de facto test is concerned merely with the observable fact of effective governmental authority.[2] Consequently, Jefferson's concern with something more than that was both a qualification of the de facto principle, and a reaffirmation of the legitimacy test with fresh content. Only to the extent that he foresaw the possibility of having to deal also with new de facto regimes of an undemocratic character could it be said that he considered effectiveness of rule.[3] Yet, even here one discerns a distinction between recognition of democratic regimes of revolutionary origin and the practical necessity of dealing with those of a different character on a more limited basis. Hence, by associating recognition with a rightfulness based on the 'will of the nation,

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[1]Briggs, loc. cit., pp. 128-129.

[2]For a rejection of the "will of the nation, substantially declared," as germane to the de facto test, see Ti-chiang Chen, The International Law of Recognition: With Special Reference to Practice in Great Britain and the United States (London: Stevens and Sons, Ltd., 1951), pp. 123-124.

[3]In his first letter to Morris, Jefferson also stated that in the case of a regime formed by the 'will of the nation, substantially declared, ". . . every kind of business may be done. But there are some matters which I conceive might be transacted with a Government de facto, such, for instance, as the reforming of the unfriendly restrictions on our commerce and navigation, such as you will readily distinguish as they occur." (Moore, op. cit., p. 120.)

substantially declared," such recognition being that of the de jure government alone, he had compromised the test of pure de factoism.[1]

The second observation, closely related to the first, is that Jefferson's failure to treat the recognition problem as one inherently of a legal character, encouraged the discretionary element in practice. That the United States recognized the revolutionary regime in France only several months after the downfall of the royal government was not to be interpreted as a precedent establishing the period to elapse prior to granting of recognition. Herein, then, lay the political nature of Jefferson's, or for those who insist, the de facto criterion. Each state, in retaining the prerogative of deciding when the 'democratic' or any other type of regime is in effective governmental control, almost inevitably falls back on subjective considerations of a national interest to be promoted. In this political sense alone, then, can it be maintained that the de facto principle has generally been accepted in the practice of states.[2] Hence, it is to

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[1]Thomas Baty, "'De Facto' States: Sovereign Immunities," A.J.I.L., v. 45, no. 1, January 1951, pp. 166-167, uses Jefferson's recognition principle to substantiate his thesis that there is no distinction between de facto and de jure recognition; Briggs, op. cit., pp. 128-129, takes an identical position.

[2]Hersh Lauterpacht, Recognition in International Law (Cambridge: Cambridge University Press, 1948), pp. 158-159, 166-174, concedes that there is an element of discretion in ascertaining the factual existence of new governments, but denies that it is an act of policy. He contends, rather naively, that evidence of the legal nature of recognition is to be found in the fact that states generally relate their acts of recognition to some objective test which they claim possesses general validity. This student submits, however, that under positive international law, and by the deliberate timing of recognition, the interests of states may be promoted as effectively as might be the case with application of a subjective test. Lauterpacht's contention that states only occasionally pursue recognition as an act of policy and his subsequent call for international administration of the recognition procedure, because of abuses inherent in decentralization, seem to embarrass each other. For if recognition has generally been

the circumstances under which the principle has been invoked, that one must turn for evidence of its political nature.

The 'politics of de factoism' were to become evident within two decades after enunciation of the Jeffersonian principle. Revolutionary activity in the Latin American colonies of Spain, having commenced during the Napoleonic Wars, was clearly successful by the latter part of 1817. Yet, in spite of both this success and the fact that the United States had dispatched agents to Buenos Aires as early as 1810,[1] the American Government did not begin to recognize the independence of the former colonies until 1822. The gap between the fait acompli of independence and recognition of that status suggests a play of forces extraneous to application of the pure de facto principle. Consideration of those forces, namely, the early stages in the development of both the Monroe Doctrine and Manifest Destiny concepts, were to result in a tentative subordination of the recognition issue to a more immediate promotion of United States interests in the Western Hemisphere.[2]

President Madison, upon learning of Great Britain's intention to purchase Florida from Spain, declared in his message of January 3, 1811 to Congress:

> Taking into view the tenor of these several communications, the posture of things with which they are connected, the intimate relations of the country adjoining the United States eastward of the Perdido River to their security and

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satisfactorily handled, from a legal point of view, why the urgency of international control? Such a call suggests, rather, that the recognition act has been essentially political in nature.

[1]Goebel, op. cit., pp. 117-119.

[2]For an insight into Great Britain's economic interests in Brazil and Spanish America, and its fear of antagonizing the legitimist Holy Alliance, the latter causing her to delay recognition of the colonies until 1825, see Smith, op. cit., pp. 115-187 and Corbett, op. cit., p. 71.

> tranquillity, and the peculiar interests they have in its destiny, I recommend to the consideration of Congress the seasonableness of a declaration that the United States could not see without serious inquietude, any part of a neighboring territory in which they have, in different respects, so deep and so just a concern pass from the hands of Spain into those of any other foreign power.[1]

Congress responded immediately with a joint resolution to that effect.[2]

Not until November 5, 1811, in another message to Congress, did the President express general sentiments of goodwill toward the rebelling colonies.[3] Subsequently, a Congressional committee, to which the message had been referred, publicly declared that evidence of effective rule would result in recognition.[4] However, the outbreak of war with Great Britain and Spanish victories in Venezuela combined to delay consideration of the Latin American problem. On July 9, 1816, when the United Provinces of Rio de la Plata proclaimed independence, the United States again took cognizance of developments to the South. Consequently, in October, 1817, Secretary of State Monroe, in a memorandum to the Cabinet, asked, in part:

> . . . Is such an acknowledgment [of the independence of the colonies] a justifiable cause of war to the parent country? Is it a just cause of complaint to any other power? Is it expedient for the U. States at this time to acknowledge the independence of Buenos Ayres or any other

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[1]J. D. Richardson, A Compilation of the Messages and Papers of the Presidents, v. 2 (Washington, D.C.: ?, 1896-1899), p. 488.

[2]T. B. Edgington, The Monroe Doctrine (Boston: Little, Brown and Co., 1904), p. 92. (Quoted from United States Statutes at Large, v. 2, p. 666.)

[3]Goebel, op. cit., p. 117. (Quoted from Hunt, ed., Writings of James Madison, v. 8 (New York: ?, 1900?1910), p. 162).

[4]Ibid., p. 118. (Quoted from American State Papers, Foreign Relations, v. 3 (Washington, D.C.: ?, 1832-1861), p. 538.)

part of the Spanish dominions in America now in a state of revolt?[1]

While the question of expediency was never explicitly answered,[2] its mere consideration is of interest in the light of both specific developments that were to follow, and of support that it possibly renders to the political thesis of recognition.

On December 16, 1817, an agent of the Rio de la Plata formally demanded recognition from the United States. The latter, however, insisted that no action could be taken until commissioners sent to the rebellious states had returned with reports on conditions there. Perceiving the Administration's delaying tactics, Congress began discussions of the recognition question. On March 24, 1818, Henry Clay moved that a provision for $18,000 to support a minister to the Provinces for one year be included in the appropriations bill.[3] He also spoke eloquently of the United States' traditional refusal to distinguish between de facto and de jure sovereigns, so long as a party had established stable, effective rule.[4] His motion was defeated by a vote of 115-45.

General Jackson's incursion into Florida in pursuit of marauding Seminole Indians, his capture of several towns, and Spain's indiscriminate piratical acts against American commercial vessels along the coasts of South America resulted in strained Spanish-American relations. President Monroe now adopted a more

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[1]Ibid., p. 120. (Quoted from Hamilton, ed., Writings of James Monroe, v. 6 (New York: ?, 1898-1903), p. 31.) Italics added.

[2]Ibid., p. 135. (Based on John Quincy Adams, Memoirs, v. 4 (Philadelphia: ?, 1874-1877), p. 15.)

[3]Ibid., p. 123. (Quoted from Annals of the Congress of the United States, 15th Congress, 1st Session, v. 2, p. 1468.)

[4]Goebel, loc. cit., p. 123. (Quoted from Annals, p. 1468.)

conciliatory attitude. Henceforth, any attempt to recognize the independence of Latin America was to be made only in concert with Europe.[1]

In the meantime, however, Spain was aware that American occupation of Florida would lead inevitably to loss of that territory. Consequently, she offered to negotiate its cession. With this offer she hoped to divert United States attention away from the recognition problem. On February 22, 1819, a treaty ceding Florida to the United States was signed. It conspicuously omitted reference to the Latin American issue. After much debate in the United States, the treaty was finally ratified on February 22, 1821.

The American Government was able again to consider the recognition question. Accordingly, in a message of March 8, 1822 to Congress, President Monroe, after observing that the wars of independence had been brought to a close, called for recognition.[2] On March 19, 1822, the Senate Committee on Foreign Affairs concurred with a unanimous expression of the justice and expediency

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[1]Monroe's attempt to effect a concerted recognition was doomed to failure, however, in view of the legitimist principle cementing the Holy Alliance; for information on the Alliance and its legitimist views, especially in respect to the Conferences at Aix-la-Chapelle (late 1818), Laybach (May 1821), and Verona (1822), and its suppression of rebellions in Spain, Naples, and Sardinia, see Roland Hall Sharp, Non-Recognition as a Legal Obligation, 1775-1934, Ph. D. dissertation in Political Science at the University of Geneva, 1934 (Liege, Belgium: Imprimerie Georges Thone, 1934), p. 23ff. and Theodore D. Woolsey, Introduction to the Study of International Law (New York: Charles Scribner and Co., 1871), pp. 66-67; for the British attitude of hostility to the Alliance's legitimist pretensions and sympathy for recognition of the Latin American colonies, see Lord Castlereagh's Circular Note of January 19, 1821, in Woolsey, op. cit., p, 67; Sharp, op. cit., pp. 28-29, and the Despatch of March 25, 1825, to Spain, informing it of Great Britain's intention to extend recognition. (British Foreign and State Papers, v. 12, pp. 909-915.)

[2]Goebel, op. cit., p. 135. (Quoted from Hamilton, ed., op. cit., v. 6, pp. 207 et seq.)

of such a grant.[1] Recognition was subsequently extended to Colombia (June 19, 1822), Buenos Ayres, Chile and Mexico (January 27, 1823), Peru (August 4, 1824), and Central America (May 21, 1826).

The Latin American case presents to the student of recognition an unusually frank example of the manner in which political considerations tend to compromise the de facto-legal thesis. President Madison[2] and Secretary of State Adams[3] hoped to create the illusion of recognition being a matter of lofty principles and legal obligations, respectively. However, the coincidence of Monroe's memorandum to the Cabinet, ratification of the treaty of cession, tacit British support, and recognition in 1822, appears to have placed the question essentially within the sphere of political interest.[4]

As early as 1811, the United States, anticipating a threat from British occupation of contiguous Florida, moved to thwart cession of the territory by Spain to any other European Power. In 1817, diplomatic and military developments rendered American acquisition likely; however, on condition that it moderate its interest in Latin American independence and recognition. Consequently, the necessity of diplomatic tact relegated the question of recognition to a position of secondary importance. Only when the treaty had been consummated could the United States again actively pursue its interests in Latin America.

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[1]Ibid., p. 136. (Quoted from Annals, 17th Congress, 1st Session, p. 1382).

[2]Goebel, op. cit., p. 142. (Quoted from letter sent by Madison to Monroe, May 6, 1822, in Hunt, ed., op. cit., v. 9, p. 29.)

[3]Corbett, op. cit., p. 70. (Based on Manning, Diplomatic Correspondence of the United States Concerning the Independence of the Latin American Nations (New York: ?, 1925), p. 157.)

[4]For concurring opinions as to the political character of the Latin American recognitions, see Goebel, op. cit., p. 142 and Corbett, loc. cit., p. 70.

The French and Latin American cases laid the groundwork for a United States recognition policy, based on discretion applied to the de factoism-legitimism principle, that was to persist until the last quarter of the Nineteenth century.[1] Thus, President Jackson, in his annual message of December 6, 1830, referring to recognition of the regime of Louis Philippe in France, asserted that

> the American people, while assured of 'the high character of the present king of the French,' a character which, if sustained to the end, would 'secure to him the proud appellation of the Patriot King,' yet rejoiced not in his success, but in that of the great principle which has borne him to the throne-the paramount authority of the public will.[2]

By 1833, however, the United States, cognizant of both the inevitability of undemocratic regimes and the flexible character of the Jeffersonian doctrine, appears to have effected a shift from the original spirit of the latter in order to accommodate the existence of the former. Thus, Secretary of State, Edward Livingston, in a note to the British Minister, Charles Vaughan, on April 30, 1833, could assert:

> It has been the principle and the invariable practice of the United States to recognize that as the legal Government of another nation by which its establishment in the actual

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[1]The international obligations principle was invoked by Henry Clay in the Texas recognition case of 1833. (See excerpts from Senate Document 406, 24th Congress, 1st Session, p. 1, in Goebel, op. cit., pp. 149-150. This principle was applied frequently only after 1877, however. Great Britain, of course, invoked it in registering hostility to the French Convention's international revolution program of 1792.

[2]Moore, op. cit., p. 123. (Quoted from Richardson, op. cit., v. 2, p. 501); Smith, op. cit., p. 101, submits that the British recognized Louis Philippe's regime not out of sympathy for representative government, but rather, in an effort to ensure European peace and stability. Consequently, recognition was used as a political instrument.

> experience of political power might be supposed to have received the express or implied assent of the people.[1]

Only forty years after enunciation of the traditional policy based on the "will of the nation, substantially declared," political necessity demanded a new interpretation. Two points in this development are significant: First, the implication that, since political reality is a constantly changing phenomenon, so, too, must national policy be subjected to re-evaluation and, where necessary, modification. The United States found it desirable to effect a change within the framework of an older, sanctified policy. Thus, while nominally adhering to a traditional policy, the philosophical-idealistic substance was progressively abandoned.

Second, the question of legal obligation in recognition was as alien to the new as it was to the old interpretation of the Jeffersonian principle. The former, too, did not attempt to obviate that element of discretion only recently affirmed by the Latin American experience. Indeed, it would be somewhat naive to expect that, after having exercised political discretion, a government would voluntarily admit a legal interpretation of the recognition act.

While continuing to encourage governments established on the basis of principles with which it was in accord, the expanded policy permitted the United States to deal simultaneously with those of another bent. Thus, for example, Secretary of State Clayton's letter of July 8, 1849 to Minister Donelson in Prussia, asserting that

> we, as a nation, have ever been ready and willing to recognize any Government, de facto, which appeared capable of maintaining its power; and should either a republican form of government, or that of a limited monarchy (founded on a popular and permanent basis) be adopted by any of the states of Germany,

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[1]Moore, op. cit., p. 129. (Quoted from MS. Notes to Foreign Legations, V, p. 102. Italics added.)

> we are bound to be the first, if possible, to hail the birth of the new Government, and to cheer it in every progressive movement that has for its aim the attainment of the priceless and countless blessings of freedom,[1]

was, in light of the broader interpretation, consistent with the American attitude toward a new regime in France.

On December 2, 1851, Louis Napoleon, President of the French Republic, dissolved the National Assembly and Council of State, called for elections based on universal suffrage, convoked the people in primary assemblies, and initiated a state of siege. Secretary of State Webster wrote to Minister Rives in Paris of Louis' attempt to prolong and enlarge the powers of the Presidency:

> . . . From President Washington's time down to the present day it has always been a principle, always acknowledged by the United States, that every nation possesses a right to govern itself according to its own will, to change institutions at discretion, and to transact its business through whatever agents it may think proper to employ. . . . If the French people have now substantially made another change, we have no choice but to acknowledge that also; and as the diplomatic representative of your country in France, you will . . . conform to what appears to be settled national authority. And while we deeply regret the overthrow of popular institutions, yet our ancient ally has still our good wishes for her prosperity and happiness, and we are bound to leave to her the choice of means for the promotion of those ends.[2]

In Latin America, an area rapidly becoming an economic sphere of interest of the United States, the discretionary de facto principle was most profitably invoked. Thus, for example, our relations with

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[1]Francis Wharton, ed., A Digest of the International Law of the United States, Taken from Documents Issued by Presidents and Secretaries of State, and from Decisions of Federal Courts and Opinions of Attorneys-General, v. 1 (Washington, D. C.: Government Printing Office, 1886), p. 537. (Quoted from MSS, Inst., Prussia.)

[2]Moore, loc. cit., p. 124. (Quoted from S. Ex. Document 19, 32nd Congress, 1st Session, p. 19.)

Mexico just prior to the outbreak of the American Civil War, illustrates the political character of recognition.

In July, 1857, a constituent congress drew up a new constitution, under which General Comonfort was elected President for a four year term. A coup, led by General Zuloaga, overthrew the Comonfort government in August. Subsequently, a civil war broke out between the new Zuloaga Government and Benito Juarez' republican faction. As a result, the former was overthrown in favor of a new government under Miramon. The American Minister, having recognized the Zuloaga Government without permission from the State Department, was now instructed to enter into relations with Miramon. Meanwhile, Juarez had established his own government at Vera Cruz, in opposition to that at Mexico City.

A crisis developed when Miramon decreed a pro rata contribution on all capital in Mexico valued at certain amounts, including that of foreigners. The American Minister in the capital, Mr. Forsyth, promptly condemned it as a forced loan and advised Americans to ignore the levy. Relations between the two governments deteriorated rapidly until finally, in June 1858, relations with Miramon were suspended and the American Minister recalled.

In the ensuing civil war between the Miramon and Juarez factions, it soon became apparent that the latter would emerge triumphant. Consequently, President Buchanan dispatched Mr. William M. Churchwell as confidential agent to investigate conditions in Mexico. His reports of February 8 and 22, 1859 were favorable to Juarez' party and urged the President to recognize his government.[1]

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[1]Stuart A. MacCorkle, American Policy of Recognition Towards Mexico (Baltimore: Johns Hopkins University Press, Ph. D. dissertation, 1933), pp. 48-54. (Quoted from Despatches from the Ministers in Mexico, Department of State, v. 23, Despatches no. 1-C.)

When Juarez agreed to settle all claims of American citizens against Mexico, to permit free trade between the two countries on the basis of reciprocity, and to protect American citizens and property involved in such intercourse,[1] a new Minister, Mr. Robert M. McLane, was dispatched to Mexico. McLane was authorized to recognize the Juarez Government if ". . . he should find it entitled to such recognition according to the established practice of the United States."[2] Secretary of State Cass, after emphasizing the irrelevance of legitimacy, advised the Minister that

> the question whether there is a government in any country is not a question of right, but of fact, and in the ascertainment of this fact in Mexico very much must be left to your discretion. Undoubtedly, however, the sympathies of the United States have been enlisted in favor of the party of Juarez which is now established at Vera Cruz, and this government would be glad to see it successful. This arises not only from the fact that it is believed to be a constitutional party, but because, also, its general views are understood to be more liberal than those of the party opposed to it, and because, moreover, it is believed to entertain friendly sentiments toward the United States. . . . The simple fact that it is not in possession of the city of Mexico, ought not to be a conclusive consideration against it. If its authority is obeyed over a large majority of the country and the people, and is likely to continue, it would be extremely unjust to delay an acknowledgment of it, because its opponents are in possession of the capital. On this subject, however, your own judgment must be your best guide.[3]

Perhaps most significant, in the light of future developments in the Mexican case, is Secretary Cass' emphasis upon the discretionary

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[1]MacCorkle, loc. cit., pp. 48-54. (Quoted from Instructions to American Ministers in Mexico, v. 17, p. 206.)

[2]MacCorkle, loc. cit., pp. 48-54. (Quoted from Despatches, loc. cit., v. 23, Despatch no. 1-C.)

[3]MacCorkle, loc. cit., pp. 48-54. (Quoted from Instructions, op. cit., v. 17, pp. 209-213.)

character of recognition. Undoubtedly, the United States' attitude toward the Juarez regime played some part in Minister McLane's decision to recognize the Mexican Republic on April 7, 1859. However, in view of a memorandum enclosed in Mr. Churchwell's reports, pertinent to economic benefits to be derived from recognition of Juarez,[1] it is apparent that the promotion of a specific national interest influenced both the timing and object of that recognition. Indeed, Minister McLane's reasons for extending recognition, as explained to Secretary Cass, confirm that conclusion:

> In any other country than Mexico, I should have had grave doubts in coming to the conclusion at which I have arrived, but a view of the very large interest, political and commercial, already involved in the right of way over the Isthmus of Tehuantepec, and with the knowledge that this transit was the subject of present legislation or decrees by both governments, and the State of Louora also which offered so desirable a route from the Pacific Ocean to our territory of Arizona, was now engaged in a contest with the central government in relation to its public domain in that state, in which contest the rights and property of American citizens were deeply involved, I felt it to be my duty to act promptly in opening political relations with some power, if such could be found consistent with those principles by which I had been instructed to govern myself.[2]

One student of American-Mexican relations[3] has submitted that the presence of English and French fleets in the harbor at Vera Cruz, demanding the performance of commercial treaties signed

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[1]MacCorkle, loc. cit., pp. 48-54. (Despatches, loc. cit., v. 23, Despatch no. 1-C.) Juarez agreed to cede not only lower California, but also a perpetual right-of-way over Tehuantepec and from Rio Grande to Guaymas and Matzatlan, respectively.

[2]MacCorkle, loc. cit., pp. 48-54. (Quoted from Despatches, loc. cit., v. 23, Despatch no. 1-April 7, 1859.)

[3]MacCorkle, loc. cit., pp. 48-54.

with various Mexican governments, was the most significant factor in hastening United States action. This conclusion is tenable, especially in view of the Monroe Doctrine and the United States' traditional hostility to expanded European influence in the hemisphere. However, the coincidence of agent Churchwell's memorandum, Secretary Cass' instructions, no doubt given with prior knowledge of concessions that Juarez was prepared to grant, and Minister McLane's explanation suggests a preoccupation with more immediate economic interests. In any event, whatever the degree of their significance, both conclusions suggest the primacy of national interests in the execution of a de facto recognition policy.

B. Legitimism

Civil war brought an expediential, if only brief, change in United States recognition policy. It was first seen in the attitude of the Federal Government toward the insurrentionary Confederacy.[1] As early as February 1861, Secretary of State Seward, responding to a Confederate effort to dispatch commissioners to Washington, reflected that attitude:

> Of course . . . the Secretary of State cannot act upon the assumption or in any way admit that the so-called Confederate States constitute a foreign power, with whom diplomatic relations ought to be established. Under the circumstances, the Secretary of State, whose official duties are confined, subject to the direction of the President, to the conducting of the foreign relations of the country and do not at all embrace domestic questions or questions arising between the several States and the Federal Government, is unable to comply with the request of Messrs. Forsyth and Crawford. . . . On the contrary he is obliged to state . . .

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[1]For an insight into the implications of the Civil War experience for United States recognition policy, see Goebel, op. cit., pp. 171-218.

> that he has no authority, nor is he at liberty to recognize them as diplomatic agents or hold correspondence or other communication with them.[1]

The Supreme Court of the United States, having held that,

> when a civil war rages in a foreign nation, one part of which separates itself from the old established government and erects itself into a distinct government, the courts of this country must view such newly-constituted government as it is viewed by the legislative and executive departments of the Government of the United States,[2]

was obliged to conclude that

> the government of the Confederate States . . . had no existence, except as a conspiracy to overthrow lawful authority. Its foundation was treason against the existing Federal Government. Its single purpose, so long as it lasted, was to make that treason successful. . . .[3]

The Federal Government, by ignoring its traditional sympathy for revolution,[4] attempted to convince other powers that the conflict

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[1]Ibid., p. 174. (Quoted from J. D. Richardson, A Compilation of the Messages and Papers of the Confederacy, v. 1 (Nashville: ?, 1906), pp. 85 et seq.)

[2]U. S. Department of State, Digest of the Published Opinions of the Attorneys-General, and of the Leading Decisions of the Federal Courts, With Reference to International Law, Treaties, and Kindred Subjects (Washington, D. C.: Government Printing Office, 1877), p. 40. (Quoted from United States vs. Palmer, 3 Wheaton, p. 610.)

[3]Ibid., pp. 79-80. (Quoted from Sprott vs. United States, 20 Wallace, pp. 459, 464, 465.)

[4]Jefferson, as early as 1787, had written: "I hold it that a little rebellion now and then is a good thing and as necessary in the political world as storms in the physical." (Quoted from Ford, ed., Jefferson's Works, v. 4, pp. 362-363, by John L. McMahon, Recent Changes in the Recognition Policy of the United States (Ph. D. dissertation, Washington, D. C.: Catholic University of America, 1933), p. 29; Taylor Cole, The Recognition Policy of the United States Since 1901 (Baton Rouge: Louisiana State University, 1928), p. 26, claims that Seward never denied either the right of revolution or the right of a people to set up governments according to their own tastes.

was domestic as a result of the illegal insurrection. Despite Federal pretensions, Great Britain declared its neutrality on May 13, 1861, after President Lincoln had decreed a blockade of the Confederate coast. Thus, the Confederacy became a belligerent power under international law.

The effect of both the insurrection and British recognition upon United States policy was significant. In reverting expedientially to the legitimacy aspect of the Jeffersonian doctrine, the Federal Government had rejected the later interpretation based on effectiveness and popular acquiescence. Consequently, in order to avoid embarrassment in the eyes of the world, it sought consistency through adoption of the older test as the keystone of its recognition policy.

The test of constitutional legitimacy, generally considered to have been encouraged by Secretary of State Seward, was most prominently applied in relations with Latin America. The Secretary first suggested a reversion to the old test in a letter of November 19, 1862, to Minister Culver in Caracas, wherein he stated that

> a revolutionary Government is not to be recognized until it is established by the great body of the population of the state it claims to govern.[1]

In a letter of April 21, 1866 from Seward to the American representative in Bolivia, stating that

> hitherto your instructions have been not to recognize any government in Bolivia which was not adopted through the free will and the constitutionally expressed voice of the people of that republic: but, nevertheless . . . the President deems it expedient under the exigencies of the present condition of affairs in that region to recognize the actual government of

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[1]Wharton, op. cit., p. 542. (Quoted from MSS. Inst., Venezuela.)

> Bolivia if that government has become truly and in fact consolidated. . . ,[1]

both the legitimacy and discretionary characteristics of the Civil War policy and recognition generally were emphasized.

The Peruvian case of 1866-1868 serves as perhaps the best illustration of Seward's policy. The Secretary had dispatched General Hovey to Peru to continue relations with the government of General Pezet. En route, however, the Pezet government was overthrown and supplanted by the regime of General Conseco. Subsequently, the entire diplomatic corps, except the American Minister, recognized the Conseco government. Shortly thereafter, a coup, headed by Colonel Prado, brought a military dictatorship to power. On March 8, 1866, influenced by the experience of his own country, Seward wrote of the latest development in Peru:

> The policy of the United States is settled upon the principle that revolutions in republican states ought not to be accepted until the people have adopted them by organic law with the solemnities which would seem sufficient to guarantee their stability and permanency. This is the result of reflection upon national trials of our own.[2]

The Prado regime was overthrown by General Conseco in May 1868, whereupon the latter claimed, by virtue of his earlier recognition, a right to continued recognition. Secretary Seward responded on May 7, 1868:

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[1]Goebel, op. cit., p. 199 and Charles Cheney Hyde, International Law, Chiefly as Interpreted and Applied by the United States, v. 1 (Boston: Little, Brown and Co., 1922), p. 44. (Quoted from Diplomatic Correspondence, 1866, v. 2, p. 330); for a reaffirmation of the discretionary element in recognition, see the case of the Iglesias regime in Peru. (Quoted by Green Haywood Hackworth, Digest of International Law, v. 1 (Washington, D.C.: Government Printing Office, 1940), pp. 158-159.)

[2]Goebel, loc. cit., p. 199. (Quoted from Diplomatic Correspondence, 1866, v. 2, p. 630.)

> What we wait for in this case is the legal evidence that the existing administration has been deliberately accepted by the people of Peru. . . . We do not deny or question the right of any nation to change it[s][government] by force, although we think that the exercise of force can be justified in rare instances. What we do require, and all that we do require, is when a change of administration has been made, not by constitutional process, but by force, that then the new administration shall be sanctioned by the formal acquiescence and acceptance of the people.
>
> We insist upon this because the adoption of a different principle in regard to foreign states would necessarily tend to impair the constitutional vigor of our own government, and thus favor disorganization, disintegration, and anarchy throughout the American continent. In our own late political convulsions, we protested to all the world against any recognition of the insurgents as a political power by foreign nations, and we denied the right of any such nation to recognize a government here independent of our constitutional republic until such new government should be not only successful in arms, but should also be accepted and proclaimed by the people of the United States.[1]

By late 1868, however, Secretary Seward apparently realized, as had Secretary Livingston in 1833, that a strict, constitutional interpretation of the Jeffersonian principle was impractical in the light of political realities. Thus, for example, when a bloodless, unresisted revolution occurred in Costa Rica, supplanting the Castro government with that of Provisional President Jimenez, Minister Blair recognized the new regime. Secretary Seward, informed that the provinces had acquiesced in suspension of the old constitution and the call for a national convention to adopt a new one, wrote to Minister Blair on December 1, 1868:

> It does not belong to the Government or people of the United States to examine the causes which have led to this revolution, or to pronounce upon the exigency which they created. Nevertheless, great as that exigency may have

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[1]Ibid., p. 202. (Quoted from Diplomatic Correspondence, 1868, v. 2, pp. 863 et seq.); quoted, in part, in Cole, op. cit., p. 29.

> been, the subversion of a free republican constitution, only nine years old, by military force, in a sister American Republic, cannot but be an occasion of regret and apprehension to the friends of the system of republican government, not only here, but throughout the world.
>
> It only remains to say that the course which you have pursued is approved, insomuch as it appears that there is not only no civil war, but no Government contending with the one which has been established.[1]

Seward's policy, contrary to the opinion of some scholars,[2] appears to have been consistent with the traditional practice of the United States in at least two senses.[3] On the one hand, it appears to have come closer in spirit to the original Jeffersonian principle than did the later interpretation recognizing acquiescence and effectiveness as a more feasible test. Indeed, the interventionist Civil War policy could be traced to Jefferson's inherently interventionist doctrine of 'democratic legitimacy.' Both men suffered the same dilemma: simultaneous respect for the right of revolution and insistence upon a democratic and constitutional legitimacy. That the latter tended both to circumscribe the former and to hamper American foreign policy formulation and execution appears to have been appreciated more by Seward than Jefferson. Hence, his post-war reversion to the later interpretation of the Jefferson doctrine.

The Civil War policy may also be viewed as consistent with traditional practice in that both were based upon the political,

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[1]Wharton, op. cit., pp. 543-544. (Quoted from MSS. Inst., Costa Rica, Diplomatic Correspondence, 1868.)

[2]See, e.g., Hyde, loc. cit., p. 44 and Goebel, op. cit., p. 200.

[3]Cole, loc. cit., p. 26, suggests that, since Seward never denied the right of revolution, his policy was not fundamentally different from that traditionally pursued by the United States.

rather than legal thesis of recognition. Neither considered recognition in terms of objective legal obligation, but rather, of discretion and national interest.

C. International Obligations

By the last quarter of the Nineteenth Century, American interests abroad, especially those in Latin America, gave rise to the need for a new, subjective criterion in our recognition policy. Hence, the test based on a regime's ability and willingness to fulfill the state's international obligations.[1] Initiated in 1877, when President Hayes, in his first Annual Message, asserted that

> it has been the custom of the United States, when such [revolutionary] changes of government have heretofore occurred in Mexico, to recognize and enter into official relations with the de facto Government as soon as it shall appear to have the approval of the Mexican people, and should manifest a disposition to adhere to the obligations of treaties and international friendship,[2]

it has remained a key test in the United States' recognition policy. Thus, the Acting Secretary of State, F. W. Seward, wrote to the American Minister in Mexico on May 16, 1877:

> The Government of the United States, . . . in the present case . . . waits before recognizing General Diaz as the President of Mexico until it shall be assured that his election is approved by the Mexican people, and that his

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[1]See footnote 1, page 43; MacCorkle, op. cit., p. 102, submits that the international obligations criterion was probably inherent in the traditional de facto principle, and has become independently significant only with the expansion of American interests abroad; for a concurring view, see Green Haywood Hackworth, "The Policy of the United States in Recognizing New Governments During the Past Twenty-five Years," Proceedings of the American Society of International Law, 1931, p. 123.

[2]Wharton, op. cit., p. 546.

> administration is possessed of stability to endure, and of disposition to comply with the rules of international comity and the obligations of treaties.
>
> . . . recognition, if accorded, . . . would imply a belief that the Government so recognized will faithfully execute its duties and observe the spirit of its treaties. The recognition of a President in Mexico by the United States has an important moral influence which, as you explain, is appreciated at the capital of that Republic. It aids to strengthen the power and lengthen the tenure of the incumbent, and if, as you say, the example of the United States in that regard is one that other nations are disposed to follow, such recognition would not be without effect upon the internal and the external peace of Mexico.[1]

Seward's note illustrates both the application of the new test and the significance of United States recognition in inter-American relations. By 1877, American influence in the hemisphere had grown to a point where its will could directly affect the existence of neighboring governments. Its action in Mexico was a testament to both that power and that will.

A Venezuelan revolution, returning Senor Blanco to power, was quickly recognized by England, France, Italy, Germany, Spain and Brazil. The United States, however, after observing both the illegitimate origin and de facto existence of the new government, decided to defer recognition until Blanco had clearly gained popular support. More important, however, recognition would be contingent on its observance of international obligations, namely, payment of a defaulted indemnity and protection of American citizens in Venezuela.[2]

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[1]Ibid., pp. 546-548. (Quoted from MSS. Inst. Mexico; Foreign Relations, 1877.) The letter specifies the Mexican government's apparent indisposition to halt border raids, forced loans against American citizens, etc., in invoking the international obligations test.

[2]Moore, op. cit., p. 150.

Its position on fulfillment of obligations was elaborated upon by Secretary of State Evarts, in a letter of June 14, 1879 to Minister Baker:

> The capacity of a state, in itself, for recognition, and the fact of recognition by other states, are two different things. Recognition is not . . . infrequently influenced by the needs of the mutual relations between the two countries. When radical changes have taken place in the domestic organization of the country, or when they seem to be contemplated in its outward relations, it is often a matter of solicitude with this Government that some misunderstanding should exist that the rights acquired by our citizens through the operation of treaties and other diplomatic engagements, shall not be affected by the change. . . .[1]

Furthermore,

> as a general rule of foreign policy, obtaining since the foundation of our Government, the recognition of a foreign Government by this is not dependent on right, but on fact. . . . When a change occurs in the administration of a nation, and the new authorities are in unopposed possession of the full machinery of Government, . . . and evincing the purpose as well as the power to carry out the international obligations of the state, recognition would follow, as a matter of course, . . . so long as no considerations of policy directly affecting the relations between his country and this intervene to postpone such a result.[2]

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[1]Wharton, op. cit., pp. 548-549. Secretary Evarts referred also to the ability to conduct customary business relations with an unrecognized government. This may be an implementation of Jefferson's distinction between the recognized government, and one, though unrecognized, with which limited business could be transacted. The United States has made such a distinction on many occasions, in order to effect a continuity of commercial intercourse and protection of American citizens and property in states with unrecognized governments.

[2]Ibid., p. 549. (Quoted from Acting Secretary of State Hunter's letter to Minister Baker, October 3, 1879, MSS. Inst., Venezuela, Italics added.)

Conclusion

American recognition practice in the Nineteenth Century serves as an instructive commentary on the nature of recognition in international relations. It has been observed that application of a legitimacy principle, whether democratic, constitutional, or monarchical, cannot but constitute an act of intervention into the domestic affairs of sovereign states. It is not surprising, therefore, that such a criterion has been almost universally condemned in legal and political circles. Yet, in spite of such condemnation, it has not become a dead-letter in international relations. President Wilson's implementation of the constitutional legitimacy test[1] doubtless confirms its powers of survival.

Application of the international obligations criterion is often less antagonistic to an unrecognized government than the legitimacy test. Nevertheless, when invoked independently of the de facto principle, it too, is inherently subjective and political. In this case it represents an inquiry into the degree of a regime's ability and disposition to fulfill obligations of an international character. Such inquiries have also transcended the reasonable limits of concern for observance of treaties to the consideration of national ideologies. The cases of Great Britain during the French Revolution and the United States vis-a-vis hostile regimes in the Soviet Union, Argentina, and Communist China, offer illustrations of the elastic political character of such a test.

Of the three tests, de factoism alone approaches an objective legal character. This writer has been reluctant to consider it a legal criterion, however, for the gap between theory and practice has

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[1]See Chapters III and IV.

historically been too great to support such a claim. As the practice of the United States and positive international law demonstrate, the de facto principle has been utilized essentially as another political test. Until the states renounce their prerogative of discretion in the recognition act, this criterion also must remain an instrument of national interests, rather than of legal obligation.

CHAPTER III

THE RECOGNITION OF REVOLUTIONARY GOVERNMENTS IN AMERICAN HISTORY (B) A NEW ROLE: 1917-1960

An understanding of the American attitude toward recognition in this century requires an awareness of the changes that the nation has undergone since its founding. As a young, weak nation, the United States tended to identify most situations involving recognition with the ideals upon which its founding was based. Consequently, it seemed to intuitively support the de facto principle.[1] In the Twentieth Century, however, the United States has become a great power with spheres of interest throughout the world. As a result, it appears that this country, moulding its diplomacy as a power, will emphasize expediency and national interests in each case of recognition in which it is involved. Thus, it is difficult to speak of American recognition practice in terms of any general policy.[2]

Three cases,[3] especially illustrative of its new role in an era of great international rivalry and strife, throw light on the

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[1]Stuart A. MacCorkle, American Policy of Recognition Towards Mexico (Ph. D. dissertation, Baltimore: Johns Hopkins University Press, 1933), p. 23; also, see Chapter II, supra, for political qualifications of this principle.

[2]MacCorkle, loc. cit., p. 23.

[3]The many cases of recognition involving the United States in the Twentieth Century suggest that it has placed different emphases on the several recognition tests under varying conditions. Furthermore, policies of the United States and other nations have been based

United States' discretionary behavior. Before reviewing the Soviet, Argentine, and Chinese cases of 1917-1933, World War II and 1949-?, respectively, a statement on the relevance of the nature of recognition to them would seem appropriate.

American practice in the Twentieth Century has followed that of the Nineteenth in that it has adhered to the political, rather than the legal, thesis of recognition. Consequently, a distinction between the two eras must be sought in evolving American interests. Survival of the traditional tests ought not to create the illusion of similarity between the two centuries. Communism, Fascism, Nazism, World War, and Cold War have undoubtedly given new meaning and purpose to traditional principles.

A. The Soviet Case

The United States' attitude toward the Soviet regime in the sixteen years prior to its grant of recognition was influenced by both traditional principles and the international situation. Its earliest hostility was engendered by the regime's actions during the First World War. Signing, on March 3, 1918, of the Treaty of Brest-Litovsk with enemy Germany took Russia out of the war. This

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upon a de facto-de jure distinction, whereas in the last century, de jure recognition alone was generally accorded. (E. g., the United States extended de facto recognition to Mexico's Carranza regime in 1915, and de jure recognition in 1917.) This change has also tended to foster the discretionary political element in recognition. For illustrations of the emphasis placed on discretionary recognition, see the case of Huerta in Mexico (Foreign Relations, 1913, p. 725ff.), the Wilsonian legitimacy test in the Tinoco (Costa Rica) case (Foreign Relations, 1917, pp. 301-307) and vis-a-vis Portugal's revolutionary junta in December 1917 (Green Haywood Hackworth, Digest of International Law, v. I (Washington, D.C.: Government Printing Office, 1940), p. 293.), Ahmet Zog in Albania (Hackworth, op. cit., p. 283.), and Obregon in Mexico (Foreign Relations, 1923, v. 2, pp. 536-548.)

alienated American public opinion and threatened to complicate future peace conferences.[1]

It is probable that developments closer to home also shaped this hostile attitude. A 'Red Scare,' culminating in association of the American Communist Party with the subversive Moscow-based Comintern, the raids and deportations promoted by Attorney-General Mitchell Palmer from 1919-1921, and the Sacco-Vanzetti Case, which dragged on from May 5, 1920 until April 9, 1927, undoubtedly exacerbated the already popular resentment of the Soviet regime.[2] As one student of public opinion has observed,

> . . . the American people from 1917 to 1921 did not know what was really going on in Russia. They did not understand the significance of the change in Russia, nor did they apprehend the meaning Russia could have as an economic symbol and social experiment. They interpreted the few economic ideas they did perceive in the simple terms of a minority ruling by violence and bloodshed. They weighed the possibilities of Communist effort in the United States not by its essential philosophy but by its apparent results.[3]

By the end of the Russian Civil War, in 1920, one American objection to recognition had become untenable.[4] The Soviet government had been able to meet the test of de facto, effective rule, and

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[1]Robert Paul Browder, The Origins of Soviet-American Diplomacy (Princeton: Princeton University Press, 1953), p. 7.

[2]For an excellent insight into the nature and extent of the 'Red Scare,' see Irving Howe and Lewis Coser, The American Communist Party: A Critical History, 1919-1957 (Boston: Beacon Press, 1957), pp. 59-60.

[3]Meno Lovenstein, American Opinion of Soviet Russia (Washington, D. C.: American Council on Public Affairs, 1941), p. 50.

[4]Browder, op. cit., p. 16, is of the opinion that the American Government believed that the Soviets would soon lose power. Undoubtedly, too, Wilson's opposition to recognition was based on his constitutional legitimacy test.

Louis L. Jaffe, Judicial Aspects of Foreign Relations; In Particular of the Recognition of Foreign Powers (Cambridge:

was rapidly consolidating its power. Yet the United States continued to refuse recognition.[1] Thus, in a declaration of policy reminiscent of the interventionist legitimacy principle, Secretary of State Colby asserted on August 10, 1920 that

> . . . the present rulers of Russia do not rule by the will or the consent of any considerable proportion of the Russian people . . . they have not yet permitted anything in the way of a popular election . . . the Bolsheviki, although in number an inconsiderable minority of the Russian people, by force

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Harvard University Press, 1933), p. 109, contends that the whole world went off the de facto standard in the Soviet case. In view of the nature and history of recognition, this observation appears to be inaccurate. It seems improper to measure the world's actions merely by the United States' sixteen year non-recognition policy. Great Britain had extended de facto recognition to the Soviets, through a Trade Agreement, as early as March 16, 1921. Both the British and French Governments recognized it de jure in 1924, while Japan did so in 1925. Indeed, by November 1926, twenty-two powers had recognized the Soviets. Recall that the interim between British and American recognition of the Latin American colonies, in the name of the de facto principle, and their actual independence, was not much shorter. In fact, only two differences, significant, of course, appear to distinguish the two cases. First, in the Soviet, a greater emphasis was placed upon the international obligations test as an independent consideration. This is not to suggest that the de facto principle was completely ignored. Thus, for example, while the British emphasized international obligations in 1921, it was still greatly influenced by the Communists' ability to rule. (For evidence of both tests being applied in the British case, see H. A. Smith, Great Britain and the Law of Nations: A Selection of Documents Illustrating the Views of the Government in the United Kingdom Upon Matters of International Law, v. 1 (London: P. S. King and Son, Ltd., 1932), pp. 237-245.) Second, the most significant difference appears to have been the nature of the national interests involved. (See N. D. Houghton, "Policy of the United States and Other Countries With Respect to Recognition of the Soviet Government, 1917-1929," International Conciliation, 1929, no. 247, pp. 18, 29 for information relevant to British, French, and Japanese political interests in the Soviet case.)

[1]Acting Secretary of State Davis (Foreign Relations, 1920, v. 3, p. 717) emphasized that lifting of the trade embargo against Russia did not imply recognition of the Soviet regime. This writer must submit, however, that while recognition was being withheld, the rescinding order at least suggested the existence of an effective government in Russia.

> and cunning seized the powers and machinery of government and have continued to use them with savage oppression to maintain themselves in power.[1]

Upon leaving office, the Secretary reiterated his administration's attitude on the recognition question:

> Refusal to recognize the Soviet Government was due in the first place to the fact that it was itself the denial of self-determination of the Russian people, being a rule by men who violently usurped power and destroyed the democratic character of the Russian people's government.[2]

Harding's Secretary of State, Charles Evans Hughes, suggested a new consideration in the Soviet case. Implying the international obligations test, he insisted that Russia's desire to exchange trade for recognition could not satisfy a United States interested only in the protection of its citizens and property in that country.[3] In a letter of July 19, 1923 to Samuel Gompers, President of the American Federation of Labor, Hughes, conceding Soviet de facto rule, elaborated on its failure to meet the international obligations test:

> . . . while a foreign regime may have securely established itself through the exercise of control and submission of the people to, or their acquiescence in, its exercise of authority, there still remain other questions to be considered. Recognition is an invitation to intercourse. It is accompanied on the part of the new government by the clearly implied or express promise to fulfil the obligations of intercourse. These obligations include, among other things, the protection of the persons and property of the citizens of one country lawfully pursuing their business in the territory of the other. In the case of the existing regime in Russia, there has not only been

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[1]International Conciliation, no. 155, October 1920, pp. 5-11.

[2]John L. McMahon, Recent Changes in the Recognition Policy of the United States (Ph. D. dissertation, Washington, D.C.: Catholic University of America Press, 1933), p. 78. (Quoted from New York Times, January 30, 1921.)

[3]Foreign Relations, 1921, v. 2, p. 768.

> the tyrannical procedure . . . which has caused the question of submission and acquiescence of the Russian people to remain an open one, but also a repudiation of the obligations inherent in international intercourse and a defiance of the principles upon which alone it can be conducted. . . .
>
> What is most serious is that there is conclusive evidence that those in control at Moscow have not given up their original purpose of destroying existing governments wherever they can do so throughout the world. . . .
>
> While this spirit of destruction at home and abroad remains unaltered the question of recognition by our Government of the authorities at Moscow cannot be determined by mere economic considerations or by the establishment in some degree of a more prosperous condition, . . . or simply by a consideration of the probable stability of the regime in question.[1]

Clearly, for the Harding Administration,

> the fundamental question in the recognition of . . . [the Soviet] government . . . [was] whether it show[ed] ability and the disposition to discharge international obligations.[2]

When the President died on August 2, 1923, the conservative Calvin Coolidge entered the White House. In his first Annual Message to the Congress, on December 6, 1923, Coolidge sounded a familiar note:

> Our Government does not propose . . . to enter into relations with another regime which refused to recognize the

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[1]Hackworth, op. cit., pp. 177-179. (Quoted from MS. Department of State, file 861.01/623. Italics added. Cited, in part, by McMahon, op. cit., p. 79. (Quoted from full text in American Federationist, v. 31, pp. 155-156.) The italicized statement may throw some light on the function of recognition. It suggests that for the United States recognition signifies an intention to pursue relations, rather than mere appreciation of an objective fact. Thus, Kelsen's dichotomous theory appears to be consistent in principle only, while in fact, DeVisscher's argument, that the legal and political aspects cannot be distinguished, is more tenable.

[2]Taylor Cole, The Recognition Policy of the United States Since 1901 (Baton Rouge: Louisiana State University Press, 1928), p. 88. (Quoted from a statement by Secretary Hughes in the New York Times, March 22, 1923, p. 1.)

> sanctity of international obligations. . . . Whenever there appears any disposition to compensate our citizens who were despoiled and to recognize that debt contracted with our Government not by the Czar, but by the newly formed Republic of Russia; whenever the active spirit of enmity to our institutions is abated; whenever there appear works . . . showing repentance, our country ought to be the first to go to the economic and moral rescue of Russia.[1]

Chicherin, Soviet Commissar of Foreign Affairs, apparently interpreting the message as an invitation to negotiate recognition, promptly telegraphed that

> . . . Soviet Government sincerely anxious to establish at last firm friendship with people and government U.S., informs you of its complete readiness to discuss with your government all problems mentioned in your message, these negotiations being based on principle mutual non-intervention internal affairs. . . . As to question of claims mentioned your message Soviet Government is fully prepared to negotiate with view its satisfactory settlement on assumption that principle reciprocity recognized all round. . . . [sic!][2]

The United States replied peremptorily that it

> . . . is not proposing to barter away its principles. . . . It requires no conference or negotiations [for the Soviet authorities to fulfil its obligations] . . . [This] can and should be achieved at Moscow as evidence of good faith. The American Government has not incurred liabilities to Russia or repudiated obligations. Most serious is the continued propaganda to overthrow the institutions of this country. This Government can enter into no negotiations until these efforts directed from Moscow are abandoned.[3]

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[1]New York Times, December 7, 1923, p. 4.

[2]Foreign Relations, 1923, v. 1, p. 7.

[3]Hackworth, op. cit., p. 303. (Quoted from Secretary Hughes' message of December 18, 1923, to the American Consul, Mr. Quarton, in Tallinn, to be read to the Soviet representative there. MS. Department of State, file 711.61/71. Italics added. For complete text, see Congressional Record, December 20, 1923, LXV, p. 451.)

The American attitude, ostensibly resting on a traditional interpretation of the international obligations principle, was in fact shaped by an expanded application of that test. Chicherin's telegram, as had previous Soviet advances, left little doubt that questions of outstanding debts and confiscated property could be settled through negotiation. Consequently, the Russian Government appears to have demonstrated a disposition to meet the traditional test. This, however, seemed to be only of secondary importance to the United States. The real issue, that of hostility toward the Soviet system and its ideology fostering international subversion, was inherently more complex and irreparable. The Soviet government, dedicated to the overthrow of capitalist institutions, presented a threat to the established order.[1] This was clearly a violation of the rule of international law safeguarding sovereign, equal states from foreign intervention; hence, an unwillingness on the part of the Soviets to meet the obligation to uphold that rule. It appears that this continued indisposition remained the basis for the United States' non-recognition policy until 1933.[2]

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[1]This threat was not unlike that perceived by Great Britain in the Declaration of the French Convention in late 1792.

[2]While it is true that the Soviets had decreed, on January 1, 1918, the annullment of foreign debts (See relevant text in Leo Pasvolsky and H. G. Moulton, Russian Debts and Russian Reconstruction (New York: ?, 1924), pp. 197-198), and that, in a note of October 28, 1921, to England, France, the United States, Italy, and Japan, Chicherin insisted on the justice of this repudiation (Cited in McMahon, op. cit., p. 85), the Russians were prepared shortly to negotiate a settlement. (This was emphasized in Chicherin's note to the powers.) At the Genoa Conference, in 1922, which the United States refused to attend, the Soviets revealed the concessions that it was willing to make. On April 24, 1922, its counterproposals to the Experts Committee agreed that, in return for immediate and adequate assistance, and de jure recognition, it would settle the question of financial obligations. (For an elaboration upon the Soviet proposals, see Jane Tabrisky Degras, Soviet Documents on Foreign Policy, v. 1 (London: Oxford

By early 1933, when Franklin Delano Roosevelt assumed the Presidency, the economic Depression and Japan's politico-military movements in the Far East had already begun to throw new light on the Soviet recognition case.[1]

1. Economics and the Great Depression

After the American Government rescinded the trade embargo in 1920, commerce between the two countries increased substantially, if only in an unbalanced fashion. Thus, in the period 1921-1930 exports to the Soviet Union rose from $15,584,000 to $114,399,000, while Soviet exports to this country increased from $1,311,000 to

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University Press, 1951), pp. 301-303.) On May 22, the Conference demanded that fulfillment of international obligations, restitution for confiscated foreign property, and termination of revolutionary propaganda abroad precede assistance. (Cited by Houghton, op. cit., p. 14, from New York Times, April 29 and May 3, 1922.) The Powers ignored the question of recognition. In a note of May 11, 1922, the Soviets restated the justice of their stand. It failed to promise termination of propaganda abroad, and denied responsibility for the acts of foreign political parties and labor organizations. (Cited in Houghton, op. cit., pp. 14-15.) One student of the Russian liability question has supported the approximately $60 million counter-claim against the Allies. (Frederick L. Schuman, American Policy Toward Russia Since 1917 (New York: ?, 1928), p. 309), which the United States, notwithstanding its own part in the Civil War, rejected summarily. Thus, it appears that the United States, because of the Soviet system and its international program, more than any other factor, was not prepared, prior to the early '30's, to consider re-establishment of normal relations.

[1]For evidence of the import of these two factors, see the pro-recognition statements of Senators Borah, Johnson, Wagner, and Cutting, Representative Rainey, Dr. Frederick L. Schuman, and Mr. Louis Fischer, in "Should the United States Recognize Soviet Russia? Pro and Con," Congressional Digest, v. 12, 1933, pp. 238-252; for opposition arguments based on the traditionally limited degree of Russo-American trade, aversion to alleged Soviet immorality and its system of government, and its failure to meet international obligations, see statements by Senator Robinson, Representative Fish, Mr. William A. Green, Reverend Dr. Edmund A. Walsh, S. J., and Mr. Philip Marshall Brown (pp. 237-247.)

$24,386,000.[1] The latter constituted a relatively small fraction of the American import trade.

When the stock market fell in October, 1929, businessmen in the United States turned to the Russian market with even greater interest. The Soviet Union, in the midst of an industrializing 5-year Plan, was perceived, ironically, as a protector of the American economy.[2] When Soviet purchases jumped from $74,091,000 in 1928- to $84,011,000 in 1929-to a post-War peak of $114,399,000 in 1930, American business was jubilant about the prospects for even greater commercial intercourse.

However, the years 1931-1932 brought a disillusioning drop in Russo-American trade. From the peak year of 1930, the decrease was to $103,717,000 and $12,641,000, respectively. This development could be traced to the Soviet Union's program of increased exports, in order to raise foreign exchange to pay for its imports. For the American market, however, the effect was similar to that resulting from 'dumping'. Competition was increased, labor was apprehensive, and protests emanated from the business community.[3] Instinctively, this turn for the worse in economic relations was attributed to our nonrecognition policy. New debate over the issue ensued.[4] That the recognition-trade issue had changed significantly,

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[1]Browder, op. cit., Table III, pp. 224-225. (Quoted from Foreign Commerce and Navigation of the United States, 1922-1939.)

[2]Lovenstein, op. cit., p. 149 and Browder, op. cit., pp. 30-32. Both maintain that, in spite of alleged violence in the Soviet planning system, respect for its determination and achievement was growing in the United States.

[3]Browder, op. cit., pp. 33-34, 224-225.

[4]E.g., Representative Sabath and Senator Johnson called for immediate recognition. (Congressional Record, 72nd Congress, 1st Session, p. 8741, and the New York Times, April 24, 1932, respectively.)

however, was lost sight of by many critics of American foreign policy. Clearly, conditions in the periods 1929-1930 and 1931-1933 had changed for both countries. As Browder has pointed out,

> an examination of the influence of economic factors on Soviet-American relations from 1929-1933 reveals two opposing curves of interest. In the earlier period, the Russians were primarily in search of an economic modus vivendi with the United States, in order to facilitate their purchasing there. Political relations were desirable and would probably follow, but they were not the primary objective. America, on the other hand, though interested in the Soviet market during the first years of the 5-Year Plan, did not reach the peak of her interest in economic relations until the end of the period, when the depression deepened and Soviet orders declined. By that time the Soviet Union had a greater desire for political than for economic intercourse and was fundamentally concerned with recognition by the United States, though it continued to use the trade argument as a weapon in its campaign. International developments, especially in the Far East, injected a new urgency in the appeals of Moscow for a diplomatic rapprochement.[1]

That new urgency was equally present in the American capital.

2. The Far East

Japan, the most powerful state in Eastern Asia, was, by the early '30's, threatening the interests of both the United States and the Soviet Union. American attempts since World War I to ensure the Open Door Policy and to halt Japanese aggrandizement had made it the prime enemy of Tokyo's aspirations.[2] For Russia, these

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[1]Browder, op. cit., p. 48.

[2]Recall the traditional racial animosity between the two and its relevance to the Versailles Conference, American opposition to the Twenty-one Demands on China, in January 1915, in order to avert collapse of the Open Door (See Secretary Bryan's note to China and Japan, Foreign Relations, 1915, p. 146), opposition to the large Japanese contingent in Siberia during the Russian Civil War, for fear of Tokyo's covetousness, the naval race, and Japan's disadvantageous end of the 5:5:3 ratio and reaffirmation of the Open Door Policy at the Washington Conference in 1922.

aspirations threatened the peace, and, in turn, the security of the socialist state and the success of its 5-Year Plan. By 1931, 'Socialism in One Country' and an expediential emphasis on international peace and stability had become a keystone of both its domestic and foreign policies.

Japanese aggression against Manchuria in September 1931 made its challenge to the United States and the Soviet Union more serious than had previously been the case. Russia, apprehensive about Tokyo's designs on its comparatively undeveloped Far Eastern territory, offered the Japanese a nonaggression pact in December.[1] While Japan delayed its response until December 1932, Russo-Japanese relations grew more tense.[2]

When the appeasement policy failed, Moscow turned to rapprochement with the United States as a means of thwarting the common 'enemy.' Thus, in February 1932, M. Korskii, Soviet envoy to Lithuania, suggested to Mr. Fullerton, the American Charge, that

> the most salutary thing that could happen in the Far East right now was for Russia and the United States to join in a common pressure upon Japan, if necessary breaking that country as between the two arms of a nutcracker.[3]

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[1]Harriet Moore, Soviet Far Eastern Policy, 1931-1945 (Princeton: Princeton University Press, 1945), p. 11.

[2]Browder, op. cit., p. 51. Tension increased over use of the Chinese and Eastern Railway in Manchuria, and over Japanese recruitment of auxiliaries from White Russian emigre colonies in Mukden and Harbin.

[3]Ibid., p. 55. (Quoted from the message of the American Charge, Mr. Fullerton, to Secretary Stimson, on February 26, 1932, MS. Department of State, file 760N.00/23.); pp. 51-53, Browder maintains that the Soviets changed their policy in order to promote the peace necessary for success of its Plan. Furthermore, aware of American opposition to Japanese activities in Manchuria (such as the Stimson Doctrine and the League's condemnation of Japan), it hoped to foster what it believed to be an inevitable American-Japanese war.

In the latter part of 1932, a relative calm prevailed in both international and Russo-Japanese relations. That this was destined to be short-lived, however, was reflected in dispatches from Ambassador Joseph Grew in Tokyo to the State Department. On August 13, 1932, he warned that the

> . . . military machine . . . has been built for war, feels prepared for war, and would welcome war. . . . I am not an alarmist, but I believe that we should have our eyes open to all possible future contingencies. The facts of history would render it criminal to close them.[1]

He wrote again in February 1933:

> We must bear in mind that a considerable section of the public and the army, influenced by military propaganda, believes that eventual war between either the United States or Russia, or both, and Japan is inevitable.[2]

In spite of the Far Eastern crisis, the United States continued to entertain qualms about extending recognition. Thus, Secretary Stimson wrote to Senator Borah, a leader of the pro-recognition forces, that

> if under these circumstances and in this emergency we recognize Russia in disregard to her very bad reputation respecting international obligations and in disregard of our previous emphasis upon that aspect of her history, the whole world and particularly Japan, would jump to the conclusion that our action had been dictated solely by political expediency and as a maneuver to bring pressure upon Japan. . . . I felt that the loss of moral standing would be so important that we could not afford to take the risk of it. However innocent our motives

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[1]Ibid., p. 59ff. Troop concentrations had been decreased along the Russo-Japanese border, a fisheries agreement reached, Sino-Soviet diplomatic relations resumed, and, in June 1932, at the World Disarmament Conference, the United States and Russia together called for international disarmament. (The Ambassador's statement, cited in Browder, pp. 67-68, was quoted from Joseph C. Grew, Ten Years in Japan (New York: ?, 1944), pp. 64-65.)

[2]Ibid., p. 68. (Quoted from Grew, op. cit., p. 77.)

> might be, they would certainly be misunderstood by the world at large and particularly by Japan. . . .[1]

By 1933, however, it appears that American public opinion had begun to view the non-recognition policy as anachronistic.[2]

3. Recognition

President Roosevelt was determined to end the sixteen year old hiatus between the two powers.[3] Consequently, on October 10, 1933, he wrote to Mikhail Kalinin, Chairman of the All-Union Central Executive Committee of the USSR, of his desire to negotiate a settlement of all outstanding issues and to renew normal relations.[4] Kalinin, on October 17, replied that the Soviet Union was prepared to dispatch Maxim Litvinoff as its negotiator.[5] After a month of difficult

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[1]Foreign Relations, 1932, v. 3, p. 778. This may also be interpreted as a statement of political interest in non-recognition, i.e., an attempt to avoid embarrassment before other states, and a desire to mollify Japan.

[2]Lovenstein, op. cit., p. 149, maintains that this change resulted from a new respect for Soviet planning, trade possibilities, Russia's increased international political power and respect for its international peace posture, and a feeling that non-recognition was untenable. These may be interpreted as a commentary on the spirit of isolationism in America. Significantly, Lovenstein has found no great concern among the population with the Far Eastern issue. Consequently, the Roosevelt Administration, working toward a rapprochement with Russia, emphasized these factors as justification for recognition, while avoiding publicity over the implications of recognition for the Far Eastern situation. For a similar opinion, see Browder, op. cit., p. 108.

[3]Henry Morgenthau, Jr., "The Morgenthau Diaries," Part III, Collier's Magazine, October 11, 1947, p. 20, submits that the President viewed prolonged non-recognition as an outmoded diplomatic device, possibly contributing to international unrest.

[4]For complete text, see Hackworth, op. cit., p. 303. (Quoted from MS. Department of State, file 711.61/287A.)

[5]For complete text, see Ibid., pp. 303-304. (Quoted from MS. Department of State, file 711.61/287½.)

discussions, the President and Litvinoff exchanged notes calling for the re-establishment of relations.[1]

While it may be argued that

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[1]For complete text, see Ibid., p. 305. (Quoted from MS. Department of State, files 711.61/343A, 711.61/343$\frac{1}{8}$.) The Soviets agreed to respect United States sovereignty and to refrain from intervening in its internal affairs. (Complete text in Hackworth, op. cit., pp. 304-305, as quoted from MS. Department of State, file 711.61/343$\frac{2}{8}$.) A final exchange of notes called for the right of Americans to worship freely in Russia, a consular convention according most-favored-nation treatment to the United States, and referred to prosecution for economic espionage, assignment of certain claims and property rights by the Soviet Union to the United States, and to renunciation of all Soviet claims arising out of American military activities in Siberia after January 1, 1918.

The United States was apparently satisfied with Soviet promises to uphold the rules of international law concerning sovereign equality of states and non-intervention. To that extent, the international obligations test was met. But what of its relevance to financial obligations? The total debt was estimated at $187,729,750. (Browder, op. cit., p. 135, citing "Leffingwell Memorandum," June 28, 1919, Loans to Foreign Governments, Senate Document no. 86, 67th Congress, 2nd Session, pp. 92-94.) In view of Soviet losses during the Civil War, America was willing to cut the debt. (Foreign Relations, 1933, v. 2 pp. 800-801.) The debt to American citizens, including pre-Revolution bonds and properties, totalled (excluding interest) $440,575,928. (Ibid., pp. 787-788.). The State Department, recalling the British and French cases of 1924, when de jure recognition was extended before a settlement of the outstanding debt issue was reached (See text of letter from Rakovsky, Soviet representative in London, to Prime Minister MacDonald, in reply to notification of the British grant of recognition, in Degras, op. cit., p. 426. Rakovsky promised to settle the debt question after recognition was granted,), had recommended earlier that the debt question be settled prior to the grant of recognition by the United States. (Foreign Relations, 1933, v. 1, pp. 785, 789, 793.) As in the French and British cases, however, America extended recognition first. In all three, the debt issue was never resolved. The negotiators merely agreed to consider a settlement between $75-150 million sometime after Russia had been recognized. (Foreign Relations, 1935, v. 2, p. 804.)

> the . . . situation in which one of the most important states of the world was not maintaining diplomatic relations with the United States while recognized by other states was an anomaly in international law, . . .[1]

it appears rather unlikely, in view of the evidence presented, that recognition was extended in late 1933 merely to rectify that circumstance.[2] For fifteen years the United States, by invoking the three tests, had been able to forestall recognition of an ideologically antagonistic government. By 1933, only the international obligations criterion remained as a justification for its non-recognition policy. As a result of the Roosevelt-Litvinoff talks only one aspect of that test, pertinent to the principles of the sovereign equality of states and to non-intervention in international law, had been met. A key issue of the 1920's, Russia's indisposition to meet its financial obligations without benefit of preliminary negotiations, was not resolved. Yet recognition was granted.

This suggests that for the Roosevelt Administration traditional criteria in the Soviet case were merely of secondary importance. Conditions of a domestic and international character had apparently assumed a more significant, if less prominent, role in the recognition question. Indeed, as one American diplomat has aptly remarked, it had become both "reasonable and advantageous to accord . . .

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[1]Charles G. Fenwick, International Law (New York: Appleton-Century-Crofts, 1948), p. 167.

[2]That the United States attempted to avoid publicity of the political implications of recognition, even to the extent of denying the influence upon it of the trade question, was evident even after recognition was granted. (See, e.g., the very coy radio address by Assistant Secretary of State Moore, on November 22, 1923, in U. S. Department of State, Eastern European Series, no. 2 (Washington, D. C.: Government Printing Office, 1834), pp. 3-4.) Moore ignored the Far Eastern issue in his address.

recognition"[1] to the Government of Soviet Russia.

B. The Argentine Case

Upon initiating the Good Neighbor Policy in March 1933, President Roosevelt asserted that

> the maintenance of constitutional government in other countries is not a sacred obligation devolving upon the United States alone. The maintenance of law and orderly processes of government in this hemisphere is the concern of each individual nation within its own borders first of all. . . . The Monroe Doctrine confers no superior position upon the United States. . . .[2]

However, even while renouncing the Wilsonian doctrine of legitimacy Roosevelt was quick to add that

> . . . if and when the failure of orderly processes affects the other nations of the continent . . . it becomes their concern; and the point to stress is that in such an event it becomes the joint concern of a whole continent in which we are all neighbors.[3]

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[1]Stanley K. Hornbeck, "Recognition of Governments," Proceedings of the American Society of International Law, 1950, p. 185; there has been some debate as to the relative importance of the trade and Far Eastern issues in America's decision to grant recognition. Browder, op. cit., p. 219, suggests that our government did not discourage hopes of greater trade for fear that this would alienate a growing section of the population sympathetic to recognition. However, he suggests that the government was aware that, in view of the 1931-1932 decline, these hopes were mere pipedreams. Statistics (pp. 224-225) appear to corroborate this view. The peak year between 1933-1939, the year 1938, brought a disappointing $69,691,000 in exports to Russia. In view of this, it appears that the American and Soviet governments were primarily concerned with the international situation (Japan's aspirations and secondarily, the rise of Hitler) and the pacifying effect that recognition would have upon it.

[2]George I. Blanksten, Peron's Argentina (Chicago: University of Chicago Press, 1953), pp. 8-9. (Quoted from Samuel S. Morrison and Henry S. Commager, Growth of the American Republic, v. 2 (New York: Oxford University Press, 1937), p. 513.)

[3]Blanksten, loc. cit., pp. 3-9. (Quoted from Morrison and Commager, loc. cit., p. 513.

The Japanese attack on Pearl Harbor brought the United States and nine Latin American nations into World War II.[1] It also threw light on the pro-Axis sympathies of neighboring Argentina and created a situation in which the President's earlier qualification seemed to be appropriate.[2]

As early as 1938, the United States had been introduced to a display of Argentine sympathies. In December of that year, Washington, sensitive to Nazi-Fascist propaganda and commercial inroads in the hemisphere, attempted to form a twenty-one nation anti-Axis bloc at the Eighth International Conference of American States at Lima. Argentine opposition, however, thwarted that effort. Consequently, the innocuous Declaration of Lima, adopted on December 24, 1938, merely reaffirmed faith in international law and promised common action to assist American states threatened by external invasion.[3]

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[1]Within one month, Costa Rica, the Dominican Republic, Guatemala, Haiti, Honduras, Panama, Cuba, Nicaragua, and El Salvador entered the war.

[2]For an insight into the nature and extent of Nazi influence in Latin America generally, and in Argentina's political, military, economic, socio-cultural, and educational life, see U. S. Department of State, "Consultation Among the American Republics With Respect to the Argentine Situation," Inter-American Series 29, Publication 2473 (Washington, D.C.: Government Printing Office, 1946), pp. 1-86.

It is to be emphasized, however, that even independently of its pro-Axis sentiments, Argentina harbored an old hostility toward America. This was undoubtedly exacerbated by its large German and Italian populations. The hostility may be traced, however, to its European orientation, meat and wheat competition with the United States (it also feared alienating a profitable Italo-German market during WW II), and rivalry over hemispheric leadership. Hence, the hostility antedated the Nazi-Fascist era. For a review of this old hostility, see Thomas A. Bailey, A Diplomatic History of the American People (New York: Appleton-Century-Crofts, 1955), pp. 834-835 and Arthur Whitaker, The United States and Argentina (Cambridge: Harvard University Press, 1954), pp. 84-108.

[3]U. S. Department of State, Press Releases, December 24, 1938, pp. 474-475. (Cited by Bailey, op. cit., p. 749.)

Within the next one and one-half years, the Axis Powers, having conquered most of the European continent, began to contemplate control of the vanquished powers' colonies in the Western Hemisphere. In an attempt to prevent this, the Second Meeting of American Foreign Ministers at Havana, in June 1940, decided that such holdings were to be administered by American governments only. Thus, as one historian has suggested, the United States had effected a "multilateralization" of the Monroe Doctrine.[1] In spite of this move and United States efforts to ensure hemispheric solidarity against the Axis by pouring millions of dollars into Latin America,[2] Nazi-Fascist subversive activities continued to flourish. Action against the prime base for these operations, Argentina, was now essential.

The Argentine Government, headed by the pro-Axis dictator-Acting President (and later, President) Ramon S. Castillo, with the assistance of an even more blatantly pro-Axis Minister of War, General Pedro Ramirez, was ostensibly pursuing a neutral policy.[3] As the fiction of Argentina's 'neutralist' policy and its service as an Axis base in the Western Hemisphere became more evident, the United States inclined to drastic measures in the hope of forcing the former into its American front against the enemy. In June 1942, at the Third Meeting of the American Foreign Ministers at Rio de Janeiro, the United States attempted to make mandatory the severance of relations with the Axis Powers, if any American nation had been

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[1]Bailey, op. cit., p. 767.

[2]Bailey, op. cit., p. 799. E. g., in December 1940, America advanced $50 million to Argentina, and in October 1941, announced that it was prepared to lend $70 million per month to Latin America.

[3]See footnote 2, page 77, and Whitaker, op. cit., pp. 108-113, for evidence of Argentina's pro-Axis activities under a guise of 'neutrality.'

attacked by them. However, Argentine and Chilean resistance proved sufficient to ensure that severance was recommendatory, rather than mandatory.[1] By the end of 1943, only intransigent Argentina had continued relations with the Axis governments.

On June 4, 1943, an uprising of Peron's Colonels' Clique in Buenos Aires brought General Arturo Rawson to power. Rawson resigned two days later, before the United States could extend recognition to his government. General Pedro Ramirez succeeded him, and, in spite of his pro-Axis sympathies, was recognized by the United States on June 11. Antipathy to the new military dictatorship was soon manifested, however. When, in August, Ramirez requested lend-lease aid from the United States, Secretary of State Cordell Hull issued a sharp rebuff.[2] Ramirez was now in a difficult position. His pro-Axis activities in Bolivia, while successful, raised the ire of the United States. Consequently, two United States-promoted countermeasures worked to ensure his political collapse. The first was adoption of the Guani Doctrine by almost all of the Republics. It held that no new regime established by force in the hemisphere was to be recognized until the American governments consulted with each other to ascertain whether it was pro-Axis. This endangered the success of Ramirez' movements throughout Latin America.

The second, and perhaps more effective, was Washington's threat to publish evidence of Argentina's pro-Axis activities in Bolivia unless it immediately broke with the Axis powers.[3]

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[1]Bailey, op. cit., p. 831.

[2]For the texts of Ramirez' note of August 5, 1943 and Hull's reply, see U.S. Department of State, Bulletin, IX, pp. 159-166.

[3]Whitaker, op. cit., p. 127; see footnote 2, Chapter IV, on the Emergency Advisory Committee for Political Defense of the Continent and its assertion that this move for consultation on the character of a new regime was made merely for wartime purposes.

After Ramirez severed relations with Berlin, Rome, and Tokyo in late January 1944, and suppressed the pro-Axis paper, El Pampero, for criticizing this action, Peron's clique, on February 24, forced him into retirement. General Edelmiro J. Farrell, Ramirez' Vice-President, was made chief executive. Only Chile, Ecuador, Bolivia, and Paraguay recognized the new regime, as the United States led a move to isolate Argentina diplomatically through adoption of a non-recognition policy. Thus, as an expedient measure,

> the Roosevelt Administration . . . was now falling back on Wilsonian non-recognition, moral castigation, and diplomatic quarantine in an effort to bring about a regime to its liking.[1]

It was not until April 1945, after Argentina had reluctantly acceded to the Act of Chapultepec, that the United States extended recognition to the Farrell government.[2]

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[1]Bailey, op. cit., p. 836; for a criticism of America's nonrecognition policy vis-a-vis Argentina, see Sumner Welles, The Time For Decision (New York: ?, 1944), p. 237ff.; Josef Kunz, "The Position of Argentina," A.J.I.L., v. 38, no. 3, July 1944, pp. 437-444, while sympathetic to Welles' criticism, nevertheless appreciates the expediency of such a policy. He suggests that recognition as an act of policy be abandoned. In its place, the Estrada Doctrine might be considered (see Chapter IV), subject always, of course, to the possibility of breaking off diplomatic relations.

[2]From February 21-March 8, 1945, the Inter-American Conference on Problems of War and Peace was held in Mexico City, to strengthen hemispheric solidarity, intensify the war effort, and prepare for post-war stability. Argentina was conspicuously absent. A resolution concerning Argentina was passed. It stipulated that Argentina could join the United Nations if it: (a) declared war against the Axis; (b) agreed to stamp out the remnants of Axis influence in the hemisphere; (c) agreed to the inter-American endorsement of the Dumbarton Oaks proposals as the basis for the San Francisco Conference's United Nations Charter discussions; (d) agreed that the Act of Chapultepec was merely a temporary wartime instrument to stifle aggression in the Americas; (e) agreed to the reorganization and strengthening of the inter-American system; (f) agreed to a series of economic measures to raise living standards in the hemisphere. Consequently, on March 27, Argentina reluctantly declared war against Germany and Japan. On April 30, in a package deal, Poland and Argentina were admitted into the United Nations.

The United States had already acknowledged that its actions in the hemisphere, especially in regard to Argentina, were motivated only by the expedience necessary for victory in a great war. While Washington's non-recognition policy was adopted in extreme circumstances, the fact remains that the nature of the recognition act itself had enabled such action on the part of the American Government.

C. The Chinese Case

The American attitude toward the mainland Communist regime also demonstrates the discretionary character of recognition.[1]

That the Communist regime has met the traditional test of de facto, effective authority need not be debated. In little more than a decade it has achieved the active support and/or acquiescence of some 650,000,000 Chinese, and recognition from Communist, 'neutralist,' and Western powers.[2] The United States itself, in negotiating with the Communist Chinese at Panmunjom, Geneva, and Warsaw, has at least manifested an awareness of its existence, if not a disposition to accord it recognition. The other traditional

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[1]Georg Schwarzenberger, "The Impact of the East-West Rift on International Law," Transactions of the Grotius Society, v. 36 (London: Longmans, Green and Co., 1951), p. 254.

[2]It appears that even Chiang Kai-shek has alluded to this de facto rule. Thus, in an interview with the American syndicated columnist, Mr. Drew Pearson (Youngstown, Ohio Vindicator, January 2, 1960, pp. 8 and 10), Chiang asserted: "In the next year or two the situation on the mainland may come to the explosion point. . . . Then will be the time for action. Failing that, the Communists may be able to hang on and consolidate their position." It appears rather unlikely that the mainland will 'explode' within two years. Indeed, it is more probable that consolidation has already been effected. In view of this, implicit in Chiang's statement is an awareness that the Communists will govern at least in the foreseeable future.

tests, legitimacy and international obligations, have influenced the American position. The latter was also raised when the United Nations branded Communist China an aggressor in Korea. However, the factors ultimately influencing United States policy appear to reside in an area of national interests only peripherally concerned with specific tests. To that area, including moral and political-strategic-military considerations relevant to the East-West conflict, this writer must now turn.

1. Moral Considerations

The Chinese case has thrown into bold relief what might be termed an American 'moral-political schizophrenia.' While rejecting morality and approval as factors in political recognition, it has insisted that the Communists conform to supposed American standards of behavior. On September 19, 1949, only days before completion of the Nationalist rout, Secretary of State Acheson, alluding to possible future recognition of the Communist regime in a speech before the Pan American Society, reminded his audience that

> we maintain diplomatic relations with other countries primarily because we are all on the same planet and must do business with each other. We do not establish an embassy or legation in a foreign country to show approval of its government. We do so to have a channel through which to conduct essential governmental relations and to protect legitimate United States interests. . . . Since recognition is not synonymous with approval, . . . our act of recognition need not necessarily be understood as the forerunner of a policy of intimate co-operation with the government concerned.[1]

Similarly, Mr. John Foster Dulles, a member of the American Delegation to the United Nations General Assembly, writing of that

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[1]U. S. Department of State, Bulletin, no. 534, September 26, 1949, pp. 463-464.

organization shortly after the Communist victory in China, observed that

> membership in the United Nations is open to all . . . peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations. . .

Mr. Dulles added, however, that he had

> . . . now come to believe that the United Nations will best serve the cause of peace if its Assembly is representative of what the world actually is, and not merely representative of the parts which we like. Therefore, we ought to be willing that all the nations should be members without attempting to appraise closely those which are 'good' and those which are 'bad.' Already that distinction is obliterated by the present membership of the United Nations.
>
> Some of the present member nations, and others that might become members, have governments that are not representative of the people. But if in fact they are 'governments'--that is, if they 'govern'--then they have a power which should be represented in any organization that purports to mirror world reality.
>
> If the Communist government of China in fact proves its ability to govern China without serious domestic resistance, then, it, too, should be admitted to the United Nations. . . .
>
> If the United Nations membership were made substantially universal, that might end a preponderant voting superiority of the United States and its friends which, while pleasant, is somewhat fictitious.
>
> Communist governments today dominate more than thirty per cent of the population of the world. We may not like that fact; indeed, we do not like it at all. But if we want to have a 'world' organization, then it should be representative of the world as it is.[1]

However, the moral factor, in spite of such practical political views, appears definitely to have infiltrated the recognition question. Thus, in January 1950, the American delegate to the United Nations,

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[1]John Foster Dulles, War or Peace (New York: The Macmillan Co., 1950), pp. 188-191. Italics added.

Dr. Philip C. Jessup, in language reminiscent of the interventionist legitimacy doctrine, explained that

> the United States believes that the people of any country have the fundamental right to determine their own forms of government without foreign dictation. People do have the right to change their form of government but we believe that change must be brought about by the freely expressed will of the people themselves--not by force. We know of no way in which people can determine and establish their own governments except by free and recurring elections in which people vote by secret ballot for their own choices among the several candidates.[1]

Moral indignation has also been expressed over the regime's alleged brutal treatment of its people. Thus, former Senator William Knowland of California insisted that since

> morality inevitably affects the foreign policy of states having representative governments. . . , Communist China, . . . a symbol of slavery, regimentation and irreligion [ought not to be recognized.] . . .
>
> . . . The interests of the United States lie in the building of a world system based on rules of law and morality. It cannot subscribe to a policy of expediency without destroying the very structure of such a system. It is my firm hope that China will one day be united under a government selected by free elections and devoted to freedom. When that day comes, recognition will be no problem.[2]

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[1]Ti-chiang Chen, The International Law of Recognition; With Special Reference to Practice in Great Britain and the United States (London: Stevens and Sons, Ltd., 1951), p. 112. (Quoted from U. S. Information Service, Daily Wireless Bulletin, no. 183, January 19, 1950); Charles G. Fenwick, "The Recognition of the Communist Government of China," A. J. I. L., v. 47, 1953, pp. 660-661, submits that the regime could meet neither the subjective international obligations test as a result of its role in the Korean War, nor the objective test, since its one-party system denies the free expression that alone could establish 'the will of the nation . . .' He adds that insistence upon an ability to meet these tests, while expedient now, may not be so in the future.

[2]William F. Knowland, "The United States Should Not Recognize Communist China," Journal of International Affairs, v. 11, no. 2, 1957, pp. 168, 170; for further criticism of the regime and sympathy

Moral considerations have not been unknown in America's recognition practice. In the Chinese case, as in the Soviet case, however, they have assumed an importance unprecedented in the history of that practice. Consequently, no government can completely disregard a public opinion which, even if perhaps unsound and embarrassing to the nation before the eyes of the world, identifies the recognition act with approval of foreign regimes.[1]

2. Political and Strategic-Military Considerations

A part of China remains within the so-called 'Free World' orbit. That part has been hailed as a political and military force opposed to the spread of Communism throughout Asia, and hence, one which this country is obliged to support both morally and materially.[2]

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for the non-recognition policy, see publications by The Committee of One Million (Against the Admission of Communist China to the United Nations), e.g., Edward Hunter, The Continuing Revolt: The Black Book on Red China (New York: The Bookmailer, 1958), pp. 7-172. This group is supported at least nominally by Americans from all walks of life, many prominent, and representatives of both major parties; for an emphasis upon the regime's alleged brutality and a thesis that a communist society cannot be a state under an international law which it has repudiated, see the anti-recognition stand of Gray L. Dorsey, "The State, Communism, and International Law," Washington University Law Quarterly, v. 1955, no. 3, February 1955, pp. 1, 35-36; for an excellent study of American attitudes toward the Chinese generally, see Harold R. Isaacs, Scratches On Our Minds; American Images of China and India (New York: The John Day Co., 1958), p. 215ff.

[1]Laurence Lafore, "The Problem of Diplomatic Recognition," Current History, v. 30, no. 175, March 1956, p. 158, submits that, while such attitudes may be uninformed and unsound, they may perhaps be most suitable "to the character and traditions of our sprawling democracy." Be that as it may, such considerations are interventionist and perhaps restrictive of the Government's freedom of action.

[2]From 1937-1949, America extended $3,523,000,000 in grants and credits to the Chiang Government. About 60% was extended after V-J Day. (U. S. Department of State, United States Relations With China; With Special Reference to the Period 1944-1949 (Washington,

Perhaps the most difficult question in the recognition case has been that concerning the future of Taiwan. While the Nationalists rule it, with United States support,[1] the Communists have refused to accept a stabilization of the status quo. Thus, on June 28, 1956, Premier Chou En-lai reaffirmed that "the Chinese people are determined to liberate Taiwan. This is the unshakable common will of the 600,000,000 Chinese."[2] President Eisenhower, supporting the status quo, replied on July 7 in a message to President Chiang: "Let there be no misapprehension about our own steadfastness in continuing to support the Republic of China."[3]

The issue is complicated further by lingering Nationalist aspirations of a future return to the mainland. Hence, of the parties directly concerned with the future of the island, only one, the

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D.C.: Publication 3573, Far Eastern Series 30, Division of Publications, Office of Public Affairs, August 1949), p. 1042; from 1951-1956, economic aid to the Nationalists on Taiwan, excluding the military program, amounted to $643,664,000, and averaged (at the time of writing, in 1956) $200-300 million per annum. (Allen S. Whiting, "The United States and Taiwan," The United States and the Far East (New York: The American Assembly of the Columbia University School (Graduate) of Business, December 1956), pp. 182-183.)

A 'Red Scare' in the '40's and '50's probably influenced the turn of American opinion against the Communist Chinese. Recall the House Un-American Activities Committee's actions beginning with the subpoena of the American Communist, William Z. Foster, in September 1945, the McCarthy era of October 1950 (when Communist China entered the Korean War)--his death in 1957, McCarthy's charge on June 30, 1951 that General Marshall had betrayed the Nationalists, and the famous Rosenberg atomic spy affair from July 1950--their execution on April 6, 1951.

[1]See preceding footnote. There is still great controversy over the legal status of Taiwan since the Japanese surrender. For an excellent article on the tactics of political evasiveness by the West, see D. P. O'Connell, "The Status of Formosa and the Chinese Recognition Problem," A.J.I.L., v. 50, no. 2, April 1956, p. 415ff.

[2]Cited by Whiting, op. cit., p. 173.

[3]Ibid.

United States, has manifested any desire to stabilize the present situation.[1]

The United States has attempted to bolster the Nationalist Government politically by maintaining the validity of its occupation of China's United Nations seat.[2] In spite of a growing sentiment in that organization favoring seating of Communist representatives, the United States has been successful in averting this development each year since 1950. Should the United States be outvoted in the future in the General Assembly, the likelihood is that the Nationalists would also lose their place on the Council. While a United States veto could conceivably block the Communists, the majority vote in the Assembly would undoubtedly circumscribe America's prerogative.[3]

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[1]For views favorable to a stabilization of the status quo, see A. Doak Barnett, "The United States and Communist China," The American Assembly, op. cit., p. 167 and Herbert Feis, "When To Recognize and When Not To?," New York Times Magazine, March 1, 1959, p. 24; two scholars, Karl W. Deutsch and Lewis J. Edinger, Germany Rejoins The Powers: Mass Opinion, Interest Groups, and Elites in Contemporary German Foreign Policy (Stanford: Stanford University Press, 1959), pp. 234-235, suggest a 'deal' between East and West, whereby both Communist China and the German Federal Republic are admitted to the United Nations at the same time, each with permanent seats on the Security Council.

[2]For Congressional opposition to Communist China occupying the United Nations seat, see S. Res. 36 and H. Res. 96 in the 82nd Congress, H. Res. 4974, H. Res. 627, and H. Res. 9678 in the 83rd Congress, and S. 2090, H. Res. 10721, and H. Con. Res. 265 in the 84th Congress. (Cited by Knowland, op. cit., pp. 168-170.)

[3]Whiting, op. cit., pp. 164-165, submits that opposition to Peking's admission may weaken the non-Communist position even more than its admission. Admission would give the Communists one more veto than they already have and need. Whiting also fears that those in the United States who oppose the United Nations may use this issue to urge our withdrawal; Schwarzenberger, op. cit., p. 233, contends that a Chinese veto in the Security Council would enable Russia to use it as a proxy against the West when it becomes involved in a controversy.

The United States has also committed itself to the military defense of Taiwan. By virtue of a Mutual Defense Treaty, signed in December 1954, it

> recognizes that an armed attack in the West Pacific area on the territories of either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes.[1]

According to Article 7, the United States is granted "the right to dispose . . . land, air and sea forces in and about Taiwan and the Pescadores."[2] Strategically, Taiwan, only three hundred and fifty miles from the American base at Okinawa, provides a flank for its protection, an obstacle to Communist advances toward the Philippines and Southeast Asia, and a possible base from which to attack the mainland in any future war against the Chinese Communists.[3]

Thus, morally, politically, economically, and militarily, the United States has committed itself to support of the Republic of China. Such support needn't, of course, necessarily involve continued non-recognition of the Communist government on the mainland. However, hostility of both Chinese regimes to permanent acquiescence in the status quo ensures that this issue will remain an important factor in the United States' future policy vis-a-vis Peking.

The problem of relations with our allies in Europe and Asia and with the Afro-Asian 'neutralist' block has also been significantly relevant to the United States' policies toward both Chinas. On the one

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[1]Quoted by Whiting, op. cit., p. 190.

[2]Ibid.

[3]However, it is possible that technological advances in weapons, e.g., in missiles, have greatly reduced, if not completely disqualified, Taiwan's strategic value.

hand, such countries as South Korea, South Viet-Nam, and the Philippines, dependent also on United States support, favor the American policy. Thus, continued moral and material support is assured them. On the other hand, Pakistan, a member of CENTO, having recognized the Communist Chinese government, is unsympathetic to the American attitude. Most significant, however, the NATO allies are not enthusiastic about American defense commitments so far from Europe. In fact, the United Kingdom, Canada, and France have already informed the United States that they will not support the defense of Quemoy and Matsu, Nationalist-held offshore islands. Furthermore, the United Kingdom, Norway, the Netherlands, and Denmark, NATO members, have recognized the Communist regime.

Opposition to American policy vis-a-vis China is perhaps strongest in the Afro-Asian bloc. Included are the United Arab Republic, Yemen, Afghanistan, India, Burma, Ceylon, Nepal, and Indonesia, each of whom has already recognized the Peking government. The bloc has also persistently worked for acceptance of Communist credentials by the United Nations. In April 1955, it left no doubt as to where it had placed its sympathies when it invited Chou En-lai, rather than a Nationalist delegation, to the Bandung Conference. Hostile to support of a vanquished and discredited regime on Taiwan, and fearful of antagonizing a powerful Communist China, it has taken sides with the latter.[1]

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[1]Whiting, op. cit., p. 191. Also, Feis, op. cit., p. 24, suggests that stabilization will bring us closer to our Allies in Europe and alignment with a policy of reality; for opinions that non-recognition has increased international tensions, see Quincy Wright, "The Status of Communist China," Journal of International Affairs, v. 11, no. 2, 1957, pp. 185-186 and Quincy Wright, "Non-Recognition of China and International Tensions," Current History, v. 34, no. 99, March 1958, pp. 152-154. In the latter, he calls for recognition and then a settlement

As one scholar has suggested, "the issue of recognizing Communist China will not, of course, be decided on mere legal grounds."[1] Indeed, the complexity of United States interests and commitments throughout the world ensure that it will not relinquish a prerogative to legal compulsion. As Secretary of State Dulles observed in July 1957:

> There are some who say that we should accord diplomatic recognition to the Communist regime because it has now been in power so long that it has won the right to that.
>
> This is not sound international law. Diplomatic recognition is always a privilege, never a right.
>
> . . . Always, . . . recognition is admitted to be an

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on Taiwan. He concedes that this might result in Communist hegemony over the island; Barnett, op. cit., pp. 165-166, emphasizes the hostility of America's allies, e.g., Britain and Japan, to the China trade embargo that was imposed upon them during the Korean War, as a prerequisite for United States aid. They feel that such trade would benefit them and possibly draw Peking away from dependence on Moscow.

[1]Philip C. Jessup, "The Two Chinas and United States Recognition," Reporter, v. 11, no. 1, July 6, 1954, p. 24; Political considerations appear also to have prevailed in the United Kingdom's decision to recognize the Communist regime on January 6, 1950. Objective de factoism, despite British pretensions, does not appear to have prevailed. (see, e.g., Chen, op. cit., pp. 119-120, quoted from L. C. Green, "The Recognition of Communist China," 3 International Quarterly, 1950, p. 418 and part of speech by Foreign Secretary Herbert Morrison, House of Commons, 1950-1951, Parliamentary Debates, v. 485, pp. 2410-2411, as quoted by Percy E. Corbett, Law in Diplomacy (Princeton: Princeton University Press, 1959, p. 80.); for suggestions and opinions of Great Britain's political, economic, and strategic interests in recognition, see House of Commons, Parliamentary Debates, May 5, 1949, v. 464, col. 1347 and November 16, 1949, v. 469, col. 2013, as quoted in Chen, op. cit., p. 119. Also see Peter Marshall Brown, "Cognition and Recognition," A.J.I.L., v. 47, no. 1, January 1953, p. 88, Hardy Cross Dillard, "The United States and China: The Problem of Recognition," Yale Review, v. 44, no. 2, December 1954, pp. 180-181, and Percy E. Corbett, ed., Charles DeVisscher's Theory and Reality in Public International Law (Princeton: Princeton University Press, 1957), pp. 231-232.

> instrument of national policy, to serve the national interest.[1]

Conclusion

The Soviet, Argentine, and Chinese cases share a coincidence that would be difficult to miss. The three originated in periods of international crisis, were and undoubtedly will be resolved on the basis of discretionary recognition promoting specific national interests, and were involved in the problem of recognition in international organization. Thus, it would seem appropriate at this point to turn to that problem for a final insight into the nature of the recognition of revolutionary governments.

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[1]U. S. Department of State, Bulletin, July 15, 1957, pp. 93-94.

CHAPTER IV

RECOGNITION AND INTERNATIONAL ORGANIZATION (REGIONAL AND WORLD-WIDE)

A study of the recognition problem in international organization may serve at least two related purposes: First, to reveal the political nature of the problem. Second, to present an insight into the primitive character of what this writer has termed the 'institutional' in an international law based upon the consent of states.

During the first half of the present century, recognition has been the concern of both regional and world-wide international organizations. On the former level, the American states have played a prominent role, while on the latter, the League of Nations and United Nations have broached the problem. To the detriment of both international law and international institutions, states have on both levels periodically thwarted attempts to remove the problem from the arena of policy control. Future success on the regional level may support Alvarez' contention some fifty years ago that international law may be rendered more meaningful as a limited geographic, rather than universal phenomenon.[1] In nineteen-hundred-and-sixty, however, this thesis is hardly less speculative than it was originally.

A. The Latin American States

Periodic attempts by these states to reduce the element of discretion in recognition may be viewed as a persistent reaction against

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[1]Alejandro Alvarez, American Problems in International Law (New York: Baker, Voorhis, and Co., 1909), pp. 98-99.

the frequently overbearing behavior of the United States.[1] From their point of view, recognition has been employed by the United States as an indirect form of intervention.[2]

The elastic international obligations criterion tended to accent the economic (and more peripherally, the political) value of recognition in the latter quarter of the Nineteenth and first quarter of the Twentieth Centuries. Four developments in the latter period, however, tended to emphasize the political (and more peripherally, the economic) effect of granting or withholding recognition.

In March 1907, Senor Tobar, Foreign Minister of Ecuador, suggested that the American Republics intervene indirectly in the internal affairs of sister republics in a state of revolutionary upheaval. This might be effected through a policy of non-recognition of unconstitutional de facto regimes, but only to serve humanitarian and altruistic ends.[3]

On December 20, 1907, the five Central American Republics incorporated the Tobar Doctrine into a convention appended to their General Treaty of Peace and Amity. Article I declared:

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[1]See Chapter II, for United States recognition policy vis-a-vis Latin America.

[2]William L. Neumann, Jr., Recognition of Governments in the Americas (Washington, D.C.: Foundation for Foreign Affairs, 1947), Introduction, ii-iii.

[3]Inter-American Juridical Committee of the Inter-American Council of Jurists, Report and Draft Convention on Recognition of De Facto Governments (Washington, D.C.: Pan American Union, February 1950), p. 7; Luis Anderson, "El Gobierno De Facto," Trabajo Presentado a la Sub-Seccion De Derecho Internacional del Congreso Cientifico de Lima (San Jose, Costa Rica: Imprenta Lehmann, 1925), p. 30. The author, a prominent Latin American student of international law and the recognition problem, while praising the high, generous, and pacifist aspects of the Doctrine, nevertheless assails it as an intervention into the domestic affairs of independent states.

> The governments of the high contracting parties shall not recognize any other government which may come into power in any of the five republics as a consequence of a coup d' etat, or of a revolution against the recognized government, so long as the freely elected representatives of the people thereof have not constitutionally reorganized the country.[1]

While some have maintained that

> . . . this policy of non-recognition . . . is based on the recognized right of the people of each country to have a government elected freely and fairly in accordance with their Constitution and laws [and that] this principle is firmly imbedded in every republican form of government, and the right to refuse recognition prevails in international law, independently of any treaty stipulations,[2]

learned opinion has generally opposed such a claim.[3] Interestingly, this document also engendered a conflict within the body of international law. Here was a treaty, presumably a part of conventional (particular) international law, directly contradicting the principle of customary (general) international law acknowledging the right of revolution against an oppressive authority.

A third development was the doctrine of constitutional legitimacy enunciated by President Wilson in 1913. This test incorporated the

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[1]A.J.I.L., Supplement, 1908, p. 229.

[2]Chandler P. Anderson, "The Central American Policy of Non-Recognition," A.J.I.L., v. 19, no. 1, January 1925, p. 166. Anderson appears to be inconsistent six years later when he condemns the de jure principle as interventionist. ("Our Policy of Non-Recognition in Central America," A.J.I.L., v. 25, no. 2, April 1931, p. 298.) In embracing both sides of a contradictory argument, Chandler appears to have overlooked the fact that international law is impartial insofar as forms of government are concerned. Governmental forms are to be regulated by constitutional law only.

[3]See Chapter I, section on criteria for recognition, Chapter II, and Luis Anderson, op. cit., p. 30, who also assails it for failing to prevent revolutions.

provisions of both the Tobar Doctrine and Central American Treaty of 1907 into official United States practice. This served to further exacerbate the hostility of Latin American scholars and politicians toward this country.[1]

A second Treaty of Peace and Amity was concluded in the absence of Panama and Honduras, by Nicaragua, Guatemala, and Costa Rica on February 7, 1923. It reaffirmed and extended the provisions of the Treaty of 1907, and incorporated the doctrines of both Tobar and Wilson.[2] The United States, though not a signatory power, felt obliged, as a sponsor of the conference, to acquiesce in the convention. It may be suggested that the United States was bound morally and by peculiar regional circumstances to adhere to the Treaty of 1923.[3] However, most of Latin America undoubtedly perceived this as one more in a line of recent reversions to an unacceptable criterion of legitimacy.

In view of the above, Latin American politicians and students of international law undertook to curtail the political and interventionist character of the recognition procedure. They sought agreement in the hemisphere on criteria to be utilized in pursuit of the desired end. Agreement was to be achieved through convention rather than formal international institutions.

In 1925, the American Institute of International Law, drafting a resolution on recognition for the American Republics, stipulated that

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[1]See Chapter II, for cases of American practice and criticism emanating from both Latin American and United States sources; see Estrada Doctrine, p. 97ff.

[2]For complete text of the treaty, see A.J.I.L., v. 17, Supplement, 1923, pp. 118-119.

[3]Philip Marshall Brown, "The Recognition of New Governments," A.J.I.L., v. 26, no. 2, April 1932, p. 337.

> . . . Article I . . . the recognition of the government of a nation has for its object merely to enter into diplomatic relations with the said nation, or to continue the relations existing. . . .
> . . . Article V. Every abnormally constituted government may be recognized if it is capable of maintaining order and tranquillity and is disposed to fulfil the international obligations of the nation.[1]

This early proposal reinforced rather than modified the political character of recognition. First, it identified recognition with entrance into diplomatic intercourse; second, it encouraged the subjective international obligations criterion, and; third, it stipulated that recognition should be left to the discretion of individual states.

This conservative draft was submitted to the Pan American Union during that year, and, in 1927, was forwarded to the meeting of the International Commission of American Jurists at Rio de Janeiro. The latter body adopted its own draft convention.[2]

The Commission draft, compared to that of the Institute, was both conservative and progressive. It identified recognition with diplomatic relations. However, by substituting 'capacity' for 'disposition' to fulfill the international obligations criterion, it substantially modified this test. Thus it tended to merge this test with the de facto principle. Most significant was the implication that a right to recognition existed when both tests had been met.

This draft was submitted to the Sixth International Conference of American States at Havana in 1929. United States opposition to

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[1]Committee Designated at Lima to Codify American International Law of the American Institute of International Law, "Project 6: Recognition of New Nations and of New Governments," A.J.I.L., Supplement, v. 20, July and October 1926, p. 310. Italics added.

[2]Complete text of draft in A.J.I.L., v. 22, 1928, Special Supplement, p. 240.

recognition as a legal obligation prevented the Conference from taking action upon the proposal.[1]

At this point, the problem of recognition was removed from the realm of active regional concern to that of a specific national interest. On September 27, 1930, Senor Genaro Estrada, Foreign Secretary of the Republic of Mexico, enunciated a doctrine which was henceforth to carry his name.[2] He recalled both Mexico's and Latin America's sufferings under a policy of recognition based upon the test of legitimacy. Considering such a policy both insulting and interventionist, the Foreign Secretary proceeded to announce a new Mexican policy in regard to revolutionary regimes. The Mexican

> . . . Government . . . [would] confine [. . .] itself to the maintenance or withdrawal, as it may deem advisable, of its diplomatic agents, and to the continued acceptance, also when it may deem advisable, of such similar accredited diplomatic agents as the respective nations may have in Mexico; and in so doing, it does not pronounce judgment, either precipitately or a posteriori, regarding the right of foreign nations to accept, maintain or replace their governments or authorities.[3]

Enunciation of this policy was received with enthusiasm in some Latin American circles.[4] However, many students of international

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[1]Inter-American Juridical Committee of the Inter-American Council of Jurists, op. cit., p. 6; Charles G. Fenwick, International Law (New York: Appleton-Century-Crofts, 1948), p. 170.

[2]English text in A.J.I.L., Supplement, v. 25, 1931, p. 203; Spanish text in Arturo Enrique Sampay, "El Reconocimiento de los Gobiernos Revoluccionarios y la Doctrina Americana de 'Pure De Factoism,'" en El Estado y Sus Atributos Segun la Convencion Inter-americana de Montevideo (Buenos Aires: Editorial "Surco," 1946), pp. 69-70.

[3]See preceding footnote for English and Spanish texts.

[4]E. g., favorable press comment in El Comercio of Lima, Peru, and La Razon of Bolivia, "The Recognition of Revolutionary Governments," in Pan American Magazine, December 1930, v. 43, no. 6,

law perceived the Doctrine as little more than a modification in the manner of granting recognition, from express to tacit.[1]

From a theoretical point of view, it possessed some value. Its implication that diplomatic agents were accredited to states rather than governments, and that de facto governments must be dealt with, tended to support the legal thesis of recognition. However, practically speaking, it did not eliminate the recognition procedure. For in the event of a civil war, foreign governments had still to choose the recipient of their diplomatic representatives. Even in cases where a revolutionary party was in complete control of the governmental machinery, the decision to accredit representatives to it was in fact an act of recognition. Consequently, the Estrada Doctrine was little more than a modification of technique in recognition.

The first regional meeting held to consider the problem of recognition after enunciation of the Estrada Doctrine was that of the International Conference of American States at Montevideo in 1933. The states agreed only on a general principle of nonintervention, a spiritual companion of the United States' new Good Neighbor Policy.[2]

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pp. 440-441; Carlos Bollini Shaw, El Reconocimiento en el Derecho Internacional Publico (Buenos Aires: Imprenta Lopez, 1936), p. 116; Gabriela Arevalo Blumenkron, La Doctrina del Reconocimiento en la Teoria y en la Practica de los Estados (Mexico, D. F., 1954), p. 132.

[1]Inter-American Juridical Committee of the Inter-American Council of Jurists, op. cit., p. 10; Gustavo Gomez Tagle, "Los Sistemas de 'Reconocimiento' y la Doctrina Estrada," en La Opinion Universal Sobre La Doctrina Estrada (Mexico: Institute de Derecho y Legislacion Comparada, 1931), p. 211; Herbert W. Briggs, ed., The Law of Nations; Cases, Documents, and Notes (New York: Appleton-Century-Crofts, 1952), pp. 122-124; Fenwick, op. cit., p. 171; Philip C. Jessup, A Modern Law of Nations (New York: The Macmillan Co., 1948), pp. 61-62.

[2]Inter-American Juridical Committee of the Inter-American Council of Jurists, op. cit., p. 6.

During World War II, considerations of hemispheric security placed a premium upon discouraging the rise of potentially pro-Axis revolutionary governments in the Americas.[1] Consequently, in 1943, the Emergency Advisory Committee for Political Defense of the Continent took action. It resolved that members delay recognition of a revolutionary regime until they had collectively determined both the circumstances leading to its establishment and its attitude toward defense of the hemisphere. The Committee emphasized simultaneously the expediential character of this measure.[2]

With the war emergency ended, the Eighth Inter-American Conference of States was held in Mexico City in 1945. It considered, among other questions, the old problem of recognition. The United States reaffirmed its adherence to the principles of non-intervention and the juridical equality of sovereign states.[3]

The Guatemalan Delegation, influenced by measures of the Emergency Advisory Committee, proposed that the Republics adopt a uniform policy of non-recognition of undemocratic revolutionary regimes. This proposal was submitted, in accordance with Resolution 38 of the Conference, to the Inter-American Juridical Committee for an opinion. That body recommended that Guatemala's proposal be rejected, as it constituted an intervention into the domestic affairs of sovereign states.[4]

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[1]See Chapter III, on the United States vis-a-vis the Farrell regime.

[2]Inter-American Juridical Committee of the Inter-American Council of Jurists, op. cit., pp. 8-9.

[3]Inter-American Conference on Problems of War and Peace, "Act of Chapultepec" (Washington, D.C.: 1945), pp. 30-33.

[4]Inter-American Juridical Committee of the Inter-American Council of Jurists, op. cit., p. 9.

An Ecuadorian resolution denounced the recognition procedure. It insisted instead on implementation of the Estrada Doctrine. The Juridical Committee, upon considering the Ecuadorian proposal, failed to agree on a constructive permanent formula. However, it did conclude that an abolition of recognition in international relations was impractical.[1]

In January 1948, the Ninth Inter-American Conference of American States sat at Bogota. Mexico submitted a draft of the Estrada Doctrine for consideration, but was no more successful than was Ecuador in 1945.[2] Subsequently, however, the Conference made greater progress on the matter of recognition than did its predecessors. Resolution 35 declared:

> (1) That continuity of diplomatic relations among the American States is desirable.
> (2) That the right of maintaining, suspending, or renewing diplomatic relations with another government shall not be exercised as a means of individually obtaining unjustified advantages under international law.
> (3) That the establishment or maintenance of diplomatic relations with a government does not imply any judgment upon the domestic policy of that government.[3]

Having established these guiding principles, the Conference, in Resolution 36, instructed the Juridical Committee to prepare a report on them.[4] The report, based on the controversial assumption that the problem was inherently juridical, concluded that recognition was a matter of both rights and duties.[5] At Rio de Janeiro, on September

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[1]Ibid., p. 11.

[2]Ibid., p. 10.

[3]Ibid., pp. 13-14.

[4]Ibid., p. 1.

[5]Ibid., p. 14.

27, 1949, the Committee drafted a convention.[1]

On the surface, this document appears to render a legal character to the problem of recognition. However, a closer scrutiny reveals that it is in fact highly conducive to political considerations.

First, while the objective de facto principle has been enunciated, the subjective international obligations test has been incorporated as an independent criterion. Consequently, this latter test may seriously compromise the provisions of Articles 3 and 9.

Second, Article 4 perpetuates an illusion created by juristic logic, namely, that recognition is a legal function since a severance of diplomatic relations cannot revoke it. This logic, however, obscures the very real and significant dispute over the definition and function of recognition.[2]

Third, Article 8, permitting individual recognition, necessarily encouraged discretionary political behavior. Thus the legal right to recognition appears to be compromised by the inherently political character of a great portion of the document.

The Report was then submitted for consideration to the parent Inter-American Council of Jurists meeting in Rio de Janeiro from May22-June 15, 1950. Unable to reconcile doctrinal divergencies and to reach a formula acceptable to an absolute majority of the member states, the matter was referred to the Council's second meeting.[3]

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[1]For complete text, see Ibid., pp. 19-20.

[2]See Chapter I, section on the definition and function of recognition and the controversy that surrounds it.

[3]Inter-American Council of Jurists, Final Act of the First Meeting, May 22-June 15, 1950, at Rio de Janeiro (Washington, D.C.: Department of International Law, Pan American Union, 1950), p. 23.

At Rio de Janeiro, the United States apparently went far in subverting attempts to reach a legal formula. It insisted that a legal basis was alien to international law, since it contravened the discretionary power granted by it. The American delegate maintained that a decision to grant or withhold recognition was one within the exclusive jurisdiction of the recognizing state.[1]

At the Council's second meeting in Buenos Aires, from April 20-May 9, 1953, the states decided that a convention on the matter would be premature. They merely reaffirmed adherence to the sound and constructive (and politically innocuous) principles of Resolution 35, and agreed to transmit all relevant documents to the Tenth Inter-American Conference.[2] In fact, a twenty-five year attempt to resolve the problem in favor of limited political discretion, if not always of law per se, was abandoned.

B. The League of Nations

Perusal of the League Covenant for passages relevant to recognition offers explicit statements on neither the problem nor its relationship to admission. Article 1, Paragraph 2, merely stipulates that

> any fully self-governing State, Dominion, or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall

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[1]Alwyn W. Freeman, "The First Meeting of the Inter-American Council of Jurists," A.J.I.L., v. 44, no. 2, April 1950, p. 379.

[2]Inter-American Council of Jurists, Final Act of the Second Meeting, April 20-May 9, 1953, at Buenos Aires (Washington, D.C.: Department of International Law, Pan American Union, August 1953), p. 10.

> accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments.

Article 3 paragraph 3 and Article 4 paragraph 4, asserting that the Assembly and Council, respectively,

> may deal with any matter within the sphere of action of the League or affecting the peace of the world,

also avoided any specific reference to recognition. Consequently, Article 20 paragraph 1, stating that

> the Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof,

appears to have been inapplicable to the recognition act.

In view of both the Covenant and the practice of members, it would seem proper to conclude that the states had not surrendered their initiative in recognition.[1] This view, however, has been severely criticized.[2]

Having established the nature of the problem in the League, one must turn to state practice. It will be observed that the thesis of implied recognition was academic. Insistence upon the individual

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[1]For concurring opinions, see "Implied Recognition," B.Y.I.L., v. 21, 1944, pp. 145-148; John Fischer Williams, "Recognition," Transactions of the Grotius Society, v. 15, 1930, pp. 62-63; Hersh Lauterpacht, Recognition in International Law (Cambridge: Cambridge University Press, 1948), pp. 401-404.

[2]See, e.g., Hans Kelsen, General Theory of Law and State (Cambridge: Harvard University Press, 1946), p. 229; Hans Kelsen, "Recognition in International Law: Theoretical Observations," A.J.I.L., v. 35, no. 4, October 1941, p. 614; Carlos Bollini Shaw, El Reconocimiento en el Derecho Internacional Publico (Buenos Aires: Imprenta Lopez, 1936), pp. 165-166; Malbone W. Graham, The League of Nations and Recognition of States (Berkeley: University of California Press, 1933), p. 1ff. Graham rejects the notion that the League recognizes for intramural purposes alone; Arnold D. McNair, ed., Oppenheim's International Law: A Treatise, v. 1 (London: Longmans, Green and Co., 1928), pp. 145-146.

political and diplomatic character of recognition appears to have prevailed.

1. Post-World War I

Recognition had been a problem at the Paris Peace Conference, where the Russian Succession States, Latvia, Estonia, Lithuania, the Ukraine, Azerbaidjan, and the Kuban Republic, among others, had sought international respect for their independence.[1] The League itself did not actively consider the problem until late 1920.

The Fifth Committee of the First Assembly met to evaluate the applications for admission of the new post-World War I states. At its first meeting on November 20, M. Van Karnebeek of the Netherlands raised the question of the juridical consequence of admission, wishing to know if this implied de jure recognition of all members. Lord Robert Cecil of the Union of South Africa, responding with a literal interpretation of Article I, concluded that the liberty of action of individual states was not affected by admissions. M. Politis of Greece, on the other hand, suggested that it might imply de jure recognition by all League members.[2]

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[1]Graham, op. cit., pp. 1-22. Significantly, as was also to be the case in the United Nations, early drafts dealing with the problem of recognition were revised in order to drop the matter. For example, President Wilson's final draft of February 3, 1919 at Paris ignored recognition of states, while several of his earlier documents had dealt with it. (See especially p. 14ff.) Thus, the League at its inception had no legal guidelines to follow in relation to the problem. Rather, it had state traditions rooted in political considerations. Subsequent League experiences were to follow those traditions.

[2]League of Nations, Records of the First Assembly: Meetings of Committees, II, 1920, Fifth Committee (Geneva: 1920), p. 157.

Failing to resolve the issue, the Committee agreed to ask a group of learned international jurists, consisting of Anzilotti, van Hamel, and van Karnebeek, for a legal opinion. M. Viviani of France suggested that the group was similar to a court of justice. It had to base its conclusions on established law and to judge facts in the light of the Covenant. Mr. Millen of Australia and the Maharajah of Nawanagar insisted that the jurists should examine the problem not merely in the interests of the League, but also with a concern for justice and the interests of the applicants.[1] Thereupon, the group commenced its deliberations.

It made its report to the Political Committee on November 30. The chairman of the Political Committee disclosed that two opinions had been rendered:

> . . . one view held that admission to the League involved the recognition of the State requesting admission by all States Members of the League; the other view was that it only entailed observation of the conditions expressly laid down by the Covenant.[2]

The jurists, unable to resolve the recognition-admission question, sent the problem back to the Political Committee for further discussions. There Lord Cecil insisted that it was useless to discuss a legal question which lent itself to an infinite number of interpretations and interminable debate. He preferred to consider the individual applications.

M. Viviani was in essential agreement with Lord Cecil, and submitted that it was wrong for the Committee to treat a fundamentally political problem as a legal question. He also feared that in a practical situation those members that had voted against admission of a state

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[1]Ibid., p. 158.

[2]Ibid., p. 160.

would be reluctant to defend it in a crisis. Consequently, the best solution would be, as Lord Cecil suggested, immediate consideration of individual applications.

M. Poullet of Belgium, linking recognition with political interest rather than law, supported the delegate from South Africa. Dr. Nansen of Norway followed suit, since he felt that recognition would remain a privilege of states, whatever the Committee decided. Chairman Gana of Chile then observed that the majority were prepared to terminate the debate in favor of a consideration of individual applications and the reports of the sub-committees upon them.[1]

Thus the League's earliest experience with the problem of law and politics in recognition resulted in a reaffirmation of the political thesis. A precedent restricting the organization's activities to the prescriptions of the Covenant had also been established. As Dr. Nansen suggested, and the final reaction against a collective, legal interpretation of the recognition act confirmed, neither juristic logic nor philanthropic pretension could extend that sphere of activity.[2]

2. The Soviet Case

Perhaps the most significant issue of recognition to be considered by the League of Nations was that resulting from the Soviet Union's application for admission in 1934. That application was subsequently forwarded to the Assembly's Sixth Committee for consideration.

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[1] Ibid., pp. 160-161.

[2] E. g., Graham, op. cit., p. 31-33, submits that the admission of Lithuania, Latvia, and Estonia in 1921 proved that antecedent recognition was not necessary for admission into the League and that these states had been collectively recognized. In view of the Wilson documents, the discussions of the Fifth Committee, and the future Soviet case, this conclusion appears both unrealistic and untenable.

The result was a roll-call vote of 38-3-7 in favor of recommending to the Assembly that the USSR be admitted. The one-sided character of the vote, however, obscured the real issue, that of recognition.[1] Here the principle of individual political recognition, defended by the minority, was acquiesced in by the majority. A brief review of that committee's work would appear appropriate and essential.

M. Caeiro Da Mata of Portugal, after contrasting the economic, juridical, political, and moral character of the Western world with that of the Soviet Union, and asserting that his delegation intended to vote in the negative, broached the problem of recognition:

> . . . how is the fact of admission into the League to be reconciled with practice, or rather with the international technique in force in the matter of the recognition of States? Are we to have recognition at Geneva and non-recognition elsewhere? Is there to be international co-operation in the League, which implies the most serious international undertakings, and abstention outside it? Will not the admission of the Soviet Union into the League logically and necessarily involve the de jure recognition of the Soviet Government by the various States? What will be the position of those who do not wish or are unable at present to adopt that attitude?[2]

M. Motta of Switzerland, after elaborating upon the distinction between East and West, and the subversive character of the Soviets, noted that

> the position adopted by the Swiss Federal Council with regard to the application of the USSR is generally known. Criticized

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[1]In view of the state of international life after the Japanese invasion of Manchuria in 1931, United States recognition of the Soviet Government in 1933, and the rise of Hitler to power in 1933, admission of the U.S.S.R. was a foregone conclusion. (See Chapter III, on the United States and recognition of the Soviets.)

[2]League of Nations, "Records of the Fifteenth Ordinary Session of the Assembly, Meeting of the Committees, Minutes of the Sixth Committee (Political Questions)," Official Journal, Special Supplement no. 130 (Geneva: 1934), pp. 17-18.

> by some, defended by others, this position . . . is contrary to the expressed policy of the greater number of delegates and especially of the three great powers represented among us.[1]

He continued:

> In spite of its constant and warm friendship for the Russian people, the Swiss Government has, however, never felt able to recognize de jure their present regime. It is determined to maintain this negative and expectant attitude. . . .[2]

M. Motta had suggested that recognition was a concern of individual governments rather than an effect of admission. In addition, he had associated recognition with an intention to enter into direct diplomatic intercourse. Conscious of its minority position, Switzerland nevertheless continued to insist that, as such intercourse was presently impossible, recognition could not be granted.

Belgium, on similar grounds, and also without previous diplomatic relations with the Soviet Union, chose to abstain. M. Jaspar explained that Soviet refusal hitherto to make restitution or reparation, or even offer an apology, for spoliation of Belgian property also contributed to his country's decision. Abstention was ostensibly motivated by a desire not to offend the Big Three favoring admission, and an attempt to promote European order and international peace.[3] Thus Belgium, supporting the Swiss conception of a political distinction between admission and recognition, also based her position on considerations of national policy.

M. Cantilo of the Argentine Republic took a stand similar to that of his Belgian colleague. He explained that maltreatment of

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[1]Ibid., p. 18.

[2]Official Journal, loc. cit., p. 18. Italics added.

[3]Ibid., p. 20.

Argentine interests in Russia in 1917, and outrages against an Argentine official and legation offices in 1920, both perpetrated without explanation or compensation, had motivated a refusal of diplomatic recognition. However, since Argentina's desire for impartiality impelled it to rise above national grievances, "which [its] . . . honor and dignity [did] . . . not allow [it] . . . to forget,"[1] M. Cantilo was instructed merely to abstain from voting. Thus, in the Argentine case, too, past refusal to extend recognition had been influenced by a consideration of national interests. Consequently, until such time as "honor and dignity" were assuaged, recognition was to be withheld, notwithstanding admission of the Soviet Union into the League.

M. De Graaf of the Netherlands, expressed his intention of voting against Soviet admission.

For the majority, M. Barthou of France emphasized the organization's aspirations to universality. M. Benes of Czechoslovakia and Mr. Skelton of Canada emphasized the importance of Soviet admission for the preservation of international peace.[2] Significantly, the Czechoslovak delegate added, in apparent appreciation of Swiss and Belgian motives, that his country

> . . . had no interests which conflict[ed] with those of the Soviet Union, [but] on the contrary, that there [were] . . . a number of points in the policies of the two countries which [were] . . . concordant and complementary.

Consequently, Czechoslovakia

> desire[d] to co-operate loyally and amicably with the Soviet Union in maintaining peace.[3]

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[1]Ibid., p. 21.

[2]Ibid., pp. 21-24, 25.

[3]Ibid., pp. 24-25.

The League case demonstrated that recognition, political in nature, fell within the spheres of interest and competence of the individual states. Both a literal approach to the Covenant and the actions and pronouncements of the members on various occasions, supported the thesis of individual recognition and helped shape the deficiencies of that organization.

C. The United Nations

Concern with the problem of recognition in the United Nations has been as great as that in its ill-fated predecessor. In both the significance to be attached to a principle of implied recognition was the key issue; in both that principle was denied by the practice of states. The United Nations' experience with the problem offers an even greater insight into the extent of that rejection.

The Charter offers no explicit statement on the recognition process. Consequently, its assertion that

> the organization is based on the principle of the sovereign equality of all its Members,

and that

> nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit any such matters to settlement under the present Charter. . . ,[1]

may be construed as an appreciation of state competence.[2]

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[1]Charter of the United Nations, Article II paragraphs 1 and 7.

[2]For confirmation of United Nations acknowledgment of state sovereignty, see International Court of Justice, "Advisory Opinion of April 11, 1949 on Reparation for Injuries Suffered in the Service of the United Nations," Reports of Judgments, Advisory Opinions, and Orders, 1949, p. 179. The Court emphasized that the United Nations, while an International Person, was neither the same as, nor superior to, the member states.

Significantly, an opinion of the Court on the question of admission into the United Nations considered only the literal provisions of

However, a case for implied recognition may be made. For example, a broad interpretation of Article 34, stating that

> the Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security,

may be invoked as evidence of such organizational jurisdiction. The United Nations' early considerations of the problem, however, appear to have answered the question of recognition in international organization.

1. The Norwegian Proposal

The United Nations Conference on International Organization was held at San Francisco, from April 25-June 26, 1945, to consider the Dumbarton Oaks proposals. In Committee II/2, the Norwegian delegation submitted that, as

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Article 4. It did not mention recognition. (See International Court of Justice, "Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)," Reports of Judgments, Advisory Opinions, and Orders, 1948, p. 65.

Herbert W. Briggs, "Community Interest in the Emergence of New States: The Problem of Recognition," Proceedings of the American Society of International Law, 1950, p. 170, suggests that the Assembly's resolution (to the effect that the Republic of Korea existed after the holding of United Nations-supervised elections, and that states establishing relations with the Korean government should take these facts into consideration) constituted an 'international birth certificate.' (See United Nations General Assembly, Official Records, 3rd Session, Part I, Plenary Meetings, 187th Meeting, December 12, 1948, p. 1042; United Nations General Assembly, Resolutions, 3rd Session, Document A/810, December 1948, pp. 25, 27. The vote on the resolution was 48-6-1.) This does not appear to be an example of collective legal or political recognition. Rather, it simply observes the existence of the Republic, but acknowledges that the members themselves must consider the question of relations.

> the obligations of a State cannot be properly assumed nor can its rights be exercised except by a recognized government,[1]

the General Assembly

> . . . should . . . have the right to present recommendations to member states with regard to the recognition of new governments or new states.[2]

The Norwegian amendment was withdrawn, suggesting that the authors of the Charter were averse to a linking of admission or seating of new governments with recognition.[3]

As a result of the Conference, Article 4 paragraphs 1 and 2 were formulated. They stipulated that, upon having met the prerequisites of peace-loving behavior, acceptance of the obligations of the Charter, and demonstration of ability and willingness to fulfill these obligations,

> the admission of any such State to membership in the United Nations will be effected by a declaration of the General Assembly upon the recommendation of the Security Council.

In view of the withdrawal of Norway's proposal and final drafting of the Charter, both apparently in accord with the attitudes of member states, the principle of implied recognition would seem to be irrelevant.[4] Yet some have continued to insist that it is applicable

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[1]United Nations, " Dumbarton Oaks Proposals, Comments, and Proposed Amendments, " Conference on International Organization, 1945, at San Francisco, v. 3 (New York: United Nations Information Organizations, 1945), p. 367. (Quoted from Document 2, G/7, (n)(1).)

[2]United Nations, Conference on International Organization, April 25-June 26, 1945, at San Francisco: Selected Documents (Washington: D.C.: Government Printing Office, 1946), pp. 119-120.

[3]For a concurring opinion, see Hans Aufricht, "Principles and Practices of Recognition by International Organizations, " A.J.I.L., v. 43, no. 4, October 1949, p. 691.

[4]For concurring ipinions, see H. Lauterpacht, ed., Oppenheim's International Law: A Treatise, v. I (London: Longmans, Green and

in the activities of the United Nations.[1]

2. The Indonesian Case

In the late summer of 1947 the problem of Indonesian-Dutch strife came before the Security Council. Of immediate concern was

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Co., 1955 and 1948), pp. 134 and 140-143, respectively; Lauterpacht, Recognition in International Law, pp. 401-403; Josef L. Kunz, "Critical Remarks on Lauterpacht's 'Recognition in International Law,'" A.J.I.L., v. 44 no. 4, October 1950, p. 719; Philip C. Jessup, A Modern Law of Nations (New York: The Macmillan Co., 1948), pp. 49-50; P. E. Corbett, trans. and ed., Charles DeVisscher's Theory and Reality in Public International Law (Princeton: Princeton University Press, 1957), p. 230; Clyde Eagleton, International Government (New York: The Ronald Press Co., 1957), pp. 70-75; International Court of Justice, "Advisory Opinion of April 11, 1949 on Reparations for Injuries Suffered in the Service of the United Nations," Pleadings, Oral Arguments, and Documents, 1949, p. 21. (Quoting the opinion of Mr. Jack Tate, Acting Legal Adviser to the American Secretary of State.)

[1]See, e.g., Hans Kelsen, Principles of International Law (New York: Rinehart and Co., 1952), pp. 278-279, 284-285. Kelsen bases his opinion on the dichotomous theory of recognition; Malbone W. Graham, "Some Thoughts on the Recognition of New Governments and Regimes," A.J.I.L., v. 44 no. 2, April 1950, p. 360. Graham submits that while the issue has not been settled, recognition is passing out of the hands of individual states and into the collective jurisdiction of the United Nations; Quincy Wright, "Some Thoughts About Recognition," A.J.I.L., v. 44, no. 3, July 1950, pp. 555-559. Wright qualifies the implied recognition principle, however, by suggesting that it is valid only in matters within the competence of the United Nations organs. Thus, members are obliged to deal with each other merely within the organization; S. Rosenne, "Recognition of States by the United Nations," B.Y.I.L., v. 26, 1949, p. 439 ff. The author is of the opinion that each organ of the United Nations has the capacity to recognize a state within the terms of its competence, as defined in the Charter, and for the purposes of applying the article out of which the demand for recognition as a state was made. In the final analysis, the Assembly must be decisive. Furthermore, he states, a majority of two-thirds voting for admission is performing an act of recognition, while the minority, if it so desires, may refrain from recognizing

a proposal that agents of the Indonesian Republic be invited to the Council's discussions.[1]

There was apprehension that an invitation would be interpreted as an implicit act of recognition. Consequently, Sir Alexander Cadogan of the United Kingdom stated that, as his Government had not yet recognized the Republic, it must vote against its participation in the debate.[2]

Thereupon, M. Nisot of Belgium asserted that

> the recognition of a State is a serious matter. I do not think it is within the Security Council's competence indirectly to accord recognition to the Indonesian Republic by admitting it as a sovereign and independent State when it is not yet recognized as a member of the community of States.
>
> It is even possible that some representatives here may not personally have the requisite authority to participate on behalf of their Governments in such recognition. I myself have no such powers, since Belgium has not recognized the Indonesian Republic. In that respect, I am therefore in the same position as my colleague, the representative of the United Kingdom.[3]

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the new member. Rosenne's line of reasoning is somewhat problematic, as it tends to confuse recognition for intramural and extramural purposes. On the one hand, the organs are strictly circumscribed by the Charter's provisions, among which there are no statements concerning recognition. On the other, individual competence is assured the states opposing admission of a new member. Consequently, in the first instance it appears that recognition, if admission or acceptance of credentials could be equated with such, is of an intramural character. In the second instance, individual recognition is guaranteed in both the intramural and extramural spheres. Thus, the author's attempt at clarification appears to have confused the function and purpose of the recognition act.

[1]Article 32 stipulates that any state not a member of the organization may be invited to the Council's discussion of a dispute to which it is a party. It may participate without a vote.

[2]United Nations Security Council, "Continuation of the Discussion on the Indonesian Question," Official Records, no. 74, 181st Meeting, August 12, 1947, p. 1923.

[3]Ibid., p. 1930.

Dr. Tsiang of the Republic of China, after maintaining that a broad definition of 'State' is permissible under the Charter, and that moral and political considerations made such an invitation necessary, concluded:

> In supporting the proposal to invite the representative of the Indonesian Republic to participate in this discussion, I imply that he would be the proper 'opposite number' of the representative of the Netherlands in this dispute. I imply nothing else, I recognize nothing else.[1]

M. El-Khouri of Syria, President of the Security Council, closed the debate and called for a vote. He concluded that the Security Council had no power to establish the sovereignty of the Republic, but merely to seek pacification of a troubled area. Consequently,

> . . . an invitation to the representative of the Indonesian Republic to participate in . . . [the] discussion would not bind any State to recognize the independence or sovereignty of the Indonesian Republic. The invitation would be extended simply in connection with the work of the Security Council. . . .[2]

At a later meeting, the representative of the Netherlands, M. Van Kleffens, expressed the attitude of those averse to collective legal recognition:

> . . . I submit that it is not for any organ of the United Nations to say that a State is recognized as either a de jure or de facto Government. That is the exclusive prerogative of individual States. There is nothing in the Charter which gives the United Nations or any of its organs, the ability to raise a political entity to the status of a State recognized de facto or de jure, or to raise the Government of such a political entity to the status of a Government recognized de facto or de jure.[3]

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[1]Ibid., pp. 1935-1936.

[2]Ibid., pp. 1939-1940.

[3]United Nations Security Council, "Continuation of the Discussion on the Indonesian Question," Official Records, no. 76, 184th Meeting, August 14, 1947, p. 1981.

3. The Palestine Case

An analogous situation arose in July 1948, when the Security Council had to consider the implications of an invitation to the Jewish authorities in Palestine to attend discussions on that strife-ridden land. M. Manuilsky of the Ukraine SSR, President of the Council, had addressed his letter of invitation to the 'Government of Israel.' Hence, the question of implied recognition of that State and Government.

The first speaker at the session of July 7, 1948, Sir Alexander Cadogan of the United Kingdom, after assailing the impropriety of the invitation, observed that

> . . . the action of the President in inviting to the Council table a representative of the Government of Israel cannot, of course, possibly affect in any way the attitude of my Government in regard to the recognition or non-recognition of that Government,

since

> the Security Council cannot commit any of its members in that way.

Accordingly,

> I wish to make it clear that the position of my Government is entirely and absolutely reserved.[1]

The French Government took a similar stand when M. De La Tournelle declared that,

> notwithstanding the procedure the President has adopted in inviting a certain Government to participate in this discussion, I wish to state, on my Government's behalf, that it reserves its right to complete freedom of action. It has not recognized the State of Israel and considers that an invitation to the

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[1]United Nations Security Council, "Continuation of the Discussion on the Palestine Question," Official Records, no. 93, 330th Meeting, July 7, 1948, p. 2.

> representative of that Government couched in these terms might complicate a situation which is in itself already very delicate.[1]

Belgium's M. Van Langenhove supported the position of his colleagues from the United Kingdom and France.[2]

M. Manuilsky subsequently assailed the objections of his European colleagues, suggesting that in the Indonesian case M. El-Khouri had invited the Indonesians as representatives of a new state.[3] M. El-Khouri quickly attacked the President's statement. He maintained that in the previous case the Netherlands-Indonesian Linggadjati Agreement had already resulted in recognition of the Republic as a de facto government. The Syrian delegate rejected M. Manuilsky's attempt to parallel the Agreement with recognition of Israel by the United States, the Soviet Union, and others. Consequently, he argued, only representatives of the Arab Higher Committee and the Jewish Agency could legally be invited.[4]

Mr. Jessup of the United States proceeded to support the President's analogy between the two cases and the right of the Government of the State of Israel to be represented as such. However, he was quick to reaffirm the British, French, and Belgian thesis that invitations extended under Article 32 implied neither collective nor individual recognition.[5]

Senor Munoz of Argentina, after deploring delay in discussing the significant issue of truce violations in Palestine, dismissed the

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[1]Ibid., pp. 2-3.

[2]Ibid., p. 3.

[3]Ibid., pp. 3-4.

[4]Ibid., p. 3.

[5]Ibid., p. 7.

relevance of the recognition problem by insisting that

> the recognition of foreign governments is the sovereign privilege of every State; it is evident that this privilege has neither been lost nor abandoned by the Government of Argentina. The terminology used by the members of the Council cannot affect this fact.[1]

The meeting closed with a vote on the motion to overrule the President's ruling that the Jewish agent was a representative of the State of Israel. With only Belgium, Canada, China, Syria, and the United Kingdom supporting the motion, it failed for want of the necessary seven affirmative votes.

Significantly, at the meeting of July 15, 1948, Mr. Eban, the Israeli representative, supported Mr. Jessup's position by holding that ". . . the Security Council has no power or duty or competence of recognition."[2]

4. The Chinese Case

Concern with the recognition problem throughout the year 1950 was significant for several reasons. First, it was the only prolonged, if not concerted effort by the major organs, the General Assembly, Security Council, and Secretariat, to deal with the recognition issue. Second, the focus of this concern was shifted from the admission of new states and invitations to contending parties to the problem of reviewing credentials of new governments in member states.[3]

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[1]Ibid., pp. 7-8.

[2]United Nations Security Council, "Continuation of the Discussion on the Palestine Question," Official Records, no. 97, 337th Meeting, July 15, 1948, p. 36.

[3]For a detailed analysis of the credentials problem and lack of uniformity in rules of procedure in the organs of the United Nations, especially in regard to the Chinese case, see Hans Kelsen, The Law of the United Nations: A Critical Analysis of its Fundamental Problems (New York: Frederick A. Praeger, 1951), pp. 943-949.

In a message of January 13 to the President of the Security Council, India's B. N. Rau emphasized the dangers inherent in the diverse procedures used by organs of the United Nations to validate the credentials of new governments. He suggested that in order to minimize the possibility of conflict, a uniform rule for the organization be adopted.[1]

Shortly thereafter, Secretary-General Trygvie Lie responded to Mr. Rau's proposal with a memorandum on the "Legal Aspects of Problems of Recognition in the United Nations."[2]

Mr. Lie explained: The primary difficulty in the current question of representation in the United Nations is its linking with the question of recognition by the member states. This association is unfortunate from the standpoints of both legal theory and practical application. In the latter, a lack of uniformity in rules of procedure encourages the possibility of rival governments being seated in one or several, but not all, of the organs. From a theoretical point of view, representation and recognition are different problems. In the latter, the decision is political and discretionary.[3] Admission and

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[1]United Nations Security Council, Official Records, 5th Year, Supplement for January 1-May 31, 1950, Document S/1447, January 13, 1950, pp. 2-3.

[2]United Nations Security Council, Official Records, 5th Year, Supplement for January 1-May 31, 1950, Document S/1466, March 8, 1950, pp. 18-23.

[3]United Nations Security Council, Official Records, 3rd Year, no. 68, 294th Meeting, May 18, 1948, p. 16. (Mr. Lie was citing the response of Mr. Warren Austin of the United States to M. El-Khouri's questioning of American recognition of Israel. Austin denied that any nation could question the sovereignty of the United States in the exercise of the high political act of recognition of the de facto status of a State. Secretary-General Lie used this as evidence of the political and discretionary character of recognition.)

representation, however, are both based on the collective action of the appropriate organs.[1] Both League and United Nations practice support this thesis. Consequently, a member voting to accept the representation of a government which it hasn't yet recognized is under no obligation coincidentally or subsequently to grant such recognition. This practice is both legally correct and in conformity with the organization's basic character.[2]

Referring to the Chinese case, the Secretary-General urged that members be guided not by an irrelevant consideration of recognition, but rather, by Article 4 of the Charter. Only that rival Government in effective authority and habitually obeyed by the bulk of the population, if peace-loving and able and willing to fulfill the obligations of membership should be seated.[3]

Later in the year, the problem passed to the General Assembly, which subsequently requested that an Ad Hoc Political Committee study it and prepare a working formula.[4] After noting the inadequacy of

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[1]See footnote 2, page 110, the International Court's opinion on the admission of states.

[2]See footnote 1, page 113, Wright and Rosenne.

[3]For an opinion to the effect that Lie's memorandum implied that the Communist Chinese should be seated, see Quincy Wright, "The Status of Communist China," Journal of International Affairs, v. 11, no. 2, 1957, p. 171; for an accusation that Lie had undermined the Chinese Nationalists' United Nations front against the Communists by a show of partiality, see Dr. T. F. Tsiang's statement in United Nations Security Council, Official Records, 5th Year, Supplement for January 1-May 31, 1950, Document S/1470, March 13, 1950, pp. 23-26.

[4]A letter of July 19, 1950 (Document A/1292), from the Cuban delegate to Secretary-General Lie, called for the placing of the question of recognition by the United Nations on the provisional agenda of the Fifth Session of the Assembly. Another Cuban letter of July 26, 1950 (Document A/1308) to the same effect, was given to Lie to circulate as

present rules, the advantage of uniformity, and the reasonableness of Assembly authority, the Cuban delegation presented its resolution. It recommended that questions of representation be decided in the light of effective authority, general consent of the population, ability and willingness to achieve the purposes of the Charter and to fulfill the state's international obligations, and respect for human rights and fundamental principles. It resolved, furthermore, that the Assembly alone consider the question of legitimate representation, requested the Secretary-General to transmit the resolution to the organs and agencies of the United Nations for such action as may be appropriate, and declared, significantly, that

> . . . decisions taken by the General Assembly in accordance with this resolution shall not affect the direct relations of individual Member States with the State, the representation of which has been the subject of such decisions.[1]

Amendments and counterproposals were considered in subsequent meetings of the Committee.[2] Finally, on November 28, 1950,

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an explanatory memorandum on the item. On September 6, 1950, Lie transmitted to the members of the Assembly the text of a June 1, 1950 (Document A/1344) letter from the Director-General of U.N.E.S.C.O., including a resolution adopted by that body's General Conference of the Fifth Session, meeting on May 30, 1950, calling for the United Nations to adopt general criteria for a uniform and practical settlement of the recognition-representation problem. At its 285th meeting, on September 22, 1950, the Assembly decided to include the item on the agenda of its Fifth Session, and referred it to the Ad Hoc Political Committee.

[1]United Nations General Assembly, "Draft Resolution by Cuba on 'Recognition by the United Nations of the Representation of a Member State,'" in the Ad Hoc Political Committee, 18th Meeting, October 20, 1950, Document A/AC.38/L.6.

[2]For an insight into the work of the Ad Hoc Political Committee prior to formulation of the final resolutions of that body and the General Assembly, see Documents A/AC.38/L.11, A/AC.38/L.21, A/AC.38/L.21/Rev.I, A/AC.38/L.22, A/AC.38/L.23, A/AC.38/L.24, A/AC.38/L.25, A/AC.38/L.45, A/AC.38/L.50, A/AC.38/L.53, A/AC.38/L.54, A/AC.38/L.55, A/AC.38/L.56.

the Ad Hoc Political Committee agreed on a formula to be sent to the General Assembly in the form of a resolution. It

> . . . 1. Recommend[ed] that whenever more than one authority claims to be entitled to represent a Member State in the United Nations, and this question becomes the subject of controversy in the United Nations, it should be considered in the light of the purposes and principles of the Charter and the circumstances of each case;
>
> 2. Recommend[ed] that the attitude adopted by the General Assembly or its Interim Committee concerning any such question should be taken into account in other organs of the United Nations and in the specialized agencies;
>
> 3. Declare[d] that the attitude adopted by the General Assembly or its Interim Committee concerning any such question shall not of itself affect the direct relations of individual Member States with the State concerned;
>
> 4. Request[ed] the Secretary-General to transmit the present resolution to the other organs of the United Nations and to the specialized agencies for such action as may be appropriate.[1]

The Assembly, at its 325th Plenary Meeting of December 14, 1950, passed a resolution similar to that recommended by its Ad Hoc Political Committee.[2]

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[1]For complete text, see United Nations General Assembly, "Resolution Adopted by the Ad Hoc Political Committee on 'Recognition by the United Nations of the Representation of a Member State," Ad Hoc Political Committee, 60th Meeting, November 28, 1950, Document A/AC.38/L.58. Italics added.

[2]United Nations General Assembly, "Resolution by the General Assembly on the Report of the Ad Hoc Political Committee," 325th Plenary Meeting, December 14, 1950, Document A/1753. This resolution is the same as that recommended by the Committee, except for this somewhat redundant insertion between paragraphs 1 and 2 of the operative section Assembly resolution: "2. Recommends that, when any such question arises, it should be considered by the General Assembly, or by the Interim Committee if the General Assembly is not in session." Hence, operative paragraph 2 of the Committee resolution is operative paragraph 3 of the Assembly resolution.

The resolution adopted by the General Assembly was no more than an innocuous concession to those seeking a legal formula, whether applied individually or collectively, for the recognition act. Significantly, the resolution ignored specific references to the recognition problem. Rather, its declaration that the Assembly's attitude shall not of itself affect the direct relations of individual member states with the state concerned, implied that recognition is a question distinct from that of representation in the United Nations.

Conclusion

Failure of the United Nations to establish precisely, except for Mr. Lie's memorandum, a distinction between recognition and representation in international organization may perpetuate the illusion of a principle of implied recognition in the United Nations. This, however, is clearly rejected by political reality and a positive international law deriving therefrom. For the student of that reality and law the observation that ". . . states are in no mood to give any more strength to the United Nations . . . ,"[1] encourages a conclusion that recognition remains a political and individual procedure in the relations among states.

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[1]University of Michigan Law School, Eighth Summer Institute on International and Comparative Law, International Law and the United Nations, Ann Arbor, June 23-28, 1955 (1957), pp. 370-371.

CHAPTER V

CONCLUSION

While states have on numerous occasions conceded the existence of International Law, attempts to establish its nature and role have produced great controversy. This writer has suggested that a study of the recognition problem might enable the student of international affairs to evaluate the role of law and a presumed legal framework in the activities of states.

In a consideration of the question, 'Is It Law?', three factors, the 'spiritual' (basic consensus among the states), 'institutional' (development of coercive supranational institutions), and 'real political' (contemporary East-West conflict), pointed to the character of International Law.

While some have argued that law cannot exist in the absence of hierarchical relationships producing coercive institutions, others have insisted that consensus among the states indicates the existence of a primitive, weak, and decentralized International Law. Thus, while the former perceive a more highly-developed institutional structure as the creative force of law, the latter concede to it only a strengthening role in progressive evolutionary development. That evolution toward a higher stage of coercive institutions must rest on a base of consensus among states.

Although the controversy over the nature of International Law has not been resolved, its present state suggests a tentative

conclusion: at best it is a primitive regulating agent able to operate only in a very circumscribed capacity. For evidence of that capacity, one must turn to the actions of states and a positive international law derived therefrom.

The refusal of states to relinquish discretion in recognition is one illustration of the limited capacity of International Law. Underlying this refusal is a basic agreement as to the political nature of recognition. To ensure the political nature of the recognition act, they have historically relied upon three criteria, legitimism, willingness and ability to fulfill international obligations, and de factoism. Only de factoism approaches an objective, 'legalistic' principle; however, the deliberate refusal of states to admit rights to, and duties of, recognition has reduced it, too, to a political instrument.

In the Twentieth Century, even while creating certain international institutions, the states have been careful not to grant them instruments of coercion. Rather, the concept of the sovereign equality of states has been written into their respective constitutions. Thus, acting as sovereigns, they have denied to the League of Nations and the United Nations a pre-eminent function in recognition. Collective, legal recognition has been categorically rejected.

While the political nature of recognition was established prior to the contemporary East-West conflict, the 'real political' factor has not failed to ensure that it will continue to be an instrument of national interests rather than legal obligation. In an era of great ideological, military, and political conflict the states have clung even more jealously to the political prerogative of recognition. Even in a relatively stable world environment, however, it is doubtful whether they would voluntarily strengthen the international rule of

law. Certainly American and British recognition practice in the Nineteenth Century renders some support to this speculation. In fact, the history of recognition seems to demonstrate that, whatever the circumstances, states only reluctantly, if ever, acquiesce in International Law as a coercive agent. Rather, a consensus upholding narrow political interests appears to be the extent of their acquiescence.

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