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International Recognition and the National Courts

Edwin D. Dickinson

University of Michigan Law School

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INTERNATIONAL RECOGNITION AND THE NATIONAL COURTS.—In the law of nations everything depends upon recognition. A newly organized state may possess all the requisites of *de facto* existence, but it can gain admission to the community of international law only as it is recognized by other states. Even after it has been admitted to the international community it may be virtually outlawed by the refusal of other states to recognize a change in its government. It is through recognition and recognition alone that a *de facto* state becomes and continues an international person and a subject of international law. See BONFILS, MANUEL, [5th ed.], sec. 199; OPPENHEIM, INT. LAW, 2 ed., I, sec. 71; WHEATON, INT. LAW, [Lawrence's 2 ed.], p. 38. Theoretically, perhaps, it may be said that as soon as a *de facto* state comes into existence it enters *ipso facto* into the international community. See HALL, INT. LAW, [7th ed.] secs. 2, 26; RIVIER, PRINCIPES, I, 57; ULLMANN, VOLKERRECHT, sec. 30. But practically it is everywhere admitted that recognition is a prerequisite to the normal and effective exercise of international rights. Moreover, the granting or denial of recognition is within the discretion of each state. Theoretically, it may be urged that a new state or government has a legal right to be recognized and consequently that there is a legal duty of recognition. See BLUNTSCHLI, VOLKERRECHT, secs. 3, 35; HALL, INT. LAW, [7th ed.], secs. 2, 26. But as a practical matter it is generally conceded that there is nothing in the custom of nations which supports the affirmation of such a duty. See BONFILS, MANUEL, [5th ed.], secs. 200, 201; OPPENHEIM, INT. LAW, [2 ed.], I, 71. Cf. NYS, in REVUE DE DROIT INTERNATIONAL, 2e, sér., V, 294; PRADIER-FODERE, TRAITE, I, sec. III4. "The decision of each individual state, on the vital point of recognition, is thus not only technically and formally, but in the majority of cases, really final. It cannot be called in question even diplomatically, as may be done with the judgment of a prize court; because, previous to recognition, there are no diplomatic relations between political communities. The judgment of the individual state can thus be disputed only *vi et armis*; and this judgment, be it remarked, extends not only to the facts, but to the law by which these facts are to be measured. Each state is to say, not only whether or not a given community fulfills the requirements of international existence, but is, moreover, left to determine what these requirements are." LORIMER, INSTITUTES OF LAW OF NATIONS, I, 107.

The principle that international personality depends upon recognition has important consequences in our national law. "International law is 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." *The Paquete Habana*, (1900)

175 U. S. 677, 700. Sec. 17 MICH. L. REV. 169. If the case turns upon the existence of a foreign community, government, or state, the international rule will be ascertained and applied by the courts only when the community, government, or state in question has been recognized by the appropriate department of our government. Thus, if the application of the rule depends upon the insurgency of a foreign community, the rule will be applied only if insurgency has been recognized. *The Three Friends*, (1897) 116 U. S. 1. See also *The Happy Couple*, (1805) Stewart 65; *The Manilla*, (1808) Edw. Adm. 1; *The Pelican*, (1809) Edw. Adm., App. D. Similarly, if the application of the rule depends upon the belligerency of a foreign community, the status of belligerency must have been recognized. See *United States v. Palmer*, (1818) 3 Wh. 610, 634; *The Divina Pastora*, (1819) 4 Wh. 52, 63; *The Neuva Anna*, (1821) 6 Wh. 193. If the case turns upon the existence of a foreign government recognition will be decisive. See *Thompson v. Powles*, (1828) 2 Sim. 194, 212; *Taylor v. Barclay*, (1828) 2 Sim. 213; *Republic of Peru v. Dreyfus Brothers*, (1888) L. R. 38 Ch. D. 348. For illustration, injuries to citizens or subjects by acts done in a foreign country became *damnum absque injuria* after recognition has conceded retroactively that the acts were done in the exercise of governmental authority. *Underhill v. Hernandez*, (1897) 168 U. S. 250. And the seizure of property in a foreign country cannot be questioned in the courts after recognition has conceded retroactively that the seizure was done in the exercise of governmental authority. *Oetjen v. Central Leather Co.*, (1918) 246 U. S. 297; *Ricaud v. American Metal Co.*, (1918) 246 U. S. 304. A foreign state may maintain an action in the courts. *The Sapphire*, (1870) 11 Wall. 164; *United States of America v. Wagner*, (1867) L. R. 2 Ch. App. 582. But of course no action can be maintained if the government of the state has not been recognized. *City of Berne v. Bank of England*, (1804) 9 Ves. 347; *Dolder v. Bank of England*, (1805) 10 Ves. 352. Extensive immunities from jurisdiction are accorded the agents and instrumentalities of a foreign state, such as the immunity of a foreign sovereign, *De Haber v. Queen of Portugal*, (1851) 20 L. J. Q. B. 488; *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149; the immunity of diplomatic representatives, *Parkinson v. Potter*, (1885) L. R. 16 Q. B. 152; *Macartney v. Garbutt*, (1890) L. R. 24 Q. B. 368; *Wilson v. Blanco*, (1889) 556 N. Y. 582; 17 MICH. L. REV. 424; the immunity of public agents in respect of acts done under the authority of their own state, *Duke of Brunswick v. King of Hanover*, (1848) 2 H. L. C. 1; *Hatch v. Baez*, (1876) 7 Hun. 596; *Underhill v. Hernandez*, *supra*; the immunity of ships of war, *The Constitution*, (1879) 4 P. D. 39; *Schooner Exchange v. McFaddon*, (1812) 7 Cr. 116; the immunity of other ships in the service of the state, *The Parliament Belge*, (1880) L. R. 5 P. D. 197; *The Jassy*, L. R. [1906] P. 270; 17 MICH. L. REV. 425; and the immunity of property of the state, *Vavasour v. Krupp*, (1878) L. R. 9 Ch. D. 351; *Mason v. Intercolonial Railway of Canada*, (1908) 197 Mass. 349. Recognition is of course a prerequisite to the enjoyment of the above immunities. It is unnecessary to multiply illustrations. The rules of international law will be administered by our courts in a great variety of circumstances if the foreign community or state involved

has been invested with international personality by the magic act of recognition.

Since the act of recognition is essentially an act of discretion or policy it belongs naturally to the political departments of government and particularly to the department in charge of foreign affairs. It belongs exclusively to the political departments of government. "And if we undertook to inquire whether she (Texas) had not in fact become an independent sovereign state before she was recognized as such by the treaty-making power, we would take upon ourselves the exercise of political authority, for which a judicial tribunal is wholly unfit, and which the Constitution has conferred exclusively upon another department." *Kennett v. Chambers*, (1852) 14 How. 38, 50. It is primarily an executive function. See PENFIELD, in 32 AM. L. REV. 390, 392. The decision of the political department is conclusive for the courts. "So soon as it is shewn that a *de facto* government of a foreign state has been recognized by the government of this country, no further inquiry is permitted in a Court of Justice here. The Court declines to investigate, and indeed has no proper means of investigating, the title of actual government of a foreign state which has been thus recognized." *Republic of Peru v. Peruvian Guano Co.*, (1887) L. R. 36 Ch. D. 489, 497. See also *Emperor of Austria v. Day*, (1861) 3 De G., F., & J. 217, 221, 233; *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149, 158, 160, 161; *Clark v. United States*, (1811) 5 Fed. Cas. 932; *Williams v. Suffolk Insurance Co.*, (1839) 13 Pet. 415, 420; *The Hornet*, (1870) 12 Fed. Cas. 529; *Oetjen v. Central Leather Co.*, 246 U. S. 297, 302; *Ricaud v. American Metal Co.*, 246 U. S. 304, 308. The courts simply do not take cognizance of an unrecognized state or government. See *Thompson v. Powles*, *supra*; *Taylor v. Barclay*, *supra*; *City of Berne v. Bank of England*, *supra*; *Jones v. Garcia del Rio*, (1823) Tur. & Rus. 297, 299; *Rose v. Himely*, (1808) 4 Cr. 241, 272; *Gelston v. Hoyt*, (1818) 3 Wh. 246, 324; *United States v. Palmer*, *supra*; *The Divina Pastora*, *supra*; *Kennett v. Chambers*, *supra*; PHILLIMORE, COMMENTARIES UPON INT. LAW, [3 ed.], II, 37; PIEDÉLIEVRE, PRECIS, I, sec. 122. If it becomes necessary for the court to know whether or not an alleged community, government, or state has been recognized by the political department, and there is no controlling proclamation, treaty, or executive action of which the court may take judicial notice, the appropriate method of ascertaining the fact is by direct communication with the political department. There are a few *dicta* which suggest that it might be permissible to prove the existence of an unrecognized community, government, or state in certain circumstances. See *Yrisarri v. Clement*, (1826) 3 Bing. 432, 438; *Consul of Spain v. The Conception*, (1819) 6 Fed. Cas. 359. And in the case of *The Charieh*, (1873) L. R. 4 A. & E. 59, the court entered into an exhaustive inquiry into the status of the Khedive of Egypt, although informed by the Foreign Office that the Khedive had not been recognized. This method was emphatically disapproved, however, in *Mighell v. Sultan of Johore*, *supra*, and it may be taken for granted in England today that when in doubt the court will always communicate with the political department and will treat that department's reply as conclusive. See also *Taylor v. Barclay*, *supra*; *Foster v. Globe Venture Syndicate*, (1900) 69 L. J. Ch. 375; *The Gagara*,

(1919) 88 L. J. P. 101; *The Annette*, (1919) 88 L. J. P. 107. It is thought that a similar method would be followed in the United States. See *Ex parte Hütz*, (1884) 111 U. S. 766; *In re Bais*, (1889) 135 U. S. 403, 431; *Underhill v. Hernandez*, *supra*; U. S. FOR. REL., 1892, p. 644.

The complete subordination of the judiciary to the political departments in the matter of international recognition is well illustrated by two recent cases in the English Court of Admiralty. In the case of *The Gagara*, a Russian merchant ship was taken over by the Bolshevik Government under a decree declaring the mercantile fleet national property, repaired and loaded with a cargo of wood, and sent on a commercial voyage to Copenhagen. It was seized and condemned by the Esthonian Government as prize of war. It was then registered as belonging to the Esthonian Republic, placed in charge of a master and crew appointed by the Provisional Government of Esthonia, and directed to London, where it was arrested on behalf of the former Russian owners. In the case of *The Annette* and *The Dora*, Russian merchant ships were requisitioned by the Provisional Government of Northern Russia, with headquarters at Archangel, and were turned over to a Russian Co-operative Association to be used in trading under the control of the Provisional Government's Director of Naval Transports. The vessels were sent with cargoes of tar to Liverpool, where they were arrested on behalf of former Russian owners. In each case an appearance was entered under protest and a motion made to set aside the writ on the ground that the vessel was immune from arrest because it belonged to and was in the service of the government of a friendly state. In each case the Court addressed an inquiry to the Foreign Office in regard to the status of the provisional government concerned. As regards Esthonia, it was replied that Great Britain had "for the time being, provisionally and with all necessary reservations as to the future, recognized the Esthonian National Council as a *de facto* independent body," and accordingly had "received certain gentlemen as informal diplomatic representatives of the Esthonian Provisional Government." It was also stated on behalf of the Attorney General that "in the present view of His Majesty's Government, and without in any way binding itself as to the future, the Esthonian Government is such a Government as could, if it thought fit, set up a Prize Court." As regards the Provisional Government at Archangel, the Foreign Office replied in part as follows: "the Provisional Government of Northern Russia is composed of Russian groups who do not recognize the authority of the Russian Central Soviet Government established at Moscow. The seat of the government is Archangel, and it extends its authority over the territory surrounding that port, and to the west of the White Sea up to the Finnish frontier. As the title assumed by that government indicates, it is merely provisional in nature, and has not been formally recognized either by His Majesty's Government or by the Allied Powers as the government of a sovereign independent state. His Majesty's Government and the Allied Powers are, however, at the present moment co-operating with the Provisional Government in the opposition which that government is making to the forces of the Russian Soviet Government, who are engaged in aggressive military operations against it, and are represented at Archangel by a British

commissioner. The representative of the Provisional Government in London is Monsieur Nabokoff, through whom His Majesty's Government conduct communication with the Archangel Provisional Government." In the case of *The Garaga*, it was held that the Estonian National Council had been recognized and that the writ should be set aside. Affirmed in the Court of Appeal, (1919) 88 L. J. P. 101. In the case of *The Annette* and *The Dora*, it was held that the Provisional Government at Archangel had not been recognized, that in any event it was not in possession of the vessels, and accordingly that the writs should not be set aside. Admiralty, (1919) 88 L. J. P. 107.

It may well be regretted that in such a vital matter as international recognition the courts are restricted to the trivial function of construing communications solicited from the department in charge of foreign affairs. The restriction can hardly be escaped, however, as governments are now constituted. The courts themselves have indicated at least three reasons for this conclusion: in the first place, the courts are not equipped to decide a question of this nature, *Republic of Peru v. Peruvian Guano Co.*, *supra*; *Kennett v. Chambers*, *supra*; PENFIELD, in 32 AM. L. REV. 390, 406; secondly, sound policy requires that the courts act in unison with the other departments of government in matters involving foreign relations, *Foster v. Globe Venture Syndicate*, *supra*; *The Hornet*, *supra*; and thirdly, the conduct of foreign relations is vested exclusively under the Constitution in other departments of the government, *United States v. Palmer*, *supra*; *Williams v. Suffolk Insurance Co.*, *supra*; *Kennett v. Chambers*, *supra*; *Oetjen v. Central Leather Co.*, *supra*.

It would seem, nevertheless, that international recognition ought on principle to be determined in a proceeding of a judicial nature. International law may properly define the elements essential to international personality; but if the existence of these elements can be established, recognition ought to follow as a matter of course. Moreover, it would be a great advantage if recognition could be of general effect for all members of the international community. The national courts are not available. Why not an international jurisdiction? Why not make it possible for each community claiming recognition to have its rights determined by a tribunal constituted at The Hague from the panel of the so-called Permanent Court of Arbitration? If a real permanent court should be established under the League of Nations, why not invest it with jurisdiction to hear and determine claims to recognition? The suggestion may be regarded as somewhat utopian, but no more so, certainly, than many another that has received serious consideration of late. Such a reform, if it could be achieved, would be a great advance in the struggle to rescue international law from the confusion and intrigue of diplomacy.

E. D. D.