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RECOGNITION OF DE FACTO GOVERNMENTS AND
THE RESPONSIBILITY OF STATES

By J. Whitla Stinson*

In almost every nation, which has been denominated free, the state has assumed a supercilious pre-eminence above the people who have formed it: hence, the haughty notions of state independence, state sovereignty, and state supremacy. In despotic governments, the government has usurped, in a similar manner, both upon the state and the people: hence all arbitrary doctrines and pretensions concerning the supreme, absolute, and uncontrollable power of government."

The responsibility of states for the acts of their de facto governments, admittedly results from the principle of their continuity. The position of the state in international law remains unchanged. A state or a people upon declaration of their independence becomes amenable to the law of nations; it may be bound by contracts; and for damages arising from the breach of those contracts; assumes responsibilities thereunder which it cannot escape by a mere change in its agents. Ensuing recognition by

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1Wilson in Chisholm v. Georgia, (1793) 2 Dall. (U. S.) 419, 461, 1 L. Ed. 400.
3Ware v. Hylton, (1794) 3 Dall. (U. S.) 199, 1 L. Ed. 568; Chisholm v. Georgia, (1793) 2 Dall. (U. S.) 419, 455, 474, 1 L. Ed. 440.
4Davis, Elements of Int. Law 43; Klütè, secs. 51-52; Bluntschli, secs. 39, 45; De Martens, secs. 74, 78; Halleck, Int. Law chap. III secs. 19, 28; chap IV. sec. 2; Wheaton, Int. Law, part II sec. 72; Vattel, Droit des Gens, book I, sec. 31, 35; Grotius, book II, sec. 8; 1 Kent, Commentaries 25-26; Hall, Int. Law, sec. 2; Creasy, secs. 104, 153; Pomeroy, secs. 126, 137, 148, 149, Pradier-Fodrè, Traité de Droit Int. Pub., secs. 149, 163; 3 Wildman, Orig. Int. Law 68, secs. 137, 236, 248.
foreign nations of the state so declaring its independence, and of
the government thereof, is not, however, without important effects
upon the rights of the state recognized, or indeed the obligations
to it of the nations recognizing it. That this effect is very persua-
sive, if not conclusive as to the giving or withholding of recogni-
tion of a government subsequently established by revolution or
otherwise in a state whose independence and governmental capacity
have been acknowledged, that it is very material to the responsi-
bility thereof for the acts of such governmental regime, these are
considerations of vital importance, particularly under present inter-
national political conditions.

Whether obligations ex contractu, or ex delicto, created by a
government without right, but firmly established in an old state,
are by the law of nations perfect in the nation which it claims to
represent, independent of its recognition as de facto, is a question
which no assumption as to the continuity of the state ought con-
clusively to settle. Truly, recognition is not necessary to denote
the existence of government in a foreign state. It is the declara-
tion of the nation according it, that they are ready to deal with
a de facto regime as the highest organ of the state in which it is
established. Mr. Hughes has recently declared that it is "an invi-
tation to intercourse," accompanied on the part of the new govern-
ment by the clearly implied or express promise to fulfill the obli-
gations of intercourse. But recognition or non-recognition, at all
events, implies a just regard in the government according it or
withholding it for the equal rights of all nations, no less of the
people whose government is or is not recognized as de facto, than
of its own.

Recognition of government as de facto is not a criterion of its
legitimacy; but it is not irrelevant to the capacity of the supreme
authority claiming to be the personality of the sovereignty of
a people, whether that capacity be deduced from their consent,
express or implied, or from the organic law, the more so if govern-
ment come into existence by municipal law. If it involve an
assumption on the part of the government so recognized of the
public obligation of the people towards the foreign state confer-
rning that recognition, it implies equally the preservation by the
latter of every claim of such people to its justice, the maintenance
of their public and private rights so far as within its protection,
particularly if it set up a responsibility in a foreign people for the
acts of their existing government.

1 Oppenheim, Int. Law 404-405.
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If recognition, de facto, operate as an acknowledgment of the validity of the acts of the government established in a foreign state, the giving or withholding it must be consistent with the general law of nations, and without prejudice to rights, public and private, founded therein, except as, consistently with that law, the sovereign will of the people is to be recognized in the acts of their government. If, then, a revolutionary regime so subvert the free institutions of a people as to silence the articulate voice of their sovereignty, the law of nations must notice the fact, and principles common to all must foreclose a responsibility in such people for the acts of that regime however de facto its governmental existence and control. If, however, the responsibility of the state is, by the principle of the continuity of states, independent of the recognition of government as de facto, it is consistent with the principle that the position of the state is unchanged in international law.

It is notable that Mr. Hughes, July 22, 1923, takes cognizance of the want under the Soviet regime of provision in its organic law, securing the civil liberties of the people. He observes that the actual acquiescence of the people of Russia in the Soviet regime remains an open question, in consideration of this omission, the tyranny of the governing power and its repudiation not only of the obligations inherent in international intercourse but its defiance of the principles upon which alone that intercourse can be conducted. Whether government is in fact the responsible agency of a people must depend then upon the consent of the people in it. In this, American practice appears to be universally accepted. Thus the Franco-Chilean Arbitral Tribunal held:

"According to a principle of international law, denied at first theoretically in the dynastic interest by the diplomacy of European monarchs, applied, however, in fact, in a series of cases, today universally admitted, the capacity of a government to represent the state in its international relations does not depend on the legitimacy of its origin, so that foreign states no longer refuse recognition of a government de facto, and that the usurper, who holds power with the consent, express or tacit of the nation, acts and concludes validly in the name of the state, treaties the restored legitimate government is bound to respect."

That such consent may be freely expressed depends upon the continued maintenance under the new government, or the recog-
nition of it, of those essential principles, as a part of the organic law thereof, wherein and whereby the consent of the people alone may be authoritatively made known. If these principles have been established by the constitution of a foreign state, under which the capacity of prior governments has been recognized, demand for clear proof, as a condition of the recognition of a new government as de facto, that it has come into existence by legal and constitutional means, would seem to be consistent with the very requirements of modern international usage, directly affecting the capacity, as distinguished from the lawful descent or succession, of the new government; the more so if in contemplation of the law of the state withholding recognition, the fundamental law of the foreign state remains unchanged until political intercourse be re-established, recognition accorded.

The question whether the United States, thus conditioning its recognition of the Tinoco Government in Costa Rica, did so consistently with the law of nations, is inferentially raised in the recent British-Costa Rican Arbitration. The learned Arbitrator, the Hon. Wm. H. Taft, referring to the attitude, in that instance, of the federal government, declines to discuss its merits, but avers that, however justified as a national policy, non-recognition on such ground may be, it certainly has not been acquiesced in by the nations of the world, which, he declares, is the condition precedent to considering it as a postulate of international law. He holds:

"The non-recognition of a government, claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it, by international law, to be classed as such. But when recognition vel non of a government is by such nations determined by inquiry not into its de facto sovereignty and complete governmental control, but into its legitimacy, or irregularity of origin, then recognition loses some of its evidential weight in the issue, with which those applying the rules of international law are alone concerned."

This is readily admitted; but it is submitted, in so far as recognition is evidential of the capacity of government to enter into intercourse and assume the obligations thereof, it is concerned with the authority of government to bind the state, and succeeding governments, with the validity of its acts, especially if they tend actually to alter the position of the state in international law, and to

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7In the Matter of the Arbitration between H. M. the King, etc., and His Excellency, the President of the Republic of Costa Rica, Washington, D. C., Oct. 18, 1923.
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prejudice the public and private rights of the citizens thereof under the law of nations within the protection of the government whose recognition is claimed. If recognition be evidential that a government has achieved an independence and control entitling it by the law of nations, rather than as a matter of independent political discretion, to be classed as the responsible governmental agency of a sovereign people, it would seem to be postulated upon an assumption that principles deemed common have been and will be equally recognized and enforced in every security they afford to the sovereign whether the people or the state, acting through governmental organs. Only by reference to some common factor of juristic principles assumed to constitute part of the municipal law of each and all nations is the responsibility of a state for the acts of a de facto government ascertainable, the more so, if sovereignty be attributable to it by the mere fact of the degree of governmental control which it has attained, and independently of the recognition of foreign claimant states, the assent of its peoples, or the express provisions of its organic law. The award treats the Tinoco Government as sovereign; but whether government is in fact sovereign, apart from the assent of the people therein, is a question to be determined according to the law of nations, which, as understood in this country, contains nothing to warrant the assumption that limited governments are in its contemplation sovereign.

"As the state has claimed precedence of the people; so, in the same inverted course of things, the government has often claimed precedence of the state; and to this perversion in the second degree, many of the volumes of confusion concerning sovereignty owe their existence. . . .

"From the differences existing between feudal sovereignties and governments founded on compacts, it necessarily follows, that their respective prerogatives must differ."8

If then the Government seeking recognition admits its republican or constitutional form, it would seem that the law of nations would require the substantiation of the fact by proof of the consent of the people.

NATURE OF THE CONTROVERSY BETWEEN GREAT BRITAIN AND COSTA-RICA

Very briefly stated, the controversy arose out of the annulment of certain acts of the Tinoco revolutionary government, its

8Chisholm v. Georgia, (1793) 2 Dall. (U. S.) 419, 455, 472, 1 L. Ed. 440.
contracts with private persons, whether with or without the sanction of the Costa Rican Congress, and by reason of the repeal of currency decrees of the Tinoco government, and acts stripping the Costa Rican courts of jurisdictional power to afford relief from these confiscatory measures. The ensuing reclamation of the British Crown was predicated on losses to British subjects, Canadian concessionaire corporations and banks, growing out of said acts of repudiation, nullification and confiscation, and denial of due process of law.

The Tinoco regime had, in 1917, assumed headship of the state, instituted a provisional government, directed elections in which 61,000 votes, against 259, were cast for Tinoco’s presidency. In June of that year the constitution of 1871 was supplanted by a new constitution, though the impairment of the older one had been set up by Tinoco as the justification for his revolt. Two years of peaceable administration ensued, during which Great Britain and the United States withheld recognition of the Tinoco government as de facto or de jure. The United States exerted its influence to prevent armed resistance to the Tinoco regime, but demanded, as a condition of recognition clear proof that it had been elected by legal and constitutional means. In 1919, during the absence of Tinoco, an absence consented to by the Costa Rican Senate, the acting president transferred the reins of government to Sr. F. Aguilar Barquero. The latter by executive decrees repealed the constitution of 1917, re-established the old constitution, brought about elections by which the presidency devolved on Sr. Acosta; and subsequently Barquero’s acts of nullification were ratified by the Costa Rican Congress.

The British Crown notwithstanding that it withheld recognition, maintained that from its inception the Tinoco government had supreme power, received the sanction of the electorate, that it could and did create obligations binding upon the state. It was urged that whether the Tinoco government were considered to be a government de facto or de jure, the succeeding government was bound thereby as to commitments with the subjects of foreign nations; and that the latter was as “illegal” and as “usurping” as the former Tinoco government, that it deprived the courts of Costa Rica of jurisdiction to hear the claims, and that its acts were contrary to fundamental principles of international law.

The government of Costa Rica responded, denying the character either de facto or de jure of the Tinoco regime; averred
that its acts were in violation of the constitution of 1871, and that, therefore, its contracts with British claimants were void; that it was the illegitimate offspring of the constitution of 1871; and therefore never entitled to the great inheritance of de facto recognition, whereby responsibility for its acts would attach to the nation, and succeeding governments. The force of this argument was denied by the Arbitrator as tantamount to holding that:

"A government which establishes itself and maintains a peaceful administration with the acquiescence of the people for a substantial period of time, does not become a de facto government. To admit this argument," the Arbitrator avers, "would be to hold that within the rule of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be and is not true."

It was further argued that either by contract or by the organic law of Costa Rica, the claimants were precluded from calling to their aid the diplomatic interposition, or invoking the national reclamation of the British Crown, but were bound to pursue their remedies in the Costa Rican Courts.9

Estoppel was set up against the British Government on the ground that it had never recognized the Tinoco regime; but grounds therefor were denied by the Arbitrator, who comments:

"It may be urged that it would be in the interest of the stability of governments and the orderly adjustment of international relations, and so a proper rule of International Law, that a government in recognizing, or refusing to recognize a government claiming admission to the society of nations should thereafter be held to an attitude consistent with its deliberate conclusion on the issue. Arguments for and against such a rule occur to me; but it suffices to say that I have not been cited to text writers of authority or decisions of significance indicating a general acquiescence of nations in such a rule. Without this it cannot be applied as a principle of International Law."

It would seem, however, that, if the people of an old state have not consistently with the general law of nations and rights founded therein, tacitly or expressly acquiesced in a revolutionary regime erected in it, the de facto recognition of which has been refused by a foreign nation, whose government prefers a claim to the justice of its own sovereign and that of such foreign nation, its responsibility for the acts of a governmental regime, without

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92 Wharton, Digest 612, 615, 617, 618; 6 Moore, Dig. Int. Law 287, 321; Borchard, 4 Amer. Soc. Int. Law 59; Borchard, Diplomatic Protection Citizens Abroad 293; Foreign Relations 870-1; 2 Moore, Dig. Int. Arbitrations 1644; Weiss, Règles de Droit Int. 59; Ralston, Int. Arbitration Law 48.
right in it, is not lightly to be assumed; and the claimant nation must be estopped to deny as to the obligation of that claimed against, the invalidity of that which by its own law is in contravention of the law of nations, and the equal rights of all peoples, the more so, those nations which regard government as the trustee of sovereign peoples, and its acts never to be presumed to validly transcend or be in derogation of the general law of nations.¹⁰

**Principles of the Fundamental Law of the United States Applicable to the Case**

The British Crown admitted in the arbitration:

"The constitution of Costa Rica, like that of all Spanish American countries, is based upon the same principles found in the constitution of the United States. It is therefore proper to apply the American doctrine and theory of government to solve or illustrate any question of the constitutional law of Costa Rica."

The recognition policy of the United States would seem to depend in the last analysis upon that "republican principle," as Marshall called it, "that the will of the majority produced, ratified and conducts the political organization of the nation."

Principles of abstract justice, admitted to regulate in large degree the intercourse of nations whose perfect independence has been acknowledged,¹¹ of vital, perpetual and universal obligation, whose recognition and enforcement are entrusted to the federal government,¹² have been established by the constitution and constrain its recognition policy,¹³ whether of new states or of new governments in old states. By reference to these principles of the internal law of nations, embodied in the constitution, having the authority of a law pervading the whole union,¹⁴ there is an element in the municipal law of the United States of permanent, not temporary obligation, which in contemplation of the constitution integrates with the public law of all nations. However true that international law in its broadest sense, including the opinions of publicists, forms part of the law of the land, principles of the general

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law of nations which have been established in the constitution are not alterable at will, but transcend and limit executive and legislative power. On these principles in part depend the inalienable jurisdictions of the Supreme Court in cases arising under the constitution.

Departments of the federal government clothed with power, in the intercourse of the nation with foreign nations, must, it is submitted, look to the maintenance, by new governments in old states of the common law of all nations, even in the exercise of the most sovereign power by such governments, much more so in the government of a state holding itself out to be that of a republic, or whose government is responsible to the people upon democratic principles. This inquiry may not involve that of the legitimate succession of the new government, but assuming the continuity of the state, involves consideration of the preservation, not only of the obligations, but of the rights of the people thereof consistently with the general law of nations, and treaties with such state.

If the courts of the United States will not sit in judgment on the acts of another nation done within its own territory, if they cannot presume the laws of a foreign nation to have been enacted in terrorem, but must regard them as completely obligatory upon the courts of such nation, it peculiarly belongs to the political departments of government to take cognizance of the state of the organic law under a new government in an old state, and of change with respect to that which it is presumed to remain in contemplation of American law, until recognition be conferred by this government consistently with the law of nations. Recognition de facto then becomes an effective and necessary check upon the pretensions of revolutionary regimes.

The right of government to bind itself to any extent not prohibited by its constitution is admitted, and so far as authorized thereby its legislative capacity may be abridged and also the discretion of succeeding legislatures. It follows that obligations transcending its constitutional authority, presumed to consist with the law of nations, in contemplation of nations which acknowledge

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18Talbot v. Seaman, (1801) 1 Cranch (U. S.) 1, 34, 2 L. Ed. 15.
this principle, cannot be binding upon successive governments, unless acquiesced in by the people. Though a state may not revoke its grants their validity depends upon the law of nations, whether obtained by fraud, or in derogation of the equal rights of all, upon evidences, internal and external, as to that law.

THE CONTINUITY OF THE STATE PRESUPPOSES THE INTEGRITY OF ITS SUBSTANTIVE SOVEREIGN RIGHTS AND OBLIGATIONS UNDER THE LAW OF NATIONS

The Arbitrator in the Costa Rica Case premises his opinion on the principle that:

"Changes in government, or the internal policy of a state, do not as a rule affect its position in international law . . . though the government changes, the nation remains with rights and obligations unimpaired."

"No change of its internal polity, no modification of its organization or system of government, nor any change in its external relations short of entire absorption in another state can deprive it of its existence or destroy its identity."

Upon principle, vicissitudes of constitutional change or other mutation in government do not change the substantive rights, the mutual and reciprocal duties of nations and peoples to each other under the general law of nations or treaties, authenticating and substantiating its great principles or vesting rights equally in all nations, consistent therewith or founded thereupon. That is "a clear position of the law of nations" declared Kent. No principle of international law, as John Quincy Adams affirmed, can be more clearly established than that the rights and obligations of a nation in regard to other states "are independent of its internal revolutions of government."

"We believe it to be a principle incontestably true," declared Marshall, "that a change in government does not dissolve obligations previously created, does not annihilate existing laws, and dissolve the bonds of society; but that a people passing from one form of government to another, retain in full force all their munici-

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191 Moore, Dig. Int. Law, 249.
20Keith v. Clark, (1877) 97 U. S. 454, 460, 24 L. Ed. 1071.
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pal institutions, not necessarily changed by the change of government.”

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AMERICAN RECOGNITION OF DE FACTO GOVERNMENTS IMPLIES, CONSISTENTLY WITH THE REPUBLICAN PRINCIPLE, THEIR CAPACITY TO BIND THE NATION

Touching revolution in government in a foreign nation, accompanied by change in its organic law, Randolph declared that Washington's maxim was “to follow the government of the people.” Whatever regime a majority of them shall establish is both de facto and de jure. Washington writes Lafayette: 24

“I think every nation has a right to establish that form of government under which it conceives it shall live most happy; provided it infracts no right, or is not dangerous to others; and that no government ought to interfere with the internal concerns of another except for the security which is due to themselves.”

It accords with our principles to acknowledge any government to be rightful which is formed by the will of the nation substantially declared, averred Jefferson; 25 “the will of the nation is the only thing essential to be regarded.” 26 The United States recognizes as the legal government of another nation that which, by its establishment in the actual exercise of political power, might be supposed to have received the express or implied assent of the people. This upon principle and as its invariable practice. 27 We have always accepted the general acquiescence of the people in a political change in government as conclusive evidence of the will of the nation. 28 Their positive acceptance of a de facto government, or ascertained acquiescence, is sufficient warranty of its legitimacy. 29 We recognize the right of all nations to create or reform their political institutions according to their own will and pleasure, 30 leaving to each to establish the form of government of its own choice 31 and not interfering in its internal arrangements. 32

25 3 Jefferson's Works, Ed. by Wash., 489; 1 Moore, Dig. Int. Law 120.
27 Livingston, April 3, 1833, Ms. Notes to For. Leg., V, 102.
28 Fish, Dec. 16, 1870, Foreign Relations 1871, p. 742.
30 Buchanan, March 31, 1848, Senate, Ex. Doc., 53; 30 Cong., 1st sess., 3; 1 Moore, Dig. Int. Law sec. 43, p. 124.
31 1 Moore, Dig. Int. Law sec. 43, 125; April 3, 1848, Senate Ex. Doc. 32, 30th Cong., 1st sess., 1-2.
32 Pickering, March 28th, 1799, 1 Moore, Dig. Int. Law sec. 44, p. 129.
Every nation possesses a right to govern itself according to its own will and to change institutions at its pleasure. It does not belong to the government or people of the United States to examine the causes which have led to revolution in a foreign government, or to pronounce upon the exigencies which they created.

Possession of governmental power and the territory of the nation are the usual conditions precedent in all cases of recognition by the United States. When the new government is thus executing the laws of the land, with the general assent of the people, and responsibly fulfilling its international obligations, the government of the United States will enter into relations with it; or again, if it be obeyed over a large majority of the country and the people, and is likely to continue, or is capable of maintaining its power. The custom of the United States is to recognize and enter into official relations with the de facto government as soon as it should appear to have the approval of the people, and manifests a disposition to adhere to the obligations of treaties and international friendship.

"So far as we are concerned that which is a government de facto, is equally so de jure." The express or the implied assent of the foreign nation, the act of the foreign state itself, justifies an acknowledgment of the new government set up in it, is highly evidential that the government which claims to represent it is fully accepted and peaceably maintained by the people thereof. In this light, "it is the settled policy of the United States to recognize the independence of all governments which have manifested to the world that they are de facto sovereign," and where an old and established nation has thought proper to change the form of its government, it is sufficient that the new government is in fact the government of the country in practical operation. This position is postulated on the conception that the recognition of the new

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*Webster, Jan. 12, 1852.*
*Hill,Sept. 8, 1900, Foreign Relations, 1900, 410; Moore, Dig. Int. Law sec. 49, p. 139.*
*Cass, March 7, 1859, M.S. Inst. to Mexico, XVII, 213; March 25, 1859, id. 232.*
*Clayton, July 8, 1849, M.S. Inst. to Prussia, XIV, 165.*
*Van Buren, Oct. 20, 1830, M.S. Inst. to Amer. States, XIV, 101; Moore, Dig. Int. Law sec. 49, p. 137.*
*Seward, March 9, 1863, M.S. Inst. Venezuela, I, 266.*
*Buchanan, March 30, 1846, M.S. Inst. Argentine Repts., XV, 19, 21, 22.*
government is not necessary to denote the existence of the nation.\textsuperscript{43} The rule that the United States will not stop to inquire whether the new government has been rightfully adopted or not has its limitations in considerations of American policy and indeed of the law of nations,\textsuperscript{44} especially if the continuity of its state imply that of its rights, duties, privileges and immunities which sovereign nations, and particularly the government of the United States are bound to respect, and which, if asserted in the courts thereof, whether it be any personal, proprietary, or sovereign right they are bound to protect, recognize and enforce.\textsuperscript{45} In such cases they are bound by the law of nations as well as by the municipal law.\textsuperscript{46}

**Recognition of New States: Its Bearing Upon the Recognition of Revolutionary Governments Set Up in Such States**

Recognition of a new state, the admission of an independent state or sovereign to "full and equal participation in the intercourse of states," is predicated on the consent of the new state, tacit or express, in the binding obligation of the general law of nations.\textsuperscript{47} It involves the highest possible exercise of sovereign powers.

"In the European system this power is now seldom attempted to be exercised without invoking a consultation or Congress of nations. That system has not been extended to this continent."\textsuperscript{48}

It must follow that the fundamental organic law of a new state recognized by the United States, must be contemplated by the departments of the federal government as securing that which is demanded of a nation by the law of nations as of the equal right, and equal justice of all nations. Thus recognition by the United States would seem to imply a reciprocal acknowledgment of the equal rights of both nations by the organic law of each, which no revolutionary regime may transcend with impunity, prejudice to which, short of the consent of the foreign nation is material to the merits of its policy in according or withholding recognition.

\begin{footnotes}
\item[44] 1 Moore, Dig. Int. Law p. 150-151, f. n.
\item[47] 1 Moore, Dig. Int. Law 72.
\item[48] Seward, April 10, 1861, Dip. Cor., 1861, 71-77; 1 Moore, Dig. Int. Law sec. 38, p. 105.
\end{footnotes}
from such government, however supreme its authority. Rights and obligations perfect in the nation independent of all compact are mutually recognized, as founded in the common law of all nations. The continuity of these fundamental rights and obligations is presupposed in the continuity of the state, and it would seem to be precisely in this sense, as Rivier declares, that recognition is the assurance given to a nation "that it will be permitted to hold its place and rank in the character of an independent political organization."\(^4\)

The rights and attributes of the sovereignty belong to a new state, independently of recognition, but it is only after it has been recognized that it is assured of exercising them.\(^5\)

The coming into being of the new state creates an indeterminate situation in the existing international order between independent nations, recognition operating to re-establish legal continuity.\(^6\) It is, then, the coming into existence of some arbitrary governmental power in such state, prejudicing the equal rights, no less of its own, than of foreign nations, upon which a refusal to recognize it as de facto, short of the acquiescence, express or implied of its people, would seem to be justly founded.

"Recognition is not an act depending wholly on the constitutionality or completeness of a change of government but is not infrequently influenced by the needs of the mutual relations between the two countries . . . The United States regard their international compacts and obligations as entered into with nations rather than with political governments. It behooves them to be watchful lest their course towards a government should affect the relations to the nation. Hence it has been the customary policy of the United States to be satisfied on this point; and doing so is in no wise an implication of doubt as to the legitimacy of the internal change that may occur in another state."\(^7\)

**THE JUDICIAL TRIBUNALS OF THE UNITED STATES AND GREAT BRITAIN BOUND UNTIL RECOGNITION BE ACCORDED TO CONSIDER THE OLD STATE OF THINGS AS HAVING CONTINUED**

"Those questions which respect the rights of a part of a foreign empire, which asserts, and is contending for its independence, and the conduct which must be observed towards the subjects of such section of an empire who may be brought before the tribunals of

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\(^4\) Rivier, Principes du Droit des Gens 57-61.
\(^5\) Moore, Dig. Int. Law sec. 27, p. 72.
\(^6\) Hyde, Int. Law secs. 43-46.
\(^7\) Evarts, June 14, 1879, Ms. Inst. Venezuela III, 67.
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this country . . ."53 are generally rather political, than legal in their character. Recognition cannot increase or decrease the rights and obligations of the government, striving to maintain its supremacy.54

The obligation of our treaties, if any, and those "principles which govern our intercourse with foreign powers" require us to maintain a strict neutrality towards revolution in the government of a friendly nation. So long as such foreign nation fulfills its duties towards us, and violates none of the rights which are secured to citizens of the United States, any act on the part of the government of the United States, tending to foster a spirit of resistance to the de jure government of such foreign nation, whatever its laws, their character and form, when administered within it, would be unauthorized and highly improper.55

Upon the principle that "no private contract or agreement which varies from the ordinary course of law, and sounds in prejudice to the commonwealth or common right shall be deemed good in law,"56 the transactions of citizens of the United States with an unrecognized revolutionary government must depend for their validity in law, or their enforcement in equity, upon their accord with prior treaties, not only with their controlling principles, but with the policy of the United States, presumptively consistent therewith, "to which it is the duty of every citizen to conform."57 If repugnant to treaty and to these principles, not only is the contract void, but the citizen violates the neutrality of the nation.

In The Divina Pastora, Marshall declares:58

"It is a principle which has frequently been laid down by this court, that it is the exclusive right of governments to acknowledge new states arising in the revolutions of the world, and until such recognition by our government, or by the government of the empire to which such new state previously belonged, courts of justice are bound to consider the ancient state of things as remaining unchanged." Taney adds:59

"It was upon this ground that the Court of Common Pleas in

54 3 Moore, Dig. Int. Arbitrations, 2876.
55 Kennett v. Chambers, (1852) 14 How. (U. S.) 38, 14 L. Ed. 316.
56 Coke's Institutes, 1, 166, 2, 4; Littleton, 244, 1, sid. 339; Wingate, Maxims p. 746, No. 291.
57 Kennett v. Chambers, (1852) 14 How. (U. S.) 38, 48, 49, 14 L. Ed. 316.
58 Divina Pastora, (1819) 4 Wheat. (U. S.) 52, 65, 4 L. Ed. 512; Rose v. Himely, (1808) 4 Cranch (U. S.) 241, 272, 2 L. Ed. 608; Gelston v. Hoyt, (1818) 3 Wheat. (U. S.) 246, 324, 4 L. Ed. 381.
59 Kennett v. Chambers, (1852) 14 How. (U. S.) 38, 51, 14 L. Ed. 316.
England, in the case of *De Wutz v. Hendricks*, decided that it was contrary to the law of nations for persons residing in England to enter into engagements to raise money by way of loan for the purpose of supporting subjects of a foreign state in arms against a government in friendship with England, and that no right of action attached upon any such contract. And this decision was quoted with approval by Chancellor Kent.

"Every sovereign state is bound to respect the independence of every other sovereign state. . . . Nor can the principle be confined to lawful or recognized governments, or to cases where redress can manifestly be had through public channels. . . . If the party seeking to dislodge the existing government succeeds, and the *independence of the government it has set up is recognized*, then the acts of such government from the commencement of its existence are regarded as those of an independent nation."

Though recognition does not depend on the rights of the revolutionary government or the want of it, it is clear that it involves a question of fact, to be determined "*according to the law of nations,*" whether or not the foreign state has "a civil government in successful operation, capable of performing the duties, and fulfilling the obligations of an independent power." The recognition of governments of new powers comprehends first, an acknowledgment of their ability to exist as independent states, and secondly, the capacity of their particular governments to perform the duties and fulfill the obligations towards the United States incident to the new condition. The recognition of the independence of a state depends on the determination of its own people, and the fact upon the successful execution of that determination. Thence ensues "an obligation of the highest order" on the part of the United States towards the foreign nation to accord recognition. In this light it is said that recognition cannot be withheld when it has been earned.

Madison declared, of the newly born South American republics:

"An enlarged philanthropy, and an enlightened forecast con-

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62Kennett v. Chambers, (1852) 14 How. (U. S.) 38, 47, 14 L. Ed. 316; Nueva Anna & Liebre, (1821) 6 Wheat. (U. S.) 193, 5 L. Ed. 239.
63Clay, Senate E. Doc., June 18, 1836, 406, 24th Cong., 1st sess.; 1 Moore, Dig. Int. Law sec. 37, p. 96-98.
64J. Q. Adams, April 6, 1822, 4 Amer. State Papers, Foreign Relations, 846; 1 Moore, Dig. Int. Law 87.
cur in imposing on the national councils an obligation to take deep interest in their destinies.\textsuperscript{66}

That interest involves, one would think, the assumption of a certain responsibility as to the common and equal rights of the people recognized, as of all sovereign states and peoples.

**Revolution Without Prejudice to the Obligation of the Common Law of All Nations**

Revolution does not strip government of its exclusive prerogatives,\textsuperscript{67} does not divest titles founded in municipal law.\textsuperscript{68} The Supreme Court of the United States has regarded the acts of revolutionary quasi or de facto governments as invalidated by pre-existing constitutional obligations which afforded no countenance for their proceedings; this where the revolution was of a part only of the people of a country and failed.\textsuperscript{69} As to such governments, failing to establish themselves permanently, all their acts perish with them, except in so far as their acts do not impair or tend to impair the civil rights of the citizens under the re-established constitution.\textsuperscript{70} The existence of insurrection and war does not loosen the bonds of society, nor do away with the civil government or the regular administration of the law, in contemplation of our constitution. As to this principle Marshall argued before the House of Delegates in Richmond, Virginia, in 1799, that the common law continued to be the law of the land after the revolution, a successful revolution in defence of the great fundamental securities of that law.

Thus it is submitted that while revolution may establish a de facto government contrary to the fundamental law of a country, as the British-Costa Rican award points out, it can never accord with our free institutions to recognize as a de facto government, a revolutionary regime founded upon a subversion of that law which forms the substratum of the law of all civilized states; nor can it be admitted that a revolutionary government, in undisputed

\textsuperscript{66}Madison, Annals of 12th Cong. 335, Nov. 5, 1811; 1 Moore, Dig. Int. Law sec. 29, p. 75.
\textsuperscript{67}Dos Hermanos, (1825) 10 Wheat. (U. S.) 306, 310, 6 L. Ed. 328.
\textsuperscript{69}Mauran v. Ins. Co., (1867) 6 Wall. (U. S.) 1, 13, 18, L. Ed. 836.
\textsuperscript{70}Williams v. Bruffy, (1877) 96 U. S. 176, 182 et seq., 24 L. Ed. 716.
control, thanks in part, if not wholly, to the negative policy of the state whose recognition it seeks, acquires by a continuance of that precarious control some sort of servitude in the highroad of sovereignty justifying its claim to the recognition of other powers, and imposing responsibility for its acts in all cases upon the people of the state in which it is established, without reference to their assent, express or implied, and the maintenance by it of principles deemed common to all nations, and constraining upon all governments.

THE CONSENT, IMPLIED OR EXPRESS, OF THE PEOPLE MATERIAL TO THE RESPONSIBILITY OF THE STATE FOR ACTS OF DE FACTO GOVERNMENT

A de facto government is one in possession of the supreme or sovereign power but without right, a government by usurpation, founded perhaps in crime, and in the violation of every principle of international or municipal law, and of right and justice. It exercises the ruling power of the country, the supreme power of the district or country over which its jurisdiction extends. While "in firm possession of any country," it is clothed, while it exists, with the same rights, powers and duties, both at home and abroad, as a government de jure. It may send ambassadors and make treaties. Such treaties descend in full force upon any succeeding government. But such intercourse is predicated upon a just observance of that which binds all nations. It implies recognition de facto. When, however, there has been a violent usurpation of governmental power in a foreign nation, unsanctioned by the will or acquiescence of the people thereof, if they be unwilling or unable to repel this usurpation, and ultimately submit to its rule, then it may become a de facto government, and responsible for its acts in contemplation of American policy.

If a government which a people have placed in power, or have consented to its exercise of power, misbehave and violate or transcend its limited functions, it is the misfortune of those who have placed it in power or consented to its elevation and to its discharge of public trusts. Its misconduct should not be visited upon those who honestly enter into engagements with its official representatives.

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"Mauran v. Ins. Co., (1867) 6 Wall. (U. S.) 1, 18 L. Ed. 836.
"Marcy, Nov. 8, 1835, H. Ex. Doc. 103, 34th Cong., 1st sess., 35.
Effect of Non-Recognition of Revolutionary Governments

Though American practice points indisputably to an executive discretion aided or unaided by legislation, in giving to or withholding recognition from new governments, it involves also considerations of public law touching the suspension of the public and private rights of a foreign people. How far it may operate to safeguard these rights, particularly those which have been granted by treaty, or which would have been held sacred independently of treaty, are considerations, vital to the merits of such a policy, and its legality. If mutation in an old state does not dissolve obligations previously created, and peculiarly those mutual obligations of treaties, and of the general law of nations; but until recognition of a new state formerly a part of an old and acknowledged nation, "the ancient state of things is to be regarded as unchanged," it is readily perceived that by this negative and neutral action, the rights of a foreign people are preserved. Where, then, there has been a revolution in government in an old state, the suspension of the public rights of the people may operate actually to preserve them, until recognition ensue its assent in the new government. Hamilton said that where a treaty antecedently exists between the United States and a nation whose government has undergone a revolution, the right of judging whether the new rulers ought to be recognized or not involves the power of giving operation or not to a treaty. For, until the new government is acknowledged, the treaties between the nations, as far at least as regards public rights, are, of course, suspended. Madison sustained this qualification for two reasons: first, "because it is pretty clear that private rights, whether of judiciary or executive cognizance, may be carried into effect without the agency of the foreign government; and therefore would not be suspended, of course, by a rejection of that agency; and secondly, because the judiciary being under oath to support the law of treaties as the supreme law of the land, might not readily follow the executive example." He points out that as the doctrine stood qualified: "It leaves the executive the right of suspending the law of treaties, in relation to rights of one description, without exempting it from the duty of enforcing it in relation to rights of another description." But he denies that it is true that "all public rights" are suspended by a refusal to acknowledge the government, or even by a suspension of all government in the foreign state, and urges:

\[1\]Moore, Dig. Int. Law 250.  \[2\]Moore, Dig. Int. Law 75.
"As public rights are the rights of the nation, not of the government, it is clear that wherever they can be made good to the nation without the office of government, they are not suspended by the want of an acknowledged government, or even by the want of an existing government.\textsuperscript{76}

Non-recognition of government as de facto in old states by the United States may then operate to impair in no wise the integrity of the rights, public or private, of the people thereof or the nation, in so far as within the protection of the United States, or, as founded in principles of the law of nations, given by the federal constitution a new form of command. Conversely, recognition may not be in derogation of the acknowledged sovereignty of a people, nor establish principles incompatible with or repugnant to those embodied in the constitution, presumed by it to have the authority of a law of universal obligation. A just regard for the equal rights of all sovereign peoples thus limits the responsibility of a foreign state for the acts of a government, but without right, in complete control of the country; and, so far as recognition implies the validity of its acts, the facts upon which it depends are seen to be determined according to the law of nations.

In the light of the foregoing, our system of "unalienable rights," as contradistinguished from the old world system of "unalienable allegiances" is maintained; the preservation of our free institutions, as adopted by foreign peoples who have suffered mutation in government, aided, without prejudice to their independence, or their just obligations to this nation in so far as they are in fact capable of fulfilling them.

"Humanity has, indeed, little to hope for if it shall, in this age of high improvement, be decided without a trial that the principle of international law which regards nations as moral persons, bound so to act as to do each other the least injury and the most good, is merely an abstraction, too refined to be reduced into practice by . . . enlightened nations. . . . Seen in the light of this principle, the several nations of the earth constitute one great Federal Republic. When one of them casts its suffrages for the admission of a new member into that Republic, it ought to act under a profound sense of moral obligation, and be governed by considerations as pure, disinterested, and elevated as the general interest of society and the advancement of human nature."\textsuperscript{77}

The same principle dominates the recognition of government as de facto.

\textsuperscript{1} Works of Madison 634-7.
\textsuperscript{2} Seward, April 10, 1861, Dip. Corresp., 1861, 71, 79; 1 Moore, Dig.