ESCOLA DE DIREITO DE SÃO PAULO DA FUNDAÇÃO GETÚLIO VARGAS

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UNBUNDLING GOVERNMENTAL RECOGNITION

ASSESSING A GOVERNMENT'S RIGHT TO REPRESENT A STATE

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Mateus Oliveira de Andrade

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Supervising Professor: Salem Nasser

Dissertação apresentada à Escola de Direito de São Paulo da Fundação Getúlio Vargas como Trabalho de Conclusão de Curso como requerimento parcial para obter o título de Bacharel em Direito

Orientador: Professor Doutor Salem Nasser

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exemplary intellectual and public servant, an avid listener of my many monologues in historical facts when I was but a child and with whom wish I had been able to share my experience not only as a law student but on so many contemporary affairs.

Abstract

The purpose of this work is to tackle the disarray surrounding the subject of recognition, with particular attention to the specificities surrounding the recognition of governments within the context of public international law. We shall demonstrate to the reader the current definitions of recognition and which are the specific doctrines that may be used to solve problems of governmental recognition. To do that it will be necessary not only to unbundle the concept of recognition, but to understand its core elements and how it has been used in the solution of concrete cases through the years. During this work we shall face questions such as why has recognition been used in such an inconstant manner, what is the role of politics as well as what are the current doctrines on the subject and what are their flaws and advantages. By the end we hope to give the reader enough material for a critical analysis of the process of governmental recognition as well as the capacity to operate practical cases.

Keywords: International Law, Governments, Recognition, Legitimacy, Coups, Civil Wars, Effective Control, Democratic Legitimacy

Resumo

O objetivo deste trabalho é abordar o emaranhado conceitual em torno do tema do reconhecimento, com particular atenção ao reconhecimento de governos, no contexto do direito internacional público. Tentaremos, por meio deste trabalho, demonstrar ao leitor as definições atuais de reconhecimento e quais são as doutrinas específicas que podem ser utilizadas para resolver casos concretos de reconhecimento governamental. Para tanto, será necessário não apenas desmembrar o conceito de reconhecimento, mas compreender seus elementos centrais e como eles têm sido utilizados na solução de casos concretos ao longo dos anos. No decorrer deste trabalho nos depararemos com questões como porque o reconhecimento tem sido utilizado de forma tão inconstante, qual sua interseção com a política, bem como quais são as doutrinas atuais sobre o tema, suas falhas e vantagens. Ao final, esperamos dar ao leitor material suficiente para uma análise crítica do processo de reconhecimento governamental e a capacidade de operacionalização de casos práticos.

Palavras-chave: Direito Internacional, Governos, Reconhecimento, Legitimidade, Golpes, Guerras Civis, Controle Efetivo, Legitimidade Democrática

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"What does recognition mean? One can recognize a man as an Emperor or as a grocer. Recognition is meaningless without a defining formula."

– Winston Churchill

Introduction

The purpose of this work is to tackle the disarray surrounding the subject of recognition, with particular attention to the specificities surrounding the recognition of governments, within the context of public international law. Through this essay we shall show the reader the current definitions of recognition and which are the specific doctrines that may be used to solve problems of governmental recognition. To do that it will be necessary not only to unbundle the concept of recognition, but to understand its core elements and how it has been used in the solution of concrete cases through the years.

During this work we shall face questions such as why has recognition been used in such an inconstant manner, what is the role of politics as well as what are the current doctrines on the subject and what are their flaws and advantages.

To start, we will first present the justifications for why the topic is still pertinent in the 21st century, showing how despite a decline in large scale wars in recent decades, coups and civil wars are still a relevant part of the contemporary world, and as a consequence so are the contested regime changes which governmental recognition must deal with.

Following this we shall present the concept of recognition. This chapter will demonstrate how the term actually holds very little meaning in its general usage within the field of international law, lacking a consistent definition and application. Here we shall also see in what ways governmental recognition is particularly different from the more commonly used State recognition.

The third chapter shall tackle the matter of the political and legal duality of the subject. How the legal elements are often mixed and influenced by the political ones and how that can radically change the result of an analysis. In this chapter we shall also see manners in which this problem has already been dealt with in the past.

The fourth chapter will present to the reader the more practical doctrines of governmental recognition. Here it will be possible to understand the different approaches that have been applied through the last century. The chapter will also demonstrate eventual inconsistencies and challenges in their application as problem-solving techniques, with their advantages and shortcomings. These approaches shall be the

Doctrine of Effective Control, the Estrada Doctrine and the Legitimist Doctrines with particular attention paid to the more recent theory of Democratic Legitimacy.

Lastly the reader will be presented with this work's conclusion, where we shall expose our final considerations on the concept of governmental recognition. By the end we hope to give the reader enough material for a critical analysis of the process of governmental recognition as well as the capacity to operate practical cases.

Chapter I

Why Talk About Recognition?

Any student of Public International Law (PIL) may tell that, with rare exceptions, the subjects of PIL are States. They are the ones endowed with the powers of celebrating treaties, incurring obligations and any other legal benefits and duties that come with legal personality. But States are not physical entities, they are in fact, the work of a collective fiction, and therefore the actions of States are in fact the actions and dealings of a few people. When the United States and the United Kingdom sit at a table and sign a trade agreement it is not two Hobbesian leviathans in the form of Uncle Sam and John Bull that are hammering out the fine points and putting their names to the paper. All of this is done by the people who represent these common fictions, what we name as the government and governmental officials. Therefore, the actions which we attribute to the legal personality of States are in fact the actions of these individuals who compose a governmental body.

Most of the time this distinction will not be essential. It is of little importance whether to say, "Brazil has signed the treaty" or "the representative of the Brazilian government has signed the treaty". But when governments or governmental change is a contested element, that is, if two or more political groups claim to represent the same State, it becomes necessary to determine which representative may lawfully act on its behalf.

In theory the problem may be evident, but is it still relevant to discuss contested regime changes in 2020? To determine that we must turn our gaze to current affairs and evaluate if there are enough situations in which governmental control is contested by different political groups, all claiming the status of government. It is necessary to observe internal conflicts and coups, the prime examples of when a government's right to rule is put in check.

War has been a common occurrence throughout human history and States have been fighting each other since they first formed. However, wars between Great Powers have been steadily decreasing[1]. Ever since the end of the Napoleonic Era, the

[1] PINKER, Steven. The Better Angels of Our Nature: Why Violence has Declined, New York, Viking, p. 222-224. Apud ROSER, Max. Our World in Data, The decline of wars between 'Great Powers' available at <https://ourworldindata.org/war-and-peace> accessed on 15.11.2020

percentage of years in which great powers have fought each other has seen a significant decline, and despite a renewed peak on this kind of warfare during the World Wars, as soon as they ended the decline continued, reaching an all-time low of no wars between Great Powers in the new millennia, an unprecedented result.

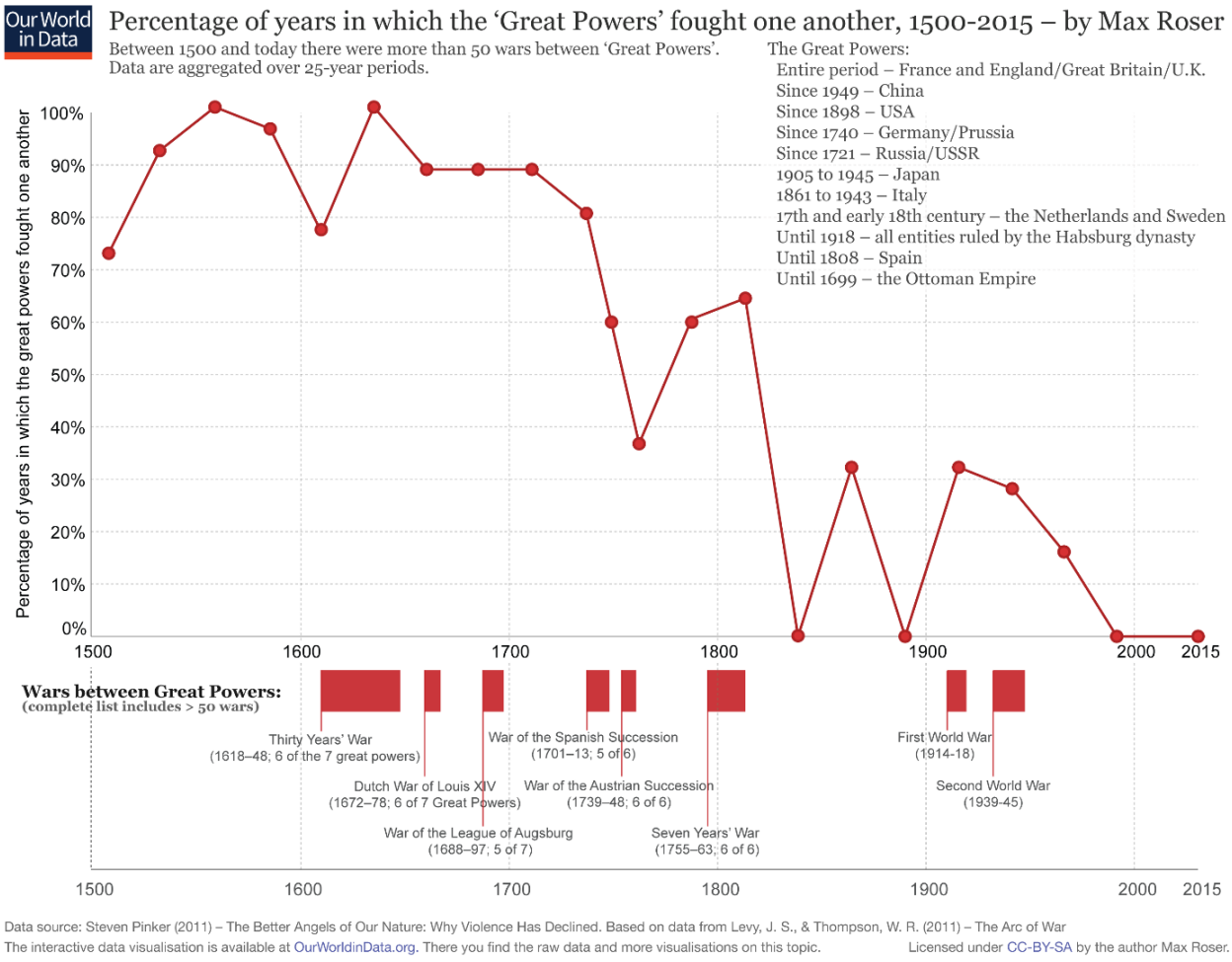

Figure 1: As can be seen in the graph the conflicts between Great Powers no longer seem to be a common problem in the 21st Century, after the end of the Napoleonic Era conflicts decreased dramatically, and despite the brutality of the two world wars in the 20th century the years in which great powers have been at war kept decreasing, reaching an all-time low of 0 in the 21st century.

There could be many reasons for this. On one hand globalisation, free trade, the creation of global institutions and the rise of the human rights discourse have made the idea of large-scale industrial wars a more costly endeavour, both financially and politically. This however does not mean that conflict gave way to peace, the threat of mutually assured destruction that comes with an all-out war between nuclear powers paved the way to different manners of conducting conflict, such as the many proxy wars

fought during the Cold War. Regardless of the reason given, the fact is that Great Powers no longer mobilize armies against one another.

As mentioned, however, this in no way equals the end of war. In fact, the amount of armed conflicts has been on the rise, increasing by over 150% since the end of

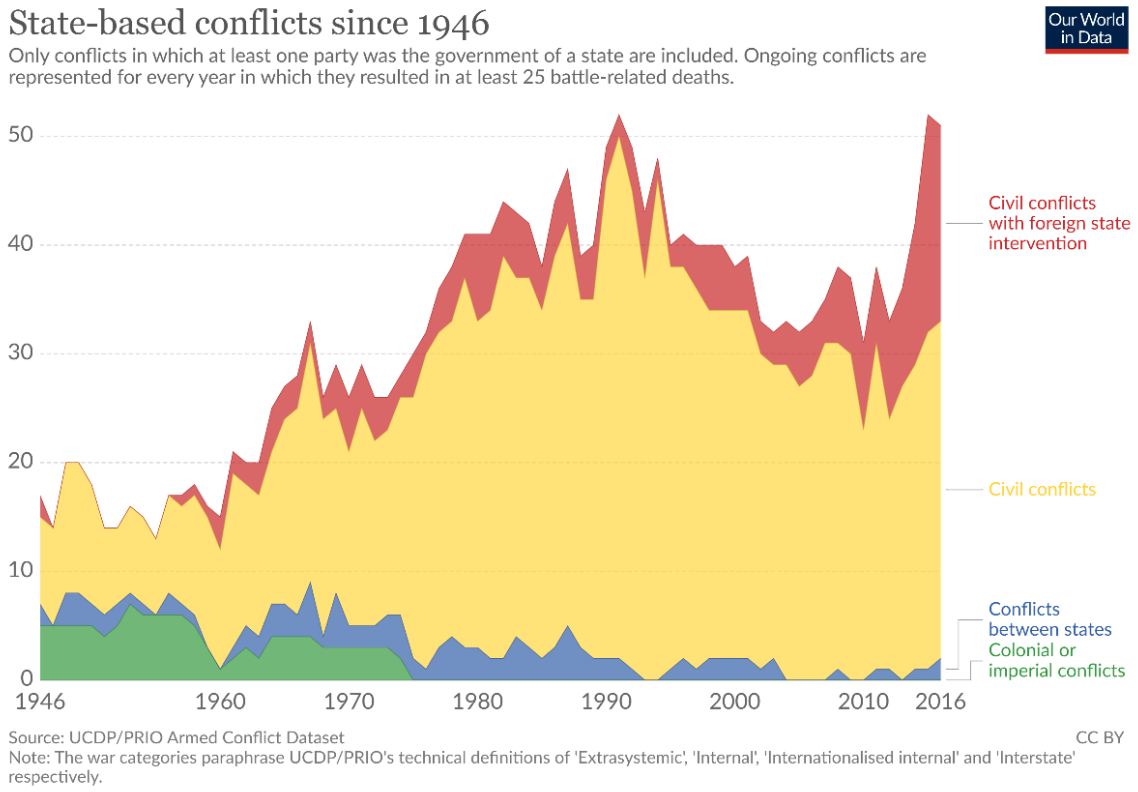

Figure 2: As can be seen in the graph above not only there was a significant increase on the total amount of armed conflicts, but there is also a sharp contrast on what kind of conflicts they are, the bulk being Civil conflicts without foreign intervention. It is also relevant to note that these conflicts did not stop with the end of the Cold War, therefore although proxy wars are probably responsible for part of the post WW2 rise the problem has continued well into the 21st century.

World War II. Despite a few minor interstate conflicts, most are internal disputes, both with and without foreign intervention. Once again, many reasons could be given to this fact, the power vacuum left after the fall of the Soviet Union and Yugoslavia, the process of decolonization in Africa and Asia, ancient ethnical hatreds or the lack of economic opportunity and collective grievances just to cite a few [2].

[2] For further readings on theories regarding the causes of civil wars see: RAY, Subhasish. Sooner or later: The timing of ethnic conflict onsets after independence - Journal of Peace Research 53(6), 2016; POSEN, Barry R. The Security Dilemma and Ethnic Conflict - Survival 35, no. 1, 1993 pp. 27-47; GAGNON, V. P. Ethnic Nationalism and International Conflict: The Case of Serbia - International Security 19, no. 3, Winter 1994/95, pp. 130-166; FEARON, James and LAITLIN, David. Ethnicity, Insurgency and Civil War - American Political Science Review 97(1), 2003, p. 75-90; TAYDAS, ZEYNEP, ENIA Jason and JAMES Patrick. Why Do Civil Wars Occur? Another Look at the Theoretical Dichotomy of Opportunity versus Grievance. - Review of International Studies Rev. Int. Stud. 37.05, 2011, pp. 2627-2650; COLLIER, Paul.

The theories behind civil wars are numerous, but the fact remains that there is a significant rise on the amount of internal armed conflicts in the last 70 years[3].This data makes it clear that internal armed conflicts are a problem of the 21st century, and more than that, they are an ever-increasing one. But the mere existence of conflict does not equal a dispute between who represents the government of a State. A distinction must be made between secessionist struggles and internal disputes for power.

Conflicts such as the Sudanese Civil Wars, Abkhazia, South Ossetia, the Donbass, Kosovo or the more recent conflict in Nagorno-Karabakh are struggles which pertain to either the creation of a new State or the dispute by two already existing States over the control of a determined region in which secessionist movements have appeared. Some in fact can even be classified within the more specific issue of State succession[4], which, although it still deals with the matter of recognition of States, is not going to be our focus in this work.

Our concern is with the legal question pertaining the recognition of governments, which is the object of contention in conflicts such as the ones in Syria[5], Libya, Yemen, and Afghanistan. Although some elements will collide, and at times it will be necessary to step into examples and discussions of State recognition, as most of the literature on recognition focus on States rather than governments, it is important to note

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The Market for Civil War, Foreign Policy, May-June 2003, pp. 38-45; BALLENTINE, Karen and SHERMAN, Jake. The Political Economy of Armed Conflict: Beyond Greed and Grievance – Lynner Reinner, Boulder, 2003; SAMBANIS, Nicolas. Do Ethnic and Nonethnic Civil Wars Have the Same Causes?, Journal of Conflict Resolution. 45(4), 2001, pp. 42-70; MUELLER, John. The Banality of Ethnic War, International Security, Summer 2000, pp. 42-70.

[3] It is important to note that this increase does not pertain to lethality and the devastation of war. An increase in the amount of conflicts does not imply a relation of causation that the world is more violent, as it addresses only the existence of conflict, not their scale and lethality. In fact, although the number of interstate conflicts increased between 2016 and 2017 researchers from the Peace Institute of Oslo determined that casualties declined by 22% in the same year. For more detailed statistics see DUPUY, Kendra and RUSTAUD, Siri Aas. Trends in Armed Conflict, 1946-2017, Conflict Trends, 5. Oslo, 2018

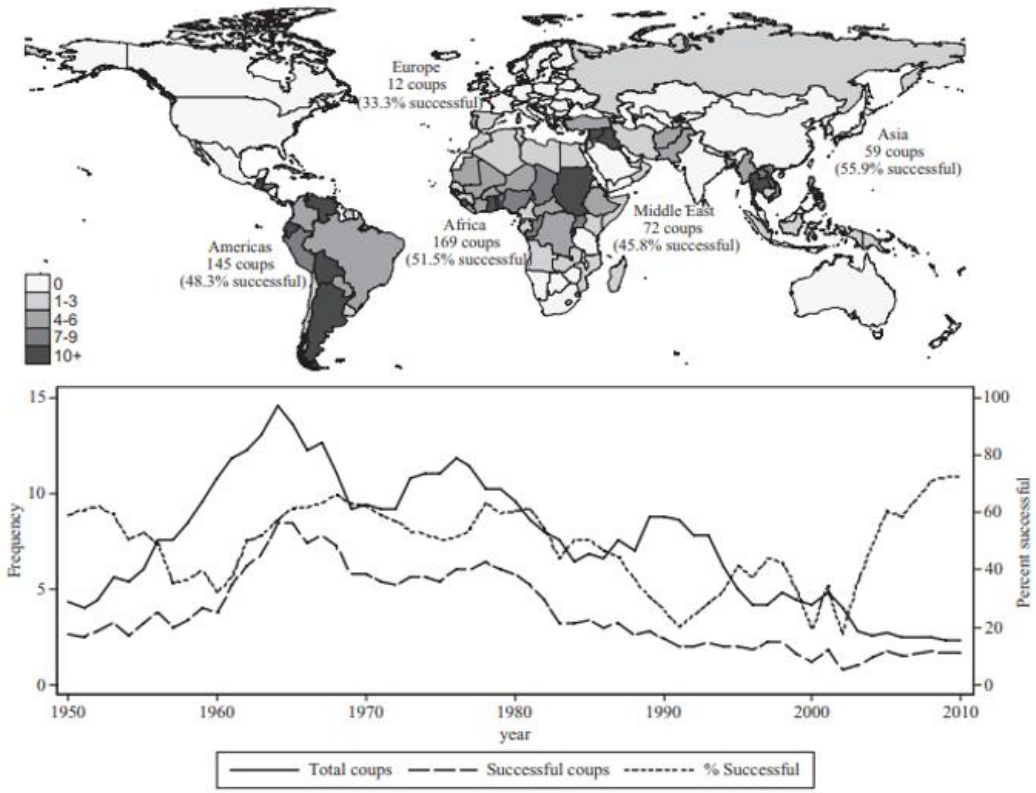
[4] This distinction was explicitly made in the Conference for the Peace in Yugoslavia by the Arbitration Committee in Opinion nº10, where it was decided that Serbia and Montenegro would not enjoy the same recognition of the Socialist Federal Republic of Yugoslavia (despite claiming the name of "Federal Republic of Yugoslavia), as the situation was one regarding the creation of a new State. See: Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, 31 I.L.M. 1488 (1992). For a more general discussion on the matter of succession of States see SHAW, Malcom N. International Law, Cambridge University Press, 5th edition, 2003, pp. 861

[5] Some particularities must be pointed in the Syrian conflict, as the eventual involvement of the Islamic State and the matter of the Autonomous Administration of North and East Syria makes the matter more complex, but regardless it is still possible to claim that the war is not one that seeks the fragmentation of the Syrian State.

that these examples will only serve the purpose of furthering the discussion on governments. The legal analysis, after all, is distinct.

It is one thing to claim Statehood, which entails creating a new personality, and it is another to deal with an already existing personality and its need to be represented in some manner so that it may exercise its rights and duties.

But it is not only armed conflict that can prompt a dispute as to who represents a government. The same is true with the far less bloody, but also more common, coups d'état. Between 1950 and 2016 there have been at least 475 attempts of coups with varying degrees of success[6]. Although the Cold War is a great contributor for this amount and numbers did decrease after its end, they are still significant. Just between January 2008 and December 2010 at least 7 coup attempts occurred, and as the maps show, this is a widespread phenomenon in all continents of the globe.



Figures 3: The map shows the number of coups and coup attempts between 1950 and 2010, with a corresponding graph demonstrating frequency and success over the period.

Available at https://www.jonathanmpowell.com/coup-detat-dataset.html accessed on 15.11.2020

[6] POWELL, Jonathan M. and THYNE, Clayton L. Global instances of coups from 1950 to 2010: A New Dataset – Journal of Peace and Research, Vol. 48 issue 2, 2011, pp. 249-259

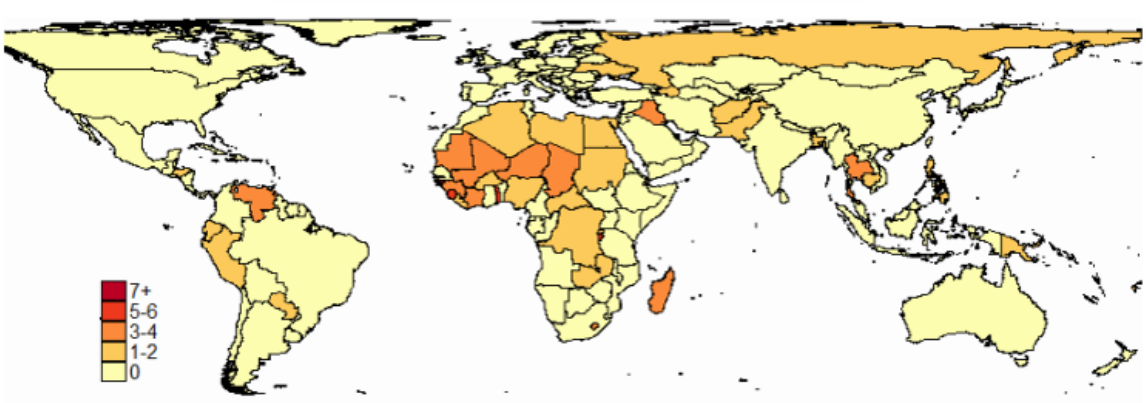


Figure 4: The coloured map above *shows coup attempts between 1990 and 2014, proving that even after the end of the Cold War coups still happen in almost all continents of the world.*

Available at https://www.jonathanmpowell.com/coup-detat-dataset.html accessed on 15.11.2020

Of course, the definition of coup is a complex one, and what some may call a coup, others may claim to be a legitimate change of government. For the purposes of this work we are using the definition presented by Powell and Thyne [7], in which a coup has the following characteristics:

(i) An attempt to overthrow the chief executive

(ii) Can be perpetrated by any elite who is a part of the state apparatus, be them civilian or military and

(iii) Is by definition illegal, so as not to be confounded with political pressure, though there is no need to be violent.

Although it is a broad definition, it is perfect for our purposes, as any such attempt will create at least some degree of doubt in the legality of a new government and could easily escalate into a problem of governmental recognition. It is not necessary here to make a moral judgment on the coup, such as for instance if it is a "democratic coup d'état"[8], nor do we need to tangle with the complexities surrounding cases such as the Brazilian impeachment in 2016. Although this definition of coup might not be able to give a precise enough answer to solve all examples, it is enough to show that coups are a problem even in the 21st century.

The diagnosis is clear. Coups and Civil Wars are still frequent enough in the 21st Century to merit attention, and although as the maps show western countries tend to

[7] Ibidem.
[8] VAROL, Ozan O. The Democratic Coup d'État, Harvard International Law Journal, Vol. 53, 2012, pp. 292-356

have more peaceful governmental transitions this is far from the global reality. But is this enough of a concrete legal problem? To address the matter, we should turn to a recent case in the International Court of Justice between Brazil and Honduras.

In 2009 the President of Honduras, Manuel Zelaya was deposed by a military coup after an attempted consultation regarding constitutional changes. After being sent away from Honduras he was able to return clandestinely and obtained asylum in the Brazilian embassy, from where he kept speaking against the regime that ousted him. The coup had been widely condemned in the international scenario, both by Nation-States[9] and international organizations[10]. Brazil claimed it would not recognize any government other than Zelaya's and thought itself justified in the granting of the asylum to him in the embassy at Tegucigalpa. The new authorities in Honduras however disagreed, believing that by hosting him the Brazilian government was in violation of article 2(7) of the United Nations charter regarding non-intervention, as well as violations to the Vienna Convention on Diplomatic Relations and the American Convention on Diplomatic Asylum. This prompted them to file an application to institute proceedings against Brazil before the ICJ[11].

The application was presented on the 24th of October 2009, and it was signed by a Mr. Julio Rendón Barnica, the Honduran ambassador to the Netherlands appointed by Mr. Carlos López Contreras, Minister for Foreign Affairs of the government headed by Roberto Micheletti that had ousted President Zelaya. However, four days later a letter was sent to the court registrar signed by Jorge Arturo Reina, Permanent Representative of Honduras to the United Nations and Ms Patricia Isabel Rodas Baca, Minister for Foreign Affairs in the Zelaya Government, informing the Court that Ambassadors Julio Rendon Barnica and Carlos López Contreras *"[had been] relinquished of their duties as*

[9] Brazil's Lula calls for Zelaya return in Honduras. Reuters, São Paulo, 29th of June 2009. Available at <https://br.reuters.com/article/idUKTRE55S2XY20090629> accessed on 15.11.2020
U. S. DEPARMENT OF STATE, Washington, 2009. Available at <https://web.archive.org/web/20090701001405/http://www.state.gov/secretary/rm/2009a/06/125452.htm > accessed on 15.11.2020

[10] General Assembly President Expresses Outrage at Coup d'État in Honduras, Says Crucial for World Community to 'Stand as One' in Condemnation, U.N. Department of Public Information, News and Media Division, New York, 29th of June 2009, available at < https://www.un.org/press/en/2009/ga10840.doc.htm> accessed on 15.11.2020, La OEA Expulsa a Honduras Mientras Zelaya Planea Volver Hoy al País, El Mundo, Madrid, 5th of July 2009, available at <https://www.elmundo.es/elmundo/2009/07/05/internacional/1246766493.html> accessed on 15.11.2020

[11] ICJ, Certain Questions concerning Diplomatic Relations (Honduras v. Brazil), 2009, Application Instituting Proceedings by the Republic of Honduras Against the Federative Republic of Brazil

Agents and Co-Agents [of] the Republic of Honduras to the International Court of Justice, and [should] not be recognized as [the] legitimate representatives"[12]. That post would now fall to Ambassador Eduardo Enrique Reina. On November 2nd, another letter was sent, again by Mr. Julio Rendón Barnica in which he said that the Government of Honduras had appointed Carlos López Contreras to act as its Agent.

The court was therefore faced with a dispute where diplomats from both the Zelaya and Micheletti governments claimed to be in possession of powers to represent the State of Honduras and therefore power to institute proceedings before the ICJ. The decision of the Court in this case would set a legal precedent on what criteria could be used to evaluate which would indeed be the competent authority, but the decision of the Court was that "*given the circumstances, no other action would be taken in the case until further notice*"[13] effectively deciding not to decide.

A year later the matter was settled diplomatically, and the proceedings were dropped by the new Honduran government. Elections were conducted, a general amnesty was passed, and the Brazilian government expressed its satisfaction with the results of the agreement between Zelaya and Micheletti[14]. The lack of action by the court therefore had no lasting impact on the matter, and the lack of a decision stopped any precedents on how to assess governmental legitimacy from being created on that case. That, however, is just one example of how the matter of recognizing the rightful governmental authority seeps into legal matters, and one for which we clearly do not have an answer for.

Consider yet the following hypotheticals. Suppose that State X is in the middle of a civil war, with factions A (the incumbent powers) and B (the rebels), both claiming to represent the State. Can delegates from faction A sign a commercial treaty with another State? Is that treaty still valid even if they are deposed? Can a State claim the Estoppel principle and obligate State X to act according to the declarations made by the "Head of State" of Faction A, even if he is defeated in the conflict and finds himself in exile? Is there a threshold determining when would his declarations no longer be valid for the application of said principle? Is a foreign military intervention request made by

[12] ICJ, Certain Questions concerning Diplomatic Relations (Honduras v. Brazil), Order 12 V 10, 2010, pp. 304
[13] Ibidem.
[14] Governo brasileiro expressa satisfação com acordo em Honduras, Reuters, São Paulo, 30th of October, 2009. available at https://br.reuters.com/article/domesticNews/idBRSPE59T0HU20091030 accessed on 15.11.2020

Faction A valid or would it amount to an act of aggression? Can the delegates sent by faction B sign a treaty or take part in the UN assembly? Does it change if they control most of the country? What if they uphold democratic values while the previous government was dictatorial? Can the exiled head of government have access to the national reserves deposited in a foreign bank? Can a company claim a breach of a contract with the State which was signed by a short-lived rebel administration?

These questions are predominantly legal, not political. And in a world where civil wars and coups are still a reality, they are questions which require answers. A far more serious dispute than the previous example with Honduras is the ongoing legal battle between Maduro's Government and the Bank of England over the access of 1 billion dollars' worth of gold reserves stored by the Venezuelan State in the Bank of England. The bank claims that as the UK has recognized Juan Guaidó as president that Maduro cannot have access to these reserves[15], and yet Guaidó exercises no control over any part of Venezuela. In a country struggling with poverty and hunger and in the midst of a global pandemic such decision could impact the lives of thousands of Venezuelan citizens.

Although there does not seem that these questions have a clear answer international law is not entirely silent on the subject. The topic of governmental recognition, as it is usually called, has been the object of several books, theories and even some case law on the past 100 years. But despite these discussions it seems that so far there has been little in terms of a practical answer or a consensus on how to deal with the subject, many times due to the wide ranging of meanings and manners in which the term recognition has been used.

[15] JONES, Marc, UK court overturns Venezuela judgment in $1 billion gold tug-of-war, Reuters, London, 5th of October 2020, available at https://br.reuters.com/article/venezuela-gold-boe-idINKBN26R09H accessed on 15.11.2020; Venezuela gold: UK High Court rules against Nicolás Maduro, BBC News, London, 2nd July 2020. Available at <https://www.bbc.com/news/world-latin-america-53262767> accessed on 15.11.2020

Chapter II

The Concept of Recognition

In 1919 the Russian civil war was at its peak. Aleksandr Vasilivych Kolchak, a former Russian admiral, was made Supreme Leader of the White Army in their struggle against the Bolshevik forces. On the 18th of June of the same year Lord Curzon of Kedleston, the British acting foreign secretary, was to send a telegram to the British High Commissioner in Siberia. The telegram opened with: "*Recognition of Admiral Kolchak's Government has made clear the policy of the Allied powers*". When the draft was concluded, the reviewer, Mr. Walford Shelby, Deputy Head of the Foreign Office's Russian Department, informed Lord Curzon that the allied governments had not yet recognized Kolchak's government, to which he replied "*Very well. But if we have not recognized him, I do not know what it all means. Everyone knows that it is recognition."*[16].

This may at first look like just a footnote in history, a pointless discussion of diplomatic bureaucracy. But Lord Kurzon poses an important question, what does it all mean after all? Britain was assisting Kolchak's White Army and it surely did not recognize the Bolsheviks as the Russian government (this would only happen in 1921[17]). So, who did Britain consider the government which represented the Russian State as a subject of international law? What did recognition mean in this situation?

Turning to the dictionary the word recognition can mean several things. It may mean acceptance that something is true or real, it may refer to an honour that has been bestowed or it can even mean the knowledge of something which one has previously experienced[18]. These meanings are clearly very distinct, and especially when used in a legal or political context consequence will vary widely.

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[16] KETTLE, Michael, Russia and the Allies, vol. II, p. 205 apud TALMON, Stefan. Recognition of Governments in International Law: With Particular Reference to Governments in Exile – Oxford University Press, 1998, p. 21

[17] DICKINSON, Edwin D. Recognition Cases 1925-1930, The American Journal of International Law, Vol. 25, No. 2, 1931, p. 229. Some years later, in 1924, the United Kingdom also granted de jure recognition. See N.D. Houghton, Recognition in International Law, 62 American Law Review, 1928, p. 231.apud SCHUIT, Anne. Recognition of Governments in International Law and the Recent Conflict in Libya, International Community Law Review 14, 2012, p. 386.

[18] RECOGNITION, in: Meriam-Webster English Dictionary, available at: <https://www.merriam-webster.com/dictionary/recognition?utm_campaign=sd&utm_medium=serp&utm_source=jsonld> accessed on 15.11.2020, and RECOGNTION, in: Cambridge Dictionary available at: <https://dictionary.cambridge.org/pt/dicionario/ingles/recognition> accessed on 15.11.2020

The meaning given by Britain at the time could not be of an assessment of reality. They clearly "recognized" the existence of Kolchak's White Army, and their political control over a significant portion of Russia, so much so that they supported his efforts to win the war. It is also obvious that the meaning referring to a previous experience has no application in this context. Would recognition then be an honour to be bestowed? A title which would confer Kolchak with the higher standing of "a government recognized by Great-Britain"? If that is the case, did it matter at all in legal terms? Would recognizing or not carry any consequences whatsoever?

This small exchange of words between Mr. Shelby and Lord Kurzon is not an exception, the term recognition is often times used to mean different things. This chapter aims to demonstrate the common definitions and uses of the term recognition in the context of international law.

Framing the Definition

It seems that none of the general definitions of recognition which we use on a daily basis tackles the meaning of the term in the context of International Public Law. If, however, we turn to the *Dictionaire de Droit International Public* we may see a different definition, already geared to a legal perspective. In that case recognition is an act in which a State verifies the existence of certain facts (such as a new State, government, treaty, situation, etc) and implicitly or explicitly admits them as the basis for legal relations[19]. The definition, however, continues to also explicitly claim that the act of recognition is discretionary and may be done freely as long as it respects the "imperative norms of international law"[20].

If a student of Public International Law searches for recognition in the large tomes and manuals that guide general studies on the subject he will most likely find the topic in the first chapters, in all probability the ones referring to legal personality and territory. In the cases where recognition also receives a sub-chapter of its own there might be a short initial definition on the subject immediately followed by the topic of State recognition (or, in some cases the introduction will already refer directly to the recognition of States). Right after, depending on the complexity of the volume, debates

[19] SALMON, Jean, Dictionaire de Droit International Public, Bruylant, Bruxelles 2001, p. 938
[20] Ibidem

between constitutive and declaratory, *de facto* vs. *de jure* and perhaps a couple of other theories might be presented, though they will often be framed within the perspective of recognition of Sates, not of governments.

This demonstrates the fact that the discussions of governmental recognition will often have been based on a framework that was more extensively discussed and exemplified with the matter of States. No wonder certain authors claim that the topic has been left to the side-lines.[21] This is why to start the discussion on the definitions of recognition we must, for now, take a step back from the matter of governments and face the definitions used when addressing the matter of the recognition of States.

Take Oppenheim's definition for instance, he claims that *"For every State that is not already, but wants to be, a member, recognition is therefore necessary. A State is and becomes an International Person through recognition only and exclusively."*[22], an understanding which can also be seen in The Handbook of International Law, which states that "[…] *unless an entity is accorded recognition as a state by a sufficiently large number of states, it cannot realistically claim to be a state with all the corresponding rights and obligations."*[23]. These initial views on State Recognition are what is known as the constitutive theory, that is, that the act of recognition constitutes a State as such.

For a different approach one may turn to Malcom Shaw's manual on International Law. At first his definition seems clear enough "*Recognition is a method of accepting certain factual situations and endowing them with legal significance*"[24]. And yet, later the author accepts that

> "*In more cases than not the decision whether or not to recognise will depend more upon political considerations than exclusively legal factors. Recognition is not merely applying the relevant legal consequences to a factual situation, for sometimes a state will not want such consequences to follow, either internationally or domestically"*[25].

This definition once again brings the discretionary element we already saw on the *Dictionaire de Droit International Public* [26].

[21] ROTH, Brad R. Governmental Illegitimacy in International Law, Oxford University Press, 2000, pp. 121
[22] OPPENHEIM, Lassa. International Law: A Treatise, Vol. 1, Second Edition, Longmans, Green and Co. 1912. pp. 116-117
[23] AUST, Anthony. Handbook of International Law – Cambridge University Press 2005 p. 17
[24] SHAW, op. cit. p. 328
[25] SHAW, op. cit. p. 368
[26] SALMON, op. cit.p. 938

We now start to see an issue with the definitions. If the constitutive approach were right, that means that the political choice posed by Shaw would be able to deny a State of their legal personality in an arbitrary manner. On the other hand, Shaw seems to veer towards the notion that because it is such a politically charged issue that a State's legal personality cannot depend on it, as he claims that *"In general, the political existence of a state is independent of recognition by other states, and thus an unrecognised state must be deemed subject to the rules of international law."*[27]

This is what is known as the debate between declaratory and constitutive views on recognition. As no nation exists in a vacuum the idea that it is necessary to be "recognized" by other participants in order to take part in the world of international law and politics is reasonable, but the matter is where the limit between fact and fiction should be set. As posed by Ti-Chiang Chen, international law is tied to the fact that an entity does exercise power and pressure over a determined territory and people, so a definition that would be too far from considering the facts would defeat the very purpose of international law.[28]

Although for decades this has been a highly charged debate in academic circles, and perhaps the central discussion on the topic of recognition, more recent discussions have questioned its relevance[29]. In fact, the 2018 report by the International Law Association has recognized that although the declaratory view has taken a more prominent role, that discussion as a whole seems to have lost its practical relevance.[30]

What we can see is that there seems to be a problem to define what exactly is this concept of recognition. Unlike cases where the debate departs from a common concept there seems to be no agreement on what recognition is, even though some of the discussions pertain to the very methods of how this "undefined" recognition is supposed to be done. [31]

[27] SHAW, op. cit. 393
[28] CHEN, Ti-Chiang. The International Law of Recognition, With special Reference to the Practice in Great Britain and the United States – Frederick A. Praeger Inc., New York, 1951, p.3
[29] TALMON, op. cit. p. vii
[30]International Law Association, Sydney Conference 2018 - Recognition/Non-Recognition In International Law, 2018 pp. 9-10
[31] It is quite common for manuals to discuss the methods of recognition despite the existing conceptual controversies. See SHAW, op. cit. pp 383-408 and CHEN, op. cit. pp. 189-258, as just a pair of examples.

The reason for that is that Recognition is "*not exactly a term of art* "[32], that is, a word with a precise meaning within the discipline of International Law. There is no such a thing as a defining formula of recognition. Suffice to look at Bronwlie's Principles of Public International Law for the acceptance that recognition is

> *"commonly used to refer to two related categories of state acts: first, the recognition of another entity as a state; and second, the recognition of that entity's government as established, lawful or 'legitimate', that is as entitled to represent the state for all international purposes.*[33]."

In fact, Bronwlie goes further in an article entitled "*Recognition in Theory and Practice*" claiming that:

> *What is called 'recognition', a deceptively simple omnibus term, involves a variety of situations in international affairs.[…] The standard works fail to warn the student of international law of the important fact that 'recognition' is not a term of art. Indeed, by implication, by dint of repetition and the constant introduction of the word into headings, the standard treatments give the firm impression that 'recognition' and its congener, 'non-recognition', are terms of art with a consistent content and legal significance. Nothing could be further from the truth.*[34]

What can be done then? If there is no common concept of recognition how can we still use it in a systematic manner to the solution of practical problems? It is necessary then to turn our gaze not to a standard definition of recognition but to its purpose. Some elements are, after all, common to all definitions of recognition. The concept is tied to the idea of legal personality, that a State or Government is indeed what it claims to be and therefore can take part in the international stage. Unfortunately, the general definition of the concept of recognition can give us no more than that.

We are now aware that the broader and more common use of recognition is a term that can yield very little in terms of a systematic analysis, as there is no agreement to what it is. Therefore, it is now necessary to look at the particularities around

[32] BROWNLIE, Ian. Recognition in Theory and in Practice, British Yearbook of International Law, Volume 53, Issue 1, 1982, pp. 197-198
[33] CRAWFORD, James. Bronwlie's Principles of Public International Law, 8th edition, Oxford University Press, 2012 p. 434
[34] BROWNLIE, Ian. Op. cit., pp. 197-198

governmental recognition and see if we shall face the same issue. Is there perhaps a more common formula in that case?

The Particularities of Governmental Recognition

The recognition of governments is a distinct element from the recognition of States. While the recognition of States is directly related to the creation of a legal personality, the recognition of governments pertains to one that already exists. The core discussion in this case is if that political entity can indeed be considered to represent a State's personality and act on its behalf.

There is a consensus in international law that the personality of a State is independent from its government, such a consensus existed for centuries. Take as an example the 1600's, when within a period of less than a 100-years England went through the English Civil War, the subsequent Restoration and finally the Glorious Revolution, none of these events changing its international legal personality, despite the many governmental changes. A more recent example can be observed in Egypt during the 2013 coup d'état[35]. The State's personality remained unbroken despite the governmental change, that is, it is still subject to the same obligations and holder of the same rights that it had on the previous regime.

It is because of this that recognition of governments might at first seem a pointless exercise. International Scholars have given little care to recognition of governments as a criterion of international law. As pointed out by Roth, *"the topic has commanded remarkably little systematic attention"*[36], and authors such as John Duggard even claim that recognition of governments is merely *pro forma* and should be seen merely as a matter of national practice.[37] If the government has no implication on continuous personality of States, then why should it be subjected to recognition at all?

[35] Again, the definition of coup may be politically contested by some, calling it a revolution. As we have previously used the definition of coup as an "*illegal and overt attempts by the military or other elites within the state apparatus to unseat the sitting executive*" (POWELL, THYNE, op. cit. p. 252) and as there is no dispute that this is the factual situation which occurred in Egypt we shall continue to dub as a coup, as even if it is named a revolution the argument will remain unchanged.
[36] ROTH, op. cit. p. 121
[37] Ibidem

No wonder many States now claim that they do not practice governmental recognition, recognizing only States. But are those allegations consistent with practice?

On January 1993 Scholar Stefan Talmon sent out a questionnaire to 158 diplomatic missions in order to establish if their countries had or not a policy of governmental recognition. Unfortunately, out of all questionnaires only 13 gave substantial replies[38].

The questionnaire was structured around a first question with three possible policies. Policy A was that in the event of an unconstitutional regime change the State would make an official statement announcing whether it recognized or not the newly established government. Policy B was that, as a general rule, when such unconstitutional change would occur no statement would be issued, though it might in exceptional circumstances. Lastly, policy C was that the State recognized States and not governments and therefore no official statement would be made.

The answering States were The Bahamas, Belgium, Bolivia, Dominica, Finland, Ghana, Greece, Iran, Italy, New Zealand, Solomon Islands, Sri Lanka, and Switzerland. Other than the Iranian response, which explicitly claimed not to have any specific procedure on recognition, the other answers could be grouped in the following manner:

Policy A	Policy B	Policy C
Bolivia	Bahamas	Belgium
Dominica	Ghana[39]	Finland
	New Zealand	Greece
		Italy
		Solomon Islands
		Sri Lanka
		Switzerland

Of course, as the author himself claims, this is a very small sample to define anything close to State practice, but it is already an indicative of how some States claim not to engage in governmental recognition. This in fact became the policy of several

[38] TALMON, op. cit. pp; 275-285

[39] Ghana's answer was not exactly clear, as it mentioned alternatives both B and C. I have put it in B for clarity as the answer itself mentioned matters of governmental recognition, but it is not a perfect fit

members of the European community including big diplomatic players such as France[40], Belgium[41] and the United Kingdom[42].

Once again, turning to the International Law Association 2018 report this seems to be confirmed as the submitted memoranda "*found that, in general, the States studied did not formally recognize governments as part of their standard practice."*[43] In fact the report says that Australia, Austria, Canada Cyprus, France, the Netherlands and the United Kingdom have explicitly adopted the policy of only recognizing States. This begs the question, is recognition of governments still a concept to be used in International Law?

The answer is yes. Despite the claim of these States to have abandoned governmental recognition they still practice it. France signed in 1994 a cooperation treaty with the People's Republic of China in which it recognized them as the "*sole legal government of China and Taiwan as an integral part of Chinese territory*". The British Foreign Secretary in 1991 when addressing the matter of Cyprus and the secession of the Turkish area claimed to recognize the government of the republic of Cyprus as the government of all of Cyprus.[44] More recently, the UK, France, Germany and Spain have led an initiative within the EU resulting in over half of its member States recognizing Juan Guaidó as President of Venezuela[45].

And not only States, but International Organizations also practice the recognition of governments under what is known as collective recognition[46], as can be seen by the following examples. After the Haitian coup in 1991 the United Nations Security Council passed a resolution explicitly stating that the legitimate Government of Haiti was the one of the deposed president Jean-Bertrand Aristide[47]. Similarly, the OAU has constantly engaged in the topic of recognition of governments in the credential proceedings for the

[40] TALMON, op. cit. p. 8
[41] Ibidem. P. 4-5
[42] Ibidem. p. 6-9
[43] International Law Association, Sydney Conference 2018 - Recognition/Non-Recognition in International Law, 2018 pp. 16-17
[44] TALMON, op. cit. p. 8
[45] Venezuela crisis: European states recognise Guaidó as president, BBC News, London, 4th of February 2019, available at <https://www.bbc.com/news/world-latin-america-47115857> accessed on 15.11.2020
[46] The particularities of collective recognition will be treated in more detail further on, for now suffice it to say that collective recognition might be allowed to give a more ample margin of arbitrariness to the topic of recognition.
[47] S/RES/841(1993)

OAU assemblies[48]. Lastly, he European Community when addressing the invasion of Kuwait claimed that it would withhold any indication of recognition from the new authorities imposed by the invaders[49].

It is clear that, despite the declarations by several major powers that Governmental recognition is no longer practiced, that is not the case. The fact is, be it within the scope of State action or of international organizations recognition of governments is still widely practiced in the international scenario.

However, unlike State recognition there is no treaty or similar document which establishes the essential constitutive characteristics that must be complied in order for an entity to be a government. While the Montevideo Convention establishes in its Article 1 that a State must have "*A permanent population, defined territory, a government and the capacity to enter into relations with other States*"[50], and article 3 even addresses the matter of recognition saying that the existence of the State is independent of such a thing, nothing similar exists regarding governments[51].

Although the Vienna Convention on the Law of Treaties does deal with the concept of *"Full powers"*[52] this concept pertains to who within a government may act to represent a State, but does not give any criteria to determine how an entity might be classified as a government.

What we may conclude from this examination is that governmental recognition has even less of an objective common concept than recognition of States. The lack of any consolidated definition dealing with the recognition of governments and the fact that, it is widely practiced (despite States claiming not to have policies on the subject), make it even harder to distinguish when it might be a legally relevant act and when is it used only for political purposes. It is this distinction that we must then depart from in order to further

[48] KUFOUR, Kofi Oteng, The OAU and the Recognition of Governments in Africa: Analyzing Its Practice and Proposals for the Future -American University International Law Review, vol. 17, issue 2, 2002 pp. 369-401
[49] TALMON, op cit. pp. 8-9
[50] Montevideo Convention on the rights and Duties of States, 1933
[51] To some degree it is possible to claim it has been attempted, such as the resolution of the *institut de droit internationale*, which in 1936 presented a resolution in Brussels attempting to clarify certain elements of governmental recognition. The resolution however was never formalized in any treaty, nor it had the clear definitions of the Montréal convention. BROWN, Philip, Marshall. *La reconnaissance des nouveaux Etats et des nouveaux gouvernements*, Institut De Droit International, Brussels, 1936
[52] Vienna Convention on the Law of Treaties, 1969

unbundle recognition and find out if there is any defining formula on respect to governments.

Chapter III

Separating Politics from Law

Recognition is, of course, heavily influenced by politics, Lauterpacht in fact claimed it is the most political element of international law, but can recognition be *determined* by politics? This chapter will attempt to show the political and legal elements of recognition in an attempt to answer how do these elements interact and to what extent it may be possible to separate them.

As a first example we shall examine a complex case in which both the matter of governmental and State recognition is in question. The case of the People's Republic of China (PRC) and the Republic of China (ROC).

During the Cold War, the United States of America (US) withheld for a long period of time the recognition of several communist regimes, one example being the People's Republic of China. According to John Foster Dulles, Secretary of State in 1957, the reasoning for the non-recognition of the PRC as the authority that represented China was as follows:

> *"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.*
>
> *That is not sound international law. Diplomatic recognition is always a privilege, never a right.*
>
> *Of course, the United States knows that the Chinese Communist regime exists. We know that very well, for it has fought us in Korea. Also, we admit of dealing with the Chinese Communists in particular cases where that may serve our interests. We have dealt with it in relation to the Korean and Indochina armistices. For nearly 2 years we have been, and still are, dealing with it in an effort to free our citizens and to obtain reciprocal renunciations of force.*
>
> *But diplomatic recognition gives the recognized regime valuable rights and privileges, and, in the world of today, recognition by the United States gives the recipient much added prestige and influence at home and abroad.*
>
> *One thing is established beyond a doubt. There is nothing automatic about recognition. It is never compelled by the mere lapse of time."*[53]

[53] BRONWLIE, (1982) op. cit. p. 198

Dulles initially claims is that Diplomatic recognition is a "*privilege*". Interpreted as such, Diplomatic Recognition would be akin to a faculty, once again going back to the definitions mentioned in the beginning of the discretionary element of recognition. He firmly denies the existence of anything similar to a "duty to recognize"[54]. But what would the implications of this recognition in this case be?

If this case is seen as one of recognition of governments, the choice of non-recognition is dependent upon the fact that there would be only one China. This would mean that the US policy would be that the Chinese State would be represented by the exiled government in Taiwan with whom they engaged in normal diplomatic relations and that the Chinese Communist Party was not entitled to any international standing. This is not an impossible argument. Several governments have already been seen as the rightful governments of their countries while in exile, even entering into treaties which were latter considered as fully valid legal obligations that continued when the government was reinstated[55].

On the other hand, Dulles admits that the US has negotiated with the PRC in occasions in which it was of their interest. In fact, the PRC fought the US in Korea and in both the referred armistices the PRC was a signatory party[56]. It seems evident then that if the PRC is a party in armistices brokered with the help of American officials that, at least in a *de facto* manner, the US accepts that the PRC must have an international legal personality.

If this is the case than the only possible solution is that there are in fact two Chinas, that is, two distinct States that hold an international legal personality. After all, it would not be possible to have both the government in Taiwan and the Chinese Communist Party as governments of the same Chinese State. However, it would be possible for there to be two international personalities, and therefore two States. If this is the case than this

[54] For more on the duty to recognize see: LAUTERPACHT, Hersch. Recognition in International Law, Cambridge University Press, Cambridge, 1947 pp. 158-174

[55] For a compilation of a series of treaties signed with over 18 different governments in exile see TALMON, op. cit. pp. 318-341

[56] Although in neither of them the United States figures as a party to the treaty not only American diplomats took part in the negotiations of the Indochina treaty but Generals Mark W. Clark and William K. Harrison, acting on behalf of the forces of the United Nations, were the ones who signed the Korean armistice. It is beyond any doubt that the USA recognizes these treaties as valid and binding to its parties. See Agreement Between the Commander-In-Chief, United Nations Command, On The One Hand, and The Supreme Commander Of The Korean People's Army and The Commander Of The Chinese People's Volunteers, On The Other Hand, Concerning A Military Armistice In Korea

is no longer a discussion of governmental recognition, but one of State recognition, as it is intrinsically related to a State's existence and the very constitution of an international personality.

The problem however is that even if the declaration of the American Secretary of State leads us to the conclusion that the discussion is one of States and not governments this implicates a contradiction with what the entities themselves claimed to be. Both the PRC and the ROC claimed until 1992[57] that there was only one Chinese state and that each of them was the government of said State. This is known as the One-China policy.

How is it possible than that if looking through the eyes of a third party the question seems to be one of recognition of States, but when taking into account the claims of the contesting parties it is one of governments? The core of the problem is politics, and the fact that all parties involved have strong political motivations for their characterization of the matter in different manners. However, in order to settle any legal disputes only one answer would be able to prevail. It is therefore necessary to pry open the concept of recognition, both of governments and of States, and understand its legal and political elements.

An attempt to separate one from the other can be found in the works of Hans Kelsen[58]. He claims that recognition is divided in two distinct acts, one which is political and the other which is legal.[59] The political act of recognition is a choice by States. It shows their disposition towards one another and their willingness to enter in official relations. This form of recognition is a decision made by rulers based on factors such as economic interests, ideological differences, strategic alliances, and the many other variables which might make a State interested in friendly relations with another nation.

This political statement may happen in many forms, it may be a unilateral declaration by one of the parties, a joint act or even the mere continuation of normal relations (in the cases of a new government for example). Political recognition may even be used in a conditional manner. In October 1920 Poland offered recognition to Latvia in exchange for the establishment of a 99 years lease on a port[60] and in May 1918 the British

[57] The matter is still not yet resolved, but the claims became more complex after the historical 1992 Consensus.
[58] KELSEN, H. Recognition in International Law: Theoretical Observations, The American Journal of International Law, Vol. 35, nº4, 1941, pp. 605-617
[59] Ibidem, p. 605
[60] LAUTERPACHT, op. cit. pp. 33-35

recognition of Finland was subjected to conditions such as the liberation of prisoners of war captured by the Germans in Finish territory and a guarantee of neutrality[61]. These are examples of recognition used as a bargain and in this case the political characteristic is evident. Recognition works as a good and it is used to further national interests and strategic goals of both parties in diplomatic negotiations.

This political act of recognition cannot carry legal meaning. Of course, subsequent acts such as trade agreements and the arrival of diplomatic delegations will have their legal consequences but the mere political choice to "recognize" does not. This recognition is arbitrary and is in no means compatible with a legal rationality, especially when the consequence is the granting of a legal personality or the right to exercise it. It is important to note that this is not only because of the need that a State has to have the capacity of exercising its statehood, but also because of its duties and obligations.

This is not to say that the political act of recognition is not relevant, but its importance on the political scene must be distinguished from its legal consequences. When a powerful State withholds its political recognition of another entity, be it State or Government, it may carry a very serious impact in the international scenario. But this impact must be put separately from the legal consequences of this act. Recognition in this sense must be seen as "an honour" (or a dishonour in the case of non-recognition) and not the assessment of a reality which would entail a consequence in the legal sphere.

The second act of recognition is recognition seen as a legal act. This form of recognition addresses the matters surrounding legal personality. If the subjects of international law are States which are controlled by governments then there must be not only a process that ascertains when a political community has indeed fulfilled the requirements for statehood but also when a certain group has become the government of this community.

Recognition here is used in a meaning akin to the acceptance that something is real, and by being real (or not) it entails certain consequences on the legal sphere, and as unanimously taken in the manuals the consequence of recognition are intrinsically tied with the existence and exercise of a legal personality.

[61] Ibidem. p. 35.

This form of recognition cannot be treated as arbitrarily as the political form. It is not possible to grant a partial international legal personality, or to withhold it demanding that certain arbitrary conditions are met, this would be incompatible with the principles of sovereignty and non-intervention which guide international law.

That is not to say that "conditions" for recognition are not possible, requirements are after all an essential part of most legal constructions, the issue is how to construe these requirements. As we shall see latter on certain theories of governmental recognition have started to pose that recognition is dependent upon democratic governance, while others require mere control over the region, although both entail "conditions" they are manifestly distinct to the examples of conditional recognition given previously in which recognition is dependent upon specific concessions such as the lease of a free-port. The point here is that legal recognition must be based on rules which can be consistently applied in different cases instead an arbitrary evaluation of relevant State interests that might be traded for recognition. After all, even our initial broad definitions on recognition mentioned the need to follow imperative norms of international law[62].

A good example of the limits between political and legal elecments in the process of recognition is the Aguilar-Amory and Royal Bank of Canada claims (Great Britain v. Costa Rica), popularly known as the Tinoco Arbitration[63] in which former American President William Howard Taft sat as judge.

In 1917 Frederico Tinoco headed a coup against Costa Rican President Alfredo Gonzalez under the claim that Gonzalez was seeking re-election, which would violate the current constitution. Tinoco then formed a provisional government and called for new elections, in which he was himself a candidate, winning around 61.000 votes, while the other candidate had mere 259. Not long after his inauguration Tinoco created a new constitution and for the next two years he ruled without any other entity disputing his authority or claiming to be the rightful government. In 1919, due to health problems and a rising opposition Tinoco retired and left the country.

The government that followed restored the old constitution and held new elections. Not long after, in 1922, Congress passed a law invalidating all contracts between the executive power and private companies that did not have the approval of the

[62] SALMON, op. cit. P. 938
[63] Aguilar-Amory and Royal Bank of Canada claims (Great Britain v. Costa Rica), 1923

legislative power during the Tinoco administration, as well as invalidating two decrees regarding the emission and circulation of 15 million Colones and the creation of the 1.000 Colones bill (Colones being, at the time, the local currency).

This was a problem for The Royal Bank of Canada and the Central Costa Rica Petroleum Company, as the Tinoco Government not only had granted them the right to exploit oil reserves in Costa Rica, but they also had received 998.000 Colones in 1.000 Colones bills. Their claim was that not only the concession was valid, but also that the Costa Rican Government was still obligated to cover the value of 998.000 Colones in question.

This prompted Great Britain to initiate arbitral proceedings against Costa Rica in order to defend the interest of its companies. They argued that the Tinoco government was both the *de facto* and *de jure* government of Costa Rica and no other governments disputed its authority during its existence. They also claimed that the government was peaceful and had "the acquiescence of its people". Therefore, the succeeding government could not avoid responsibility for the acts of the previous one, as that would be a violation of International Law.

The Costa Rican government on the other hand claimed that Tinoco had not been a *de facto* or *de jure* government according to international law, that the contracts and obligations of the Tinoco government were against the 1871 Costa Rican constitution and that the Estoppel principle should be applied as Great Britain had refused to recognize the Tinoco Government and therefore was bound by this non-recognition.

During his stay in Power the Tinoco government failed to acquire significant international recognition and although several nations did recognize it[64] the United States and its allies did not, even forbidding Costa Rica to sign the peace treaty at Versailles, despite Tinoco having declared war on the German Empire.

Therefore on one hand Tinoco had a short lived administration which lacked a significant recognition by international actors, including that of Great Britain, but on the other its administration of Costa Rica during those two years was uncontested and it had concluded business dealings with British companies. On the matter of distinguishing

[64]Bolivia, Argentina, Guatemala, Switzerland, Germanty, Denamrk, Spain, Vatican, Colombia, El Salvador, Romania, Brazil, Peru and Ecuador

the political and legal elements of recognition and handling the claims of non-recognition Taft said the following:

> *"The non-recognition by other nations 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 illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. What is true of the non-recognition of the United States in its bearing upon the existence of a de facto government under Tinoco for thirty months is probably in a measure true of the non-recognition by her Allies in the European War. Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the de facto character of Tinoco's government, according to the standard set by international law"*

This is a perfect example of the distinction that must be given to recognition in its political and legal sense. Taft's claim could be translated as saying that despite any political considerations that surround the issue of recognition it is necessary to look at the facts. A similar understanding was reached in Wulfsohn v. Russian Socialist Federated Soviet Republic[65], in which the court explicitly stated that *"whether or not a government exists […] is a fact, not a theory*" and in the Upright v. Mercury Business Machines[66] where it was stated that *"A foreign government, although not recognized by the political arm of the United States Government, may nevertheless have de facto existence which is juridically cognizable*."

While Taft did not create a test to determine when a government is or not the legal representative of a State, he was able to demonstrate that recognition has many facets, and although political elements may mix with legal ones[67], even being relevant in the conduction of the legal analysis, they must be seen within the factual context.

What we must now start to question is whether recognition is in fact a legal act, a political act with legal consequences or something altogether different. Although it

[65] Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 138 N.E. 24,24 (N.Y. 1923) available at < https://www.casemine.com/judgement/us/5914a847add7b049346faaf5> accessed on 15.11.2020

[66] Upright v. Mercury Business Machines Co., 213 N.Y.S.2d. 417, 419 (1961) available at <https://casetext.com/case/upright-v-mercury-business-mach-co> accessed on 15.11.2020

[67] Taft did not discard the element of non-recognition as irrelevant after all but considered it too weak of an evidence to point to non-recognition. Political non-recognition cannot be used as the cornerstone of a judicial decision, but it certainly merits consideration and must be addressed.

is too early to answer this now, if we turn to the existing doctrines of governmental recognition and how they have been applied in practical cases perhaps presenting an answer to this question will become more feasible.

Chapter IV

Doctrines of Governmental Recognition

So far it has been demonstrated that Recognition is not used in a uniform manner. Academic circles apply it in different ways, be it when dealing with governments or States and although used as if it was a term of the art, it is no such thing. We have also seen how despite several States claiming not to engage in governmental recognition practice says otherwise.

Within this context it seems that many of the uses given to recognition are in fact political, and as the conclusion of the last chapter has shown, differentiating the mere political usage from eventual legal consequences is essential when solving practical cases. Now we shall demonstrate some of the legal theories that have been created to tackle governmental recognition through the last century in an attempt to confer it a more systematic legal treatment.

The Doctrine of Effective Control[68]

The Doctrine of Effective Control is perhaps the most intuitive doctrine of governmental recognition and can trace its origins for several centuries. Samuel von Pufendorf in his book *De jure Naturae et Gentium Libri* in 1672 already argued that it was more relevant for a foreigner to follow the doings of the usurper when he took power than to evaluate how he came by it [69]. During the French Revolution the theory was also used by Thomas Jefferson when he argued for the recognition of the new French Revolutionary Government as opposed to any claims of royal legitimacy because its rightfulness emanated from the "*will of the people*"[70] who had accepted the new regime instead of the old Bourbon King. These origins concerned themselves not with claims of a legitimate authority but with the factual circumstances with which one held power[71].

More recently this doctrine was used in the solution of a practical case. In 2013 the Egyptian president Mohamed Morsi submitted a declaration pursuant to article

[68] Not to be confused with the effective control test created by the ICJ in the Nicaragua case where the objective was the attribution of State responsibility to a State for the conduct of private individuals within another State's territory.
[69] ROTH, op. cit. p. 136
[70] Ibidem. p. 140
[71] Jefferson's example also brings a certain degree of popular sovereignty into play, but as shall soon be demonstrated that is not foreign to the effective control doctrine.

12(3)[72] of the Rome Statute to the to the International Criminal Court. In it he accepted the jurisdiction of the court over Egypt for crimes committed from June 2013 onward, requesting that the Office of the Prosecution started a Preliminary Examination.

The problem was that Mohamed Morsi had been recently deposed by a military coup that happened on the 3rd of July of the same year[73]. Because of this the office of the Registrar did not accept Morsi's request as a 12(3) Declaration, but as a communication pursuant to article 15 of the Statute.[74]

Article 15 establishes that "*The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court*", which would consider Morsi's request such a "*basis of information*". But as Egypt is not a party to the Rome Statute the court had no jurisdiction over the matter, regardless of this communication. However, had the Court accepted the claim as one under article 12(3) than it would have asserted its jurisdiction over Egypt within the limited time frame that was established.

Despite the Registrar's first classification The OTP evaluated the request further, and decided not to accept the declaration because of the following argument:

> *"*[The declaration] *was not submitted, as a matter of international law, by any person with the requisite authority or bearing "full powers" to represent the State of Egypt for the purpose of expressing the consent of that State to the exercise of jurisdiction by the Court. In short, the applicants lacked locus standi to seize the Court's jurisdiction pursuant to article 12(3) of the Rome Statute."*[75]

In its legal analysis the OTP observed the UN Protocol List, which indicated Adly Mansour as head of State, Hazem El Beblawi as Head of Government and Nabil Fahmy as foreign minister, all appointed after the coup. Even more, the OTP also

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[72] Article 12(3) states that *"If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.".* Simply put this article allows for non-party states to accept the jurisdiction of the Court for events in a specified timeframe.

[73] We have already mentioned this case in passing, see fn. 36 for more specific considerations on the usage of "coup" in this instance.

[74]ICC, The determination of the Office of the Prosecutor on the communication received in relation to Egypt, press release, 8th May 2014, available at:
< https://www.icc-cpi.int/Pages/item.aspx?name=pr1003> accessed on 15.11.2020

[75] Ibidem.

observed the fact that the UN General Assembly had accepted the credentials of the new Egyptian government. Their conclusion was that this was an indication of a collective non-recognition of Morsi's government.

The matter eventually went on to Pre-Trial Chamber II[76].The Chamber also maintained the position and claimed that the applicant lacked procedural standing. However, the Court made no mention of the effective control test that was used by the OTP in its analysis, summing its judgment on the matter of *locus standi*[77].

Although, like in the Honduras case of the first chapter, the court failed to create any case law on governmental recognition, the analysis of the OTP gives enough insight on the criteria used for the application of the effective control test.

They claimed that the requirements were that "*the entity which is in fact in control of a State's territory, enjoys the habitual obedience of the bulk of the population, and has a reasonable expectancy of permanence, is recognized as the government of that State under international law*"[78] and because of it "*Dr Morsi was no longer the governmental authority with the legal capacity to incur new international legal obligations on behalf of the State of Egypt*"[79]

Let us proceed then to the dissection of the effective control test. Firstly, there is the matter of territoriality. This is already an issue, especially in the cases of Civil War, as usually neither party will have full control over the whole State, therefore it will be necessary to analyse which regions are controlled by whom and how relevant they might be in determining the requirement of "*control*". Some theories also take into account the relevance of the control of the Capital when determining effective control of the territory. Although there is dispute if it might also be seen as a 4th criterion[80], it could also be a relevant element in determining the scope of territorial control, complementing the first element. This is what happened in the cases of the DR of Congo, Cambodia, and Yemen,

[76] ICC, Decision on a Request for Reconsideration or Leave to Appeal the "Decision on the 'Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014', Pre-Trial Chamber II, 22 September 2014
[77] Ibidem, p. 5
[78] ICC, The determination of the Office of the Prosecutor on the communication received in relation to Egypt, press release, (2014), op. cit.
[79] Ibidem.
[80] SCHUIT, op. cit. p. 390

as the existence of disputed claims as to which authority controlled the State's territory was settled through an evaluation of who controlled the capital[81].

It is usually also agreed that this control must be exercised without the assistance of a foreign power[82]. That however has not always been followed, as in the case of the UK's recognition of the new Ugandan government after the ousting of Idi Amin by the Tanzanian forces, which still remained on the country when recognition was accorded to the new government[83].

The second and perhaps more complex element is the habitual obedience of the bulk of the population. To better comprehend the theory behind this requirement we should once again turn to Kelsen. He claims that the validity of a national legal order begins when it becomes efficacious[84], that is, when people obey it, and it is enforced. Therefore, coups and revolutions attain their legitimacy as soon as they obtain the habitual obedience of the bulk of the population[85], this is the main proof of effective control.

It is important to note though that the obedience by the population is not necessarily equal to what Jefferson might have envisioned as the of "*will of the people*"[86]. This obedience can be originated from democratic governance or it can be dictatorial, as long as those subject to it have accepted the legal order of the governing authority. On this Kelsen continues that the point is that the individuals "*behave […] in conformity to the new order*"[87]. This was also the definition used by the Pakistani Supreme Court in Asma Jilani v. The Government of Punjab, claiming that *"It is not the success of the revolution, therefore, that gives it legal vitality but the effectiveness it acquires by habitual submission to it from the citizens"*.[88]

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[81] Ibidem.
[82] SCHUIT, op cit. p. 396
[83] Ibid. op cit. p. 389.
[84] KELSEN, Hans. General Theory of Law and State, Anders Wedberg trans, New York, Russell & Russel, 1961, p. 111 apud ROTH, op cit. p. 137
[85] MOORE, International Arbitrations, Vol 3. pp.2876-2877, apud DOSWALD-BECK, "The Legal Validity of Military Intervention by Invitation of the Government", 56 British Yearbook of International Law, 189, 193 (1985) apud. ROTH, op. cit. p. 138
[86] There is however some room for argument. Lauterpacht himself addressed this issue by claiming that in moments of instability and chaos such as the aftermath of a civil war obedience is a sign of "popular assent" and indicates a likely stability of the new government, which will force the International Community to deal with it as a fact of life. More on that on SHAW, op. cit. p. 141
[87] KELSEN, (1961) op. cit. p. 118 apud ROTH, op. cit. p. 138
[88] Supreme Court of Pakistan, Asma Jilani v. The Government of Punjab, 1972, Hamoodour Rahman. Available at http://www.cssforum.com.pk/css-optional-subjects/group-vi/constitutional-law/44333-asma-jilani-vs-govt-punjab.html accessed on 15.11.20

Lastly is the criterion regarding the reasonable expectancy of permanence. The entity claiming to be the State's government must reasonably be expected to remain in power. The issue with this criterion is that there is no definition as to how this expectancy must be evaluated. Is it a matter of the passage of time? Is it related to an evaluation of if there is a risk of being deposed? Can a transitional government be considered one with "reasonable expectancy of permanence"? None of these questions have an answer.

Evidently, a government that maintains its effective control only through fear and brutal authority is unlikely to last, but as long as it does, according to this doctrine, it must be seen as the representative of the State. This adoption of a Machiavellian-like pragmatism avoids any judgment as to the nature of the regime and focuses merely on the factual circumstances revolving around its true power.

Although the Doctrine of Effective control may seem rather harsh at times it focuses on the practical solution of problems. If a political group has acquired power and controls the apparatus of the State, indicating that it will continue to control it for the foreseeable future it is only reasonable that such a group be considered the governing authority of said State.

That is not to say that it is not possible for other nations to oppose this taking of power, apply sanctions and exercise political pressure so that the regime complies with certain international practices, but according to the effective control doctrine there would be no reason to deny the factual circumstances that these individuals are now the representatives of the State. There is a clear separation between international politics and facts in the application of the effective control doctrine.

The doctrine is not perfect, and as demonstrated there are still many questions left unanswered which probably would demand legal precedents by courts or the elaboration of treaties to be solidified. In cases where neither party can fulfil the requirements to be in effective control over the State the doctrine seems to give little assistance and it will likely fall to the recognizing State to weigh the elements when it makes its decision. However, with all of its imperfections it attempts to provide legal method to a subject which, as we have seen, lacks just that.

The Estrada Doctrine

The Estrada doctrine[89] is of particular interest, as it has recently been brought back by Mexican president Andrés Manuel López Obrador to maintain a neutral position on the matter of Venezuela [90]. The Estrada doctrine, named after Mexican Foreign Relations Secretary Genaro Estrada Félix, was established in the 1930's and states that the State will take no stance on the legitimacy of the governments of other countries as it considered such a practice a violation of sovereignty to question the legal capacity of foreign regimes[91].

The doctrine takes a hard-line position of non-interference, it attempts to discard any political influences on the matter of recognition and not take part in the dispute. And yet by doing so the Estrada doctrine takes a position, the position of *in dubio pro status quo*. Take the Venezuelan case as an example. Mexico has not recognized Juan Guiadó, as it believes that doing so is an act of intervention. And yet, by not recognizing him the Mexican government accepts, by all means and purposes, that the Maduro government is the representative of the Venezuelan State.

Since international personality cannot be revoked or suspended[92] someone must exercise it. A claim of neutrality and non-intervention during a contested regime change does in fact assist whoever controlled power before the dispute began, it is, for all effects, the acceptance of the incumbent as the legitimate government of the State.

In situations where there is no difficulty in separating the incumbent from the insurgent the Estrada doctrine might be applied to some success, favouring whoever already held power until times change and there is an eventual uncontested victor to the dispute. But although this may work with claimants that are not able to present a concrete

[89] Also called by some "De factoism", SCHUIT, op. cit. p. 393

[90]BERMÚDEZ, Ángel. Qué es la doctrina Estrada, la vieja práctica diplomática de México que guiará la política exterior de AMLO y cómo afectará a Venezuela y a Guaidó - BBC Mundo, 24th of January 2019, available at https://www.bbc.com/mundo/noticias-america-latina-46909829, accessed on 15.11.2020, and ¿Qué es la Doctrina Estrada que AMLO argumenta frente al caso Venezuela? – Expansion Política, 24th of January 2019, available at https://politica.expansion.mx/mexico/2019/01/24/que-es-la-doctrina-estrada-que-amlo-argumenta-frente-al-caso-venezuela, accessed on 15.11.2020

[91] MURPHY, Sean D. Democratic Legitimacy and The Recognition of States and Governments - The International and Comparative Law Quarterly Vol. 48, No. 3, 1999, pp. 567

[92] Some might argue that in certain struggles if no one is able to exercise the personality of the State it might be suspended, for more on that. There is also the possibility of "revocation" through annexation or the fall of a State. Regardless, neither of these arguments would apply here as Venezuela is not under some collapse where no authority exists and its existence as a sovereign State is also not in question.

challenge to the control of the incumbent (such as the case of Guaidó) this doctrine will face several hindrances in other practical situations.

If neither party has complete control over the State, the Estrada doctrine gives no answer. Its use is incapable of giving a method to solve legal problems that might appear during the conflict, and as noble as it might seem not to want to intervene, the question of who represents the State needs an answer. The doctrine also does not give any assistance in establishing how long it is necessary for a new authority to become the legitimate government. Can the rebels be considered the government immediately after the victory? Is there the need to show a degree of stability before recognition is considered an act of intervention and characterized as premature[93]?

Even when recognition is not an explicit act, just the matter of dealing with the authority will already give some indication of State policy. If more explicit issues of recognition such as the signing of treaties does not occur, the very acceptance of credentials from diplomats may prompt a discussion on who is the government, as seen in the Honduras case presented in the introduction.

Some may mistakenly classify the Estrada doctrine as equal do the Doctrine of Effective control[94]. I would argue that is an imprecise classification. It is true that in practical terms the Estrada doctrine will seem to favour the authority that holds control over the country, but the doctrine by no means establishes how this control is to be measured. Its lack of any concern with how effective control would be assessed is a clear indication that this is not a variation on the doctrine but instead an attempt to present a different option focusing on the principle of non-intervention, ineffective as such a position may be.

Take the following hypothetical, the incumbent government is under siege by the rebel forces, having lost most of the country and holding only a couple of last strongholds in mildly important cities. Despite this, their representatives are still the only ones present in international organizations and there are no delegations disputing these places. It is quite possible that an assessment of effective control would already consider the rebel forces as the true holders of power in the State. The Estrada doctrine however is a doctrine which favours non-intervention, a denial of recognition to the current

[93] For discussions on premature recognition see LAUTERPACHT, op cit. p. 9
[94] ROTH, op cit. pp. 137-138

diplomatic representatives of the incumbent government would be a far more interventionist reply than Estrada might have foreseen, and if the conflict dragged on for a few more years the Estrada doctrine might not be able to decide which entity should be seen as government.

The lack of a system for the solution of practical cases is what makes the Estrada doctrine insufficient and forces it to eventually fall back on other approaches, such as perhaps the one of effective control, which might be perceived as more "neutral". Regardless, the claim that the Estrada doctrine is an extension of the effective control doctrine seems to be a premature conclusion on how it might be used to solve practical problems.

What this demonstrates is that a claim of neutrality in the matter of governmental recognition is not possible and certainly cannot be used to solve concrete cases that may arise from it. All that the Estrada doctrine might do is to avoid dealing with the matter, but eventually when a legal dispute occurs some decision will have to be made and the doctrine is unable to present under what criteria the government would be evaluated. In its attempt not to be political the Estrada Doctrine fails to present a solution to the problem at hand.

The Doctrines of Legitimism

In a radical opposing direction of the previous doctrines is the doctrine of Legitimism, which made a comeback in a secularized manner in the first half of the 20th century, much in part due to the constant governmental crisis in Central America[95]. Although the original doctrines of legitimacy may even pre-date the effective control approach, as they go back to the divine right of Kings[96], their comeback in the beginning of the 20th century as secularized doctrines focused on constitutional rule is quite relevant.

[95] COCHRAN, Charles L. The Development of an Inter-American Policy for the Recognition of de Facto Governments, The American Journal of International Law, Vol. 62, No. 2, 1968, pp. 460-464 SALISBURY, Richard V. Revolution and Recognition: A British Perspective on Isthmian Affairs during the 1920s, The Americas, Vol. 48, No. 3, 1992, pp. 331-349; SALISBURY, Richard V. Mexico, the United States, and the 1926-1927 Nicaraguan Crisis, The Hispanic American Historical Review, Vol. 66, No. 2 (1986), pp. 319-339; WOOLSEY, L. H. The Non-Recognition of the Chamorro Government in Nicaragua - The American Journal of International Law, Vol. 20, No. 3 1926, pp. 543-549; WOOLSEY, L. H. The Recognition of the Government of El Salvador - The American Journal of International Law, Vol. 28, No. 2, 1934, pp. 325-329

[96] SHAW, op. cit. p. 142/

The first one that must be mentioned is the Tobar Doctrine. This Doctrine was very similar to the anti-revolutionary position adopted by the Holy Alliance in the aftermath of the Napoleonic Wars. Carlos Tobar, foreign minister of Ecuador, believed that the political instability of Latin-America and the constant revolutions and coups were a motive of concern and had to be combated[97]. Therefore, his solution was the creation of the Tobar Doctrine, which aimed to consolidate a coalition which would not recognize any governments that acquired power through forceful means and violated current constitutions.

The Doctrine was viewed with scepticism by other Latin-American countries due to an already existing concern of constant interventions by foreign powers in local politics[98], which was one of the reasons for the future creation of the Estrada doctrine. However, despite this concern it was adopted by the Central American Republics in the two General Peace and Amity treaties signed in 1907 and 1923[99]. The treaty explicitly said that no recognition would be granted to *"any other government which may come into power in any of the five republics as a consequence of a coup d'état, 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".*

Although the Tobar doctrine had not gained much popularity, a very similar position was latter formulated by U.S. Secretary of State Henry Stimson, which would be known as the Stimson Doctrine, Wilson Doctrine or the Doctrine of Constitutional Legitimacy[100]. This doctrine was adopted by the Wilson administration claiming the primacy of constitutional provisions against any insurgent governments [101]. Wilson put this in action during the Mexican revolution when, after Huerta's coup and the execution of Francisco Madero, the American government refused to recognize Huerta and even occupied the city of Veracruz[102].

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[97] STANSIFER, Charles L. Application of the Tobar Doctrine to Central America - The Americas, Vol. 23, No. 3, 1967, pp. 251-272
[98] Id. p. 266
[99] GRANT, John P. BARKER, J. Craig. Parry & Grant Encyclopaedic Dictionary of International Law, Oxford University Press, Third Edition, 2009 p. 606
[100] The Stimson Doctrine was also adapted latter into a more general rule of not recognizing acts originated through force. Stimson would latter on become secretary of war during the Roosevelt administration and this doctrine would be used to condemn Japan's annexation of Manchuria. See MURPHY, op. cit. pp. 545-581
[101] Id. p. 568
[102] Ibidem

One of the main obstacles for the doctrine of constitutional legitimacy is the fact that even a constitutional government has an extra-legal origin[103], that is, at some point even the current "legitimate" government had its origin in a previous state where there was no constitution. The American Republics themselves were all established due to revolutionary action by the colonized, violating the laws of their respective colonizing powers.

This challenge was one of the reasons that the constitutional legitimacy doctrine alongside the Tobar doctrine could not endure[104]. Although it may initially be shunned by its neighbours if the revolutionary government is able to reorganize the country, promulgating a constitution and promoting free elections that might validate this new constitution any claim that this would not be a legitimate government is absurd. As the matter of governmental legitimacy only arises in situations where there are unconstitutional changes of government a doctrine based on upholding the constitution becomes highly problematic[105].

Another issue of doctrines of legitimism is that they are far more concerned with the values and objectives of the recognizing countries than with that of the recognized. An example of that can be seen in the Brezhnev[106] and Reagan doctrines during the Cold War, new versions of legitimist doctrines which explicitly associated governmental legitimacy to a set of ideological positions and not on the evaluation of any factual circumstances[107]. Although the Reagan doctrine made claims to be upholding democratic values it was far more concerned with the deterrence of communism than seeking to promote free and fair elections over the globe[108].

Legitimacy doctrines are more friendly to eventual claims of a need to intervene than a doctrine of effective control, as their concern is the establishment of a specific kind of order, depending on the source of legitimacy in which the doctrine will

[103] ROTH, op cit. pp. 145
[104] MURPHY, Op. Cit. pp. 569-570
[105] Ibidem.
[106] For an interesting examination of soviet views on recognition see John N. Hazard's review of Recognition of Governments in International Law [Priznannie Pravietel'stv v Mezdhdunarodonom Prave) by D. I. Fel'dman, Kazan USSR, Kazan University Press, 1961. Pp. 90 36 kop in HAZARD, John N. The American Journal of International Law, Vol. 57, No. 1 Jan. 1963) pp. 159-161.
[107] SHAW, op. cit. p. 147
[108] MURPHY, op cit. p. 570. He exemplifies this with the fact that the Chinese government in Taiwan did not hold elections for decades. One may also look at the Latin American dictatorships which were by no means upholding democratic values.

be based on. This makes a generalized adoption of this doctrine an obstacle in a plural global society where governments and States adopt very different views on what is the source of legitimacy for authority.

The Doctrine of Democratic Legitimacy

The most relevant of all doctrines based on legitimacy is the now rising claim of a "doctrine of democratic legitimacy", which claims that recognition is dependent upon the existence of democratic values and institutions.

The cornerstone of this theory is the paper by Thomas Franck entitled *"The Emerging Right to Democratic Governance"*[109]. In this work the author argues that international law has developed a right to democracy, evolving from the right to self-determination to freedom of expression and finally culminating in the right to an electoral process.

Franck's argument relies strongly on the actions of international organisms, even more so that the individual practice of State's. Elements such as article 21 of the Declaration of Human rights, which states that "*Everyone has the right to take part in the government of his country, directly or through freely chosen representatives*" as well as *"The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures"* are used to reinforce the point that this has become a global phenomenon.

Supporting Franck's argument is also the 1966 International Covenant on Civil and Political Rights, which in article 25 states that:

> *"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free ex pression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country rights to participate in public affairs and to free elections*[110]

[109] FRANCK, Thomas M. The Emerging Right to Democratic Governance - The American Journal of International Law, Vol. 86, No. 1, 1992, pp. 46-91
[110] International Covenant on Civil and Political Rights, 1966

Also, on the same direction the 1985 Helsinki Final Act, the 1990 Charter of Paris for a New Europe and the general condemnation of Southern-Rhodesian independence due to the presence of apartheid[111]. These and many more examples illustrated a rising factor of democratic governance and self-determination as elements of international relations directly pertaining to governments.

One of the leading cases which might give indication of this rising Doctrine of Democratic Legitimacy is the one of Haiti.

In 1991, after mere 8 months in office, President Jean-Bertrand Aristide was deposed by the Haitian Army. Despite the military holding complete control over the country the international reaction was not to apply the effective control test nor to take a neutral stance following the Estrada Doctrine. The reaction was one of condemnation, denouncing the new military government as illegitimate and calling for the immediate restoration of the mandate of President Aristide.

The first response came from the Organization of American States, which within three days of the coup passed a resolution in which the members agreed to

> *"[…] recognize the representatives of the Government of President Jean-Bertrand Aristide as the only legitimate representative of the Government of Haiti to the Organs, agencies and entities of the inter-American system […] 10. To … adopt in accordance to the Charter and International law, any additional measures that may be necessary and appropriate to ensure the immediate reinstatement of President Jean-Bertrand Aristide to the exercise of his legitimate authority".*[112]

Soon after yet another resolution was passed with an even stronger language, establishing that

> *"3. To declare that no government that may result from this illegal situation will be accepted and consequently to declare that no representative of such government will be accepted.*
>
> *4. To urge the member states to proceed immediately to freeze the assets of the Haitian State and to impose a trade embargo on Haiti, except for humanitarian aid."*[113]

Similarly, the United Nations Security Councill passed a unanimous resolution on October 3rd of the same year welcoming the OAS resolutions and

[111] MURPHY, op. cit. pp. 552-553
[112] MRE/RES. 1/91 Corr. 1, OEA/Ser.F/V.1 (3rd of October 1991), apud ROTH, (2000). p. 372
[113] MRE/RES. 1/92 OEA/Ser.F/V.1 (8th of October 1991), apud ROTH, (2000). p. 372

demanding "*the immediate restoration of the legitimate government of President Jean-Bertrand Aristide*"[114]. This was further reinforced two years later on resolution 841 which reiterated the OAS resolutions by also determining that all State parties proceed in freezing any funds of the State of Haiti that might be directly or indirectly controlled by the military government[115].

It is beyond any doubt that the measures taken go well beyond a mere condemnation of the coup because of democratic values. These organizations took manifest concrete actions in an attempt to remove the military junta from power and restore Aristide to power. This collective recognition directly questioned the power of the military regime to represent the State of Haiti with real consequences such as the determination to freeze Haitian assets abroad.

Despite the United-States also following suit and denouncing the coup[116], it is worthy of note that most actions remained within the sphere of international organizations, and although the resolutions were all unanimously approved very few nations condemned the coup through their own governmental channels.

Regardless of this fact however, the case of Haiti is a strong indicator that the violation of democratically elected leaders can lead to strong backlash by the international community, culminating in concrete actions of non-recognition, blocking a political group of acting on a State's behalf.

The doctrine of democratic legitimacy however is still very loosely formulated, there being no specific set of requirements which forms the core of the Doctrine, therefore it is necessary to look at different authors to see other arguments pertaining to it. To further define the doctrine of democratic legitimacy we may now turn to Jean D'Aspremont.

In his essay *Legitimacy in the Age of Democracy*[117], the author argues that democracy has become an essential characteristic on the recognition of governments. Not only he brings the case of Haiti but also mentions Sierra Leone, Burundi, Niger, Ivory

[114] G.A. Res. 46/7 (1991) apud. ROTH, (2000). p.373
[115] S/RES/841(1993)
[116] FRIEDMAN, Thomas L. U.S. Suspends Assistance to Haiti And Refuses to Recognize Junta, The New York Times, 2nd of October, 1991, available at https://www.nytimes.com/1991/10/02/world/us-suspends-assistance-to-haiti-and-refuses-to-recognize-junta.html accessed on 15.11.2020
[117] D'ASPREMONT, Jean. Legitimacy in the Age of Democracy - New York University Journal of International Law and Politics (JILP), Vol. 38, 2006

Coast, Guinea Bissau and Togo, all examples that, according to him, show a general international practice of refusing recognition to non-democratic authorities. However, once again it seems that all examples given are not based on unilateral declarations by States but on the use of collective non-recognition through international institutions.

Further example of this is given in the cases where international organizations have refused accreditation to the delegates of governments originated from coups. He admits however that this is not necessarily a sign of democratic governance but of what he calls an issue on the legitimacy of origin of these governments[118].

He proceeds to argue that there are two distinct moments where legitimacy must be observed, one is on the origin of the government and the other is when it exercises power.[119] Although rare, he argues that non-recognition through exercise is possible and that the disqualification of South Africa due to its Apartheid policy is an example of it.

It is important to note that when D'Aspremont talks about the concept of legitimacy he gives it the same meaning of previous legitimist doctrines and of other doctrines of recognition. This is not a classification of legitimacy in a political sense, but a direct association with the legal capability of acting on a State's behalf. He claims that *"If a new government secures international recognition and its delegates are accredited within international organizations, it qualifies as the legitimate representative entitled to speak and act on behalf of the state*."[120] And *"International law is only concerned with the way in which a government's legitimacy is perceived by other international authorities."*[121] There is therefore no doubt that his argument is one pertaining to the legal sphere.

And this leads us to perhaps one of the biggest contradictions of his proposition. The separation of legitimacy of exercise and of origin creates the possibility of a power vacuum in which no entity would represent the State. If D'Aspremont's claim is correct than it would be possible to disqualify a non-democratic government without

[118] This is especially true because the representatives of non-democratic governments such as Kuwait and Afghanistan were accredited, the fundamental reason for the denial of those not accredited being their illegal origin.
[119] D'ASPREMONT, op cit. p. 894
[120] Ibidem. p. 880
[121] Ibidem. p. 883

there even being contention for the title by a disputing authority, this is, by itself, incompatible with a State's right to personality.

This however is not the only objection with the arguments of the Democratic Legitimacy Theory. Both D'Aspremont and Franck take a manifest position that Democracy has become the only accepted form of government[122]. They may be correct in the conclusion that governments have always resorted to popular will as a source of their legitimacy, however this is not equal to democracy, as several authoritarian governments have done the same[123]. Even the Hobbesian leviathan draws his legitimacy from the social contract, which is by all means an exercise of the will of the people which binds it to an absolutist ruler.

A justification of rule through popular will does not equal "*The advent of democracy as the sole acceptable political regime*", in fact if anything the last decade has presented a series of crisis to the democratic model that has left many disillusioned, including within the "*older democracies*" that Franck claims should act as the leading examples to the rest of the world.

The Theory of Democratic Legitimacy also falls into the dangerous trap of an Eurocentric interventionist model. The idea that Western democratic institutions might be used as a requirement for granting governments the right to act on behalf of their States is incompatible with a plural global society, even more so than the previous constitutional legitimacy theory. This view goes beyond demanding the existence of rule of law and demands a specific model for this rule of law.

This leads to another problem. As we have seen in the first chapter the countries in which coups and civil wars and more prevalent are not the developed Western Powers. Most are either Latin-American, Middle Eastern, African, or located in South-East Asia. These countries social structures however are widely different, and while maybe Latin American countries may find themselves more adapted to more Eurocentric models the same would not necessarily be the case in the Islamic or South-East Asian worlds. The radically different cultures and power structures between these countries creates an even greater obstacle for a doctrine which is formulated following a system

[122] FRANCK, op cit. p.46-47 and D'ASPREMONT, op cit. p. 884-885
[123] D'ASPREMONT, op cit. 884 and ROTH, op. cit. p. 38

with no correspondence to the local customs and institutions of the nations where the problems of recognition usually occur.

It also falls short in other practical situations. Although some have defended the advent of the Democratic Coup D'état[124] even they admit that, effectively, the democratic appraisal of the regime only takes place after an eventual victory and the organization of new elections. Until then the contesting power has no such a thing as a real claim to democratic representation.

Take the case of Venezuela. Many of the States that have denounced Maduro claim that his government is an authoritarian dictatorship, and because of this have chosen to recognize Juan Guaidó. Guaidó however can make no claim to any form of democratic legitimacy. His only "democratic test" is his election as a congressman, not even having competed in presidential elections. Therefore, even if one takes the position that Maduro's election was fraudulent it is still impossible to claim that this would give every opposition leader a claim to be the representative of the popular will.

Although the doctrine might be useful when an established democratic regime is under attack by authoritarian forces such as in the case in Haiti the same is not necessarily true when the incumbent power is the authoritarian regime and the contesting forces are still unproved in their claims of representing the popular will.

However, despite of all its problems, the doctrine should not be taken lightly. The last decades have given several examples of democratic governance being used to settle disputes of governmental legitimacy, and in the case of Sierra-Leone even leading to armed intervention by foreign powers. The examples shown before are a strong argument of the relevance of this approach in contemporary international relations.

The fact that this doctrine has seen far more action within the scopes of collective rather than individual recognition also raises a series of questions. Could the collective practice within international organizations eventually constitute a source of international law? Could member States that have voted following this doctrine within the Security Councill act in a different manner when according individual recognition? The lack of clear concepts on recognition also presents an obstacle to the practical effects that might come from the practice of collective/individual modes of recognition.

[124] VAROL, op. cit.

Although the Democratic Legitimacy Doctrine is not able to claim to be to be "*a sine qua non of governmental legitimacy*"[125] it certainly must be evaluated amongst the possible policies of recognition undertaken by States.

[125] ROTH, op cit. p. 417

Chapter V

Conclusion: What Are we Trying to Achieve?

The title of this work is "Unbundling Governmental Recognition". So far we have delved in the complexities of both governmental and State recognition, its lack of a standard definition, the manner in which Sates practice governmental recognition while simultaneously claiming not to engage with it, how political elements might completely change the legal outcome of recognition debates and finally some practical doctrines to the problems of recognition. Despite all of this, we are yet to finish unbundling it. Churchill's question still remains, what is the defining formula?

By this point it must be clear to the reader that the term "recognition" by itself is meaningless. Beyond the fact that it deals with matters of international personality and that it must follow general rules of international law nothing comes of it. Shaw claims that:

> "*Recognition is an active process and should be distinguished from cognition, or the mere possession of knowledge, for example, that the entity involved complies with the basic international legal stipulations as to statehood. Recognition implies both cognition of the necessary facts and an intention that, so far as the acting state is concerned, it is willing that the legal consequences attendant upon recognition should operate*." [126]

It seems however that this may not be entirely true. He is correct, recognition is an active process, and it does imply both a step of cognition of facts and later an emission of judgment of whether or not to recognize. The problem however lies with the matter of legal consequences.

What are the legal consequences of recognition? We have already seen that when used in an exclusively political manner recognition does not and must not entail legal consequences, be it in the matter of States or Governments. To do so would not only hinder the solution of legal problems, but also be incompatible with the very nature of international law, as a matter so essential as legal personality, be it its creation or exercise, cannot be said to be at the behest of the political interests of the recognizing parties.

[126] SHAW, op. cit. pp. 376

Therefore, although political recognition exists it is not that which international scholars and manuals concern themselves with. This shape of recognition lies within the halls of politicians and diplomats, not of law. Were it a political act with legal consequences the doctrine of effective control would be pointless and Taft's judgment a mistake. It is not the political action that determines the legal outcome, both remaining independent from each other.

We must then answer, is governmental recognition a legal act, is it an act (political or legal) which may only occur under certain conditions established by international law or is it something altogether different?

To answer this, it is necessary to examine the common elements of the doctrines that have been previously demonstrated. All of them establish sets of criteria for a State to be able to give his recognition. Whether one takes the position that what matters is an assessment of effective control or whether it is the presence of a legitimist theory (be it democratic or not), in all cases the procedure is centred upon an examination of fact.

Despite no approach being entirely sound, all of them concern themselves with the cognition step of the procedure, and none seems is compatible with a State = upon examining the necessary elements for the granting of recognition, decides not to do so. This means that there are two options. Either there exists an obligation to recognize, or the whole concept or recognition is nothing more than a process of cognition, which we nominate as "recognition" to comply with the general rules of international law so that it be applied by consent.

Take both the cases of Haiti and of Egypt. Both use a radically different approach to assess which authority is the ruler of a determined State. However, although there might a dispute as to which method should be the general procedure to determine who is the government, there is no question that upon applying the method the result is evident, regardless of the recognizing State accepting the result or not.

Of course, a realist might claim that it would never be possible to impose the recognition if the recognizing party refused to acknowledge it. But the fact is that the same procedure must occur not with one, but with all States of the international community, and if for some reason the government in question is refused by all, then what we have is a discussion on the criteria for the process of cognition, and not a two-step

program in which the second one is discretionary. That window set by the "imperative norms of international law" is in fact much narrower than it might at first seem.

Although the idea of abolishing recognition as a concept in favour of cognition might seem a step too far, after all as Brownlie says *"it is essential to accept the distinction between the cognition of the fact that some entity is in existence, calling for some characterization, and the nature of the consequent legal and political characterization which may be made."* the current meaning of recognition has been lost to legal scholars, and while the term is used in the same manner as it has been in the previous decades there will be continuous confusion in the solution of concrete cases.

See, once again, the case of Venezuela. All the doctrines that have been shown here clearly indicate that President Maduro is the official representative of the State of Venezuela. He fulfils the effective control requirements, he has maintained the status quo of the Estrada doctrine, his government has followed a constitution established in 1999, and even the claims of democratic legitimacy are enough to support Guaidó's claim over him, at maximum beginning a discussion on legitimacy of exercise of the current government as argued by D'Aspremont, but not legitimizing the other claimant. Despite all of that, a series of countries has claimed not to recognize Maduro's government, presenting no legal basis for it. This cannot be seen as an element of international law and cannot be used by courts as indicative of any normative source. These non-recognizing States may denounce Maduro to their hearts content, however as we have seen through this work, the legal consequences must be set aside from partisan politics.

It is said that Napoleon once claimed "What is the government? Nothing, unless supported by opinion." This is true. However legal and political opinions live in different realms, and as legal scholars if we have the objective of solving cases of governmental recognition than it will be necessary to unbundle the concept and see it for what it is. A process of cognition of facts in which the discussion shall pertain to how these facts should be evaluated, regardless of the declarations of the recognizing parties.

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