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THE ESTRADA DOCTRINE AND UNITED STATES POLICY

CHARLES L. COCHRAN*

When the government of a state is overthrown by illegal or unconstitutional means and a de facto government accedes to power, the issue is raised with outside states as to whether or not the new regime should be accorded recognition. And, if the decision is made to extend recognition, how should it be accorded?

Most states when considering whether or not to extend recognition have applied political considerations as well as legal criteria. There is little uniformity in the practice of recognition since states are free to apply the criteria in a way that most effectively advances their own self-interest. Thus recognition is held to be essentially a political and not a legal act, or rather, a political act with legal implications. Consistent with the view that recognition is a political act is the generally accepted position that there is no legal duty to recognize a new regime.

As a result, attempts to formulate a common basis for the recognition of de facto governments have been very limited both in their scope and their success.¹

Nevertheless, a proposal put forward in 1930 by H. E. Genaro Estrada, the then Secretary of Foreign Relations of Mexico, for a uniform policy is making an impressive resurgence. His proposal, known as the Estrada Doctrine, made little impact outside Mexico for several decades except for its being generally acknowledged as an unusual approach to the problem.

The Estrada Doctrine was originally put forward by the Foreign Minister of Mexico in reaction to the heavy-handed policies of recognition employed by various administrations in the United States. His doctrine

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criticized the practice of recognition as an insult insofar as it implies that judgment may be passed by other countries upon nations in which a coup or revolution takes place. He wrote:

It is a well-known fact that some years ago Mexico suffered as few nations have, from the consequences of that doctrine, which allows foreign governments to pass upon the legitimacy or illegitimacy of the regime existing in another country, with the result that situations arise in which the legal qualifications or national status of governments or authorities are apparently made subject to the opinion of foreigners.²

Accordingly, the government of Mexico instructed its Ministers that the Mexican government would not issue declarations or grants of recognition since that government regards it an insulting practice that offends the sovereignty of other nations. Governments assumed an attitude of criticism when they decided, favorably or unfavorably, as to the legal qualifications of foreign regimes.³

Estrada announced that Mexico would simply maintain or withdraw its diplomatic agents as it deemed advisable concerning the governments in question. Recognition in such a practice ceases to be an instrument of policy since the decision is reached automatically. The Estrada doctrine does this by treating revolutionary or unconstitutional changes of government no differently than normal governmental changes. That is, irregular changes are treated as a normal change of leadership within the government, not as a change of the government itself. Mexico hoped that other governments would follow its lead but only Panama and Nicaragua adopted that general policy until very recently.

The United States, in contrast, has usually placed considerable emphasis on the use of recognition as an instrument of policy. The traditional position of the United States with respect to the recognition of *de facto* governments in the Hemisphere has included legal criteria as well as political considerations. In recent years the considerations have included at least the following.

1. Whether the government is in *de facto* control of the territory and in possession of the machinery of the state;
2. Whether it is administering the government with the assent or consent of the people, without substantial resistance to its authority, i.e., whether there is public acquiescence in the authority of the government; and

3. Whether the new government has indicated its willingness to comply with its international obligations under treaties and international law.⁴

However, an examination of the United States practice of recognition in this Hemisphere, beginning in 1968, reveals that none of the above criteria has been applied, and instead the government has followed the Estrada doctrine of "continuing relations" with the new *de facto* government. Since 1968 there have been ten irregular changes in government in six different Latin American states.⁵ In each case the Department of State issued a statement during its weekly press conference in the aftermath of a coup in which it was stated that diplomatic relations were continuing and that the question of recognition did not arise.⁶

The new policy has a great deal to recommend it, not the least of which is the realization that the supposed advantages of the skillful use of recognition prove to be very marginal when weighed against the potential costs.

The major argument in support of the use of recognition as an instrument of policy usually is that the extension of recognition at a timely moment may help to stabilize a friendly *de facto* government, while the prolonged withholding of recognition might weaken an unfriendly one by helping to isolate it. At the very least, so the argument runs, it can obtain concessions from hostile governments. For example, in Latin America the United States has attempted to extract assurances that military *juntas* would set a timetable for returning to a popularly elected government in the future, and assurances that the new government would respect the international obligations of the state.

The negative aspect of such a policy is that a quick extension of recognition in an effort to stabilize a regime has the unfortunate effect of identifying the United States with that regime, which does not necessarily serve our interests. This is particularly true if the regime involved is an authoritarian conservative government. The result is often to arouse suspicions that the United States, at minimum, encouraged the coup and perhaps even aided it. A prompt recognition would feed those suspicions.

Perhaps more importantly, however, the withholding of recognition has not been demonstrably successful in determining whether an unfriendly government lasts or not. And, at least in Latin America, the United States government eventually recognizes the *de facto* government, no matter how unsuccessful the attempts to gain concessions may have been. And even if concessions have been obtained, there is, of course,

no guarantee that the concessions would be honored after recognition is granted.

And finally the policy of nonrecognition of a government with whom we disagree serves to isolate the United States as much as the non-recognized government. Thus communications between two governments are made even more difficult at the very time when every effort should be made to facilitate an exchange of views. The lack of communications may cloud reality and increase mutual misunderstanding. At the same time it encourages a policy of avoiding the reality of the new situation, which is obviously damaging to a rational foreign policy.

Although the traditional concept of recognition has been that recognition does not imply the approval of a foreign government, the use of recognition in an effort to directly serve foreign policy interests militates against the concept of recognition as being neutral. Not surprisingly the United States government has been plagued by the handicap of having its recognition policy identified with a connotation of approval or disapproval.

The United States Senate even felt compelled to deny the implication in a resolution in 1969 which stated:

. . . that it is the sense of the Senate that when the United States recognizes a foreign government and exchanges diplomatic relations with it, this does not of itself imply that the United States approves of the form, ideology, or policy of that foreign government.⁷

Technically that is correct and merely repeats acceptable theory, but realistically the association of approval with recognition is unavoidable when recognition is used in an effort to further foreign policy goals.

The adoption of the Estrada Doctrine does more to end the confusion surrounding the connotations of recognition than any Senate resolution ever could. It is ironic that the policy of "continuing relations" and treating irregular changes of governments as merely changes in personnel, and not as a change in the government itself, has more advantages than the use of recognition on a case by case approach. As Estrada suggested, a government should not have its legality subject to the judgment of foreigners.

The policy and its enthusiastic endorsement by Latin American governments signals the decline of the importance of recognition as a political act on the international level.⁸ This would appear to be a step forward in both law and diplomacy.

NOTES

¹Dr. Carlos Tobar, the Foreign Minister of Ecuador, was one of the main proponents of a policy of automatic non-recognition of governments which came to power by revolution. This doctrine was incorporated into the General Treaty of Peace and Amity of 1907. Text of the treaty in 1 Hackworth, *Digest of International Law* 186; 2 *A.J.I.L. Supp.* 229 (1908). The Emergency Advisory Committee for Political Defense of the Continent, meeting in Montevideo in 1943, adopted a resolution which recommended that the American Governments which had declared war on the Axis Powers, or had severed relations with them, withhold recognition from new governments instituted by irregular means until consultations among themselves could take place to determine whether the new government complied with the inter-American commitments for the defense of the Continent. 10 *Dept. of State Bulletin* 20 (1944). In 1965, Resolution XXVI was included in the Final Act of the Second Special Inter-American Conference held at Rio de Janeiro, Brazil. The resolution provides for an informal procedure of consultation whenever the problem of the recognition of *de facto* governments arises. See Res. XXVI, Second Special Inter-American Conference, Rio de Janeiro, Brazil, November 17-30, 1965, Final Act (Pan American Union, 1965), p. 38; 60 *A.J.I.L.* 460 (1966).

²*Boletín Oficial de la Secretaría de Relaciones Exteriores, Estados Unidos Mexicanos*, Sept. 1930, Vol. LV, No. 9, p. 9, as translated in 25 *Am. J.Int'l. L. Supp.* 203 (1931).

³*Ibid.*

⁴Whiteman, *Digest of International Law* 72 (1963). Other factors considered as appropriate include "the existence or nonexistence of evidence of foreign intervention in the establishment of the new regime; the political orientation of the government and its leaders; evidence of intention to observe democratic principles, particularly the holding of elections; the attitude of the new government toward private investment and economic improvement." *Ibid.* p. 73.

⁵Forcible changes in government occurred late in 1968 in Panama and Peru; in 1969 in Brazil and Bolivia; and in 1970 in Ecuador, Argentina, and Bolivia. Argentina and Bolivia both experienced coups once again in 1971. And Ecuador had a forcible change in February 1972.

⁶The closest the government came to a statement of recognition came in the case of Bolivia in 1969 when a United States note "stated our wish to reciprocate the Bolivian Government's intention, expressed in its note, to continue and strengthen the friendly relations that exist between the two countries. This action was taken after consultation with the other American Republics pursuant to Resolution 26 of the 1965 Rio Conference." 61 *Bulletin* 378 (1969). Ordinarily these statements have not been carried in the Department of State Bulletin since late 1968. More typical was the statement of John F. King of the State Department to the press after the change in the military junta in Argentina in 1970 when he said "that the change of leadership does not give rise to a question of recognition: as there is no basic discontinuity in the military Government of Argentina." *The New York Times*, June 13, p. 62 (1970).

⁷1st Congress, 1st session S. Res. 205, 1969.

⁸At least the following Latin American states have begun using the Estrada Doctrine in the last several years: Brazil, Chile, Ecuador, El Salvador, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela. It is likely that it will be universally applied throughout the Americas in the near future.