RECOGNITION OF GOVERNMENTS SHOULD NOT BE ABOLISHED

By M. J. Peterson*

Recognition of governments serves three functions in the international legal system: ensuring that only regimes clearly deserving such status are accepted as governments of states, assuring new governments that others will respect their status, and informing courts, government agencies, and nationals of recognizing states that a particular regime is in fact the government of another state. Lately, some statesmen and a respectable number of legal scholars have come to view recognition of governments as causing more difficulties than it is worth as it is now used. In particular, they suspect that decisions whether to recognize a new regime often depend more on its character or policy than on its ability to meet the objective test of effectively ruling its state, and they believe that current doctrine on the effects of recognition or nonrecognition creates unnecessary confusion. As the late Judge Baxter wrote in 1978:

[A]n institution of law that causes more problems than it solves must be rejected and replaced by working arrangements that are flexible and realistic. The partial withdrawal of law from this area of international relations will facilitate the maintenance of relations with states in which extraconstitutional changes of government are taking place, and that in itself is a good thing.¹

Recognition of states is not at issue here. Those who advocate abolishing recognition of governments agree that recognition of new states will remain necessary as long as the international system lacks central institutions capable of determining for all when a new state has emerged. In fact, most of the arguments for abolishing recognition of governments rest on the assumption that recognition of states will remain and provide the framework within which changes of government can be handled without resort to recognition.

To assess the validity of arguments in favor of abolishing recognition of governments, it is necessary to understand why that legal institution has fallen into such disrepute, and to determine whether other "working arrangements" would perform the three functions mentioned above at least as well as does recognition of governments.

I. THE ROOTS OF DISREPUTE

International law on recognition of governments has always dealt with two main topics: (1) the circumstances necessitating and the conditions permitting

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recognition of a new government, and (2) the effects of granting or withholding recognition for the new government, the deciding government, their respective states and nationals, and third parties. Developments in both areas have brought the legal institution into question. The narrowing of effects has encouraged the belief that recognition of governments no longer performs any useful functions in the international system. The apparent arbitrariness of many recognition decisions has made it seem a political game that creates more confusion than its useful functions are worth.

The Changing Effects of Recognition

Although 19th-century state practice maintained great distinctions between recognized and unrecognized governments, legal doctrine contained principles that could be used to criticize their extent. First, it was universally accepted that the legal personality of the state remains undisturbed by any change in government, no matter how legal or illegal in domestic law. Thus, changes of government did not affect the state's rights and duties under international law. Nineteenth-century discrimination against unrecognized governments meant, however, that a state could have difficulties fulfilling its duties or (more frequently) exercising its rights. Yet as early as 1896, legal scholars were arguing that this creates an anomalous situation that should be corrected either by abolishing recognition of governments or by narrowing its effects so that state rights and duties would not be disturbed. Second, except among the members of the Quadruple Alliance in the years 1815–1830, and among certain Western Hemisphere governments later in the century, it was generally conceded that each state (or, in the more democratic formulations, the people of each state) has the right to establish whatever government it wishes. This doctrine, though often ignored, gave powerful impetus to arguments that the origins of a government were far less important than its ability to control the state effectively and to win or extract obedience from the people. Since recognition became an issue only when regimes came to power in ways contrary to the constitution, laws, or customs of the country affected, this was a powerful argument against it. Though a legal succession could be interpreted to mean that the recognition granted to one government was handed to its successor along with the rest of its legitimate claims to power, the idea that origins should be irrelevant won wider acceptance as the principles of self-determination and nonintervention gained adherents.

Three 20th-century developments gave impetus to basing practice on these 19th-century arguments. First, as nonrecognition came to be used to express ideological dislike for particular new governments, periods of nonrecognition lengthened. The maximum length increased from 3 years in the 19th century to 16 years during the interwar period, and 30 or more in the postwar period (the record being the Portuguese refusal to recognize the Soviet Government from 1917 until the Portuguese Government itself was overthrown in 1974). The number of ideologically based nonrecognitions also increased dramatically after 1917. Once begun, these ideological nonrecognitions were often

\[1\] A. Rivier, Principes de Droit des Gens 285 (1896).
hard to reverse. Large or important segments of opinion in the nonrecognizing state—and even in the target state—came to view any change in attitude toward the new regime as highly significant. Governments would be tempted, therefore, to deal with particular issues or crises that arose on an ad hoc basis, expanding the content of "informal" or indirect contact to do so.

This tendency was reinforced by a second development. In the late 19th and early 20th centuries, governmental activity expanded into such fields as transport, regulation of economic activity, direction of all or some economic enterprises, health, scientific research, and social services heretofore left largely to private initiative. It soon became apparent that international cooperation in these fields, as in more traditional fields of government concerns like regulation of international trade and financial transactions or suppression of crime, meant that governments had to stay in more constant and more varied contact with one another. The need to maintain contact encouraged the definition of many activities as routine or administrative matters separate from political decisions like entering into formal diplomatic relations with another government. This alone, but even more so when combined with protracted nonrecognition of a new government, widened the range of low-level contacts.

Third, there was a great expansion of multilateral relations, whether in the form of conferences or of standing intergovernmental organizations. This expansion, which stemmed in part from the need to heighten cooperation in nonpolitical fields and in part from efforts to prevent a repetition of World War I by creating new mechanisms of political cooperation, reinforced the effects of the second trend, and made avoidance of political contact with unrecognized governments more difficult. In most multilateral undertakings, decisions about who could participate were made by a simple or (more often) qualified majority of the members. This meant that a government might be forced to consider political matters with another it did not recognize, unless it could get enough other members to agree that the latter ought not to be allowed to participate.\(^3\) In most cases, it could not, which would put it in a position where political discussions could not be avoided and bilateral relations could not always be kept separate from multilateral ones. Though some legal scholars have advocated ending the confusion by requiring all members of an organization to recognize a new government once its delegates are admitted to participation,\(^4\) governments have been reluctant to hand recognition decisions over to others.

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\(^3\) The United States succeeded in maintaining such a majority against seating delegates of the People's Republic of China (PRC) in the United Nations General Assembly from 1949 until 1971; between October 1971 and January 1979 it had to deal with the PRC as a fellow member of the United Nations though refusing to recognize it.

\(^4\) Such a solution has been advocated by H. Lauterpacht, Recognition in International Law 166–69 (1947); T. Chen, The International Law of Recognition 222–23 (1951); J. Charpentier, La Reconnaissance internationale et l'évolution du droit des gens 317–18 (1956); S. Patel, Recognition in the Law of Nations 79 (1959); Chatelain, La Reconnaissance internationale, in 2 La Technique et les principes de droit public 707, 710 (C. Rousseau ed. 1950); Q. Wright, Some Thoughts about Recognition, 44 AJIL 548, 558–59 (1950); Tabata, Admission to the U.N. and Recognition of States, 5 Japanese Annual of International Law 1, 1 (1961); and P. Corbett, The Growth of World Law 67 (1971).
The result of these three developments is a striking change in legal doctrine on the effects of recognition in bilateral relations. In, to pick a date at random, 1890, a government would treat another it did not recognize with great reserve. Diplomats and consuls remained in place, but were instructed to avoid all but the most necessary and informal contact with officials of the new regime. Thus, communications were confined to oral discussion, third person *notes verbales*, or letters addressed to the official by name rather than title. Official ceremonies and receptions were also avoided. Negotiations were usually, though not always, confined to matters affecting the diplomatic or consular missions themselves, the protection of nationals' lives and property, or emergencies requiring immediate action. Though governments differed in the extent of their caution, none concluded the most formal types of agreements with unrecognized regimes, or included political clauses in other agreements. Some even avoided making trade agreements or armistices (using cease-fire agreements between military commanders instead). Even so, heads of diplomatic missions would usually remain at their posts, particularly when the interval of nonrecognition was expected to be short, and did not present new credentials when their government recognized the regime they had been dealing with informally.\(^5\)

By the 1970's, restraint was more an option than a requirement in many areas. An unrecognized government participating in a multilateral organization or conference could not be ignored there. Diplomats and consuls now pursued a wider variety of negotiations and had wider freedom to conclude agreements. Armistices no longer raised any problems. Long-term trade agreements were possible, some made directly with the regime, but more with state-owned enterprises or private associations acting with government approval. Far-reaching political agreements were possible if expressed informally; the 1972 U.S.-China Shanghai Communiqué, a press statement that laid out understandings on a variety of issues—such as the future of Taiwan—and formed the basis of the two Governments' relations until U.S. recognition in January 1979, is the most notable recent example. State visits, such as that of Chinese Premier Zhou Enlai to Ethiopia in 1973 or of U.S. President Nixon to China in January 1972, were not impossible despite all the public ceremony they entail. In fact, the only forms of bilateral contact universally avoided were conclusion of a formal bilateral treaty on political matters; conclusion of a comprehensive commerce, friendship, and navigation treaty (where one had lapsed or never existed between the states concerned); final settlements of claims; and establishment of formal diplomatic relations.\(^6\) U.S.-China relations reflect these developments: the liaison offices were turned into embassies effective with recognition, a claims settlement was reached in May 1979, and the United States extended most-favored-nation status to the Peo-

\(^5\) A change of the sending government would require new credentials even if the new government decided to retain the diplomatic representative sent by its predecessor. *See* I. Pradier-Fodéré, *Cours de droit diplomatique* 388–89 (1881).

\(^6\) *See*, e.g., I. Verhoeven, *La Reconnaissance internationale dans la pratique contemporain* 355–415 (1975).
people's Republic (PRC) in their Trade Agreement of July 1979. If the interval of nonrecognition was short, diplomats still remained at their posts. They would leave if the interval of nonrecognition was extended, if their government recognized a rival claimant as the government of the affected state, or if the new government insisted. Again, new credentials are not issued at recognition; a recognizing government's intent to leave the same diplomats at their posts is assumed when it replies to the new regime's note announcing that it has taken power and wishes to continue diplomatic relations with other governments.

In the 19th century, national courts tended to treat unrecognized regimes as legally nonexistent. The longer nonrecognition of the 20th century, coupled with the faster pace and greater number of international transactions, pushed courts away from these ideas. The courts in civil law states, which asserted greater independence from the executive in this regard, were the first to break with tradition. They began to treat the acts of an unrecognized regime in clear control of its state as acts of state to be given full legal effect if they regulated the activities of persons on their own territory, nationalized property there, involved tasks of routine administration and taxation, provided legal authenticity to documents (as by notarization), or granted nationality to ships, aircraft, corporations, or persons. Courts in common law states adopted similar views somewhat later. In the United States, they changed their views during the long nonrecognition of the Soviet Government in 1917–1933; British courts slowly followed after World War II. Giving full effect to the internal acts of an unrecognized regime that ruled the whole state received specific international endorsement in the Tinoco claims arbitration of 1923.

Similarly, courts in civil law states began the modern shift towards granting immunity from suit to regimes controlling the whole state. Again, the courts of common law states did likewise after some delay. Changes in opinion, reinforced in some countries by the adoption of legislation defining the conditions under which sovereign immunity should be granted and leaving courts to decide these matters without guidance from the executive in each case, have now resulted in the extension of the same immunity from suit to unrecognized governments controlling the whole state as to recognized governments.

7 U.S.-PRC Agreement on the Settlement of Claims of May 11, 1979, 18 ILM 551 (1979); Art. II of the U.S.-PRC Agreement on Trade Relations of July 7, 1979, id. at 1041.
8 E. SATOW, GUIDE TO DIPLOMATIC PRACTICE sec. 21.1–3 (Gore-Booth 5th ed. 1979). If diplomatic relations had been interrupted or a new head of mission sent, then new credentials would be necessary.
11 On the general question of sovereign immunity for unrecognized governments, see T. CHEN, supra note 4, at 140–45; RESTATMENT (SECOND), supra note 9, §65; Lord Atkin's opinion in
should be noted, though, that the general sovereign immunity these regimes and governments enjoy is less broad than that prevalent in the 19th century. Today, sovereign immunity is generally held not to cover suits arising from private acts and commercial dealings undertaken by governments, whereas in the 19th century it covered suits arising from almost any governmental act.

Differences of treatment persist in three fields: a new government’s ability to sue in foreign courts, suits involving governmental acts having extraterritorial effect, and possession of state property located abroad. Nonrecognition is no longer considered an absolute bar to the new regime’s suing in foreign courts, but most courts remain somewhat reluctant to entertain such suits. Courts are far less ready to give extraterritorial effect to the acts of unrecognized governments than to those of recognized governments, and generally insist that there be recognition before the return of state property acquired by a previous government (embassy buildings and bank accounts are the most frequent objects of dispute).

At present, therefore, because the effects of nonrecognition are relatively narrow, many observers believe that recognition of governments seems to make little difference. Advocates of abolition have been quick to argue that its remaining functions could now be performed, perhaps more slowly but no less effectively, in other ways. New governments could have their status accepted bit by bit as the need arose. In multilateral relations they would receive assurance that their status would be respected, at least in large part, by all governments participating in the same organizations and conferences. With the widening of intergovernmental and transnational contacts and the improvement of communications, individual nationals of foreign states and particular organs or agencies of foreign governments could determine for themselves who rules where and act accordingly. Though sometimes advanced simply as a cure for legal confusion, arguments that the few remaining dif-


12 In the 1930’s, a number of European scholars argued that there is no general obstacle to admitting such suits. See J. Spiropoulos, supra note 9, at 130; and E. von Livonius, Der Völkerrechtlicher Anerkennung 15 (1934). European legal codes permit unrecognized governments to sue. British and American courts remain reluctant to entertain their suits. On U.S. attitudes, see Russian Socialist Federated Soviet Republic v. Gibraltar, 259 N.Y. 158 (1924), 2 Ann. Dig. 41; Republic of Vietnam v. Pfizer, Inc., 556 F.2d 892 (8th Cir. 1977), summarized in 72 AJIL 152 (1978); and RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §205 (Tentative Draft No. 2, 1981).

13 See T. Chen, supra note 4, at 145–66; J. Charpentier, supra note 4, at 22–39; RESTATEMENT (SECOND), supra note 9, §113; and RESTATEMENT (REVISED), supra note 11, §205. The extraterritorial acts of recognized governments are not given automatic effect; their effects are limited by rules on conflict of laws.

ferences could be treated better without the notion of recognition have received the most attention from those who feel that the way recognition decisions are made is unnecessarily arbitrary.

The Changing Rules of Decision

There has been only one rule governing decisions on whether to grant or refuse recognition to a new government: the necessary, but not sufficient, criterion is whether a government effectively controls its state. Within the limits of this rule, which forbids recognizing before control is shown or continuing to recognize after control is lost, governments are free to adopt any one of a number of rules for decision. To add to the confusion, most governments have asserted several at once, choosing among them as circumstances warrant.

Between 1830 and 1914, most recognition decisions were based on the effectivist rule: that is, recognition was granted once the foreign government was satisfied that the new government did in fact control its state.\(^{15}\) There were, however, instances of refusal to recognize because the new government had come to power by using extreme violence,\(^{16}\) or because it was receiving too much foreign help to be considered a truly indigenous government.\(^{17}\) More frequent were delays of recognition until the population had given its express approval of the new government in an election or referendum,\(^{18}\) or until the new government had made assurances that it would respect international agreements made by its predecessor.\(^{19}\)

In doctrinal terms, the most striking moves away from effectivism were monarchical and democratic legitimism. In both, new governments that departed from the preferred form were refused recognition. Monarchical legitimism found some use in Europe during the Quadruple Alliance era (1815–1830), but declined and then disappeared rapidly from recognition decisions. Democratic legitimism was invoked in the Americas late in the century. The

\(^{15}\) This is usually called a “defactoist” rule in the literature on recognition. That term distinguishes decisions based solely on whether the new regime controls the state only from decisions based on ideological beliefs about the relative acceptability of different forms of government. The term “effectivist” is meant to provide a distinction between decisions based on control and those based on all other considerations.

\(^{16}\) British, Dutch, French, Italian, and United States nonrecognition of the Karageorgevich dynasty in Serbia, which was brought to power in 1903 by a coup resulting in the deaths of the former King and Queen, several of her relatives, and several ministers of the Government. See 1 H. Smith, Great Britain and the Law of Nations 229–33 (1932).


\(^{18}\) Swiss and United States delay in recognizing the Second French Empire (J. Moore, supra note 17, at 125–126); Austrian, British, German, and Russian delay in recognizing the Third French Republic (Fontes Jus Gentium, Series B: Digest of the Diplomatic Correspondence of the European States, sec. 1, vol. 1, pt. 1, at 164–70); general delay in recognizing the Portuguese Republic in 1910–1911 (1 H. Accioly, Traité de droit international public 182–83 (1940)).

\(^{19}\) See p. 39 infra.
United States had occasionally invoked popular support as a separate criterion for recognition, but the move to democratic legitimism was made first by the five Central American Republics of Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua in an additional protocol to their 1907 Treaty of Peace and Amity. They undertook "not [to] recognize 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."20 This agreement hardly discouraged coups, but the parties applied it among themselves with little controversy. Problems arose when the United States Government, which with Mexico had brought the five Republics to the conference producing the Treaty, cited it to justify its own policy in the area, a policy that combined nonrecognition with armed intervention and other forms of interference.21 U.S. policy took on particularly strong tones of constitutional legitimism under the presidency of Woodrow Wilson, who began U.S. nonrecognition of the Carranza Government of Mexico on these grounds in 1913.

After 1918, recognition and nonrecognition were used frequently to express sympathy for or hostility to a new government. Many of the traditional doctrines defining circumstances in which governments could delay recognition came to be used to cover decisions taken for arbitrary reasons. Constitutional legitimism was again attempted by treaty in Central America between 1923 and 1931,22 and was occasionally asserted by other Western Hemisphere governments. Interest in constitutional legitimism or in insisting upon express popular acceptance has continued to wax and wane in the Western Hemisphere. Such ideas were not as popular in the rest of the world, though the Soviet "Brezhnev Doctrine" can be read to include the idea that non-Communist governments coming to power in states previously ruled by Communists should not be recognized.23 Similar reasoning often lay, at least in part, behind the long, ideologically based nonrecognitions of the PRC Government. The fact of foreign assistance has been used to explain other nonrecognitions, such as those of the Lon Nol or Heng Samrin Governments of Cambodia in 1970 and 1979, respectively.

Under prolonged nonrecognition, legal assertion diverges from reality. As the number and length of prolonged nonrecognitions increased, many legal scholars and some statesmen came to feel strongly that legal assertion must follow reality by being based solely on the fact of who rules rather than on the nature of their rule or how it came about. Governments like the British and Swiss that had been following effectivist policies for some years found themselves joined by an increasing number of others.

21 For fuller discussion, see R. Sharp, Nonrecognition as a Legal Obligation 43–47 (1934).
22 Text of the 1923 Treaty in 17 AJIL, Supp. 117 (1923). This Treaty included the 1907 provisions plus clauses aimed at preventing the organizers of a coup from attaining high office in the Government formed by the postcoup elections.
23 English translation in 7 ILM 1323 (1968).
Recognition of governments was also discredited in many minds by the frequent use by stronger states of a new government’s need for recognition to extract from it promises about its general policy or specific actions. This practice was quite common in the 19th century in those parts of the world where colonization had not occurred or had already ended. Thus, the United States Government used recognition for this purpose quite frequently in the Caribbean and Central America. Acting together, the European great powers traded recognition for a long series of promises from the new Sultan of Morocco in 1908, and for the Chinese Republic’s continued adherence to the treaties providing extraterritoriality for foreign nationals and various privileges for the great powers in 1911. This practice continued in the interwar era, though some of the intended victims were strong or clever enough to resist. Attempts to impose stipulations on the Soviet Union were abandoned quite early. Efforts to impose them on the Turkish and later Chinese Governments ended in favor of the intended victim. Mexican Governments resisted U.S. attempts to secure guarantees of prerevolutionary grants of oil rights. In the postwar period, use of threats not to recognize in order to extract concessions has disappeared, in part because the costs of the policy (the resentment created in the target state) came to outweigh the gains, and in part because more efficacious means to the same end were found. The anti-imperialist cast of postwar discourse has meant, though, that the practice is still criticized as if its revival were likely.

II. The Alternative

Governments disturbed by these practices have reacted in two ways. Some have sought to de-emphasize recognition of governments by lessening the difference in treating legal and extralegal changes; others have sought to end the difference by abolishing recognition of governments altogether. De-emphasis can take two forms: adopting an effectivist recognition policy, or avoiding the question of recognition by defining specific changes of government as “legal” whenever possible.

The first form, adopting effectivist policies, is an old remedy and need not be treated at length here. It does not abolish the distinction between legal and extralegal changes of government, but does specify that reaction to the extralegal changes should be kept within rather narrow bounds. If the new government has control, its status should be acknowledged; if it does not, it should not be given status it does not deserve. Strict adherence to this rule would end the various political uses of recognition and the abuses stemming from them. It would not of itself clarify doctrine on the effects of recognition but, by encouraging governments to abandon lengthy nonrecognitions of gov-

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84 See 1908 FOREIGN RELATIONS OF THE UNITED STATES [hereinafter cited as FRUS] 648–49; 1912 FRUS 68–86, passim; and 1913 FRUS 84–115, passim.

25 On the particular instances, see I G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 250–52, 257–65, 280–81, and 305–07 (1944); S. Maccorkle, American Policy of Recognition Toward Mexico 82–100 (1933); and H. LAUTERPACHT, supra note 4, at 33–36. For a discussion of why using recognition as a bargaining tool is unlikely to recur, see M. Peterson, Political Use of Recognition, 54 WORLD POL. 324, 347–98 (1982).
ernments clearly in control of their states, it would avoid the problems that arise when prolonged nonrecognition has to be combined with contacts of various sorts.

The second form, reclassifying as "legal" a number of changes formerly deemed "extralegal," has been practiced since World War I. In the 19th century, the line between "legal" and "extralegal" was usually assumed to be the same as that between "violent" and "peaceful." Even then, however, it was possible to arrange a partly violent and partly peaceful takeover. In a number of Latin American republics this became a fine art: a group seeking to take over without putting the armed forces in the streets would first persuade (with threats if necessary) the vice-president, or whoever stood to succeed to the presidency, to resign. This official would be replaced by the person the group wished to see in power. After a suitable, but fairly short, interval, the president would be induced to resign, and the new vice-president would succeed. The government would have been changed according to constitutional procedures and without overt violence.26 In countries where the head of state was a ceremonial figure and the real power was exercised by the head of government, a "legal" takeover could be arranged by persuading the head of state to appoint a new head of government, whether elections had been held or not.27 A number of Latin American coups even inspired a doctrine that coups could be ignored for recognition purposes if the newly installed group was a faction of a movement that had previously taken over the country.28

None of these doctrines, not even that assuming a change is legal if the head of state grants formal approval, has won general acceptance or been used in all the actual cases.29 Though there was some interest in creating general rules during the interwar years, governments today have preferred to be vague and to confine their comments to "the question of recognition does not arise" in doubtful cases, without specifying the basis for defining a change as "legal." This second method, too, does not abolish recognition of governments. It does not end the distinction between "legal" and "extralegal" changes; it only moves the line a bit and makes it fuzzier. It does not necessarily

26 E.g., the 1951 coups bringing Ureña to power in the Dominican Republic, Montero in Chile, and the "Acción Communal" group in Panama, as well as two changes of president in Portugal during 1926. 1 G. HACKWORTH, supra note 25, at 231, 243, 269, and 293–95.
27 Mussolini's takeover in Italy, Hitler's appointment as Chancellor of Germany, and changes of premier in Thailand in 1952 and 1953. 2 M. WHITEMAN, supra note 9, at 463–64. Also the 1948 Communist coup in Czechoslovakia, the 1957 Thai coup, U Nu's forced resignation as Premier of Burma in 1958, and the Greek colonels' coup of 1967. Id. at 466 and 548; [1948] 4 FRUS 733–55; 56 DEP't STATE BULL. 750 (1967).
28 E.g., the 1953 accession of the Ocampo junta in Peru, which was drawn from a faction of the "August 1950" movement that had been in power. [1951] 2 FRUS 918–21. President Obregón of Mexico tried to persuade U.S. President Harding to recognize his Government with the same argument in 1921. See his letter dated June 11, 1921, in [1921] 2 FRUS 419.
29 Exceptions noted, inter alia, in 1 G. HACKWORTH, supra note 25, at 306–07; 2 M. WHITEMAN, supra note 9, at 265; Hsiung, China's Recognition Practice, in CHINA'S PRACTICE OF INTERNATIONAL LAW 14, 43 (J. Cohen ed. 1972); and AUSTRALIAN MINISTRY OF EXTERNAL AFFAIRS, CURRENT NOTES ON INTERNATIONAL AFFAIRS 660 (1971).
end political abuse in recognition decisions because the possibility of considering a change "extra-legal" remains. It also has no effect on the confusion about effects of recognition, except as it actually reduces the number of non-recognitions.

A few governments, believing that de-emphasis in any form will not solve the problem, have opted to abolish recognition of governments completely. They propose confining recognition to states and indicating their readiness to deal with any regime that comes to power in another state by maintaining formal diplomatic relations with it.

The elements of a doctrinal argument for this position have been present a long time, but they have been assembled only recently. In the late 1890's, the Swiss legal scholar Alphonse Rivier argued:

It results from the principle of the permanence or identity of the nation, which subsists and remains the same regardless of the changes occurring in the form of its government, that a recognition of the new state of affairs, of the transformation of the constitution, by other nations does
not appear at all necessary.\textsuperscript{30}

Another form of Rivier's argument is that since having a government is a necessary attribute of statehood, questioning the status of the government means questioning the continued existence of the state itself.\textsuperscript{31} A somewhat different approach insists that failure to accept a new government denies the state its right to participate in international affairs because such participation is only possible through a government.\textsuperscript{32} The long-standing tradition that recognition need not be indicated by formal note or public statement, but could be inferred from the establishment of formal diplomatic relations with the new regime,\textsuperscript{33} was also useful to the abolitionists. They could point out that legal doctrine already included a relatively quiet way to indicate acceptance of a new regime's status, and thus could claim that their ideas were less of a break with past practice than they might have seemed at first glance.

The new doctrine sought to fulfill the functions traditionally performed by recognition of governments by equating formal diplomatic relations with acceptance of the new government's existence and status, rather than using the traditional formula that having diplomatic relations is an act equivalent to recognition and recognition means acceptance of the new government's existence and status. Its advocates were quick to adopt and extend an argument first raised by Mexican Foreign Minister Genaro Estrada in 1950:

After a very careful study of the subject, the Government of Mexico has transmitted instructions to its Ministers or Chargés d’Affaires in the

\textsuperscript{30} 1 A. Rivier, supra note 2, at 293.

\textsuperscript{31} Huess, Zum Problem juristischer Unterscheidung völkerrechtlicher Anerkennungsarten, 19 ZEIT- SCHRIFT FÜR VÖLKERRECHT 1, 4–5 (1935); 1 J. de Louter, Le Droit international positif 245 (1920); and Brown, The Legal Effects of Recognition, 44 AJIL 617, 630–33 (1950).

\textsuperscript{32} Charvin, La République démocratique allemande et le droit international, 75 REV. GÉNÉRALE DROIT INT’L. PUBLIC [RGDIP] 1014, 1022 (1971); N. Ulanova, Recognition of States and Governments and Participation in Multilateral Treaties, 1961 SOVIET Y.B. INT’L. L. 321.

\textsuperscript{33} One of the few points of general agreement among statesmen and legal scholars in both the 19th and 20th centuries.
countries affected [by coups in 1930 and 1931], informing them that the Mexican Government is issuing no declarations in the sense of grants of recognition, since that nation considers that such a course is an insulting practice and one which, in addition to the fact that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments, inasmuch as the latter assume, in effect, an attitude of criticism, when they decide, favorably or unfavorably, as to the legal qualifications of foreign régimes.

Therefore, the Government of Mexico confines itself to the maintenance or withdrawal, as it may deem advisable, of its diplomatic agents, and to the continued acceptance, also when it may deem advisable, of such similar accredited diplomatic agents as the respective nations may have in Mexico; and in so doing, it does not pronounce judgment, either precipitately or a posteriori, regarding the right of foreign nations to accept, maintain or replace their governments or authorities.\footnote{Press statement of Sept. 27, 1930, \textit{translated in} 25 \textit{AJIL}, Supp. 203 (1931).}

The precise meaning of the “Estrada Doctrine” was unclear from the start, and the Mexican Government has never fully explained it. Some of its early supporters claimed that it meant to abolish recognition of governments.\footnote{See many of the early Latin American reactions in \textit{INSTITUTO AMERICANO DE DERECHO Y LEGISLACIÓN COMPARADA, LA OPINIÓN UNIVERSAL SOBRE LA DOCTRINA ESTRADA} (1931).} Others argued that it amounted to combining tacit forms of recognition and an effectivist rule for decision.\footnote{Jessup, \textit{The Estrada Doctrine}, 25 \textit{AJIL} 719 (1931); and the Mexican diplomat M. Nervo, \textit{La Doctrine Estrada et la reconnaissance des gouvernements “de facto,” 4 SÉANCES ET TRAVAUX DE L’ACADÉMIE DIPLOMATIQUE INTERNATIONALE} 84–88 (1931). A later acceptance of this interpretation appears in 1 J. VERHOEVEN, \textit{supra note 6}, at 91.} Mexican behavior, notably the long refusal to recognize the Franco Government of Spain\footnote{The Mexicans went even further, continuing to recognize the Republicans as the Government of Spain from 1939 until 1977. \textit{See New York Times, March 19, 1977, at 4, col. 3.}} and a few delays in signaling acceptance of coup-born Western Hemisphere governments, supports the latter view. In any event, the Estrada Doctrine is not prominent in the current discussions. Many states outside the Western Hemisphere have admitted ignorance of it,\footnote{See responses from the Burundi, Danish, Dutch, and Libyan Governments in L. T. GALLOWAY, \textit{supra note 1}, App. A. The Finns view it as a Western Hemisphere doctrine inapplicable to their policy (\textit{id., n.28}), while the Swiss say it applies only in certain circumstances and cite the Spanish and Angolan civil wars as examples (\textit{id., n.33}).} and it has not been mentioned in the arguments of those most interested in abolishing recognition of governments.

The new doctrine—that recognition applies only to states, that all effective regimes are to be accepted as governments, and that this acceptance is to be indicated by continuing formal diplomatic relations with the new regime—was first applied by France and Belgium in the mid-1960’s.\footnote{1 J. VERHOEVEN, \textit{supra note 6}, at 90, credits France with the first use.} Their initial uses were hesitant. In a 1965 Senate debate, the Belgian Foreign Minister ended up having to explain that the policy advocated using tacit recognition, not abolishing it.\footnote{Exchange between Senator Rolin and Foreign Minister Spaak on Dec. 14, 1965, \textit{quoted in} 4 \textit{REV. BELGE DROIT INT’L} 541–42 (1968).}
in 1965 and the Belgian note to the Qaddafi Government of Libya in 1969 stated both that the sending state recognized only states, not governments, and that the note or the continuation of formal diplomatic relations should be deemed the equivalent of recognition. These may have been simply explanations given for the benefit of legislators, the public, and foreign governments unfamiliar with the new doctrine rather than retreats from it. Recent French statements indicate that abolition is the goal. The statement on the 1979 change of government in Iran is typical:

The practice of the French government consists, moreover—is it necessary to recall?—of recognizing States and not governments. France is ready to pursue cooperation with Iran in respect of the mutual interests of the two countries. Its ambassador in Teheran has made contact with Mr. Bazargan. The French government earnestly hopes that the process of normalization will lead to the reestablishment of civil peace and security throughout Iran.

Belgium’s express recognition of the PRC Government was not a retreat from abolition. It was clearly motivated by special circumstances, both the need to disavow relations with a rival regime and Chinese insistence on a statement ending a long nonrecognition that had begun before Belgium adopted its new doctrine.

Today, Belgium and France are the most consistent users of the new doctrine, but it has also been applied at times by the West German, Soviet, Kenyan, Swiss, Italian, and Spanish Governments. The Austrian, Finnish, Irish, Ivory Coast, Portuguese, and Saudi Arabian Governments have professed adherence to it, and some Francophone African states have also used it. However, most governments continue to treat recognition of governments as a separate legal institution even if they are giving it less prominence.

III. The Alternative Evaluated

Those who advocate abolition argue that the traditional functions of recognition would be equally well fulfilled by maintenance or severance of diplomatic relations as the situation required. Their objections to recognition can be summarized under four headings: (1) most changes of government occur so quickly that the question who rules the state is answered almost before it can be asked; (2) the speed and intensity of modern communications allows government agencies, courts, and foreign nationals to determine accurately on their own who actually does rule any state; (3) any attempt to use recognition for influencing a new government’s fate or policy will be ineffective; and (4) political uses of recognition cause more practical difficulties than they

42 83 RGDP 808 (1979).
44 L. T. Gallaway, supra note 1, App. A and notes thereto.
45 I J. Verhoeven, supra note 6, at 91, notes that Senegal and Madagascar follow it.
are worth by ignoring reality. All of these arguments have received sympathetic responses from governments, many of which have adopted effectivist policies or reduced the publicity they give to questions of recognition.

There are, however, circumstances and considerations that make outright abolition undesirable. In two sets of circumstances, first, the relatively uncommon one of an extended civil war and second, the quite common one of a lack of diplomatic relations between two countries, there is need for a mechanism allowing explicit statements about a new government's status. The need for consistency and clarity in legal doctrine also makes outright abolition less desirable than it appears at first glance.

To begin with the rarer situation, although most changes of government are accomplished relatively quickly, some are not. They may be prolonged because a group unable to accomplish a coup chooses the more lengthy tactic of beginning its antigovernment struggle in the countryside, because a group that thought it could accomplish a coup does not succeed and turns instead to waging a wider struggle, because a government widens the struggle to maintain its position against challengers, or because a coalition that overthrows a government falls apart and rival factions contend for power. In any of these situations, there may be periods when two or more groups have equally plausible claims to be the government of the state. Traditionally, international law has dealt with this problem by resolving doubts in favor of the previously established government for as long as possible.

There often comes a time, however, when this delaying tactic cannot be used any longer. Government agencies, courts, and nationals acting on their own might decide at about the same time which government deserves acceptance, but there is a potential for confusion and contradictory decisions that can be avoided if all follow foreign ministry guidance. If the former government has disappeared and the struggle is between rival factions, the likelihood of divergent conclusions is greater and coordination therefore more important. Admittedly, such situations are infrequent, and it can be legitimately objected that legal doctrine should not be made on the basis of rare cases. However, they have occurred often enough that, given the rise of mass participation in politics and of heated ideological contention, they can be expected to recur in the future. Thus, legal doctrine must take them into account. Even L. Thomas Galloway admits as much when he notes that should questions of status arise that a court cannot resolve on its own, it will seek guidance from the State Department. 46 Though he uses this point as an argument for abolishing recognition of governments, one could as easily view it as an argument for retaining it.

The more common circumstance is lack of diplomatic relations between two governments. Most governments cannot afford to maintain diplomatic missions in the capitals of all 170 independent states of the world. Instead, they send missions to neighbors and to more distant states of particular importance to them, and deal with other states through these missions or through missions to international organizations. Diplomatic relations may also be lack-

46 L. T. GALLOWAY, supra note 1, at 152.
ing because they were severed before the new government came to power. In the past, severance of diplomatic relations was uncommon except in case of war between two states. Displeasure might be indicated by recalling the head of the mission for extended "consultations," but only rarely would the whole mission be withdrawn. Today, however, severance of diplomatic relations is more common; many governments find it an effective gesture because it appeals to excited populaces and is not very hard or costly to make.47 In either situation, acceptance of a new government cannot be indicated by continuing what does not exist; the foreign government has to indicate its attitude by some statement.

Several examples will indicate the complications attendant on the alternative to recognition when diplomatic relations are absent. The Mexican Government caused great confusion when it recalled its ambassador to Brazil a few weeks after the military coup that ousted João Goulart in March 1964. The recall was part of a routine personnel change in the Foreign Ministry, but Mexican statements on the matter were so confusing that neither the Brazilians nor third governments were certain of Mexico's attitude until the following September.48 Most African governments had to comment on the 1974 Portuguese coup because they had earlier severed diplomatic relations with Portugal in response to an OAU resolution that called for such action until Portugal conceded independence to its African colonies. They did not reestablish diplomatic relations until the new Portuguese Government showed that it would accept decolonization.49 In 1975, the Khmer Rouge Government of Cambodia insisted that France (among other powers) close its Embassy in Phnom Penh. When the Vietnamese imposed a Government of their own in 1979, the French had to explain their attitude toward the new regime:

Recent events have complicated the situation. The establishment of diplomatic relations could possibly be envisioned only if there clearly existed a Khmer government effectively exercising power over the whole country, and that apparently is not the case. Moreover, it is noteworthy that neighboring countries, especially the members of the Association of Southeast Asian Nations, have not shown any haste in this regard. In these conditions, a French initiative at the present time could only be premature.50

In such situations, a government wishing to make its position clear has to make some statement—even if only to representatives of the new government. The statement might take the form of a joint communiqué announcing the establishment of diplomatic relations, or it might be a public statement that the new government is the effective ruler of its state.

In addressing the matter of precision in legal doctrine, it must be admitted that the current state of affairs regarding relations with unrecognized governments is not satisfactory. Advocates of abolishing recognition of govern-

47 Compare the number discussed in the Chronique section of the RGDP in 1930 and 1976.
49 79 RGDP 525 (1975).
50 1979 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 983.
ments argue that the only way to cure the confusion is to get rid of the institution permitting it, and they would seem to have a good case. The state of United States-China and United States-Cuba relations in 1974 was such that it was hard to remember that the United States had recognized the Cuban Government in 1959, but had yet to recognize the Chinese Government. 51 Diplomatic relations with the Cuban Government, which had been severed in January 1961, were conducted through third states, Czechoslovakia representing Cuba in Washington and Switzerland representing the United States in Havana; at the same time, the United States and China conducted their relations through "liaison offices" given diplomatic status by both sides. 52 High United States officials visited China and conferred with the Chinese on many issues, including the great political questions of the day, while direct Cuba-United States contacts were limited to UN headquarters and secret sessions at airports. 53 Agreements with China, though made by the very informal methods of joint communiqués or government-encouraged understandings between Chinese state corporations and foreign private companies, touched on the future of Taiwan, policies in Asia, and trade; new agreements with Cuba included only an exchange of notes on refugees in 1965, an antihijacking pact in 1973, and a maritime boundary agreement provisionally in force since 1978. 54 Both trade and travel contacts with Cuba remained prohibited, while with China limited trade and travel were allowed. 55 The only sure indication of the two Governments' respective positions came in the courts. Being recognized, the Cuban Government and its agencies were able to sue in U.S. courts; being unrecognized, the Chinese Government could not. 56

It is true that abolishing recognition would end the sort of confusion that occurs when relations with an unrecognized government become friendlier than those with a recognized one, but the same could be accomplished by basing recognition decisions solely on control. Any time such confusion has arisen, recognition has been withheld for political reasons. If recognition had been granted when control was shown, confusion about who was or was not recognized would not have arisen. Abolishing recognition would not end the expression of different degrees of friendship or hostility among governments. Recognition was never a guarantee of friendly relations; it simply indicated

51 A number of scholars and officials who ought to know better have been confused on this point. See, e.g., Stepan, U.S.-Latin American Relations, 58 FOREIGN AFF. 659, 689–90 (1980); L. Silberman (former U.S. Ambassador to Yugoslavia), No Recognition for Cuba and Vietnam Now, New York Times, April 25, 1977, at 31; and (at least with the headings supplied in the published version) then Deputy Secretary of State Warren Christopher’s address, “Normalization of Diplomatic Relations,” Dept’t of State Press Release No. 269, June 10, 1977.

52 The text of the communiqué establishing the liaison offices appears in 67 AJIL 536 (1973). In the United States, the grant of diplomatic status required special legislation, which can be found in id. at 762.


54 DEP’T OF STATE, TREATIES IN FORCE ON JANUARY 1, 1981, at 45–46.

55 Compare regulations governing trade, financial transactions, and travel in Title 22, pt. 52.72 with those in Title 33, pts. 500, 505, 515, and 520 in the 1975 Code of Federal Regulations.

that no doubts about the other government's status stood in the way. In fact, it is possible to combine recognition with an absence of virtually all relations. The British recognized the Hoxha Government of Albania in 1945, but have never established diplomatic relations or carried on much trade with it.\footnote{1 M. Whiteman, supra note 9, at 226; the 1980 Europa Yearbook includes no Albanian mission in London or British mission in Tirana in its lists of diplomatic missions accredited to each Government.}

In certain respects abolition would create more confusion than it would cure. The idea that recognition applies only to states\footnote{This is not a new idea; several supporters of the Estrada Doctrine advanced it in 1931. See Jessup, supra note 36, at 721.} rests in part on a notion that recognition should apply only to subjects of international law, and not to their agents. However, the term "recognition" has a much broader meaning in international law. As in domestic law, "recognition" means taking formal cognizance of and giving legal effect to the existence of any number of situations, whether the emergence of a new entity (a state, a rebel group deserving belligerent status), a particular circumstance (war, foreign military occupation of a given territory), or a potentially controversial fact (claim to sovereignty over territory, existence of a foreign court ruling relevant to some case). If viewed in this broader perspective, there is nothing objectionable about applying recognition to the emergence of new governments.

Questions about the status of, communication with, and approval of new regimes are logically separate, but have tended to become intertwined. Advocates of abolition argue that current doctrines allowing governments great discretion about whether to recognize permit, if not encourage, identification of acknowledging status with approval, while communication is treated separately in all the informal ways previously discussed. They propose breaking the status-approval link by forming a link between status and communication. Under their alternative, status would be assumed once a government entered into formal communication (established diplomatic relations) with the new regime. Questions of approval would be left aside. This whole proposal rests on beliefs that governments must remain in as constant formal contact as possible and that the need for communication will overcome any disapproval of the new regime. Certainly, the expansion of "informal," "nonpolitical," and indirect forms of intergovernmental communication in the course of the 20th century supports their ideas.

Yet, on reflection, the situation seems far less simple. Creating a link between formal communications and the granting of status does not banish the possibility that questions of status will get mixed up with approval or disapproval of the new regime. Governments have long used severance of diplomatic relations to express strong disapproval of the current policies or postcession political evolution of other governments. As noted earlier, this practice has become more common in recent years. It seems unlikely that such connections between communications and approval will be given up. Yet separating them will be necessary if linking status to formal communications is to break all links between approval and acceptance of status.
Then, too, the link between formal communications and acceptance of status rests on an inaccurate assumption and creates unnecessary complications. Such a link assumes that governments communicate mainly through diplomatic missions and cannot get along without them for long. This was largely true in the 19th century, but is not true today. Multilateral organizations, transgovernmental channels between agencies charged with similar tasks, contacts with state-owned enterprises or trade bodies, and various sorts of informal envoys all provide alternatives to diplomatic missions, as do the services of third parties. Many of these methods are cumbersome and ill-adapted to the discussion of important political issues, but they mean that governments are not faced with a choice between formal diplomatic relations and no contact at all. Moreover, the formal communications-status link does not work when diplomatic relations are absent. Finally and most seriously, a link between communications and status means that any failure to communicate during the early days of a regime's existence will be viewed as a sign of doubt about its status—regardless of the reason for the failure.

For all these reasons it is clear that separation of status and approval occurs only if all three questions are separated from one another. Total separation can best be realized by reforming the rules on recognition to require that decisions about status be guided by the effectivist rule. Nations could then base their decisions about communication on their relations with the other country or their ability to support a diplomatic mission without having to worry whether the lack of diplomatic relations suggests doubts about the new regime's status. Approval or disapproval can be indicated in many ways that have no relation to status or formal diplomatic relations, such as increasing or decreasing aid, encouraging or discouraging contacts between nationals, or commenting publicly on events in the other country.

Even if governments continue to insist upon links, the effectivist rule will still provide the best solution. A link between approval and communications creates some inconvenience, but it raises far fewer complications than a link between approval and status. An effectivist recognition rule would guide governments towards using the less inconvenient form of linkage.

Many advocates of abolition create more logical confusion when they support their ideas by saying that states maintain diplomatic relations with states rather than with governments. States do not maintain diplomatic relations with anyone, though writers often personalize them for brevity's sake. States are abstract entities capable of acting only through some human agent, and the government is that agent. A state communicates, fulfills its obligations, and asserts its rights through its government. It is thus through the contact between one government acting on behalf of its state and another government acting on behalf of its state that international relations are carried out. If states could act on their own, recognition of governments would never have raised any problems because governments would have had no international significance. This need for and reliance on human agents is expressed in the traditional diplomatic practice, still followed even by governments flirting with the notion that diplomatic relations are undertaken between states, of ac-
crediting diplomats from the head or government of the sending state to the head or government of the receiving one.\textsuperscript{59}

Worse, any confusion of recognition with maintenance of diplomatic relations could threaten the almost universally accepted rule that recognition ends only with the demise of the recognized government and may not be withdrawn at the will of the recognizing government.\textsuperscript{60} In the past, this rule has provided an important protection against the worst sort of possible political abuses, and is a powerful reinforcement for the idea that according status should depend on the fact of control rather than on emotional reactions or political calculations. Were recognition of governments abolished, some statesmen might be tempted to view severance of diplomatic relations as a method for challenging status as well.

Those who believe that the international community should refuse to accept regimes that come to power by means violating international law (for example, as a result of foreign imposition) have an additional reason to retain recognition of governments.\textsuperscript{61} Though refusal to continue diplomatic relations with the new regime might serve to indicate severe disapproval, its symbolic effectiveness is greatly reduced since there are many reasons for not having diplomatic relations that have no connection to the international legality or illegality of the new regime's origins. Particularly in a world where recognition normally followed an effectivist rule, nonrecognition would be an indication of severe disapproval. The danger that individual states might use such decisions as a new form of political response could be decreased by requiring that they be made collectively, as through the United Nations.\textsuperscript{62}

Thus, for both practical and doctrinal reasons, abolishing recognition of governments would be a mistake. This is not to argue that the existing institution is perfect. Far from it. Advocates of abolition are correct in their basic

\textsuperscript{59} As codified in Art. 14 of the Vienna Convention on Diplomatic Relations, TIAS No. 7502, 23 UST 3227, 500 UNTS 95.

\textsuperscript{60} The Restatement (Revised), supra note 12, §203, appears to endorse the idea of withdrawing recognition from a government still in control of its state, using the "de-recognition" of the Teipeh Government as an example. In strict legal terms, however, this was the ending of an illegal prolonged recognition of a regime that had lost control of its state 29 years before, not a withdrawal of recognition from an effective government. The only way it could be taken to be the latter is by assuming that Taiwan is a state independent of China, something neither the Teipeh nor the United States Government has ever done.

\textsuperscript{61} Though it has been proposed that recognition be denied to regimes that are imposed by foreign intervention, depend for their continued existence on foreign support, base themselves on policies of racial discrimination, represent counterrevolutionary movements, or commit massive violations of human rights in the course of consolidating power, none of these ideas has won general support. In the absence of such support and, equally important, relatively objective and agreed criteria for determining whether a new regime falls into any of the agreed categories, this author believes such proposals are simply excuses for continuing to play political games with recognition regardless of whether decisions are made by individual states or some UN body.

criticisms of recognition as it has been practiced, and in their insistence that any government in effective control of its state should have its status acknowledged and respected. If recognition of governments is to perform its proper functions, and confusion among acknowledgment of status, communication, and approval is to be avoided, recognition decisions must be based solely on whether the new government has control of its state. This effectivist rule would secure the advantages sought by advocates of abolition without causing the disadvantages attendant upon abolition.