ships through territorial waters to Shanghai, since this would be a violation of the law of non-intervention in internal affairs. As declared by Secretary Seward in 1862 at the time of the New Granada insurrection, the United States

> regards the government of each state as its head until that government is effectually displaced by the substitution of another. It abstains from interference with its domestic affairs in foreign countries, and it holds no unnecessary communications, secret or otherwise, with revolutionary parties or factions therein.[6]

Such strict impartiality, however, does not mean that United States cruisers must stand idly by while American lives and property engaged in innocent trade are endangered by wanton and reckless action of the contestants contrary to the rules of civilized hostilities. On the other hand, American ships, on their part, cannot expect protection when they invite disaster by crossing the line of fire or taking other provocative action. But within those limits it would seem that they should see that American shipping is guarded in lives and property from promiscuous and illegal firing of either party whether on the high seas or in territorial waters.

Although the Isbrandtsen ships apparently attempted to breach the closure order contrary to the warnings of the Department of State and thereby contributed to the damage suffered, yet the fire of the Chinese gunboat, if outside territorial waters, was none the less wrongful. Perfectly lawful means of preventing trade were open to the Chinese Government. One method was laying a mine-field within territorial waters, as it appears was finally accomplished and widely notified. The facts relating to the attack of January 9th on the *Flying Arrow* as she approached the mouth of the Yangtze are not clearly established. It is somewhat incredulous, as alleged by the Chinese, that signals and warning shots to halt were ignored and that the devastating gunfire some twenty miles offshore was necessary to prevent her entering the mine-field. In view of past attacks by the Chinese and notice of a mine-field in the Shanghai approaches, it would seem to have been the part of prudence to halt on warning and ascertain the situation. The contrary would be asking too much of fortune. If this attack occurred on the high seas, it would seem the American destroyers should have given protection.

L. H. WOOLSEY

SOME THOUGHTS ON THE RECOGNITION OF NEW GOVERNMENTS AND RÉGIMES

The general furore attending the Soviet challenge to continued representation of Nationalist China on the Security Council and other bodies of the United Nations has served to bring to a focus, and direct public attention to, the changing criteria as to the legality or the "legitimacy"

[6] Moore, Digest, Vol. VI, p. 20.

of changes in government and changes in régime within states whose recognized status is not in question. Certainly, in the halcyon days before World War I, when changes in statehood were few and far between, international law did not greatly concern itself with the legal premises on which individual governments acted in defining their *rapports* with new governmental régimes in established countries. What, one might ask, was the use of finding juristic formulae to express acceptance of situations in which the heady wine of factionalism repeatedly burst the frail bottles of nineteenth-century constitutionalism in various parts of the world? Apart from counseling circumspection and moderate delay in acting, lest too precipitate a recognition of a new government should appear to be interference in the internal affairs of a state, general discussions tended to suggest procedural formalities of an almost catechistical character, whereby the actual *détenteurs du pouvoir* in any country could be brought to book as to the sincerity of their intentions to observe past contractual engagements with regard to the nationals, property, vested rights and concessionary privileges of the particular governments concerned. This kept the discussion on grounds of international rather than municipal law, and avoided the necessity of looking behind the returns to test succession to authority in government in terms of constitutional law. Thus any clear or uniform distinction between *de facto* and *de jure* status of a claimant to represent a fully recognized state tended to disappear into the *coulisses* of diplomacy. "Expectant expediency" might well suffice as the most terse characterization of what the official attitude of foreign Powers should be. And if, in the amorphous stage of international institutions, this tended to become a passive acceptance of internal iniquities for the sake of maintaining the external peace between states, it is hardly to be wondered at. Formal criteria by which to judge the situations arising were fundamentally lacking. Such was the situation, by and large, down to 1913.

Seen in that retrospect, the efforts of President Wilson to develop new juristic criteria for evaluating the lawfulness of succession to power of newcomers in old states had no very secure footing on which to stand. They can be viewed in our day as persistent attempts to invoke, as the binding rule of conduct among governments, the fundamental principles and appropriate constitutional stipulations of the country seeking recognition. In default of an international authority or criterion, the touchstone was domestic and constitutional. While possibly operable in an ordered, stable or static society, the norms proposed by Wilson were invoked on behalf of claimants to authority in a period of unprecedented social and political upheaval, especially in Mexico, when the very norms of domestic behavior were not only in question, but in the melting pot. Hence the experiment, however laudable, tended in operation to throttle the course of a revolution and to hold volcanic forces within a constitutional

straight-jacket. Failing to stay, by a Canute-like fiat, the tides of revolution, Wilson in fact changed ground fundamentally, and eventually sought, by divers means, to legitimate the new authority by concerted and collective recognition, setting in this connection far-reaching precedents which Sumner Welles, in analogous circumstances a quarter-century later, was only too eager to follow. What is significant for us out of that epoch of transition is that the period of fumbling for momentary remedies for exceptional situations gave birth to both collective recognition and general international organization. Only from a "Thirty Years' View" is it possible to see the juxtaposition, then the slow gravitation, of principles toward each other.

I have noted elsewhere the immediate effects, doctrinal and practical, of the creation of the League of Nations and the specific stipulations of the Covenant upon the general problem of new states.[1] While that study concerned primarily fully self-governing states, colonies and dominions, it became a manifest impossibility for the League Assemblies to admit new states as Members without simultaneously recognizing their governments and amassing considerable documentary evidence as to the extent of recognition of both in the world outside of the *Salle de la Réformation*. And after the rounding out of formal admissions, it became part of the work of one of the more important functionaries of the Secretariat to do what probably not even the best organized foreign office was then doing—to keep an up-to-the-minute box-score on recognitions of *governments,* in order to have in hand at least the basic, elemental evidence for formulating an official "League policy" in the field of recognition, whenever that became pertinent to the transactions of the League. Within less than a decade of formal operation, the quintessential data for concerted, collective policy, even for a certain degree of League autonomy in such matters, were gathered from all corners of the earth and methodically analyzed to determine the trends of action. While never pushed too far under the Covenant, the collective recognition doctrine, as applied to governments, became an "inarticulate major premise" of the League's conduct of day-to-day affairs. Starting out on a perfectly casual *de facto* basis, it went through a limited period of crystallization to such an extent that the Secretariat, while never going back of the returns to challenge the status of any representative of a new government on the territory of a Member State, did develop a limited procedure of regularization, whenever a change of internal régime took place in the homeland of any League Member. In a number of instances it directly asked the home government, by cable or radio—in some cases merely by formal letter—for fresh documents re-accrediting the "permanent delegates," an institution unknown to the letter of the Covenant; in others, it required fresh credentials

[1] The League of Nations and the Recognition of States (University of California, 1933).

from career diplomats stationed in Europe and only intermittently serving as official representatives to *ad hoc* conferences called to meet under League auspices. Since, to a certain extent, the League was compelled to act quickly, it frequently sought by cable or radio "'full powers," and on receipt of assurances via such media, allowed representatives to sign treaties and conventions, awaiting the eventual arrival, by mail or courier, of the corroborating documents. No instance is known to the writer of the failure of home governments to provide such validating data.

The League therefore appears in retrospect to have broken important ground in deciding, of its own accord, the degree and extent to which it could officially recognize new governments in Member States. This writer is not aware of any instance in which Assembly committees ever reversed the Secretariat; on the other hand, their credentials committees, so far as is known, invariably followed the "official line" in seating delegates from governments with which the Secretariat was *en rapport*. This tended to make the Secretariat feel on a surer footing and was undoubtedly a guide to the changing personnel of successive Assembly commissions. This was, *a fortiori*, also true of the Secretariat in its relations to the Council, the commissions and the Permanent Court of International Justice. Save as the Stimson Doctrine was invoked in its particular frame of reference, the League adventitiously, then incrementally, but always non-contentiously, developed an articulating recognition policy vis-a-vis new governments and régimes, to which virtually all Members tended to conform.

Between the fumbling first efforts of the League to cope with the problems arising out of the recognition of new governments and the present strident controversy over the succession to Nationalist China lie nearly thirty years of diplomatic fencing, of attempts to solve the problems arising from a change in *détenteurs du pouvoir* on a unilateral, bilateral or multilateral basis. The period has witnessed no less ponderous efforts to accept juridically the consequences of far-reaching changes in régime, politically and economically. Ordinary shifts in the succession to titular power or the chieftainship of state can, and are, quickly decided by almost purely verbal formulae, but changes in economic and social régime are unquestionably far more controversial and litigious. Whether international usage will come formally to acknowledge such a distinction is, of course, indeterminate, but the course of the last quarter-century is strewn with ineffectual efforts at agreement on appropriate legal phraseology whereby static or conservative régimes seek to tether and harness the champing or runaway steeds of fast-moving, revolutionary, social and economic change. In the 'twenties and 'thirties this sometimes took the form of the most elaborate stipulations and exactions on the part of the recognizing state, but (save for the unsuccessful venture at Genoa in 1922) always at the level of national diplomacy, to the complete exclusion of international machinery from the process. This sedulous disengagement

of the modalities of recognition of new régimes from the procedures of the then existing nexus of international institutions perhaps reflects an understandably high degree of skepticism as to the perdurance of the ensemble of the institutions of international government. At all events, and irrespective of the reasons formally given, it succeeded in confining the rapprochements of antithetical régimes during the immediately past generation to the levels of national diplomacy, entirely excluding supranational agencies.

Our own generation is not so privileged, although it cannot be entirely gratified at the initial efforts made to raise recognition problems to a wholly intergovernmental level. The failure of fruition of the efforts made, primarily at Yalta and Potsdam, but to a lesser degree in subsequent meetings of the Council of Foreign Ministers, to determine the composition of governments still to be recognized in the surrendered or satellite states is attributable, in part, to the fact that the principal members of the wartime alliance were still reluctant to entrust to the tender mercies of an inexperienced general international organization such matters of high policy as the recognition of new governments; in part, to the rather naïve belief—which also underlay the negotiation of the Minority Guarantee Treaties at Paris in 1919—that an almost immutable allocation of territory in return for a pledge of future conduct would automatically guarantee the immutability of status, whether of governments or of minorities. In any event, the recognition of changes in social régime was confined to Great Power politics on the understanding that members of the general international organization would be in honor bound to follow implicitly the decisions of the Big Three or Big Four. Such was the locus of the question between Yalta and Potsdam. The primordial consideration was to keep the decision of such questions *intra mures,* or at least out of the hands of the United Nations.

Whatever the dubious virtues of such a selective, closed-corporation settlement then, the problem today is obviously incapable of solution on a comparable basis. Hence the Soviet challenge to the Security Council, as, indeed, to all United Nations bodies, confronts the United Nations Organization with the necessity of taking far-reaching decisions. For the first time in the history of international organization, the problem of a change of régime in a Member state is tending to pass out of the exclusive domain of national diplomacy and to be settled in terms of the stipulations of the Charter, rules of procedure of the various bodies involved, or by the setting of new and far-reaching precedents. The question is still unsolved at this writing (March 20, 1950), but the answer given to it by the United Nations may well mark an important transition point in the history of both international law and international organization.

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