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DE FACTO AND DE JURE RECOGNITION: IS THERE A DIFFERENCE?

The last decade has witnessed considerable evolution in the practice of recognition of new governments that have come to power by irregular means. Many of these changes appear to have gone almost unnoticed by many scholars in the field.

Of particular significance is the denial by Miss Marjorie Whiteman, Assistant Legal Adviser to the Department of State, in Volume II of her work, of a difference in the character of recognition, *i.e.*, *de facto* or *de jure* recognition.¹ Miss Whiteman lends her authority to this position when she states in Volume II of her *Digest*:

While the terms "*de facto* recognition" and "*de jure* recognition" are frequently employed, the expressions "recognition of a *de facto* government," situation, etc., are preferable. The character of the object recognized may be recognized as "*de facto*" in existence or control. In prevailing practice, when the United States extends recognition, it is recognition *per se* not "*de facto*" recognition.²

William O'Brien and Ulf Goebel apparently misunderstand Miss Whiteman when they cite the preceding quotation and conclude: "Thus, what the authors interpreted to be implicit *de jure* recognition of new states is termed recognition 'per se' by Miss Whiteman."³

In reply to a letter from this writer requesting clarification concerning the terms *per se* and *de jure* and whether those terms were interchangeable in her usage as O'Brien and Goebel assume, Miss Whiteman left no doubt as to her meaning when she said:

. . . I had hoped to make it clear in the *Digest* that in the past the United States has extended *de jure* recognition to both *de jure* and *de facto* governments, as the case may have been. It is the government that is *de facto*, not the U. S. recognition. I used the expression recognition "*per se*" meaning that the recognition was "recognition" not a tenuous or qualified recognition, not a *de facto* recognition.⁴

According to Miss Whiteman, then, the terms *de facto* and *de jure* refer only to the character of the government and not to the character of recognition.⁵ This view disagrees with the position that different legal and

¹ 2 Whiteman, *Digest of International Law* 3 (1963).

² *Ibid.*

³ William O'Brien and Ulf Goebel, "U.S. Recognition Policy Toward the New Nations," 3 *Yearbook of World Polity* 111 (1965).

⁴ Letter to the writer from Miss Whiteman, dated April 6, 1966.

⁵ See, in this regard, 1 Whiteman, *Digest* 917-920 (1963).

political consequences flow from *de facto* and *de jure* recognition by denying the latter distinction. Mr. Leonard Meeker, the Legal Adviser of the Department of State, in an interview with the author in March, 1966, said that he was "not sure" if there was a difference between *de facto* and *de jure* recognition. Mr. Meeker then cited the case of the recognition of Israel in 1948 as an example of an instance when, for a time, "something less than *de jure* recognition might have been intended."⁶

The significance of the case of Israel to the discussion necessitates a brief review of the situation. The British Mandate over the area that was to become the Jewish state of Israel was to end on May 14, 1948. That morning the Provisional Government of Israel sent a note to President Truman assuring him that the government had been "charged to assume the rights and duties of government" for that state and to discharge its international obligations. President Truman replied to the note that same day announcing that:

This country recognizes the Provisional Government as the *de facto* authority of the new State of Israel. When a permanent government is elected in Israel it will promptly be given *de jure* recognition.⁷

The statement definitely appears to indicate something less than the traditional concept of "*de jure* recognition." However, Philip Jessup, the Deputy United States Representative in the Security Council said in December, 1948, "the United States extended immediate and full recognition to the state of Israel as a *de facto* authority of the new state."⁸ The extension of "full recognition" indicates the traditional concept of "*de jure* recognition," while *de facto* authority describes the type of power the government enjoyed.

Further uncertainty was caused by a White House Press Release which announced that "*de jure* recognition" had been extended as of January 31. The release read:

On October 24, 1948, the President stated that when a permanent government was elected in Israel, it would promptly be given *de jure* recognition. Elections for such a government were held on January 25. . . . The United States Government is therefore pleased to extend *de jure* recognition to the Government of Israel as of January 31.⁹

Miss Whiteman includes a description of the case of Israel in Volume II of her *Digest*, but does not interpret it in the light of her statement that recognition is granted *per se*. In reply to a private letter of inquiry regarding this case, Miss Whiteman wrote:

. . . in the instance of Israel, U. S. officials repeatedly stated that the United States "recognizes" the provisional government as the "*de facto* authority" of Israel. The note of May 14, 1948 so stated, and it

⁶ In an interview with the writer, March, 1966.

⁷ 19 Dept. of State Bulletin 582 (1948). ⁸ *Ibid.* 723.

⁹ 2 Whiteman, *Digest* 169.

was followed by at least two other statements to the same effect. . . . The implication of the wording of the White House Press Release . . . was confusing. The May 1948 "recognition" had not been described as "*de facto* recognition."

. . . I feel that a lot of people have been using "*de facto*" recognition when what they were referring to was recognition of a "*de facto* government."¹⁰

This is clearly a denial that the recognition of Israel was ever anything less than full and complete recognition.

Most authoritative writers on the subject would tend to agree with Miss Whiteman that there is no difference in legal effect between recognition which is labeled "*de jure* recognition" and recognition which is labeled "*de facto* recognition."¹¹ Indeed there is little evidence to support the position that there is a legal difference.

Some writers, however, maintain that *de facto* and *de jure* recognition are distinct legal acts justifiable under different circumstances¹² and producing different legal results. Proponents of this distinction maintain that *de jure* recognition allows a government to "represent the State in matters of State succession and otherwise," while *de facto* recognition does not.¹³ This does not appear to be the case, though, as the Soviet Government's contention in 1922 that it could not be held liable for the debts of its predecessors until it had been extended *de jure* recognition was not accepted by the other world Powers at the time.¹⁴ But since the succession to liabilities is the same, whether *de facto* or *de jure* recognition is extended, it cannot be argued consistently that a difference arises in the succession to rights.

It has also been held by this school of thought that "*de facto* recognition" is provisional while "*de jure* recognition" is not.¹⁵ However, the position of the State Department at the First Meeting of the Inter-American Council of Jurists at Rio de Janeiro in 1950 was that recognition is irrevocable, and the severance of diplomatic relations after recognition has been granted does not constitute revocation. The binding effect of recognition may be terminated only if the community recognized ceases to fulfill the requirements for recognition as a state (or government) in

¹⁰ Letter to the writer, dated April 6, 1966. Nevertheless, the courts have speculated over a possible legal difference between *de facto* and *de jure* recognition in: *Luther v. Sagor* (1921), 3 K.B. 532; and in *Murarka et al. v. Bachrack Bros., Inc.*, 215 F. 2d 547 (2d Cir., 1954), 49 A.J.I.L. 254 (1955).

¹¹ For example, see: W. W. Bishop, Jr., *International Law Cases and Materials* 249 (2nd ed., 1962); J. L. Brierly, *The Law of Nations* 146-150 (6th ed., edited by Sir Humphrey Waldock, 1963); Ti-Chiang Chen, *The International Law of Recognition* 277-289 (ed. by L. C. Green, 1951); Hans Kelsen, *Principles of International Law* 397-398 (2nd ed., rev. and edited by Robert Tucker, 1967).

¹² See C. G. Fenwick, "The Recognition of *De Facto* Governments: Is there a Basis for Inter-American Collective Action?" 58 A.J.I.L. 109-113, esp. 112 (1964); also by the same author, see "Recognition *De Facto*—In Reverse Gear," *ibid.* 965-967; also Sir Hersch Lauterpacht, *Recognition in International Law* 338-345 (1947).

¹³ Lauterpacht, *op. cit.* 345-346.

¹⁴ 28 A.J.I.L. 99 (1934).

¹⁵ Lauterpacht, *op. cit.* 38.

international law, or by the recognition of a successor to the previously recognized entity.

Many authorities have held that if the legal differences are open to question, there are political differences. The most important political difference between *de facto* and *de jure* recognition, they contend, is that it denotes the status of political relations between the parties involved. *De jure* recognition reflects an intimate relationship between the Powers, while *de facto* recognition lacks this intimacy. This argument seems to miss the point, since the relations between communities are determined by the circumstances peculiar to their relationship, not by the character of recognition. For example, the United States may have serious misgivings concerning the manner in which a government has come to power, as well as its foreign policy; nevertheless our interests may best be served by recognizing it and entering intimate relations with it. The recognition in itself should not be considered either approval or disapproval of the government.

Whatever the merits of the arguments for or against the distinction between *de facto* and *de jure* recognition, it is clear that the difference, if any, is becoming less clear. Research by the writer has shown that nothing less than full recognition has been extended to states and governments since the questionable case of Israel. The existence of *de facto* recognition is becoming a moribund issue simply by not being raised as a possibility by the government. The interpretation of Miss Whiteman as stated in her *Digest* will tend to be accepted without question with the passage of time. This will be due in no small measure to the authority that the State Department's *Digest* will lend to that position.

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THE DEVELOPMENT OF AN INTER-AMERICAN POLICY FOR THE
RECOGNITION OF DE FACTO GOVERNMENTS

It is ironic that Fidel Castro, who is currently ostracized from the inter-American system of states, has provided the impetus needed to overcome the obstacles that have for so long prevented agreement on the procedure for Hemispheric action regarding the recognition of *de facto* governments. Earlier attempts to formulate a common basis for the recognition of *de facto* governments have been very limited both in their scope and their success.

Dr. 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 1907,¹ which was signed by the five Central American Republics. A Conference of the Central American Republics was held in Washington in 1923 and resulted in the signing of

¹ Text of the treaty in 1 Hackworth, *Digest of International Law* 186; 2 A.J.I.L. Supp. 229 (1908).