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THE POSITION OF UNRECOGNIZED GOVERNMENTS BEFORE THE COURTS OF FOREIGN STATES

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The term "unrecognized government" is here used to designate a government which has not been granted political recognition in any degree by the executive branch of the government whose courts are called upon to exercise jurisdiction in cases in which its status is involved, that is, a government which has not been recognized by the executive as either a de jure government or a de facto government.[1] British courts have refused to distinguish between the two degrees of recognition, holding both to be equally significant, so far as their legal effect is concerned.[2] It does not appear that the United States Supreme Court has concerned itself definitely with any distinction,[3] though the New York Supreme Court has indicated that it con-

* See p. 544 for biographical note.

[1] Recognition of belligerency does not constitute political recognition in any degree. See *Williams v. Bruffy*, 96 U. S. 176 (1878); *Hickman v. Jones*, 9 Wall. 197 (1870); *Prats v. United States*, Moore, *Arbitrations*, Vol. III, p. 2886 (1871). See also Crandall, S. B., "Principles of International Law Applied by the Spanish Treaty Claims Commission," 4 *Am. Jour. Int. Law* 806; and see the Opinion of the Commission in *Sen. Doc.* No. 25, 58th Cong., 2d sess.

[2] *Republic of Peru v. Peruvian Guano Co.*, 36 Ch. D. 497 (1887); *Luther v. Sagor*, [1921] 3 K. B. 532 (1921); and Baty, Thomas, "So-called 'De Facto' Recognition," 31 *Yale Law Jour.* 469.

[3] See *Thorington v. Smith*, 8 Wall. 1 (1869); *Williams v. Bruffy*, 96 U. S. 176 (1877); *Underhill v. Hernandez*, 168 U. S. 250 (1897); *Oetjen v. Central Leather Co.*, 246 U. S. 297 (1918).

sidered that no distinction in legal effect could properly be made.[4]

From the opening of the nineteenth century, it has been the practically unbroken policy of both British and American courts to consider themselves definitely bound by the attitude of the executive in the matter of the political status of foreign governments.[5] In 1819, Judge Johnson, of the United States Circuit Court for South Carolina, stated that, "courts exercising jurisdiction of international law may often be called upon to deduce the fact of national independence from history, evidence, or public notoriety where there has been no formal recognition."[6] And in 1825, Chief Justice Best, of the British Court of Common Pleas, seemed willing to admit, in the case of *Yrisarri v. Clement*,[7] the existence of the independence of Chile on evidence, when its independence had not been recognized by the British government, but on appeal, decision of that question was not deemed to be material or necessary. But, by a long line of judicial decisions, the doctrine of the dependence of the courts upon the executive in this regard has become quite definitely established, to the extent, at any rate, that the courts will not concede de facto character to an unrecognized government against the known opposition of the executive, or when, for any reason, such concession would appear to involve danger of embarrassment to the executive or of international complications.[8]

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[4] *Sokoloff v. National City Bank*, 199 N. Y. Supp. 355 (1922).

[5] *City of Berne v. Bank of England*, 9 Ves. 347 (1804); *Dolder v. Bank of England*, 10 Ves. 352 (1805); *Rose v. Himely*, 4 Cranch 241 (1808); *Gelston v. Hoyt*, 3 Wheat. 246 (1818); *Divina Pastora*, 4 Wheat. 52 (1819); *Williams v. Suffolk Ins. Co.*, 13 Pet. 415 (1839); *United States v. Yorba*, 1 Wall. 412 (1863); *Jones v. United States*, 137 U. S. 202 (1890); *In re Cooper*, 143 U. S. 677 (1900); *Pearcy v. Stranahan*, 205 U. S. 257 (1907).

See also Oliver P. Field, "The Doctrine of Political Questions in the Federal Courts," (1924) 8 Minn. L. Rev. 485.

[6] *Consul of Spain v. The Conception*, 6 Fed. Cas. 359 (1819).

[7] 2 Carr. and Payne 225, 229 (1825). Both these cases are referred to by Quincy Wright, "Suits Brought by Foreign States with Unrecognized Governments," 17 *Am. Jour. Int. Law* 742.

[8] It should, of course, be understood that in no case does the court grant any sort of political recognition, that being exclusively an executive function.

THE CAPACITY OF UNRECOGNIZED GOVERNMENTS TO SUE IN THE COURTS OF THE UNITED STATES

The Constitution of the United States extends the judicial power to controversies "between a State, or the citizens thereof, and foreign States",[9] and it has long been the policy of the courts, both national and state, to permit foreign governments which have been recognized by the executive, to sue in order to protect or enforce their rights as against persons or corporations[10] within the jurisdiction of the court,[11] upon compliance with certain required conditions.[12] A similar practice is also followed by the courts of other countries.[13]

In fact, the New York Supreme Court, in the case of *Republic of Mexico v. De Arrangois*,[14] went so far as to declare that to deny a recognized foreign government access to the courts of the United States "would be something more than a breach of national comity, and even something more than a violation, if not of the terms, of the spirit of our Federal Constitution", and that, "As an arbitrary denial of justice, it would furnish a very grave subject of remonstrance and complaint, and . . . might

[9] Art. III.

[10] It was indicated in *Cohens v. Virginia*, 6 Wheat. 264, 406 (1821), that the eleventh amendment would not prohibit a suit by a foreign state in the national courts against one of the states of the Union.

For cases in which the courts have conceded de facto character, that is, capacity legally to act for the state, in private rights controversies, see *Keene v. McDonough*, 8 Pet. 308 (1834); *United States v. Home Ins. Co.*, 22 Wall. 99 (1875); *Horn v. Lockhart*, 17 Wall. 570 (1873); *Thorington v. Smith*, 8 Wall. 1 (1869). See also Houghton, N. D., "Recognition in International Law," 62 *American Law Review* 228, and "The Validity of the Acts of Unrecognized de facto governments in courts of non-recognizing states," (1929) 13 Minn. L. Rev. 216; also Hyneman, Charles S., "Judicial Interpretation of the Eleventh Amendment," II Ind. L. Jour. 371; Hervey, John G., "Legal Effects of Recognition in International Law.

[11] See *Republic of Mexico v. De Arrangois*, 11 How. Pract. 1 (1855), 5 Deur 634 (1856) (N. Y.); *King of Prussia v. Kupper*, 22 Mo. 550 (1856); *Republic of Honduras v. Soto*, 112 N. Y. 310 (1889); *State of Yucatan v. Argumedo*, 157 N. Y. Supp. 219 (1915); *Kingdom of Roumania v. Guaranty Trust Co.*, 250 Fed. 341 (1918); *Kingdom of Norway v. Federal Sugar Refining Co.*, 286 Fed. 188 (1923).

[12] They must, for instance, agree to submit themselves as private suitors with respect to set-offs. Wright, Quincy, 17 *Am. Jour. Int. Law* 742. See also 25 *Col. Law Rev.* 556.

[13] See *Hullett v. King of Spain*, 1 Dow. & Cl. 169 (1828); *United States of America v. Wagner*, L. R. 1867, 2 Ch. App. 582 (1867).

[14] 5 Deur 634 (1856).

even be deemed a just cause for war". But this doctrine of the absolute privilege of a foreign state to sue does not appear to be firmly established, the privilege being based rather upon international comity than upon international law.[15]

Although, until recent years the question of the capacity of an unrecognized foreign government to sue in the courts of another state has seldom arisen, the generally indicated attitude of the courts, both in England and in the United States, has been that only recognized governments could sue.[16] Professor Borchard states that the rule permitting recognized foreign governments to sue in the courts of the United States does not establish the converse proposition that unrecognized governments may not sue.[17] However, with one exception,[18] unrecognized governments have not been permitted to recover in the courts of the United States.

In the cases of *The Penza* and *The Tobolsk*,[19] the Russian Soviet Government, in 1921, sought to libel and obtain possession of two steamers in the possession of the United States. The United States District Court for the eastern district of New York held that the Soviet Government, not having been recognized by the United States, could not sue in the courts of the United States.

In 1918 a committee of the Commissariat of Public Instruction of the Soviet Government entered into a contract with one Cibrario for the purchase of certain motion picture equipment, and delivered to the American Commercial Attaché in Petrograd a million dollars to be by him deposited in a reputable bank in the United States. The deposit was subject to drafts according to specified conditions. The money was deposited in the National City Bank of New York City. Later, the Soviet Government commenced an action in the New York courts to compel Cibrario to account for sums, which, according to the

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[15] See, for example, the decision of the New York Supreme Court in *Republic of Honduras v. Soto*, 112 N. Y. 310 (1889), and of the New York Court of Appeals in *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N. Y. 255 (1923).

[16] *City of Berne v. Bank of England*, 9 Ves. 347 (1804), and *The Sapphire*, 11 Wall. 164 (1871).

[17] 31 *Yale Law Jour.* 536.

[18] *Government of Mexico v. Fernandez*, (Mass. 1923) not reported. Discussed *infra*, note 27.

[19] 277 Fed. 91 (1921).

allegation, he had been obtaining from the deposit through fraud. The Supreme Court of New York took jurisdiction of the case, and ordered the appointment of a receiver, on the ground that the matter was solely contractual, and that the political status of the plaintiff was immaterial. But the Appellate Division[20] reversed the order, holding that, "plaintiff, never having been recognized as a sovereignty by the executive or legislative branches of the United States Government, has no capacity to sue in the courts of this State".

The Court of Appeals[21] affirmed the decision of the Appellate Division on the ground, in part, that the right of a foreign government to sue in the courts of the United States, depending upon *international comity*, could not be enjoyed by an unrecognized government, since in that case there could be no international comity as between the United States and the unrecognized government.[22] But the court gave as an additional and practical reason for its position, the danger of international complications and of possible embarrassment to the national executive which might result from judicial concession of the right to sue to unrecognized governments. "More than once during the last seventy years", said Mr. Justice Andrews, "our relations with one or another existing but unrecognized government have been of so critical a character that to permit it to recover in our courts funds which might strengthen it or which might even be used against our interests would be unwise. We should do nothing to thwart the policy which the United States has adopted."[23] And, "Yet", he added, "unless recognition is the test of the right [of a foreign government] to sue we do not

[20] *Russian Socialist Federated Soviet Republic v. Cibrario*, 198 N. Y. App. Div. 869, 1st dept., 191 N. Y. Supp. 543 (1921).

[21] 235 N. Y. 255 (1923).

[22] For criticisms of the decision see 31 *Yale Law Jour.* 534; 35 *Harv. Law Rev.* 768; 25 *Col. Law. Rev.* 551.

[23] After the decision of the Appellate Division, the members of the Commissariat of Education sought to commence an action against Cibrario as individuals and trustees of an express trust. The New York Supreme Court refused to take jurisdiction, holding that the officials or agents of the Soviet Government could have no greater rights than their unrecognized principal. The court stated further, however, that even if the plaintiffs as individuals had had capacity to sue, the fact that an action had been brought by the Soviet Government, the beneficiary of their trust, in its own name, would have terminated and extinguished their right as agent to bring an action on the same cause. *Preobozhenski v. Cibrario*, 192 N. Y. Supp. 275 (1922).

see why Maximilian as emperor of Mexico might not have maintained an action [in the courts] here".

A similar point of view was expressed by the United States District Court for the northern district of California in the case of *The Rogdai.*[24] In this case the court refused to permit the Soviet Government to recover by libel a ship which was admittedly the property of the Russian state, but which was in the possession of Mr. Bakhmeteff, Russian Ambassador appointed by the Kerensky government,[25] stating that, "The question at issue is one of state; it involves international relations, and is primarily for the State Department. If, as contended by libellants, it be granted that a revolution has taken place in Russia, and that the Soviet Republic is in actual control, the question when, if at all, such *de facto* government shall be recognized, is a political one. It involves considerations of national policy, which are not justiciable, and touching it the voice of the Chief Executive is the voice, not of a branch of the government, but of the national sovereignty, equally binding upon all departments."[26]

But the Superior Court of Essex County, Massachusetts, in May, 1923, in a case involving the capacity of the unrecognized Obregon government in Mexico to sue, departed from the general judicial practice in such cases, though with the tacit approval of the State Department for the particular case.[27] One

[24] 278 Fed. 294 (1920).

[25] It would thus appear that both the inability of an unrecognized government to sue and the immunity of a foreign state from suit were involved. See *infra.*

[26] In the case of *Russian Government v. Lehigh Valley R. R.*, 293 Fed. 133 (1919); 293 Fed. 135 (1923), the United States District Court for the southern district of New York held that Mr. Bakhmeteff, as the recognized "Ambassador of Russia," had authority to commence a suit for recovery of damages for losses suffered by the state of Russia in the destruction of certain goods in 1916, belonging to the Imperial Government; and that the suit might be continued by Mr. Serge Ughet, Financial Attaché of the Russian Embassy, "whose diplomatic status . . . was not considered to be altered by the termination of the ambassador's duties," according to a statement by Secretary Hughes for the information of the court, dated February 19, 1923.

These decisions are criticised in 23 *Col. Law Rev.* 787, and Vol. XXV, p. 552. But, a motion for leave to file a petition for a writ of prohibition was denied by the United States Supreme Court, May 12, 1924, without an opinion. 265 U. S. 573 (1924).

[27] *Government of Mexico v. Fernandez,* (Mass. 1923) not reported. Discussed by Quincy Wright, 17 *Am. Jour. Int. Law* 742.

Fernandez, an employee of the Mexican treasury, left Mexico, in February, 1923, with a large amount of money belonging to the United Mexican States. The money was thought to have been placed in a locked box in the National Bank of Haverhill, Massachusetts. An attorney appeared in the name of the "Government of Mexico" and obtained a temporary restraining order forbidding removal of the contents of the box.

Fernandez questioned the right of a representative of an unrecognized government to appear for Mexico. But, during the course of the trial, a statement by the United States Department of State was introduced to the effect that, "The Government of the United States has not accorded recognition to the administration now functioning in Mexico, and therefore has at present no official relations with that administration. This fact, however, does not affect the recognition of the Mexican state itself, which for years has been recognized by the United States as an 'international person' as that term is understood in international practice. The existing situation simply is that there is no official intercourse between the two states." And the court, considering the apparently favorable attitude of the State Department, together with evidence to the effect that the Obregon government was in effective control of affairs in Mexico, that it maintained agents in many American cities performing functions of a consular nature, though without exequaturs, and that it had a chargé d'affaires at Washington, who, though not officially received by the State Department, actually did represent Mexico, conceded the Obregon government court standing and continued the restraining order. The court also adverted to the pending negotiations between the United States and the Obregon government, which, it was considered, might at any time result in recognition,[28] giving retroactive standing to the Obregon government. And in the meantime, to refuse the privilege to sue might, and in fact certainly would, result in loss of the money which was clearly the property of the Mexican state.[29]

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[28] As they did, on August 31, 1923, three months later.

[29] The situation in this case was somewhat similar to that in the case of the *State of Yucatan v. Argumedo*, 157 N. Y. Supp. 219 (1915), in which the New York courts permitted representatives of the unrecognized Carranza government to appear in behalf of the State of Yucatan. There is this difference, however, in the Argumedo case, the Carranza government had been recognized by the United States as the de facto government of Mexico before the case came before the Supreme Court, but after

The courts have been subjected to some criticism both for their policy of *refusing to permit* the Soviet Government to sue, and the Massachusetts court for its *permitting* the unrecognized Obregon government to sue. Professor E. D. Dickinson sees, in the refusal of the courts to permit unrecognized governments to appear and seek protection for state property or other public interests, danger that the country may thereby become involved in serious international complications, which is the very thing the courts are trying to avoid.[30]

On the other hand, Professor Quincy Wright sees danger of international complications arising from permitting unrecognized governments to sue and recover state property, as was done in the Fernandez case. While admitting the advantage of such a policy, in the event that the unrecognized government so favored ultimately becomes recognized, as was the case with the Obregon government, Professor Wright points out that, if such a government, to which United States courts might extend such a privilege, and which through a suit should have turned over to it property belonging to the foreign state, should ultimately fall and never be recognized by the United States, the succeeding government might, and in fact he believes, would, hold the United States responsible "for assisting in the conversion" of the public property of the foreign state.[31]

Irrespective of the question of the validity of such a claim by a foreign government, the possibility of its assertion shows that the danger of international complications from such a situation must be ever guarded against by the courts. And it must be obvious that the effectiveness of the executive policy of withholding recognition would be seriously affected, if not entirely destroyed, by permitting an unrecognized government to have access to the courts of the state withholding recognition.[32]

Professor Borchard suggests a possible distinction between cases in which an unrecognized government seeks to sue to recover or protect property rights which it claims *as successor*

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the starting of the case in the lower courts, the Supreme Court holding the recognition to be retroactive.

[30] He suggests that, unless the courts find some way to give such protection, it may become necessary to create some sort of federal custodian for the property of unrecognized governments during the period of nonrecognition. See Dickinson, E. D., "The Unrecognized Government or State in English and American Law," 22 *Mich. Law Rev.* 29 ff. and 118 ff.

[31] 17 *Am. Jour. Int. Law* 744.

[32] In this connection, see 38 *Harv. Law Rev.* 620.

to a prior government, and cases in which the property rights involved are claimed by the unrecognized government as being *of its own acquisition.* The former, he would agree, may involve danger of international complications and the courts, he states, are properly guided in such cases by the fact of recognition or non-recognition. But with respect to property which is claimed by an unrecognized government as a result of its own acquisition, he sees no reason for denying the de facto government access to the courts for relief in such cases.[33]

It would seem to be obvious, therefore, whatever difference of opinion there may be with respect to particular instances, that a policy of permitting unrecognized governments to sue in foreign courts would be fraught with possibilities of involving the executive with embarrassment in the conduct of foreign relations. And, so long as that situation persists, both the state courts and the national courts in the United States may be expected to pursue a conservative policy in such cases, having regard for the attitude of the Department of State, as they have in the past.[34]

IMMUNITY OF UNRECOGNIZED GOVERNMENTS FROM SUIT IN THE COURTS OF THE UNITED STATES

It is a generally accepted rule of international practice that a sovereign state is immune from suit without its consent in the courts of foreign states.[35] In the United States this prin-

[33] Thus Professor Borchard would seem to approve the decisions in the cases of *The Penza, The Tobolsk,* and *The Rogdai,* cited and discussed *supra,* while disagreeing, on principle, with the decision in the Cibrario case. Though, actually, because of the pecliar situation with respect to the Soviet Government due to the continued recognition of a representative of a former regime, he does not drastically criticise that decision. See Borchard, E. M., "Can an Unrecognized Government Sue?" 31 *Yale Law Jour.* 534.

[34] See *Agency of Canadian Car and Foundry Co. v. American Can Co.,* 253 Fed. 152 (1918); *The Rogdai,* 227 Fed. 294 (1920), 293 Fed. 135 (1923). See also: *Government of Mexico v. Fernandez,* decided by the Superior Court of Essex County, Massachusetts, in 1923, cited *supra,* note 27; and 22 *Col. Law Rev.* 278.

[35] For a statement of the principle of immunity before international commissions and tribunals, see the advisory opinion of the Permanent Court of International Justice in the *Eastern Carelia Case, Publications of the Permanent Court of International Justice,* Series B, p. 27 (1923). See also 10 *Am. Bar Assn. Jour.* 195.

See also Scott, J. B., *Sovereign States and Suits Before Arbitral Tribunals and Courts of Justice.* Chapter VI.

ciple applies alike in both national and state courts,[36] and is practically absolute, extending to proceedings *in rem* against commercial ships belonging to, and operated by, a recognized foreign government.[37] And, although the immunity has generally been considered to be based upon international comity rather than upon international law,[38] there appears to be a tendency in recent years on the part of the courts in the United States to consider that a foreign government enjoys immunity from suit without its consent as a matter of sovereign right in international law.[39]

The question of whether or not an *unrecognized* foreign government is immune from suit in the courts of the United States has not arisen until within recent years, and the courts had no precedents upon which to base their decisions in such cases. In the case of *Oliver Trading Co. v. Government of Mexico*,[40] it was sought to attach certain property and public funds of the unrecognized Obregon government, in the state of New York, on a claim for damages for an alleged breach of a contract by the Mexican National Railway management. But, like the Argumedo case,[41] it was not finally decided until October 11, 1923, after the Obregon government had been recognized by the United States, and the United States District Court, attributing retroactive effect to the recognition, vacated the attachment, which it had previously granted, and declined to exercise further jurisdiction against the recognized government of a foreign

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[36] *Oliver Trading Co. v. Government of United States of Mexico*, 264 U. S. 440 (1924).

[37] *Berizzi Bros. Co. v. The Steamship Pesaro*, 271 U. S. 562 (1926). See also Garner, J. W., "Legal Status of Government Ships Employed in Commerce," 20 *Am. Jour. Int. Law* 759.

[38] See, Angell, E., "Sovereign Immunity—The Modern Trend," 35 *Yale Law Jour.* 159; and Hayes, Alfred, "Private Claims Against Foreign Sovereigns," 38 *Harv. Law Rev.* 599.

See also *The Exchange*, 7 Cranch 116 (1812); *Rothschild v. Queen of Portugal*, 3 Y. and C. 594 (1839); *The Parlement Belge*, L. R. 5 P. D. 197 (1878); *Underhill v. Hernandez*, 168 U. S. 250 (1897); *Mighell v. Sulton of Johore*, 1 Q. B. 149 (1894); *Hassard v. United States of Mexico*, 173 N. Y. 645 (1903).

[39] See *Oetjen v. Central Leather Co.*, 246 U. S. 297 (1918); *Nankivel v. Omsk All Russian Government*, 237 N. Y. 150 (1923); *Wolfsohn v. Russian Socialist Federated Soviet Republic*, 234 N. Y. 372 (1923), Discussed *infra*.

[40] 70 *N. Y. Law Jour.* 209 (1923).

[41] Cited and discussed *supra*, note 29.

state. In 1924, the Circuit Court of Appeals, to which the case had been sent by the United States Supreme Court for decision,[42] affirmed the decision of the District Court, without declaring upon the question of the immunity from suit in case the Mexican government had not been recognized in the meantime;[43] though the original action of the District Court, in granting the attachment, would seem to indicate that that court, at any rate, did not consider an unrecognized government to be immune from suit.

A similar position was assumed by the New York Supreme Court in the case of *Wolfsohn v. Russian Socialist Federated Soviet Republic*,[44] and sustained by the Appellate Division, though it was overruled by the Court of Appeals, with the support of the United States Supreme Court. Plaintiff sought to sue the Soviet Government for the recovery of certain property which had been confiscated in Russia. The New York Supreme Court held that since the Soviet Government had not been recognized by the United States, it could claim no immunity from suit in the courts of the United States, which it held to be enjoyed by recognized foreign governments on the basis of international comity. This view was sustained by the Appellate Division,[45] the court stating that it was "a matter of common knowledge that the defendant, though not recognized by the government of the United States, is *de facto*, at least, the existing government of Russia. . . . But, being unrecognized and unacknowledged, it is not entitled to the immunities accorded to recognized governments. . . . it is a foreign corporation aggregate, and as such, for the time being because it is representing the people of Russia, it is a legal entity for whose acts the nation is responsible. Like a foreign corporation which has failed to comply with the requirements of the General Corporation Law and the Tax Law, it cannot sue in our courts, but may be sued."

This position was, however, overruled by the Court of Appeals,[46] holding that a foreign sovereign may not, without his consent, be brought "before our bar, not because of comity, but because he has not submitted himself to our laws. Without

[42] 264 U. S. 440 (1924).
[43] 5 F. (2d) 659 (1924).
[44] 192 N. Y. Supp. 282 (1922).
[45] 195 N. Y. Supp. 472 (1922).
[46] 234 N. Y. 372 (1923).

his consent he is not subject to them. Concededly that is so as to a foreign government that has received recognition. But whether recognized or not, the evil of such an attempt would be the same. 'To cite a foreign potentate into a municipal court for any complaint against him in his public capacity is contrary to the law of nations and an insult which he is entitled to resent.' In either case the hands of the state department would be tied. Unwillingly it would find itself involved in disputes it might think unwise. Such is not the proper method of redress if a citizen of the United States is wronged. The question is a political one, not confided to the courts but to another department of government. Whenever an act done by a sovereign in his sovereign character is questioned it becomes a matter of negotiation, or of reprisals, or of war."[48]

THE STATUS OF PUBLIC SHIPS OF UNRECOGNIZED GOVERNMENTS

In the case of *The Ambrose Light*,[49] it was held by the United States District Court for the southern district of New York that the war vessels of a revolutionary government which had not been recognized either as a de facto government, or as having belligerent rights, either by the government of the state in which it was organized[50] or by foreign governments, were piratical and subject to confiscation. But subsequent recognition of such a state of affairs by the United States was held to be sufficient basis for the release of the vessel, with costs assessed upon the claimants.

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[47] See *Oetjen v. Central Leather Co.*, 246 U. S. 297 (1918).

[48] The United States Supreme Court refused to take jurisdiction in the case, without opinion, citing *Oliver Trading Co. v. Government of Mexico*, 264 U. S. 440 (1924), cited *supra*, note 42. 266 U. S. 580 (1924).

In the case of *Nankivel v. Omsk All Russian Government*, 237 N. Y. 150 (1923), the New York Court of Appeals stated, on authority of decision in the Wolfsohn case, that the defendant, had it been in existence at the time the suit was brought, would have been immune from suit, though it was not recognized. Judgment had been obtained in the lower court in 1922 by default, and the appeal was by third persons who resisted an order for their examination in supplementary proceedings in aid of the execution of the judgment. But judicial notice was taken of the fact of the disappearance of the Omsk Government as early as 1920, two years before the action was started by service upon a Kerensky agent.

[49] 25 Fed. 408 (1885).

[50] The ship was commissioned by a revolutionary government in Colombia.

In the cases of the *Annette* and the *Dora*[51] the British Admiralty Division, in 1919, restored two vessels to two Esthonian subjects, who claimed to be their owners and who had arrested the vessels by proceedings *in rem*, over the protest of the Provisional Government of Northern Russia, which had requisitioned the ships for its public use. The decision was based upon the fact that that government had not been recognized by Great Britain. While in the case of the *Gagara*,[52] the Court of Appeal, affirming a decision of the Admiralty Division, declined jurisdiction in a cause involving a vessel which was in the possession and use of the Esthonian National Council, which had been recognized by the British Government as a de facto government.

In the case of the *Lomonosoff*,[53] the Admiralty Division awarded salvage, in December, 1920, for the rescue of a Russian ship by British and Belgian officers and soldiers, from the Bolsheviki at Murmansk upon their taking possession of that port, which had previously been under control of the Provisional Government of Northern Russia. The decision was based upon the fact, that, at the time of the rescue, the Soviet Government had not been recognized by Great Britain. Hill, J., stated that,

". . . . this court respecting the comity of nations, would never treat as a meritorious service the act of persons who in defiance of the laws of an established government, recognized by and in friendship with this country, took a ship out of the lawful control of such a government. But at Murmansk on February 21 [1920] there was no government recognized by this country and indeed no established government at all. There was for the moment a state of anarchy, during which armed men were taking possession of all the ships they could get at. It is true that, so far as I can judge, they were not strictly pirates in the sense that they were persons who plundered indiscriminately for their own private ends. But, on the other hand, they were not acting with the authority of a politically organized society which at the time was recognized by this country. There is nothing, therefore, in the comity of nations which compels this court to treat the rescue as a rescue from lawful authority. I hold that the danger was one to which this court can have regard and a rescue for which this court can reward. It is not the same as, but it is analogous to. a rescue from pirates or mutineers, which this court has always recognized as the subject of salvage."[54]

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[51] L. R. [1919] 105 (1919).

[52] L. R. [1919] 95 (1919).

[53] L. R. [1921] 97 (1920).

[54] The policy of the courts of the United States in the matter of public vessels claimed by the Soviet Government has been discussed in connection

In the foregoing consideration it has been pointed out that both the British and the American courts have considered themselves bound by the action of the executive in respect to recognition or non-recognition of foreign governments, and that no distinction has ever been recognized by the courts of either country between the effect of de jure recognition and recognition of a government simply as a de facto government. It has also been pointed out that, in the matter of permitting unrecognized governments to sue, the courts have likewise been guided by the attitude of the executive, with the result, in general, that unrecognized governments have not been permitted to sue; that the practice of the courts in this respect has been subjected to some criticism; that the chief difficulty confronting the judicial branch in such cases is the danger of involving the executive in international complications; and, that so long as the situation continues to involve the possibility of such complications, the courts may be expected to maintain a conservative attitude. It has been further indicated that unrecognized governments have been held to be immune from suits in the courts of the United States, the principal basis again being the danger of international difficulties which might arise from permitting a sovereign state to be sued without its consent in the courts of a foreign state, though the public ships of unrecognized governments have not been held to be immune from judicial process, and British courts have awarded salvage for the rescue of a vessel from the possession of the unrecognized Soviet Government.

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with the question of the capacity of unrecognized governments to sue. *Supra.*