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THE RESPONSIBILITY OF THE STATE FOR THE ACTS AND OBLIGATIONS OF GENERAL DE FACTO GOVERNMENTS — IMPORTANCE OF RECOGNITION

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The term "De Facto Government" is generally used to designate a new government which has come into being by more or less irregular, and usually not strictly legal, methods. Any revolutionary government is likely to be spoken of as a *de facto* government, as distinguished from a *de jure*, or regularly constituted government. Such a government may get itself established with general control over the political affairs of an entire country, displacing completely the regular authorities and assuming their functions. Or it may establish its authority and control over only a section or part of the state, from which position it may, or may not, ultimately extend its sway over the entire country. A *de facto* government which maintains political control over only a portion of the territory of a state is called a *local de facto* government, while one which succeeds in establishing its authority over the entire area of a state, or practically so, is spoken of as a *general de facto* government.¹

Since the question of the responsibility of the state for the acts of a local *de facto* government is determined with reference to principles sufficiently different from those by which the responsibility of the state is determined for the acts of a general *de facto* government to justify separate treatment of the respective topics, and since the matter of the responsibility of the state for the acts of local *de facto* governments is of sufficient size and importance to deserve more adequate treatment than would be practicable in a joint consideration,² this paper is confined to

* See biographical note, p. 452.

¹ See Borchard, *Diplomatic Protection of Citizens Abroad*, p. 206.

a consideration of the question of the responsibility of the state for the acts and obligations of general *de facto* governments—and more particularly, to the importance of recognition by foreign governments as a factor in the determination of that responsibility.

In the determination of the responsibility of the state for the acts of a *de facto* government, it is necessary for the adjudicating body to determine first definitely whether or not the organization whose acts are complained of really possessed what is termed *de facto character*; that is, whether or not it was a government which was really in a position legally to act for the state, for a mere insurrectionary body does not have the capacity to bind the state by its acts or engagements. And the burden of proof in establishing the *de facto* character of a government in such cases rests upon the claimant.³

Tests for Determining De Facto Character

In determining whether or not a particular government is or was possessed of *de facto* character so as to have capacity to bind succeeding governments by its acts and obligations, a number of tests or *criteria* have been relied upon by courts and international commissions, with varying emphasis and results. The chief tests which have been applied, or at least mentioned by tribunals and commissions as having been considered in this connection are:

1. Actual possession of supreme power by the government in the district or state over which its jurisdiction extends;
2. The acceptance or acknowledgment of its authority by the mass of the people, as evidenced by their general acquiescence in and rendering habitual obedience to its authority; and
3. The recognition of the government as *de facto*, or *de jure*, by foreign governments.⁴

The actual exercise of power and control over the area within its asserted jurisdiction is perhaps universally required to be established in order that a government be conceded to have the

² See Houghton, N. D., *The Responsibility of the State for Acts and Obligations of Local DeFacto Governments and Revolutionists*, 14 Minn. Law. Rev. 251 (Feb., 1930).

³ *Day and Garrison v. Venezuela*, Moore, *Arbitrations*, Vol. IV, p. 3548 (1885). See also, *Cuculla v. Mexico*, *ibid.*, Vol. III, p. 2873 (1871).

⁴ Borchard, *Diplomatic Protection of Citizens Abroad*, p. 210.

capacity to act as a government with power to represent the state. Likewise, the acquiescence of the people, with at least some sort of obedience to the laws and decrees of a government, has frequently been given consideration as a factor in the determination of its power to bind the state. In the case of *Jansen v. Mexico*,⁵ the United States-Mexican Claims Commission of 1868, after setting forth at some length the facts connected with the Maximilian regime in Mexico, stated that, "It results from the foregoing investigation that the so-called empire was not a government *de facto*; because, lacking the element of popular support or of habitual obedience from the mass of the people, it rested alone on the assistance of foreign force, which contemplated and extended only a temporary interference, and because another government, disputing successfully its pretensions, bore rule in Mexico as a fact, in possession of much the largest part of the territory, and sustained by the mass of the people." And, in the British-Costa Rican arbitration of 1923, Mr. Taft referred to the fact that the Costa Rican people acquiesced with applause in the election of Tinoco to the presidency in 1917, as having weight as evidence of the *de facto* character of the Tinoco government.⁶

It is in connection with the third of these tests mentioned above, namely, recognition by foreign powers, that the most controversy has arisen, and with regard to which the most uncertainty appears. Before proceeding with a further discussion of this subject, however, which is the chief purpose of this paper, some mention ought perhaps to be made of a fourth type of test for determining *de facto* character, which has, as yet, been little more than suggested in actual adjudication of the question; but which would seem to offer a practical suggestion for possible future development.

The suggestion for the fourth type of test for determining *de facto* character comes out of one of the defenses offered by Costa Rica against liability for the acts of the Tinoco government in the British-Costa Rican arbitration of 1923. It was urged that, since representatives of the Tinoco government were not permitted to sign the Versailles Treaty, and Costa Rica was thus not permitted to become one of the original members of the League of Nations, it was evident that the Peace Conference

⁵ Moore, *Arbitrations*, Vol. III, p. 2902 (1871).

⁶ *Fallo Arbitral*, p. 11. See also, 18 Am. Jour. Int. Law, 151.

of 1919 did not consider the Tinoco government to have capacity to act for the State of Costa Rica.⁷ Of course, in this particular case, there may, or may not, have been much international significance in the action of the Peace Conference of 1919, considering that it appears that the refusal to permit the Costa Rican representatives to sign the treaty was due primarily to the influence of the United States,⁸ whose national policy had been already declared in the form of a pointed refusal to recognize the Tinoco government.⁹ But the value of the instance, if any, lies, not in any influence it may have had in the adjudication of that particular case, for as a matter of fact it appears to have had little, if any, influence; but rather in the suggestion that, especially in these days of increasing international contacts, the question of who is competent to speak and act for a particular state has come to be a matter of general international concern; that the attitude of a great international conference upon the matter ought, at least, if arrived at after proper investigation and deliberation, to have some weight; and, finally, that, really, the matter is one which could be advantageously determined by a *permanent* international agency, such as the Council of the League of Nations.¹⁰

Importance of Recognition

In the matter of the liability of subsequent governments for the acts and obligations of a prior *de facto* government, the fact

⁷ *Costa Rican Case*, p. 21.

⁸ In response to a Senate resolution inquiring as to why "Costa Rica, a belligerent with the Allies in the war just ended, was not permitted to sign the Treaty of Peace at Versailles," Secretary Lansing, on August 16, 1919, stated that, "To declare war is one of the highest acts of sovereignty. The Government of Costa Rica, being for the Government of the United States legally non-existent, it follows that so far as the Government of the United States is concerned, no state of war could exist between Costa Rica and the Imperial German Government. Obviously, there could be no question so far as this Government was concerned as to signing with Costa Rica the Treaty of Peace at Versailles." *Sen. Doc.*, No. 77, 66th Cong., 1st Sess. p. 2.

⁹ See *For. Rel.* 1917, p. 308.

¹⁰ The establishment of some sort of international machinery which should be competent to determine the matter of recognition of new governments and thus remove recognition from the realm of pure national policy, would seem to be possible. In fact, such an arrangement might readily remove much of the uncertainty with respect to the capacity of a *de facto* government to bind the state, which often is not determined for years after

of recognition or non-recognition of the *de facto* government by foreign governments, and especially by the claimant's own government, has on several occasions been a very significant element. As has already been indicated, recognition by foreign states has quite generally been considered evidence of the *de facto* character of governments; and, in a number of cases non-recognition by the claimant's government has been held to be conclusive as against its own citizens, and to operate as an estoppel against later assertion of claims growing out of acts or contracts of such unrecognized governments.

In the case of *Kennett v. Chambers*,¹¹ a case involving the liability of a former officer of the Texan army for claims upon a contract with a citizen of the United States, made in 1836 on behalf of the State of Texas, whose independence had not been recognized by the United States, the contention was set up that, Texas, though her independence had not been recognized, was actually an independent state; and, that a citizen of a neutral state may lawfully lend money to one that is engaged in war to enable it to carry on hostilities against its enemy. The United States Supreme Court, after pointing out that the case did not involve the necessity of deciding to what extent such a contract would be upheld in case of war between two states acknowledged to be independent, stated that, "It is a sufficient answer to the argument to say that the question whether Texas had or had not at that time become an independent state, was a question for that department of our government exclusively which is charged with our foreign relations. And until the period when that department recognized it as an independent state, the judicial tribunals of the country were bound to consider the old order of things as having continued, and to regard Texas as a part of the Mexican territory." Similarly, in the case of *Jones v. United States*,¹² the same court stated that, "Who is sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, *as well as all other officers, citizens and subjects.*"¹³

the government in question has passed out of existence, and after the persons who have suffered from its acts have died.

¹¹ 14 How. 38 (1852).

¹² 137 U. S. 202 (1890). See also, *Thorington v. Smith*, 8 Wall. 1 (1869), where the court mentions recognition as an evidence of *de facto* character.

¹³ Italics mine.

The most significant pronouncements, from the international point of view, upon the importance of recognition as a factor in the liability of a state for the facts of *de facto* governments, have come, however, from international commissions and arbitrators; though an examination of their decisions does not reveal absolute uniformity on the point, and the exact status of international law on the matter does not appear to be definitely certain.

In the case of *Day and Garrison v. Venezuela*,¹⁴ a case submitted by the United States to the Venezuelan-United States Claims Commission of 1885, involving the responsibility of Venezuela for obligations entered into with American citizens by the Paez government under his dictatorship from 1861 to 1863, one of the defenses offered by Venezuela was the fact that the United States had not recognized the Paez government in any degree. Discussing the significance of the defense, the commission stated that, "While the failure or refusal of the United States to recognize the government of Paez is not binding upon us as a court in determining the question whether that government was a government *de facto* or not, the necessity of determining that question, in some way" is "an essential prerequisite absolutely vital to the correct determination of the main issue involved, . . . and on this question of *fact* the failure of the United States to recognize the Paez government is a fact which cannot be ignored."

The Mexican-United States Claims Commission of 1868, in the case of *Schultz v. Mexico*,¹⁵ refused to allow a claim presented by the United States on behalf of an American citizen whose property had been destroyed by the revolutionary Miramon government in 1859, one of the grounds being that on the day upon which the acts were alleged to have occurred, the United States had recognized the Juarez government as the government of Mexico. And the same Commission, in the case of *Jansen v. Mexico*,¹⁶ disallowed a claim presented by the United States on behalf of one Charles Jansen, an American citizen, for compensation for a vessel and cargo which had been confiscated by the Maximilian government. Though, as indicated before,¹⁷ the commission found another reason for holding the

¹⁴ Moore, *Arbitrations*, Vol. IV, p. 3548 (1885).

¹⁵ Moore, *Arbitrations*, Vol. III, p. 2973 (1871).

¹⁶ *Ibid.*, p. 2902 (1871).

¹⁷ See *supra*, note 5.

Maximilian government not to be possessed of *de facto* character, namely, that it did not have the support and acquiescence of the Mexican people; yet it stated definitely, that, irrespective of that fact, the refusal of the United States to recognize the Maximilian regime as the government of Mexico constituted sufficient grounds for disallowing the claim.

The refusal of the Venezuelan-United States Claims Commission of 1903 to allow, in the case of *Jarvis v. Venezuela*,¹⁸ a claim against Venezuela Based on bonds issued by the Paez government during its period of control from 1861 to 1863, was based in part upon the doctrine of the invalidity of contracts with a *de facto* government in aid of revolution.¹⁹ But the claim, which did originate in a contract in aid of a revolution headed by Paez in 1849, was held to be quite as definitely invalid on the further ground that the United States, not having recognized the Paez government in 1861 to 1863, was estopped from prosecuting a claim growing out of its action, against the State of Venezuela on behalf of a citizen of the United States, upon whom the non-recognition of the Paez government was held to be conclusive.²⁰

The British-Costa Rican Arbitration of 1923

Among the acts of the Tinoco government²¹ which the restored Costa Rican government declared to be null and void in 1920,²² were certain contracts with and concessions to British subjects. The question of liability of Costa Rica to make restitution for losses occasioned thereby was submitted, in 1923, to arbitration before Chief Justice Taft of the United States Supreme Court, who acted as sole arbitrator.

One of the defenses relied upon by Costa Rica was based upon the contention that non-recognition of the Tinoco government by Great Britain was conclusive upon British subjects as to the *non-de facto* character of that regime, and that it operated as an estoppel against later presentation of claims by Great Britain on behalf of British citizens, growing out of con-

¹⁸ Ralston, *Ven. Arb.* 1903, p. 145.

¹⁹ See *Kennett v. Chambers*, 14 How. 38 (1852), and *DeWutz v. Hendricks*, 2 Bing. 314 (1824).

²⁰ The parts of these decisions relating to the importance of recognition will be discussed more fully at a later point.

²¹ The Tinoco Revolution occurred in 1917.

²² See *Costa Rican Case*, p. 381; and *British Exhibits*, p. 100.

tracts with the Tinoco government. Non-recognition, according to the Costa Rican argument, "gave notice to the nationals of those governments [which refused recognition] that Tinoco was not acceptable to them as an Agency for business dealings with the State of Costa Rica, and that consequently they would not sanction any business relations by their nationals with Tinoco, as the representative of the people of Costa Rica."²³

Great Britain contended, however, that the acts of the Tinoco government were binding upon Costa Rica, as the acts of the only government which Costa Rica had for some two years and nine months, during which time there was no other organized government disputing its sovereignty; and that, since it was in complete control of the entire country with the acquiescence of the people, its acts were binding upon Costa Rica, irrespective of any question of recognition.²⁴ It was further contended, also, that Great Britain had not *refused* to recognize the Tinoco government, in the sense in which the United States had refused recognition; but that recognition had simply been "delayed." It was urged that, "It is one thing to refrain from diplomatic relations with a Government, but it is an entirely different thing to contend that the British Government should not protect its own subjects when another State denies justice to British subjects and refuses to recognize their rights."²⁵ No cases were cited, however, in which Great Britain, or any other country, had recovered compensation from a subsequent government for acts of a *de facto* government which it had not recognized.²⁶

It is true that Great Britain, though not recognizing the Tinoco government, did not warn British subjects that they would not be given diplomatic support for their claims which might arise out of their dealings with it, as was done by the United States with regard to its citizens.²⁷ And this fact was cited as

²³ *Costa Rican Case*, pp. 73, 74. See also, *Fallo Arbitral*, p. 7, and *British Royal Bank Case*, p. 123.

²⁴ *Fallo Arbitral*, p. 6. See also, 18 *Am. Jour. Int. Law* 149. See also, *British Royal Bank Case*, pp. 85, 123.

²⁵ *British Amory Case*, pp. 65, 66; *Costa Rican Case*, p. 51.

²⁶ For a discussion of cases in which the United States has held foreign states responsible for acts of unrecognized revolutionists who later became the *de jure* government, see Moore, *Digest*, Vol. VI, pp. 991-994, and Moore, *Arbitrations*, Vol. II, p. 4785. See also, Ralston, *Ven. Arb.* 1903, p. 7; *Bolivar Railway v. Venezuela*, *ibid.*, p. 388; and *For. Rel.* 1901, pp. 427-434; *For. Rel.* 1899, pp. 352-54; *Ror. Rel.* 1913, p. 949.

²⁷ *Fallo Arbitral*, p. 21. For the text of the notice issued by the

evidence that Great Britain did not intend that non-recognition should be construed to have any effect upon the rights of British subjects.

Counsel for Costa Rica,²⁸ in support of the contention that non-recognition of the Tinoco government by Great Britain should operate as an estoppel against later prosecution of claims of British subjects against Costa Rica arising out of contracts²⁹ with the Tinoco government, cited numerous court decisions, both of British and United States courts, to the effect that the courts are bound by the action of the political departments of a government in the matter of the status of a new foreign government.³⁰ It was hoped thus to show:

1. that, had the case under adjudication been one coming within the jurisdiction of the courts of Great Britain, they would have felt bound to declare the acts of the Tinoco government invalid, because it was not recognized by Great Britain; and,
2. that an international arbitration tribunal ought to give consideration to the attitude of municipal courts upon the matter.

With respect to those citations, the arbitrator stated that their only effect was to show that British and American courts considered the matter of recognition to be not a judicial, but a political question; and that, though well done, the establishment

Department of State to American Citizens, see *For. Rel.* 1917, p. 308. The government of the United States was alleged to have encouraged, or at least to have been in sympathy with the action of the Costa Rican government in nullifying the British concessions. See Eberlin, E., *Oil and Empire*, 311 *Living Age* 693. See also, *N. Y. Times*, Feb. 27, 1921.

²⁸ Chandler P. Anderson.

²⁹ It was tacitly admitted that Costa Rica would have been liable for claims by foreigners for damages suffered from acts of violence on the part of the Tinoco regime. It was contended that, "There is an important distinction to be drawn between demands on account of contracts voluntarily entered into with an unrecognized government, and pecuniary claims for damages caused by that government through acts of violence to the persons or vested property rights of foreigners who appeal to their own government for protection." *Costa Rican Counter Case*, p. 73.

³⁰ *City of Berne v. The Bank of England*, 9 Ves. 347 (1804); *Thompson v. Powles*, 2 Sim. 194 (1828); *Taylor v. Barclay*, 2 Sim. 213 (1828); *Republic of Peru v. Dreyfus*, L. R. 38 Ch. D. 348 (1888); *Luther v. Sagor*, (1921) 1 K. B. 456 (1920); *Thompson v. Barclay*, 9 L. J. (O. S.) Ch. 215 (1831); *Gelston v. Hoyt*, 3 Wheat. 246 (1818); *Rose v. Himely*, 4 Cranch 241 (1808); *Jones v. United States*, 137 U. S. 202 (1890); *Oetjen v. Central Leather Co.*, 246 U. S. 297 (1918).

of that fact had no bearing upon the *international significance of non-recognition*, as it might affect the responsibility of a state for the contracts of a *de facto* government with the citizens of a state whose government had not recognized the *de facto* government.³¹ And, he gave it as his opinion that, just as British and American courts have accepted the determination of the executive as to the *de facto* character of foreign governments, whatever that position may have been at any particular time; so they would probably accept a *changed* position of the executive, when, for some reason, it should decide that a government, which it had earlier refused to recognize, had really possessed *de facto* character, even though the government had already passed out of existence, as in the case of the Tinoco government.³²

As a matter of fact, the decisions of the British courts seem to have little direct bearing upon the specific question of the operation of non-recognition as an estoppel to later claims in cases such as the one in question. In the case of *Republic of Peru v. Dreyfus Bros. and Co.*,³³ the Chancery Division clearly recognized the importance which non-recognition might assume. The case involved the question of the validity of contracts made by the Pierola government in Peru in 1880 with foreign subjects, which were annulled by a subsequent government. Holding the contracts to be valid, at least when the Pierola government had been recognized by the government of which the other party to the contract was a subject, the court stated that, "It is difficult to see how this [validity of the contracts of the Pierola government] can be determined by the law of Peru. It is a question of international law of the highest importance whether or not the citizens of a foreign State may safely have such dealings as existed in this case with a Government which such state has recognized. If they may not, of what value to the citizens of a foreign state is such recognition by its Government? . . . When the Government of this country recognized the third Emperor of the French, if any Englishman entered into contracts with his [Napoleon's] Government, could it be maintained that the validity of such contracts must depend upon the law of *France* as settled by decree of the Republic which was established on his deposition? Obviously, it would follow that no Englishman could

³¹ *Fallo Arbitral*, pp. 17, 18.

³² *Ibid.*

³³ L. R. 38 Ch. D. 348 (1888).

safely contract with the present Government of France, or, indeed, with any existing Government, lest it in time should be displaced by another Government which might treat its acts as void.

"There is no authority for any such proposition. I must take the law to be that an Englishman or Frenchman might safely contract with Senor Pierola's Government, if not before, at any rate after, it was recognized by the Governments of *England* and *France* respectively." The court was thus not called upon to decide upon the validity of contracts between the Pierola government and persons whose government had not recognized that government; although, as pointed out above, it clearly considered that the fact of non-recognition in such a case might be significant.

The arbitrator admitted that the fact of non-recognition of the Tinoco government by Great Britain might be used against it as *evidence* to disprove the *de facto* character of that government, which *de facto* character the British government was in 1923 seeking to establish; just as the fact of recognition may be used as evidence of the *de facto* character of a government. But he stated that the earlier position of Great Britain was subject to change (apparently, from either more mature consideration or expediency).

As such evidence of the *non-de facto* character of the Tinoco regime, Costa Rica cited the fact that, besides Great Britain, other nations, especially the United States, had refused to recognize it. Mr. Taft considered that the failure of Great Britain to recognize the Tinoco government had probably been due to the influence of the United States, and that since recognition by foreign states of a *de facto* government may be based on the *national policy* of the particular state, and is not regulated by international law; therefore, recognition or non-recognition is not conclusive in the matter of the *de facto* character of a government.³⁴ "The non-recognition by other nations of a government claiming to be a national sovereignty," said the arbitrator, "is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel nom* of a government is by such nations determined by inquiry, not into its *de facto* sovereignty and complete governmental control, but into its le-

³⁴ *Fallo Arbitral*, p. 14.

gitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. What is true of the non-recognition of the United States [on the ground of illegitimate origin] in its bearing upon the existence of a *de facto* government under Tinoco for thirty months is probably in a measure true of the non-recognition by her Allies in the European War. Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the *de facto* character of Tinoco's government, according to the standard set by international law."³⁵

In support of the contention that non-recognition by Great Britain of the Tinoco government should operate as an estoppel against any later claim upon a subsequent government of Costa Rica on behalf of British subjects, Costa Rica cited the decisions of the Mexican-United States Claims Commission of 1868 in the cases of *Schultz v. Mexico*,³⁵ and *Jansen v. Mexico*,³⁷ and also that of the Venezuelan-United States Claims Commission of 1903, in the case of *Jarvis v. Venezuela*,³⁸ to which reference has already been made.³⁹ In these cases, as stated above, the commissions ruled that non-recognition of a *de facto* government by the claimant's own government was conclusive upon its subjects, whose claims could not be validly asserted against a subsequent government. But Mr. Taft, in refusing to follow the decisions in these cases, considered that this particular point in the opinions was not vital to the decisions, stating that, "the array of facts in the cases was conclusive against the existence of a *de facto* government, and the expressions were unnecessary to the conclusion."⁴⁰

It happened that this decision of Judge Taft on the matter of the effect of non-recognition of a *de facto* government by the claimant's government upon the liability of a subsequent gov-

³⁵ *Fallo Arbitral*, p. 15.

Mr. Taft pointed out that, in so far as recognition by foreign powers constitutes evidence of the *de facto* character of a government, there was considerable basis for the argument that the Tinoco government was of a *defacto* character. For, actually, it was recognized by some twenty states, including most of the Latin-American states. *Ibid.*, p. 12.

³⁶ Moore, *Arbitrations*, Vol. III, p. 2973.

³⁷ *Ibid.*, p. 2902.

³⁸ Ralston, *Ven. Arb.* 1903, p. 145.

³⁹ *Supra*, note 18.

⁴⁰ *Fallo Arbitral*, p. 13.

ernment for the acts and contracts of the unrecognized *de facto* government did not affect the actual disposition of the claims;⁴¹ and it may be that it was a perfectly sound decision, one which may serve as a precedent for the development of a definite rule of international law on the matter.⁴² But, out of consideration for former decisions of international commissions, from whose principles it departs, it is only fair to present a definite statement of those earlier decisions, in the light of the disposition made of them in this case; namely, that the matter of non-recognition was not really a material element in the decisions.

Now, as a matter of fact, it may be true that in these particular cases there were sufficient grounds for deciding them as they were decided, irrespective of the question of non-recognition by the United States. But, on the other hand, it is quite clear from the language of the opinions that the commissions certainly did not consider the matter of non-recognition as irrelevant or insignificant. In fact there seems to be a very clear indication in all three of the cases, that the tribunals considered non-recognition *alone* to have been a sufficient basis for rejecting the claims.

In *Schultz v. Mexico*,⁴³ the claim before the Mexican-United States Claims Commission of 1868 was, as stated earlier in this Chapter, for compensation for destruction of property belonging to an American citizen by the Miramon government on April 7, 1859. The facts showed that on that same day the United States had recognized another government in Mexico under the presidency of Jaurez. Mr. Wadsworth, American Commissioner, speaking for the Commission in dismissing the claim, stated that, "There could be but one sovereign power in the same political community at the same time. The United States having de-

⁴¹ Rejecting the contention that Costa Rica was not responsible for the acts of the Tinoco government, Mr. Taft held that, therefore, the British claims must be decided on the basis of the laws of the Tinoco government. And upon examination of the Tinoco Constitution and the laws which were in operation at the time the concession and contract were made, he held the claims to have been invalid and not collectible even against the Tinoco government; and so the claims were dismissed as not binding upon the restored government either, except in so far as the restored government had given validity to part of one of the claims by its own voluntary action in 1921. See *Fallo Arbitral*, pp. 28, 41-43, 50-52.

⁴² See *Geo. W. Hopkins v. The United Mexican States*, General Claims Commission, United States and Mexico (1926). Discussed *infra*.

⁴³ Discussed *supra*, note 15.

terminated for itself, and according to the well-sustained fact, in what Mexican authorities this sovereignty resided, and maintaining to this day political and amicable relations with it as the only government in Mexico, can not now claim that another government existed in that country."⁴⁴ Thus, though other grounds did exist in this case for holding that the Miramon government did not possess *de facto* character, yet it is obvious that non-recognition was considered a vital principle in the case.

In the case of *Jansen v. Mexico*,⁴⁵ the same commission, after an extended review of the facts connected with the Maximilian regime, which led to the conclusion that it "was not a government *de facto*," stated, Mr. Wadsworth again delivering the opinion: "*But, waving these considerations*, it is impossible for the United States successfully to claim that the so-called empire was a government *de facto*. The government of that country uniformly and expressly refused to regard it as such, when the inducements were strong and the danger of refusing great. On the contrary, it recognized the republic and maintained relations of amity and friendship with it to the close, as it had done from the beginning of its trials. *This fact must oppose an insuperable barrier to any and all reclamations by the United States against the Republic of Mexico for the acts of the Maximilian authorities, so-called.*"⁴⁶ There could be but one government at a time, as a matter of fact, and the United States has determined the question between the two contending parties for itself."

And, in the case of *Jarvis v. Venezuela*,⁴⁷ in which the Venezuelan-United States Claims Commission of 1903 held Venezuela not liable for the payment of certain bonds which had been issued by the Paez *de facto* government in 1863, as compensation for aid rendered by Jarvis, an American citizen, to an earlier revolutionary attempt by Paez, the fact that the United States had refused to recognize the Paez government was held to operate as an estoppel to later presentation of claims on behalf of cit-

⁴⁴ Mr. Wadsworth then added that, "If such inconsistent positions were allowable, we have (previously) decided that the Zuloaga and Miramon pretensions in Mexico never reached the sovereignty nor constituted the government *de facto*; their movement being always only an attempt to displace the constitutional government, which ultimately and signally failed." See also, *Cuculla v. Mexico*, Moore, *Arbitrations*, Vol. III, p. 2873 (1871).

⁴⁵ *Supra*, note 16.

⁴⁶ Italics mine.

⁴⁷ Discussed *supra*, note 18.

izens of the United States. So far as the claimants were concerned, the issuance of the Jarvis bonds by the Paez authorities was held to be not the "act of the Venezuelan Government." "It is doubtless true," the commission stated, "that the question whether the Paez government was or was not the *de facto* government of Venezuela at the time the bonds were issued is one of fact. But the decision of the political department of the United States Government on November 19, 1862,⁴⁸ that there was no such conclusive evidence that the Paez government was fully accepted and peacefully maintained by the people of Venezuela as to entitle it to recognition must be accorded great weight as to the fact, *and is in any event conclusive upon its own citizens.*"⁴⁹ Though this case could, as has been indicated at an earlier point,⁵⁰ probably have been decided as it was decided on other grounds, namely, the insufficiency of the contract because of illegal consideration; yet there is apparently no ambiguity in the commission's statement of its attitude on the matter of the effect of non-recognition by the claimant's own government. Moreover, there was no question but that the Paez government was in actual control of the country for a period of some twenty-one months; and there certainly was presented no "array of facts" which could properly be considered as "conclusive against the existence of a *de facto* government."⁵¹

*Responsibility of Mexico for Acts of the
Huerta Government*

The question of the effect of the refusal of the United States to recognize the Huerta government in Mexico, upon the liability of subsequent governments for its acts was for several years a matter of some interest, and was the object of speculation on the

⁴⁸ Mr. Seward to Mr. Gulver, Minister to Venezuela: "The United States deem it their duty to discourage that (revolutionary) spirit so far as it can be done by standing entirely aloof from all such domestic controversies until, in each case, the State immediately concerned, shall unmistakably prove that the government which claims to represent it is fully accepted and peacefully maintained by the people thereof." And, it was further declared that, "This Government sees no such conclusive evidence" that the Paez government "is the act of the Venezuelan State as to justify acknowledgment thereof by this Government."

⁴⁹ Italics in the original.

⁵⁰ See *supra*, note 20.

⁵¹ *Fallo Arbitral*, p. 18.

part of publicists in the field of international law. This was especially true with respect to claims by citizens of the United States, particularly in the light of the declaration of President Wilson, in November, 1913, to the effect that the government of the United States would not recognize as binding upon the people of Mexico, anything done by the Huerta government after Huerta became dictator on October 10, 1913.⁵²

In 1917, Professor Borchard gave it as his opinion that the state of Mexico was, and could be held, liable for the acts and obligations of the Huerta government. He regarded it as at least a general *de facto* government, for whose acts a state is, in general, held to be responsible. As to the effect of the executive declaration just referred to, he stated that, "As against foreign governments, it would seem that the alleged statement of the President does not alter the obligations of the Mexican nation under the general principles of international law. As regards citizens of the United States having claims against Mexico, it does not seem that the Mexican government can avail itself of any such declaration to escape obligations properly incurred and due by the nation or its authorities under the recognized principles of international law. In other words, the declaration is without legal effect except in so far as the Department of State, in the exercise of its discretion as the prosecutor of the claims of American citizens, may determine not to espouse claims of the character described. As such a position would be politically unwise and legally and morally unjust it is hardly likely that it will be taken."⁵³

A similar point of view was expressed by Thomas Baty, an English jurist, with reference to the responsibility of subsequent governments for a loan floated by Huerta in 1914. He predicted that the Huerta government, being in actual control of the affairs of Mexico, would be held to have had power to bind the state by its obligations, irrespective of the attitude expressed by the government of the United States.⁵⁴

It was not until March, 1926, however, that the matter of the responsibility of the state of Mexico for the acts and obligations

⁵² *For. Rel.* 1913, p. 856.

⁵³ Borchard, E. M., *International Pecuniary Claims Against Mexico*, 26 *Yale Law Jour.* 339. See also Borchard, *Diplomatic Protection of Citizens Abroad*, p. 211.

⁵⁴ Baty, Thomas, *Mexican Loans*, 39 *Law Mag. and Rev.*, 5th Ser., 470.

of the Huerta government, was actually declared upon by a body with legal authority to fix that responsibility. According to the terms of a convention signed by the United States and Mexico on September 8, 1923, a General Claims Commission was set up to adjudicate upon the claims of citizens of each country against the other, arising since 1868; excepting claims for damages growing out of the revolutions in Mexico from 1910-1920, which latter claims were to be considered by a Special Claims Commission established by a convention signed September 10, 1923.⁵⁵ It was the General Claims Commission which first found it necessary to pass upon the question of the responsibility of Mexico for the acts of the Huerta government.

In the case of *Geo. W. Hopkins v. The United Mexican States*,⁵⁶ decided on March 31, 1926, the commission made three very pertinent declarations. In the first place, it was stated that all acts of the Huerta government during the period when it was a general *de facto* government⁵⁷ were binding upon the nation. No dates were fixed as demarking the exact period when the Huerta government should be considered to have been a general *de facto* government, it not being deemed essential to a decision of this case.

The second significant feature in the decision was a distinction which the commission made between: (1) the "unpersonal acts of the Government itself as an abstract entity;" and, (2) the "acts of the Huerta administration in its personal character." It was pointed out that the greater part of the machinery of government and governmental functions need not be, and usually are not, affected by changes in the higher administrative officers; that the great mass of routine business of a government having

⁵⁵ For the texts of both conventions, see 43 Stat. at L., Part II, 1722, 1730. See also, 18 *Am. Jour. Int. Law, Supp.*, 143, 147.

⁵⁶ Docket No. 39, General Claims Commission, United States and Mexico (1926).

⁵⁷ The commission did not use the exact term, using instead a description of the concept, an administration of illegal origin which "operates directly on the central authority by seizing, as Huerta did, the reins of the government, displacing the regularly constituted authorities from their seats of power, forcibly occupying such seats, and extending its influence from the center throughout the nation." It did, however, define the extent of the territory essential to be controlled in order to constitute such a government, a government whose acts bind the nation, that is, a general *de facto* government, as being "control and paramouncy . . . over a major portion of the territory and a majority of the people of Mexico."

to do with providing for the ordinary needs of the people in their regular day to day life, such as postal service, railway service (where it is a governmental function), registration of births, deaths, and marriages, conduct of the schools, and numerous other functions, must go on without being affected by governmental crises, dissolutions of parliament, or revolutions. It was further pointed out that when Huerta seized the government he took over, practically intact, the machinery of government having to do with the type of functions mentioned above, and that, moreover, the same was done by the Carranza government when it displaced the Huerta regime.

For these "unpersonal acts of the Government itself as an abstract entity," Mexico was held to be bound, no matter at what stage of the rise or fall of the Huerta government they may have occurred. "To the extent," it was held, "that this machinery acted in the discharge of its usual and ordinary functions or to the extent that it received benefits from transactions of an unusual nature, Mexico is bound."⁵⁸ Whereas, those acts of the Huerta government which were characterized as "acts of the Huerta administration in its personal character," though the commission did not enumerate them, nor indicate at all clearly just their nature, were held to be binding upon subsequent governments, only in the event that at the time of their occurrence the Huerta government was exercising "real control and paramountcy . . . over a major portion of the territory and a majority of the people of Mexico."⁵⁹

The other point of especial significance in this case was the declaration of the commission concerning the effect of non-recognition by the claimant's government upon a later prosecution of a claim against a subsequent government arising out of the acts of a prior unrecognized government. The commission was confronted by the question, "Has the American Government for-

⁵⁸ The claim involved in this case was for certain money orders purchased by the claimant from Mexican post offices between April 27, 1914, and June 8, 1914. They were bought during the period of the rapid decline of the Huerta government; but were held to bind the state as "unpersonal acts of the Government itself as an abstract entity."

⁵⁹ The situation here described seems, as indicated at an earlier point in the discussion of this case, to be that of a *general de facto* government; though in no instance before does it appear that just the extent of the territory and population essential to constitute a *general de facto* government, as distinct from a *local de facto* government, has been defined.

feited its right to espouse Hopkins' claim because in 1913 it warned its citizens against the 'usurper' Huerta and never recognized his administration?" It was held that, "such warnings and such failure to recognize the Huerta administration can not affect the vested rights of an American citizen or act as an estoppel of the right of the American Government to espouse the claim of such citizen before this commission.⁶⁰ The position assumed by the American Government under the administration of President Wilson was purely political and was binding, even on that administration, only so long as it was not modified. It was an executive policy, which, so long as it remained unmodified and unrevoked, would close to the American Government the avenue of diplomatic interposition and intervention with the Huerta administration. It temporarily, therefore, rendered this remedy—diplomatic interposition or intervention—unavailable to an American citizen but it did not affect a vested *right* of such citizen." It was considered that non-recognition of the Huerta government by the United States meant simply disapproval of the methods by which it came into power, having no further legal or international significance; and that, "while the Government of Mexico continued to exist and to function, its *administration* was not entitled to recognition," according to the views of the President of the United States.

In this connection it ought perhaps to be pointed out that the Special Claims Commission, established by a convention signed between the United States and Mexico upon the occasion of the establishment of the General Claims Commission, in September, 1923, has indicated a somewhat different view of the effect of non-recognition. Referring incidentally to an agreement of July 28, 1920, by which Provisional President Adolfo de la Huerta made peace with Francisco Villa, the majority opinion in the *Santa Ysabel Cases*,⁶¹ decided April 26, 1926, stated *obiter*, that, "this agreement was effected by a provisional government one not recognized [by the United States] and as to whose acts it is doubtful whether they could involve responsibility for the nation."

It appears from the foregoing consideration that, of the chief

⁶⁰ The decision of Hon. William H. Taft, in the British-Costa Rican arbitration of 1923 was cited as a precedent for this position.

⁶¹ Special Claims Commission, United States and Mexico, Docket No. 449 (1926).

tests for *de facto* character of governments, the question of recognition by foreign states, and particularly the effect of non-recognition by the claimants own government upon a later prosecution of claims arising out of acts of an unrecognized prior *de facto* government, is the one whose status is perhaps most uncertain at the present time. While earlier decisions of international commissions have held such non-recognition to constitute a barrier to later espousal of claims on behalf of its citizens by the non-recognizing government, later holdings have not followed the earlier precedents, enunciating the principle that such non-recognition does not affect the rights of persons who have dealings with such an unrecognized government.



