2 Limits to Recognition of Governments

Four broad prescriptions of general international law, two defining occasions and two defining effects, bound the implications of recognition decisions by identifying when recognition or nonrecognition of a new government in another state needs to be decided, and setting some outside limits on the legal consequences attached to recognition decisions. In tandem, the four define the area of choice within which governments set their recognition policies.

The rules limiting occasions confine recognition decisions to situations when a new government has come to power by methods that are not stipulated in the affected state’s constitution, basic law, or other fundamental political customs and impart a one-way character to the act by treating recognition as irrevocable until the government recognized loses power. The doctrines defining effects limit how far others can discriminate against an unrecognized government. The doctrine of state continuity protects the state’s rights and preserves its obligations under international law. The doctrine’s precise impact on how others treat unrecognized governments depends on a fourth consideration, whether recognition is regarded as constitutive or declaratory of a government’s status as international agent of its state. Regarding recognition as constitutive encourages making strong distinctions in the day-to-day treatment of recognized and unrecognized governments; regarding it as declaratory encourages reducing those distinctions.

The rules that recognition is irrevocable and that the state’s legal personality is undisturbed by changes of government have held steadily since 1815. The definition of occasions requiring recognition has been manipulated a little, in the direction of somewhat reducing the number of occasions. This has made little difference in the overall impact of the rule, which is to confine recognition decisions to a minority of the changes of government occurring in the world. The fourth, stipulating whether recognition constitutes or declares status, has shifted over time toward the declaratory view, helping erode the strong differentiations of treatment accorded to recognized and unrecognized governments in the nineteenth century.
WHEN RECOGNITION IS NEEDED

No government or legal scholar has ever asserted that every change of government raises the need for recognition. Though a custom that new rulers or governments formally notify others of their accession to power was well-established by 1815, it was not linked to recognition. Everyone accepted that changes of government occurring according to the procedures specified in a state’s constitution, basic law, or fundamental political customs maintained the domestic legal continuity of rule and raised no doubts about the new ruler’s or government’s claim to act as international agent of its state. Even the minority of legal scholars treating notification as a formal request for recognition admitted that the possibility of withholding the requested recognition only arose with extra-legal changes of government.

Nineteenth-century legal doctrine rested on an assumption that the distinction between ‘legal’ and ‘extra-legal’ largely corresponded to that between peaceful and violent methods of ousting the preceding government. The possible uses of violence and other preliminary moves to engineer an ostensibly legal change were seldom discussed; though Holtzendorff did suggest an opening for ignoring them by noting that no question of recognition arises if the head of state resigns in favour of someone else. In the nineteenth century, governments took the opposite view, paying more attention to the violent preliminaries than to the ‘voluntary’ resignation. Thus the British regarded recognition as necessary following a forced change of Portuguese regents in 1820 and most governments did so after the forced abdication of the Persian Shah in 1909.

Both scholars and governments became more attuned to the possibilities of forcing resignations during the interwar period. Some of the scholars sought to clarify matters (or, on another view, to shore up the traditional dichotomy) by dividing all of the possible combinations into ‘legal’ and ‘extra-legal’ for purposes of recognition. Governments preferred handling the problem on an ad hoc basis, but did increase the number of changes regarded as ‘legal’ by dispensing with recognition if the head of state remained in place or violence appeared as an ancillary element in an otherwise constitutional transition. This meant that two of the most significant changes of government in the period – Mussolini’s accession in Italy and Hitler’s in Germany – did not raise questions of recognition. The US government at least regarded two changes of premiers in Thailand during a hotly contested shift from absolute to constitutional monarchy as raising no