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Overview

On the recognition of foreign heads of state

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1. Recognition of foreign heads of state: the position in international law

The requester raises the question whether it is permissible in international law for a state to **recognise a person as head of state of a foreign country** if he or she may not have obtained that office in the framework of the applicable national constitution or if the constitutionality of the change of government under the applicable law of the foreign country is doubted by other organs of that country's constitution.

The recognition of governments is essentially regulated by the same principles of international law that apply to the **recognition of states**.[1] By far the predominant view among scholars of international law is that recognition has, in principle, only a declaratory and not a constitutive effect.[2] Consequently, recognition by another state does not alter the constitutionality or unconstitutionality of a change of government, which can only be judged on the basis of domestic law.[3] In other words, mere recognition lends no legitimacy to the new government. When granting recognition, states have a certain margin of discretion. This discretion may be reflected, for example, in diverse national recognition practices towards one and the same government.[4]

At the same time, it should be noted that a unilateral, declaratory act of recognising a foreign head of state does not constitute a legal nullity; on the contrary, recognition could have legal effects, particularly in conjunction with the principle of good faith, which also applies in international law.[5] Depending on the specific circumstances of a particular case, a declaration of

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1 The basic position is set out by Jost Delbrück in section 19 – 'Begriff und rechtliche Bedeutung der Anerkennung,' pp. 187 *et seq.* – and section 20 – 'Das Recht und die Pflicht zur Anerkennung', pp. 196 *et seq.*, of Dahm, Delbrück and Wolfrum, *Völkerrecht*, Vol. I, Part 1, second edition, New York, 1988. On differences between the recognition of states and that of governments, see James Crawford, *Brownlie's Principles of Public International Law*, eighth edition, Oxford, 2012, pp. 151 *et seq.*

Cf. also Jochen A. Frowein, 'Recognition', in Rüdiger Wolfrum (ed.) Max Planck Encyclopedia of Public International Law (MPEPIL), at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1086?prd=EPIL#law-9780199231690-e1086-div1-4 (last updated: December 2010), paragraphs 14-22.

2 Delbrück, *loc. cit.*

3 Numerous sources, e.g. Patrick Daillier and Alain Pellet, *Droit International Public*, 7e édition, Paris, 2002, p. 417, para. 273.

4 On the current state of play regarding recognitions in the present case, see France 24, *UN will not join any group on Venezuela crisis talks: Guterres* (United Nations (United States)(AFP)), at https://www.france24.com/en/20190204-un-will-not-join-group-venezuela-crisis-talks-guterres?fbclid=IwAR3A9OWuK9Oc40gBWHnDLN6cbOupJjUQymXGNjcS5s3BN5RmUFhaJYNc6wc .

5 Numerous sources, e.g. Daillier and Pellet, *op. cit.*, pp. 418-9. On good faith, see Markus Kotzur, 'Good Faith (*Bona fide*)', as well as Thomas Cottier and Jörg Paul Müller, 'Estoppel', both in Rüdiger Wolfrum (ed.), *MPEPIL*, at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1412?rskey=353eg3&result=1&prd=EPIL, as well as http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1401?rskey=353eg3&result=4&prd=EPIL. States recognising a new foreign head of state would be acting inconsistently, for example, if they continued to treat the representatives of the old government as diplomatically accredited, since this would infringe the principle of estoppel in international law.

recognition might constitute an admissible or inadmissible **interference** in the internal affairs of the country in question[6] or indeed an **unfriendly act**[7] towards that country.

Interference in internal affairs must always be regarded as inadmissible intervention within the meaning of international law if it involves recourse to forcible or dictatorial means.[8] The mere declaration of recognition of a government entails no evident recourse to legally inadmissible means.

In the constellation of the present case, moreover, it is a moot point whether there has actually been any interference in purely internal affairs. Internal affairs are defined in international law as those fields of state activity which are **solely the responsibility of internal state actors**.[9] In view of the present human-rights situation in the country in question,[10] including the distress migration driven by the social and economic situation,[11] there is room for doubt, since **human rights**, with their international implications, are no longer exclusively regarded in international law as part of the national *domaine réservé*. On the contrary, the international community sees the protection of human rights more and more as a mission to be pursued collectively.[12] Similarly, the regional dimension of flight and migration from the country in question has long

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6 Numerous sources, e.g. Philip Kunig, 'Prohibition of Intervention', in Rüdiger Wolfrum (ed.), *MPEPIL*, at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1434#law-9780199231690-e1434-div2-4 (last updated April 2008).

7 Numerous sources, e.g. Dagmar Richter, 'Unfriendly Act', in Rüdiger Wolfrum (ed.), MPEPIL, at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e423?rskey=gE3FvM&result=1&prd=OPIL (last updated January 2013).

8 See also the examples cited in Daillier and Pellet, *op. cit.*, pp. 441-2, particularly the reference to ICJ, Military and Paramilitary Activities in und against Nicaragua (*Nicaragua v. United States of America*). Merits, Judgment. I.C.J. Reports 1986, p. 14, https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf .

9 Kunig, *loc. cit.*, paragraph 1.

10 Numerous sources, e.g. OHCHR, overview of human-rights news from Venezuela, 2014 to the present (last updated 31 January 2019), at https://www.ohchr.org/en/NewsEvents/Pages/NewsSearch.aspx?CID=VE ; UN News, *Independent UN rights expert calls for compassion, not sanctions on Venezuela*, 31 January 2019, at https://news.un.org/en/story/2019/01/1031722 , Amnesty International, Venezuela report, 2017/2018, at https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF, and Human Rights Watch, Venezuela report, at https://www.hrw.org/world-report/2018/country-chapters/venezuela .

11 The UNHCR, in *Venezuela situation*, at https://www.unhcr.org/venezuela-emergency.html, states that "People continue to leave Venezuela due to violence, insecurity and threats, and lack of food, medicine and essential services. With over **3 million Venezuelans now living abroad**, the vast majority in countries within South America, this is the **largest exodus in the recent history of Latin America**. Ongoing political, human rights and socio-economic developments in Venezuela compel growing numbers of children, women and men to leave for neighbouring countries and beyond. Many arrive scared, tired and in dire need of assistance" (emphasis in original).

12 Numerous sources, e.g. Katja S. Ziegler, 'Domaine Réservé', in Rüdiger Wolfrum (ed.), *MPEPIL*, at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1398#law-9780199231690-e1398-div1-2 (last updated April 2013), particularly paragraph 6 and paragraphs 12 *et seq.*

been raising issues of **international security**.[13] Nevertheless, a sharp distinction must be made here between, on the one hand, the internal situation in terms of human rights and international law and the question of the **election or appointment of the head of state**. The latter remains solely the responsibility of internal state actors, at least in cases where the machinery of state has not broken down completely.[14] There are therefore strong reasons to assume that the recognition of a head of state *ad interim* in the present case constitutes interference in a country's internal affairs. It is therefore perfectly legitimate to ask whether this particular interference should be classed as **inadmissible intervention**.

In principle, scholars of international law tend to be reticent about the recognition of new governments if the question of their constitutionality has not been finally resolved domestically:

> "The appointment and composition of the government is not regulated by international law but by the national constitution of the state. States are bound to treat the government which, according to the national law of the state in question, holds office as the organ of that state in international legal transactions too. This also applies, however, to a revolutionary government **which has truly established itself**. In cases where the new authority must first establish itself in a struggle with what has hitherto been the legitimate government, that struggle must, by any objective and rational assessment, have been decided in favour of the revolutionaries but it need not have been ended.[15] […]
>
> Recognition must not be premature, that is to say it must not be granted before the new state authority has established itself definitively. **Premature recognition** *per se* […] does not make the government legitimate. In this respect it has no effect in international law.

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13 Cf. UNHCR, *Number of refugees and migrants from Venezuela reaches 3 million*, 8 November 2018, at https://www.unhcr.org/news/press/2018/11/5be4192b4/number-refugees-migrants-venezuela-reaches-3-million.html .

14 On the admissibility of intervention in failing states for the purpose of protecting a nation's right of self-determination and human rights, see Daniel Thürer, 'Failing states', in Rüdiger Wolfrum (ed.), *MPEPIL*, at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1404?prd=EPIL#law-9780199231690-e1404-div2-4, paragraph 13: "The right to self-determination, together with human rights, was considered to authorize intervention in matters of internal affairs with the object of restoring the State authority needed for the proper functioning of international law".

15 Delbrück, *op. cit.*, p. 194 (emphasis added).

On this point, see also Frowein, *loc. cit.*, paragraph 15: "Where there are still two competing governments, **recognition** of the revolutionary government as the government of the State **is unlawful unless it has established its authority to such an extent that the outcome of the conflict is clear** and the former government's authority is reduced to a negligible area." (emphasis in original).

The same conclusion is reached by Crawford (*op. cit.*, p. 152), who states that, "In the case of governments, the standard set by international law is so far the **standard of secure de facto control of all or most of the state territory**." (emphasis added).

This view is also taken in Daillier and Pellet, *op. cit.*, p. 418: "En effet, la reconnaissance du gouvernement est (…) fondée sur l´**effectivité des autorités gouvernementales nouvelles et non sur leur légalité**." (emphasis added).

> On the other hand, it represents a repudiation of the legitimate state authority by the recognising state, whereby the latter incurs **tortious liability under international law**, and also encounters serious reservations from a peacebuilding perspective.[16] […]
>
> The verdict as to whether a new state authority has been definitively established and the old authority has finally ceased to exist is a value judgement based on prediction and is often open to question. There are situations, potentially enduring over lengthy periods, which can be judged in various ways, even from an objective and rational perspective. In such an ambiguous situation every state must decide on the basis of its **own political assessment** whether or not it already intends to recognise the new authority. Although every state has a right to recognise the new authority in such circumstances, the latter does not yet have any right of recognition by other states."[17]

It should also be considered that, in political practice, a state's own **national interests and considerations of expediency** often play a decisive role, while the legally relevant issue of effective state authority appears not to receive the attention prescribed by international law.

Whether, in the constellation to which the submitted question relates, the actual conditions set out above for an admissible recognition were in place **at the time of recognition** or not until some days later cannot be established beyond doubt with the means at our disposal. It would be necessary, for example, to ascertain exactly when the conflict between the president and the interim president is finally decided, even if it is not yet ended. This would require, for example, day-to-day investigation of the facts to establish who is exercising effective control of the state, including the armed forces and the security apparatus, at any given time.[18] Only on the basis of this **establishment of facts** can it be conclusively determined whether the recognition of a domestically contested interim president crosses the threshold of inadmissible interference in the country's internal affairs.

Even if recognition in the present case of a foreign interim president whose tenure of office is disputed in his own country did not cross the inadmissibility line and hence become unlawful interference in that country's internal affairs, it might still be possible to class it as an **unfriendly act** in international law. An unfriendly act occurs when the conduct of one subject of international law inflicts a disadvantage on, or expresses disregard or discourtesy towards, another subject of international law without actually violating any legal norm. An unfriendly act is not an international wrongful act, but its consequence is that the target state is entitled to resort to retorsion, in other words unfriendly but lawful countermeasures.[19] In the eyes of a government

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16 Delbrück, *op. cit.*, p. 200 (emphasis added).

17 Delbrück, *op. cit.*, p. 201 (emphasis added).

18 On the current situation, see footnote 4 above and the latest UN reports at https://news.un.org/en/news/region/americas .

19 Dagmar Richter, *loc. cit.*, paragraphs 1 and 7. See also Thomas Giegerich, 'Retorsion', in Rüdiger Wolfrum (ed.), MPEPIL, at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e983?rskey=39hCtQ&result=1&prd=EPIL .

that is still in office, the recognition of a head of state *ad interim* will surely always be deemed unfriendly.

2. Threatened recognition

The submitted question asks whether, in international law, a **call for free and fair elections** may be linked with a threat to recognise the interim president as head of state if those elections are not held.

Any threat to recognise the interim president is ultimately subject to the same basic principles as actual recognition. Accordingly, the admissibility of the threat likewise depends on who is exercising **effective state authority** in the country in question at the time when the threat of recognition is issued. Reference has been made above to the margins of discretion, the complex establishment of facts and the considerations of national interests that come into play in this context.

Besides, a call made by one state to another to hold democratic elections is not an infringement of international law. Although international law does not yet recognise a **right to democracy**, the law is certainly undergoing dynamic development in that area.[20] In the Millennium Declaration of the UN General Assembly, for example, the international community undertook, among other things, to spare no effort to promote democracy and strengthen the capacity of all its countries to implement the principles and practices of democracy.[21]

3. Threats of military intervention and detention

The submitted question regarding the admissibility of threatening **military intervention** and the **internment** of an incumbent head of state in the detention camp at Guantanamo Bay Naval Base relates to comments made by a security adviser to the United States Government which were quoted in the press.[22]

The legal basis that applies to the use of threats is **Article 2(4) of the Charter of the United Nations**, which stipulates that all Members must "refrain in their international relations from the

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20 Cf. Knut Ipsen, *Völkerrecht*, sixth edition, Munich 2014, section 8, paragraphs 61 *et seq*. § 8 Rz. 61 ff. On the current state of development and future prospects, see Gregory H. Fox, 'International Protection of the Right to Democracy', in Rüdiger Wolfrum (ed.), *MPEPIL*, at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e773?prd=EPIL#law-9780199231690-e773-div1-7; on the historical development of the concept, see Daillier and Pellet, *op. cit.*, p. 433.

21 United Nations Millennium Declaration, A/Res/55/2, 8 September 2000, at http://www.un.org/millennium/declaration/ares552e.htm, paragraphs 24 and 25.

22 Numerous sources, e.g. *El País*, 'El consejero de Seguridad de Trump amenaza a Maduro con Guantánamo', 2 February 2019, at https://elpais.com/internacional/2019/02/01/estados_unidos/1549040120_719684.html.

threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".[23]

The threat of military intervention is a **threat of force against the territorial integrity** of a state. Since Article 2(1) of its Charter states that the United Nations Organization is based on the principle of the sovereign equality of all its Members, and since military intervention conflicts with that principle of sovereign equality, such a threat is also **inconsistent with the purposes of the United Nations**.

The threat of internment in the detention camp at Guantanamo Bay Naval Base may also be interpreted as a threat of physical force. The threat addressed to the head of state targets the **political independence** of a state and likewise violates the principle of the sovereign equality of states. It is not clear that the source of this threat envisages a fair trial and due process in a court with jurisdiction *ratione personae*, *ratione loci* and *ratione materiae*. In the light of the previous practice of various US Administrations, the specific reference to Guantanamo might even be intended as a threat of arbitrary detention.[24] However that may be, this threat also falls within the scope of Article 2(4) of the Charter of the United Nations.

The fact is that that both threats violate the principles set out in the UN Charter, regardless of whether the conduct that the issuer of the threat seeks to impose on its recipient would be consistent with international law or would even be required by international law. The threat and use of force against the territorial integrity or political independence of any state are ruled out by the UN Charter as instruments of unilateral enforcement.

The prohibition of the threat of force has been repeatedly reaffirmed by the international community since the adoption of the UN Charter, notably in the Friendly Relations Declaration of the UN General Assembly.[25] On this point, the Declaration reads as follows: "Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.[26]

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23 Charter of the United Nations of 26 June 1945, at http://www.un.org/en/sections/un-charter/chapter-i/index.html

24 Cf. Human Rights Commission, Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, E/CN.4/2006/120, 15 February 2006, at https://undocs.org/E/CN.4/2006/120 .

25 Declaration of 24 October 1970 on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Friendly Relations Declaration), A/RES/2625 (XXV), at http://www.un-documents.net/a25r2625.htm.

26 *Ibid.*

The question remains whether remarks allegedly made by a security adviser to the government are attributable to the state as a subject of international law. This question concerns the responsibility of states. The relevant customary international law in this field is reflected in the Draft articles of the UN International Law Commission on Responsibility of States for Internationally Wrongful Acts.[27] According to draft articles 4 und 5,[28] the key point is whether the person or entity committing such an act is authorised by domestic law to exercise governmental functions. Such authorisation should probably be assumed in the case of a security adviser to the US Government. His statements would therefore be attributable to the state.

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27 ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10), at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf .

28 *Ibid.*, pp. 40 and 42.