

Summary: The Derecognition Approach: Government Illegality, Recognition, and Non-Violent Regime Change

Danny Auron, BA (Hons.), JD, LLM (Candidate)

Precis/Executive Summary

My research considers whether regime change could be effected legally by means other than direct physical intervention in situations where the international community is obliged to act on its collective responsibility to protect (R2P) civilians from mass crimes. I suggest the use of recognition policy – derecognition of existing regimes and the substitute recognition of opposition forces - as a novel approach to non-physical intervention, prevention, and regime change. Such policy would assist in the termination of administrations which face mass opposition from their population and meet this resistance with systematized violence.

R2P offers an imperative to states to find a way to protect endangered individuals abroad with any peaceful means possible before resorting to military intervention. This can include effecting regime change, an act legally and morally more acceptable if it comes about as a result of non-physical involvement and occupation. Derecognition offers a *de jure* change in the accepted government of a state – a non-violent regime change – in favor of those asserting an alternative ordering for their society. When the people manifestly demonstrate, across segments of society, that they wish to reform the governmental structure, a dictatorial regime has no support in the pillars of sovereignty, legitimacy or effective control. All are vitiated by the people’s demonstrated will. When the regime uses violence to suppress the movement, this only makes the illegality of the regime starker and more in need of acknowledgment.

International law presently withholds recognition from governments installed by force or illegal means (*ex injuria jus non oritur*), but not from governments that remain in power with the same techniques. It accords benefits of recognition to armed belligerents who appear to have popular support and reasonable success, but not to non-violent movements with the same basis. In light of R2P and the prioritization of non-violence, this illogical arrangement must cease.

The scheme of derecognition proposed here has a twin purpose. The first is to explicitly acknowledge that the present government has lost its authority by popular will, and/or by its use of organized violence. The second is to relocate sovereignty – in the eyes of the international community – to the people who have chosen to assert their will to choose their government. The change would be brought about only in clear circumstances of the rejection of the government or verifiable cases of government using violence to maintain power. The decision should be made as broad-based as possible in the international community, across ideological lines, and taking a cue from the reaction and opinion of the relevant regional bodies, such as the Arab League in the cases of Libya and Syria.

While the *de jure* change does not necessarily in itself factually change the government or the circumstances in the country, it is a clear sign that the international community will no longer tolerate the actions of the former regime. From a practical perspective, access to state funds abroad is automatically turned over to the new government, which can take whatever steps it believes necessary to solidify the changes it seeks. From a deterrence perspective, the former regime knows that the full range of international sanctions, including all due force, can subsequently be legally brought to bear in protecting the rightful sovereigns of the state.

The derecognition method is still interventionist, but it has a basis in concepts of sovereignty, legitimacy, and the responsibility to protect, as well as historical precedent. It is a

way to effect *de jure* regime change non-violently and on less tenuous legal ground than the much-debated possibility of humanitarian intervention against the wishes of the target state. If derecognition can work as a coercive measure, the costs in terms of both finances and lives of a continued stalemate between the existing regime and the people - in the country itself and in the international arena - can be minimized. Syria is an appropriate venue for an introduction of the measure, much needed by the SNC and the violently-oppressed citizenry.

Detailed Summary of Conclusions

Illegality of Violent Governments

A number of methods are used as legal justification for a government's representation of its population. The three most common of these legality-granting norms are sovereignty, effective control, and legitimism. Under each approach, when a government violently crushes dissent amongst its population, it loses its claim to legality under the rubric.

Sovereignty

While the original view of sovereignty focused on the inviolability of the state with respect to the actions of other states, sovereignty today is understood as being held by the people, who grant it to a legitimate government to ensure their protection and to pursue activities to provide for their various individual needs.

Effective Control

When reliable reports of mass demonstrations demanding the ouster of a regime exist concomitantly with the use of state violence to squash dissent, there should be no hesitation from states, even those relying on strict conceptions of effective control, in withdrawing recognition of the no-longer-effective government. There is no other logical conclusion that can be predicated on the doctrine of effective control, the legal components of which (habitual obedience) have been removed.

Legitimism

From the very concept of sovereignty we must allow for the minimum stipulation that a legitimate government respect the dignity and basic rights of the people, and operate on some form of their consent. The people should be permitted to choose the government they want, even if they choose a dictator. However, this choice cannot be made irrevocable. Sovereignty does not transfer permanently to the dictator. This is not a choice of democracy over other forms of government but rather a recognition that political legitimacy arises from the peoples' will, not from the fact of state sovereignty. To the extent that a government requires legitimacy, it cannot rely on systematic violence to ensure compliance, particularly when faced with clear demonstrations of a loss of popular support.

Expansion of Ex Injuria Jus Non Oritur

States have been unwilling to predicate new recognitions of governments on non-compliance with internal legal norms, or "violation of the provisions of a treaty to which one is a party"; why should continued recognition not maintain the same requirement? The same logic of avoiding situations arrived at unjustly should apply equally. While emergency laws and other legal regimes could ostensibly justify the use of some techniques as within 'legal norms', there

are also non-derogable universal human rights, and *jus cogens* crimes – for instance, a state must refrain from murdering citizens.

To allow such governments to retain recognition for their actions *within* states while still honoring the morally-equivalent *ex injuria* principle in affairs *between* states is to discount individual rights in favor of state rights, to revert to the traditional and supplanted conception of sovereignty instead of acknowledging the dominance of popular sovereignty represented in the human rights regime and R2P.

Legality and Practice of Removal of Recognition; Examples from Libya and Syria

Derecognition action would necessarily depend on the disappearance or non-existence of the requirements of international law, whether that be sovereignty, effective control, legitimacy or an application of *ex injuria*. By any standard, the actions of violent dictatorships in using military force against dissenters warrant the use of derecognition, as does the appearance of a pervasive rejection of the extant regime as demonstrated by the scale of popular demonstrations and the like.

While some observers have found recognition of the NTC improper even in light of the large-scale armed conflict, the international community was less reluctant to become involved in recognition policy in Libya than so far in Syria. The clearest explanation for this is that fighting ability and control of territory are considered conditions for recognition of opposition movements. Such logic limits the viability of non-violent dissension. To aid in the adoption of non-violent *resistance*, which better reflects the desires of the international community for non-violent *intervention*, a standard must be effectuated which acknowledges the capacity of non-violent movements to be equally robust as violent movements and equally deserving of support and recognition. If international law offers these advantages to violent resistance, it should *a fortiori* offer the same advantages, or greater ones, to non-violent resistance. It was in fact appropriate to grant recognition to the NTC, or at least to derecognize the Gadhafi regime, and this argument is only strengthened in Syria by the SNC's general abstention from violence.

Utility of Derecognition/Recognition of Opposition

Recognition even of belligerent status allows for some diplomatic benefits for the opposition, and official recognition as the government of the state entirely changes the calculus and legality of further international intervention, whether economic, diplomatic, or physical. The recognized government can request assistance from the UN against the former regime or to aid with human security issues, claim assets held in the state name in foreign banks, access international criminal law, and achieve the protections of sovereignty lost by the violent regime.

It is also a flexible tool. Derecognition could be accompanied by threats or promises of economic support for the new government, threats or promises of military support or intervention on behalf of the new government, referral by the Security Council to the International Criminal Court (or a self-referral by the newly recognized government, should the country already be part of the Court's regime or choose to accede), or any other coercive means.