CARL ZEISS AND NON-RECOGNITION OF GOVERNMENTS IN UNITED KINGDOM AND UNITED STATES COURTS

1. *Introduction*

The problem of what effect should be accorded to the legal acts of an unrecognized government has recently been highlighted by the *Carl Zeiss* litigation in many states of the world[1] including England[2] and the United States.[3] This note attempts to evaluate comparatively the differing approaches to this problem adopted by the courts of the United Kingdom and United States.

The orthodox reasoning aimed to prevent differing, and often contradictory, views concerning the legal status of another State or government by the Foreign Office and the courts, and thus at avoidance of possible embarrassing situations, led initially in England to the present practice. When the question arises in the courts as to whether a particular government is the government of a foreign sovereign State, the courts simply ask whether or not the Foreign Office has recognized that government as *de jure* or *de facto* entitled to exercise legislative authority over the territory controlled by that State, and then regard themselves as bound by the answer to that question.

The decision of the House of Lords in *Duff Development Co.* v. *Kelantan Government*[4] is probably the *locus classicus* of the orthodox view stated above. Lord Sumner in that case stated:

> . . . a foreign ruler whom the Crown recognizes as sovereign is such a sovereign for the purposes of an English Court of law and the best evidence of such recognition is the statement duly made with regard to it in His Majesty's name.[5]

It is thus not for the Court to inquire into the fact of status but only as to whether or not the Crown has created that status by recognition.

American practice as, and to the extent, exemplified in a recent New York decision, *Upright* v. *Mercury Business Machines Co.*,[6] appears to have established a "*de facto* principle".[7]

In *Upright* the plaintiff, an American resident in New York, was the assignee for value of a bill drawn on and accepted by the defendant company. The assignor company was a State-controlled enterprise of the German Democratic Republic. The trial judge had held that as the G.D.R. had not been recognized by the United States and could not have sued in its own name

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[1] For an interesting survey of *Carl Zeiss* litigation in the Supreme Court of the Federal Republic of Germany, and courts of U.A.R., the Netherlands and Austria see M. Magdalana Schoch, "Recent Significant German Decisions" (1959) 53 *Am. J. Int'l. Law* 687-92. See also *V.E.B. Carl Zeiss, Jena and the Carl Zeiss Stiftung, Jena* v. *Carl Zeiss Heidenheim and the Carl Zeiss Stifting, Heidenheim*, heard by the Paris Court of Appeal, on April 2, 1963 and confirmed by Cour de Cassation on March 15, 1965. The *Carl Zeiss* litigation in Australia has not yet involved issues with which this paper is primarily concerned: see *Re Carl Zeiss Pty. Ltd's. Application* (1969) 43 A.L.J.R. 196.

[2] *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* (Cross, J. March 6, 1964, unreported); (1965) Ch. 525 (C.A., in part allowing motion to request information as to status of German Democratic Republic); (1965) Ch. 596 (C.A., reversing decision of Cross, J.); (1967) 1 A.C. 853 (H.L., reversing C.A.); (1969) 3 W.L.R. 991 (Buckley, J., denying effect by way of estoppel to decisions of Cross, J., and H.L.).

[3] *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena* 293 F. supp. 892 (1968); see also, D.C., 42 F.R.D. 406 (1967); 32 F.R.D. 609 (1963).

[4] (1924) A.C. 797.

[5] *Id.* at 824.

[6] (1961) 213 New York Suppl. (2d.) 417 (hereafter called *Upright*).

[7] See D. W. Greig, "The Carl Zeiss Case and the Position of an Unrecognized Government in English Law" (1967) 83 *L.Q.R.* 96. Greig explains (at 125) the "*de facto* principle" as meaning "that the acts of a clearly established, though unrecognized, government will always be taken into account excepting where there is a definite policy statement from the executive to the effect that neither that government nor its decrees are to be recognized and acknowledged in the U.S.". This article will be hereafter cited by author.

in the U.S., so, too, the plaintiff assignee, which could be in no better a position than its assignor, must fail in its action. The decision of the trial judge was overruled on appeal where it was held that the plaintiff assignee must succeed in its action if it could show that its assignor had a clearly established position as a "*de facto* authority".[8] Breitel, J. observed:

> a foreign Government, although not recognized by the political arm of the U.S. Government may nevertheless have *de facto* existence which is juridically cognizable. The acts of such a *de facto* Government may affect private rights and obligations arising either as a result of activity in, or with persons or corporations within, the territory controlled by such *de facto* Government.[9]

It is thus apparent that whilst some courts in the United States practice tend to rely on Executive policy statements to rebut the *prima facie* recognition of legislation of an unrecognized government, English practice has been to accord recognition to such legislation if and only if the Executive has certified the recognition of the foreign government by the United Kingdom.

American practice has also diverged somewhat from the English practice in its modification of the hitherto unchallenged dichotomy of "the recognized government v. the unrecognized government". Some American courts have established a third category—that of "the unrecognized government the existence of which is nevertheless acknowledged".[10] Thus in *Salimoff* v. *Standard Oil Co.*[11] the certificate of the State Department made explicit its attitude by stating that the Department while not according diplomatic recognition to the Soviet regime was nevertheless "cognizant of the fact that it was exercising control in Russia".[12]

The leading English decision of *Luther* v. *Sagor*[13] has had the effect that the English courts would not create or concede the category of the non-recognized government, the existence of which is nevertheless acknowledged. In that case, as is well known, a Soviet government decree of 1918 purported to expropriate a portion of the woodworking industry in Russia. The plaintiff was a company incorporated in Russia which owned property in Russia which property was seized pursuant to the decree. Amongst the property seized was a quantity of timber branded "Venesta". The Russian government sold some timber labelled "Venesta" to the defendant, a company incorporated in the United Kingdom. The plaintiff brought suit in the United Kingdom claiming a declaration that it still owned the timber.

The Foreign Office was not a little embarrassed at the routine request concerning the status of the Russian Soviet government. A Russian trade delegation had been carrying on negotiations in London for some months and M. Krassin of the delegation was not only the very person with whom, in his status as Russian representative, the defendants had contracted to buy timber from the Russian government, but was also regarded by the United Kingdom as entitled to limited immunities from process in English courts. The Foreign Office certificate set out these facts elaborately and in conclusion stated that apart from accepting Krassin as a representative of "a State Government of Russia" who had been granted certain jurisdictional immunities "beyond these

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[8] *Upright* at 423.

[9] *Upright* at 419. Whilst Judge Breitel stated this principle as representing "traditional law", Greig is of the opinion that it is "an innovation based on a fusion of the hesitant steps hitherto taken by the New York courts with the Supreme Court and other Federal decisions on the *de facto* status of the Confederacy during the civil war". Greig, *supra* n. 7 at 125n.

[10] See Greig, *supra* n. 7.

[11] (1933) 262 N.Y. 220; 186 N.E. 679.

[12] *Id.* at 227; *id.* at 682.

[13] (1921) 1 K.B. 456; reversed on further facts by the Court of Appeal, (1921) 3 K.B. 532.

propositions the Foreign Office has not gone nor moreover do these expressions of opinion purport to decide difficult and, it may be very special questions of law, upon which it may become necessary for the Courts to pronounce. I am to add that His Majestys Government have never officially recognised the Soviet Government in any way".[14]

Roche, J. held, at first instance, that he was satisfied upon the information supplied by the Foreign Office that His Majesty's government had not recognized the Soviet government as the government of a sovereign State and that consequently he was unable to recognize its decree as a valid legislative act. The Court of Appeal later reversed Roche, J.'s decision on the ground that the British government had, since the holding below accorded recognition to the Soviet government, so that effect could be given to its decrees, thus leaving intact the reasoning of the lower court on the principal issue of the effect of non-recognition in English courts.[15]

In *Luther* v. *Sagor*, as it may now be seen in retrospect, an embarrassed Executive set out the whole situation—that while the United Kingdom had not formally recognized the Soviet regime, it regarded the head of the Soviet delegation as representing a Russian government—in the hope that the court would uphold the Soviet decrees even in the absence of formal recognition. Should that hope have been fulfilled English courts would have come close to the United States category of the "acknowledged" but unrecognized government.

2. *Facts of the Carl Zeiss Dispute*

The facts of the *Carl Zeiss Case* are complicated in the extreme, but for the present purpose a statement of relevant facts must include the following: The Carl Zeiss Stiftung was a general charitable foundation overseeing a glass and optical works, established in 1846 for the benefit of the University and town of Jena. Under the constitution of the foundation the ultimate administrative authority in charge of the foundation was vested in the appropriate governmental authority responsible for the University. In 1945 the United States Army re-established a provisional government in the vicinity of Jena, and in June 1945 the Americans withdrew under the Potsdam Agreement. In this short period, the Americans transferred the board of management together with as many workers as possible from Jena to Heidenheim in West Germany. The remainder of the foundation business in Jena was confiscated by the Russian government and ninety-five per cent of the machinery and plant was removed to the U.S.S.R. In 1948 the optical and glass undertakings were nationalized and two state enterprises (V.E.B.s) were registered as proprietors. The boards of management of the former undertaking of the Stiftung have continued to exist alongside and comprise the same individual members as the boards of management of the new V.E.B.s. The V.E.B.s have from the beginning regarded themselves as under a duty to provide funds for the foundation to carry out its objects. On the establishment of an East German trade mark register in 1954 registration was effected in the name of the foundation, not the V.E.B. Carl Zeiss. A declaration of agreement was issued by the foundation and the V.E.B. which stated that the latter had been using the trade marks free of charge with the Stifung's permission since 1948 and that the same arrangement would be continued for the future. The Soviet government later purported to expropriate all Zeiss trademarks owned by the Zeiss firm wherever situated. The State of Wuerttemberg in West Germany, purporting to rely on Article 87 of the German Civil Code (which provides that where a foundation's purposes can no longer be fulfilled its statutory purpose may be amended by the "appropriate authority" to enable it to

[14] (1921) 1 K.B. 456 at 477.
[15] *Cf.* Greig, *supra* n. 7 at 104-5.

function in accordance with the founder's intention as far as possible) transferred the foundation's domicile to West Germany.[16] The action of the State of Wuerttemberg stemmed from its view that Soviet expropriation made it impossible to fulfil the foundation's stated purpose of maintaining the Zeiss foundation's commercial enterprises and domicile in Jena, and left its operational centre and principal remaining commercial works in Wuerttemberg. In 1952 a decree of the German Democratic Republic provided that the newly created district of Gera was henceforth to be responsible for the area of Jena.

The central issue thus arising in the *Zeiss* litigation is whether the East German V.E.B. foundation or the West German foundation is legally identical with and the successor to the original foundation. On that issue depends the answer to the question of the ownership of the Zeiss trademarks used throughout the world.

3. *Carl Zeiss Litigation in the United States*

The 1968 New York decision[17] is valuable principally because of its apparent extension of the "*de facto* principle". Hitherto that principle had simply meant that courts in the United States would take into account the acts of a clearly established though unrecognized government unless there was a definite policy statement from the Executive to the effect that neither that government nor its decrees were to be recognized in the United States. The "*de facto* principle" as stated in the *Upright Case* and in the American *Restatement on Foreign Relations* had up to this time confined recognition to only such acts of an unrecognized government as pertained to "its purely local, private and domestic affairs".[18] The plaintiffs contended that the United States government's policy of non-recognition of the G.D.R. meant that United States courts could not examine any law other than the body of law applicable in the Federal Republic of Germany (West Germany) as relevant to the issue. The defendants contended that the United States government had accorded *de facto* recognition to the East German government because (a) the West German government did not claim to have sovereignty or territorial jurisdiction over East Germany, (b) the United States did not regard West Germany as the *de jure* government for the whole of Germany.

The above argument coupled with the defendants' contention that non-recognition did not preclude application of the law of an unrecognized government when the latter is the *de facto* government of that territory led the defendants to the logical conclusion that the relevant German law was the law promulgated and applied in East Germany notwithstanding the non-recognition policy of the United States.

Judge Mansfield was thus posed with a choice between two opposing and contrasting legal systems, each valid and each purporting to apply exclusively

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[16] In *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena* 293 F. Supp. 892 (1968) Judge Mansfield, upon an examination of the relevant aspects of the Code, accepted the view of experts that under the circumstances of the case (*viz.* Soviet expropriation of the foundation) "the State of Wuerttemberg, as a member of the German Federation was empowered by §87 as the 'appropriate authority' to establish the Foundation's domicile where its administrative center and principal operations were now located" (at 903-4).

[17] *Supra* n. 16.

[18] "§113. Effect of Non-Recognition on Application of Foreign Law: A court in the United States will give the law of an unrecognized entity or regime which satisfies the requirements for recognition specified in §§100 and 101 the effect which it would have under the rules of conflict of laws if the entity or regime were recognized, to the extent only that such law relates to:

(a) matters of an essentially private nature within the effective control of the unrecognized entity or regime, or

(b) the transfer of property localized at the time of the transfer in the territory of the unrecognized entity or regime and belonging then to a national thereof."

Restatement on the Foreign Relations Law of the United States (1965) 354.

to the particular facts. The Judge's decision to examine the East German law uninhibited by the non-recognition of East Germany by the United States is the aspect most important for the present analysis.

The decision at first glance appears explicable on the basis of the "*de facto* principle", yet that principle had hitherto been applied only to the acts of a foreign government relating to the purely local, private and domestic affairs of that government.[19] But here the Court was confronted with acts not strictly falling within either of the abovementioned categories as the decisions of East German courts concerned matters such as the effect of the U.S.S.R. decree purporting to expropriate all assets (including property in trade marks etc.) of the Carl Zeiss foundation *wherever situate*, and the effect of the state of Wuerttemberg's purported change of the domicile of the foundation from Jena to Heidenheim.

Both the decree and the purported change of domicile were acts which did not pertain to the purely local, private and domestic affairs of a government. The result was that Judge Mansfield considered the legislation of the unrecognized government of East Germany not on the *Upright* "*de facto* principle" but on an extended version of that principle.

In *Upright* Mr. Justice Breitel had recommended the recognition of the *de facto* existence of a foreign government which, though not recognized by the political arm of the United States government, was, nevertheless, still "juridically cognizable". Yet if the New York District Court decision in the *Carl Zeiss Case* can be taken to portend the future American practice, the acts of such a *de facto* government might be expected in certain situations to affect rights and obligations arising not only as a result of activity within, but also as a result of activity without the territory controlled by such *de facto* government.

A second especially significant feature of Judge Mansfield's decision is the relegation of the Executive's non-recognition policy to the status of one factor, which, although of some importance, was to be weighed together with many other factors in coming to a decision. It is important to stress that on the facts of the case, no certificate from the Department of State was called for. The Court simply regarded non-recognition of East Germany as a fact of which it could take "judicial notice". Judge Mansfield said:

> While our Government's diplomatic recognition policy is entitled to considerable weight in determining what law is to be applied . . . the invocation of the policy is complicated in the present case by the fact that the Court is dealing with a divided country. . . .[20]

Judge Mansfield's revolutionary approach to the role of the Executive policy receives support from his claim, as a part of the discretionary powers of the Court, to decide in favour of citizens or nationals of an unrecognized government *or* State where the facts so warranted. In his view:

> . . . the Court will not be barred by our Government's non-recognition policy from awarding United States trade marks to citizens or residents of a non-recognized country found to be the owners of them any more than our Government deems itself barred from conducting trade relations with East Germany and other "Iron Curtain" countries.[21]

Whether or not Judge Mansfield's extension of the *de facto* principle to cover acts affecting people and property outside the territory of the unrecognized government can be explained on the basis of the status of the foundation as an international business organization is not clear. Judge Mansfield said: ". . . the legal existence, status, identity and domicile of a foreign corporate

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[19] 293 F. Supp. 802 at 900 (1968).
[20] *Ibid.*
[21] *Id.* at 916.

entity or juristic personality . . . must be determined by the laws of the country where it has been created and continues to exist."[22] The Judge further observed:

> (w)here a juristic entity or personality created by one state has been recognized by other states which permit it to "do business" in their respective territories . . . so that it assumes a status as an international business organization, no sound reason appears, in fairness or logic, why termination of its existence in the creating state and purported seizure of its assets without compensation should require those other states . . . to treat its existence as terminated everywhere rather than assume sponsorship or recognition of the entity as continuing to exist within their borders. Permission to "do business" would appear as a matter of international law, to carry the implied condition that the entity be treated as continuing for certain purposes within the state granting such permission.[23]

Judge Mansfield thus relied (i) on the United States policy against extra-territorial recognition of an unrecognized government's decrees purporting to expropriate foreign property, and (ii) on the fact that an international business corporation comes into existence in the state of incorporation but may assume an independent status in other countries, in order to conclude that the true legal successor to the original foundation was the owner of the United States trade marks. That legal successor had to be determined by a consideration of the German Civil Code, 1900, and the law (including decisional law) of the Federal Republic of Germany and the German Democratic Republic.[24]

4. *The U.K. Approach*

In England the *Carl Zeiss* decision in the Court of Appeal and the decision in the House of Lords[25] although reaching opposite conclusions followed the same path in the application of the orthodox *Duff Development Co.* v. *Kelantan Government* rationale of the Executive certificate.[26] In the United Kingdom the issue was the preliminary one of whether the official of the foundation appointed by the Council of Gera, which was the creature of the unrecognized G.D.R., could validly authorize the commencement of proceedings in the English courts. The Foreign Secretary certified in reply to a request for information that since June 1945 "and up to the present date Her Majesty's Government have recognized the State and Government of the Union of Soviet Socialist Republics as *de jure* entitled to exercise governing authority in respect of . . . (the) zone (allocated to the U.S.S.R.)".[27] And the certificate categorically stated that the Government have not recognized either "*de jure* or *de facto* . . . (a) the 'German Democratic Republic' or (b) its 'Government' ".[28]

The Court of Appeal held that non-recognition required the English courts to treat the G.D.R. as non-existent. Its legislation could not be recognized, nor was it an agent of or subordinate authority to the U.S.S.R. In response to the argument that the U.S.S.R. treated the G.D.R. as a sovereign State, the Court of Appeal held that this was irrelevant as the legislative acts of the G.D.R. would stand or fall according to the status of the G.D.R. in the eyes of the United Kingdom government.[29]

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[22] *Id.* at 898.
[23] *Id.* at 899.
[24] *Id.* at 914-15.
[25] (1967) A.C. 853. See also *supra* n. 2 for a complete citation of *Carl Zeiss* litigation in England.
[26] See text accompanying nn. 4, 5 *supra.*
[27] (1967) A.C. 853 at 859, giving the full text of the Foreign Office certificate dated November 4, 1964.
[28] *Ibid,* giving the full text of the certificate dated September 16, 1964.
[29] (1965) Ch. 596 at 651.

The House of Lords, on the other hand, held that the fact that the Foreign Office certificate manifested the United Kingdom recognition of the U.S.S.R. as *de jure* entitled to govern the area under dispute and that the U.S.S.R. purported conferral of independent governing power on the G.D.R. meant that the G.D.R. had to be treated as a subordinate authority to the U.S.S.R. The decrees of the G.D.R. were thus validated as decrees of a subordinate authority to the *de jure* governing authority, and had thus to be given effect to.

The English decision then did not decide on the merits of the *Carl Zeiss* dispute, but merely upheld the retainer of the G.D.R. counsel. Far from paralleling any of Judge Mansfield's new ideas, the United Kingdom courts adhered so closely to the orthodox strict approach of the Executive certificate that both the Court of Appeal and the House of Lords saw fit to rest their decisions on interpretations, albeit conflicting interpretations, of that certificate.

The recent Privy Council decision in *Madzimbamuto* v. *Lardner-Burke and Anor.*[30] clearly emphasizes (with the exception of Lord Pearce's dissenting opinion) the rigidity in the English Court's approach to non-recognition in general. In that case the Privy Council pronounced upon the status of Mr. Smith's unilateral Declaration of Independence (U.D.I.) proclaimed on 11th November, 1965 and of the new Constitution promulgated subsequent to the Declaration.

On 16th November, 1965, the United Kingdom Parliament passed the Southern Rhodesia Act and immediately thereafter there was issued the Southern Rhodesia Constitution Order 1965 declaring the new Rhodesian government invalid and declaring all its Acts, laws and decrees invalid. Madzimbamuto was at the time of U.D.I. under arrest pursuant to emergency regulations lawfully issued in terms of the Emergency Powers Act, 1960. That Act empowered the Governor to declare a state of emergency which declaration would be valid for three months unless renewed. Madzimbamuto was detained under a state of emergency which terminated on 4th February, 1966. His detention was prolonged from time to time by the Smith government acting under the 1965 Constitution. The Smith government later issued new emergency regulations pursuant to which Madzimbamuto's detention was further prolonged. Madzimbamuto's wife challenged the validity of his detention on the ground that the Rhodesian government was an illegal government and that the declaration of a state of emergency and the subsequent detention order were invalid.

The General Division of the Rhodesian Court held that legal sovereignty over Rhodesia was still vested in the United Kingdom Parliament and the acquisition of sovereign independence by Rhodesia would only have come about legally and constitutionally by the grant of such independence by Her Majesty through an Act of the United Kingdom Parliament. However, the Court, *inter alia*, held that the regulations and orders under which the plaintiff was detained had to be given effect to "on the basis of necessity and in order to avoid chaos and a vacuum in the law".[31]

The majority in the Privy Council held that individual sovereignty over Rhodesia vests in the Crown; that the United Kingdom Act and Order in Council of 1965 were effective in the territory to deprive the Rhodesian

[30] (1968) 3 All E.R. 561 (P.C.); (1968) 3 W.L.R. 1229.

[31] Judgment GD/CIV/23/66 dated 9 September, 1966 reported in the Rhodesian Government Blue Book. For an analysis of the *Madzimbamuto* and related cases in the Rhodesian Courts, see J. M. Eekelaar, "Splitting the *Grundnorm*" (1967) 30 *Mod. L.R.* 156; Eekelaar, "Rhodesia: The Abdication of Constitutionalism" (1969) 32 *Mod. L.R.* 19; F. M. Brookfield, "Kelsen and the Rhodesian Revolution" (1969) 19 *Univ. of Toronto L.J.* 236; H.R. Hahlo, "The Privy Council and the 'Gentle' Revolution" (1969) 86 *South African L.J.* 419.

legislature of the power to make laws; that the usurping government was not a lawful government and finally that all its Acts and decrees were invalid.[32]

The Privy Council decision provides a good example of the carrying of a juridical conception to the extreme, notwithstanding Cardozo, J.'s injunction in *Sokoloff* v. *National City Bank* against this very practice.[33] Professor Hahlo is of the view that the 1965 United Kingdom legislation amounted to "no more than non-recognition spelled out at length", and that *Madzimbamuto* was a perfect opportunity for English courts to accept the American doctrine that "an unrecognized government may still be a *de facto* government, and that if justice is to be done, some of its acts ought to be recognized even though the government is not".[34]

The dissenting judgment of Lord Pearce casts a glimmer of hope for the according in English law of some measure of recognition to the acts of an acknowledged but unrecognized government. Lord Pearce agreed with the majority judges that the acts of a *de facto* government are not *per se* valid but accepted the principle laid down in the American cases that "acts done by those actually in control without lawful validity may be recognized as valid or acted on by the courts, with certain limitations".[35]

5. *Conclusion*

(1) The origins of the policy of looking to the Executive for a statement of the status accorded a foreign government, as expounded in the *Duff Development Case* may be traced to the desire of the courts to refrain, wherever possible, from acts relating to recognition of foreign legislation, which might cause the Executive embarrassment.

(2) The Courts of the United Kingdom have adhered closely to this orthodox view of the role of the Executive certificate in the law of recognition.

(3) Judicial and executive practice in the United States has recently developed a category in between that of "the recognized government" and that of "the unrecognized government", namely that of "the unrecognized government the existence of which is nevertheless acknowledged".

(4) United States courts have recently extended the "*de facto* principle" as expounded in *Upright* into a principle which together with the practice described in paragraph (3) leads the way to a policy of:

(a) subjugation of the role of the Executive policy of non-recognition into one factor to be weighed with others when deciding questions of the recognition to be accorded to a foreign government's laws;

(b) recognition of the laws of an unrecognized government the existence of which is nevertheless acknowledged insofar as those laws relate to matters of not only internal but also external concern to that country.

(5) It is questionable to what extent the latest United States attitudes are attributable, in the *Carl Zeiss Case*, to one or more of the following factors:

(a) the peculiar nature of the *Carl Zeiss* dispute in which the laws of a divided country were involved;

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[32] Lord Pearce in his dissenting judgment agreed with the majority that the United Kingdom could legislate for Rhodesia but relied on the principle of "state necessity" or "implied mandate" for recognition of certain acts of Rhodesian government as valid. See (1968) 3 All E.R. 561 (P.C.) at 587.

[33] (1924) 239 N.Y. 158; 145 N.E. 917. Cardozo, J. there stated: "Juridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it." But he added: "In practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of commonsense and fairness. . . ." *Id.* at 165; *id.* at 918.

[34] Hahlo, article cited *supra* n. 31 at 434. It is important to note the fact that allied with this refusal of recognition was the 1965 United Kingdom legislation which purported juristically to "annihilate" the Rhodesian government and all its laws.

[35] (1968) 3 All E.R. 561 at 579. Also see *supra* n. 32.

(b) the peculiar nature of the *Carl Zeiss* dispute in which the status of an international business corporation was involved;
(c) the United States public policy against recognition of any foreign extra-territorial expropriation of U.S. property (trade marks held in the U.S.).

(6) While the United Kingdom policy of strict adherence to the simple dichotomy of (a) "the recognized government" and (b) "the unrecognized government" is unduly formalistic in this day and age when many governments continue an active policy of commercial negotiations or transactions with unrecognized governments, the United States policy of recognition of a middle category of the "unrecognized government the existence of which is nevertheless acknowledged" appears a satisfactory solution to the problem. Use of this third category would allow the courts to follow a *de facto* principle, "that the acts of a clearly established though unrecognized government will be taken into account *unless* there is a definite policy statement from the Executive to the effect that neither the government nor its decrees are to be recognized. . . ."[36] The initiative would still be with the Executive in the shape of the control and wording of the policy statements to be contained in the Executive certificate. Judicial resort to the distinction between the "unrecognized government the existence of which is not in any circumstances to be acknowledged" and the "unrecognized government the existence of which is, despite non-recognition, acknowledged", may thus avert the type of embarrassing position created by Roche, J.'s decision in *Luther* v. *Sagor* in 1921.

(7) The extension of the *de facto* principle so as to blur the line between intra-territorial and extra-territorial legislation of an unrecognized government, as seen in the New York *Carl Zeiss* decision, should not be followed. Whilst the Executive can control the recognition of intra-territorial legislation of an unrecognized government by the rigidity and content of the Executive certificate together with policy statement, it should leave the judging of the effect of an unrecognized government's extra-territorial legislation and decrees to the courts which would weigh the issue in the light of public policy.

(8) The dissenting judgment of Lord Pearce in *Madzimbamuto* and the recognition, perhaps, of the principle of "state necessity" casts a glimmer of hope for the according by English law of some measure of recognition to the acts of an acknowledged but unrecognized government.

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[36] Greig, *supra* n. 7 at 125.