THE DOCTRINE OF RECOGNITION — A CASE NOTE ON *BILANG v. RIGG*

This article discusses a New Zealand case where the Court recognized a grant of administration made by a judicial officer of Southern Rhodesia, the government of which is not recognised by New Zealand.

INTRODUCTION

The twentieth century has witnessed two interesting international developments; first, a growing diversity of political creeds and second an increasing cooperation between nations. It has also been apparent that the former has restricted the latter. International relations with the U.S.S.R., the People's Republic of China, the German Democratic Republic and Southern Rhodesia, for example, have been hampered by a refusal of recognition by those nations who disapprove Communist or apartheid creeds. Large nations are substantially limited in dealings with non-recognizing states and their citizens exposed to hardship in the nonrecognizing courts.

Since the doctrine of recognition seems to be a major obstacle in the path towards international cooperation, its place in modern international law deserves careful scrutiny. For this purpose the case of *Bilang* v. *Rigg*[1] proves valuable, for it provokes a consideration of the place of recognition in international and domestic legal relations. It is believed that this consideration will show that, as modern trends are redefining the place of recognition, it no longer provides the sole criterion of the treatment a new entity will receive.

As an introduction to the investigation of this hypothesis, the facts and issue of *Bilang's* case will be outlined. A discussion of recognition in international and domestic relations will follow, involving comment on the judgment in that case. Finally, a conclusion on the hypothesis will be drawn. It should be noted here that as the problems raised by the recognition of states and of governments are not essentially different, no distinction is made between the two.

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1. [1972] N.Z.L.R. 954 (SC). A note at the beginning of the case states that the case was not originally reported "because it was unlikely that it would be relied upon in New Zealand in the future." In response to a request from overseas the case was reported because of its constitutional importance and its discussion of the English cases. The learned editors have not made it easy for the case to be relied upon, for the only reference to it in the Index is under *Executors and Administrators*. Their opinion that the case would not be relied upon may have been because the judgment is not, with all respect, very clear. On the other hand, this should not detract from the significance of the 'necessity principle' which the case employed.

II BILANG v RIGG

The plaintiff, Bilang, was appointed executor of a will in 1969 under the Southern Rhodesia Administration of Estates Act 1907. The order was made by Mr Perry, "Additional Assistant Master" of the High Court of Rhodesia. Perry had been appointed under the above Act by the "Minister of Justice" in 1966. A certificate attesting the grant of administration was forwarded to New Zealand for resealing pursuant to section 50 of the Administration Act 1952. This provides that where any grant of administration is made by "any competent Court of any Commonwealth country" and a copy produced in New Zealand, the Registrar of the Supreme Court shall reseal it and it will have the same effect as if originally granted here. The Registrar refused to reseal the grant and the plaintiff sought a writ of mandamus.

After U.D.I. in November 1965 the United Kingdom adopted the Southern Rhodesia Act 1965 and the Southern Rhodesia (Constitution) Order 1965. The former declared that the Government and Parliament of the United Kingdom continue to have responsibility and jurisdiction for and in Southern Rhodesia; the latter had the effect of transferring completely the legislative power in Southern Rhodesia to the Queen in Council.

The issue was whether the order made by Perry was made by a "competent Court". It was argued that the Court was not competent because Perry was appointed by a "Minister of Justice" whose own appointment was invalidated by the legislation referred to above.

Notwithstanding that the New Zealand government does not recognize the Smith régime, Henry J. found the court was competent and granted mandamus. This decision raises two interesting questions as to the place of recognition in modern international law. Is a grant of recognition becoming less significant for international legal purposes? Is the same tendency apparent for domestic legal purposes? By way of introduction, something must be said of the nature of recognition.

The Nature of Recognition

It is clear that recognition bestows prestige and certain international and domestic advantages. There is, however, no definitive rule as to the precise scope of these advantages or to its other effects. According to the constitutive theory, a state or government does not exist until it has been recognized. Logically, this view would mean that unrecognized entities had neither rights nor duties at international law, yet state practice allows them the right of territorial inviolability, for example, and demands that they observe rules of customary international law. Full rights, such as diplomatic immunity, remain dependent on the formal grant of recognition.

The need for formal government recognition before an entity can even be held to exist has caused the United Kingdom courts to formulate the doctrine of de facto recognition. If necessary, the government will

be considered by the courts to have provisional (de facto) recognition to an effectively operating government. Some rights result from this. Final *(de jure)* recognition, and complete rights, are granted when the government indicates that full recognition has been accorded.

The declaratory theory considers that an entity exists when it is effective and has then basic international rights and duties. While recognition gives full rights, some rights may arise before recognition, merely by virtue of existence. The decision is a matter of policy.

Both theories agree that the attainment of all rights follows only on formal recognition. The grant is thus essential if the nation is to participate fully in world affairs and if its legislative, administrative and judicial acts are to be taken cognisance of in the courts of foreign countries. Influential as recognition is, the decision to grant it has always been one each nation makes for itself. According to Lauterpacht, a constitutive theorist, the grant is made automatically, by reason of a legal duty, to any entity which qualifies for recognition by being in effective control of the country.[2]. Jessup, suggesting new approaches to international law, agrees with the notion of automatic recognition of de facto control.[3] Lauterpacht supported the existence of a duty by his interpretation of state practice but on another interpretation[4] it seems no such consistent duty emerges. The declaratory theory acknowledges that political factors govern the decision to recognize and a legal duty to recognize is denied.[5] In any case, as the decision might be seen by a State in some particular cases as affecting its vital interests, it is reasonable to assume that in those cases political matters predominate.

Thus, whether a nation is to gain the advantage of recognition has in such cases been determined by an individual, politically-based decision. It may be, however, that an investigation of the questions raised by *Bilang's* case will indicate that recognition and the decision to grant it are becoming less significant for the treatment a nation receives.

II THE PLACE OF RECOGNITION IN INTERNATIONAL LEGAL RELATIONS

In the international sphere, it is submitted that two developments may be reducing the significance of the power of individual states to

2. Lauterpacht, *Recognition in International Law* (1948).
3. Jessup, *A Modern Law of Nations* (1946).
4. See, for example, Kato, "Recognition in International Law; some thoughts on Traditional Theory, Attitudes of and Practice by African States" (1970) 10 Indian Jl Intl Law 299.
5. The words of W. R. Austin, a former United States representative on the Security Council, typify this attitude. Speaking of the recognition of Israel, he said: "I should regard it as highly improper for me to admit that any country on earth can question the sovereignty of the United States of America in the exercise of that high political act of recognition of the de facto status of a state." (Quoted by Brierly, *The Law of Nations* (6th ed. 1963) p. 140).

grant or withhold recognition. The first is the increasing contact between unrecognized and recognized régimes in traditional bilateral agreements and newer methods of multilateral arrangements; the need for recognition diminishes to the extent that cooperation is achieved without it.

Traditional bilateral treaty relations may be entered into without a prior formal act of recognition and there is today an increasing class of treaty to which recognition is irrelevant. The treaties may result from and lead to frequent contacts between the countries who carry out their obligations despite nonrecognition. For example, there were Sino-USA meetings in Geneva in 1954 at which technical and security issues were discussed[6] and the same trend was apparent in President Nixon's recent visit to Peking.

Developments in the bilateral field may nevertheless be restricted by fears that such contact will be taken as implied recognition. Multilateral arrangements overcome this obstacle and there are now many examples which show that several nations can cooperate together without first insisting on recognition.[7]

At international conferences representatives of recognized and unrecognized governments engage in consultations which may lead to a resolution binding them to common action. A large group of states pressed for German Democratic Republic participation in international councils, even if only as an observer.[8] North Korea and North Vietnam attended the Geneva Conferences on Korea and Indochina of 1954, and North Vietnam attended the Laos Conference 1962 and signed the Paris Peace Agreement 1973.[9]

Entry to international organisations is not automatically governed by prior recognition of the applicant by all members, with the result that these organisations, including the United Nations, count among their number governments unrecognized by the others. Further, as Bot writing in 1968 states: "The DDR, North Korea, North Vietnam and also Communist China are parties to a comparatively large number of non governmental organizations", citing the Red Cross Organization as an example.[10]

Multilateral treaties similarly encourage cooperation in many areas by all governments. Instruments may be unrestricted either in their accession clauses e.g. the four Geneva Conventions (1949);[11] or in

6. Lachs, "Recognition and Modern Methods of International Cooperation" (1959) 35 B.Y.I.L. 252, 253.
7. E.g. ibid., 258. The author gives figures from 1864 to 1955 which show how quickly the number of multilateral treaties has increased. Although the numbers of unrecognized members are not given, the trend towards multilateralism is established. See also Bot, *Nonrecognition and Treaty Relations* (1968).
8. Bot, 7, p. 44. Since June 1973 the G.D.R. has been generally recognized.
9. Ibid., 119; and (1973) 12 I.L.M. 52.
10. Ibid., 169, 170.
11. Lachs, n. 6, 256.

substantive provisions e.g. The Charter of the United Nations.[12] When a multilateral treaty is of great significance for the world recognition problems may be more easily surmounted. Most of the presently widely unrecognized régimes are parties to one or other of the Laos and Vietnam accords or to the disarmament treaties beginning with the Test Ban Treaty of 1963.[13]

Coupled with the growth of multilateral arrangements is the development of measures to ensure that cooperation between recognized and unrecognized countries is fostered although official contact is avoided. Bot cites several of these devices, including the institution of two or more depositories; the acceptance of a treaty as binding without officially signing or adhering to it (e.g. Red Cross Conventions); notification of the depositories that Convention rules have been incorporated in national legislation (e.g. Railway Conventions).[14]

The second development which may be affecting the place of recognition works in a different way. It is the growing incidence of a group of nations acting together to protect a general international policy rather than their own interests. Part of the total attack is a collective decision not to recognize. Not only is the individual decision submerged but the fact of nonrecognition does not alone determine the treatment accorded to the unrecognized nation — the moral policy dictates treatment of the nation also.

The notion of collective disapproval expressed in a refusal to recognize was embodied initially in the Stimson Doctrine. It was postulated that all states should deny recognition to " . . . any situation, treaty or agreement which may be brought about contrary to the covenants and obligations of the Pact of Paris."[15] The policy here was rejection of aggression as a means of gaining territory and it was hoped that the refusal, by denying legality to an aggressor's acts would demonstrate that aggression did not give a good title to territory.

The failure of the Stimson Doctrine as a peace-keeping device was attributed to the "weakness of world organization."[16] Since then the United Nations has emerged as representative of the opinion of a majority of nations. It has adopted in some cases the idea of the Stimson Doctrine in that recognition by members of the United Nations has been refused on international policy grounds. The doctrine that sovereignty cannot be acquired by the illegal use of force provoked the Security Council resolution which declared invalid any measures and actions by Israel which might purport to alter the legal status of

12. Idem.
13. Bot, n. 7, 139.
14. Ibid., 251-4.
15. Stimson, American Secretary of State, put forward this view in a note to China and Japan in 1932 and it was embodied in a League of Nations Resolution in that year (Brierly n. 5, 172).
16. Jessup, A Modern Law of Nations (1946, reprinted Archon Books, 1968), 162.

Jerusalem after the 1967 War.[17] The right to self-determination and prohibition of racial discrimination were aspects of international policy newly protected by the United Nations in its reaction to Southern Rhodesia's U.D.I. The Security Council called on all states not to recognize the Smith régime and to refrain from rendering any assistance to it.[18] Resolution 217 condemning "the usurpation of power by a racist settler minority", characterized the Rhodesian declaration of independence as having no legal validity and embodied the first stage of a sanctions policy.[19] Collective nonrecognition is used to protect the same rights in Namibia,[20] formerly South West Africa and mandated to South Africa whose claim to govern is no longer acknowledged.

As seen in the history of the Stimson Doctrine, a nation cannot be brought to heel merely by collective nonrecognition and the consequences which follow from that. As a purely negative reaction to facts, nonrecognition must be promptly followed by further international action of a more positive kind, such as a sanctions policy. Otherwise, it becomes a formal gesture whose only effect is to entrench the unrecognized government in its unlawful position. Nonrecognition should not by itself govern the attitude the United Nations takes towards the disapproved nation.

It is submitted that the significance of the grant or the withholding of recognition by individual states is being diminished by means of increased contact without recognition; and by collective institutional nonrecognition as part of a wider attack. The question now arises whether the same trend is at work in domestic legal relations.

III THE PLACE OF RECOGNITION IN DOMESTIC LEGAL RELATIONS

In the domestic sphere, it is submitted that three doctrines may be available to surmount the effects of nonrecognition. These are the doctrine of necessity, the doctrine of the validity of the acts of a de facto officer, and the doctrine of de facto recognition discussed above. The first two were relied on in *Bilang* v. *Rigg* to avoid the result that as New Zealand does not recognize Southern Rhodesia it could not recognize any act of its government.

The doctrine of necessity expresses the idea that acts done by an unlawful government to preserve order and good government should be obeyed by the citizens and enforced by the courts. In its original seventeenth century formulation[21] the doctrine applied to the situation

17. Res. 267 (3.7.69).
18. Res. 216 (12.11.65), See (1966) 5 I.L.M. 167.
19. Res. 217 (20.11.65), idem.
20. In October, 1966 the General Assembly terminated South Africa's mandate and assumed direct responsibility for South West Africa. See (1966 5 I.L.M. 1190).
21. The doctrine was formulated by civilian writers such as Grotius, Vattel and Victoria. Grotius' statement of it in *De Jure Belli et Pacis* I 4.15 is representative.

of usurpers and was justified on the grounds of an implied mandate from the sovereign to obey in order to preserve his realm. Subsequent developments have broadened its application to the situation of an unrecognized government in a foreign country and emphasis has shifted from the implied mandate to the need to allow citizens to continue their ordinary lives without inconvenience. The approach of Henry J. requires both situations to be considered.

The attempt by the Confederacy during the American Civil War to usurp the authority of the Federal government provides examples of cases in which the doctrine of necessity was invoked to validate the acts of a usurper. In a series of cases decided after the war the Supreme Court declared that necessity demanded that the acts of the usurper be recognized but only in so far as they did not promote the rebellion.[22] The class of acts actually validated was, however, restricted to those relating to the currency, for all other acts would tend to promote the rebellion by enabling the usurper to entrench his authority. The notion of an implied mandate was not favoured. Obedience was said by the courts to result from military force; but their conclusions are probably explicable on the grounds that the rebellion was over and the lawful sovereign had won.

The relationship between Britain and the Smith régime is another example of usurpation. Two cases have considered the necessity doctrine in this situation. In *Madzimbamuto* v. *Lardner-Burke*[23] the question was the validity of a declaration of emergency by the Smith government; in *Adams* v. *Adams*[24] it was the validity of a divorce decree. The argument that both acts could be validated by the doctrine as being vital to order and good government was rejected in both cases. A major distinction from the United States cases was that the rebellion was current and any recognition could serve only to consolidate the usurper's position. A mandate from the lawful sovereign could not be implied as the 1965 legislation negatived any intention to grant one. Lord Pearce, however, dissenting in *Madzimbamuto's* case, held that the necessity doctrine did apply. The point in time when recognition was given was said not to be important in principle and a mandate could be implied from the Governor's directions in November that ordinary citizens should continue their normal lives.[25].

As the United States and British cases cited above concern the attitude a court should take towards a usurper in its own country, they are not applicable to the relationship of a New Zealand court to the Smith régime. Nevertheless the doctrine of necessity was introduced to New Zealand law by Henry J. in *Bilang's* case by way of the English authorities.

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22. E.g. *Thorington* v. *Smith* 75 U.S. 1 (1868); *Williams* v. *Bruffy* 96 U.S. 176 (1877); *Baldy* v. *Hunter* 171 U.S. 388 (1898); *Keith* v. *Clark* 97 U.S. 454 (1878); *Horn* v. *Lockhart* 84 U.S. 570 (1873).
23. [1969] 1 A.C. 645.
24. [1971] P. 188.
25. [1969] 1 A.C. 645 at 733, 738, 739.
26. [1972] N.Z.L.R. 954 at 958.

The learned Judge accepts that the issue — whether the Court was competent — is to be answered by applying the test in *Adam's* case. He formulated it thus: "if a Southern Rhodesia court applied its own law correctly, ought it to recognize the grant notwithstanding the *de jure* lack of qualification of the Minister of Justice who purported to make the appointment?"[26] Here, Henry J. assumes the issue is the validity of the grant by Perry; later it is the validity of Perry's appointment.[27] It is submitted that whichever *is* in issue, had Henry J. consistently adopted the position of a Southern Rhodesian Judge applying the proper law of his country he could not have validated either the grant or the appointment. Part of the law of Southern Rhodesia was the 1965 United Kingdom legislation. Under the Order in Council all Ministers are dismissed and any purported ministerial act in contravention of the Order is void and of no effect. Perry's appointment, a purported ministerial act, would be void and thus the grant made by him would also be void. A Southern Rhodesia court would be compelled to reach this conclusion unless some doctrine such as that of necessity could validate the appointment or the grant.[28] Faced with the acts of a usurper, the Rhodesian courts could apply necessity only if there was a mandate from the lawful sovereign. The very fact of the 1965 legislation disproves any mandate. The Rhodesian courts could not apply necessity to validate either act.

Henry J., purportedly taking a Southern Rhodesian approach, deals with the matter differently. The doctrine of necessity is invoked to validate Perry's grant itself because it was the sort of ordinary administrative act allowed by the Governor's directives of November. Only then does the learned Judge consider the United Kingdom legislation, failing like Lord Pearce to appreciate that the later legislation would override the Governor's directives. The learned Judge holds that the legislation does not specifically preclude Perry's grant, and ignores the aspect of the invalidity of his appointment under the Order in Council. With respect, this line of reasoning is not altogether clear. If Henry J. is to put himself in the position of a Southern Rhodesia Judge it is submitted necessity cannot apply and full effect must be given to the United Kingdom legislation, as the legislation of the sovereign legislature.

Even if Henry J. abandons the Rhodesian position and acts as a New Zealand Judge looking at the acts of a foreign unrecognised government it is submitted that he applies inappropriate authority to invoke the necessity doctrine and ignores the obvious approach. Henry J. finds his authority in the "usurper" decisions, *Madzimbamuto* v. *Lardner-Burke* and *Adams* v. *Adams*. Both are

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27. Ibid., 960.
28. That the doctrine of necessity would have been available to Southern Rhodesia judges before the Privy Council decision is evidenced by the fact that in *Madzimbamuto's* case the General Division of the High Court of Rhodesia and Fieldsend AJA in the Appellate Division held it applicable there.

distinguished on the facts so that the necessity doctrine may be invoked. *Madzimbamuto's* case was distinguished because it did not involve the case of ordinary citizens carrying on normal tasks (whereas *Bilang's* case involved an ordinary grant of administration), and because it concerned invalid legislation (whereas the Administration of Estates Act 1907 was valid).[29] *Adam's* case was distinguished because it too involved invalid legislation and because it did not turn on the absence of a lawfully constituted appointing authority.[30] As the present case was distinguishable, the necessity doctrine did not need to be rejected as it had been in the United Kingdom cases. Lord Pearce's dissenting judgment could be followed and the doctrine applied to ordinary acts of administration. The learned Judge goes on to suggest that in any case Lord Pearce's dissenting judgment can be reconciled with the majority as their judgment dealt with the judiciary but did not deal with ordinary acts of administration. With respect, Henry J.'s use of the necessity doctrine was not persuasive. Not only were the authorities inapplicable, but a dissenting judgment is not a strong basis on which to introduce a debated concept. The two opposing positions in *Madzimbamuto's* case cannot be dovetailed in the way Henry J. suggests. A careful reading shows that Lord Pearce included the judiciary in his application of the doctrine,[31] which he considered could apply to the acts of a usurper. The majority rejected any application of it to the acts of a usurper. There is no possible reconciliation.

In following British authorities, Henry J. compared the constitutional position of Britain and Southern Rhodesia. The relationship between Britain and Southern Rhodesia is that of usurper and usurped; that which Henry J. was concerned with is that between

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29. The latter distinction is true, but it may be noted that the passage cited from *Madzimbamuto's* case for the purpose of demonstrating the distinction did not in fact do so. Henry J. cites this passage (at 960-961): "Apart from the provisions of this legislation and its effect upon subsequent 'enactments' the whole of the existing law remains in force. But it is necessary to determine what, as a true construction, is the legal effect of this legislation". ([1969] A.C. 645 at 729). Henry J. goes on to say (at 961): " "This legislation was a legislative enactment made in defiance of the legislative prohibition placed on the usurping power by the United Kingdom Government. Here we have no such condition." However, on reading the *Madzimbamuto* passage in context, it becomes apparent that "this legislation" in fact refers to the legislative prohibition i.e. Southern Rhodesia Act 1965 and Order in Council 1965, and *not* to subsequent legislation.
30. This is a valid distinction in that *Adams* case did not turn *only* on the absence of a lawfully constituted appointing authority. But it is submitted that Henry J. is not correct when he says (at 958) "The absence of a lawfully constituted appointing authority does not seem to have been raised in *Adams* v. *Adams* . . . " The Judge in *Adams* case did consider the point, concluding (at 214) " . . . the Queen in Parliament in the United Kingdom has expressly declared that those who appointed Macaulay J. were non de jure, and the executive has refused to recognize them as exercising power de facto. For the judiciary here to recognize the efficacy of the acts of such an appointee on the ground that he was exercising his office de facto would indeed involve the State speaking with two voices."
31. [1969] 1 A.C. 645 at 739.

unrecognizing and unrecognized governments. The trend has been to apply necessity in the second situation.

In the United States the necessity doctrine was initially applied to the acts of the rebel States done under their internal unusurped authority.[32] These cases provided a basis for the extension of the doctrine in this century to the acts of the unrecognized U.S.S.R. government.[33] Unlike English courts, the American courts could admit the existence of an unrecognized state or government and apply the necessity doctrine to its acts. The principle evolved that nonrecognition by the government left the courts free to determine the effects of what was done by the foreign sovereign. Under the Cardozo Doctrine the effects of the government's acts had to be drawn from the former, recognized law but this approach was broadened in *Salimoff* v. *Standard Oil Co.* This decision appeared to allow the courts to give almost as complete a validity as they wished to the acts of an unrecognized government. Although subsequently restricted, the broad approach seems to be favoured in recent authority.[34]

The formulation of the necessity doctrine as applied to the acts of an unrecognized foreign government has developed from the early cases. Recognition of acts was justified on the grounds of the desirability of avoiding hardship for ordinary citizens. A public policy test was applied to determine the kind of acts to be recognized. In the Civil War cases the aspect of public policy protected was the need to maintain the authority of the Federal government. Acts which had furthered the rebellion were invalidated, and only those essential nonpolitical acts necessary for society to function were recognized. Later in the U.S.S.R. cases, public policy widened considerably. In *Sokoloff* v. *National City Bank* and in *Salimoff* v. *Standard Oil* the policy element was expressed in terms of fairness and justice to the parties. Thus, political acts not strictly necessary for order and good government came to be recognized. The onus on the party requesting enforcement (as in *Sokoloff's* case) of proving that policy considerations require enforcement has been replaced by an onus on the party denying it (as in *Upright* v. *Mercury Business Machines Inc.*) to show that enforcement was undesirable.

No uniform approach to the doctrine of necessity emerges in the civil law jurisdictions. It appears that most countries favour the British line that validity depends on formal recognition, whether *de jure* or de facto.[35] Nevertheless, case law in Switzerland, Belgium, Holland and

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32. E.g. *Texas* v. *White* 74 U.S. 700 (1868); *Hanauer* v. *Woodruff* 82 U.S. 439 (1872); *Thomas* v. *City of Richmond* 79 U.S. 349 (1870).
33. E.g. in *Sokoloff* v. *National City Bank* 239 N.Y. 158 (1924) where the "Cardozo Doctrine" was enunciated; *Russian Reinsurance Co.* v. *Stoddard* 240 N.Y. 149 (1925); *Salimoff* v. *Standard Oil* 262 N.Y. 220 (1933).
34. *The Maret* 145 F. 2d. 431 (1944) appeared to reject completely the view taken in *Salimoff's* case (supra), but *Upright* v. *Mercury Business Machines* Inc 213 N.Y.S. 2nd 417 (1926) and *Carl Zeiss Stiftung* v. *YEB, Carl Zeiss, Jena* 293 F. Supp. 892 (1968) indicate that a broad application may again be accepted.
35. O'Connell, International Law (2nd ed. 1970) p. 181-183.

Egypt[36] indicates that at least in this century courts in these countries are prepared to acknowledge existence without formal recognition and thus give effect to the acts of unrecognized governments. As in the United States a public policy test governs the class of act to which recognition will be accorded, though of course the content of the policy varies with the interests of the country.

The idea of the necessity doctrine has recently been approved at the international level in an advisory opinion of the International Court of Justice.[37] It was said: " . . . while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory."

English courts have not joined the trend towards employing the necessity doctrine and it may be that their rigid attitude towards recognition stands in the way. There is no halfway position of an unrecognized government whose existence is acknowledged in English law. Despite this, there have been expressions of judicial approval of the doctrine. In *Carl Zeiss Stiftung* v. *Raynor and Keeler*[38] legislation of an unrecognized foreign government was in issue. Although, by reason of the wording of the Foreign Office certificate, the House of Lords was not faced directly with the choice of causing hardship or applying necessity, Lord Wilberforce and Lord Reid favoured application of the doctrine in appropriate circumstances.[39] In *Madzimbamuto's* case and *Adam's* case there was rejection of the doctrine only in the circumstances of the cases. The current state of English authority would thus seem not unfavourable to the doctrine.

The doctrine of necessity would seem a worthwhile and well established concept to introduce to New Zealand law and the decision in *Bilang's* case is valuable for not rejecting it. However, had the learned Judge appreciated the true constitutional relationship of New Zealand and Southern Rhodesia the doctrine could have been introduced more straightforwardly.

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36. Switzerland: *Hausner* v. *Banque Internationale* Ann. Dig. 1925-6 p. 97n; *Schinz* v. *High Court of Zurich* Ann. Dig. 1925-6, Case no. 23; *Tcherniak* v. *Tcherniak* Ann. Dig. 1927-8, Case no. 39. Belgium: *N. d'Aivassoff* v. *De Raedemaeker & Partners* Ann. Dig. 1927-8, Case no. 46; *Pulenciks* v. *Augustovskis* (1951) 18 I.L.R., Case no. 20. Holland: *Herani Ltd.* v. *Wladikawkaz Railway Co.* Ann. Dig. 1919-42 (Supp.), Case no. 10. Egypt: *Gross* v. *Gretchenko* Ann. Dig. 1923-4, Case no. 23; *Charalambos Papadopolos* v. *Monastery of Mount Sinai* Ann. Dig. 1927-8, Case no. 41; *Dahan & Dora Bros.* v. *Paul Tchoureff* Ann. Dig. 1935-7, Case no. 34.
37. *I.C.J. Advisory Opinion on the Legal Consequences For States of the continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)* 1971 I.C.J. Reports 16.
38. [1967] 1 A.C. 853.
39. Ibid., Lord Reid at 907-8; Lord Wilberforce at 954.

The path to be taken by a New Zealand court considering an act of the Smith régime was indicated by Quentin-Baxter in 1970.[40] The learned authoress begins by pointing out that "The United Kingdom courts must consider the effect of a legal revolution in a territory which is subject to the authority of the United Kingdom Government and Parliament. The New Zealand courts on the other hand, must deal with issues relating to Rhodesia on the basis that it is the rebellious colony of another state". English authorities are thus irrelevant. The court should seek an executive certificate as to whether Rhodesia has been recognized. The certificate would probably deny any form of recognition in view of Security Council Resolutions. In these circumstances, it would be for the courts to determine in each case the legal consequences of the absence of recognition. She suggests that there would then be room for the application of principles akin to the doctrine of necessity. If the formulation of the United States and European cases were adopted, a public policy test would be applied to determine the kind of act to be validated. It is submitted that in regard to Southern Rhodesia policy is no longer a municipal matter but an international one, indicated in the Security Council Resolution not to recognize the rebellious state. In applying this test, a New Zealand court would be required to ensure that recognition was given to no act which would hinder the achievement of self-determination and racial equality. In *Bilang's* case, had Henry J. followed the approach outlined above it is submitted that the grant of administration could have been validated as it does not appear to contravene this policy.[41]

The United States, some European countries, New Zealand and the I.C.J. have come to apply the necessity doctrine to the acts of foreign unrecognized governments. English courts appear to leave open the possibility of it being invoked. Necessity is thus a firmly based doctrine, available to mitigate the effects on the private citizen of a governmental decision not to recognize. It is submitted that the significance of recognition and the decision to grant it are thus diminished for, recognized or not, a country may pursue its ordinary activities and have them accepted.

The next question is whether the doctrine of the validity of the acts of a de facto officer has the same effects. This doctrine postulates that the acts of an officer *de facto sed non de jure* are valid and unimpeachable. A de facto officer is "one who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law".[42] The doctrine operates to restrict the implications of

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40. Quentin-Baxter, *Rhodesia and the Law* (1970) p. 39 et seq.
41. In *Bradley* v. *Commonwealth* (1973) 47 A.L.J.R. 504 it was argued that a declaration and an injunction should not be granted to the plaintiff, the director of the Rhodesian Information Centre, on the grounds that the Postmaster-General was acting in accordance with Security Council Resolutions when he withdrew all postal and tele-communications services from the Centre. The High Court of Australia did not accept this argument, refusing to give weight to Security Council Resolutions.
42. Per Lord Ellenborough in *R* v. *Bedford Level* (1805) 6 East 356, at 368.

the view that an unconstitutional statute or appointment is a complete nullity. Though the doctrine is deeply embedded in the common law, recent authority and discussion is scant except in the United States. This discussion need not be burdened with the United States decisions, however, as it is believed that the doctrine is not applicable to the situation in issue. Again, because of the approach of Henry J. there are two situations to be considered. First, the attitude a court should take to the acts of a de facto official in its own country; second, its attitude to the de facto official of a foreign unrecognized entity.

In New Zealand, the doctrine appeared in *In Re Aldridge*.[43] Here, the applicant was imprisoned by a Judge whose appointment was subsequently declared invalid by the Privy Council. The New Zealand Court of Appeal held that the imprisonment could be validated by the de facto officer doctrine because the Judge had acted by colour of right. "He held a Commission from the Governor; he was recognized as a Judge by the Officers of the Supreme Court; and conducted the proceedings of a sitting of that Court in a regular manner; and such proceedings were not questioned at the time".[44]

In England, the doctrine was considered in *Adam's* case. Although this was a decision of an English and not a Rhodesian court, it is best considered as an example of the first of the situations outlined above because judges in both countries owed allegiance to the same Head of State and were subject to the same sovereign legislature. In that case a decree of divorce was pronounced by a Judge who had failed to take the oaths required by the only constitution the United Kingdom Parliament regarded as valid. The de facto doctrine was held not to apply, for two reasons. It would be a constitutional anomaly to recognize the acts of a de facto judge while the executive acts of those appointing him were refused de facto recognition by the United Kingdom government; and the doctrine had never been applied to the prejudice of any right of a sovereign.

Both these decisions concern a de facto officer in the court's own country and are not therefore any precedent for the attitude a court should adopt to a de facto official in an unrecognized country. Nevertheless Henry J. attempted to apply them.

The de facto doctrine was invoked as another means of answering the question formulated by Henry J. The judgment is again not clear which official — the Minister of Justice or Perry — is the de facto official whose act is in question. But it is submitted that this point is again not material. Supposedly viewing the matter as would a Southern Rhodesia judge, Henry J. cites *Adam's* case, where the doctrine was not available, and *Aldridge's* case, where it was. Unable to distinguish them, he prefers to apply the latter. In doing this, he assumes that the doctrine is available in Southern Rhodesia although giving only a New Zealand authority.

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43. (1896) 15 N.Z.L.R. 361.
44. Ibid., per Conolly J. at 380.

However, the two cases are reconcilable and had Henry J. continued his stance as a Rhodesian judge (assuming with him that the doctrine does apply there) he would have found that they precluded the application of the doctrine. In *In re Aldridge* the Judges drew a distinction between the acts of a usurper, which would be invalid, and those of a judge with a colourable title, which would be valid. Denniston J. said: " . . . the results of all the authorities seem to me to be that it is only in the case of a usurper — that is, a person without a colourable title — that judicial acts done in due form in a competent Court are other than valid and unimpeachable."[45] In *Adam's* case the learned Judge points out that he could "find no trace of its (the de facto officer doctrine) ever being applied during a rebellion to accord recognition to the judicial or official acts of or under a usurping power."[46] Both decisions appear to accept the validity of the acts of a de facto official but not of a usurper. The Rhodesian courts are concerned with the acts of a usurping government. Government ministers and officials, such as the "Minister of Justice" and Perry, must also be usurpers and according to *Adam's* case and *Aldridge's* case their acts could not be valid.

The Rhodesian approach is not pursued, however. The learned Judge appears to prefer to view the officials in question as those of a foreign unrecognized government to which he can apply a common law doctrine embodied in a New Zealand authority.

This raises the question of the second situation outlined above i.e. the attitude of the court towards the de facto official of an unrecognized government. There appears to be no instance in which the de facto officer doctrine has been applied in this situation. Pannam, in a detailed study of the doctrine, considers a large number of English and American cases, all dealing with the acts of a national.[47] In any case, it does not appear to be within the scope of the doctrine to give relief to the citizens of an unrecognized country. The doctrine applies to a person who has been appointed to an office created by an unconstitutional statute and a person who is appointed pursuant to the terms of an unconstitutional statute to a valid office. These questions of constitutionality belong in the province of the national courts.

Thus Henry J. made an unwarranted extension of the de facto officer doctrine to the acts of officials in Southern Rhodesia. Moreover it was undesirable, for it would be a futile and improper interference for an unrecognizing court to decide on the constitutionality of the statutes of the unrecognized government. It was also unnecessary since the doctrine of necessity already exists to give validity to the acts of a foreign unrecognized government. Here there is room for the foreign

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45. Ibid., per Denniston J. at 379; and see Richmond J. at 372 and Conolly J. at 380.
46. *Adams* v. *Adams* [1971] P. 188, 214.
47. Pannam, "Unconstitutional Statutes and de facto Officers" (1960) 2 Fed.L.R. 37.

country to show its disapproval of another's acts, by way of the public policy test. Acts repugnant to international or municipal policy can be refused validity.

The doctrine of necessity is well established and, besides, more direct. A foreign court could not simply apply the de facto officer doctrine to validate any act of a de facto official of an unrecognized country, for the legislation under which he performs his acts may not be automatically recognized. The doctrine of necessity, called on to validate this legislation, validates the act as well.

It is submitted that the doctrine of the validity of the acts of a de facto officer is not available to mitigate the effect of a nonrecognition decision, and thus does not affect the place of recognition.

CONCLUSION

It was originally suggested that recognition no longer provides the sole criterion of the treatment a new entity will receive at international and domestic law. The discussion has not attempted to provide final proof of this suggestion but has, it is hoped, offered indications of present trends. It is submitted that, internationally, the power of individual states to grant and withhold recognition is becoming less relevant as unrecognized and unrecognizing nations cooperate together in multilateral arrangements, and as a broad range of institutional action is taken against disapproved governments. In the domestic sphere, it is submitted that recognition is becoming less relevant through the increasing acceptance of the necessity doctrine. It is believed that these developments are beneficial to the cause of world peace. A decision to grant recognition, based on individual political considerations, should not stand in the way of nations working together for international harmony and well being. Collective action against any creed that may threaten that harmony and well being is more effective than individual effort. It is more just and conducive to good international feeling if ordinary civilian life is not disrupted by a political decision over which the citizens have no control. Thus, if international trends do exist as outlined in this paper, they are to be welcomed.

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