

# FOREIGN GOVERNMENTS BEFORE THE COURTS\*

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## *Introduction*

Foreign states, their governments and their property increasingly appear before the courts. The mixing of market economies, the growth of the welfare state and the interdependence of international society ensure an expanding involvement of public authority and public property in private litigation.<sup>1</sup> Yet at such a time when the courts more than ever need clear principles on the treatment of foreign governments, they show themselves unsure about the suitability of existing ones and are stumbling to find new ones. The purpose of this article is to explore the current hesitancy in legal doctrine in three stages. First, it will briefly survey the courts' treatment of recognition, immunity and such like problems posed by foreign governments in order to display the consistency and coherence of their traditional approach. Next it will describe the breakdown of traditional principles and the consequent inadequacy of the courts' methods of handling these problems. Then, it will canvas the prospects for a new coherence of principle by suggesting avenues of productive enquiry and investigating current soundings by the courts themselves.

### *I. Traditional Principles.*

Diplomatic recognition of a foreign regime gives rise to a number of municipal consequences.<sup>2</sup> It is generally said<sup>3</sup> that a recognized state or government henceforth may expect (1) freedom to sue in the courts of

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\* This article is based on an address in the series Current Problems in International Law delivered at University College, London University on June 6<sup>th</sup>, 1979.

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<sup>1</sup> For an illuminating conspectus of the legal impact of this process of transnationalization see MacDonald, Morris & Johnston, *The New Lawyer in a Transnational World* (1975), 25 U. of T.L.J. 343.

<sup>2</sup> On recognition generally see B.R. Bot, *Non-Recognition and Treaty Relations* (1968); T.-C. Chen, *The International Law of Recognition* (1951); H. Lauterpacht, *Recognition in International Law* (1947); and H.M. Blix, *Contemporary Aspects of Recognition* (1970), 130 *Hague Recueil des Cours* 587, which is the latest comprehensive study and contains a further bibliography.

<sup>3</sup> E.g. Chen, *op. cit.*, *ibid.*, pp. 133 *et seq.*; Lauterpacht, *op. cit.*, *ibid.*, pp. 741 *et seq.*; J.G. Starke, *An Introduction to International Law* (8th ed., 1977), pp. 168 *et seq.*; S.A. Williams, & A.L.C. de Mestral, *An Introduction to International Law Chiefly as Interpreted and Applied in Canada* (1979), pp. 73 *et seq.*

the recognizing state;<sup>4</sup> (2) immunity from their jurisdiction;<sup>5</sup> (3) protection of its public property in the local territory from attachment, execution and taxation;<sup>6</sup> and (4) respect for its own acts committed at home.<sup>7</sup> To the contrary, the consequences of non-recognition are a lack of all these advantages municipally. Not being a diplomatic personality in the eyes of the government, the courts will refuse standing to sue to a foreign claimant to authority<sup>8</sup> and will not specially exempt it or its claimed property when sued.<sup>9</sup>

The grant of recognition, being an aspect of the conduct of foreign affairs, is within the prerogative of the Crown; it is in substance an exclusive function of the government.<sup>10</sup> On the other hand, the determination of its municipal effects, always excepting legislative intervention,<sup>11</sup> has been controlled in principle by the courts. Thus an act of recognition by the government, whatever it may symbolize to the foreign regime and to the international society generally, has carried a particular significance municipally. It has signalled to the other organs of state the advent of a new diplomatic personality. In turn, the courts, in carrying out their function to determine the legal attributes of the new personality, have been careful to ensure they have received the signal correctly. As a procedural precaution to ensure that they are accurately informed of the government's position, the courts have made it a conclusive practice to seek an authoritative certificate from the Secretary of State.<sup>12</sup>

In summation, under traditional judicial doctrine, upon diplomatic recognition by the government attested by ministerial certificate, the courts must accord immunity to the foreign state and its property abroad and respect for its acts at home. Without executive recognition, the courts will not interfere in the normal course of events of litigation.

This approach to the problems created by foreign governments coming before the courts has the twin merits of being simple to operate

<sup>4</sup> *Hullett and Widder v. King of Spain* (1828), 2 B1. N.S. 31, 4 E.R. 1041.

<sup>5</sup> *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149 (C.A.); *The Cristina*, [1938] A.C. 485 (H.L.); *Desaullès v. Republic of Poland*, [1944] S.C.R. 275.

<sup>6</sup> *The Parlement Belge* (1880), 5 P.D. 197, at pp. 214-215; *The Cristina*, *ibid.*; *Ref. as to Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208.

<sup>7</sup> *Banco de Bilbao v. Sancha*; *Banco de Bilbao v. Rey*, [1938] 2 K.B. 176.

<sup>8</sup> *City of Berne v. Bank of England* (1804), 9 Ves. Jun. 347, 32 E.R. 636.

<sup>9</sup> *The Annette*; *The Dora*, [1919] P. 105.

<sup>10</sup> 18 Halsbury's Laws of England (4th ed., 1977), para. 1406; R.M. Dawson, *The Government of Canada* (5th ed., 1970), pp. 147-148; P.W. Hogg, *Constitutional Law of Canada* (1977), p. 182.

<sup>11</sup> E.g. Diplomatic Privileges Act 1708, Stats. U.K. 1708, c. 12; Diplomatic and Consular Privileges and Immunities Act, S.C., 1976-77, c. 31.

<sup>12</sup> *Duff Development v. Kelantan*, [1924] A.C. 797 (H.L.); *The Arantzazu Mendi*, [1939] A.C. 256 (H.L.).

and, in principle, complete. But it is wholly dependent upon the courts' respect for the government's decisions about diplomatic recognition. Such an attitude is quite nineteenth century in its interpretation of the function of recognition municipally. It reflects the constitutive theory of recognition in its most limitative approach.<sup>13</sup> Domestic legal personality is conferred on the foreign regime by the government's act of recognition, and only by that decision, even though it may then be necessary to extrapolate its effects retroactively.<sup>14</sup> But this much canvassed theory of academic commentators is not referred to as the basis for judicial action in Anglo-Canadian courts at any rate.

The explanation supplied by the courts for their dependence upon the government's decision is a desire to avoid involvement in foreign relations. They have turned away from the merits of a dispute on numerous occasions in many different circumstances with a recital of what may appropriately be called the "unison principle". A particularly clear statement of the unison principle was provided by Lord Atkin in the *Arantzazu Mendi*:<sup>15</sup>

Our state cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our sovereign has to decide whom he will recognize as a fellow sovereign in the family of states; and the relations of the foreign state with ours in the matter of state immunities must flow from that decision alone.

This is but one reiteration of a series of deliberate recitals of the unison principle since it was first voiced in *Taylor v. Barclay* in 1828,<sup>16</sup> has been expressed in Canada in *Re Chateau Gai Wines Ltd and the Attorney General of Canada*,<sup>17</sup> and is still to be heard in the House of Lords in 1978.<sup>18</sup> The circumstances of judicial utterance have concerned the status of a foreign state or government, the boundaries of a foreign state, the authority of foreign acts of state, the force and effect of a treaty, the extent of national territory and the protection of national sovereignty from foreign extra-territorial jurisdiction.

There is no obvious, simple generic classification to these occasions other than the involvement of the national government's foreign affairs powers. In particular, the courts themselves have been

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<sup>13</sup> Lauterpacht, *op. cit.*, footnote 2, especially pp. 38-41.

<sup>14</sup> E.g., *Luther v. Sagor*, [1921] 1 K.B. 456, rev'd [1921] 3 K.B. 552 (C.A.).

<sup>15</sup> *Supra*, footnote 12, at p. 264.

<sup>16</sup> 2 Sim. 213, at p. 221, 57 E.R. 769, at p. 772: "It appears to me that sound policy requires that the Courts of the King should act in unison with the Government of the King."

<sup>17</sup> (1970), 63 C.P.R. 195, at p. 208, (1971), 14 D.L.R. (3d) 411, at p. 422 (Ex.C.).

<sup>18</sup> *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, [1978] A.C. 547, at pp. 617, 650-651. For other examples see also *Foster v. Globe Venture Syndicate Ltd.*, [1900] 1 Ch. 811, at p. 814; *The Fagernes*, [1927] P. 311, at p. 324 (C.A.); *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.*, [1966] A.C. 853, at p. 961 (H.L.); and *Oppenheimer v. Cattermole*, [1976] A.C. 249, at p. 278 (H.L.).

content to cite the unison principle "on such a matter" without ever refining that class of subject matter. Thus, although their utterances have been persistent and consistent, it is impossible to judge the motivation for the pervading judicial attitude. Whether it be principally out of concern for the constitutional separation of powers between the executive and the judiciary, or from fear of embarrassing the government in the conduct of its foreign policy, or more as a convenient and now hallowed escape for personal misgivings over messing with politics and diplomacy is all speculation.

Unfortunately, the inarticulation of the judicial premises for the unison principle have become significant, if not critical, in the treatment of foreign authorities by the courts. Of the example quoted it may be observed that constitutionally indeed the government must decide who to recognize<sup>19</sup> and internationally certain immunities must flow from that decision, but there is no such compelling logic or virtue in the unison principle so as to dictate the range of municipal consequences from this diplomatic act alone, as may now be shown.

## II. Breakdown of Traditional Principles.

Traditional judicial principles on the treatment of foreign governments had a chance of working so long as they sufficiently fitted the facts of diplomatic life. Chief of these were the conditions that states only interacted after recognition had been granted and diplomatic relations had begun, and that states only transacted diplomatic and not commercial business. These conditions were probably never true of international life and are certainly now decreasingly so. Whereas formerly there may have been a close enough approximation between the principles and the practice of recognition, now there is no longer so.

Nary a government nowadays asserts that recognition is not a political act but a legal one.<sup>20</sup> Legal factors remain present, even prerequisite, to the decision to grant recognition but are not dominant. A distinguishable territory and population and a stable and effective government of independent authority continue to be asserted as the minimal criteria of statehood at international law,<sup>21</sup> but governments look to a wide range of other political interests before they grant a claimant diplomatic recognition. A typical example of the attitude of

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<sup>19</sup> *Supra*, footnote 10.

<sup>20</sup> The British Foreign Office appears to be the only one that continues to do so but it avoids the ensuing complications for its foreign policy by its equally singular use of *de facto* recognition.

<sup>21</sup> Crawford, *The Criteria for Statehood in International Law* (1976-77), 48 Br. Y.B. Int. L. 93.

recognizing governments is provided by this statement of the Honourable Mitchell Sharp, Secretary of State for External Affairs:<sup>22</sup>

As far as recognition of states is concerned, the Canadian Government must first be satisfied that any entity claiming statehood meets the basic requirements of international law, that is, an independent government wielding effective authority over a definite territory. When these conditions appear to be fulfilled, the timing of recognition is determined in accordance with Canadian national interests, given the political and economic consequences of recognition. Once granted, state recognition survives changes in governments, unless it is explicitly withdrawn.

The recognition of governments involves a consideration as to whether an authority claiming to be the government of a state is able to exercise effective control with a reasonable prospect of permanency in the area which it claims to govern; the support it enjoys of the population and its expressed willingness to fulfill its international obligations may also be taken into account. While the act of recognition is essentially legal in nature, the relevancy of political factors is recognized in modern international practice; each situation is therefore considered on its own merit. Most of the time, however, when an orderly change of government, or type of government occurs in a territorial entity recognized by Canada as a state, the question of recognition does not arise. In such cases, the recognition already granted to a previous government continues to apply to its successors.

This expression of one government's approach to recognition is supported by studies of Canadian practice at other times and of the conduct of other states.<sup>23</sup> Consciously or not, such statements provide widescale evidence for the declaratory theory of recognition as the better explanation of current state practice. The distance that states have placed themselves from a constitutive approach to recognition is nicely summed up by Wheaton's quip:<sup>24</sup>

*A de jure* government is one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them. A *de facto* government is one which is really in possession of them, although the possession may be wrongful or precarious.

Inasmuch as states select the timing of their recognition of a foreign regime they also choose as much or as little avoidable interaction and co-operation with it while unrecognized. But if the usual legal criteria for statehood or government, whichever is at issue, are present, it is both practically and legally impossible for

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<sup>22</sup> Letter dated July 23rd, 1971 as abstracted in (1972), 10 Can. Y.B. Int. L. 308.

<sup>23</sup> Dai, Recognition of States and Governments Under International Law With Special Reference to Canadian Postwar Practice (1965), 3 Can. Y.B. Int. L. 290; Binavince, Canadian Practice in Matters of Recognition in MacDonald, Morris & Johnston eds., Canadian Perspectives on International Law and Organization (1974), p. 153; Misra, India's Policy of Recognition of States and Governments (1961), 55 Am. J. Int. L. 398; L.T. Galloway, Recognizing Foreign Governments, the Practice of the United States (1978), especially Appendix A.

<sup>24</sup> Quoted in Wheaton, Elements of International Law (6th Eng. ed., 1929), p. 43.

them not to take cognizance of the regime. In this context, cognition indicates something much less than recognition. Cognition implies restraint and non-violation of the rights inherent in statehood.<sup>25</sup> Recognition indicates a willingness to undertake active co-operation and other diplomatic courtesies. For instance, the failure to take cognizance of a regime meeting the legal standards of statehood or government could result in a breach of international law. Any form of action amounting to intervention in the affairs of such a regime would be contrary to its independence and its right to territorial integrity.<sup>26</sup> Refusal to recognize, however, cannot found a complaint.

The concept of cognition is particularly apposite in contemporary international society, circumscribed as it is by the United Nations. Since membership of that organization is open only to states,<sup>27</sup> admission of a new member must, if nothing else, provide multilateral acknowledgement of its achievement of statehood which no other non-recognizing state can possibly deny.<sup>28</sup>

The corollary to an existing state's cognition of a foreign regime is an expectation that its own statehood and the rights of its nationals will likewise be respected. This is not a matter of reciprocity, but a reverse application of the same principle of inevitable cognition. A lately insurgent now dominant and stable regime is bound to take cognizance of existing states and governments. The unsatisfactory treatment of their nationals and their property, however, has often created the unfriendly relations which have politically prevented a recognition of the new regime. Yet contacts of an intergovernmental character have had to be made in order to settle the assertions of mistreatment and other alleged delinquencies. Hence, in the absence consequent upon non-recognition of the usual facilitative channels that diplomatic relations provide, other less convenient and less direct means of communication have had to be invented. The tortuous paths to recognition of the Soviet and Peking governments provide examples.

As a matter of fact of diplomatic life the need and occasions for governments to interact with unrecognized regimes are numerous and varied. Moreover, as Hans Blix has shown in his recent comprehensive lectures at the Hague Academy,<sup>29</sup> governments readily exceed necessary transactions and enter a great variety of

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<sup>25</sup> Blix, *op. cit.*, footnote 2, at p. 609; Briggs, *Recognition of States: Some Reflections on Doctrine and Practice* (1949), 43 Am. J. Int. L. 113, at p. 120.

<sup>26</sup> As Hans Blix also concludes, *op. cit.*, *ibid.*, p. 697.

<sup>27</sup> U.N. Charter, Art. 4.

<sup>28</sup> And see Hans Blix, *op. cit.*, footnote 2, pp. 693-694.

<sup>29</sup> *Op. cit.*, *ibid.*, p. 587.

voluntary and co-operative arrangements with unrecognized regimes. The international practice of non-recognition, it seems, varies from very restrained relations to quite fluent ones. Semi-official yet permanent missions may be exchanged. Multilateral and even bilateral agreements may be concluded with unrecognized parties. So much so that it may become difficult to avoid inferring the recognition that these kinds of co-operative acts would traditionally imply. As Hans Blix concludes:<sup>30</sup>

Non-recognition, unrelated to genuine doubts as to the fulfilment of the legal criteria of statehood or status of government, signifies merely an attitude of withholding optional relations and courtesies. It may be assumed for a variety of purposes and with greater or lesser rigidity. For practical and humanitarian reasons it never involves a total withholding of relations. It may be very lenient. The establishment of formal diplomatic relations and the conclusion of very formal bilateral treaties are practically the only relations which consistently are deemed incompatible with such a policy.

A topical and particularly interesting example that bears out Blix's conclusions<sup>31</sup> is the continuance of treaty and other relations between the United States and Taipei. Former Secretary of State Vance has stated:<sup>32</sup>

We have been able to establish full diplomatic relations with the People's Republic of China in a way that protects the well-being of the people of Taiwan. . . . First, the United States will not abrogate the Mutual Defense Treaty. Rather, we have given notice that we will exercise our right to terminate the treaty with Taiwan in accordance with its provisions, which permits [*sic*] termination by either party after one year's notice. All other treaties and agreements will remain in effect. . . . In constructing a new relationship with the people on Taiwan, we are taking steps to ensure continuity of trade, cultural, and other unofficial relations. . . . In the future these relations will be conducted through a nonprofit nongovernmental corporation called the American Institute in Taiwan. . . . Taipei will handle its unofficial relations with this country in similar fashion. . . .

This statement of continuing relations between the United States and Taipei is unusual but not remarkable. Its unusualness lies in the circumstances of China. There has been a change of recognition but no change of government. It is rare for the previously recognized regime to persist, as Taipei obviously does. Since it does, the United States evidently finds it politically expedient to choose a particularly lenient policy of non-recognition, albeit arranged in a way that presumably is acceptable to the newly recognized government in Peking.

The circumstances of contemporary diplomatic life, so far discussed, necessarily involve the acts of governments and their

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<sup>30</sup> *Op. cit.*, *ibid.*, p. 697.

<sup>31</sup> See also the study of B.R. Bot, *Non-Recognition and Treaty Relations* (1968).

<sup>32</sup> Official Text of briefing for U.S. businessmen on trade opportunities with China, Washington, Jan. 15th, 1979.

doctrinal explanation. The focus of this article, however, is not the appropriateness of different theories about diplomatic recognition between consenting states. Its chief concern is the municipal consequences of recognition and non-recognition. The external, diplomatic practice of governments *inter se* has been surveyed only to expose the fictitiousness in the judicial foundation for internal, domestic action, namely the unison principle.

When recognition is withheld, governments, far from ignoring each other, are bound to take cognizance of, and in fact find it convenient to engage in a wide variety of international transactions with, their unrecognized opposites. In such circumstances a government at once denies recognition but accords relations which recognition would promote. It is then that government itself can be seen to be speaking with a forked tongue; its own voice is not single. Under these conditions it is impossible for the courts to sing in unison. Their principle of operation is defeated by the very organ of state whose conduct it is supposedly designed to assist. It is bitter irony for the courts that the unison principle, when most convenient to them, is most thoroughly betrayed. Its very inoperability as a legal concept exposes the uncertainty of function and responsibility in the courts.

Yet the courts cannot ignore the issues that non-recognition cases are bound to create. As the judicial organ of state they are as much bound as the government to take cognizance of a foreign state. Nor can they avoid the merits of a dispute over a transaction which refers to an unrecognized regime. In practice the courts have not shirked their responsibilities but have engaged in other circumventions or subterfuges of construction, which are a clear enough indication that new foundations for their action must now be investigated.

### III. *Search for New Principles.*

A too slavish and mechanistic respect for the government's diplomatic deployment of recognition has prevented the courts from perceiving the breakdown of their traditional principles. Were it to be questioned, then two refreshing perspectives might be pursued. First is the possibility of distancing the diplomatic, that is external, consequences of the government's decision on recognition from its domestic legal effects, so far as international law permits such freedom to the nation state. Secondly, as a consequence, the problems presented by foreign governments in the courts may be investigated on their merits. In general these problems are either about excessive immunity for the activities of foreign states that have been recognized or about too grudging respect for them when they are unrecognized. Both sets of problems originate in the way the



courts inform themselves of the foreign party's status, namely by executive certificate. Accordingly these three lines of enquiry will be treated here separately and in reverse order.<sup>33</sup>

### 1. *Problems Over Executive Certificates.*

Of their own initiative, the courts are conclusively informed on a wide range of matters by certificates of the Secretary of State which are then formalistically construed. The practice is long founded but the recent case of *Re Chateau Gai Wines Ltd. and the Attorney General of Canada*<sup>34</sup> conveniently enumerates its use:<sup>35</sup>

- a) a question as to whether a person is a foreign sovereign power,
- b) a question as to what persons must be regarded as constituting the effective government of a foreign territory,
- c) a question as to whether a particular place must be regarded as being in Canada or as being under the authority of a foreign sovereign authority,
- d) a question as to whether Canada is at peace or at war with a foreign power, or
- e) a question whether a person in Canada is entitled to diplomatic privileges as being an ambassador of a foreign power or a member of the entourage of such an ambassador.

The conclusiveness of executive certificates upon such questions is generally taken to have been settled by the House of Lords in *Duff Development v. Kelantan*<sup>36</sup> as Lord Atkin remarked a few years later in *the Arantzazu Mendi*:<sup>37</sup>

I pause here to say that not only is this the correct procedure, but that it is the only procedure by which the Court can inform itself of the material fact whether the party sought to be impleaded or whose property is sought to be affected, is a foreign sovereign state. This, I think, is made clear by the judgments of this House in the *Kelantan* case.

The irony of these decisions in the interwar period is that they established the exclusive procedure of conclusive reference to the government at the very time that the nineteenth century ideas of club-like interstate relations which they support were seriously beginning to break down. They appear to have locked the courts on a course from which states themselves are increasingly diverging.<sup>38</sup>

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<sup>33</sup> Some of these problems have been handled with varied success through concepts of private international law. This article is exclusively concerned with the impact of public international law.

<sup>34</sup> *Supra*, footnote 17.

<sup>35</sup> *Ibid.*, at 208 (C.P.R.).

<sup>36</sup> *Supra*, footnote 12.

<sup>37</sup> *Supra*, footnote 12, at p. 264. And see Lord Reid's remarks in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.*, *supra*, footnote 18, at p. 901.

<sup>38</sup> *Supra*.

Under current conditions of international life, there is noticeable inconsistency in the matters referred to the government and a questionable extent to the curial conclusiveness of its replies. As to the range of matters referred, it is wise constitutionally for a court to enquire of the government whether a foreign state or government is recognized since this is a matter of foreign relations within the Crown prerogative.<sup>39</sup> It follows for the same reason that a question about the status of a claimant representative of a foreign state is well put to the organ of state that must accept and accredit the individual. One may wonder, therefore, why the same sensible principle does not apply to receiving foreign agencies and permitting the establishment of allegedly representative foreign instrumentalities, such as news agencies<sup>40</sup> and trading enterprises.<sup>41</sup> The courts' interest to avoid mistreating, by subjecting to their jurisdiction, such extensions of a foreign sovereign state is surely just as great as their concern for its personnel, yet an enquiry on this matter is never made of the government. It does not seem to have occurred to the courts that they ought to, or might even find it useful to, refer such a question.

Along much the same lines of argument, one might question why the courts enquire of the government whether a person is a member of a diplomatic class but they unaidedly determine the scope of immunities of that class for themselves. It is easy to see that according an immunity involves the application of international and municipal law,—a truly judicial function,—but the courts must also learn whether the claimant was received by the government upon any special privileges. Likewise the courts do not involve the Secretary of State in any issues about alleged foreign state property. They neither enquire whether property in issue is recognized as public, for instance upon entry into the country, nor how it might be respected. It seems, therefore, that the courts have often foregone a useful source of assistance to themselves in a number of tricky circumstances touching foreign relations. This is the more surprising in view of their over anxious concern to speak in unison with the government's foreign policy and their conclusive respect for its opinion upon some matters.

To these inconsistencies in the judicial practice of reference may be added a scepticism, also expressed by other writers,<sup>42</sup> for the

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<sup>39</sup> *Supra*, footnote 10.

<sup>40</sup> *Krajina v. The Tass Agency*, [1949] 2 All E.R. 274 (C.A.).

<sup>41</sup> *Compania Mercantil Argentina v. U.S. Shipping Board* (1924), 93 Sol.J. 816 (C.A.); *Baccus S.R.L. v. Servicio Nacional del Trigo*, [1957] 1 Q.B. 438 (C.A.).

<sup>42</sup> *E.g.* Blix, *op. cit.*, footnote 2, p. 700; Chen, *op. cit.*, footnote 2, pp. 238 *et seq.*; *Cf.* F.A. Mann, *Studies in International Law* (1973), pp. 402-403; Merrills, *Recognition and Construction* (1971), 20 Int. Comp. L.Q. 476, at p. 493.

judicial principle of executive conclusiveness. At least a typically legal enquiry must be made about the scope of executive conclusion, but one may go further and question its propriety altogether. The courts are not to be accused of avoiding their duty to apply an executive certificate to the events in issue before them but of their manner in doing so.

They could hardly evade the task of application short of turning the whole case over to the Secretary of State for decision. Then too the government has rightly rejected enquiries tending to transfer jurisdiction rather than acquire information<sup>43</sup> and has stated in its certificates that conclusions are not implied by its statements but are for the determination of the court.<sup>44</sup> Furthermore, the government will temporize in its certificate when it is diplomatically expedient to do so.<sup>45</sup> This practice confounds the unison principle of the courts and forces them, however unwillingly, to exercise wide discretion in interpretation.

More often, the government's opinion is clear and then the courts do severely attenuate their judicial function in the face of executive certificates. Out of deference to their monument to supposed unison with the government, the courts make too literal constructions of executive certificates that lead to mechanical applications. Atkin L.J. seems to have appreciated this risk in *The Fagernes* yet resolutely to have continued:<sup>46</sup>

The question to be decided in this case is no less momentous than whether the Bristol Channel is part of the realm of England. What is the territory of the Crown is a matter of which the Court takes judicial notice. The Court has, therefore, to inform itself from the best material available; and on such a matter it may be its duty to obtain its information from the appropriate department of Government. Any definite statement from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive. A conflict is not to be contemplated between the Courts and the Executive on such a matter, where foreign interests may be concerned, and where responsibility for protection and administration is of paramount importance to the Government of the country. In these circumstances the Court requested the assistance of the Attorney-General who, after elaborate and valuable argument on the municipal and international law, so far as it affects the question, eventually informed the Court that he had consulted the Home Secretary, and was by him instructed to say that the place of collision was not within the limits to which the territorial jurisdiction of His Majesty extends. I consider that statement binds the Court,

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<sup>43</sup> See, e.g., the course of enquiries and certificates in *White, Child and Beney Ltd. v. Eagle Star and British Dominions Ins. Co.* (1922), 127 L.T.R. 571 (C.A.).

<sup>44</sup> E.g. *Laane & Baltzer v. Estonian State Cargo & Passenger Steamship Line*, [1949] S.C.R. 530, at p. 532; *Boguslawski v. Gdynia Ameryka Linie*, [1950] 1 K.B. 157, at p. 160; *Re Al-Fin Corporation's Patent*, [1970] Ch. 160, at p. 164.

<sup>45</sup> See A.B. Lyons, *Judicial Application of International Law and the "Temporizing Certificate of the Executive"* (1952), 29 Br. Y.B. Int. L. 227.

<sup>46</sup> *Supra*, footnote 18, at pp. 324-325.

and constrains it to decide that this portion of the Bristol Channel is not within British jurisdiction, and that the appeal must be allowed.

I think, however, that it is desirable to make it clear that this is not a decision on a point of law, and that no responsibility rests upon this Court save that of treating the statement of the Crown by its proper officer as conclusive. Speaking for myself alone, if I had to decide this case upon the materials before Hill J. and the further authorities brought before us, I should have been inclined to come to the same conclusion as he did.

This is a singularly clear cut example of supporting the word of the government regardless of practice. One may be forgiven for thinking, contrary to Atkin L.J., that territorial jurisdiction is very much a question of law for the determination of the court. His own recital of British practice over two more pages of judgment belies his stated decision and undermines the wisdom of giving automatic effect to the government's pronouncement.

Equally mechanical was Jackett P.'s treatment in *Re Chateau Gai Wines and Attorney-General of Canada*<sup>47</sup> of the question whether a treaty between Canada and France had ever come into force. The procedures for ratification called for by the terms of the treaty itself were never fulfilled but it appeared that a supplementary, informal agreement purportedly brought it into force. Jackett P. accepted the certificate of the Secretary of State that "the two countries have regarded the agreement as having come into force as of June 10, 1933"<sup>48</sup> as conclusive that it did so. Indeed, he went further than Atkin L.J. in asserting that this issue was one of the class of questions, "whether of fact or law or both",<sup>49</sup> that should be determined by the government because of the unison principle.<sup>50</sup>

Though superficially attractive, constitutionally his statement is surely wrong. While the government has exclusive authority to make treaties, there has never been any doubt in Canadian or British jurisdictions that the courts are responsible for their interpretation.<sup>51</sup> Whether a certain convention is in force is a matter of treaty interpretation. While it was undoubtedly right to ask the Secretary of State, as the maker and lawful signatory for Canada, what he had done, it did not follow necessarily and without scrutiny that in law he had achieved what he had sought to do.<sup>52</sup>

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<sup>47</sup> *Supra*, footnote 17.

<sup>48</sup> *Ibid.*, at p. 207 (C.P.R.).

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*, at p. 208 (C.P.R.).

<sup>51</sup> McNair, *Law of Treaties* (1961), pp. 345 *et seq.*; A. Jacomy-Millette, *Treaty Law in Canada* (1975), p. 292.

<sup>52</sup> *Cf.* the remarks of Pigeon J. in *Chateau Gai Wines Ltd. v. Institut National des Appellations D'Origine des Vins et Eaux-de-Vie et al.* (1975), 51 D.L.R. (3d) 120, at p. 124, where the issue was left open. For a commentary see Pharand, *Annual*

In cases of non-recognition this criticism may become particularly acute. If the government's denial of recognition is literally respected in the face of an existing foreign regime, all sorts of problems attend the courts. The passage of the famous case of *Luther v. Sagor*<sup>53</sup> is a good example involving, as it did, a change of diplomatic recognition, a consequence reversal of judicial decision and a retroactive application of law. As the number of voluntary contracts between the government and the unrecognized regime increase, so the courts' difficulties brought on by mechanical adherence to the words, regardless of the practice, of the government also grow.

Current state practice of non-recognition, such as the United States' treatment of Taiwan, strain the judicial principle of conclusive certificates beyond breaking point. In making enquiries of the government, what the courts require and what the Secretary of State supplies are diplomatic facts,—“facts of state” as Harrison Moore has called them.<sup>54</sup> The courts need to know, for instance, whether a regime is diplomatically recognized, or whether an individual has been received as an ambassador, by the government. These are questions about the attitudes of government which remain matters of fact even though they depend upon decisions which may themselves involve elements of law.<sup>55</sup> The decision to recognize a foreign regime or to receive an ambassador is not reviewable in the courts because it is part of the exclusive function of the government in conducting foreign affairs. Its decision, therefore, is a matter of fact, regardless of influences of law, so far as the courts are concerned.

Informing themselves of the contents of such decisions remains essential. Since courts may take judicial notice of facts of state,<sup>56</sup> executive certificates are obviously a practical procedure to adopt. After all, the statement of the principal is usually the best evidence of his decision and ought generally to be accepted by his audience. Indeed a court will never desire to deny the Secretary of State's word that, for instance, a regime is not recognized. But there is no good purpose served by engrafting onto this sensible and helpful practice the dogma of conclusiveness. In the example of an unrecognized regime, it does not assist the courts to force themselves to conclude that there is no foreign government. Indeed they may be in breach of

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Survey of Canadian Law: International Law (1977), 9 Ott. L.Rev. 505, at pp. 552 *et seq.*

<sup>53</sup> *Supra*, footnote 14.

<sup>54</sup> Act of State in English Law (1906), p. 33.

<sup>55</sup> *Supra*. And see Chen, *op. cit.*, footnote 2, pp. 247-253. Cf. Lauterpacht, *op. cit.*, footnote 2, pp. 70-71.

<sup>56</sup> *Duff Development v. Kelantan*, *supra*, footnote 12, at pp. 805, 813, 824.

international law in failing to take cognizance of it. Nor is it helpful to exclude other evidence about transactions, and especially existing treaties, between the government and the foreign party. Both sets of circumstances may have far reaching consequences in a rational, as opposed to mechanical, appraisal of the effects of non-recognition on the particular issue before the court municipally.

In summary, notwithstanding Lord Atkin's criticism in the *Arantzazu Mendi*,<sup>57</sup> the greater wisdom on the use of executive certificates was expressed by Lord Sumner in *Duff Development v. Kelantan* when he said:<sup>58</sup>

. . . the Courts are bound . . . to act on the best evidence and, if the question is whether some new State or some older State, whose sovereignty is not notorious, is a sovereign state or not, the best evidence is a statement, which the Crown condescends to permit the appropriate Secretary of State to give on its behalf.

Upon this basis, the courts would be free to weigh the opinions of the government along with evidence of other relevant events. Presumably, where the international situation is particularly fluid or uncertain, such as revolution or civil war in the foreign territory, the courts would receive much guidance from the government's certificate. But where the evidence establishes a firm set of circumstances which the government, by its certificate, does not care to recognize for diplomatic reasons, the courts may act accordingly. How they might act is the subject of the next two sections of discussion.

## 2. Problems Over Unrecognized Regimes.

When unrecognized regimes are caught in the web of civil litigation they present problems chiefly about the respect to be accorded to their own internal acts of effective power. These events cannot be treated by the courts as acts of state in the traditional way when, by definition, there is no recognized source of authority for them. If the regime is so unstable or uncertain as not to meet the minimum legal standards of statehood or government then it is usually too transitory to create any situations that last long enough to be litigated in foreign domestic courts. But if an unrecognized regime is providing government, however disagreeable, over an at least quiescent population, its internal authority to the extent of its effective exercise of power can hardly be denied. The more stable and organized and particularly the more long lasting the regime is, the greater will be its consequences for all affected both at home and abroad. In a nutshell, a sense of permanency in a regime leads to institutionalization of its power and thence to the interaction of its

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<sup>57</sup> *Supra*, footnote 12, at p. 264.

<sup>58</sup> *Supra*, footnote 12, at p. 824.

members and its population upon expectations of certain patterns of conformity.

Thus legitimated internally, these activities pose a problem of treatment externally. They cannot simply be ignored. The application of legal blinkers called for ever since the case of *Luther v. Sagor*<sup>59</sup> does not work. That was the occasion when the original owner of a timber mill, which had been seized by the new Russian Soviet government, sued the purchaser from the government of some of the mill's stock upon its importation into Britain. At trial, the court ignored the nationalization decrees because the Russian Soviet regime was not then recognized by the British government. The consequences of the case are the denial of every order, regulation, action or event that actually took place since the advent of an unrecognized regime. In short, *Luther v. Sagor* purports to apply a principle of nullity. But justice is not so blind as to work such inhumanity were it possible to impose such a fiction as an operative principle. As it is, members of the House of Lords have recognized the enormity of their own doctrine. In *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.*, Lord Reid observed:<sup>60</sup>

We must not only disregard all new laws and decrees made by the Democratic Republic or its Government, but we must also disregard all executive and judicial acts done by persons appointed by that Government because we must regard their appointments as invalid. The result of that would be far-reaching. Trade with the Eastern Zone of Germany is not discouraged. But the incorporation of every company in East Germany under any new law made by the Democratic Republic or by the official act of any official appointed by its Government would have to be regarded as a nullity, so that any such company could neither sue nor be sued in this country. And any civil marriage under any such new law, or owing its validity to the act of any such official, would also have to be treated as a nullity, so that we should have to regard the children as illegitimate. And the same would apply to divorces and all manner of judicial decisions, whether in family or commercial questions. And that would affect not only status of persons formerly domiciled in East Germany but property in this country the devolution of which depended on East German law.

Notwithstanding this devastating catalogue of disorder, the House of Lords in substance confirmed the fictional principle of *Luther v. Sagor* and consequently had tortuously to circumvent it.

The range of ordinary activities of a modern state which would be denied existence and effect in the courts is worth noting. Lord Reid mentions all legislative, executive and judicial acts of the unrecognized regime itself. He points out how these acts would affect the establishment of legal persons and the status of natural persons. Consequently the purported impotence of the foreign

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<sup>59</sup> [1921] 1 K.B. 456, approved on this point by the Court of Appeal, *supra*, footnote 14.

<sup>60</sup> *Supra*, footnote 18, at p. 907.

regime will have both direct, intergovernmental and indirect, inter-personal effects upon transnational transactions. As examples, consider these instances of international litigation. At an external government level, the courts will not act upon or reciprocate judicial decisions of the unrecognized regime. Of its legislative activity, they will not acknowledge its internal force let alone any extraterritorial effectiveness. Thus nationalization of property whether belonging to nationals or aliens is ignored, as *Luther v. Sagor*<sup>61</sup> itself attests. Upon a personal plane the courts may not admit a private or public enterprise incorporated by executive decree or under the laws of the foreign regime as a party to litigation. They must treat as non-existent all agreements and contracts of such an enterprise, even to the detriment of local nationals who have relied upon their terms.

It follows that all disputes about property, whether within the jurisdiction or in the foreign territory, that are brought to court are, in effect, non-contests so long as one party has in its chain of claimed title a disposition by law of, or a transferor incorporated under, the unrecognized regime. In like manner, there are devastating effects indirectly imposed on family affairs. Two persons may not be said by the courts to have been married under the foreign regime, so that, for instance, their children wherever born are illegitimate. But also a divorce under the foreign regime is impossible, so that neither person may remarry even a local national, and their subsequent offspring are equally illegitimate. The indirect consequences of these legal conclusions upon the devolution of the family's property for possibly several generations is utterly confusing and personally distressing.

By no means all this nonsense has been permitted to occur by the courts.<sup>62</sup> In several cases they have found ways around the impact of non-recognition that have led to more practical and thus more realistic results. The *Zeiss*<sup>63</sup> case was itself an instance of worldwide confusion over property rights as a result of the non-recognition of a partitioned Germany for very serious political reasons. These were luckily turned by the House of Lords to its advantage in a circumvention of the legal impasse that discovered a lawful umbrella for the legislative activity of the unrecognized East German regime in the authority of the Soviet Union. The Lords were thus able to recognize for their own purposes the acts of the

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<sup>61</sup> *Supra*, footnote 14, reversed only upon recognition.

<sup>62</sup> Rules of private international law or conflicts are often applied to evade such unjust conclusions but they are not solutions to the problems posed by the courts' use of public international law.

<sup>63</sup> *Supra*, footnote 18.



authorities in East Germany. But the decision, though a solution, was hardly a credible or creditable one.<sup>64</sup>

Previously the case of *Luigi Monta of Genoa v. Cechofracht Co. Ltd.*<sup>65</sup> had presented an issue about an executive order of the Formosan regime for which no supervening recognized authority could possibly be found. The court was asked to construe the terms of a contract, in fact the war risk clause of a charter-party, which referred to the orders of any "government"<sup>66</sup> without qualification. It did so by avoiding the judicial blindness of non-recognition by the British government and treating the issue as a matter of intent between private parties.

More recently the North Korean regime was the centre of litigation but this time over the interpretation of a reference in the United Kingdom Patents Act to hostilities with "any foreign state".<sup>67</sup> *Re Al-Fin Corporation's Patent*<sup>68</sup> is importantly distinct from *Luigi Monta's* case in its statutory rather than contractual origins. It was a public, not a private, matter. Nevertheless, the court drew considerable strength from the judgment in *Luigi Monta* and took the same line, evasive of the consequences of non-recognition, in making a literal interpretation of the statute.

These cases have been discussed by Mr. J. C. Merrills of Sheffield University<sup>69</sup> as exhibiting a construction approach<sup>70</sup> that allows the courts to throw off the blinkers of non-recognition and relieve its rigours in some circumstances. The judicial effort, however, is partial and uncertain. Mr. Merrills is the first to admit that "neither the scope of the principle (of construction) nor some aspects of its operation can yet be considered entirely satisfactory".<sup>71</sup> Frankly, the courts have turned to narrow principles of construction as a fictional way to avoid the fictitious impasse caused by diplomatic non-recognition. When fiction is piled on fiction to make the law accord with reality, it is high time to face facts.

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<sup>64</sup> Greig, *The Carl-Zeiss Case and the Position of an Unrecognized Government in English Law* (1967), 83 L.Q.Rev. 96; Merrills, *Law, Politics and the Legislation of the Unrecognized Government* (1968-69), 3 Ott.L.Rev. 1.

<sup>65</sup> [1956] 2 Q.B. 552.

<sup>66</sup> *Ibid.*, at p. 554.

<sup>67</sup> Patents Act, 1949, Stats U.K., 1949, c. 87, s. 24(1).

<sup>68</sup> *Supra*, footnote 44.

<sup>69</sup> *Op. cit.*, footnote 42.

<sup>70</sup> *Op. cit.*, *ibid.*, at p. 479.

<sup>71</sup> *Op. cit.*, *ibid.*, at pp. 479-480.

Reason suggests that courts would do well now to regard non-recognition functionally,<sup>72</sup> not dogmatically, and to treat its municipal problems on their individual merits. In fact, necessity has impelled a functional approach on at least two occasions in the United Kingdom alone. The courts have already begun to apply for themselves international legal standards of statehood and government and to take cognizance of the results.<sup>73</sup> Far from being a dangerously political, if not impossible task, it results in the enforcement of international law. Cognizance is accorded when due, though recognition is not. The prime responsibility of the courts to give effect to the law, including international, is thereby upheld. Nothing impels them to go further and interfere with the government's policy of non-recognition, that is its non-co-operation with and diplomatic distance from a foreign regime, unless that policy itself involves a transaction now the subject of litigation. Such a judicial approach to non-recognition is restrained, out of legitimate care for the government's exclusive authority to conduct foreign policy, yet deals directly with facts and law, not fiction. It is thereby the less dogmatic and the more functional.

Judicial notice being thus apprised of the actual character of a foreign regime, the matters in issue must then be judged upon their own face values. To do so a court may have to admit so many of the inherent legal rights of statehood, or the additional rights, if any, accorded by voluntary intergovernmental contacts, into the municipal setting as is necessary for the determination of the particular issues in dispute. For instance, it is not beyond imagination that a Canadian court will need<sup>74</sup> to grant immunity for some purposes to an unrecognized foreign regime contrary to traditional practice.<sup>75</sup>

Again the English judiciary have already shown the practicability of this way to proceed. Once around the traditional constrictions of non-recognition brought on by the conclusiveness of the executive certificates supplied, both courts in *Luigi Monta*<sup>76</sup> and *Al-Fin*<sup>77</sup> were

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<sup>72</sup> See the conclusions of Blix, *op. cit.*, footnote 2, p. 700; and the opinions of Prof. R. Y. Jennings, *General Course on International Law* (1967), 121 *Hague Recueil des Cours* 360.

<sup>73</sup> *Luigi Monta of Geneva v. Cechofracht Co. Ltd.*, *supra*, footnote 65; *Re Al-Fin Corporation's Patent*, *supra*, footnote 44. Compare the approach of the international arbitrator in *The Tinoco Concessions* (1923), 1 U.N.R.I.A.A. 369. And see Lubman, *The Unrecognized Government in American Courts* (1962), 62 *Col. L.Rev.* 275.

<sup>74</sup> As American courts have already discovered: *Wulfsohn v. Russian Socialist Federated Soviet Republic* (1923), 234 N.Y. 372, 138 N.E. 24 (N.Y.C.A.).

<sup>75</sup> *Supra*. Also footnote 9.

<sup>76</sup> *Supra*, footnote 65, at pp. 568, 561-562.

<sup>77</sup> *Supra*, footnote 44, at p. 180.

willing and able to make their own legal determinations about the condition of the regimes in Formosa and North Korea respectively and then to act upon them. Though each decision depended upon judicial admission of the existence of Formosa and North Korea and their governments, neither has had any damaging effect on the British government's diplomatic policy towards either regime. In such clear instances, it was hardly to be expected otherwise. Indeed, had the doctrine of conclusiveness of executive certificates not given counsel a ground on which to insert and build an argument that citations of "state" and "government" must always refer to such diplomatically recognized entities only, there would have been no need for the courts to engage in their evasions of Formosa's and North Korea's unrecognized status before proceeding to the facts. These cases are examples of the hinderance of executive certificates when clothed judicially with conclusiveness.

In less certain circumstances, executive certificates may be very useful for the court's own decision about a foreign regime, but no less inhibiting if still conclusive. Treated as a source of information both about the regime and about the government's opinion or conduct towards it, an executive certificate is likely to be much more reliable than any other form of judicial notice. It could become especially helpful when there is genuine doubt about the existence of a certain regime at a particular time, or the course of relevant contacts with the government.<sup>78</sup> It could be equally valuable when the status of unofficial representatives and the consequences of other informal relations are in dispute.<sup>79</sup> A court presumably has no greater difficulty in weighing the force of an executive certificate than any other piece of evidence.

In pursuing this course, the courts may find themselves granting a degree of respect or even immunity for a foreign regime that superficially may seem wholly out of accord with the government's declarations of diplomatic distance. But the illusion will be in the denials of recognition by the government for diplomacy's sake and no longer in the fictions of the courts. If they judge non-recognition cases upon sound information, the more so where it is provided by the government's certificate itself, their decisions cannot interfere with foreign policy that must itself be built upon the same facts, and will more directly settle the legal merits of such disputes.

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<sup>78</sup> *E.g. Laane and Baltser v. Estonian State Cargo & Passenger Steamship Line*, *supra*, footnote 44; *Gdynia Ameryka Linie Zeglugowe Spolka Akcyjna v. Boguslawski*, [1953] A.C. 11 (H.L.); *Civil Air Transport Inc. v. Central Air Transport Corp.*, [1953] A.C. 70 (H.L.).

<sup>79</sup> *Fenton Textile Assoc. v. Krassin* (1921-22), 38 T.L.R. 259.

### 3. Problems Over Recognized States and Governments.

In comparison to judicial endeavours to ignore unrecognized regimes, the courts have gone to the opposite extreme in their treatment of recognized states and governments. The problems are essentially the same but are viewed from a different perspective. The constant issues are the extent of immunity for the foreign sovereign and the measure of respect for its acts, but the status signalled by diplomatic recognition ensures different standards for their consideration. The courts' solutions, until recently, reflect almost gross deference for the status of the foreign sovereign. The generosity of their respect for foreign acts of state and of their grants of state immunity have been at the expense of international law and the local sovereign. Recent judicial realization of these denigrating effects have exposed the basic issues afresh without resolving them.

Concerning the acts of recognized governments committed at home, the courts have refused, until recently, to entertain any kind of review at all. Up to a point this course is an accurate reflection of international law, which the courts are bound to apply. It is a matter of fundamental principle in international law that the organs of one sovereign state shall respect the equality and independence of another. Consequently in most circumstances the courts ought not to permit challenges to the validity of foreign acts of state. As recently as 1965 Diplock L.J. reaffirmed this international limitation upon the authority of the courts to decide the merits of a case otherwise within their municipal jurisdiction:<sup>80</sup>

As a member of the family of nations, the Government of the United Kingdom (of which this court forms part of the judicial branch) observes the rules of comity, videlicet, the accepted rules of mutual conduct as between state and state which each state adopts in relation to other states and expects other states to adopt in relation to itself. One of those rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent state, or to apply measures of coercion to it or to its property, *except in accordance with the rules of public international law.*

But the real reasons for adopting judicial restraint and for respecting foreign acts of recognized sovereigns do not appear to have much to do with this international legal principle. In the leading British decision of *Luther v. Sagor*<sup>81</sup> the more sinister but by now well recognizable judicial concern for the local sovereign's foreign policy obtrudes. Upon appeal, all three justices were emphatic that the acts of the Russian Soviet government could not be impugned once it had been diplomatically recognized,<sup>82</sup> but it was Scrutton L.J. who spelled out the reasons for this stand. After stating that "it

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<sup>80</sup> *Buck v. Attorney-General*, [1965] 1 Ch. 745, at p. 770.

<sup>81</sup> *Supra*, footnote 14.

<sup>82</sup> *Ibid.*, at pp. 543, 548, 556 (C.A.).

is impossible to recognize a government and yet claim to exercise jurisdiction over its person or property against its will", he continued.<sup>83</sup>

Further, the Courts in questions whether a particular person or institution is a sovereign must be guided only by the statement of the sovereign on whose behalf they exercise jurisdiction. . . . In the present case we have from the Foreign Office a recognition of the Soviet Republic in 1921 as the *de facto* Government, and a statement that in 1917 the Soviet authorities expelled the previous Government recognized by His Majesty. It appears to me that this binds us to recognize the decree of 1918 by a department of the Soviet Republic, and the sale in 1920 by the Soviet Republic of property claimed by them to be theirs under that decree, as acts of a sovereign state the validity of which cannot be questioned by the Courts of this country. . . .

The thrust of this reasoning is that the courts must follow the guidance of the government in their handling of foreign acts of state. In other words, Scrutton L.J.'s protestation of judicial duty is a slightly disguised recital of the unison principle. What is more, the guidance received, namely an executive certificate, can be seen to be just as mechanically applied to afford impugnity to acts of the recognized government as it is to prevent any impact of those of an unrecognized regime.<sup>84</sup> The court's opposing extremes of reaction to the government's reversal of recognition during the course of the case are revealing. The consistency of concern for government policy rather than the law in instances both of recognition as well as non-recognition is prominent but no less alarming.

The suaviseness of judicial deference to executive policy that the decision in *Luther v. Sagor* injected so sweepingly into problems over recognized governments as well has continued to pervade the courts. As recently as 1975 Lord Denning gave the reason for granting immunity from legal process to a recognized sovereign as the risk that adverse judgment and attendant execution "might imperil our relations with that country and lead to repercussions impossible to foresee".<sup>85</sup>

The objection to the court's approach to problems over recognized governments exhibited by *Luther v. Sagor* is its essential denial of the impact of international law. While the curial results are the same so long as perceived government policy and international law are consistent, so soon as these standards diverge the law is ignored. The foreign policy of the government is not itself the cause of the difficulties because all the courts request is an executive statement of recognition. The source of trouble is the too large

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<sup>83</sup> *Ibid.*, at p. 556 (C.A.).

<sup>84</sup> *Supra*.

<sup>85</sup> *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan*, [1975] 3 All E.R. 961, at p. 965 (C.A.).

influence of this supposedly embracing statement of foreign policy, in place of the rules of international law, on the minds of the judiciary.

The prevalence of this attitude does not permit a challenge to the foreign sovereign's acts of state on grounds of breach of international law. Although it cannot be said that the courts pay no attention to the international principles of sovereign independence and equality in the way that Diplock L.J. cited them,<sup>86</sup> nevertheless they have virtually never exercised their powers expressed with added emphasis in his proviso. Notwithstanding his proviso that international law will be enforced, the courts have given almost no indication until 1976 that they will review foreign acts of state according to international law.

After *Luther v. Sagor* a challenge to the acts of a friendly foreign government on the grounds of breach of international law did not arise in any British Court for over thirty years until the case of *The Rose Mary* in Aden.<sup>87</sup> Even then the obscurity in the reporting<sup>88</sup> and the criticism in the reasoning<sup>89</sup> of the judgment pretty well submerged its possible influence. The uncertain references to *The Rose Mary* and to public, as opposed to private, international law as grounds for the decision in the other case in the nineteen fifties, *Re Helbert Wagg*,<sup>90</sup> did not assist. The pervasive spirit of *Luther v. Sagor* continued into the seventies when Lord Denning, for instance, could confirm "the doctrine by which the English courts will recognize the validity of foreign legislation and decrees . . . [citing *Luther v. Sagor*] save in certain circumstances [citing *Re Helbert Wagg*]"'.<sup>91</sup>

Only in *Oppenheimer v. Cattermole*,<sup>92</sup> decided in 1976, did the House of Lords finally and clearly establish as an active principle that the courts will apply international law to foreign sovereign acts of state. The case was brought by a German Jewish immigrant who was appealing his British income tax assessments on a German pension. It turned on his continued German nationality. Part of the

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<sup>86</sup> Quoted, *supra*. at footnote 80.

<sup>87</sup> [1953] 1 W.L.R. 246.

<sup>88</sup> The judgment never went beyond the weekly reports nor was it recorded in any other series.

<sup>89</sup> See D. W. Greig *International Law* (2nd ed., 1976), pp. 62-63; K. Lipstein, [1956] *Camb. L.J.* 138, at p. 140; and D. P. O'Connell, *A Critique of the Iranian Oil Litigation* (1955), 4 *Int. Comp. L.Q.* 267.

<sup>90</sup> *In Re Claim of Helbert Wagg & Co. Ltd.*, [1956] Ch. 323.

<sup>91</sup> *Buttes Gas and Oil Co. v. Hammer*, [1975] 1 Q.B. 557, at p. 573. And see also the remarks of Roskill L.J., at p. 579.

<sup>92</sup> *Supra*, footnote 18.

decision dwelt on the legal effects of the barbarously discriminatory Nazi decree of 1941 that deprived Jewish emigrants first of their citizenship and consequently of their property. In declaring the invalidity of the decree and in reversing the opinion of Buckley L.J. in the Court of Appeal, Lord Cross said:<sup>93</sup>

If a foreign country purported to confer the benefit of its protection on and to exact a duty of allegiance from persons who had no connection or only a very slender connection with it our courts would be entitled to pay no regard to such legislation on the ground that the country in question was acting beyond the bounds of any jurisdiction in matters of nationality which international law would recognize.

Thereby Lord Cross deliberately assured the courts of an international jurisdiction. He accepted the proposition that they are not bound to pay any attention to foreign sovereign legislative acts violative of international law. In so doing he demonstrated the review power of the courts in municipal law to execute international law. He placed the imprimatur of the House of Lords on the exercise of international law over foreign sovereign activities.

But Lord Cross went on to admonish the courts to be cautious in the exercise of their international jurisdiction for reasons which by now are very familiar. He stated:<sup>94</sup>

A judge should, of course, be very slow to refuse to give effect to the legislation of a foreign state in any sphere in which, according to accepted principles of international law, the foreign state has no jurisdiction. He may well have an inadequate understanding of the circumstances in which the legislation was passed and his refusal to recognize it may be embarrassing to the branch of the executive which is concerned to maintain friendly relations between this country and the foreign country in question.

The significance of this reasoning lies in its reference to embarrassment of the government in the conduct of its foreign policy. Lord Cross perpetuates the motivating force of the unison principle expressed in recognition cases through *Luther v. Sagor*. Though now curtailed by the preponderant responsibility to apply international law, the old antagonisms between policy and law are not expunged and consequently the old problems about respect for foreign sovereign acts of state continue to require judicial explication along more precise and functional lines of analysis.

It is with regard to the immunity of recognized states, their governments and their property, that the courts have been the most noticeably active of late. It may safely now be said that, notwithstanding an executive certificate of recognition, the dignity of a foreign sovereign at international law can no longer sustain the requirement of blanket immunity for himself from suit or his

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<sup>93</sup> *Ibid.*, at p. 277.

<sup>94</sup> *Ibid.*, at pp. 277-278.

property from attachment.<sup>95</sup> To that extent the courts will no longer let state immunity completely overrun the demands of personal justice for an individual as litigant. The problems of recognized governments as litigants may now be generalized as a question of how much immunity is appropriate. Canadian, British and American courts have been the last to recognize this evolution of customary law and not without the help of their legislatures.<sup>96</sup> Having finally shed the dogmatism of absolute immunity, they are now tackling the issues of immunity with a deliberately and explicitly more functional approach, which cannot be said of other aspects of litigation over foreign governments.

At bottom, immunity cases present a clash of jurisdictions between two sovereign states, each entitled at international law to equality and independence. Hence it can be argued that a foreign sovereign has the liberty to organize its own affairs, including as much state participation in commercial activities, as it wishes and these arrangements must be respected in the receiving state like any other acts of state. The opposing argument that doubts why the local sovereign should subjugate its own independence to a foreign one has won out. If the foreign state chooses to enter the local territory, then, goes the argument,<sup>97</sup> it should expect to be treated like any other alien, subject to minimum standards of sovereign immunity set by international law.

There does not appear to be any maximum limit in international law to the immunity that a receiving state may grant to a foreign sovereign. Hence Canada and Britain have been and are free to continue to follow a principle of absolute immunity were they to wish to. The recent scurry of litigation has in fact concerned the formulation of criteria for the application of minimum standards of immunity that may be demanded as a right by a foreign government and its agencies upon entering the local jurisdictions. On this aspect of the problems over foreign governments before the courts the numerous judicial and academic contributions<sup>98</sup> have made the

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<sup>95</sup> Perhaps there never was truly absolute immunity. See *Sultan of Johore v. Abubakar Tunku Aris Bendahar*, [1952] A.C. 318 (P.C.), per Viscount Simon, at p. 343: "Their Lordships do not consider that there has been finally established in England . . . any absolute rule that a foreign independent sovereign cannot be impleaded in our courts in any circumstances." And see Williams, & de Mestral, *op. cit.*, footnote 2, p. 155. As to whether the dignity of a foreign sovereign was ever a satisfactory basis for state immunity see Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States* (1951), 28 Br.Y.B.Int. L. 220, at pp. 228-232.

<sup>96</sup> In U.K. see State Immunity Act 1978, Stats. U.K. 1978, c. 33 and in U.S.A. see Foreign Sovereign Immunities Act of 1976, 90 Stats. 2891, 15 I.L.M. 1388.

<sup>97</sup> E.g. Sucharitkul, *Immunities of Foreign States Before National Authorities* (1976), 149 Hague Recueil des Cours 87, pp. 207-209.

<sup>98</sup> The latest comprehensive study was made in 1976 by S. Sucharitkul, *op. cit.*,



development of the restrictive theory of state immunity thoroughly well known. In Britain, first the Privy Council on appeal from Hong Kong in *The Philippine Admiral*,<sup>99</sup> and then the Court of Appeal in *Trendtex Trading Corp'n. Ltd. v. Central Bank of Nigeria*<sup>100</sup> approved the restrictive approach to state immunity. In Canada, the courts of Quebec<sup>101</sup> and Ontario<sup>102</sup> have applied the restrictive theory, which has also found a resounding echo of approval from the present Chief Justice of Canada while a justice in dissent in the case of *Venne v. Democratic Republic of the Congo*.<sup>103</sup> The full Supreme Court has yet to determine the issue but cannot be expected to stand alone in the Western world by continuing to afford absolute immunity.

Many features of the new orthodoxy in state immunity aspects of the treatment of foreign governments before the courts remain to be reviewed or worked out. The first group are those raised by the adoption of a restrictive approach concerning its own operation. The courts have had to establish tests by which to distinguish *acta imperii* and *acta gestionis*. This process has left an impression of a search for an answer to the generalized question how much immunity is appropriate. The courts appear unconsciously to have elaborated as their objective in cases of state immunity just the same purposes as have already been achieved quite separately in matters of diplomatic and consular immunity.<sup>104</sup> Their answer is to grant only so much immunity as is necessary for the free conduct of international relations between two or more sovereign states.

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*ibid.*, which contains a lengthy selected bibliography. Some further literature on the judicial, as opposed to legislative, developments since 1976 include Kincaid, *Sovereign Immunity of Foreign State-Owned Corporations* (1976), 10 J. World Trade L. 110; McRae, (1976), 54 Can. Bar R. 747; Higgins, *Recent Developments in the Law of Sovereign Immunity in the United Kingdom* (1977), 71 Am.J.Int.L. 423; White, *State Immunity and International Law in English Courts* (1977), 26 Int. Comp. L.Q. 674; and Marasinghe, *A Reassessment of Sovereign Immunity* (1977), 9 Ott. L.Rev. 474.

<sup>99</sup> [1977] A.C. 373. The case has already been applied in *I Congreso del Partido*, [1978] 1 Q.B. 500, aff'd (1979), 123 Sol. J. 689 (C.A.).

<sup>100</sup> [1977] Q.B. 529 (C.A.), not foll'd in *The Uganda Co. (Holdings) Ltd. v. The Government of Uganda*, [1979] 1 Lloyd's L.R. 481 (Q.B.); appl'd *Hispano Americana Mercantil S.A. v. Central Bank of Nigeria*, [1972] 2 Lloyd's L.R. 277 (C.A.).

<sup>101</sup> *Allan Construction Ltd. v. Government of Venezuela*, [1968] R.P. 145; *Venne v. Democratic Republic of the Congo* (1968), 5 D.L.R. (3d) 128 (Que. C.A.), rev'd. on other grounds [1971] S.C.R. 998; *Penthouse Studios Inc. v. Government of Venezuela* (1969), 8 D.L.R. (3d) 686 (Que. C.A.); *Sicard Inc. v. Government of Venezuela*, [1970] R.P. 97; *Zodiak International Products Inc. v. Polish People's Republic* (1977), 81 D.L.R. (3d) 656 (Que. C.A.).

<sup>102</sup> *Smith v. Canadian Javelin Ltd.* (1976), 12 O.R. (2d) 244.

<sup>103</sup> *Supra*, footnote 101, at p. 1010.

<sup>104</sup> Vienna Convention on Diplomatic Relations (1961), 500 U.N.T.S. 95 and

The new judicial outlook is commendably more functional than the old. Indeed it is said<sup>105</sup> the courts have moved from a perspective of status to one of function. But the change in outlook should not be regarded as altogether outright and exclusive. The status of the party cannot be wholly displaced by the characterization of his actions. Adoption of the restrictive theory does not necessitate that all state trading activities shall lose their former immunity in Canadian and British courts.

For instance, it is one kind of transaction for a foreign state to purchase a commodity such as wheat in the local market from a private exporter, but quite another to do so through an agreement between ministries of foreign affairs or overseas trade. Although it may be thought that the purpose of the transaction, in this example the acquisition of wheat, should be the controlling feature, the status of the parties may not be so blithely overlooked. *Venne's case*<sup>106</sup> itself, seen from the perspective of the majority of the Supreme Court of Canada as expressed by Mr. Justice Ritchie, was another example of the continuing influence of status. Venne, an architect, sued the Government of the Congo for unpaid fees. Undoubtedly to him the performance of an agreement to draw plans for a national pavilion at Expo 67 was a private commercial transaction, but the question<sup>107</sup> addressed by the Supreme Court was whether or not the other party, the Government of the Congo, was engaged in a public sovereign act. In the particular circumstances of the case Mr. Justice Ritchie was moved to affirm that it was.<sup>108</sup>

If the courts are concerned to protect the free conduct of diplomatic relations then they must first investigate whether either party to the matter in dispute before them is truly a representative of state interests. That is a question of status. If the enquiry is negative, no question of immunity arises. If it is positive, and only then, is it reasonable to look at the character of the transaction to determine

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Vienna Convention on Consular Relations, 596 U.N.T.S. 261. The preambles to both conventions recite "that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions (of diplomatic missions as representing States)/(by consular posts on behalf of their respective States)." See also M. Hardy, *Modern Diplomatic Law* (1968), especially pp. 8-12; L.T. Lee, *Consular Law and Practice* (1961), especially pp. 246 *et seq.*; and Lee and Vechslor, *Sovereign, Diplomatic and Consular Immunities* in MacDonald, Morris and Johnston eds., *op. cit.*, footnote 23, p. 184, especially at p. 195.

<sup>105</sup> E.g. Laskin J. (dissenting) in *Venne v. Democratic Republic of the Congo*, *supra*, footnote 101, at p. 1020; and Shaw L.J. in *Trendtex Trading Corp'n. Ltd. v. Central Bank of Nigeria*, *supra*, footnote 100, at p. 576.

<sup>106</sup> *Supra*, footnote 101.

<sup>107</sup> Correctly it is submitted, as opposed to the answer supplied.

<sup>108</sup> *Supra*, footnote 101, at p. 1008.

from the circumstances whether it is not of a public character and hence not entitled to immunity.

It is important to note that the characterization of function or purpose of a transaction must be in this negative form. If the foreign party is a state government it is *prima facie* entitled to immunity from suit for itself.<sup>109</sup> The restrictive theory is aptly named inasmuch as it does not create immunity, but cuts down that which a government or state agency may claim to exercise in those classes of international transactions that are not relevant to the conduct of diplomatic relations.

Many difficulties have been met and much energy expended in developing the tests by which to distinguish *acta gestionis* from *acta imperii*. This process is culminating now that statutory formulations of the criteria are available throughout Europe<sup>110</sup> and America,<sup>111</sup> although Canada has yet to disclose fully either its legislative or judicial preference. Other important aspects of immunity problems, which meanwhile have been submerged, have now to receive their due attention.

At least one aspect is already noticeable and in need of review. It concerns the prerequisite issue of status, namely whether the claimant to immunity is an instrumentality suitably representative of a sovereign state. The courts give the impression that they have quietly narrowed the range of government agencies that will be recognized as representative of foreign states for diplomatic purposes. Gone are the generous days of so regarding wheat boards and news agencies on the say-so of foreign ambassadors as was done in such cases as *Baccus*<sup>112</sup> and *Krajina*.<sup>113</sup>

Closer judicial scrutiny of governmental involvement is being made. While *Mellenger v. New Brunswick Development Corporation*<sup>114</sup> shows that an independently constituted Crown corporation may yet be an organ of state sufficiently controlled by government ministers and officials, the more recent *Trendtex*<sup>115</sup> case indicates how great a degree of governmental influence is now necessary even over so important an instrument of state policy as a national issuing bank. The decision also demonstrates that the burden of proof of governmental control is now a matter of

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<sup>109</sup> As reiterated in the State Immunity Act 1978, *supra*, footnote 96, s. 1(1).

<sup>110</sup> European Convention on State Immunity (1972), 11 I.L.M. 470; U.K. Act, *ibid.*

<sup>111</sup> Foreign Sovereign Immunities Act of 1976, *supra*, footnote 96.

<sup>112</sup> *Baccus S.R.L. v. Servicio Nacional del Trigo*, *supra*, footnote 41.

<sup>113</sup> *Krajina v. Tass Agency*, *supra*, footnote 40.

<sup>114</sup> [1971] 2 All E.R. 593 (C.A.).

<sup>115</sup> *Supra*, footnote 100.

independent and objective evidence of considerable gravamen. If this suggestion of such trends is sustainable, then the influence they may have on immunity claims by foreign governments before the courts is obviously important and worthy of investigation. The inferred purposes of such changes could have significant impact on the functionalism of the restrictive approach to the municipal legal consequences of diplomatic relations.

### *Conclusion*

Governments have demonstrably accepted that in today's increasingly interdependent world, though they may generally want to have as little as possible to do with a certain regime, they will probably have to, and in some instances may positively desire to, interact more or less directly in some ways. They have, therefore, fallen on non-recognition as a symbolic signification of their displeasure and distance but yet they get on with such daily relations as are necessary notwithstanding. Accordingly the diplomatic niceties of inter-governmental respect will also be accorded so far as is necessary to facilitate those contacts that are necessary or desired, regardless of traditional, orthodox doctrine to the contrary.

In the midst of this evolution of international relations, the courts are stumbling away from their dependence on recognized sovereign status as declared by their own government towards assessment of the merits of the international events brought before them. The trend is most noticeable in matters of immunity yet it has a long way to go in all problems over recognized and unrecognized foreign governments alike.

Meanwhile the courts are unaware that the changes in inter-governmental practice and of their own making involve them also in a reassessment of their role vis-à-vis both their own state and the international legal system. The current trend of decisions demands, in a way that no case in Britain or Canada touching international relations has yet approached, a thorough discussion of the operation of local sovereignty, which is internally divided *inter alia* between government and judiciary, as it is affected by international law.

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