

GOVERNMENTAL STATUS BEFORE ENGLISH COURTS: QUESTIONS OF MUNICIPAL AND INTERNATIONAL LAW

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ABSTRACT

From the Russian Revolution to the Venezuelan constitutional crisis, it has not been uncommon for English courts to deal with cases that concern the identity of foreign governments, including in situations that raise questions of international law. Indeed, such cases have arisen in relation to the representation of a state, the privileges and immunities of a state, the conferral of private rights, and the construction of private-law instruments. The article examines judicial and executive practice over the years to offer a systematic analysis of English law on questions related to the identity of foreign governments and to assess the extent to which it ensures the UK's compliance with international law. The article finds that, as a matter of English law, the enjoyment of governmental status is, at least to a considerable extent, unnecessary for the conferral of private rights and possibly for the identification of a 'government' in the construction of private-law instruments too. Conversely, governmental status is generally determinative for the representation, and in relation to certain privileges and immunities, of a state, as required by international law. For the UK to be in conformity with its international legal obligations, English courts must nevertheless correctly identify the government of the state in question. In practice, this often depends on executive conduct, given the judicial deference to executive recognition or denial of governmental status. The importance of the executive acting in accordance with the international legal criteria for governmental status—as was understood to have been historically the case and as the 1980 policy itself can be understood to confirm—is thus difficult to overstate. There are nevertheless situations in which English courts autonomously assess governmental status. In so doing, they may—and, as a matter of public policy, perhaps ought to—apply the *Somalia* common-law factors in accordance with the international legal criteria for governmental status.

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I. INTRODUCTION

It is not uncommon for English¹ courts to face cases involving a contested claim to governmental status in respect of a foreign state. For example, English courts have considered who may represent the Central Bank of Venezuela in arbitration and give instructions in its name in respect of gold reserves held at the Bank of England, there being competing representatives appointed by rival persons claiming to be the President of Venezuela.² The English judiciary has also been asked to ascertain the identity of the Chairman of Libya's Investment Authority (LIA), who was to be appointed by Libya's government, in connection with a claim to approximately GBP 2 billion in damages.³ One other question was whether the National Transitional Council of Libya may give instructions in respect of certain bank accounts held by the Libyan embassy in London.⁴ This is not only a modern phenomenon. Examples of earlier cases include those involving the purported right of a specific claimant to receive money owed to Somalia⁵ or to recover a debt due to Ethiopia.⁶ Other cases have concerned the effectiveness of ostensibly-governmental acts,⁷ such as ostensibly-legislative acts performed by each of the two rival governments during the Spanish Civil War,⁸ the confiscation and sale of goods by the Soviet authorities in the early twentieth century,⁹ the sale of state property by the nationalist government towards the end of the Chinese Civil War,¹⁰ and the ostensible exercise of Poland's executive authority in undertaking to pay a sum of money to members of the Polish merchant fleet.¹¹

¹ References within the present work to 'English courts' and 'English law' ought, of course, to be taken to refer to 'the courts of England and Wales' and 'the law of England and Wales' respectively. The phrases are shortened for ease of reference, since, moreover, the cases under consideration did indeed generally arise in England. That said, much of what the article finds may well reflect UK law more generally, given also the constitutional issues raised in some contexts and the Supreme Court's relevant pronouncements.

² *"Maduro Board" of the Central Bank of Venezuela v "Guaidó Board" of the Central Bank of Venezuela* [2021] UKSC 57 (*'Maduro v Guaidó'*).

³ *Hassan Bouhadi v Abdulmagid Breish* [2016] EWHC 602 (Comm) (*'Bouhadi v Breish'*).

⁴ *British Arab Commercial Bank Plc v The National Transitional Council of the State of Libya* [2011] EWHC 2274 (Comm) (*'British Arab Bank v NTC'*).

⁵ *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA and others* [1993] QB 54 (*'Somalia v Woodhouse'*).

⁶ *Haile Selassie v Cable and Wireless (No 2)* [1939] Ch 182 (*'Haile Selassie'*).

⁷ Whether an ostensible government enjoys governmental status is a conceptually distinct question from whether an ostensibly-governmental act is effective. The enjoyment of governmental status may nevertheless inform the effectiveness of an ostensibly-governmental act. It is due to this possibility that questions concerning the identity of a state's government are taken to include cases concerning the effectiveness of ostensibly-governmental acts.

⁸ *Banco de Bilbao v Sancha; same v Rey* [1938] CA 176 (*'Banco de Bilbao'*).

⁹ *Akstonairnoye Obschestvo Dlia Mechanicheskoyi Obrabotky Diereva (1) A.M. Luther (Company for Mechanical Woodworking A.M. Luther) v James Sagor and Company* [1921] 3 KB 532 (*'Luther v Sagor'*); *Princess Paley Olga v Weisz and others* [1929] CA 718 (*'Princess Paley Olga'*).

¹⁰ *Civil Air Transport Incorporated v Central Air Transport Corporation* [1953] AC 70 (*'Civil Air Transport'*).

¹¹ *Gdynia Ameryka Linie Zeglugowe Spolka Akcyjna v Boguslawski and another* [1953] AC 11 (*'Gdynia Ameryka Linie'*).

All of this practice notwithstanding, little consideration has been given to whether there exists a coherent framework for the identification and on the relevance of governmental status in English law, let alone to whether any such framework is compatible with the UK's international legal obligations. This is so despite at least some of the relevant cases directly affecting the position of the foreign state whose government's identity is in question and notwithstanding that the conduct of a state's municipal courts may contribute to a breach by that state of its international legal obligations. For example, depending on how English courts decide who is to be given access to a foreign state's sovereign assets, the UK may find itself in violation of the prohibition of intervention.¹² As another example, a decision by the English judiciary that a person does not qualify as head of government and thus does not qualify for head-of-government immunity generally brings the UK in breach of its international legal obligations concerning immunities.¹³

It is against this background that the present article examines the English-law framework for dealing with questions involving the status of ostensible governments and the extent to which it enables the UK's compliance with international law. To this end, and after providing certain prefatory clarifications concerning its terminology and scope (Part II), the article outlines the key aspects of the constitutional framework on matters concerning governmental status (Part III). It then examines the English-law approach to assessing the enjoyment of governmental status, whether by ascertaining the executive's position or by autonomous judicial assessment (Part IV). The article then identifies the issues that turn, as a matter of English law, on the enjoyment of governmental status (Part V). Finally, by considering the matters that turn on the enjoyment of governmental status under international law, as well as the international legal framework for assessing governmental status, the article examines the extent to which the English-law approach to cases concerning foreign ostensible governments secures the UK's compliance with relevant international legal obligations (Part VI).

The article identifies several contexts in which English courts may face questions concerning a contested claim to governmental status. It finds that, in relation to the ostensible conferral by claimant governments of private rights and possibly in identifying the 'government's in the construction of private-law instruments too, the enjoyment of governmental status is not generally determinative. At the same time, the enjoyment of governmental status is—convergent with the circumstances in which compliance with international law turns on the identity of a state's government—necessary for the representation, and in respect of

¹² See eg "*Maduro Board*" of the *Central Bank of Venezuela v "Guaidó Board" of the Central Bank of Venezuela* [2020] EWCA Civ 1249 ('*Maduro v Guaidó* (Court of Appeal)') para 54(5). But see also *ibid* paras 135–6. See, further, the text accompanying n 349 below.

¹³ On such immunities generally, see *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3 ('*DRC v Belgium*') para 51.

the enjoyment of certain privileges and immunities, of a state. Where the executive has recognised or denied the governmental status of a relevant claimant, the UK's compliance with its international legal obligations nevertheless often depends on whether the executive has recognized or denied governmental status in accordance with the applicable international legal criteria, given the judicial deference to executive practice. It is thus important that the executive continues to understand itself as due to operate in accordance with the relevant international legal framework. In the absence of executive recognition or denial of governmental status, compliance with international law depends on how English courts understand and apply the English-law factors involved in their autonomous assessment of governmental status. They can, and public policy considerations may well require them to, apply these factors in line with the international legal criteria for governmental status.

II. PREFATORY CLARIFICATIONS

The article concerns itself with the enjoyment and relevance of governmental status under English law. In so doing, it examines the contexts in which claims to governmental status and the relevance of this status has been contested. It does not focus on issues of statehood, title to territory, or occupation, but it does consider cases on such points to the extent that they shed light on questions concerning governmental status.

In addition to further clarifications that appear later in the article, certain terminological points can be clarified at the outset. Perhaps most fundamental in this regard is the understanding of the term 'the government'. Narrowly conceived and as understood for the purposes of the present work,¹⁴ 'the government' of a state refers, unless otherwise specified, to the person who or collectivity of persons which, by occupying one or more specific offices, directs the exercise of public authority on behalf of that state. Put differently, 'the government' of a state generally comprises the person who or group of persons which occupies certain governmental offices in which vests executive authority to act on a state's behalf.¹⁵ The governmental offices of a state include the office of head of state, head of government, and the ministerial offices of the state, regardless of whether a person or collectivity of persons occupies one or more of these offices as a '*de facto*' or '*de jure*' state organ.¹⁶ Moreover, the

¹⁴ See also S Magiera, 'Governments' in R Wolfrum and A Peters (eds), *Max Planck Encyclopedia of Public International Law* (2007) paras 2–4. On the relationship between the government of a state and the organs of a state, see N Pavlopoulos, *The Identity of Governments in International Law* (OUP 2024) 15–19.

¹⁵ The exercise of executive authority on a state's behalf is not to be confused with the exercise of executive functions on behalf of a state. A number of persons not comprising part of the government of a state may exercise executive functions on behalf of that state. See also *Propend Finance Pty Limited and Others v Sing and Others* (Court of Appeal, 2 May 1997) (1999) 111 ILR 611, 648–9.

¹⁶ Pavlopoulos, *Identity of Governments*, 19–30.

'government' of a state includes the head of state,¹⁷ even if the state's constitution provides that its head of state is to exercise only ceremonial functions¹⁸ and even if it gives the title of 'government' only to its head of government and its ministers.¹⁹

The present work uses the terms 'claimant to governmental status' ('claimant', for short) and 'ostensible government' interchangeably to refer to any person who or collectivity of persons which claims or purports to be the government of a state, regardless of whether or not that person or collectivity of persons indeed qualifies as the government of that state under either English law or international law. The term 'governmental status' refers, unless otherwise specified, to status enjoyed as a matter of English law, irrespective of its conformity with international law. Where reference is made to the claimant that enjoys governmental status as a matter of international law, the article speaks of the 'right' government. Conversely, the 'wrong' government refers to a claimant that does not enjoy governmental status under international law.

As a matter of English law and as used within the present article (without prejudice to how the term is understood in international law),²⁰ the term 'recognition' in respect of one or more persons as the government of a state is used to refer exclusively, unless otherwise specified, to the express acceptance by the executive of a specific claimant as the government of a foreign state.²¹ Neither the reflection of the executive's view that a specific claimant qualifies for governmental status in other conduct nor the treatment by an English court of a specific claimant as the government of a foreign state amounts to 'recognition' of governmental status as a matter of English law. The present article instead refers to such acts as involving the 'acceptance' of governmental status. Similarly, the present article uses the term 'denial' of governmental status exclusively to refer to the rejection, through a relevant statement by the executive, of a specific claim to governmental status in respect of a foreign state. Given the possibility of the executive impliedly rejecting governmental status through the express acceptance of a rival claimant's governmental status, the term 'denial' of governmental status covers also the implicit rejection in this way by the executive of a specific claimant's

¹⁷ ILC, Draft Articles on Jurisdictional Immunities of States and Their Property and Commentaries Thereto, ILC Ybk (1991) II(2), 13 (art 2, comment 8).

¹⁸ On the constitutional variation of the powers of heads of states of different states, see also A Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 *Recueil des cours de l'Académie de Droit International de la Haye* 9, 24–5. On non-ceremonial heads of state, see eg *Maduro v Guaidó*, para 109.

¹⁹ Other not-uncommon municipal titles for a collective organ that is charged under the constitution of a state with exercising at least certain aspects of executive authority on behalf of that state include 'Cabinet' and 'Council of Ministers'. See, generally, Pavlopoulos, *Identity of Governments*, 20–1.

²⁰ In this regard, see *ibid* 40–3.

²¹ See eg *Halsbury's Laws of England: International Law and Foreign Relations* (LexisNexis 2018) para 48.

governmental status. Despite their frequent conflation, the ‘denial’ of governmental status is conceptually distinct from mere ‘non-recognition’ of a specific claimant’s governmental status. While the former involves the executive’s rejection of a claim to governmental status, the latter refers to the situation in which the executive has neither recognized nor denied the governmental status of that claimant. For the rejection by an English court of such status, the article refers to the ‘refusal’ of governmental status. The ‘executive’ in the present article refers, unless otherwise specified, to His or Her Majesty’s Government, as the case may be.

III. QUESTIONS OF GOVERNMENTAL STATUS: THE CONSTITUTIONAL FRAMEWORK

A. The existence of no more than one government

As a matter of English law, a foreign state may have no more than one government. As Lord Porter put it, ‘[t]here cannot ... be two governments of the same country at the same time’.²² Accordingly, Lord Lloyd-Jones stated that the ‘clear and unequivocal recognition of Mr Guaidó as President of Venezuela ... necessarily entailed that Mr Maduro was not recognised as President of Venezuela.’²³ Similarly, the Foreign Secretary clarified that ‘HMG’s recognition of Mr Guaidó as constitutional interim president of Venezuela’ operated ‘to the necessary exclusion of Mr Maduro as President in any capacity’.²⁴

In what appears to be largely a historical and exceptional situation,²⁵ there may nevertheless be simultaneous recognition of one ostensible government of a state as ‘de jure government’ and of a rival ostensible government as ‘de facto government’.²⁶ That this is compatible with the possible existence of no more than one government and that it is not necessarily inconsistent with the suggestion by Hobhouse J that ‘there is no room for more than one government at a time nor for separate de jure and de facto governments in respect of the same state’²⁷ arises from the fact that recognition as ‘de facto government’ may but does not necessarily involve recognition of governmental status. Indeed, at least where it occurs alongside recognition of a rival claimant as ‘de jure government’, recognition as ‘de facto government’ is generally understood not to involve recognition of governmental status. Rather, when there is recognition of one claimant as ‘de facto government’ and a rival claimant as ‘de jure government’, this generally involves recognition of the former as

²² *Gdynia Ameryka Linie*, 27. See also *Somalia v Woodhouse*, 67.

²³ *Maduro v Guaidó*, para 92.

²⁴ “*Maduro Board*” of the Central Bank of Venezuela v “*Guaidó Board*” of the Central Bank of Venezuela) UKSC 2020/0195, Case on behalf of the Foreign Secretary (‘Foreign Secretary’s Case’) para 33.

²⁵ *Maduro v Guaidó*, para 99.

²⁶ See Foreign Secretary’s Case, para 31, including fn 28 thereof.

²⁷ *Somalia v Woodhouse*, 67.

some other administering authority over part or all of the territory of a state of which there is concurrent recognition of the latter as enjoying governmental status. As the Foreign Secretary put it, in the 'isolated historic examples of dual recognition', '*de jure* recognition is accorded to an incumbent, previously recognized government; whereas *de facto* recognition is accorded to a usurping government that has established effective control in a particular area'.²⁸

For example, the executive had at some point 'recognized [Haile Selassie] as *de jure* Emperor of Ethiopia' and simultaneously 'recognized the Italian Government as the Government *de facto* of virtually the whole of Ethiopia'.²⁹ As another example, in February 1938 General Franco's government was recognized 'as the Government which exercises *de facto* administrative control over a considerable portion of the Basque country, including Bilbao', simultaneously recognizing 'the Republican Government of Spain as the *de jure* Government of the whole of Spain including the area in which it recognizes General Franco's Government as exercising *de facto* administrative control'.³⁰

Having heard from the Foreign Office that, since 1980, 'the terms *de jure* and *de facto* were no longer in wide usage',³¹ the UK Supreme Court (UKSC) expressed doubt as to whether the distinction between a 'de jure government' and a 'de facto government' 'has a useful role to play any longer before courts in this jurisdiction'.³² Recognition as 'de facto government' may nevertheless continue to occur, possibly but not necessarily alongside recognition as 'de jure government'.

B. Recognition of governmental status: executive policy and practice

Until 1980, 'the policy of successive British Governments ha[d] been [to] announce a decision formally "recognising" the new government' '[w]here an unconstitutional change of régime takes place'.³³ In 1980,³⁴ in apparent pursuit of avoiding the implicit political or moral approval that was sometimes seen to accompany recognition (instead of it being treated as 'simply a neutral formality'),³⁵ the UK adopted a policy of ceasing generally to recognize foreign governments.³⁶ It was nevertheless made clear that the executive 'shall continue to decide the nature of [its] dealings with regimes which come to power unconstitutionally'.³⁷ Since 1980, the question of the executive's stance

²⁸ Foreign Secretary's Case, para 31.

²⁹ *Haile Selassie v Cable and Wireless Ltd* [1938] 1 Ch 839, 841.

³⁰ *Banco de Bilbao*, 181.

³¹ Foreign Secretary's Case, para 26.

³² *Maduro v Guaidó*, para 99.

³³ See Hansard (HL Debates), 28 April 1980, vol 408, cols 1121–2.

³⁴ For the 1980 policy remaining in effect, see eg *Maduro v Guaidó*, para 18.

³⁵ See Hansard (HL Debates), 28 April 1980, vol 408, cols 1121–2.

³⁶ *Ibid* ('[w]e have therefore concluded that there are practical advantages in following the policy of many other countries in not according recognition to governments').

³⁷ *Ibid*.

has thus to some extent been ‘folded into’ the existence or otherwise of diplomatic relations through a specific government,³⁸ even if such relations were previously ‘distinguished’ from the question of recognition, it having been noted that, unlike matters of recognition, the ‘question of entering into diplomatic relations ... is entirely discretionary’.³⁹

The 1980 policy notwithstanding, the executive may recognize a claimant’s governmental status. This may be in circumstances that are deemed not to fall within the scope of the 1980 policy⁴⁰ or it may instead be in circumstances that do fall within the scope of this policy. As Mance J put it, ‘outside or despite the scope of the 1980 announcement, Her Majesty’s Government [may] actually indicate[] unequivocally that it recognises ... a particular body as the government of a foreign state’.⁴¹ Similarly, in the words of Lord Lloyd-Jones, the executive ‘reserves the right to [recognize foreign governments] where it considers it appropriate to do so in all the circumstances’.⁴² Indeed, there are several instances of recognition of governmental status since 1980,⁴³ including the recognition in 2011 of the National Transitional Council in Libya ‘as the Government of Libya’⁴⁴ and the recognition in 2019 of Juan Guaidó ‘as the constitutional interim President of Venezuela’.⁴⁵

Instead of recognizing the governmental status of a specific claimant, and generally pursuant to the 1980 policy, the executive may refrain from recognizing a claimant’s governmental status. Alternatively, it may deny that claimant’s governmental status or recognize it in some other capacity, for example as the legitimate representative of a people, as the supreme organ of a political movement,⁴⁶ or even as ‘de facto government’⁴⁷ in the sense of a local insurrectionary movement or an occupying Power.

C. The ‘one voice’ principle and judicial autonomy

Under the UK’s constitution, the executive has exclusive competence ‘to determine foreign policy’, including decisions as to whether or not to

³⁸ J Crawford, *The Creation of States in International Law* (2nd edn, CUP 2006) 152.

³⁹ Hansard (HC Debates), 21 March 1951, vol 485, cols 2410–2411. Recognition was said not to be ‘entirely discretionary’ because ‘international law ... defines the conditions under which a Government should be recognised’. Ibid. That said, recognition remains discretionary in the sense that the executive may opt not to recognise a particular claimant.

⁴⁰ For limits to the 1980 policy, see Part IV.A.4.

⁴¹ *Kuwait Airways Corp v Iraqi Airways Co (No 5)* [1999] CLC 31 (‘*Kuwait Airways* (first instance)’) 67.

⁴² *Maduro v Guaidó*, 91. See also *Dr Ali Mahmoud Hassan Mohamed v Mr Abdulmagid Breish and others* [2020] EWCA Civ 637 (‘*Mohamed v Breish*’) para 72 (Males LJ); *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2001] 3 WLR 1117, para 350 (Brooke LJ).

⁴³ See also *Maduro v Guaidó*, para 68.

⁴⁴ *British Arab Bank v NTC*, paras 23, 25.

⁴⁵ *Maduro v Guaidó*, para 110(1).

⁴⁶ See, generally, Pavlopoulos, *Identity of Governments*, 43–4.

⁴⁷ On whether or not recognition as ‘de facto government’ involves recognition of governmental status, see Part IV.A.2.

engage in what is referred to as ‘recognition’ of a claimant’s governmental status.⁴⁸ With a view to ensuring respect for this exclusive competence,⁴⁹ English courts adopted the ‘one voice’ principle.⁵⁰ Pursuant to this principle, which is ‘rooted in the constitutional allocation of the roles of the executive and the judiciary in this country’,⁵¹ English courts accept ‘as conclusive’ the executive’s recognition of a specific claimant as the government of a foreign state.⁵²

The principle’s ‘classic formulation’⁵³ is found in *Arantzazu Mendi*, albeit in a matter that was treated as one principally concerning recognition of statehood. There, Lord Atkin held that:

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 recognise 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.⁵⁴

The same is understood to apply, *mutatis mutandis*, to recognition of governmental status. As Lord Lloyd-Jones put it, the matters to which this principle applies ‘include the sovereign status of a state or government and whether an individual is to be regarded as a head of state’.⁵⁵

Moreover, while it is typically considered in the context of recognition, there is no apparent conceptual or constitutional hurdle to the application of the ‘one voice’ principle in respect of the denial of governmental status. Indeed, the considerations that dictate judicial deference to the executive in a case of recognition of governmental status would appear equally to require judicial deference to the executive in respect of denial of governmental status. Unlike in situations of mere non-recognition of governmental status, the absence of judicial deference to the denial of governmental status would risk the UK speaking with two voices, as it were, in respect of matters that fall within the executive’s exclusive competence.

Judicial decisions support this view. Persuasive authority can be found in the Court of Appeal’s approach in *Gur Corporation v Trust Bank of Africa Ltd*, a case involving a question of statehood. In delivering the lead judgment, Sir John Donaldson MR referred to a ‘public policy constraint that the courts cannot take cognizance of a foreign judicial person, if to do so would involve them in acting inconsistently with the foreign

⁴⁸ *Maduro v Guaidó*, paras 64, 69, 91. See also *Mohamed v Breish*, para 57.

⁴⁹ See *Maduro v Guaidó*, para 78.

⁵⁰ On the origins of ‘one voice’ principle, see *Maduro v Guaidó*, paras 69–78. See also *Mohamed v Breish*, paras 58–61, 72.

⁵¹ *Mohamed v Breish*, para 57.

⁵² *Government of the Republic of Spain v S.S. ‘Arantzazu Mendi’* [1939] AC 256 (‘*Arantzazu Mendi*’), 265; *Maduro v Guaidó*, para 68.

⁵³ *Maduro v Guaidó*, para 69.

⁵⁴ *Arantzazu Mendi*, 264.

⁵⁵ *Maduro v Guaidó*, para 69.

policy or diplomatic stance of this country'.⁵⁶ Accordingly, the denial of statehood⁵⁷ was 'conclusive'.⁵⁸ Another perhaps more pertinent example is the judgment of the Court of Appeal in *Kuwait Airways*. In the context of treating the issue before it as one concerning governmental status and not the 'recognition or non-recognition of states',⁵⁹ Brooke LJ cited approvingly the following finding by Mance J at first instance:

Circumstances may ... arise where Her Majesty's Government's attitude to recognition of a suggested government is clear to a point where, if this court were to take a different attitude, the state would be speaking with two voices in the manner emphatically rejected in *The Arantzazu Mendi*.⁶⁰

While Mance J does not refer expressly to the denial of governmental status, that he understood the UK's position in that case to involve denial of governmental status (rather than mere non-recognition of governmental status) is reflected in the view that the UK would indeed 'be speaking with two voices' if English courts accepted the governmental status of the claimant in question. It is not clear how the UK would be 'speaking with two voices' if an English court accepted the governmental status of a claimant whose governmental status the executive had merely refrained from recognizing. Mance J referred also to the possibility of the 'one voice' principle applying subsequent to the executive's 'categorical attitude regarding recognition, or non-recognition',⁶¹ which in the circumstances may also more accurately be understood to refer to recognition or denial of governmental status. Indeed, aside from the difficulty in conceptualizing how an attitude of mere non-recognition might be 'categorical', further support for the term 'non-recognition' actually being used to refer to denial of governmental status arises from its subsequent characterization as an act of 'positively refus[ing]' recognition.⁶² Based on Mance J's elucidation of the 'one voice' principle, the Court of Appeal considered the denial of governmental status to be grounds for it not to accept the governmental status of the claim in question.

Similarly, Lord Lloyd-Jones's pronouncement in *Maduro v Guaidó* that, '[o]n those occasions when HMG does issue a formal statement of recognition or non-recognition of a foreign government, the certificate will be taken by the court as conclusive'⁶³ is best understood as concerning recognition or denial (not non-recognition) of governmental status. Indeed, in addition to the conceptual difficulty of 'non-recognition' being 'conclusive' and to the legal implications that such a reading would

⁵⁶ *Gur Corporation v Trust Bank of Africa Ltd* [1987] QB 599 ('*Gur Corporation*') 620E.

⁵⁷ That the certificate was one of denial, rather than mere non-recognition, of statehood is apparent from the terms of the certificate. See *ibid* 604E–F.

⁵⁸ *Gur Corporation*, 623E.

⁵⁹ *Kuwait Airways*, paras 48–50 (Brooke LJ).

⁶⁰ *Ibid* para 350 (Brooke LJ).

⁶¹ *Kuwait Airways* (first instance) 67.

⁶² *Ibid*.

⁶³ *Maduro v Guaidó*, para 68.

entail,⁶⁴ he referred to cases involving recognition and denial of status in support of this point. More specifically, he referred to *Veysi Dag v Secretary of State for the Home Department*, where the executive had ‘not accorded any form of recognition to the so-called “Turkish Republic of Northern Cyprus (TRNC)”’ and indeed ‘recognise[d] only one State in the island of Cyprus’, the territorial integrity of which was also recognized. The statehood of the TRNC was thus taken to be denied.⁶⁵ Lord Lloyd-Jones referred also to *British Arab Commercial Bank plc v National Transitional Council of the State of Libya*, which involved both recognition and denial of governmental status.⁶⁶ Finally, he referred to *R (HRH Sultan of Pahang) v Secretary of State for the Home Department*, where the court deferred to the executive certification of ‘Pahang [as] a constituent territory of Malaysia’ and whose sultan ‘is the Sultan of the territory of Pahang and is not the Head of State of Malaysia’.⁶⁷ Here, too, there was denial of governmental status.

As for the judicial approach in respect of a claimant whose governmental status the executive has neither recognized nor denied, there was early support for the view that ‘the courts could not take notice of a foreign government not recognised by the Government’.⁶⁸ But English law has developed so as to allow courts to take cognizance of the acts of claimants that are not recognized by the executive as the government,⁶⁹ and it is now clear that the ‘one voice’ principle does not preclude English courts from autonomously assessing the governmental status of a claimant whose governmental status the executive neither recognizes nor denies.⁷⁰

At the same time, an English court will not invariably assess a claimant’s governmental status where the outcome of a case turns on it. In *Bouhadi v Breish*, for example, Blair J considered it ‘contrary to principle and premature now to rule on the issue’ of the leadership of the LIA, which turned on the identity of Libya’s government.⁷¹ The executive was taken to have neither recognized nor denied the governmental status of either of the claimants in question⁷² and, so, Blair J deemed it ‘[i]n principle ... open to the court’ to identify Libya’s government.⁷³ He nevertheless held that ‘the declarations which the court [was] invited to

⁶⁴ Under positive English law, English courts are free to assess governmental status where there is no recognition or denial of governmental status. Lord Lloyd-Jones also acknowledged this. See *ibid* para 96.

⁶⁵ *Veysi Dag v Secretary of State for the Home Department* (2001) 122 ILR 529, paras 17–18.

⁶⁶ *British Arab Bank v NTC*, para 25.

⁶⁷ *R (HRH Sultan of Pahang) v Secretary of State for the Home Department* [2011] EWCA Civ 616, paras 8, 14 (Maurice Kay LJ), 30 and 36 (Moore-Bick LJ).

⁶⁸ *Maduro v Guaidó*, para 70, and the cases cited therein.

⁶⁹ See Part V.C.1(c).

⁷⁰ See *Bouhadi v Breish*, para 40; *Maduro v Guaidó*, para 96.

⁷¹ *Bouhadi v Breish*, para 48.

⁷² *Ibid* para 40.

⁷³ *Ibid*.

make would risk cutting across the stated position of HMG'.⁷⁴ This position was reflected in a statement by the Foreign Office that 'HMG's highest priority is to support the efforts of the United Nations and the international community to establish a Government of National Accord (GNA)' in accordance with the 2015 Libyan Political Agreement, that the process for the formation of the GNA was ongoing, and that soon thereafter the GNA's head would 'clarify' who is appointed as the leader of the LIA. With the clarification of the LIA's leadership being expected 'within the coming weeks',⁷⁵ Blair J adjourned consideration of the case.⁷⁶

Albeit in relation to situations that involved contested title to territory or uncertainty as to a state's subsistence, further judicial authority supports the exercise of restraint by English courts from assessing governmental status where there is a possibility that the executive will soon clarify its stance on the matter.

An example in this regard is the Court of Appeal's adjournment of proceedings in *Haile Selassie*. At first instance, Bennett J had found that 'the plaintiff, recognized by His Majesty's Government as the Emperor de jure of Ethiopia, has lost the right to recover the debt in a suit in [England]'.⁷⁷ On appeal, after the executive had announced its intention to recognize 'in a very short time' the King of Italy 'as Emperor of Abyssinia',⁷⁸ the Court of Appeal adjourned the proceedings 'until such recognition had in fact taken place'.⁷⁹

A further example is *Re an Application by Ernst Jaakson and Aarand Roos*,⁸⁰ where Millett J did not make an independent determination on the continued *de jure* existence of the Republic of Estonia, let alone on the existence of a government of Estonia that would be entitled to make direction for the proceeds of sale of property, the beneficial owner of which was 'the Republic of Estonia, if it still exist[ed]'.⁸¹ In the light of the 'real possibility that in the reasonably foreseeable future a State of Estonia may emerge which is recognized by Her Majesty's Government and which is capable of appointing accredited representatives to the Court of St James',⁸² Millett J directed the proceeds of sale in question 'to be lodged in Court with liberty to apply for payment out to the applicants, to the Attorney-General and to any other person with the leave of the Court'.⁸³ In so doing, he followed the Attorney-General's

⁷⁴ Ibid para 49.

⁷⁵ Ibid Annex (Operative parts of letter of 3 March 2016 from the FCO to the court).

⁷⁶ Ibid para 52.

⁷⁷ *Haile Selassie*, 192–4.

⁷⁸ Ibid 194.

⁷⁹ Ibid.

⁸⁰ *Re an Application by Ernst Jaakson and Aarand Roos* (1991) 85 ILR 53 ('*Ernst Jaakson and Aarand Roos*').

⁸¹ Ibid 59.

⁸² Ibid 61.

⁸³ Ibid 62.

submission 'that the moneys ought to be paid into court pending clarification of the position in Estonia and the possible future recognition by Her Majesty's Government of the State of Estonia and the resumption of dealings between the Governments of the two States'.⁸⁴ Millett J acknowledged that the proceedings 'concern the prerogative, relations of Her Majesty's Government with foreign States and the direction of its foreign policy'.⁸⁵ He held that:

In the absence of a government of an independent State of Estonia recognized by the Government of the United Kingdom and of any prospect of such a government coming into existence in the foreseeable future[, transferring the proceeds of the sale in question to the United States where they can be applied for the benefit of Estonians and their diplomatic representation in the United States] might be an appropriate course to take. But when there is a prospect of the emergence of such a government in the foreseeable future, I think it would be wrong to deprive that government of the right to procure the application of these proceeds of sale as it sees fit.⁸⁶

In what has particular relevance for the English-law approach to cases involving contested claims to governmental status and the purported conferral of private rights, English courts have suggested that the 'one voice' principle applies also in respect of recognition as 'de facto government', including when such recognition does not amount to recognition of governmental status. More specifically, in *Bank of Ethiopia*, Clauson J held that 'this Court is bound to treat the acts of the government which His Majesty's Government recognize as the de facto government of the area in question as acts which cannot be impugned as the acts of an usurping government'.⁸⁷ This was endorsed by the Court of Appeal in *Banco de Bilbao*:⁸⁸

'[s]hould the question arise as to what government must be recognized in this Court as the government of the territory in which Bilbao is situate, the question must, in case of doubt, be resolved by a statement made by His Majesty to this Court'.⁸⁹

Moreover, in delivering the judgment of the UKSC in *Maduro v Guaidó*, Lord Lloyd-Jones mentioned approvingly the finding by Popplewell LJ in *Breish* that '[in *Bank of Ethiopia* and *Banco de Bilbao*] the one voice principle was determinative of the legal consequences because it identified the appropriate government from whom the relevant law to be applied flowed'.⁹⁰

⁸⁴ Ibid 57.

⁸⁵ Ibid.

⁸⁶ Ibid 61.

⁸⁷ *Bank of Ethiopia v National Bank of Egypt and Liguori* [1937] 1 Ch 513 ('*Bank of Ethiopia*') 519 (Clauson J).

⁸⁸ *Banco de Bilbao*, 195.

⁸⁹ Ibid.

⁹⁰ *Maduro v Guaidó*, para 145.

IV. THE IDENTIFICATION OF A STATE'S GOVERNMENT UNDER ENGLISH LAW

A. Judicial deference: ascertaining the executive's position

1. In general

In cases where the enjoyment of governmental status is relevant, the 'one voice' principle requires English courts to determine whether or not the executive has recognized or denied the governmental status of the claimant in question. Indeed, English courts might well proactively seek out the executive's position in this regard.⁹¹

In ascertaining whether or not there is an executive position to which English courts must defer, regard is to be had only to executive statements on the matter, despite some uncertainty in this regard soon after the adoption of the 1980 policy.

The executive explained in 1980 that its 'attitude' as to whether 'a new regime [which] comes to power unconstitutionally ... qualifies to be treated as a government will be left to be inferred from the nature of the dealings, if any, which [the executive] may have with it, and in particular on whether [the executive] are dealing with it on a normal government to government basis'.⁹² The Lord Privy Seal made the same statement in response to a question as to 'how in future, for the purposes of legal proceedings, it may be ascertained whether, on a particular date, Her Majesty's Government regarded a new regime as the Government of the State concerned'.⁹³

In the first case on the matter, *Hobhouse J* nevertheless considered the 'forensic use' of the "'inferred recognition" theory' to be impractical and that the use by the executive of the phrase "'left to be inferred" [was] designed to fulfil a need for information in an international or political, not a judicial, context'.⁹⁴ In the judicial context, he considered there simply to be no existing voice, so to speak, to which the English courts could—let alone ought to—defer. In a later case, *Mance J* was of the similar view that 'the government did not intend in 1980 to replace clear statements of binding intention with coded language from which courts would then struggle invidiously to derive an inferred intention'.⁹⁵ The

⁹¹ See eg *Bouhadi v Breish*, para 15 (Blair J).

⁹² See Hansard (HC Debates), 23 May 1980, vol 985, col 385W, this explanation being given in response to a 'question as to how in future, for the purposes of legal proceedings, it may be ascertained whether, on a particular date, HMG regarded a new regime as the government of the state concerned'.

⁹³ Ibid.

⁹⁴ *Somalia v Woodhouse*, 63. See also *Kuwait Airways* (first instance) 65 (Mance J). On academic views as to the approach that English courts ought to take in the absence of recognition, cf J Crawford, 'Decisions of British Courts during 1985-1986 involving Questions of Public International Law' (1986) 57 BYIL 405; I Brownlie, 'Recognition in Theory and Practice' (1982) 53 BYIL 197, 209; FA Mann, *Foreign Affairs in English Courts* (OUP 1986) 42ff; C Warbrick, 'The New British Policy on Recognition of Governments' (1981) 30 ICLQ 568.

⁹⁵ *Kuwait Airways* (first instance) 65.

UKSC endorsed this position, with an additional reason for its adoption. Lord Lloyd-Jones stated that:

Quite apart from the practical difficulties of doing so, to infer the intention of HMG in relation to recognition would be to trespass into an area which is constitutionally within the exclusive competence of the executive. In such circumstances recognition ceases to be the determinative criterion and the court must identify who may be the government or head of state by making its own findings of fact as indicated in *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA*.⁹⁶

This followed the intervention by the Foreign Secretary, who indicated that, '[a]s the courts have recognised, [the 1980] policy was not intended to replace express recognition with implied recognition'.⁹⁷ In his view, '[b]y leaving the question of whether a regime "qualifies to be treated as a Government ... to be inferred from the nature of [HMG's] dealings ... with it" ... , HMG intended that the courts' enquiry would avoid the question of "recognition" entirely'.⁹⁸ 'Even in the exceptional cases in which HMG recognises a government outside the 1980 policy, it is difficult to imagine a circumstance in which HMG would evince an intention to recognise without an express statement of recognition'.⁹⁹ It is thus the content of executive statements, not other conduct, that is relevant to the judicial ascertainment of whether or not there is recognition of governmental status.

The reasons that favour abstention from a finding of recognition on the basis of something other than an express executive statement of recognition may generally be seen to apply, *mutatis mutandis*, also to assessing whether or not there is denial of governmental status. That said, denial of governmental status in respect of one claimant may be implied by a statement of recognition accorded in respect of a rival claim, since each state may have no more than one government.

Where they exist, executive statements of recognition or denial of governmental status, which typically emanate from the Foreign Office, may take different forms. They may be written or made orally and they may be addressed to the public at large, to one of the parties or to the court in the course of judicial proceedings.¹⁰⁰ There may also be more than one relevant statement. In *Maduro v Guaidó*, for example, the UKSC considered both a letter from the Foreign Office and a public statement by

⁹⁶ *Maduro v Guaidó*, para 98.

⁹⁷ Foreign Secretary's Case, para 23.

⁹⁸ *Ibid* para 24.

⁹⁹ *Ibid*.

¹⁰⁰ See eg *Maduro v Guaidó*, para 102; *Somalia v Woodhouse*, 64; *Luther v Sagor*, para 536. See also *Mohamed v Breish*, para 37, finding that 'no unfairness has resulted from the course taken in this case', which included the FCO letters being procured after being 'sought privately by one party following private meetings with officials in which a partial view of the dispute could be presented and in which other parties did not have an opportunity to put forward their views or relevant materials'.

the Foreign Secretary which was incorporated in that letter, as well as further statements made to the court.¹⁰¹ All of this led it to conclude that the recognition of Mr Guaidó as interim President of Venezuela was 'beyond doubt'.¹⁰²

In ascertaining whether or not the executive has recognized or denied the governmental status of a specific claimant, the UKSC has confirmed that '[t]he interpretation of [an] executive certificate, is, of course, a matter for the court.'¹⁰³ Put differently, English courts must ascertain the import of an executive statement as regards the recognition or denial of governmental status. For example, a court may need to ascertain whether the executive's expression of 'support' for a specific claimant conveys recognition of governmental status. That said, given the English-law position on implied recognition, it is unlikely that English courts will treat such support,¹⁰⁴ let alone executive cognizance of certain facts, such as control over territory,¹⁰⁵ as involving recognition of governmental status.

In interpreting an executive statement to ascertain whether or not it involves recognition of governmental status, the UKSC has stated that '[w]hat matters is the subjective intention of the executive as disclosed by the [statement]'.¹⁰⁶ If, moreover, the executive expresses its position in response to a judicial request, the wording of the response is to be considered 'in the light of the request to which it responds'.¹⁰⁷ The view of Hersch Lauterpacht that ambiguity in an executive statement 'must ... be dealt with by the court with the help of the rule of interpretation which assumes that the intention of the government is to abide by the rules of international law and the international obligations of [the UK]'¹⁰⁸ has not found much support in English courts.

Indeed, English courts ought to be cautious as to the matters on which they rely to interpret executive statements. In delivering the lead judgment of the Court of Appeal in *Mohamed v Breish*, Popplewell LJ had regard to Foreign Office letters, to 'public statements and conduct of HMG',¹⁰⁹ and to a statement of the President of the UN Security Council to which the FCO had referred in its communication to the

¹⁰¹ *Maduro v Guaidó*, para 110(3).

¹⁰² *Ibid* para 102.

¹⁰³ *Ibid* para 103. See also *Gdynia Ameryka Linie*, 43 (Lord Reid).

¹⁰⁴ See eg *Mohamed v Breish*, para 35(2), in light of *Maduro v Guaidó*, paras 95–6.

¹⁰⁵ See eg *Maduro v Guaidó*, para 93, referring to the 'extraneous factors', which include the acknowledgement of a claimant's control over the population of a state. But see eg *Arantzazu Mendi*, 265 (Lord Atkin), albeit in treating the executive statement in question as one of recognition of statehood and in response to the executive clarification that '[t]he question whether the Nationalist Government is to be regarded as that of a foreign sovereign State appears to be a question of law to be answered in the light of the preceding statements and having regard to the particular issue or circumstances with respect to which the question is raised'. See *ibid* 258. For criticism of this decision, see H Lauterpacht, 'The Form of Foreign Office Certificates' (1939) 20 BYIL 125, 127.

¹⁰⁶ *Maduro v Guaidó*, para 91.

¹⁰⁷ *Ibid* para 92.

¹⁰⁸ Lauterpacht, *Foreign Office Certificates*, 126.

¹⁰⁹ *Mohamed v Breish*, paras 35(2), 38.

court. While this was done not to make a finding of implied recognition but in support of an existing construction of executive statements,¹¹⁰ the UKSC has since made an obiter remark that, '[o]n its face, the resort by the Court of Appeal in *Breish* to such extraneous materials is inconsistent with the one voice principle'.¹¹¹ The 'extraneous materials' to which the UKSC referred include at least 'the public stance HMG had taken in its statements and conduct, including the fact that "HMG has full diplomatic relations with representatives of the GNA and has maintained them throughout the relevant period"'.¹¹² Similarly, in relation to the case before it, the UKSC found the Court of Appeal to have erred in having had regard to other factors, including the executive's practice in having dealings and diplomatic relations with a specific claimant and in not accrediting as a diplomat the representative of a rival claimant.¹¹³

In this light, leaving aside the separate possibility of English courts having regard to the executive's dealings with an ostensible government in autonomously assessing a claim to governmental status, the UKSC's position in relation to the exclusion of executive conduct seemingly outweighs the suggestion by Hobhouse J in *Somalia v Woodhouse* that the existence of an 'accredited representative of a foreign state in [the UK]' would render it 'contrary to public policy for the court not to recognise as a qualified representative of the head of state of the foreign state the diplomatic representative recognised by Her Majesty's Government'.¹¹⁴ For what it is worth, the Foreign Secretary has also considered it 'impermissible ... to look behind [a certificate] to HMG's conduct'.¹¹⁵

The interpretative function of English courts notwithstanding, the UKSC has indicated that 'any ambiguity in [a] statement should be resolved by a further request to the FCDO for clarification'.¹¹⁶ The extent to which courts will continue to interpret ambiguous executive statements, as distinct from situations in which the executive itself makes clear that the legal import of its statements are to be decided by the courts, remains to be seen. In any event, the UKSC in *Maduro v Guaidó* made clear that English courts are not to treat an executive statement as ambiguous 'by reference to extrinsic evidence ... when no ambiguity was apparent on the face of the [statement]'.¹¹⁷

2. Recognition of governmental status

There is no particular formula that the executive must use in order for it to recognize a claimant's governmental status. Some statements are

¹¹⁰ Ibid paras 35, 38.

¹¹¹ *Maduro v Guaidó*, para 96.

¹¹² See the specific reference to such dealings in *ibid* para 95.

¹¹³ Ibid para 93.

¹¹⁴ *Somalia v Woodhouse*, 66.

¹¹⁵ Foreign Secretary's Case, para 3.

¹¹⁶ *Maduro v Guaidó*, para 96. See also *Civil Air Transport*, 86 (Viscount Simon).

¹¹⁷ *Maduro v Guaidó*, para 93.

nevertheless clearer than others in their qualification as statements of recognition of governmental status.

Perhaps clearest among the statements of recognition of governmental status are those which expressly provide that the UK 'recognizes' a specific claimant as 'the government of [a particular state]'. For example, the following certificate by the Foreign Secretary clearly reflects the recognition of two separate claimants as the government of Poland at two different times:

'[u]p to and including midnight of July 5–6 July, 1945, His Majesty's Government in the United Kingdom recognized the Polish Government having its headquarters in London as being the Government of Poland, and as from midnight of July 5–6 July, 1945, His Majesty's Government in the United Kingdom recognized the Polish Provisional Government of National Unity as the Government of Poland, and as from that date ceased to recognize the former Polish Government having its headquarters in London as being the Government of Poland'.¹¹⁸

Recognition of governmental status might nevertheless take the form of recognition of the leadership of a political movement as the government of a state or of a specific person or collectivity of persons as the occupant of a particular governmental office (typically one of the two most senior offices, namely those of head of state and of head of government). The executive need not express a view on the identity of the entire composition of another state's government in order for it to recognise a foreign government. For example, the recognition of Mr Guaidó as 'constitutional interim President of Venezuela' amounts to recognition of governmental status. While somewhat less clear, recognition of the National Transitional Council 'as the sole governmental authority in Libya' was also taken to amount to recognition of governmental status.¹¹⁹

It is not inconceivable, moreover, that a statement that does not employ the term 'recognition' nevertheless involves recognition of governmental status. But the ascertainment of recognition from such a statement may well be less straightforward. For example, the Court of Appeal in *Mohamed v Breish* considered that the executive's expression of 'support' of a specific ostensible government 'as the legitimate executive authorities of Libya' amounted to 'implied recognition of its effective status as the executive authority'.¹²⁰ In making this assessment, Popplewell LJ explained that there had been no reference to the 1980 policy 'in qualifying what is said in a statement', considering this to be an 'indication that the 1980 policy is not a significant consideration' in

¹¹⁸ See eg *Gdynia Ameryka Linie*, 17.

¹¹⁹ *British Arab Bank v NTC*, paras 6, 24. On the possible ambiguity of comparable statements, see Pavlopoulos, *Identity of Governments*, 53.

¹²⁰ *Maduro v Guaidó*, para 35(2).

that case.¹²¹ But with the UKSC having since considered it to be ‘inappropriate for courts in this jurisdiction to rely on notions of implied recognition’,¹²² a statement of ‘support’ for a particular claimant might not now be taken to amount to recognition of governmental status. Indeed, the Foreign Office has since clarified that ‘HMG’s position on recognition was not expressly stated [in *Mohamed v Breish*]. It was not a case in which HMG deliberately departed from the 1980 policy’, noting that the ‘Foreign Office letters in that case did not use the language of “recognition”’,¹²³ a point mentioned also by the UKSC.¹²⁴ Although it cannot definitively be excluded that a statement not employing the term ‘recognition’ involves recognition of governmental status, it appears unlikely that such a statement would indeed today be taken under English law to involve recognition of governmental status.¹²⁵

A statement, even one that employs the term ‘recognition’, might be unclear as to whether or not it involves recognition of governmental status, especially when the claimant is not recognized as ‘the government of [a specific state]’. On the one hand, a statement need not expressly refer to a claimant as ‘the government’ of a state in order to amount to recognition of governmental status. On the other hand, an ostensible government might be recognized in a capacity other than as the government of a state.

Recognition as a ‘de facto government’ is notable in its uncertainty as to whether or not it involves recognition of governmental status. The term ‘de facto government’ may be and has been used in statements of recognition to convey recognition as the government of a state and, in other cases, to convey recognition in another capacity, for example as an insurrectionary movement exercising control over part of a state’s territory or as an occupying force exercising control over all or part of a state’s territory.¹²⁶ This explains why ‘[g]eneral propositions about the distinction [between “de jure governments” and “de facto governments”] are to be distrusted’.¹²⁷ The occasional characterisation of recognition itself being ‘de facto’ or ‘de jure’ neither clarifies nor further complicates the assessment of whether or not there is recognition of governmental status. Such terms have generally been used interchangeably with recognition as a ‘de facto government’ and recognition as a ‘de jure government’ respectively.¹²⁸

One clear indicator that recognition as ‘de facto government’ does not involve recognition of governmental status is the simultaneous

¹²¹ *Mohamed v Breish*, para 33.

¹²² *Maduro v Guaidó*, para 96.

¹²³ Foreign Secretary’s Case, para 61(1).

¹²⁴ *Maduro v Guaidó*, para 95.

¹²⁵ See *ibid*.

¹²⁶ See eg S Talmon, *Recognition of Governments in International Law* (OUP 1998) 60.

¹²⁷ J Crawford, *Brownlie’s Principles of Public International Law* (OUP 2019) 143. See also Foreign Secretary’s Case, para 27; *Maduro v Guaidó*, para 84.

¹²⁸ See eg Foreign Secretary’s Case, para 31; *Haile Selassie*, 197. See also R Jennings and A Watts (eds), *Oppenheim’s International Law* (9th edn, Wildy 1992) vol 1, 135.

recognition of a rival claimant as the 'de jure government' of the same state. This is because recognition as a 'de jure government' generally reflects recognition of governmental status¹²⁹ and because it is generally accepted that as a matter of English law each state may possess no more than one government. Even if there is a possibility of recognition as a 'de jure government' being in some sense 'lesser'¹³⁰ than 'the fullest recognition which can be given',¹³¹ this is not to be taken to suggest that recognition as 'a de jure government' might involve recognition not as the government of a state. It might be 'lesser' in the sense that it acknowledges that 'there is concurrently some other body de facto exercising a rival authority to that of the "de jure" sovereign', a fact that does not prejudice the recognition of governmental status of the 'de jure government'.¹³² Other statements that amount to recognition of governmental status also clarify that the recognition of a rival claimant as 'de facto government' does not involve recognition of governmental status.

Relatedly but also more generally, while the term 'legitimate' can be understood in a number of ways,¹³³ recognition of a claimant as the 'legitimate' government of a state is perhaps generally to be taken as equivalent to recognition of governmental status.¹³⁴ For example, in *Kuwait Airways* the Court of Appeal treated the executive's statement that its conduct was 'strictly in conformity' with Security Council resolutions—which, in turn, referred to the 'legitimate government of Kuwait'—as a 'blunt statement that Her Majesty's Government had always continued to recognise Kuwait as an independent state, and its legitimate government as the only government entitled to recognition'.¹³⁵

Also in *Mohamed v Breish*, Popplewell LJ understood the executive's reference to the claimant in question as 'the legitimate executive authorities of Libya' 'to convey at least recognition of de facto status as a government',¹³⁶ although reliance might best not be had on executive statements considered in *Mohamed v Breish* to establish recognition of governmental status, albeit seemingly more because of the absence of the term 'recognition' in the relevant statement, rather than anything else.

Another example of 'legitimate' being used as shorthand for 'the claimant that enjoys governmental status' appears to be the executive's reference to Tejan Kabbah as 'the legitimate leader' of Sierra Leone, not as 'the "former" President'.¹³⁷ In that case, rather than the

¹²⁹ See eg Foreign Secretary's Case, para 29.

¹³⁰ Ibid para 30(3).

¹³¹ *Maduro v Guaidó* (Court of Appeal), para 121.

¹³² See *Maduro v Guaidó*, para 86(3), quoting from *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 ('*Carl Zeiss v Rayner & Keeler*'), 957.

¹³³ See, generally, Pavlopoulos, *Identity of Governments*, 124.

¹³⁴ See eg *Mohamed v Breish*, para 35(2).

¹³⁵ *Kuwait Airways*, para 347.

¹³⁶ *Mohamed v Breish*, para 35(2).

¹³⁷ *Sierra Leone Telecommunications Co Ltd v Barclays Bank plc* [1998] CLC 501 ('*Sierra Leone*') 507–8 (Cresswell J).

characterization as 'legitimate', the executive's non-use of the term 'recognition' coupled with the contemporaneous judiciary's reluctance to find that the executive deviated from the 1980 policy might better explain why the executive's references to Tejan Kabbah as 'the legitimate leader' of Sierra Leone was not taken to involve recognition of governmental status.

Recognition as the constitutional government or constitutional office-holder within a government will also generally be understood as recognition as the government of a state. While in *Mohamed v Breish* Popplewell LJ was inclined to accept that the 'one voice' principle does not oblige English courts to accept the recognition of an ostensible government as 'legitimate' if legitimate meant 'lawful under local constitutional law',¹³⁸ the UKSC in *Maduro v Guaidó* deferred to recognition of Mr Guaidó 'as the constitutional interim President'.¹³⁹

To determine whether or not recognition as 'de facto government' amounts to recognition as the government of a state, especially where no rival claimant is recognized as enjoying governmental status in respect of the same state, further regard to the specific wording of the statement may be helpful, in particular whether or not the claimant is recognized as 'the de facto government of [a state]'. For example, Bankes, Warrington, and Scrutton LJ all considered the recognition of 'the Soviet Government as the de facto Government of Russia' to amount to recognition of governmental status. Bankes LJ referred to the recognition of 'the Soviet Government as the Government really in possession of the powers of sovereignty in Russia';¹⁴⁰ Warrington LJ treated an agreement between the executive and the political entity in Russia as comprising 'a trade agreement between [the UK] and Russia', with the date of this agreement being the date at which the recognition 'took effect',¹⁴¹ and opined that 'there is no difference for the present purpose between a government recognized as such de jure and one recognized de facto';¹⁴² and Scrutton LJ held that state immunity applied in respect of the Soviet Government, seemingly on the basis of the executive's position as to the governmental status of the Soviet Government.¹⁴³

In contrast, and although in the specific circumstances there was also recognition of a rival claimant as 'de jure government' of a state, recognition of a claimant as 'being in fact (de facto) the government of [a specific area within the same state]', as with the recognition of Italian control in Abyssinia, is unlikely to reflect recognition of governmental status.¹⁴⁴ The same goes for recognition as 'a government which at present

¹³⁸ *Mohamed v Breish*, para 35(2).

¹³⁹ *Maduro v Guaidó*, para 16.

¹⁴⁰ *Luther v Sagor*, 543.

¹⁴¹ Ibid 548. See also ibid 550–1.

¹⁴² Ibid 551.

¹⁴³ Ibid 553–5.

¹⁴⁴ See eg *Bank of Ethiopia*, 515. See also ibid 519.

exercises *de facto* administrative control over the larger portion of [a state]', as with recognition of the Spanish nationalist claimant as 'the Government which exercises *de facto* administrative control over a considerable portion of the Basque country, including Bilbao',¹⁴⁵ at least prior to the House of Lords' decision in *Arantzazu Mendi*.

Distinct from the simultaneous recognition of one claimant as 'de facto government' and of a rival government as 'de jure government' of the same state is the recognition of what are in fact two rival ostensible governments of the same state as enjoying governmental status in respect of two different states. This is how the House of Lords in *Arantzazu Mendi* understood the recognition of the rival authorities in Spain during the Spanish Civil War.¹⁴⁶ This finding might be questioned, given that the Nationalist Government was taken to be recognized as the government of a state that was distinct from the state of which the Nationalist Government actually claimed to be the government.¹⁴⁷ But in focusing on the question of statehood, the House of Lords can be understood to have taken guidance from the executive, which stated that '[t]he question whether the Nationalist Government is to be regarded as that of a foreign sovereign State appears to be a question of law to be answered in the light of the preceding statements and having regard to the particular issue or circumstances with respect to which the question is raised'.¹⁴⁸ This, in turn, might be explained by the terms of the judicial request directed to the executive, which sought to 'ascertain whether the Nationalist Government of Spain was recognized by His Majesty's Government as a sovereign state'.¹⁴⁹ The House of Lords' approach nevertheless remains questionable, also because the executive had recognized the 'de facto government' as exercising 'de facto administrative control over the larger portion of Spain' and not of any territory that was not Spain's territory, while simultaneously recognizing 'the Government of the Spanish Republic as the only *de jure* Government of Spain or any part of it'.¹⁵⁰

3. Non-recognition of governmental status

In the early years following the adoption of the 1980 policy, there was an apparent reluctance on the part of English courts to find that the executive had recognized or denied the governmental status of a specific claimant; and where there is neither recognition nor denial of governmental status, there is non-recognition of governmental status.

¹⁴⁵ *Banco de Bilbao*, 181. See also Lauterpacht, *Foreign Office Certificates*, 126.

¹⁴⁶ *Arantzazu Mendi*, 264–5, as more fully reproduced in *Spain v Owners of the Arantzazu Mendi* [1938] P 233, 242.

¹⁴⁷ *Arantzazu Mendi*, 264.

¹⁴⁸ *Ibid* 258.

¹⁴⁹ *Spain v Owners of the Arantzazu Mendi*, 239.

¹⁵⁰ *Arantzazu Mendi*, 264.

Notably, Hobhouse J appeared to treat the 1980 policy as having generally precluded the executive's position as a basis for courts to make a finding on the enjoyment or otherwise of governmental status.¹⁵¹ In his words, 'recognition by Her Majesty's government is no longer the criterion of the locus standi of a foreign "government" in the English courts and the possession of a legal persona in English law'.¹⁵² The executive may well have contributed to such a finding in that particular case, having indicated that its practice was not to recognize governments and that, accordingly, '[t]he question of whether to recognise the purported "interim government" in Mogadishu thus d[id] not arise for [it]'.¹⁵³ More generally, Hobhouse J distinguished Nourse LJ's apparent acceptance of recognition, in *Gur Corporation*, of South Africa as being 'de jure entitled to exercise governing authority in respect of [particular territory]',¹⁵⁴ as involving 'the recognition of a state and the competence of a subordinate body within the recognised territory of that state under the laws of that state', rather than the recognition of governmental status.¹⁵⁵

Additionally, Hobhouse J rejected the possibility of 'inferred recognition',¹⁵⁶ and undertook an autonomous assessment of the relevant claimant's governmental status, despite acknowledging that, 'if the question before the court is to be decided on the basis of the attitude adopted by Her Majesty's Government, an order cannot be made in favour of the interim government'. He took this approach notwithstanding him having noted that the executive's position on the governmental status of the claimant in question was 'clearly not [because of] any disapproval of an established regime but rather [because] there [was] no regime which has control, let alone any administrative control which has the requisite element of stable continuity'.¹⁵⁷ Indeed, for Hobhouse J it was

clear ... that Her Majesty's Government does not consider that there is at present any effective government in Somalia. It refers to "factions" and treats the interim government as merely one among a number of factions. The further letter, dated 9 March 1992, adds little to that of 20 February. It confirms that the attitude of Her Majesty's Government has not changed and that there is still no single body exercising administrative authority in Somalia.¹⁵⁸

He nevertheless deemed the enjoyment of governmental status to be a matter for autonomous judicial assessment.

Similarly, in *Sierra Leone*, Cresswell J noted that '[t]he policy of the UK is now not to confer recognition on governments' and, on this basis,

¹⁵¹ *Somalia v Woodhouse*, 63.

¹⁵² *Ibid.*

¹⁵³ *Ibid* 64.

¹⁵⁴ *Gur Corporation*, 625.

¹⁵⁵ *Somalia v Woodhouse*, 66.

¹⁵⁶ *Ibid* 63.

¹⁵⁷ *Ibid* 65. See also *ibid* 64.

¹⁵⁸ *Somalia v Woodhouse*, 65.

proceeded autonomously to assess governmental status.¹⁵⁹ The possibility of recognition or denial of governmental status again appears not to have been entertained, and on this occasion the executive had not expressly referred to its 1980 policy. Rather, the Foreign Office had sent a letter to one of the parties stating that, in 'set[ting] out the British Government's policy towards Sierra Leone', the UK government 'consistently condemned the military coup of 25 May 1997 which overthrew the democratically elected government of Sierra Leone [and] continue[d] to deal with the democratically elected government of Sierra Leone under President Kabbah'.¹⁶⁰ The Foreign Office had also clarified its position in stating that 'Tejan Kabbah is not the "former" President of Sierra Leone; he remains the legitimate leader of that country'.¹⁶¹

These cases notwithstanding, it has since become clear that the executive may—and from time to time does—recognize or deny the governmental status of a specific claimant. The Court of Appeal in *Kuwait Airways* made clear that there may be recognition or denial of governmental status notwithstanding the 1980 policy;¹⁶² and the UKSC in *Maduro v Guaidó* indicated that courts ought to seek clarification when a statement is unclear as to its import for the status of a particular claimant to governmental status. Accordingly, *Somalia v Woodhouse* or at least *Sierra Leone*¹⁶³ might provide limited guidance for a present-day assessment as to whether or not the executive has recognized or denied the governmental status of a specific claimant, even with implied recognition remaining out of the question.

At the same time, there may still be executive non-recognition, including by total executive inaction as regards the status of a specific claimant government or, for example, by a statement 'confirming that the practice of Her Majesty's Government [i]s to recognise states not governments'¹⁶⁴ or 'that Her Majesty's Government [i]s not concerned with the recognition of governments'.¹⁶⁵ Even if a statement indicates the executive's favourable disposition towards a specific claimant, for example by being coupled with the expression of 'support' for that claimant, such a statement might be taken to reflect the non-recognition of governmental status,¹⁶⁶ especially if no further clarification is provided by an executive statement.

¹⁵⁹ *Sierra Leone*, 506 (Cresswell J).

¹⁶⁰ Ibid 507.

¹⁶¹ Ibid 508.

¹⁶² *Kuwait Airways* (first instance) para 350.

¹⁶³ One notable difference between these cases is that the executive apparently did not refer to the 1980 policy in its statements relating to *Sierra Leone*.

¹⁶⁴ *Somalia v Woodhouse*, 64.

¹⁶⁵ Ibid.

¹⁶⁶ See *Mohamed v Breish*, para 35(2), in light of *Maduro v Guaidó*, paras 95–6.

4. Denial of governmental status

As with recognition of governmental status, there is no particular formula that the executive must use in order for it to deny a claimant's governmental status, although, again, some statements are clearer than others.

One apparent example of denial of governmental status, albeit connected with contested title to territory, arose in *Kuwait Airways*. In this case, consideration was given to the executive's statement that:

Her Majesty's Government in the United Kingdom have not at any time, throughout the period from the date specified in the learned judge's order until the expulsion of Iraqi forces from Kuwait on 26 February 1991, recognized Iraqi occupation or control over the territory of Kuwait.¹⁶⁷

That this was understood as a denial of the Iraqi government's claim to governmental status in respect of Kuwait finds support in Mance J's treatment of it, ultimately 'find[ing] it difficult to conceive how [he] could conclude that the Government of Iraq constituted de facto the Government of Kuwait' on the basis of the executive's statement.¹⁶⁸ The Court of Appeal unanimously supported this conclusion,¹⁶⁹ even if it expressed doubt as to whether the matter was even one of recognition of governmental status rather than one of 'recognition or non-recognition of states'.¹⁷⁰ The subsequent treatment, in *Bouhadi v Breish*, of the executive's stance as it pertained to *Kuwait Airways* as being 'in effect a categorical statement by HMG of non-recognition [*viz* denial of governmental status]', as distinct from non-recognition pursuant to the 1980 policy, also appears to support the view that the executive's statement under consideration in *Kuwait Airways* reflected the denial of governmental status.¹⁷¹

To determine whether a statement involves non-recognition or denial of governmental status, the three following considerations appear relevant.

First, the lack of reference, in the executive statement, to adherence to the 1980 policy might contribute to a finding that the statement is one of denial, rather than mere non-recognition, of governmental status. Conversely, an express indication of adherence to the 1980 policy might contribute to a finding that a statement is one of non-recognition. Notable in this regard is *Bouhadi v Breish*, where Blair J treated the stance of the executive under consideration in *Kuwait Airways*, in which there was no reference to the 1980 policy, as being 'in effect a categorical statement by HMG of non-recognition'. He considered that statement to be 'different' from the stance of the executive as it pertained to the

¹⁶⁷ See *Kuwait Airways*, para 264.

¹⁶⁸ *Kuwait Airways* (first instance) 68.

¹⁶⁹ *Kuwait Airways*, para 350.

¹⁷⁰ *Ibid* para 349.

¹⁷¹ *Bouhadi v Breish*, para 40.

case before him, where ‘the reason given for non-recognition’ was the ‘simple policy one, namely that following the change of policy in 1980, HMG recognises states rather than governments.’¹⁷² The wording of the executive statement under consideration in *Bouhadi v Breish* was not otherwise less clear than that in *Kuwait Airways*, providing as it did that ‘HMG has not recognised as the Government of Libya either the “Tobruk government” or the “Tripoli government”.’¹⁷³

Secondly, the existence of a situation that the court considers to fall outside the scope of the 1980 policy might support a judicial finding that an executive statement is one of denial, rather than mere non-recognition, of governmental status. A possible example in this regard again concerns the situation in *Kuwait Airways*, which might have been outside the scope of the 1980 policy because of the claim of title to territory that accompanied the claim of governmental status: the 1980 policy can be understood narrowly to apply only to situations in which ‘a new regime com[ing] to power unconstitutionally’ within an existing territorial arrangement, not to situations involving foreign claims to territory.¹⁷⁴ The existence of certain international legal obligations incumbent on the UK in dealing with specific claims to governmental status is another possible reason why the situation in *Kuwait Airways* might have been outside the scope of the 1980 policy. Indeed, in *Kuwait Airways*, the Court of Appeal noted that the 1980 policy did ‘not even purport to answer or deal with the exigencies of the present case, where the [UK] government wanted, and was obliged, to make its attitude to the situation perfectly clear’.¹⁷⁵ It is also on this basis that Mance J at first instance had distinguished the situation in *Kuwait Airways* from that in *Somalia v Woodhouse*.¹⁷⁶ Relatedly, the executive itself, in its statement in the context of *Kuwait Airways*, asserted that ‘[t]he conduct of [HMG] has been strictly in conformity with the requirements of [certain UN Security Council decisions]’,¹⁷⁷ which were taken to impose ‘a positive obligation ... not to recognise any regime other than the legitimate government of Kuwait, and to do nothing which might be interpreted as even an indirect recognition of Kuwait’s annexation’.¹⁷⁸ The executive made reference also to the UNSC’s determination, which UN member states are obliged to accept, that Iraq had ‘usurped the authority of the legitimate Government of Kuwait’.¹⁷⁹

Taking the above into consideration, the Court of Appeal considered that it was

¹⁷² Ibid. See also *Kuwait Airways* (first instance) 67.

¹⁷³ *Bouhadi v Breish*, para 24(i).

¹⁷⁴ See also *Kuwait Airways* (first instance) 67.

¹⁷⁵ *Kuwait Airways*, para 350.

¹⁷⁶ *Kuwait Airways* (first instance) 67–8.

¹⁷⁷ Ibid 65.

¹⁷⁸ *Kuwait Airways*, para 350.

¹⁷⁹ See *Kuwait Airways* (first instance) 65; UNSC Res 661 (6 August 1990) op para 1.

impossible to read [the executive's] letter other than as a blunt statement that Her Majesty's Government had always continued to recognise Kuwait as an independent state, and its legitimate government as the only government entitled to recognition, and that, in accordance with its obligations as a member state of the United Nations, it had never given any recognition either to Kuwait's annexation or to any regime set up by Iraq by virtue of its occupation.¹⁸⁰

As a third and perhaps clearer consideration concerning the determination of whether a statement involves non-recognition or denial of governmental status, the concomitant recognition of one claimant as the government of a state would ordinarily indicate that the government denies the governmental status of any rival claimant. In this light, a statement that the executive 'ceased to recognize' a claimant as the government of a state at the same time from which it recognized a rival claimant as the government of the same state involves denial of the former claimant's governmental status.¹⁸¹

B. Autonomous judicial assessment: The common-law factors

Especially in the first years following the adoption of the 1980 policy, English courts have autonomously assessed whether or not a specific claimant qualifies as the government of a state. The contemporary approach to such assessment traces back to *Somalia v Woodhouse*, where Hobhouse J identified certain factors, endorsed in subsequent cases by the Court of Appeal and eventually the UKSC,¹⁸² for the autonomous judicial assessment of governmental status.¹⁸³

The factors relevant to the judicial assessment of a claimant's governmental status, as stipulated by Hobhouse J, are as follows:

(a) whether it is the constitutional government of the state; (b) the degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the state; (c) whether Her Majesty's Government has any dealings with it and if so what is the nature of those dealings; and (d) in marginal cases, the extent of international recognition that it has as the government of the state.¹⁸⁴

The assessment of one or more of these factors in a concrete case may be 'a difficult exercise',¹⁸⁵ not least because of factual uncertainties. It is unclear, moreover, from the limited case-law what precise weight each of these factors carries and which, if any, of them might be 'formally

¹⁸⁰ *Kuwait Airways*, para 347.

¹⁸¹ See eg *Gdynia Ameryka Linie*, 17. See also *Civil Air Transport*, 86–7.

¹⁸² *Kuwait Airways*, para 351; *Maduro v Guaidó*, para 98.

¹⁸³ *Somalia v Woodhouse*, 68.

¹⁸⁴ *Ibid.*

¹⁸⁵ *British Arab Bank v NTC*, para 22.

conclusive'.¹⁸⁶ Judicial decisions nevertheless indicate the following in respect of the content, assessment, and relevance of these factors.

1. *Constitutionality*

'Constitutionality' is understood, in relevant case-law, as concerning a valid claim to power on the basis of the state's existing constitution. In other words, the assessment of constitutionality takes place against the constitutional framework that existed before the identity of a state's government was brought into question, not any change to the framework that might occur as a result of any claimant's success in attaining governmental status. Otherwise, there could not be an unconstitutional government since the constitution of a state undergoes a fundamental change when an unconstitutional government attains governmental status.¹⁸⁷

In assessing constitutionality, English courts appear to consider themselves able to ascertain the relevant facts without reliance on external materials,¹⁸⁸ although regard may be had, for example, to communications from the executive and to Security Council resolutions.¹⁸⁹ English courts appear, moreover, to acknowledge the possibility that the constitution of a state undergoes constitutionally-compliant changes (as distinct from fundamental changes), even if the facts before the courts have not justified such a finding in the cases before them.¹⁹⁰

As for the relevance of constitutionality, Hobhouse J drew a distinction, later endorsed by the Court of Appeal, between a claimant that has been 'the constitutional and established government of a state' and a claimant 'which is seeking to achieve that position either displacing a former government or to fill a vacuum'. '[A] loss of control by a constitutional government may not immediately deprive it of its status, whereas an insurgent regime will require to establish control before it can exist as a government.'¹⁹¹ In other words, whether or not a claimant has a constitutional claim to governmental status affects the relevance of control. Control has particular significance for an unconstitutional claim to governmental status; it appears that a constitutional claimant need not exercise effective control in order to enjoy governmental status under English law.

2. *Degree, nature and stability of administrative control*

As generally concerns 'the degree, nature and stability of administrative control, if any, that [a claimant] of itself exercises over the territory of the

¹⁸⁶ *Halsbury's Laws of England*, para 48.

¹⁸⁷ On the relationship between the government of a state and the constitution of a state, see Pavlopoulos, *Identity of Governments*, 9–10, 16, 96. On fundamental changes to a state's constitution, see also H Kelsen, *The Pure Theory of Law* (M Knight tr, 2nd edn, University of California Press 1967) 209.

¹⁸⁸ *Somalia v Woodhouse*, 67.

¹⁸⁹ *Sierra Leone*, 507–8; *Kuwait Airways*, para 352.

¹⁹⁰ *Somalia v Woodhouse*, 67.

¹⁹¹ *Ibid* 67. *Kuwait Airways*, para 352.

state', a claimant's exercise of 'effective administrative control' appears to be a strong indicator in favour of its enjoyment of governmental status. Indeed, Hobhouse J considered that, for an unconstitutional claimant to enjoy governmental status, 'it must be able to show that it is exercising administrative control over the territory of [that state]'.¹⁹²

'[E]ffective administrative control' is understood, by Lord Atkin and Lord Justice Brooke, to refer to the exercise of 'all the functions of a sovereign government, in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the government'.¹⁹³ In assessing the effectiveness of control, it appears relevant to determine whether 'this control seems likely to continue'.¹⁹⁴ For example, the determination of the 'international community' to reverse a claimant's seizure of power, 'if necessary by force' was accepted as relevant in demonstrating that the control exercised by a specific claimant was 'fragile and temporary'.¹⁹⁵ This specific circumstance would appear also to concern—or, to be precise, arise from—the international recognition of a rival claimant.¹⁹⁶

As for relevant evidence, regard has been had to statements, including by persons who were affiliated with one of the claimants to governmental status in question, among others.¹⁹⁷ Beyond this, Hobhouse J took the view that executive 'statements about what is happening in the territory of some foreign state ... may not be the best evidence'.¹⁹⁸ According to Hobhouse J:

Once the question for the court becomes one of making its own assessment of the evidence, making findings of fact on all the relevant evidence placed before it and drawing the appropriate legal conclusion, and is no longer a question of simply reflecting government policy, letters from the Foreign and Commonwealth Office become merely part of the evidence in the case.¹⁹⁹

3. *Existence and nature of HMG's dealings*

Hobhouse J clarified that the absence of dealings by the executive with a claimant 'cannot ... be conclusive because their absence may be explained by some extraneous consideration, for example, lack of occasion, the attitude of the regime to human rights, its relationship to

¹⁹² *Somalia v Woodhouse*, 67.

¹⁹³ *Kuwait Airways*, para 353, quoting from *Arantzazu Mendi*, 264–5.

¹⁹⁴ See *Kuwait Airways*, paras 354–5.

¹⁹⁵ *Ibid* para 356.

¹⁹⁶ See eg UNSC Res 1132 (8 October 1997) op para 1.

¹⁹⁷ *Sierra Leone*, 508–9.

¹⁹⁸ *Somalia v Woodhouse*, 65. See also *White, Child and Beney v Simmons; same v Eagle Star & British Dominions Insurance Company* [1922] Lloyd's Law Reports 7 ('*White v Simmons*') 9–14, on the value of executive statements regarding the control exercised by a specific claimant, as discussed in Part V.D below.

¹⁹⁹ *Somalia v Woodhouse*, 65.

another state'.²⁰⁰ He considered that 'the conduct of governments in their relations with each other maybe affected by considerations of policy as well as by considerations of legal characterisation',²⁰¹ and that the courts are concerned in this context only with the latter.²⁰²

On the contrary, where the executive 'is dealing with the foreign government on a normal government to government basis as the government of the relevant foreign state, it is unlikely in the extreme that the inference that the foreign government is the government of that state will be capable of being rebutted and questions of public policy and considerations of the interrelationship of the judicial and executive arms of government may be paramount... But now that the question has ceased to be one of recognition, the theoretical possibility of rebuttal must exist'.²⁰³ For his part, the Foreign Secretary expressed the view that '[c]onsideration of HMG's broader dealings is relevant in cases in which the court is required to determine for itself whether a government exist'.²⁰⁴

As for what evidence is relevant in assessing the existence and nature of the executive's dealings with a claimant, statements by the Foreign Office will, in the view of Hobhouse J, 'almost certainly be the best and only conclusive evidence of that fact'.²⁰⁵ Moreover, the qualification of dealings 'on a normal government to government basis' is an important one, as states may have 'relations with bodies which are not states or governments of states'.²⁰⁶ This qualification thus calls for care to be taken before dealings by the UK with a claimant are accepted as being on a government-to-government basis and thus relevant to the assessment of governmental status.

4. *International recognition*

Despite the indication by Hobhouse J that international recognition, beyond that by the UK, has significance only 'in marginal cases',²⁰⁷ the Court of Appeal appears to have been open to considering otherwise. It acknowledged the 'undesirability on practical grounds in opening up the test to an evaluation of the world's dealings with a putative government', and considered that when the nature and degree of recognition was

²⁰⁰ Ibid 63.

²⁰¹ Ibid.

²⁰² Ibid 63–4.

²⁰³ Ibid 65–6. See also *Kuwait Airways*, para 358.

²⁰⁴ Foreign Secretary's Case, para 61(2).

²⁰⁵ *Somalia v Woodhouse*, 65. See also *Sierra Leone*, 509.

²⁰⁶ *Somalia v Woodhouse*, 67. See also Pavlopoulos, *Identity of Governments*, 43–5.

²⁰⁷ *Somalia v Woodhouse*, 68. See also *ibid* for the reference to the other three considerations as 'the three important factors' and *ibid* 67, for the view that 'where ... the regime exercises virtually no administrative control at all in the territory of the state, international recognition of an unconstitutional regime should not suffice and would, indeed, have to be accounted for by policy considerations rather than legal characterization'.

‘vague or ambiguous, it may prove not to be of any help at all’.²⁰⁸ At the same time, it considered that where international recognition was ‘clear and unequivocal, [it] did not see why it should not provide considerable support for a particular view’.²⁰⁹

As for the relevance of international recognition, Hobhouse J indicated that where a claimant ‘exercises virtually no administrative control at all in the territory of the state, international recognition of an unconstitutional regime should not suffice and would, indeed, have to be accounted for by policy considerations rather than legal characterisation’.²¹⁰ For his part, in considering ‘international recognition’, Cresswell J had regard to United Nations sanctions, the widespread condemnation of a coup, and a peace plan that sought to reinstate the pre-existing constitutional government, in support of its governmental status, despite lacking control.²¹¹

In any event, as with assessing the existence and nature of the executive’s dealings with the ostensible government in question, regard must be had to the capacity in which a claimant is recognized, specifically in whether or not it is recognized as the government of a state.

V. THE RELEVANCE OF GOVERNMENTAL STATUS IN ENGLISH LAW

Questions related to governmental status have arisen in four broad types of situations. The first is the ostensible representation of a state—specifically, whether a specific person or group of persons can speak for the state such that they may prospectively affect the position of that state, including certain organs, agencies or instrumentalities. The second involves the privileges and immunities of the state—specifically, whether a certain claimant is to benefit from immunities owed in respect of the governments or certain members of governments of states. The third concerns the purported conferral of rights of a private-law character by the performance of ostensibly-governmental acts—specifically, whether one or more ostensibly-governmental acts of a claimant are to be given effect for the purposes of conferring a private-law right to a natural or legal person.²¹² The fourth concerns the identification of a ‘government’ or the acts thereof in the construction of a private-law instrument.

²⁰⁸ *Kuwait Airways*, para 359.

²⁰⁹ *Ibid.*

²¹⁰ *Somalia v Woodhouse*, 67.

²¹¹ *Sierra Leone*, 509.

²¹² While such cases typically arise between private parties, a notable exception is *Civil Air Transport*. Initially a case between two private parties, an Order in Council provided that the impleading of a ‘foreign sovereign State’ was not a bar to the court’s jurisdiction in that case and a Chinese state entity was made party to the proceedings. Still, the state entity in question did not appear, let alone claim any subsisting rights in the property in question.

A. Representation of the state

Examples of matters of state representation that have come before English courts include whether a specific person or group of persons is entitled to give instructions in respect of the bank accounts of a state's embassy²¹³ and of assets of a state's central bank,²¹⁴ and to control assets of a sovereign wealth fund.²¹⁵ The question of state representation has arisen also in respect of title to a chose in action over a debt owed to a state,²¹⁶ as well in respect of collecting the proceeds of a sale owed to a state.²¹⁷

In determining who may represent a state, English courts generally require the government of the state to be identified. This reflects the position that, as a matter of English law, each state may be represented only through its government. Accordingly, a person who neither qualifies nor acts under the authority of whoever is deemed to comprise the government of a state will generally not be in a position to represent that state for the purposes of English law. Among other examples,²¹⁸ the following three cases illustrate the distinctive ability of the government of a state to represent that state in English courts.

First, in delivering the judgment of the Court of Appeal in *Haile Selassie*, Sir Wilfrid Greene MR noted the lack of dispute as to the 'entitle[ment] by succession' of His Majesty, the King of Italy, who was recognized 'as de jure Emperor of Ethiopia', 'to the public property of the State of Abyssinia'; 'the late Emperor of Abyssinia's title thereto is no longer recognized as existent'.²¹⁹

Secondly, and although Sir Wilfrid Greene MR had not expressed a view on whether the concomitant recognition of one claimant as de jure government and of a rival claimant as de facto government in Ethiopia would have divested the former of the capacity to sue in Ethiopia's name,²²⁰ in assessing whether a sum of money owed to Somalia could be paid to the solicitors instructed by the so-called 'interim government', Hobhouse J considered '[t]he question [to be] whether the interim government is the Government of Somalia'.²²¹ Upon finding that this claimant did not qualify under English law as the government of

²¹³ *British Arab Bank v NTC*, para 21(1).

²¹⁴ *Maduro v Guaidó*, para 2.

²¹⁵ *Mohamed v Breish*, para 4; *Bouhadi v Breish*, paras 10–11.

²¹⁶ *Haile Selassie*, 192.

²¹⁷ *Somalia v Woodhouse*, 61.

²¹⁸ See eg *British Arab Bank v NTC*, para 32, where Blair J, having found the NTC, and not the Qadhafi regime, to be recognized as the government of Libya, stated that the Qadhafi government 'would have no *locus standi* in the English courts to challenge the NTC's claim as regards the accounts'.

²¹⁹ *Haile Selassie*, 197.

²²⁰ *Ibid.* Indeed, Sir Wilfrid Greene MR found that 'th[e] right of succession is to be dated back at any rate to the date when the de facto recognition, recognition of the King of Italy as the de facto Sovereign of Abyssinia, took place'.

²²¹ *Somalia v Woodhouse*, 61.

Somalia, he directed that no part of the sum be paid to the solicitors instructed by that claimant.²²²

Thirdly, Millett J found that the Consul-General of Estonia in the US and the Estonian Council in New York were not entitled to remit the proceeds of the sale of a property of which '[t]he beneficial owner [was] the Republic of Estonia, if it still exists',²²³ not least because 'Her Majesty's Government has ceased to recognize any authority as constituting the Government of the Republic of Estonia with the result that there is no authority recognized by Her Majesty's Government as capable of appointing diplomatic representatives of the Republic'.²²⁴

That said, for the most part, English courts provide little reasoning on this matter, at least in relation to the representation of a state *eo nomine*. While the foreign act of state doctrine may well be relevant in this regard,²²⁵ it generally appears to be taken for granted that a state may be represented only through its government. At the same time, there may well be additional factors that English courts must assess before accepting that a state entity may be represented through the government of that state.

For example, in *British Arab Bank v NTC*, Blair J stated that, 'as a matter of principle, ... accounts [of a foreign state's embassy] must be operated in accordance with the instructions of those accredited to the mission'. There was thus an additional question of accreditation that had to be addressed as regards the representation of a diplomatic mission. It was acknowledged in that case that accreditation was a matter for the executive and had taken place.²²⁶

As another, somewhat more complex, example, in *Maduro v Guaidó*, the question who may act for the Central Bank of Venezuela (BCV) was answered not solely by reference to the identity of Venezuela's government. The qualification by Juan Guaidó as President of Venezuela resulted in treating his appointment of specific individuals to the board of the BCV as an executive act to which the foreign act of state doctrine applied. On this basis, the UKSC gave effect to the appointment, enabling the BCV to be represented by Mr Guaidó's appointees.²²⁷ The effect of decisions by Venezuelan courts that purported to declare as null and void relevant acts by Mr Guaidó had also to be considered, though his appointments to the BCV were ultimately found to be unaffected by

²²² Ibid 68.

²²³ *Ernst Jaakson and Aarand Roos*, 59.

²²⁴ Ibid 60. But the rule that only persons belonging to or acting under the authority of its government may represent the state might not be absolute, at least where the continued subsistence of the state is in question. One year prior, the Consul-General of Estonia in the US and the Estonian Council in New York obtained the High Court's leave to sell the aforementioned property, albeit with the proceeds to be paid into court unless otherwise ordered. Ibid 54.

²²⁵ *Maduro v Guaidó*, para 146.

²²⁶ *British Arab Bank v NTC*, para 28.

²²⁷ *Maduro v Guaidó*, para 181.

them.²²⁸ The UKSC held that ‘no recognition or effect could be given to a judgment of the [Supreme Tribunal of Justice of Venezuela] if and to the extent that to do so would conflict with the recognition by HMG of Mr Guaidó as the interim President of Venezuela’.²²⁹

As these cases suggest, considerations that are additional to the identification of a state’s government do not ordinarily pose difficulty to the government representing the state as a matter of English law. But that does not necessarily mean that there exist no such obstacles. For example, to the extent that the effectiveness of the ostensible representation of a state through its government involves accepting as effective acts that are governed by the foreign act of state doctrine, the limitations and exceptions to this doctrine²³⁰ might provide grounds for treating as ineffective the representation of a state. Nor can it be excluded that English courts identify other grounds to refuse to give effect to the ostensible representation of a state through the claimant that is found to enjoy governmental status as a matter of English law in circumstances where the ‘one voice’ principle would ordinarily apply.²³¹ The principal point—that a state may be represented only through its government—nevertheless stands.

B. Privileges and immunities of a state

As an entity with legal personality under the municipal law of the UK,²³² a foreign state enjoys certain entitlements under English law. Some such rights may extend to specific organs, agents and instrumentalities of a state. Perhaps most notable in this regard are the rights under the State Immunity Act of 1978 (SIA), which include a right to immunity ‘from the jurisdiction of the courts of the [UK]’,²³³ that extends to ‘the government of that State’.²³⁴ As such, the possession of governmental status gives rise to the enjoyment of this right. Under a comparable common-law rule preceding that contained in the SIA, the House of Lords in *Arantzazu Mendi* set aside a writ and warrant of arrest of a vessel once it established that these actions impleaded ‘the Government of a sovereign State’.²³⁵

With the scope of immunity having developed over the years,²³⁶ the enjoyment by a claimant of governmental status does not mean that that claimant will enjoy immunity in all cases. But a claimant that does not enjoy governmental status will lack a general legal basis from which it

²²⁸ Ibid para 181(3).

²²⁹ *Deutsche Bank AG v Central Bank of Venezuela* [2022] EWHC 2040 (Comm) paras 194–214.

²³⁰ See eg *Maduro v Guaidó*, para 136.

²³¹ See *Mohamed v Breish*, para 41.

²³² *Law Debenture Trust v Ukraine* [2023] UKSC 11, para 24.

²³³ State Immunity Act 1978 (‘SIA’) s 1(1).

²³⁴ Ibid s 14(1)(b).

²³⁵ *Arantzazu Mendi*, 267 (Lord Russell).

²³⁶ See eg *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, 555–7 (Lord Denning MR), reflected in SIA 1978, s 3; *Kuwait Airways*, para 335.

could benefit from state immunity.²³⁷ This was the case, for example, with the unrecognized 'Provisional Government of Northern Russia'.²³⁸

C. Conferral of private rights

An English court may be faced with a claim to a private right under or pursuant to a foreign state's ostensible exercise of governmental authority. The effectiveness (that is, the validity and applicability) under English law of an ostensibly-governmental act for the purposes of a claimed right might be controversial where the governmental status of the ostensible government through which the act was performed is in doubt.

Examples in this regard include cases concerning claimed property rights in respect of goods that were confiscated and then sold in the aftermath of a revolution²³⁹ and of goods that were owned by the state and that were subsequently sold during a civil war;²⁴⁰ a claimed right to represent a private bank on the basis of being appointed to its board pursuant to a decree purporting to amend the constitution of certain banks;²⁴¹ and the claimed conferral of private rights by the ostensible exercise of governmental authority pursuant to wartime powers granted in respect of a merchant fleet.²⁴²

In such cases, only an ostensibly-legislative act, only an ostensibly-executive act or both of these types of acts may be in question, with distinct acts not always having received separate judicial examination. Rather than the nature or number of the ostensibly-governmental acts in question, the key distinction is whether or not the object of the claimed right is situated in the territory controlled by a *de facto* government.

1. Within territory controlled by a 'de facto government'

(a) In general

In a consequential decision, the Court of Appeal in *Luther v Sagor* accepted as effective a confiscatory decree by the Soviet claimant, which was recognized as 'the *de facto* government of Russia'. The confiscation by the Soviet authorities of property pursuant to that decree was also accepted as effective. This enabled the court to find that the Russian

²³⁷ This does not preclude the possibility that UK law, in specific circumstances, allows the conferral of immunities to members of certain 'national committee[s]' that are comparable to those enjoyed by 'member[s] of the government of [certain] foreign Power[s]'. Diplomatic Privileges (Extension) Act 1941, s 1(1)(a)–(b).

²³⁸ *The Annette*; *The Dora* [1919] P 105.

²³⁹ *Luther v Sagor*; *Princess Paley Olga*.

²⁴⁰ *Civil Air Transport*, 89. At the time in question, 'Her Majesty's Government in the United Kingdom [was] the sovereign government of Hong Kong'.

²⁴¹ *Banco de Bilbao*.

²⁴² *Gdynia Ameryka Linie*.

Commercial Delegation's eventual sale of property to the defendants was effective, leading it to identify the property's rightful owners. Despite agreeing on the outcome of the case, the Lord Justices indicated several possible legal bases for at least certain aspects of their respective views. Such differences notwithstanding, the enjoyment of governmental status appears generally to have been relevant in this regard.

One apparent basis for the Court of Appeal's approach is what today is an aspect of the foreign act of state doctrine. More specifically, as the UKSC has put it, there were 'statements in *Luther v Sagor* supporting the existence' of a rule comprising part of the foreign act of state doctrine,²⁴³ 'which prohibits [English] courts ... from questioning an act of the executive of a foreign state'.²⁴⁴ For example, Bankes LJ expressed the view that 'the decree of confiscation [and] the seizure of ... goods ... , and the subsequent sale of them ... were all acts of the Soviet Government which has now been recognized by His Majesty's Government as the de facto Government of Russia, and must be accepted by the Courts of this country as such'.²⁴⁵ For his part, Warrington LJ found it to be 'well settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the Courts of this country'.²⁴⁶ Scrutton LJ considered that the court was bound 'to recognize the decree ... and the sale ... as acts of a sovereign state the validity of which cannot be questioned by the Courts of this country'.²⁴⁷

Another possible rule concerns state immunity. Scrutton LJ considered that the court could not 'indirectly question [title] in the hands of a purchase from [a] Government by denying that the Government could confer any good title to the property', due to 'immunity [that] follows from recognition as a sovereign state [*viz* government]'.²⁴⁸ It is nevertheless now clear that immunity does not apply where a foreign state is not directly or indirectly impleaded.²⁴⁹ Nor does jurisdictional immunity arise in respect of commercial acts, such as the sale of movable property,²⁵⁰ though it may of course remain relevant in respect of the enactment and enforcement of the confiscatory decree.

A further rule as at least regards the ostensibly-legislative act in question is the *lex situs* rule, a choice-of-law rule under English law. Notably, Bankes LJ 'proceeded on the basis that title to the confiscated timber was governed by the *lex situs* and the expropriatory decree was a part of

²⁴³ *Maduro v Guaidó*, para 124.

²⁴⁴ *Ibid* para 118.

²⁴⁵ *Luther v Sagor*, 544.

²⁴⁶ *Ibid* 548.

²⁴⁷ *Ibid* 556. See also *ibid* 557.

²⁴⁸ *Ibid* 556.

²⁴⁹ *Belhaj and another v Straw and others; Rahmatullah (No 1) v Ministry of Defence and others* [2017] UKSC 3, para 15.

²⁵⁰ SIA, s 3(1).

that law'.²⁵¹ He refused to disapply what he considered to be the law of Russia on grounds of morality or 'the principles of justice'.²⁵² He considered it 'all the more difficult' not to give effect to the ostensible legislation of the Soviet authorities in light of 'the fact that the vendor in the present case is a duly recognized sovereign state whose law conferred the title which is challenged'.²⁵³

Soon after this decision in *Luther v Sagor*, in *Princess Paley Olga* the Lord Justices of the Court of Appeal found that certain decrees promulgated by the Soviet claimant provided a basis for valid title to movable property that was situated in territory controlled by it. This time, in relation to the apparent application of the *lex situs* rule,²⁵⁴ Scrutton LJ made reference to the fact that the Soviet authorities in 1924 'had been recognized by the British Government as the de jure Government of Russia, and as the de facto Government in 1918 or the end of 1917'.²⁵⁵ In treating the foreign act of state doctrine applicable to one or more of the ostensibly-governmental acts in question, all Lord Justices considered it relevant that the acts were performed under the authority of a claimant that enjoyed governmental status under English law.²⁵⁶

The decisions of the Court of Appeal in *Luther v Sagor* and *Princess Paley Olga* thus suggest that, as regards the conferral of private rights in respect of property that is located in territory controlled by the claimant that enjoys governmental status in respect of a state, an ostensibly-legislative act will be given effect under both a choice-of-law rule (specifically the *lex situs* rule) and the foreign act of state doctrine. In those cases, there was, however, no rival claimant, let alone a competing ostensibly-governmental act.

Judicial decisions since then, notably in situations involving rival claims to governmental status, suggest that it is not necessarily the ostensibly-governmental acts performed by the government of a state that English courts will treat as effective. Instead, in focusing on the application of choice-of-law rules, subsequent decisions have treated as effective an ostensibly-legislative act promulgated by the claimant that controls the territory whose law is taken to govern the claimed right in question, even in the presence of a rival claimant that qualifies for governmental status under English law. Ostensibly-executive acts performed on the basis of such legislation has also been given effect. In these cases, English courts have not given effect to ostensibly-governmental acts performed by the government of the 'territorial' state—that is, of the state with title over the territory the law of which is taken to govern the claimed right in question.

²⁵¹ *Maduro v Guaidó*, para 124.

²⁵² *Luther v Sagor*, 545.

²⁵³ *Ibid* 546.

²⁵⁴ For the view that the court was applying the *lex situs* rule, see also *Maduro v Guaidó*, para 125.

²⁵⁵ *Princess Paley Olga*, 722 (Scrutton LJ).

²⁵⁶ *Ibid* 723–5 (Scrutton LJ), 728–31 (Sankey LJ), 736 (Russell LJ).

In *Banco de Bilbao*, for example, one question was which of two rival bodies of directors had the right to represent a private bank. Answering this question required a determination to be made as to which of two competing ostensibly-legislative acts, promulgated by rival ostensible governments, was to be given effect pursuant to the *lex loci contractus*.²⁵⁷ In addressing this matter, the Court of Appeal treated as effective the ostensibly-legislative act of General Franco's ostensible government, which was recognized as 'the Government which exercises de facto administrative control over a considerable portion of the Basque country, including Bilbao',²⁵⁸ recognition that in that case clearly was not taken to amount to recognition of governmental status.²⁵⁹

Clauson J adopted a similar approach in *Bank of Ethiopia* in determining whether or not, by virtue of the law in the area in which it was incorporated, a 'company',²⁶⁰ had been dissolved by acts performed by the Italian authorities in Abyssinia and, if not, whether the action had been brought with the authority of that bank. He stated that the acts of the Italian government, which the executive had recognized 'as being in fact (de facto) the government of the area of Abyssinia then under Italian control',²⁶¹ must, 'in an area from which the former government has departed, and in which there is no governmental authority except for that of the de facto government',²⁶² 'necessarily ... have the status of acts of a fully responsible government'. This was so despite the executive's 'recognition of the fugitive Emperor as a de jure monarch'.²⁶³ The bank was found to have been dissolved and the action brought before English courts deemed to have been brought without the authority of the liquidator and thus of the bank.²⁶⁴

The abovementioned decisions in *Bank of Ethiopia* and *Banco de Bilbao* appear to misapply the Court of Appeal's judgment in *Luther v Sagor* in finding that recognition of a claimant as 'de facto government' requires the acts of that claimant to be treated as effective, even at the expense of competing acts by a 'de jure government'. While leaving open the possibility of applying a different 'test' where an occupying power acts in a way that is challenged by a rival autochthonous government that

²⁵⁷ *Banco de Bilbao*, 195.

²⁵⁸ *Ibid* 181.

²⁵⁹ In delivering the judgment of the Court of Appeal, Clauson LJ acknowledged that 'His Majesty's Government recognises the Republican Government of Spain as the de jure Government of the whole of Spain including the area in which it recognizes General Franco's Government as exercising de facto administrative control' (*Banco de Bilbao*, 181).

²⁶⁰ The Bank of Ethiopia appears to have been treated as a private entity, despite being referred to as 'a bank of issue', which 'acted in close contact with the Minister of Finance'. See *Bank of Ethiopia*, 517.

²⁶¹ *Ibid* 515.

²⁶² *Ibid* 521-2.

²⁶³ *Ibid* 522.

²⁶⁴ *Ibid* 524.

exercises some control over the occupied state's territory,²⁶⁵ Clauson J in *Bank of Ethiopia* considered that, pursuant to *Luther v Sagor*, he was 'bound to treat the acts of the government which was so recognized as acts which cannot be impugned on the ground that it was not the rightful but a usurping government'.²⁶⁶ As for *Banco de Bilbao*, Clauson LJ at the Court of Appeal relied in part on *Luther v Sagor* in making a similar finding. But in *Luther v Sagor*, recognition as 'de facto government' was taken to reflect recognition of governmental status, which was not the case with recognition as 'de facto government' in either *Bank of Ethiopia* or *Banco de Bilbao*. Indeed, in each of these two cases, a rival claimant was recognized as enjoying governmental status in respect of the relevant state.²⁶⁷

Its misapplication of *Luther v Sagor* notwithstanding,²⁶⁸ *Banco de Bilbao* provides authority for the view that, at least in respect of private rights that are taken to be regulated by the law in force of a particular territory, the acts of the 'de jure government' in respect of territory controlled by a rival 'de facto government' are to be treated as a 'mere nullity'.²⁶⁹ Similarly, in dealing with the case before it, *Bank of Ethiopia* provides that 'there is ... no ground for suggesting that the de jure monarch's theoretical rights (for ex hypothesi he has no practical power of enforcing them) can be taken into account in any way in any of His Majesty's Courts'.²⁷⁰

Bank of Ethiopia and *Banco de Bilbao* concerned different claimed rights and choice-of-law rules from those in question in *Luther v Sagor*.²⁷¹ Both nevertheless suggest, in apparent contrast to *Luther v Sagor*, that the recognized status of a claimant as an authority exercising control over the relevant territory is relevant (that is, its recognized status as de facto government in a sense that does not involve recognition of governmental status), and that the enjoyment of governmental status in respect of the territorial state is not relevant, to the application of choice-of-law rules, which are determinative of claims concerning private rights in respect of property situated within that territory.²⁷²

²⁶⁵ Ibid 521–2.

²⁶⁶ Ibid 519.

²⁶⁷ Similarly, in *Bank of Ethiopia*, 521, the 'fugitive Emperor' was still recognized 'as a de jure monarch'.

²⁶⁸ In both cases, there was also reliance on *White v Simmons*, which is also misplaced for similar and other reasons. There, in a case concerning the construction of a private-law instrument, the court left open the possibility of a different result in the presence of a rival claimant recognized as a 'de jure government'.

²⁶⁹ *Banco de Bilbao*, 196.

²⁷⁰ *Bank of Ethiopia*, 522.

²⁷¹ In *Bank of Ethiopia*, 518–20, the law in force where a bank operates or has its 'siège social' was taken to regulate its liquidation and appointment of liquidators. In *Banco de Bilbao*, 194–5, 'the law from time to time prevailing at the place where the corporate home [of a commercial entity] was set up'—understood to be the *lex loci contractus*—was taken to govern the construction of the articles of constitution of that entity.

²⁷² See also *Haile Selassie*, 192.

Indeed, the Court of Appeal in 2012 indicated that *Luther v Sagor* and *Princess Paley Olga* may 'have to be reassessed today, as matters concerned with private rights and private international law principles rather than sovereign authority'.²⁷³ The focus, since *Princess Paley Olga*, on choice-of-law rules in assessing the effectiveness of ostensibly-governmental acts, coupled with the disregard of acts performed by the government of a state, can indeed be taken to suggest that the foreign act of state doctrine now has limited relevance to the determination of the effectiveness of an ostensibly-government act in relation to the conferral of private rights.²⁷⁴ English courts have accepted as effective the ostensibly-governmental acts of claimants that do not enjoy governmental status on the basis of choice-of-law rules.

Such reassessment might well be desirable as a matter of legal policy, not least because the simultaneous application of the foreign act of state doctrine and of a choice-of-law rule where there exists a 'de facto government' and a rival claimant enjoying governmental status might give rise to conflicting determinations. Choice-of-law rules ordinarily favour the 'de facto government', while the foreign act of state doctrine generally favours the claimant that enjoys governmental status.²⁷⁵

This is not to say that the concurrent application of choice-of-law rules and of the foreign act of state doctrine would invariably give rise to competing outcomes. Both have limits such that they do not operate to give effect to any ostensibly-governmental act in favour of which they might ordinarily operate. For example, the Court of Appeal in *Kuwait Airways* considered whether or not 'for the purposes of the lex situs rule and the territorial act of state doctrine [the ostensibly-legislative] resolution [in question] should be regarded as prima facie effective to pass title' in respect of movable property.²⁷⁶ In the circumstances of that case, there was found to be 'great difficulty in seeking to rescue a limited, legitimate, territorial provision out of the illegitimate wreck of a fundamentally exorbitant piece of legislation'.²⁷⁷ Similarly, the House of Lords considered that Iraq's 'expropriatory decree [was] simply not acceptable'.²⁷⁸ Accordingly, the ostensibly-legislative act of a claimant to governmental status²⁷⁹ was not treated as effective under the applicable choice-of-law rule. Nor was the foreign act of state doctrine deemed applicable in respect of that act.

²⁷³ *Yukos Capital SARL v OJSC Rosneft Oil Company* [2012] EWCA Civ 855, para 42.

²⁷⁴ See also *Maduro v Guaidó*, para 145.

²⁷⁵ This is because respect for state sovereignty is the basis of the foreign act of state doctrine, and the sovereignty of a state is exercised by a claimant that enjoys governmental status, not by an usurping authority. See eg *ibid* para 172.

²⁷⁶ *Kuwait Airways*, para 363.

²⁷⁷ *Ibid* para 369. See also *ibid* para 370.

²⁷⁸ *Kuwait Airways Corp v Iraqi Airways (Nos 4 and 5)* [2002] UKHL 19 ('*Kuwait Airways (House of Lords)*'), para 28 (Lord Nicholls). See also *ibid* para 31 (Lord Nicholls), 113 (Lord Steyn), 148 (Lord Hope).

²⁷⁹ On the possibility of the situation being seen as one involving a claim by Iraq's government to governmental status in respect of Kuwait, see *Kuwait Airways*, para 348.

As another possibility, the law given effect in application of a choice-of-law rule might not disfavour the government of a state and thus not diverge in result from the application of the foreign act of state doctrine. For example, in *Sierra Leone* Cresswell J held that '[t]he law of the place of incorporation determines who are the corporation's officials authorised to act on its behalf',²⁸⁰ including in respect of a 'parastatal company, i.e. a company wholly owned by the Sierra Leone government which controls its business dealings'.²⁸¹ Since the company's articles of association provided that its board of directors was to be appointed by 'the government of Sierra Leone',²⁸² Cresswell J sought to ascertain the identity of Sierra Leone's government under English law in order to determine who comprised the company's board of directors.²⁸³ In other words, the application of the choice-of-law rule resulted in giving effect to a rule that favoured the government of the state.

These possibilities notwithstanding, the focus in choice-of-law rules and not on the foreign act of state doctrine does not altogether avoid the possibility of conflicting determinations by the simultaneous application of a choice-of-law rule and of the foreign act of state doctrine. Moreover, the focus on rules of private international law to address questions concerning the effectiveness of ostensibly-governmental acts has been seen to achieve a delicate balance, serving the interests of 'justice and common sense' without contravening any consideration of public policy.²⁸⁴

Where the government of a state purports to confer private rights in respect of property located in territory controlled by a rival de facto government without any competing act by the latter claimant, the following *obiter* remark in *Civil Air Transport* may nevertheless remain relevant. More specifically, Viscount Simon noted that:

If the previous government sells goods which belong to it but are situated in territory effectively occupied at the time by insurgent forces acting on behalf of what is already a de facto new government, the sale may be valid if the insurgents are afterwards defeated and possession of the goods is regained by the old government. But if the old government never regains the goods and the de facto new government becomes recognized by H.M. Government as the de jure government, purchasers from the old government will not be held in her Majesty's courts to have a good title after that recognition.'

In this way, '[s]ubsequent recognition de jure of a new government as the result of successful insurrection can in certain cases annul a sale of goods by a previous government.'²⁸⁵

²⁸⁰ *Sierra Leone*, 505.

²⁸¹ *Ibid* 502.

²⁸² *Ibid* 506.

²⁸³ *Ibid* 506–10.

²⁸⁴ *Hesperides Hotels Ltd and another v Aegean Turkish Holidays Ltd and another* [1978] QB 205 ('*Hesperides Hotels*') 217–8.

²⁸⁵ *Civil Air Transport*, 93.

(b) Retroactivity of recognition

As a separate matter, the early cases of *Luther v Sagor* and *Princess Paley Olga* provide a basis for giving retroactive effect to recognition in further support of the effectiveness of ostensibly-governmental acts performed by the 'de facto government'. In the absence of 'any English authority' on the matter,²⁸⁶ Bankes LJ in *Luther v Sagor* considered 'sound' the 'principle' stated by US courts that the acts of a claimant that subsequently comes to comprise the government of a state are to be treated as being those of a government of a state 'from the commencement of its existence'.²⁸⁷ Similarly, Warrington LJ held that 'in principle recognition [of governmental status] would be retroactive at any rate to such date as our Government accept as that by which the government in question in fact established its authority'.²⁸⁸ On this basis, recognition of the Soviet claimant as the government of Russia resulted in the treatment of acts performed by it prior to its recognition as acts of the government of a state. This reasoning was subsequently applied in *Princess Paley Olga* in respect of similar acts.²⁸⁹

Luther v Sagor suggests that retroactivity extends back to the 'commencement of [the government's] existence'²⁹⁰ or to the date 'by which the government in question in fact established its authority'.²⁹¹ While these two times are not necessarily co-extensive, they can both be understood to refer to the date on which the government seized power over the territory and population of a state. The regard subsequently had in *Princess Paley Olga* to the government having 'been in power since November 7, 1917'²⁹² accords with this view. Later authority also supports the view that the date by which the subsequently-recognized government established control is, at least without any guidance from the executive suggesting otherwise, determinative of the temporal scope of retroactivity of recognition. For example, Lord Morton in *Gdynia Ameryka Linie* opined, *obiter*, that, 'in order to ascertain the date as from which ... recognition [in terms different to those in question then before the court] became effective, it would be necessary for the court to go into past history and ascertain the date on which that provisional government acquired effective control of Poland'.²⁹³ Moreover, Clauson J in *Bank of Ethiopia* observed that effect was to be given to acts by the Italian authorities 'done at any time at which, on the facts proved before me,

²⁸⁶ *Luther v Sagor*, 541.

²⁸⁷ *Ibid* 542–3.

²⁸⁸ *Ibid* 549.

²⁸⁹ *Princess Paley Olga*, 724–5 (Scrutton LJ), 728–30 (Sankey LJ).

²⁹⁰ *Luther v Sagor*, 542–3.

²⁹¹ *Ibid* 549.

²⁹² *Princess Paley Olga*, 729–30 (Sankey LJ). See also *ibid* 732 (Russell LJ).

²⁹³ *Gdynia Ameryka Linie*, 40.

they were in fact the government, though not yet recognised as such by His Majesty'.²⁹⁴

That retroactivity might extend so far back does not preclude the executive from expressing its view as to the temporal scope of the retroactivity of its recognition, a position to which English courts might consider themselves bound to defer.²⁹⁵ For example, Lord Oaksey in *Gdynia Ameryka Linie* suggested that, '[i]n the absence of any intimation from the Foreign Secretary of the length of that period [of retroactivity,] it may be necessary for British courts to go into the facts on these matters. Each case must be decided on its own facts'.²⁹⁶ But Lord Porter in the same case seemed somewhat less deferential to the executive in this regard. He suggested that retroactivity applied 'to the time at which it is shown or acknowledged to have been in control'.²⁹⁷

Even the existence of any 'intimation' from the executive as to the temporal scope of any retroactivity of its recognition may not always be beyond doubt. For example, the executive statement in question in *Gdynia Ameryka Linie* gave rise to divergent understandings in this regard. On the one hand, Lord Morton considered that:

The Foreign Secretary has been at pains to exclude any possible retroactive effect by stating (1) that up to a particular moment of time His Majesty's Government recognized the old Polish Government as being the government of Poland; (2) that *as from* that moment of time His Majesty's Government recognized the new Polish Government as the government of Poland, and (3) *as from* that moment ceased to recognize the old Polish Government.²⁹⁸

Similarly, Lord Porter noted that, '[u]p to the end of July 5 on this view the old government was in power, thereafter the new. There is no scope for any argument as to the retroactive effect of an acknowledgment of change of government'.²⁹⁹ On the other hand, Lord Reid was of the view that 'paragraph 3 [of the executive certificate] seems to make it impossible to suppose that the Secretary of State intended to prevent any retrospective effect, because [the Secretary of State] said that he was advised "that the question of retroactive effect of recognition of a government is a question of law for decision by the courts"'.³⁰⁰ For his part, Lord Oaksey considered that there was an 'absence of any intimation from the Foreign Secretary of the length of [retroactivity]'.³⁰¹

Elsewhere, the executive has made clearer that its recognition of the governmental status of one claimant 'as from' a specific date does not preclude that government being a 'de facto government' from an earlier

²⁹⁴ *Bank of Ethiopia*, 519.

²⁹⁵ Cf the early view in *White v Simmons*, 11 (Banks LJ).

²⁹⁶ *Gdynia Ameryka Linie*, 38.

²⁹⁷ *Ibid* 30.

²⁹⁸ *Ibid* 40.

²⁹⁹ *Ibid* 28.

³⁰⁰ *Ibid* 44.

³⁰¹ *Ibid* 38.

date. More specifically, subsequent to its statement that '[a]s from midnight of January 5/January 6, 1950, H.M. Government recognized the Central People's Government as de jure government of the Republic of China', the Foreign Office made clear that the Central People's Government was already a 'de facto government'. In response to a question put to it, the Foreign Office clarified that, 'in the period between October 1, 1949, and January 5-6, 1950, the Central People's Government was the de facto government of those parts of the territory of the Republic of China over which it had established effective control, and if control was established after October 1, 1949, as from dates when it so established control'.³⁰²

Any difficulty in ascertaining whether the executive has expressed a position as to the retroactivity of its recognition could be clarified by seeking further guidance from the executive. That said, it might remain for English courts to ascertain the weight to be accorded to the executive's view in determining the temporal scope of retroactivity. In any event, such retroactivity may be unnecessary in assessing whether private rights have been conferred through one or more ostensibly-governmental acts, given that English courts have since found that a claimant may qualify as a 'de facto government' whose ostensibly-governmental acts are to be effective based on that claimant's exercise of control over relevant territory, regardless of any recognition.

(c) The effectiveness of acts of unrecognized claimants not enjoying governmental status

In assessing whether or not there has been a conferral of private rights, it appears that an English court will now treat as effective an ostensibly-legislative act performed by an unrecognized claimant that is not otherwise found to enjoy governmental status but that in fact controls the relevant territory, even at the expense of the recognized government of the territorial state. In an *obiter* remark, Lord Denning MR in *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* stated that he would

unhesitatingly hold that the courts of this country can recognise the laws or acts of a body which is in effective control of a territory even though it has not been recognised by Her Majesty's Government de jure or de facto: at any rate, in regard to the laws which regulate the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations, and so forth: and furthermore that the courts can receive evidence of the state of affairs so as to see whether the body is in effective control or not.³⁰³

This was so despite the executive having recognized a rival claimant 'as the de jure government of any part of Cyprus' and the existence of a

³⁰² *Civil Air Transport*, 88.

³⁰³ *Hesperides Hotels*, 218.

certificate making clear that ‘Her Majesty’s Government in the United Kingdom do not recognise the administration established under the name of the “Turkish Federated State of Cyprus”’.³⁰⁴

In support of his position, Lord Denning MR referred to the ‘most authoritative statement’ on the matter, namely Lord Wilberforce’s statement in *Carl Zeiss v Rayner & Keeler*:

[W]here private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned ... the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question.³⁰⁵

Since then, Sumner J in delivering judgment in *Emin v Yeldag* noted an apparent exception to the ‘principle that English courts cannot give effect to the acts of an unrecognised State ... where it affects private rights’,³⁰⁶ affirming the existence and application of such an exception in respect of ‘decrees of divorce validly granted [under the judicial system of an unrecognized regime]’.³⁰⁷

While the precise contexts in which ‘a consideration of public policy to the contrary has to prevail’ remain open to question, English courts still refrain from giving effect to ostensibly-governmental acts of a de facto government on the grounds that they are ‘not concerned with private rights, acts of everyday occurrence, routine acts of administration, day to day activities having legal consequences, or matters of that kind’, but instead concern ‘public functions ... and the lawfulness of a public law decision’.³⁰⁸ The distinction appears to be premised on what is understood not to undermine the executive’s prerogative, including in relation to the recognition of governments. As Lord Denning MR described it:

The executive is concerned with the *external* consequences of recognition, vis-à-vis other states. The courts are concerned with the *internal* consequences of it, vis-à-vis private individuals. So far as the courts are concerned, there are many who hold that the courts are entitled to look at the state of affairs actually existing in a territory, to see what is the law which is in fact effective and enforced in that territory, and to give such effect to it – in its impact on individuals – as justice and common sense require: provided always that there are no considerations of public policy against it.³⁰⁹

³⁰⁴ Ibid 216 (Lord Denning MR).

³⁰⁵ *Carl Zeiss v Rayner & Keeler*, 954.

³⁰⁶ *Emin v Yeldag* (*Attorney-General and Secretary of State for Foreign and Commonwealth Affairs intervening*) [2002] 1 FLR 956, para 28.

³⁰⁷ Ibid para 68.

³⁰⁸ *R (on the application of Kibris Türk Hava Yollari and CTA Holidays Limited) v Secretary of State for Transport and the Republic of Cyprus* [2010] EWCA Civ 1093, para 79. While this case was decided in relation to an entity whose claim to statehood was also contested and in the context of a different exception, it is nevertheless understood that the principle involved is ‘similar’. See *ibid* para 77.

³⁰⁹ *Hesperides Hotels*, 217–8.

2. *Outside territory controlled by a 'de facto government'*

Questions concerning the conferral of private rights pursuant to an ostensibly-governmental act might arise otherwise than in relation to an object situated in territory controlled by a *de facto* government. For example, *Gdynia Ameryka Linie* concerned the conferral of private rights by the exercise of ostensible governmental authority in respect of the merchant fleet of Poland located outside the territory of Poland.³¹⁰ As another example, *Civil Air Transport* concerned the validity of the contract entered into by the Nationalist government of China for the sale of civil aircraft belonging to China and located, at the time of sale, in Hong Kong, then under British rule.³¹¹

In such contexts, it appears to be the ostensibly-governmental act of the claimant that enjoys governmental status that will be given effect. As the Judicial Committee of the Privy Council (JCPC) put it, *Gdynia Ameryka Linie* is 'authority for the proposition that a contract made by a *de jure* government as regards property situated outside the *de facto* territory was binding on the *de facto* Government'.³¹² For Lord Reid, it appeared a straightforward matter that 'the government entitled to operate [certain powers conferred on the Polish Government by Polish legislation] in London on July 3 was the government which was then recognized as the Government of Poland by the British Government'.³¹³ In this regard, he noted that the individuals claiming the private rights in question did 'not rely on any articles of association or statutes of the appellant company'.³¹⁴ Accordingly, the purported conferral of a private right by the claimant that was recognized at the material time 'as the Government of Poland' was effective.³¹⁵ In particular, the undertaking by the Minister of Industry, Commerce and Shipping—who, pursuant to the Act of March 30, 1939, concerning the Communications in the Defence Service of the State exercised 'supreme management' of 'private shipping undertakings'³¹⁶—was given effect. The promise of a gratuity by the Minister to certain individuals of the Polish merchant fleet was enforceable.³¹⁷

Similarly, in *Civil Air Transport*, without reference to any choice-of-law rule or the foreign act of state doctrine, the JCPC held that '[a] government's policy in buying or selling chattels which it owns is not subject to the review of foreign tribunals'.³¹⁸ The JCPC appears simply to have accepted that it is the government of a state that may act in

³¹⁰ *Gdynia Ameryka Linie*.

³¹¹ See *Civil Air Transport*, 89 (Viscount Simon).

³¹² *Civil Air Transport Incorporated v Claire Lee Chennault and Whiting Willauer and HC Wang and others* (Hong Kong Supreme Court, 13 May 1950) (1956) 17 ILR 173, 183.

³¹³ *Gdynia Ameryka Linie*, 46.

³¹⁴ *Ibid.*

³¹⁵ *Ibid.* 17.

³¹⁶ See *ibid.* 30–1 (Lord Porter).

³¹⁷ *Ibid.* 29–31 (Lord Porter), 38–9 (Lord Oaksey), 45–7 (Lord Reid), 51 (Lord Tucker).

³¹⁸ *Civil Air Transport*, 92 (Viscount Simon).

respect of 'a State-owned enterprise, operating under ministerial control'.³¹⁹ In this light, whether a contract for the sale of state property effectively transferred ownership in respect of that property required knowing whether the government under whose authority the sale was made qualified as the government of China.³²⁰ Since this was found to be so, the existence of a rival claimant recognized by the executive as 'the de facto government' of certain parts of the territory of China was immaterial.³²¹ The contract of sale was effective in passing title in respect of the aircraft to the purchasers and successfully operated to defeat a claim to ownership of the aircraft by the communist government that subsequently attained governmental status.

These cases do not suggest that effect will always be given to ostensibly-governmental acts performed by the government of a state as regards the conferral of private rights the object of which is situated in territory controlled by a 'de facto government' that does not enjoy governmental status. In addition to other possible limitations concerning the specific act in question,³²² these cases have not definitively precluded the possibility of rival acts of a de facto government that is subsequently recognized as the government of a state being given effect at the expense of acts performed by a previously-recognized government. As judges in those cases noted, neither *Gdynia Ameryka Linie* nor *Civil Air Transport* involved a conflicting act performed by the rival ostensible government. Indeed, in *Civil Air Transport*, for example, Viscount Simon considered it 'not necessary to discuss ultimate results in the hypothetical case when before the change in recognition both governments purport to deal with the same goods'.³²³ In *Gdynia Ameryka Linie*, although Lord Oaksey stated that 'retroactivity of recognition should be confined to spheres of de facto control',³²⁴ Lord Porter noted that 'the new government might have taken some steps which they could enforce in Gdynia. What they could have done was not suggested to your Lordships, but perhaps the simplest answer to this argument is that in fact they did nothing'.³²⁵

Even if there is no competing de facto government, it was made clear in *Civil Air Transport* that:

³¹⁹ Ibid 81 (Viscount Simon).

³²⁰ Ibid 85–6 (Viscount Simon).

³²¹ See ibid 88 (Viscount Simon).

³²² See eg *Gdynia Ameryka Linie*, 31–2 (Lord Porter), for the suggestion that 'honesty' qualified the minister's powers.

³²³ *Civil Air Transport*, 93–4.

³²⁴ *Gdynia Ameryka Linie*, 39. But he also noted that the case before him did not involve an act of the government of a state that 'trench[ed] upon or conflict[ed] with' the authority of any rival de facto government. Ibid para 38. See also, ibid 45, where Lord Reid considered 'that there might be difficulties if the old government had purported before withdrawal of recognition to take some action with regard to matters already under the control of the new government, but that does not arise in this case'.

³²⁵ Ibid 29.

Their Lordships must not be understood to reject the possibility of our courts refusing, in a conceivable case, to recognize the validity of the disposal of State property by a government on the eve of its fall, e.g., by a despot, who knows that previous recognition is just being withdrawn, where it is clear that his purpose was to abscond with the proceeds, or to make away with State assets for some private purpose.³²⁶

D. The construction of private-law instruments

A question of governmental status might arise in relation to the construction of a specific private-law instrument. Illustratively, *White v Simmons* concerned the relevance of governmental status in determining whether certain acts by 'the Bolsheviks' in December 1917 were acts 'by the Government of the country in which the property is situated' or, alternatively, by 'rebellions, military or usurped power' within the meaning of an insurance policy.³²⁷ Another example is *Luigi Monta of Genoa v Cechofracht Co Ltd*, which arose in relation to conduct of the Taiwan-based government and which concerned the construction of a provision in a charterparty governed by English law that referred to 'the government of the nation under whose flag the vessel sails [or] any other government'.³²⁸

In *White v Simmons*, Banks LJ considered that 'the government from the point of view of the [insurance] policy [was] a person or body exercising full executive and legislative power in the country'.³²⁹ He held that the Soviet claimant was recognized 'as the *de facto* government' and that 'its acts must be recognised by the courts of this country as the acts of the recognised authority and government of the country at the time'.³³⁰ This suggests that a claimant must qualify for governmental status in order to qualify as a 'government' within the meaning of the particular charterparty.

Banks LJ nevertheless acknowledged that the date at which 'a particular government came into existence as a government' is not invariably a matter for the executive to determine³³¹ and that, in the absence of executive guidance in this regard, it is for the court itself to 'form an opinion' on the matter.³³² Warrington LJ also appeared to consider the matter not to be for the executive's exclusive determination. In his view, at least where the executive declines to provide further clarification, the 'real question [was] whether on the evidence ... there are any facts proved which prevent the Court from arriving at the conclusion that

³²⁶ *Civil Air Transport*, 93 (Viscount Simon).

³²⁷ *White v Simmons*, 7.

³²⁸ *Luigi Monta of Genoa v Cechofracht Co Ltd* [1956] 2 QB 552 ('*Luigi Monta of Genoa*') 552.

³²⁹ *White v Simmons*, 12.

³³⁰ *Ibid.*

³³¹ *Ibid.* 11.

³³² *Ibid.*

there existed this recognised government so early as Dec. 13, 1917', when 'that government first came into existence'.³³³ Atkin LJ did not exclude the possibility of deferring to a view expressed by the executive as to the date at which a government came into existence.³³⁴ At the same time, he opined that, subsequent to the Foreign Office's refusal to answer the question, 'it became a question of fact as to when [a] government first began to exist as a government, and that [the courts are] entitled to give effect to the evidence ... even if it was inconsistent with the opinion given by the Foreign Office'.³³⁵

This judgment thus seems not to exclude the possibility of an English court accepting as 'the government of [a] country' a claimant prior to the recognition of its governmental status by the executive, and perhaps even before it might otherwise be found to qualify as the government of a state. In further reflection of that possibility not being precluded by the present case, Bankes LJ considered the possible existence of a rival claimant recognized as 'the *de jure* government' to raise a separate, unanswered question that did not arise in this case.³³⁶

The later case of *Luigi Monta of Genoa* further indicates that recognition may help but is unnecessary for a claimant to be treated by English courts as 'the government of [a] nation' in the construction of a private-law instrument. Sellers J, in delivering the judgment in that case, noted that there would

have been little if any controversy on the main issue if the Foreign Office of the British Government, from whom evidence was sought, had, at the [relevant time], recognized the so-called Nationalist Government of China as being either a *de jure* or *de facto* government of the Republic of China, or in fact the Government of Formosa as a supreme or sovereign and not subservient government.³³⁷

At the same time, he held that 'the government situated and functioning in Formosa was at one time recognized by this country, and it does not follow because recognition has ceased that the government, once recognized, has in any way altered its activities or lost such powers and authority as it had been exercising'.³³⁸ Perhaps most relevantly in this regard, he held that:

As a matter of construction of the charterparty, an ordinary trading or commercial contract, there would seem to me to be no ground for saying that the authority giving the orders or directions has to be a government recognized as such by Her Majesty's Government here. It does not say so and I see no

³³³ Ibid 13–14.

³³⁴ Ibid 14.

³³⁵ Ibid 13–14.

³³⁶ Ibid 12.

³³⁷ *Luigi Monta of Genoa*, 564.

³³⁸ Ibid 567.

circumstances which require such a construction or which would give rise to any implication to that effect.³³⁹

As for whether a claimant must enjoy governmental status in order to be considered 'the government of the nation under whose flag the vessel sails [or] any other government', Sellers J found that the latter phrase, in the charterparty under consideration, referred

to national governments, not to a subservient authority such as a municipal or provincial government. The qualities or character required by the body giving the order or on whose behalf it was given or purported to be given must, therefore, include essentially the exercise of full executive and legislative power over an established territory.³⁴⁰

This suggests that the 'government of [a] nation' was understood to refer to a claimant that enjoys governmental status. But at the same time, Sellers J considered that 'it matters not that the government in question does not embrace the whole of the Chinese race or the whole of China, as it apparently claimed to do'.³⁴¹ This might be understood to leave open the possibility that a claimant need not qualify for governmental status in order to qualify as 'the government of [a] nation' within the meaning of the charterparty.

Whether or not the enjoyment of governmental status is necessary for a claimant to qualify as a 'government' of a nation or country for the purposes of a private-law instrument may well depend on the circumstances of the specific case, including the specific wording of the provision in question. As a general matter suggesting the possibly-limited contemporary significance of governmental status in the construction of private-law instruments, the parties to a specific such instrument may well be taken to be unconcerned with 'the niceties of international law [and] of diplomacy' to which the enjoyment of governmental status and the practice of recognition relate.³⁴²

VI. COMPATIBILITY WITH INTERNATIONAL LAW

A. Matters dependent on the enjoyment of governmental status

As a general matter of international law, the conduct of all state organs is attributable to that state for the purposes of state responsibility.³⁴³ Accordingly, the decision of a state's municipal courts, if it amounts to a violation of the state's international legal obligations, will generally engage the international responsibility of that state.³⁴⁴ So, insofar as international law obliges the UK to accept the governmental status of a

³³⁹ Ibid 565.

³⁴⁰ Ibid 552.

³⁴¹ Ibid 564.

³⁴² Ibid 568.

³⁴³ See ILC, Articles on the Responsibility of States for Internationally Wrongful Acts 2001, art 4.

³⁴⁴ See also P Capps, 'British Policy on the Recognition of Governments' [2014] Public Law 229, 231.

claimant that qualifies for that status under international law or to treat as effective the acts of such a claimant, the UK may incur international responsibility for a decision by an English court not to accept as the government or not to accept as effective the acts of the claimant that enjoys governmental status under international law. The same goes, *mutatis mutandis*, in respect of any obligation incumbent on the UK not to accept as the government, or not to accept as effective any ostensibly-governmental acts performed by, a claimant that does not enjoy governmental status under international law.

That said, there is no general international legal obligation that directs a state to have its courts accept or reject as effective an ostensibly-governmental act performed by a specific claimant to governmental status in relation to the conferral of private rights. So, as regards cases concerning the claimed conferral by ostensible governments of private rights, decisions by English courts on such matters are not generally capable of resulting in a violation by the UK of its international legal obligations. In general, decisions of English courts to treat as ineffective the ostensibly-governmental acts of a claimant that enjoys governmental status under international law is unproblematic as a general matter of international law. The same goes, *mutatis mutandis*, for decisions of English courts to give effect to ostensibly-governmental acts of claimants that do not enjoy governmental status under international law. In specific circumstances that relate to the violation of peremptory norms or Security Council decisions, for example, English courts may be required to refrain from accepting as effective certain ostensibly-governmental acts.³⁴⁵

Moreover, the limited case-law provides some indications in favour and some indications against the position that a claimant must enjoy governmental status in order to qualify as 'the government' of 'a nation' or 'country' within the meaning of a private-law instruments. In any event, relevant decisions show that a claimant need not have its governmental status recognised at a certain moment in time in order for it to be considered 'the government' of a nation or country at that time for the purposes of the relevant instrument. More generally, no compelling policy reason has been put forth to suggest that the courts must generally defer to the position of the executive or to the English-law position on governmental status, although a specific private-law instrument may well be found to require that. In any case, a decision by English courts on such matters seem unlikely to place the UK at risk of breaching its international legal obligations, as international law has little to say about such matters. Even the construction of the phrase 'legislation in force in a [state]' in an international legal instrument has been found to encompass ostensibly-legislative acts by an ostensible government that did not enjoy governmental status.³⁴⁶

³⁴⁵ *Kuwait Airways*, paras 381–2.

³⁴⁶ *Fubini Case* (1959) 14 RIAA 420, 429–30.

At the same time, international law does provide that a state is to be represented only through its government.³⁴⁷ Indeed, if the UK, through English courts, allows a state to be represented by someone neither belonging to nor acting under the authority of the 'right' government or refuses to accept as effective the representation of a state by a 'wrong' government, it might violate certain international legal obligations of that state. Perhaps most notably, this includes the prohibition on intervening in the affairs of other states. For example, such intervention may occur as a result of the decision by one state's court to permit a claimant that does not enjoy governmental status to direct the use of another state's assets (or, conversely, to prevent a claimant that does enjoy governmental status from directing the use of such assets).³⁴⁸ Similarly, other decisions that deny the representation of a state by the 'right' government or that accept as effective the ostensible representation of a state by the 'wrong' government is liable to result in interference in the affairs of that state.³⁴⁹ Other obligations may also be violated as a consequence of such decisions,³⁵⁰ such as the obligation to respect immunity from execution in respect of state property by accepting the 'wrong' government's waiver of such immunity.³⁵¹

Moreover, and more generally, denying the immunity owed in respect of certain governmental office-holders based on the refusal to accept the 'right' government's governmental status would violate the law of immunities. Put differently, a state cannot lawfully refuse to accord immunity, for example, to a head of government, head of state, or minister for foreign affairs on the ground that it does not recognize that person as head of government, head of state or minister for foreign affairs.³⁵² To this extent, the approach of English courts in treating as immune claimants that enjoy governmental status and not as immune those that do not enjoy governmental status is generally consistent with international law. The decision to accord comparable or identical immunities to those not enjoying governmental status is not generally unlawful, although it may interfere in the internal affairs of that state.

By treating questions of state representation and of entitlement to immunities and privileges as dependent on the enjoyment of governmental status, English courts generally facilitate the UK's compliance with its international legal obligations. But insofar as English courts defer to the executive on the assessment of governmental status, and given that the executive might recognize the governmental status of the 'wrong' government or deny the 'right' government's governmental status,

³⁴⁷ Pavlopoulos, *Identity of Governments*, 24–30.

³⁴⁸ Ibid 76–7.

³⁴⁹ See, generally, Crawford, *Brownlie's Principles*, 144. See also eg Talmon, *Recognition of Governments*, 199, including fn 451 thereof.

³⁵⁰ See eg Talmon, *Recognition of Governments*, 198–9.

³⁵¹ See, generally, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment [2012] ICJ Rep 99, para 118.

³⁵² See, generally, *DRC v Belgium*, para 51.

English courts are liable to cause the UK to be in breach of its international legal obligations. With the approach of English courts in this regard having a well-established and long-standing constitutional basis, the executive cannot overlook the importance of having its practice in recognizing or denying governmental status accord with the international legal framework concerning the identification of the governments of states.

B. The assessment of governmental status

The deference by English courts to executive recognition and denial of governmental status heightens the significance of the executive practice conforming to the international legal framework concerning the identity of governments.³⁵³ As the then-Secretary of State for Foreign Affairs stated in 1951, 'international law ... defines the conditions under which a government should be recognised, and it is a matter of judgment in each particular case whether a régime fulfils the conditions'.³⁵⁴ Also in 1980, the executive did not consider that its new policy affected the basis on which the executive was to 'decide the nature of [its] dealings with regimes which come to power unconstitutionally'. This was to be done 'in the light of [its] assessment of whether they are able of themselves to exercise effective control of the territory of the state concerned, and seem likely to continue to do so'.³⁵⁵ In other words, the nature of the UK's dealings were to be decided on the basis of what then comprised the framework for assessing governmental status in international law.³⁵⁶

With this framework having changed over time,³⁵⁷ and situations of recognition continuing to arise despite the 1980 policy, the UK will benefit, as far as compliance with international law is concerned, by its executive recognizing and denying governmental status on the basis of the applicable international legal framework. Depending on the circumstances, to ensure compliance with the UK's international legal obligations, the executive might also benefit from bearing in mind and bringing 'to the court's attention [any specific] obligations by which this country was and is bound under international law' not to 'accord ... any de facto governmental status' to a specific claimant, for example on the basis of a specific UNSC resolution.³⁵⁸

In the absence of recognition or denial of governmental status, the autonomous assessment by English courts of a claim to governmental status has particular significance in ensuring the UK's compliance with

³⁵³ On this framework, see Pavlopoulos, *Identity of Governments*, 94–141.

³⁵⁴ Hansard (HC Debates), 21 March 1951, vol 485, cols 2410–2411.

³⁵⁵ Hansard (HL Debates), 28 April 1980, vol 408, cols 1121–2.

³⁵⁶ See eg Pavlopoulos, *Identity of Governments*, 97.

³⁵⁷ See *ibid*, especially 107–8.

³⁵⁸ *Kuwait Airways*, para 350 (Brooke LJ), referring approvingly to *Kuwait Airways* (first instance) 67–8 (Mance J). For such obligations, see eg Pavlopoulos, *Identity of Governments*, 80–1.

its international legal obligations, including as regards the prohibition on intervention and beyond, especially in relation to the representation of a state and as regards questions concerning the privileges and immunities of a state, in both of which cases one or more international legal obligations of the UK may be engaged.

In this light, it is favourable for the UK's compliance with its international legal obligations that the approach of English courts to the assessment of governmental status is not far from—indeed, can be applied consistently with—the relevant international legal framework. The following points may be noted about the common-law factors in this regard.

The approach to the assessment of effective control appears sufficiently uniform in English law and international law. For example, under English law, regard has been had to whether the claimant is 'exercising all the functions of a sovereign government, in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the government.'³⁵⁹ It also appears relevant that 'this control seems likely to continue'.³⁶⁰ Similarly, in assessing governmental status under international law, regard has been had to the fact that

'[t]he courts sat, [the legislature] legislated, and the government was duly administered. [The claimant's] power was fully established and peaceably exercised. The people seemed to have accepted [the] government with great good will when it came in, and to have welcomed the change.'³⁶¹

Additionally, the English-law formulation of effective control referring to the ability of a claimant to exercise control 'of itself',³⁶² lends itself to assessing whether the claimant is autonomous, as is required under international law.³⁶³

In what concerns the significance of constitutionality and control, English courts have acknowledged that, in contrast to an unconstitutional claimant, a constitutional claimant need not exercise effective control in order to enjoy governmental status under English law. This accords with the position under international law, according to which an autonomous constitutional claimant will be accorded priority over any rival claimant, including one exercising effective control, and may enjoy governmental status without exercising or ever having exercised control.³⁶⁴ Conversely, an unconstitutional claimant will have to exercise effective

³⁵⁹ *Somalia v Woodhouse*, 66, quoting from *Arantzazu Mendi*, 264–5 (Lord Atkin).

³⁶⁰ See *Kuwait Airways*, paras 354–5.

³⁶¹ *Aguilar-Amory and Royal Bank of Canada Claims (Great Britain v Costa Rica)* (1923) 1 RIAA 375, 379.

³⁶² *Somalia v Woodhouse*, 68.

³⁶³ Pavlopoulos, *Identity of Governments*, 101–6.

³⁶⁴ *Ibid* 115.

control in order to enjoy governmental status (and may do so only in the absence of an autonomous constitutional claimant).³⁶⁵

While having particular regard to the executive's dealings with the claimant in question is unwarranted as a matter of international law,³⁶⁶ it places the UK in no more a precarious position, as regards compliance with international law, than deferring entirely to the executive's recognition or denial of governmental status. This is especially so where there exist executive 'dealing[s] with the foreign government on a normal government to government basis as the government of the relevant foreign state', which English courts appear to treat not all that differently from executive recognition of governmental status.³⁶⁷ English courts nevertheless appear to retain considerable openness to accepting as a government of a foreign state a claimant through which the executive does not have government-to-government relations. In such contexts, the UK better secures its compliance with international law, as it accords with the international legal position according to which a claimant may qualify as the government of a state even if one or more other states choose not to recognise or have dealings with that government.³⁶⁸

As for consideration of international recognition, it does not necessarily cause English courts to deviate from the international legal identity of a state's government. Indeed, under both English law and international law, widespread and consistent recognition of governmental status may have important evidential value for the identification of a state's government.³⁶⁹ Moreover, the point made by Hobhouse J as to the limited value of recognition in respect of an unconstitutional government that exercises no control over the state's territory accords with the general framework for the enjoyment of governmental status in international law.

Of course, there is no guarantee that English courts will apply the English-law factors as described above and thus in full accordance with the international legal framework regulating the identity of governments. As Males LJ put it, '[w]hen a question arises in an English court as to the existence or identity of a foreign government, that question must be determined in accordance with English law'.³⁷⁰ It nevertheless remains open to English courts to apply the English-law framework in a way so as to limit the extent to which the UK may be in breach of its international legal obligations on account of refusing to treat the 'right' government as the government or by accepting the 'wrong' government as the government of another state.

³⁶⁵ Ibid 114–20.

³⁶⁶ On the evidential value of recognition in general, see *ibid* 88–92. On recognition not being 'constitutive', see *ibid* 87–8.

³⁶⁷ *Somalia v Woodhouse*, 65.

³⁶⁸ Pavlopoulos, *Identity of Governments*, 71–2, 87.

³⁶⁹ See *ibid* 92.

³⁷⁰ *Mohamed v Breish*, para 72.

Indeed, considerations of public policy may well call for such an approach. If public policy allows for the introduction of new rules of law where there is otherwise a lacuna,³⁷¹ it would certainly seem open to English courts to rely on public policy considerations to provide otherwise-limited guidance in applying existing common-law factors in a way that contributes to ensuring the UK's compliance with its international legal obligations. Indeed, in *Somalia v Woodhouse*, Hobhouse J considered 'public policy' to be relevant to the application of at least one of the factors for assessing governmental status under English law;³⁷² and international legal considerations may well be considered to inform English public policy. As Brooke LJ put it, 'there is, at any rate in the abstract, every reason to think that in most cases English public policy will be at one with, and will be illuminated by, clearly established principles of international law.'³⁷³ In addition to contributing to compliance with the UK's international legal obligations, having regard to the international legal framework for assessing governmental status in the application of the English common-law factors in assessing governmental status would provide also a means of ensuring consistency in the application of the English-law factors.³⁷⁴ In addition to the reasons that support this approach, there is no apparent reason not to adopt such an approach.

That said, the circumstances in which English courts autonomously assess governmental status may be limited for at least two reasons. First, English courts do not generally refuse to entertain the possibility of recognition of governmental status after the adoption of the 1980 policy, which the executive does occasionally undertake. Secondly, even where the executive has neither recognized nor denied a claimant's governmental status, an English court may decide to exercise restraint and postpone its decision, pending clarification from the executive on the matter. The importance of the executive's stance in recognizing or denying governmental status thus remains difficult to overstate in ensuring the UK's compliance with its international legal obligations.

VII. CONCLUSION

There are a range of situations in which English courts may face questions concerning a contested claim to governmental status in respect of a foreign state. These can be broadly divided into four categories: the representation of a state; the privileges and immunities of a state; the conferment of private rights, both within and outside territory controlled by a 'de

³⁷¹ See, generally, S Brekoulakis, 'The Evolution of Public Policy and Judicial Function in English Law' (2019) 10 JIDS 472, 481.

³⁷² *Somalia v Woodhouse*, 66.

³⁷³ See eg *Kuwait Airways*, para 323.

³⁷⁴ See, generally, Brekoulakis, 'The Evolution of Public Policy', 489.

facto government'; and the construction of private-law instruments. Case-law shows that, in contrast to the third and possibly also the fourth categories, governmental status is generally decisive in respect of the first two categories. This enables the UK's compliance with its international legal obligations, since international law requires deference to governmental status in respect of those matters. At the same time, the assessment of governmental status in English courts is, for constitutional reasons, largely dependent on executive practice. The UK's compliance with international law in cases where its courts are dealing with questions concerning the representation or privileges and immunities of a state is thus often dependent on whether the executive continues to recognize or deny governmental status in accordance with the applicable international legal framework in this regard. In the absence of such executive action, it is for English courts to independently assess a claimant's governmental status, in which contexts they can—and, as a matter of public policy, perhaps ought to—assess governmental status in a way that accords with the international legal framework on governmental status.