

JUDICIAL DETERMINATION OF FOREIGN "GOVERNMENT" STATUS

THE lack of effective government in Somalia since the overthrow of the régime of President Siad Barre at the beginning of 1991, and the armed struggle among numerous competing factions in different parts of the country, has caused untold human misery. A legal by-product of the chaotic civil war was the problem of which entity, if any, should be regarded as the government of Somalia for the purpose of claiming property belonging to the state of Somalia in litigation in England. Before 1980, when the United Kingdom government abandoned the policy of making formal statements about recognition of foreign entities claiming to be governments of recognised states, this problem would in English law have turned largely on the recognition practice of the United Kingdom government. In a careful analysis in *Republic of Somalia v. Woodhouse Drake & Carey (Suisse) S.A. (The Mary)* [1993] Q.B. 54, Hobhouse J. concluded that in view of the 1980 policy change the inquiry could not now be limited to an investigation of the attitude of the United Kingdom government or even to the degree of international recognition enjoyed by the claimant entity, but must extend to the constitutional legality of the claimant entity and the extent of its effective administrative control within the foreign state.

In January 1991 the Republic of Somalia bought and paid for a cargo of rice which was shipped on the *Mary* for discharge at Mogadishu. Because of fighting in Mogadishu the master considered the port unsafe. The cargo was sold and the proceeds paid into court in London. English solicitors, instructed from a hotel room in Jeddah, Saudi Arabia, by "the Interim Government of the Republic of Somalia" (headed by Ali Mahdi Mohammed), issued a summons in January 1992 as "solicitors for the Republic of Somalia," with a view to obtaining for their client such of the proceeds as were not required to satisfy commercial claims of the shipowner and other commercial parties. Hobhouse J. held that he ought not to order payment out of the sum in court unless he was satisfied that the solicitors had authority from an entity entitled to represent the Republic of

Somalia. There was no doubt that the claim to the relevant sum was state property of the internationally recognised state of Somalia (although this matter is not always so straightforward). The question was thus whether the "Interim Government" was the proper representative of Somalia for this claim.

Simplifying matters slightly, the orthodox answer in English law prior to 1980 was that capacity to sue on behalf of a recognised state, and capacity to claim state property, depended upon recognition of the claimant entity by the United Kingdom government as government of the particular state. Since 1980 the policy of the Foreign Office has been not to certify that any particular entity is recognised by the United Kingdom government as the government of a certain state: it will however provide information as to the United Kingdom government's dealings with the entity and as to the situation on the ground. Hobhouse J. considered and rejected the view that courts should simply *infer* recognition or non-recognition from the United Kingdom government's dealings with the foreign entity and rely on such inferred recognition in the same way as they had previously relied on official statements of recognition or non-recognition. This, he said, was obviously impractical and could not have been intended by the 1980 policy statements. It was for the courts to determine the legal characterisation of an entity purporting to be a government. Hobhouse J. identified four considerations relevant to such legal characterisation. These will be considered in turn.

(1) *Whether the entity is the constitutional government of the state in question.* This criterion has attractions, but difficulties will arise if courts are expected to make findings about constitutionality in each case. How are the well-known problems about revolutionary legality to be resolved? What of situations where it is manifestly undesirable for English courts to venture pronouncements on delicate and complex issues of the constitutional legality of régimes during periods of transition or turbulence? Hobhouse J.'s finding that the 1991 Djibouti agreement (the outcome of a conference involving several Somali factions and numerous other states and international organisations) was not constitutional, while plausible, is itself a foray into a difficult area: certainly international agreements *can* have constitutional significance and be highly relevant to questions of legitimacy. Hobhouse J. in fact makes use of the constitutionality criterion for the less ambitious purpose of introducing a widely-accepted qualification to the criterion of effective control: "a loss of control by a constitutional government may not immediately deprive it of its status, whereas an insurgent régime will require to establish control before it can exist as a government" (p. 67). The weighing of competing claims by a (*de jure*) constitutional government and a (*de facto*) government

in effective control is not resolved by this formulation. Hobhouse J. does assert that there cannot be such competing claims by *governments* as only one government can exist at any given time; while this is a highly desirable position when it comes to determining who may represent the state in English proceedings, it must not be overlooked that it is quite possible for competing entities simultaneously to have some international status, and for their acts to have certain international legal effects. One of the uses of explicit recognition of governments was as an aid to municipal courts in dealing with the problem of determining (often arbitrarily within a range of possibilities) a particular time at which a change of government took place, a problem which English courts will eventually have to confront anew after the 1980 policy change.

(2) *The degree, nature, and stability of administrative control exercised by the entity within the state.* Hobhouse J. seems to imply that where there is substantial and continuing administrative control by the claimant entity this entity will be regarded by English courts as the government. A significant objection to this view is that allowing an effective government established or operating in flagrant violation of international law to claim state property in English courts may entail countenancing a gross breach of international law, *e.g.* concerning the prohibition of the use of force (see Brownlie, (1982) 53 B.Y.I.L. 197 at p. 204), and may (albeit exceptionally) undermine a solid international policy of non-recognition. This objection can be met, but only in part, by governmental or legislative action, particularly the use of economic and similar sanctions. United States courts have gone further in a different direction, and effectively allowed the executive branch to approve or deny access to United States courts for governments not recognised by the United States on a case by case basis as a foreign policy tool (see, *e.g.* *National Petrochemical Co. of Iran v. MIT Stolt Sheaf* 860 F.2d 551 (2nd Cir., 1988)), but such an approach may be criticised on grounds relating to due process and the role of courts in a rule of law system, and finds little support elsewhere.

(3) *The nature of any dealings the United Kingdom government has with the entity in question.* Three different situations are explicitly contemplated in the judgment. First, where the United Kingdom government deals with an entity 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 inter-relationship 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" (p. 66). Secondly, where the United Kingdom has accredited a particular person as a representative of the foreign state in the United Kingdom, "it would be 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" (p. 66). While such accreditation will be relevant, and will constitute strong evidence of normal government-to-government dealings, it would seem to be going too far to hold that accreditation must in all circumstances confer on the entity sending the diplomat the status of "government" for all purposes in English courts. If the presumption arising from United Kingdom government dealings with an entity is rebuttable (however exceptionally), diplomatic accreditation ought not to make it irrebuttable. Leaving aside the special situation of diplomatic property, the Diplomatic Privileges Act 1964 does not appear inconsistent with this common law position. It is theoretically possible to envisage situations where the forum state continues to accredit a diplomatic representative of a displaced régime (or alternatively accredits a representative of an aspiring régime) but it would be internationally wrongful to allow that régime to claim state property. Thirdly, where the United Kingdom government's dealings with an entity claiming to be a government are not on a normal government-to-government basis, or are non-existent, the nature of the dealings is a relevant factor for the court, but is far from decisive. Hobhouse J. observed that the United Kingdom government might limit its dealings with another entity because of "considerations of policy" (e.g. concern about human rights abuses) as well as because of "considerations of legal characterisation," and he took the view that only the latter could be relevant to the question before the court. On the facts Hobhouse J. found that the United Kingdom government did not deal with the "Interim Government" as anything more than a faction, but he did not regard this finding as determinative of the case.

(4) *The extent of international recognition of the entity as the government of the state in question.* Hobhouse J. held that this was a relevant factor, but apparently only to the extent of establishing governmental status in marginal cases: where (as Hobhouse J. found was the case with the "Interim Government") an unconstitutional entity exercised little or no effective control, no amount of international recognition could entitle it to claim state property in an English court. (How United Kingdom government-to-government dealings would weigh in the calculus was not specifically discussed.) Situations might arise where a United Kingdom court should attach somewhat more weight to massive international recognition as a basis of legitimacy, or con-

versely where a United Kingdom court ought to be influenced by systematic international non-recognition. Hobhouse J. rightly observed that in some cases international recognition as a government would "have to be accounted for by policy considerations rather than legal characterisation" (p. 67). It is essential to consider for what purposes an entity has been "recognised," and in what circumstances the "recognition" took place. While "legal characterisation" by reference to such factors as constitutionality and effective control may be unproblematic in some cases, it is not always so easy to draw bright lines between law and policy in taking positions about the status of states and governments, as the recent practice of European Community states with respect to former Yugoslavia all too clearly demonstrates.

Hobhouse J. had little difficulty in concluding that the "Interim Government" was not entitled to represent Somalia for the purpose of claiming the money paid into court. In examining this specific problem and finding that its solution was not determined by recognition or by the United Kingdom government's dealings, his judgment is a reminder that use of the catch-all term "recognition" often obscures analysis of more precise and useful questions. The topic of "recognition of governments," still purveyed in many textbooks as a single topic susceptible to the application of unified theories on the international and municipal planes, is better understood as a set of disaggregated (albeit related) questions that in practice arise for resolution in markedly different contexts. Thus the questions of the capacity to make international claims, bear international responsibility, exercise the power of a state to make a particular request or release, represent a state in an international organisation, send and receive diplomats with diplomatic privileges and immunities, claim sovereign immunity, sue and be sued as representative of the state in a foreign municipal court, claim state property, and adopt laws on personal relations which foreign courts will take into cognisance, may all involve slightly different considerations; and the considerations found relevant may depend on the forum in which the issue has arisen.

Hobhouse J. has rightly accepted that the 1980 policy statement leaves the courts with little choice but to attempt their own legal characterisations; this shift of responsibility from the executive to the judiciary has advantages and disadvantages. The four criteria he enumerated are useful, although they will require refinement and possibly extension to meet the needs of other cases, and the relations between them will require elaboration. It is a matter of concern that they do not directly include any reference to public international law rules concerning either the legal characterisation of entities claiming to be governments (or states) or the disposition of particular issues.

The criteria formulated by Hobhouse J. might involve an English court accepting a claim to state property in an English court by an internationally shunned régime which was installed by an illegal invasion by a foreign state and has just secured continuing effective control through torture and genocide. The whole question of the proper relationship and allocation of responsibilities between the executive (or parliament) and the judiciary in foreign affairs is complex, but criteria which leave this scenario open seem inadequate.

A final point of interest concerns executive certificates. Unlike executive certificates concerning, *e.g.* sovereign immunity or diplomatic status, executive certificates concerning foreign entities claiming to be governments do not in general have any statutory force. Hobhouse J. took the view that such certificates "will almost certainly be the best and only conclusive evidence" as to the United Kingdom government's dealings with the foreign entity (p. 65), apparently leaving open the possibility of looking behind the certificate even on this issue in highly exceptional circumstances. On the question of effective control he found that Foreign Office certificates need not be treated as the best evidence as to what is happening on the ground, and he took account also of other evidence on this issue. Both holdings are supportable, although their adoption further increases the possibility of the government and the courts speaking with discordant voices on foreign affairs.

BENEDICT KINGSBURY.