Foreign Affairs in National Courts: The Role of the Executive Certificate

Summary

• National courts in the United Kingdom and other countries frequently have to consider issues of foreign relations and international law.

• Courts in common law countries accept statements by the executive branch as conclusive evidence on certain matters in international affairs, such as recognition of states and governments.

• The important function of the executive in giving these conclusive statements must be kept within clear limits. It is for courts, not governments, to determine the law.

• Litigants have a right to have their claims decided, but states have a legitimate interest in securing court decisions that do not prejudice the effective and peaceful conduct of international relations.

• An overly controlling approach by the executive risks destroying the relationship of trust between judiciary and government, and, in some areas, may also leave the latter more susceptible to human rights claims and to diplomatic and political pressure from foreign governments and commercial interests.
Introduction

Litigation before national courts of claims that include a foreign affairs issue has increased significantly, both in the United Kingdom and abroad. National courts are often required to take a view on such issues in order to resolve the matters brought before them.1

The decisions of the courts have not always reflected the views of the national government concerned. A notable example is the Distomo case, where the Greek courts denied Germany immunity from claims relating to a massacre carried out by German soldiers during the Second World War, yet the Greek Minister of Justice refused, on the basis of Germany’s sovereign immunity, to give consent to enforce the judgment.2 In the Ferrini case,3 the Italian Court of Cassation held that Germany had no immunity from claims by prisoners of war captured in Italy during the Second World War and taken to Germany as forced labourers. The Italian government had not taken any formal position in the litigation (perhaps assuming there was no need to do so given that the lower courts had upheld Germany’s immunity). In subsequent similar cases, the government did intervene and submitted its view that Germany was entitled to sovereign immunity; however, the court did not agree and continued to deny this.4 In addition to the potential damage to relations between the states concerned,5 such a divergence of opinion between two organs of the same state can result in some uncertainty as to the formation of customary international law.

The application of international law in the domestic sphere may vary from one state to another, depending on national constitutional and procedural rules and traditions. In general terms, national courts have the responsibility of ensuring that the law is observed by all, including the executive, but the exercise of this judicial function can be particularly challenging with regard to foreign affairs. In constitutional terms, foreign relations in most states have remained a matter for the executive. The justification often put forward for this is that a state must speak with one voice in foreign affairs in order to represent its interests effectively, and that the executive is best placed to fulfil that function.6 Regarding the latter aspect, a US court has noted that ‘in the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves’.7

National legal systems are faced with the challenge of how to balance the need for courts to address effectively international legal issues in resolving individual cases, on the one hand, and on the other the interests of states in ensuring that the courts do not adjudicate in ways that could prejudice the peaceful and effective conduct of international relations. Civil lawsuits are increasingly being used by individuals to resolve claims with an international character, ranging from suits against foreign state officials for violations of international criminal law to suits against corporations for human rights abuses and proceedings of many kinds against foreign governments. In addition, proceedings may be brought against the government of the forum state or former officials of that state in circumstances that implicate foreign governments and bring into question the legality and motivation of actions by those governments.8

Traditionally, courts have shown restraint in ruling on matters relating to the conduct of foreign relations, with well-established rules that exclude certain matters from judicial scrutiny. The UK courts apply the doctrines of act of state and non-justiciability in this context. The principle of ‘act of state’ requires that the courts do not adjudicate upon the transactions of foreign sovereign states.

In addition, the UK courts have always refused, or at least been very reluctant, to adjudicate on acts that constitute an exercise of sovereign power by their own government in the field of foreign affairs, such as making war or peace, concluding a treaty, or ceding territory.9

There is also a long-standing practice in the UK courts whereby certificates on certain matters within the knowledge of the Foreign and Commonwealth Office (FCO) may be issued for the purpose of court proceedings. Such certificates are treated as conclusive by the courts in establishing the facts certified.10

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1 See Lord Bingham, Foreword to S Fatima, Using International Law in Domestic Courts (Hart Publishing, Oxford 2005).
2 Greece Court of First Instance, Leivadia, No 137, 30 October 1997, and Prefecture of Volos v FRG, Case 11/2000, Areios Pagos, 4 May 2000. The Greek government’s refusal to enforce the judgment was later upheld by the Greek Supreme Court (Margarülos v FRG, Case No 6/2002, Greek Supreme Court, 17 September 2002, 129 ILR 526). The matter is, however, ongoing, with the incumbent Greek government threatening to allow enforcement.
3 Ferrini v FRG, Italian Court of Cassation, Judgment No 5044, 11 March 2004; 128 ILR 659.
4 FRG v Mantelli, Italian Court of Cassation, Judgment No 14201, 29 May 2008; and Mazieta v FRG, Italian Court of Cassation, Judgment No 14209, 29 May 2008.
5 Germany eventually brought proceedings against Italy in the IGI.
7 Spacil v Crowe, 489 F.2d p. 614, p. 619 (5th Cir. 1974).
8 See for example Belhaj & Anor v Strand & Ors [2014] EWCA Civ 1394.
9 See for example R v Jones [2006] UKHL 16, where Lord Bingham noted ‘there are well-established rules that the courts will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services …’.
10 Duff Development Co Ltd v Kelantan (1924) AC 797.
In recent years, the increasing rate of transnational litigation concerning matters such as human rights and international trade and commerce has challenged some of the established doctrines, and some national courts have shown themselves to be willing to venture a little further into areas that were once free from judicial oversight. It could be argued that the increasing rate of litigation, combined with the greater expectations of litigants and the growing recognition of human rights, has made the old ‘hands-off’ approach of the courts to matters involving state sovereignty and foreign affairs unsustainable. Indeed some have gone further and argued that modern courts should never permit such considerations to affect the determination and fulfilment of private rights. Such an approach inevitably carries implications for the relationship between the courts and the executive in this field. One of the questions that arises is to what extent, if any, the executive should seek to influence or control determinations of the courts in such cases.

This paper will briefly survey the methods by which national courts obtain the certificates or statements of the executive in such cases, and the degree of deference given to executive statements. In doing so, it will look primarily at practice within the United Kingdom, but it will also compare this with the approach taken in other jurisdictions in Europe and in the United States. Given the increasing number of cases in which national courts are faced with difficult questions relating to international affairs, it will address whether such methods are working effectively, and if there is any evidence that the approach taken in the United Kingdom and elsewhere has changed significantly in recent years.

Background

The UK courts have a long-standing practice of accepting statements by the Secretary of State for Foreign and Commonwealth Affairs as conclusive in so far as they concern certain categories of fact in the field of international affairs. These ‘international facts’ often concern relatively straightforward matters such as the status of a litigant – for example, whether or not a particular individual has been received as a diplomat. In the past, such statements were made only in the exercise of the prerogative, whereas now many certificates and statements are issued under statutory powers which specify the effect they have. The power may be exercised in respect of litigation in which the Crown may or may not be involved. The categories of cases in which such statements have been treated as conclusive are not closed, and could in theory cover any matter falling within the Crown’s responsibilities in foreign affairs. In practice, statements have been accepted as conclusive in a variety of international situations in which the government can reasonably be expected to have taken a formal position. Examples include: whether a foreign state or government has been recognized by the United Kingdom; whether certain territory is under the sovereignty of one foreign state or another; whether a person is to be regarded as the head of a foreign state; whether a state of war exists with a foreign country or between two foreign countries; and whether a person has been accepted as a diplomat.

Even where the court makes a request, the Crown is not obliged to give a substantive reply if it considers the circumstances are not appropriate.

Traditionally such statements are conclusive only as to the fact or particular facts stated, and it is for the court to draw from that statement of fact the proper conclusion as to the law. If, for example, a court is uncertain as to whether a particular individual enjoys diplomatic immunity from its jurisdiction, it is the practice for the certificate issued by the secretary of state to assert simply that the individual concerned has or has not been received as a member of the diplomatic staff of the mission concerned. In some cases the distinction between law and fact is not easy to make. Sometimes a statement of fact will depend on prior conclusions reached by the government on a question of international law.

UK courts are not obliged to seek such statements, and may choose to establish the relevant facts in some other way. In the first hearing before the House of Lords in the Pinochet case, no request was made for an FCO certificate, and the case proceeded on the basis that the evidence showed that General Pinochet had been the Chilean head of state on the relevant dates. In the second hearing, however, counsel for both sides submitted questions to the FCO as to whether Pinochet had been recognized as head of state, and, if so, on what dates; the FCO replied by letter. Even where the court makes a request, the Crown is not obliged to give a substantive reply if it considers the circumstances are not appropriate. In 2013 the High Court approached the FCO seeking a certificate...
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The courts in other common law jurisdictions tend to place a similar reliance on their government's assessment of 'international facts'. In the United States the 'suggestions' made by the Department of State are, however, often more extensive and include comments on the legal issues and the views of the executive. By contrast, there tends to be no formal tradition of executive certification in non-common law jurisdictions, although this is not to say that consultation on such matters between executive and courts does not occur. Judges in some jurisdictions, such as France and Germany, have traditionally shown considerable deference to the views of their governments in matters of foreign affairs; and in practice, there has been little serious conflict between the executive and judicial organs. In other countries, such as Italy and Greece, the pattern has been more mixed, although following the judgment of the International Court of Justice (ICJ) in Jurisdictional Immunities of the State (Germany v Italy), the Italian Court of Cassation has suggested that it may be more deferential to the executive branch in future cases.

Current practice

The most controversial element in the use of executive certificates is the obligation on the court to treat them as conclusive. What does this obligation mean in practice? There is some variation from one jurisdiction to another. In the majority of cases in the United Kingdom, the scope of the certification procedure is limited by the very narrow category of facts to which they can apply. Their function is generally limited to what the Crown has or has not done, or what is or is not recognized by it. They are facts that the courts must accept not because they are within the exclusive knowledge of the UK government (although they may be), but because they represent matters that are exclusively for decision by the government and not the courts. Examples include whether a particular individual or individuals are regarded as the head or government of a foreign state, or whether a person has been received as a member of the diplomatic staff of a foreign mission. In such circumstances, the rationale behind the procedure is readily apparent, and the government can reasonably be regarded as best placed to provide the relevant information.

Immunities

As we have seen, the courts often seek a certificate where the status of a defendant is in question. Such matters can be relatively straightforward, but uncertainties may arise. In 2011 the question of whether a Mongolian official was entitled to immunity in respect of an extradition request from Germany was before an English court; the proceedings focused on whether the official was on a 'special mission' to the United Kingdom, in which case he would have been entitled to immunity. A letter from the FCO stated that the government had not consented to the visit of a Mongolian official as a special mission, and the High Court had to consider whether the letter was conclusive evidence of that fact. At the time there was no formal procedure in the United Kingdom for the reception of special missions, and the government of Mongolia contended that the United Kingdom had in fact consented through its ambassador in Mongolia. The court took the view that there was no rational basis for distinguishing between certificates on special missions and those relating to the reception of diplomats, and decided that the FCO letter conclusively established that the United Kingdom did not consent. The United Kingdom has subsequently tightened its practice on special missions, although it is still careful to emphasize that it is for the courts to decide on the legal consequences of any decision to grant special mission status.

The role of the US executive is potentially very extensive; and the Supreme Court has recently confirmed that the executive retains a role in determining the individual official immunity of all foreign government officials, including former officials.

In recent years, the US State Department has frequently intervened in litigation involving questions of immunity, filing 'suggestions' in cases of incumbent heads of state, heads of government, foreign ministers and persons on special mission. Unlike its UK counterpart, it has not confined itself to the question of recognition of official status, but has also asserted the immunity or non-immunity from jurisdiction of the individual concerned. Such statements...
have been consistently accepted by the courts as binding, on the basis that in certain areas of foreign affairs the executive rather than the judiciary has the constitutional authority to declare what the law is.

The role of the US executive is potentially very extensive; and the Supreme Court has recently confirmed that the executive retains a role in determining the individual official immunity of all foreign government officials, including former officials. This follows the ruling in *Samantar v Yousef*20 to the effect that the common law, not statute, continues to govern all questions of the immunity of foreign government officials. Thus, the executive may certify as to immunities derived not only from the personal status of an individual – for example as a diplomat or head of state – but also from the ‘official’ nature of the acts carried out by that individual. The latter derives from the immunity of the state itself, and can give rise to difficult questions of law, as – unlike the immunities derived from status – it does not involve any act of recognition for which the executive is specifically empowered. In the *Samantar* case, the US government took the position that the courts owed absolute deference to the State Department’s view on both types of immunity. The Supreme Court was not required to rule on the matter, but its judgment did suggest that the courts should respect the State Department’s determinations on immunity whenever they were given, declaring: ‘We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department’s role in determinations regarding individual official immunity.’ The case was remanded for decision on the merits, and it is notable that, although the Fourth Circuit court accepted the requirement for absolute deference on status-based immunity doctrines such as head of state immunity, it was less convinced in regard to conduct-based immunity, concluding that the latter carries considerable weight but was not controlling.21

The high degree of deference shown by the US courts can be contrasted with the attitude of the Italian Court of Cassation in *Italy v DM (Djukanovic)*, where, in determining whether or not a particular individual could be regarded as a head of state, the court proceeded on the basis that the view expressed by the Italian ministry of foreign affairs was just one of the factors to be taken into account.22 Generally speaking, however, courts in other European jurisdictions tend to comply with the views of their executive on such matters23 – although the means by which such views are transmitted are not always very clear.

**Recognition of states and governments**

In the countries that follow the civil law tradition, there is no legal requirement for the courts to defer to the executive on the question of recognition of foreign states or governments, although judges often seek advice informally. In common law countries there is, however, a long tradition of deference on such matters.

Although it is generally true that most certificates issued by the UK government certify as to facts not law, practice is not entirely consistent on this point. As we have seen, the existence of the facts may often depend on a determination of the law. The State Immunity Act 1978: Section 21(a) goes further in providing that a certificate shall be conclusive evidence of ‘whether any country is a State for the purposes of Part I of this Act …’. It has been argued that the question of whether or not a particular entity qualifies as a state should not depend on recognition by the UK government, but is a separate question of international law. In *HRH Sultan of Pahang v Secretary of State for the Home Department*, however, the Court of Appeal reaffirmed the conclusive nature of the FCO certificate as regards the recognition or non-recognition of states and the public policy need for the courts to follow that information.24

The question of whether or not a particular regime has been recognized by the United Kingdom as the government of a foreign state is also a matter on which the courts may seek the help of the executive. Such issues can be complex and politically highly charged. In 1980 the UK government announced that it would no longer accord recognition to governments and would instead ‘decide the nature of our dealings with regimes which come to power unconstitutionally in the light of our assessment of whether they are able themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so’. The question of whether or not a particular regime qualified to be treated as the government of a foreign state remained of importance to some litigants; and, although practice was scant, this policy change appeared to have the effect of shifting decision-making from the executive to the courts. The latter could still approach the executive for help, but any certificate provided would simply describe any contacts and dealings with the particular regime, leaving it to the court to deduce whether this should be treated as a government.

22 Final Appeal on Preliminary Question, Court of Cassation No 49666 (Italy 2004) ILDC 74.
23 See Jean Francois N’Dengue, Judgment 20 June 2007, Cour d’appel de Versailles, Chambre de l'instruction, 10ème Chambre, Section A, where proceedings against the director-general of police of the Republic of the Congo were halted following a note from the French ministry of foreign affairs confirming that he was on a special mission and ‘in this capacity, and by virtue of customary international law, he benefits from immunity from jurisdiction and execution’.
In *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA*,\(^25\) the court was faced with the unenviable task of determining whether a particular interim authority was the government of Somalia. This was at a time when Somalia was in effect a battleground between competing factions all claiming to be the government of the whole or parts of its territory. FCO letters before the court described the situation in Somalia and the nature of the UK government’s dealings with the various factions, and concluded that, although informal contact was maintained with all factions, ‘there have been no dealings on a Government to Government basis’. The judge, while conceding that, in such circumstances, the FCO evidence will almost certainly be the best and only conclusive evidence of the extent of any dealings with a specific regime, noted that there none the less existed the possibility of rebuttal, declaring ‘now that the question has ceased to be one of recognition, the theoretical possibility of rebuttal must exist’. By contrast, in 2011, in an apparent reversal of its declared policy, the UK government specifically recognized the National Transitional Council (NTC) as the ‘sole governmental authority in Libya’. In litigation concerning control of bank accounts of the Libyan embassy in London, the court obtained an FCO certificate to the effect that the NTC and not the Gaddafi regime was the government of Libya. The court ruled on the basis that the certificate was conclusive on the question.\(^26\)

**Other matters**

Questions concerning the recognition of states and governments are matters on which – as even critics of this approach would admit – the views of the executive should carry considerable weight. But what about the views of the executive on other questions of international relations on which its role may be considered to be less central? Can it be right for a court to treat such views as conclusive in the absence of specific statutory authorization to that effect?

In *R v Gul*,\(^27\) a question arose as to the legal nature of the conflicts involving UK armed forces in Iraq and Afghanistan. The distinction between the two categories of armed conflict, international and non-international, is a complex and sometimes controversial issue of international law that can affect the application of rules of international humanitarian law: in particular, whether participants enjoy combatant immunity and international legal status. The Crown was party to the proceedings and, in the course of its formal submissions, asserted that the nature of the conflicts was a ‘fact of state’, and as such a matter that could only be determined by the executive. An FCO certificate was submitted stating the view of Her Majesty’s Government (HMG) that both situations were non-international armed conflicts between the respective government and various insurgent armed forces. The appellant conceded that the certificate was highly persuasive, but contended that the question remained a question of fact for the jury. No attempt was made by the court to look at the situation itself, and as the argument developed it became no longer necessary for the court to adjudicate on the issue. Nevertheless, in the proceedings before the Court of Appeal, it noted that, in its provisional view, the certificate was conclusive.

### Conclusions

The increasing amount of litigation in national courts involving questions of international law is bound to test the relationship between the courts and the executive. In such cases, both are required to tread a very fine line between fulfilling their respective proper functions and usurping the function of the other.

While it is probably true that the areas of non-reviewable executive power have shrunk a little over the last few decades, there is little evidence to suggest that where certificates or statements of interest are submitted by the executive on certain matters, courts are any less likely to regard them as conclusive.

It has been said that domestic courts are abandoning their traditional deference to the executive branch with regard to foreign affairs. While it is probably true that the areas of non-reviewable executive power have shrunk a little over the last few decades, there is little evidence to suggest that where certificates or statements of interest are submitted by the executive on certain matters, courts are any less likely to regard them as conclusive.

The prescriptive approach followed by the US State Department – and the high level of deference shown to its views on both fact and law – risks stepping over that line. The US legislation on state immunity was enacted to reduce the role of the executive in court cases involving foreign sovereigns. At the time, it was felt that the State Department’s susceptibility to diplomatic and political...
pressure had resulted in inconsistent treatment of foreign sovereigns and was becoming burdensome. There is clearly a danger that its current role will result in increased lobbying, with competing demands from foreign governments, human rights advocates and business interests.  

The former Legal Adviser of the State Department noted this risk, but contended that it is offset by the fact that the more the State Department establishes an official immunity policy over time, the more silent we can afford to be in most cases. Such a policy requires consistency on matters of legal principle that can be followed by the courts. If this approach is, in practice, largely informed by political preferences, foreign policy and considerations of reciprocity, such optimism may be unfounded. Despite the strong tradition of deference, the danger of overstepping the mark as far as the courts themselves are concerned cannot be entirely ignored. In this connection, the Legal Adviser added: ‘Only if our suggestions of immunity became unreasonable, it seems to me, would courts be tempted to explore the delicate and uncharted zone between “substantial deference” and “absolute deference” …’  

Leaving aside these risks, a policy of executive certification can provide clear benefits. Whether one accepts that the traditional ‘avoidance’ doctrines – such as non-justiciability – used by national courts to steer clear of certain foreign affairs issues have been substantially eroded or not, the sheer volume of transnational litigation involving foreign relations has plainly increased. This, combined with the fact that the boundary between domestic and foreign affairs is now much less well-defined, means that, inevitably, national courts are drawn into the international arena in resolving the disputes before them. Indeed it has been argued that national courts are now key players in the evolution of the international legal order – their judges relatively more independent than the judges in international tribunals, and enjoying broader public support for their decisions. In these circumstances, they should have access to the best information available in order to address the issues involved properly. On certain matters the executive may be best placed to provide that information. But safeguards are needed. Such certification or executive intervention should be open and transparent, and should not consist of ‘behind the scenes’ contacts.  

There should be clear limits to ensure that the executive does not usurp the role of the court to determine the law. As we have seen, in the United Kingdom there are some specific instances where the fact on which HMG may certify involves a determination of law. Some of these are now the subject of statutory authorization. There is, of course, no impropriety in the FCO, if requested, issuing a certificate stating the Crown’s view on almost any matter in foreign affairs, provided this is treated by the court as the view of the Crown – there are only a limited number of matters on which the court must treat the certificate as determinative also on the underlying issue of law. These matters represent a relatively narrow category and should not be extended – at least not without statutory authorization. Any certificate issued that covers both types of issue should make this distinction clear.  

On balance, the approach of the executive in the United Kingdom has been restrained, and stands up well against the more controlling approach in the United States and the generally less transparent and sometimes disorganized approach in continental jurisdictions. Even in an area where a determination of law is inherent – for example, whether or not a country is a state – the executive branch has generally refrained from drawing any legal conclusions from the facts stated, leaving it to the court to consider the implications and apply the law to the particular situation before it. However, the issues that arose in the Gul case illustrate that care needs to be taken not to overstep the mark. The primary responsibility rests with the courts to ensure that evidence on the law – which may well be the best evidence they have and highly persuasive – is not thereby assigned a conclusive nature merely because of its source.

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28 See Bellinger (2010), ‘Ruling Burdens State Department. Samantar held foreign officials are not immune from human rights suits, so State will have to decide whether to assert immunity and will be subject to lobbying’, National Law Journal, Vol 32 (42), p. 47, where it is noted that: ‘The Obama administration will now be buffeted by competing demands from foreign governments for protection for their officials and from human rights advocates for accountability for human rights abusers’.  
30 Ibid.
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