Hilary Term
[2017] UKSC 3
On appeals from: [2014] EWCA Civ 1394 and [2014] EWHC 3846 (QB)

JUDGMENT

Belhaj and another (Respondents) *v* Straw and others (Appellants)

Rahmatullah (No 1) (Respondent) *v* Ministry of Defence and another (Appellants)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Mance
Lord Clarke
Lord Wilson
Lord Sumption
Lord Hughes

JUDGMENT GIVEN ON

17 January 2017

Heard on 9, 10, 11 and 12 November 2015

Appellants (Rt Hon Jack Straw MP and 6 others)
Rory Phillips QC
Sam Wordsworth QC
Karen Steyn QC
Sean Aughey
(Instructed by The Government Legal Department)

Respondents (Belhaj and another)
Richard Hermer QC
Ben Jaffey
Maria Roche

(Instructed by Leigh Day)

Appellant (Ministry of Defence and another)
James Eadie QC
Karen Steyn QC
Melanie Cumberland
(Instructed by The Government Legal Department)

Respondent (Rahmatullah)

Phillippa Kaufmann QC
Edward Craven

(Instructed by Leigh Day)

Respondent (Rahmatullah)
Richard Hermer QC
Nikolaus Grubeck
Maria Roche
(Instructed by Deighton Pierce Glynn)

Interveners (UN Special Rapporteur on Torture and another)
Nathalie Lieven QC
Ravi Mehta
Shane Sibbel
(Instructed by Bhatt Murphy Solicitors)

Interveners
Martin Chamberlain QC
Oliver Jones
Zahra Al-Rikabi
(Instructed by The Redress Trust)

Interveners:-
(1) International Commission of Jurists
(2) JUSTICE
(3) Amnesty International
(4) REDRESS

LORD MANCE:

Table of Contents (page reference)

I Introduction

1. The appeals now before the Supreme Court in *Belhaj and Boudchar v Straw* and *Ministry of Defence v Rahmatullah* concern the alleged complicity of United Kingdom authorities and officials in various torts, allegedly committed by various other states in various overseas jurisdictions. The torts alleged include unlawful detention and rendition, torture or cruel and inhuman treatment and assault. The defences include in both appeals state immunity and the doctrine of foreign act of state. The case of *Rahmatullah* also raises for consideration the inter-relationship of these concepts with article 6 of the European Convention on Human Rights. The meticulous but differing analyses of the Court of Appeal (Lord Dyson MR and Sharp and Lloyd Jones LJJ) in *Belhaj* and Leggatt J in *Rahmatullah* underline the difficulties. The Supreme Court has nonetheless benefitted greatly from their analyses, as well as that of a previous Court of Appeal (Rix, Longmore and Davis LJJ) in *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855; [2014] QB 458 ("*Yukos v Rosneft*").

2. The issues come before the courts by way of challenges under CPR rule 11.1 to the existence or exercise by the court of jurisdiction over the appellants (the defendants in the proceedings), combined with applications for dismissal of the relevant claims under CPR rule 3.1. The issues have, necessarily, to be determined by reference to allegations contained in the respondents' (the claimants') pleadings which have not been investigated or tested. One of the appellants' objections to their adjudication is indeed that it is impermissible or inappropriate for a domestic court to investigate allegations of the type advanced.

II The claimants' allegations

3. Both cases originate with events in February/March 2004. In *Belhaj*, Mr Belhaj, a Libyan national and opponent of Colonel Gaddafi, and his wife, Mrs Boudchar, a Moroccan national, attempted (under, it seems likely, other names) to take a commercial flight from Beijing to London, but were instead and for whatever reason deported by the Chinese authorities to Kuala Lumpur. There they were detained. MI6 is alleged to have become aware of their detention and on 1 March 2004 to have sent the Libyan intelligence services a facsimile reporting their whereabouts. This is said to have led to a plan being developed to render them against their will to Libya. Thereafter, they allege, they were unlawfully detained first by Malaysian officials in Kuala Lumpur and then by Thai officials and United States agents in Bangkok, before being put on board a US airplane which took them to Libya. There they were further detained, in the case of Mrs Boudchar until 21 June 2004, in the case of Mr Belhaj until 23 March 2010.

4. Mr Belhaj and Mrs Boudchar allege that the United Kingdom procured this detention in all these places "by common design with the Libyan and US authorities". They allege that they suffered mistreatment amounting to torture at the hands of US agents in Bangkok and in the airplane and at the hands of Libyan officials in Libya. They allege that the United Kingdom "by common design arranged, assisted and encouraged [their] unlawful rendition … to Libya". They rely in this connection upon a letter dated 18 March 2004 alleged to have been written by the second appellant, Sir Mark Allen, allegedly a senior official of the Secret Intelligence Service ("SIS") to Mr Moussa Koussa, Head of the Libyan External Security Organisation. The letter congratulated Mr Moussa Koussa "on the safe arrival of [Mr Belhaj]". It said that "This was the least we could do for you and for Libya to demonstrate the remarkable relationship we have built over recent years". It indicated that British intelligence had led to Mr Belhaj's transfer to Libya, although the British services "did not pay for the air cargo". Mr Belhaj and Mrs Boudchar further allege that the United Kingdom "conspired in, assisted and acquiesced in torture, inhumane and degrading treatment, batteries and assaults inflicted upon [them] by the US and Libyan authorities". Again, it should be stressed that these are allegations, based inter alia on alleged awareness of the risks of torture of detainees in United States and/or Libyan hands. It is also pleaded that "the renditions took place as part of a co-ordinated strategy designed to secure diplomatic and intelligence advantages from Colonel Gaddafi". The claims are framed

as claims for false imprisonment, trespass to the person, conspiracy to injure or to use unlawful means, misfeasance in public office and negligence. They are brought against Mr Jack Straw as Foreign Secretary, Sir Mark Allen, the SIS, the Security Service, the Attorney General, the Foreign and Commonwealth Office and the Home Office, all of whom are the appellants in *Belhaj*. The first and second appellants, Mr Straw and Sir Mark Allen, state that the Official Secrets Act makes it impossible for them to advance any positive case in response to the allegations against them. The remaining appellants state that it is the position of Her Majesty's Government that it would be damaging to the public interest for them to plead to such allegations.

5. Upholding Simon J on the point, the Court of Appeal held, and it is now accepted, that all the claims depend upon proof that torts such as those alleged existed under the laws of the places where they were allegedly committed (subject only to any countervailing considerations of, in particular, public policy under section 14 of the Private International Law (Miscellaneous Provisions) Act 1995). The issues now before the Court relate to all the claims, save for three negligence claims which are independent of the alleged facilitation of and acquiescence in rendition to and detention in Libya and which arise from alleged failure by the appellants to take protective steps after they became aware that Mr Belhaj and Mrs Boudchar were in Libya.

6. In *Rahmatullah*, Mr Rahmatullah, a Pakistani citizen, was on 28 February 2004 detained by British forces in Iraq on suspicion of being a member of Lashkar-e-Taiba, a proscribed organisation with links to Al-Qaeda. The UK and the USA were at the time occupying forces in Iraq, where there was a situation of international armed conflict. Shortly after his original detention, within a matter of days at most, Mr Rahmatullah was transferred into the custody of US forces, and by the end of March 2004 they had transferred him to Bagram Airbase in Afghanistan, where he was detained for over ten years without charge or trial, until released on 15 May 2014. He alleges that he was subjected to severe mistreatment in both British and United States detention. His claims are put under the like heads to Mr Belhaj's and Mrs Boudchar's, with assault and torture as additions. Again, the claims allege in various terms that the relevant appellants acted in concert or combination with the United States authorities, or assisted, encouraged or were complicit in relation to the alleged unlawful detention and mistreatment by the United States authorities. Again, the tenor of the allegations is that the United States authorities were the actors, even if they were being encouraged or engaged, procured, or utilised by the appellants to do as they allegedly did. Leggatt J regarded the claims relating to Mr Rahmatullah's detention by British forces and transfer into the custody of US forces as barred by the defence of Crown act of state, assuming that arrest and detention were authorised pursuant to lawful United Kingdom policy. The appeal from that aspect of his judgment was joined with the appeal in *Mohammed (Serdar) v Ministry of Defence* [2015] EWCA Civ 843; [2016] 2 WLR 247. The Court of Appeal allowed the appeal on the basis that Crown act of state is a nuanced defence, applicable only where "there are compelling considerations of public policy which require the court to deny a claim founded on an act of the Executive performed abroad" (para 359), with the result that there must be a trial on the facts on the issue of Crown act of state.

In its separate judgment of today's date from that decision of the Court of Appeal, the Supreme Court restores (though for different reasons) Leggatt J's conclusions that Crown act of state is in principle available in respect of the United Kingdom's detention and transfer to US custody of Mr Rahmatullah. The issues now before the Supreme Court relate solely to Mr Rahmatullah's claims in tort in respect of alleged acts or omissions of US personnel while he was in US detention. The claims are brought against the Ministry of Defence and the Foreign and Commonwealth Office, both of which are the appellants in *Rahmatullah*.

7. The appellants' case in both proceedings is that the issues now before the Supreme Court are inadmissible or non-justiciable on their merits by reason of principles governing state immunity and/or foreign act of state. More specifically, the appellants submit that the claims are based on conduct where the prime actors were foreign state officials, and they either implead the foreign states or would require the English courts to adjudicate upon foreign acts of state. I use the phrase "foreign act of state" loosely at this point to cover various bases on which it is submitted that the English court cannot or should not adjudicate upon proceedings against the United Kingdom, its authorities or officials when the proceedings would also involve adjudicating upon the conduct of a foreign state, even though state immunity is not established on the part of the United Kingdom and the relevant foreign state is not impleaded in the proceedings. The appellants submit that the principles governing foreign act of state dovetail naturally with those governing state immunity, and that underpinning both are conceptions of mutual international respect and comity. That said, there are, as will appear, also differences, not least that state immunity is firmly based on customary international law, whereas foreign act of state in most if not all of its strands has been developed doctrinally in domestic law. State immunity qualifies the jurisdiction of domestic courts. Foreign act of state in one sense requires a domestic court to accept without challenge the validity of certain foreign state acts, but in another sense it is a broader principle of non-justiciability, whereby the domestic court must simply declare itself incompetent to adjudicate. The difficulties which exist in separating or aligning these strands are considerable.

8. I note at this point that the appellants do not suggest that the tortious claims against them which are in issue on these appeals can or do attract a defence of Crown act of state. The leading authorities on Crown act of state are now *Nissan v Attorney General* [1970] AC 179 and the Supreme Court's separate judgment, delivered today in the cases of *Rahmatullah* and *Serdar Mohammed* (para 6 above). In *Nissan*, Lord Pearson said (at p 237F-G) that:

> "it is necessary to consider what is meant by the expression 'act of state', even if it is not expedient to attempt a definition. It is an exercise of sovereign power. Obvious examples are making war and peace, making treaties with foreign sovereigns, and annexations and cessations of territory. Apart from these obvious

> examples, an act of state must be something exceptional. Any ordinary governmental act is cognisable by an ordinary court of law (municipal not international): if a subject alleges that the governmental act was wrongful and claims damages or other relief in respect of it, his claim will be entertained and heard and determined by the court."

Nissan concerned the Crown's occupation of a hotel while assisting to maintain peace under an agreement made between the United Kingdom and Cyprus. The doctrine of Crown act of state was held not to bar a claim for compensation. Lord Morris said (at p 217D) that the acts in question in that case (of feeding and housing troops in the hotel) were "far removed from the category of transactions which by reason of being a part of or in performance of an agreement between states are withdrawn from the jurisdiction of the municipal courts." And Lord Wilberforce indicated (pp 235H-236A) that between the acts complained of and the pleaded agreement with the Government of Cyprus, the link was "altogether too tenuous" for the Crown to be able to invoke Crown act of state - "if accepted as sufficient to attract the description of act of state it would cover with immunity an endless and indefinite series of acts, judged by the officers in command of the troops to be necessary, or desirable, in their interest".

9. On the other hand, in our concurrently delivered judgment, we have accepted that the doctrine of Crown act of state is available in respect of the United Kingdom's detention and transfer to United States custody of Mr Rahmatullah. In these circumstances, two questions arise as to how that fits with the absence of any suggestion that Crown act of state is or could be a defence in respect of the United Kingdom's alleged involvement in the wrongful detention, combined with mistreatment, by various foreign states of Mr Belhaj, Mrs Boudchar and Mr Rahmatullah.

10. First, one can understand why there is no plea of Crown act of state in respect of the allegations of severe mistreatment inflicted on the various respondents by various foreign state authorities. Further, in the cases of Mr Belhaj and Mrs Boudchar, the allegations of wrongful detention and mistreatment might well be regarded as inseparable. However, in the case of Mr Rahmatullah, the appellants deny the allegations of mistreatment, while admitting that he remained in United States custody for more than ten years. There has been no plea of Crown act of state in respect of any period of this detention, which is not necessarily linked with any mistreatment. If Crown act of state is available, as the court holds, in respect of detention by the United Kingdom, then one might have thought that it would logically be available in respect of detention by a third state in respect of which the Crown is alleged to have been complicit. The explanation may, however, lie in the length of the period of Mr Rahmatullah's detention and the considerations that he was never charged or tried, was deprived of any access to a lawyer for the first six years and was unable to speak freely for the remainder of the period. A plea of Crown act of state in respect of detention of this nature might well have been considered unrealistic. Second, however, this leaves a

tension between, on the one hand, apparent recognition that the nature of the acts is not such as to justify a plea of Crown act of state in respect of the United Kingdom's alleged complicity in such acts and, on the other hand, the case now advanced that the alleged involvement of other states in such acts precludes any claim against the United Kingdom in respect of them on the grounds of foreign act of state. As I have said in my separate concurrent judgment (para 4), it is likely to be easier to establish that a domestic court should abstain from adjudicating on the basis of Crown act of state than on the basis of foreign act of state.

III Summary of conclusions

11. For the reasons which I shall set out, I have reached the following conclusions:

State immunity (paras 12 to 31):

(i) The appellants' pleas of state immunity fail because the various foreign states (Malaysia, Thailand, the United States and Libya) are not impleaded, and their legal position is not affected, either directly or indirectly by the claims in tort advanced by the respondents solely against the appellants: para 31.

Foreign act of state (paras 32 to107):

(ii) The concept of foreign act of state needs to be disaggregated, or broken down, and approached at a more particular level of enquiry: para 34.

(iii) Three types of foreign act of state can be identified under current English authority:

a) The first is the rule of private international law, whereby a foreign state's legislation will normally be recognised and treated as valid, so far as it affects movable or immovable property within the foreign state's jurisdiction: para 35.

b) The second is that a domestic court will not normally question the validity of any sovereign act in respect of property within the foreign state's jurisdiction, at least in times of civil disorder: para 38.

c) The third is that a domestic court will treat as non-justiciable - or, to use language perhaps less open to misinterpretation, abstain or refrain

from adjudicating upon or questioning - certain categories of sovereign act by a foreign state abroad, even if they occur outside the foreign state's jurisdiction: para 40.

(iv) The appellants' case, to the effect that the second and/or third types should be expanded or combined so as to cover all sovereign (*jure imperii*) acts by a foreign state anywhere abroad outside the jurisdiction of the domestic court whose jurisdiction is in issue, should be rejected:

a) To the extent that it exists at all, the second type of foreign act of state is and should be limited to acts relating to property within the jurisdiction of the foreign state: para 74 to 78.

b) If (contrary to a), the second type were to be viewed as covering acts directed against the person, it would be subject to a public policy exception, which would enable at least the allegations of complicity in torture, unlawful detention, enforced rendition and disappearance made in these cases to be pursued in the English courts: para 80.

c) The third type of foreign act of state is not limited territorially. Whether an issue is non-justiciable falls to be considered on a case-by-case basis. Considerations both of separation of powers and of the sovereign nature of foreign state or inter-state activities may lead to a conclusion that an issue is non-justiciable in a domestic court: paras 90 to 95. But in deciding whether an issue is non-justiciable, English law will have regard to the extent to which the fundamental rights of liberty, access to justice and freedom from torture are engaged by the issues raised: paras 98 and 101.

d) I see little attraction in and no basis for accepting a yet further doctrine whereby United Kingdom courts might be precluded from investigating acts of a foreign state, if the Foreign Office communicated to it the Government's view that this would embarrass the United Kingdom in its international relations (though I accept that consequences for international relations may feed into the question of justiciability or abstention under the third type of foreign act of state): para 41.

e) In the present case, the circumstances as they are presently before the Supreme Court do not lead to a conclusion that the issues are non-justiciable in a domestic court: paras 96 to 105.

f) Had a contrary conclusion been reached, the result would have been that, although the relevant foreign states could, at least in theory, have been sued within their own jurisdictions for the torts alleged to have been directly committed by their own officers, the appellants could not have been sued anywhere for their alleged complicity in such torts, since they would be entitled to invoke state immunity in any foreign jurisdiction: para 102.

Miscellaneous points (paras 108 to 110):

(v) It is unnecessary to reach any final determination of the respondents' case:

a) that, in so far as what is alleged amounts to complicity in torture, the United Nations Convention against Torture (Treaty Series No 107 (1991)) obliges states to provide a universal civil remedy in respect of torture wherever committed in the world, at least when (allegedly) committed by or with the connivance of United Kingdom citizens, and that any otherwise applicable type of foreign act of state should be modified accordingly. It suffices to say that I would as at present advised see no basis for differing from the rejection of this argument in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitution Affairs intervening) ("Jones v Saudi Arabia")* [2006] UKHL 26; [2007] 1 AC 270.

b) that article 6 of the Convention rights scheduled to the Human Rights Act 1998 is engaged by and renders impermissible in the present circumstances any reliance by the appellants on either state immunity or foreign act of state. Again, this would face a difficulty raised by the House of Lords' conclusions in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573 and *Jones v Saudi Arabia*, paras 14 and 64, that article 6 is not engaged by a plea of state immunity. The European Court of Human Rights has reached a contrary conclusion (see eg *Al-Adsani v United Kingdom* (2001) 34 EHRR 11; *Sabeh El Leil v France* (2011) 54 EHRR 14), and it would have been necessary to consider this disagreement. Foreign act of state, on the other hand, operates, even under the case law of the European Court of Human Rights, as a substantive bar to liability or adjudication (see *Roche v United Kingdom* (2005) 42 EHRR 30; *Markovic v Italy* (2006) 44 EHRR 52), and so would not, if applicable, engage article 6. Further, even if article 6 were engaged, the question would then have arisen whether it rendered impermissible any reliance on either state immunity or foreign act of state. But, since I would hold that the appellants cannot rely on either in any event, it is unnecessary to go further into this.

Conclusion:

(vi) These conclusions lead to the conclusion that the appellants are not entitled to rely on state immunity or the doctrine of foreign act of state to defeat the present proceedings, and the appeals must accordingly be dismissed and the cases proceed to trial. The detailed reasoning supporting them follows.

IV State immunity

12. State immunity is, as indicated, a principle of customary international law recognised at common law, but now provided for by the State Immunity Act 1978. The International Court of Justice has described state immunity as occupying "an important place in international law and international relations" and as deriving from "the principle of sovereign equality of states, which, as article 2, para 1 of the United Nations Charter makes clear, is one of the fundamental principles of the international legal order": *Jurisdictional Immunities of the State, Germany v Italy*, judgment of 3 February 2012 [2012] ICJ Rep, p 99. The "absolute independence of every sovereign authority" and the "international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state" were similarly identified as the bases of state immunity by Brett LJ in the seminal common law case of *The Parlement Belge* (1880) 5 PD 197, 214-215.

13. Section 1 of the 1978 Act provides:

> "General immunity from jurisdiction.
>
> (1) A state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.
>
> (2) A court shall give effect to the immunity conferred by this section even though the state does not appear in the proceedings in question."

The Act specifies various exceptions to state immunity, including, but not limited to, submission to the jurisdiction (section 2), commercial contracts and contracts to be performed in the United Kingdom (section 3), personal injuries and damage to property (section 5) and ownership, possession and use of property (section 6). Sections 5 and 6 read:

"5. Personal injuries and damage to property.

A state is not immune as respects proceedings in respect of -

(a) death or personal injury; or

(b) damage to or loss of tangible property,

caused by an act or omission in the United Kingdom.

6. Ownership, possession and use of property.

(1) A State is not immune as respects proceedings relating to -

(a) any interest of the state in, or its possession or use of, immovable property in the United Kingdom; or

(b) any obligation of the state arising out of its interest in, or its possession or use of, any such property.

(2) A state is not immune as respects proceedings relating to any interest of the state in movable or immovable property, being an interest arising by way of succession, gift or bona vacantia.

(3) The fact that a state has or claims an interest in any property shall not preclude any court from exercising in respect of it any jurisdiction relating to the estates of deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts.

(4) A court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property -

(a) which is in the possession or control of a state; or

(b) in which a state claims an interest,

> if the state would not have been immune had the proceedings been brought against it or, in a case within para (b) above, if the claim is neither admitted nor supported by prima facie evidence."

14. It follows that state immunity is a personal immunity, *ratione personae*, possessed by the state in respect of its sovereign activities (*acta jure imperii*) so far as these do not fall within any of the exceptions. When state immunity exists, the nature and gravity of the alleged misconduct are irrelevant. Even the admitted illegality of the acts complained of "does not alter the characterisation of those acts as *acta jure imperii*": *Jurisdictional Immunities*, para 60; see also *Jones v Saudi Arabia* [2007] 1 AC 270, where the House rejected "the argument that torture or some other contravention of a jus cogens cannot attract immunity rationae materiae because it cannot be an official act": per Lord Hoffmann at para 85.

15. The classification does not appear in the 1978 Act, but the situations in which state immunity applies are commonly described as involving either direct or indirect impleading of the state. A state is (directly) impleaded by legal proceedings taken against it without its consent: *Cia Naviera Vascongado v SS Cristina (The "Cristina")* [1938] AC 485, 490, per Lord Atkin. Lord Atkin also identified a second situation of immunity in which, even though the state may not be a party, the proceedings relate to state property. In so far as the state is put in a position where it must either forego or appear to defend its property interest, this situation can readily be described as one of indirect impleading: see eg *The Parlement Belge* (1880) 5 PD 197, 217-219, where the Court of Appeal did just that. On the other hand, immunity exists, as will appear, in some situations where a state's property interests are affected in ways which it may not be so natural to identify as indirect impleading, and these are sometimes therefore treated separately: see eg *United States of America v Dollfus Mieg et Cie SA* [1952] AC 582, where Lord Porter at pp 612 and 614 referred to an action "impleading the two governments or affecting their rights" and to the foreign governments being "implicated or their rights invaded", while Lord Radcliffe in contrast at p 616 treated it as a suit which might affect a sovereign's interest in property under the head of proceedings which "amount in one way or another to a suit against the sovereign"; and see recently in Canada *Khadr v The Queen* 2014 FC 1001, para 35 per Mosley J.

16. The appellants submit that the immunity is wide enough to cover cases such as the present where it is integral to the claims made that foreign states or their officials must be proved to have acted contrary to their own laws, before any claim against the United Kingdom authorities and individuals sued can get off the ground. The respondents submit the contrary, on the basis that nothing in the present proceedings can or would involve any form of judgment against, or in any way affect any legal interests of, the relevant foreign states or their officials.

17. Some uncertainty exists about the appropriate classification of the undoubted immunity which exists in relation to proceedings directed against state officials for acts done in their official capacity, in circumstances where the state itself would if sued have had state immunity. That immunity is firmly established: see *Propend Finance Pty v Sing* (1997) 111 ILR 611 and *Jones v Saudi Arabia*, cited above. But the two leading speeches in *Jones v Saudi Arabia*, with both of which all other members of the House expressed their agreement, explain it on differing bases. Lord Bingham in para 31 said:

> "It is, however, clear that a civil action against individual torturers based on acts of official torture does indirectly implead the state since their acts are attributable to it. Were these claims against the individual defendants to proceed and be upheld, the interests of the Kingdom would be obviously affected, even though it is not a named party."

In contrast, Lord Hoffmann at para 69 said that:

> "… 'state' in section 1(1) of the [State Immunity Act] and 'government', which the term 'state' is said by section 14(1)(b) to include, must be construed to include any individual representative of the state acting in that capacity, as it is by article 2(1)(b)(iv) of the Immunity Convention. The official acting in that capacity is entitled to the same immunity as the state itself."

It is unnecessary to consider which of these two formulations may be preferable, although Lord Hoffmann's should not be misunderstood as suggesting that a state official possesses his own personal immunity which he can waive. His immunity depends upon the state's, and can only be waived by the state. The immunity in respect of acts done in the course of their office extends to state officials *ratione materiae* even after they have left office (as well as to heads of state, who enjoy an additional immunity *ratione personae* while in office): see eg *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, 202G-H, 269F and 281C-G, per Lords Browne-Wilkinson, Millett and Phillips, citing *Hatch v Baez* (1876) 7 Hun 596.

18. Whatever classification be adopted, the property cases are instructive as to the boundaries of state immunity. They originate in the context of admiralty proceedings *in rem*: see eg *The Parlement Belge*, an action *in rem* against a mail ship belonging to the King of the Belgians in his public capacity, and *The Cristina* itself. In the light of modern understanding of the nature of an action *in rem*, it might be argued that such an action involves from the outset direct impleading: see *Republic of India v India Steamship Co Ltd (The Indian Grace)* [1997] UKHL 40; [1998] AC 878. Be that as it may be, the House in *The Cristina* approved a number of previous authorities indicating

that a state might be impleaded by proceedings against a vessel of which it had de facto possession, or "such rights of direction and control, without possession, as arise from requisitioning" (referring to *The Broadmayne* [1916] P 64), when those proceedings would, "if successful … result in an order of the court affecting that possession or those other rights": see *United States of America v Dollfus Mieg et Cie SA* [1952] AC 582, 617, per Lord Radcliffe.

19. *United States of America v Dollfus Mieg et Cie SA* was concerned with property, but in a very different context. The Bank of England held for safe custody 64 numbered bars of gold which had in 1944 been forcibly and wrongfully removed by German troops from a French bank holding them on behalf of Dollfus Mieg. The bars were recovered from Germany by Allied forces and lodged with the Bank of England, to be held to the order of a Tripartite Commission for the Restitution of Monetary Gold established by the American, British and French governments to deal on their behalf with gold taken from Germany. The Commission was "no more than three sovereigns joined in a particular relation": p 615, per Lord Radcliffe. The Bank of England by mistake sold 13 of the bars, retaining 51. Dollfus Mieg claimed delivery up alternatively damages against the Bank of England. The action was stayed at the instance of the United States and France as regards the 51 bars, on the basis that the claim indirectly impleaded the three states as bailors in respect of their immediate possessory rights as against the Bank. It was allowed to continue as regards the 13 bars, on the basis that the Bank had terminated any bailment by their sale.

20. Lord Radcliffe faced squarely the problem that title was what was in issue, saying:

> "But certainly a special difficulty begins when he [the sovereign] is not actually named but the suit is one which may result in a judgment or order that will affect his interest in some piece of property. Even to say that much begs one important question, for it assumes that he has a valid interest in that property: whereas a stay of proceedings on the ground of immunity has normally to be granted or refused at a stage in the action when interests are claimed but not established, and indeed to require him to establish his interest before the court (which may involve the court's denial of his claim) is to do the very thing which the general principle requires that our courts should not do."

21. Lord Radcliffe resolved the problem by reference to the three states' possessory rights as bailors of the goods to the Bank of England, concluding at pp 618-619 that:

> "The property of a sovereign state, which is an abstraction, must be in the physical possession of some actual person, and I do not

> see any distinction of substance in a matter of this kind between the possession of a servant of the state and the possession of its bailee when the bailment is of such a nature as that of the bank in this case. Indeed, I think that the Commission's 'possession and control' of the gold bars in the hands of the bank amounted to a form of property more substantial than that which HM Government acquired by requisitioning the *Broadmayne*. …
>
> The suit began as a claim in detinue. That means that the court was going to be asked or at any rate could be asked to make an order upon the bank to hand over the bars to the plaintiffs. Such an order would unquestionably interfere with the Commission's possession of them and compel the Commission, if they wished to recover possession, to come to court and try to get them back from the plaintiffs. I cannot feel any doubt that such a suit offends against the principle of sovereign immunity."

In short, the Commission would no longer be entitled to look to the Bank as bailees, but would have as owners to establish title by proceedings against Dollfus Mieg.

22. Addressing an argument that Dollfus Mieg could avoid the problem by limiting itself to a claim in conversion for damages, Lord Radcliffe found the point one of considerable difficulty, but in the end concluded that a claim on this basis was also precluded by state immunity:

> "… when I consider the real nature of a claim for damages for conversion I come to the same conclusion. Subject to the payment of costs and special damages (if there are any) an action for damages for conversion can always be stayed if the defendant offers to hand over the property in dispute. In that sense a suit for damages for conversion is an attempt to use the court's process to interfere with the existing possession of the chattel the title to which is in dispute. If the defendant continues to resist and damages are awarded against him he may keep the chattel and pay the damages; but if he does he becomes entitled, if he is a bailee, to set up the plaintiffs' title to the goods, which he has thus paid for, against his own bailor. In other words the court's judgment in the personal action against him would materially affect the existing right of his bailor in respect of the possession and disposal of the chattel. The result of a judgment in damages has thus some analogy to a sale by the court of a chattel which is in the possession or under the requisition of a foreign sovereign: if the sale cannot be ordered in the one case because to order it would be to use the court's

> process against the sovereign, then the judgment cannot be rendered in the other."

Again, the Commission would no longer be able to look to the Bank of England as simple bailees, but would face the issue that the Bank now stood, at least in theory, in the same position as Dollfus Mieg.

23. It seems clear that Lord Radcliffe viewed the facts in *Dollfus Mieg* as close to the outer parameters of state immunity. Ultimately, the decision focused on the existence of a bailment, and on the second order consequences for the three States' and the Bank of England's legal positions as bailors and bailee if Dollfus Mieg's claim could be pursued and was successful. Five years later the House confirmed in *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 that a similar position applied where the issue was title to a chose in action, consisting of monies transferred without authority from an account of the Nizam and his government at the Westminster Bank Ltd to an account opened by that bank in the name of Mr Rahimtoola, the High Commissioner for Pakistan, in his capacity (as the House held) as agent for the state of Pakistan. The Nizam's suit was barred by state immunity. Viscount Simonds put the matter as follows at p 395:

> "A suit by a third party, the Nizam, is calculated and intended to interfere with the title of Rahimtoola and his principals, the Government of Pakistan, and with their possession or control of their property. It can only be maintained if the Government of Pakistan take a course which their sovereign dignity entitles them to reject and descend into the arena."

The appellants argue on the present appeals that state immunity was recognised as existing in *Rahimtoola*, although the State of Pakistan would not have been bound by a judgment in proceedings involving a "third party". But that was not how Viscount Simonds saw the matter - unsurprisingly since Mr Rahimtoola was acting in his official capacity and proceedings against him therefore involved, on their face, state property.

24. The special treatment in section 6(4) of the State Immunity Act 1978 of claims against third parties in respect of property cases also suggests that such cases represent a particular head of immunity, based on a state's possession or control of or claim to some (legal) interest in the property in question. However, the appellants rely upon the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) as being based on a broader conception of "interests", which, they submit, should inform the domestic understanding of indirect impleading. Articles 5 and 6 provide:

> "Article 5 State immunity

> A state enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another state subject to the provisions of the present Convention.
>
> Article 6 Modalities for giving effect to state immunity
>
> 1. A state shall give effect to state immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another state and to that end shall ensure that its courts determine on their own initiative that the immunity of that other state under article 5 is respected.
>
> A proceeding before a court of a state shall be considered to have been instituted against another state if that other state:
>
> a. is named as a party to that proceeding; or
>
> b. is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other state."

By article 2(1)(b), "State" is defined in broad terms, as meaning: (i) the State and its various organs of government; (ii) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity; (iii) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State; and (iv) representatives of the State acting in that capacity.

25. The appellants rely on the words "interests or activities" in article 6(2)(b) which, they submit, indicate that state immunity should be understood as extending beyond claims affecting property or other rights. The Convention is not yet in force, lacking a sufficient number of ratifications, including any from the United Kingdom. But in *Jones v Saudi Arabia*, at para 26, Lord Bingham referred to the Convention as being, "[d]espite its embryonic status, … the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases", going on to say that "the absence of a torture or jus cogens exception [in it was] wholly inimical to the claimants' contention". This was a statement made expressly about the "limits" of state immunity in the context of an issue whether the legal liability of a state official for torture fell outside the scope of such immunity. That was a fundamental question which the Convention, however embryonic, could be expected to cover. To

attach equivalent relevance to the use in a Convention with no binding international status of the ambiguous terminology of article 6(2)(b) is to take Lord Bingham's words out of context. The appellants' reliance on the further passage in Lord Bingham's speech quoted at para 17 above, with its adoption of the word "interests" is open to the same objection. The appellants note that the International Court of Justice has referred to the "adoption" of the Convention (see eg *Jurisdictional Immunities*, paras 77 and 89). Again, this was in the context of the issue, very different from the present, whether state immunity was subject to any exception in the case of violations of human rights, the law of armed conflict or *jus cogens*.

26. The drafting history locates article 6 firmly in the context of the case law concerning the arrest of vessels, such as *The Parlement Belge*, and property in which states claim an interest, such as *Dollfus Mieg*: see eg the Report of the International Law Commission (Yearbook 1991, Vol II, (2), pp 23-25). The Report also explains the focus of article 6 as avoiding the exercise of State jurisdiction in a way which would put any foreign sovereign in the position of having to choose between being deprived of property or otherwise submitting to the jurisdiction; and it explains the words "to affect" as having been introduced to replace the prior draft wording "to bear the consequences of a determination by the court which may affect", in order to avoid "unduly broad interpretations" of article 6(2)(b). Even so, concerns were expressed at the drafting stage by both Australia and the United States about the potential width of article 6(2)(b): see the Report of the Secretary General of the United Nations A/47/326 of 4 August 1992. But academic commentators have concluded that any uncertainty in its scope should be addressed by recognising that "'interests' should be limited to a claim for which there is some legal foundation and not merely to some political or moral concern of the State in the proceedings": Fox and Webb, *The Law of State Immunity*, 3rd ed (2015 revision), p 307; and O'Keefe, Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property* (2013), pp 110-111, indicating that some specifically legal effect should be required as distinct from a social, economic or political effect.

27. Reliance was also placed by the appellants on two decisions of the International Court of Justice, the first the *Case of The Monetary Gold removed from Rome in 1943* (judgment of 15 June 1954) ICJ Reports 1954, P19 and the second the *Case concerning East Timor (Portugal v Australia)* (judgment of 30 June 1995) ICJ Reports 1995, P90. In *Monetary Gold* an arbitrator had held that certain gold removed from Rome by the Germans had belonged to Albania, but France, the United Kingdom and the United States agreed that it would be delivered up to the United Kingdom in partial settlement of the International Court's judgment of 15 December 1949 against Albania in the *Corfu Channel* case [1949] ICJ Rep, p 244, unless either Albania or Italy applied to establish a claim. Albania did not so apply. Italy did, but objected to the court's jurisdiction in the absence of Albania. The court held that, since Italy's claim would involve determining the legal position as between Albania and Italy, it could not adjudicate without Albania's consent. It said, inter alia, that "Albania's legal interests would not only be affected by a decision, but would form the subject-matter of the decision" (p

32). Addressing an argument that, as a third party, Albania would not under the court's rules be bound, the court responded:

> "This rule, however, rests on the assumption that the court is at least able to render a binding decision. Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third state, the court cannot, without the consent of that third state, give a decision on that issue binding upon any state, either the third state, or any of the parties before it."

The case is distinct from the present. The International Court was, above all and as in the domestic case of *Dollfus Mieg*, being asked to determine the immediate destination of specific property. In the courts below, Leggatt J at para 78 distinguished *East Timor* and the Court of Appeal at para 42 distinguished *Monetary Gold* as cases about international jurisdiction, required in the case of the International Court to be based upon consent, in contrast with which domestic courts exercise compulsory jurisdiction over those within their reach. That is correct as far as it goes, but states' domestic jurisdiction also depends on consent in contexts where state immunity otherwise exists. The situation is therefore nuanced. Nevertheless, *Monetary Gold* is not about state immunity, and does not on its facts assist on the issue now before the court, even by way of analogy.

28. The same applies to the *East Timor* case. By United Nations Resolution 1514 of 15 December 1960, East Timor was under Portuguese administration as a non-self-governing territory. Following internal disturbances in 1975, the Portuguese authorities withdrew to an island, and the armed forces of Indonesia intervened, after which the Portuguese withdrew entirely. In 1978 Australia recognised the fact that East Timor was part of Indonesia "but not the means by which this was brought about", and in 1989 Australia negotiated a Treaty with Indonesia, to create a "Zone of Cooperation" in "an area between the Indonesian Province of East Timor and Northern Australia". Portugal claimed that, in entering into this Treaty, Australia had acted unlawfully and in violation of the obligation to respect the status both of Portugal as the administering power and of East Timor as an area under such administration. The court accepted the *erga omnes* character of this obligation, but declined jurisdiction to rule on the lawfulness of Australia's conduct, when any judgment "would imply an evaluation of the lawfulness of the conduct of another State [viz Indonesia] which is not a party to the case" (p 102). It stressed that, as in *Monetary Gold*, "Indonesia's rights and obligations would … constitute the very subject-matter of such a judgment made in the absence of that party's consent", contrary to the well-established principle that the Court can only exercise jurisdiction over a state with its consent. The subject matter of any judgment would have been, in essence, whether Portugal or Indonesia had the right to administer, and so enter into treaties relating to, East Timor, an issue about territorial title.

29. The present appeals involve no issues of proprietary or possessory title. All that can be said is that establishing the appellants' liability in tort would involve establishing that various foreign states through their officials were the prime actors in respect of the alleged torts. But, unlike the position in *Dollfus Mieg*, that would have no second order legal consequences for the relationship between the respondents and the foreign states in question or their officials. None of the above domestic and international cases carries the concept of "interests" so far as to cover any reputational or like disadvantage that could result to foreign states or their officials from findings as between the appellants and respondents. On the contrary, the pains which the House of Lords took in *Dollfus Mieg* and *Rahimtoola* to identify a potential legal effect of the litigation on the relevant state rights point against any broader conception of interest.

30. Some consequences of the appellants' case are also worthy of note. The present proceedings in which they are sued as ancillary parties would be incapable of being maintained in this jurisdiction against them or against the states (Malaysia, Thailand, Libya and the United States) alleged to be primarily responsible for the physical conduct complained of by the respondents. Each such other state would, on conventional principles governing state immunity, be capable of being pursued in its own courts in respect of the particular conduct complained of in its case. But the claims could also not be pursued against the appellants in the courts of any of such other states, since the appellants would there enjoy state immunity against any direct impleading. The appellants' case on state immunity in this jurisdiction would preclude suit against them anywhere.

31. For the reasons given, I consider that the issues now before the Supreme Court do not attract state immunity, because the legal position of the foreign states, the conduct of whose officials is alleged to have been tortious in the places where such conduct occurred, will not be affected in any legal sense by proceedings to which they are not party. The decisions reached by the Court of Appeal in *Belhaj* and by Leggatt J in *Rahmatullah* were correct and the appeals should be dismissed on the issue of state immunity.

V Foreign act of state

32. The starting point of the appellants' case is that adjudication of the issues now before the court in favour of the claimants would necessarily involve a finding by the English courts that foreign states had acted illegally under the laws of the places where the conduct complained of occurred. With regard to Mr Belhaj's and Mrs Boudchar's alleged detention and mistreatment, that would mean in Kuala Lumpur by Malaysian officials, in Bangkok by Thai officials as well as United States officials, in the airplane by United States officials and in Libya by Libyan and United States officials. With regard to Mr Rahmatullah's detention and alleged mistreatment, that would mean by

United States officials in Iraq and Afghanistan. So much can be accepted as the premise to what follows.

33. In the opening words of his introduction to the chapter entitled The Foreign Act of State in his book Foreign Affairs in English Courts (1986), Dr Francis Mann wrote that:

> "Public policy dominates one of the most difficult and most perplexing topics which, in the field of foreign affairs, may face the municipal judge in England: the doctrine of the foreign act of State displays in every respect such uncertainty and confusion and rests on so slippery a basis that its application becomes a matter of speculation."

In *Yukos v Rosneft* the Court of Appeal suggested (para 115) that, in view of the limitations on foreign act of state recognised in the case law:

> "The important thing is to recognise that increasingly in the modern world the doctrine is being defined, like a silhouette, by its limitations, rather than to regard it as occupying the whole ground save to the extent that an exception can be imposed."

Leggatt J observed (para 134) that, when a rule is said to be defined by its absence, there is reason to wonder whether there is in fact such a rule. That aphorism goes too far. As Dr Francis Mann has suggested, quoting Cardozo J (Mann, *Conflict of Laws and Public Law* [1971] 1 Recueil des Cours 107, pp 148-149, 151-156 and Foreign Affairs in English Courts (1986) p 164), what is required is to approach the concept of foreign act of state at a more particular level of enquiry, by enunciating principles - rather than maxims which, "starting as devices to liberate thought, … often end by enslaving it". Or, to adopt a phrase from Professor Campbell McLachlan's *Foreign Relations Law* (CUP, 2014), para 12.129, what is required is a "much more fine-grained approach - disaggregating the general category in order to achieve the 'specialization of the principle' in its application to particular classes of case".

34. Happily, there is a very substantial measure of common ground within the Supreme Court about the broad framework or structure of the relevant principles. Addressing briefly at this point such differences as there are between Lord Sumption and myself, Lord Sumption in para 227 distinguishes between (i) cases concerned with the applicability or examinability of foreign municipal legislation within a state's own territory (which he calls municipal law act of state) and (ii) cases concerning the transactions of foreign states (which he calls international law act of state). This distinction corresponds generally with the distinction which I have identified in para

11(iii) above between the first type of foreign act of state (which I consider is better viewed as a rule of private international law, a view with which Lord Sumption expresses sympathy in the first four sentences of his para 229) and the third type of foreign act of state (which I describe as a rule of non-justiciability or judicial abstention). What Lord Sumption does in para 228 is enlarge the first of his two categories, to embrace the second potential type of foreign act of state identified in para 11(iii) above), that is executive acts by a foreign state within its own territory. Apart from differences in the terminology we prefer, the differences between us lie in the ambit assigned to the second and third type of foreign act of state. Lord Sumption includes within the second acts against the person as well as property, and he gives the third type of foreign act of state (non-justiciability or judicial abstention, or in his terminology international law act of state) a wider scope than I do, but then cuts that back by a domestic public policy qualification drawing inter alia on the international law concept of jus cogens.

VI Three types of foreign act of state

35. Three types of foreign act of state are in my opinion identifiable under current English authority. First, there is a well-established rule of private international law, according to which a foreign state's legislation will be recognised and normally accepted as valid, in so far as it affects property, whether movable or immovable, situated within that state when the legislation takes effect: *Dicey, Morris and Collins, The Conflict of Laws,* 15th ed (2012), rule 137; and see *Carr v Fracis Times & Co* [1902] AC 176 (seizure of ammunition by British officers in Muscat under the authority of a proclamation of the absolute ruler, the Sultan of Muscat, whose word was law), *Luther v Sagor* [1921] 23 KB 532 (seizure by decree of Russian revolutionaries later recognised as the government), *Princess Paley Olga v Weisz* [1929] 1 KB 718 (seizure by similar decrees) and *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368 (compulsory purchase of shares in Spain).

36. Movable and immovable property is thus subject to a territorial principle. So too is domestic trade mark protection based on a reputation acquired domestically, which cannot therefore be affected by foreign legislation: *Lecouturier v Rey* [1910] AC 262, cited by Warrington LJ in *Luther v Sagor*, pp 548-549. Under familiar conflict of laws principles, different connecting factors govern the recognition of foreign state legislation in other spheres. For example, foreign legislation affecting contractual rights will be recognised if enacted by the state whose law governs the contract: *Dicey, Morris and Collins,* op cit, rule 227(1); and see eg *In re Helbert Wagg & Co Ltd's Claim* [1956] Ch 323 and *Adams v National Bank of Greece and Athens* [1961] AC 255. And, if one moves away from state legislation to adjudication by state courts, yet further connecting factors govern the recognition of foreign judgments. Leaving aside treaty arrangements and the European regime of the Brussels Regulation and Lugano Convention, the recognition of foreign judgments depends upon the foreign court having had jurisdiction

in the limited international sense recognised by English courts and examined in *Dicey, Morris & Collins*, op cit, rules 43 to 47.

37. However recognition will, exceptionally, be refused, when recognition would conflict with a fundamental principle of domestic public policy. The classic authorities in respect of legislation affecting property or contracts are *Oppenheimer v Cattermole* [1976] AC 249 (non-recognition of Nazi laws discriminating against Jews) and *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19; [2002] 2 AC 883 (non-recognition of an Iraqi law confiscating the Kuwait Airways fleet, which was in Iraq, and giving it to Iraqi Airways in undeniable breach of Security Council Resolutions). Similarly, recognition may be denied to foreign judgments where this would be contrary to public policy: *Dicey, Morris & Collins*, rule 51; see also *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804 ("*Altimo"*) and *Yukos Capital Sarl v OJSC Rosneft Oil Co* (No 2) [2014] QB 458.

38. Second, it has been held that a rule exists whereby an English court will not question a foreign governmental act in respect of property situated within the jurisdiction of the foreign government in question. The Court of Appeal in *Princess Paley Olga* upheld the judgment against the claimant Princess on this (its third) ground, as well as two others in the case, stating that:

> "This court will not inquire into the legality of acts done by a foreign Government against its own subjects in respect of property situate in its own territory" (per Russell LJ at p 736)

See also per Scrutton LJ at pp 723-724 and Sankey LJ at pp 726-730. Similar reasoning, derived from United States authority including *Oetjen v Central Leather Co* (1918) 246 US 297 (para 51 below), had appeared in *AOAM v James Sagor & Co* [1920] 3 KB 532, in particular in the judgment of Warrington LJ at p 549. The issue there was however whether to recognise a confiscatory decree, which was treated by the other members of the court simply as Russian legislation. Other direct authority on this type of foreign act of state is limited, though there are some general dicta wide enough to embrace it as well as the third type of foreign act of state: see eg Lord Sumner's statement in *Johnstone v Pedlar* [1921] 2 AC 262, 290 that

> "Municipal Courts do not take it upon themselves to review of the dealings of State with State or of Sovereign with Sovereign. They do not control the acts of a foreign state done within its own territory, in the execution of sovereign powers, so as to criticise their legality or to require their justification";

See also Lord Wilberforce's dicta in *Buttes Gas,* to which reference is made in para 59 below. The existence of this second type of act of state has not in fact been challenged on this appeal. However, assuming (as I am prepared for present purposes to do without deciding) that it exists, it will be necessary to examine more closely its scope and rationale. It may be regarded, like the first type of act of state, as a rule of private international law - though this can hardly be in a literal conflicts of "laws" sense since the effect of the relevant act is determined not by law, but regardless of law. Perram J called it in *Habib v Commonwealth* [2010] FCAFC 12; (2010) 265 ALR 50 at paras 38 and 43 "a super choice of law rule". In these circumstances, it can, so far as it exists, just as well be understood as a special rule of abstention: witness Scrutton LJ's reference to an "act of state into the validity of which this Court would not enquire" in *Princess Paley Olga v Weisz* [1929] 1 KB 718, 723-724.

39. In *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA* (*The "Playa Larga" and "Marble Islands"*) [1983] 2 Lloyd's Rep 171, the Court of Appeal was concerned with unlawful conduct involving theft by Cuban sellers of one cargo of sugar, property in which had already passed to the buyers, and non-delivery of a second combined with trickery whereby the intended buyers were nonetheless induced to pay its price. The first cargo was on a vessel which was discharging at its Chilean discharge port, when the vessel was withdrawn by the sellers. The second cargo was on the high seas *en route* to Chile when withdrawn. The Court rejected any defence of foreign act of state for a series of reasons, primarily because there was no such plea and no proof that the acts were acts of the Chilean government, but secondarily also because, if they were, there "seems no compelling reason for judicial restraint or abstention" in a case "where it is clear that the acts relied on were carried out outside the sovereign's own territory". Whether that reasoning was correct in respect of the second type of foreign act of state arises for consideration on these appeals. Whether any like doctrine extends to sovereign acts in respect of persons, rather than property, also requires determination.

40. Third, it is established at the highest level that there are issues which domestic courts should treat as non-justiciable or should abstain from addressing. The Court of Appeal in *Yukos v Rosneft* understood this principle as "not so much a *separate* principle as a more *general and fundamental* principle", which had "to a large extent subsumed [the first and second types of act of state] as the paradigm restatement of that principle" (paras 48 and 66). That, in my view, plays into the problem identified by Dr Mann and Professor McLachlan (see para 33 above). It blurs the distinctions between different types of foreign act of state to which I have referred in para 11 above. It impedes the important task of identifying the scope and characteristics of each type of foreign act of state.

41. The Court of Appeal in *Yukos v Rosneft* suggested at para 65 that the third type might be allied with a yet further doctrine, precluding United Kingdom courts from investigating any acts of a foreign state when and if the Foreign Office communicated the Government's view that such investigation would "embarrass" the United Kingdom

in its international relations. I see little attraction in and no basis for giving the Government so blanket a power over court proceedings, although I accept and recognise that the consequences for foreign relations can well be an element feeding into the question of justiciability. I consider in paras 100 to 102 below the reliance placed by the appellants on adverse effects of these proceedings on international relations.

42. *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888 is the leading English authority on the third type. It was recently considered by this Court in dicta in *Shergill v Khaira* [2014] UKSC 33; [2015] AC 359. In *Buttes Gas*, the claimant Buttes Gas sued Dr Hammer and Occidental Oil Company for slander, eliciting a counterclaim for an alleged conspiracy between Buttes Gas, the Ruler of Sharjah and others to cheat and defraud, and to procure the British government and others to act unlawfully to the detriment of, Dr Hammer and Occidental Oil. The counterclaim related to oil exploration rights off the island of Abu Musa in the Persian Gulf, and raised a whole series of boundary and other international and inter-state law issues, set out by Lord Wilberforce on p 937 of the report. The claimant applied to strike out the counterclaim. Lord Wilberforce, giving the sole reasoned speech concluded at p 938A-C:

> "It would not be difficult to elaborate on these considerations, or to perceive other important inter-state issues and/or issues of international law which would face the court. They have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which it can be said not to have been drawn to the attention of the court by the executive) there are - to follow the Fifth Circuit Court of Appeals - no judicial or manageable standards by which to judge these issues, or to adopt another phrase (from a passage not quoted), the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were 'unlawful' under international law. I would just add, in answer to one of the respondents' arguments, that it is not to be assumed that these matters have now passed into history, so that they now can be examined with safe detachment."

Having concluded that the counterclaim was non-justiciable, the House noted the injustice which could follow if the claim alone proceeded. In the event, the House was able, without more, to take advantage of the claimant's offer to submit to a stay of the claim as a term of dismissal of the counterclaim.

43. In *Shergill v Khaira* [2015] AC 359 this Court referred to the third type of foreign act of state under the head of non-justiciability which it said (para 41) "refers to a case where an issue is said to be inherently unsuitable for judicial determination by reason only of its subject matter" (even though it would otherwise be within the English courts' jurisdiction under, for example, the Brussels Regulation and Lugano Convention or the rules of court). The court went on (paras 41-43) to say that such cases "generally fall into one of two categories":

> (i) The first was where the issue was "beyond the constitutional competence assigned to the courts under our conception of the separation of powers", of which the "paradigm cases are the non-justiciability of certain transactions of foreign states and of proceedings in Parliament". The distinctive feature of such cases was that "once the forbidden area is identified, the court may not adjudicate on the matters within it, even if it is necessary to do so in order to decide some other issue which is itself unquestionably justiciable". *Buttes Gas* falls into this category.
>
> (ii) The second category was of cases not involving private legal rights or obligations or reviewable matters of public policy, and included "issues of international law which engage no private right of the claimant or reviewable question of public law". Such issues were not justiciable in the abstract, but "must nevertheless be resolved if their resolution is necessary in order to decide some other issue which is in itself justiciable". Examples of this second category, where no private right or reviewable question of public law was engaged, are *Nabob of the Carnatic v East India Co* (1793) 2 Ves Jun 56, where the Nabob was seeking to sue for an account due under an international treaty, and *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, where the House of Lords stated that it is "axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law" (p 499F-G per Lord Oliver of Aylmerton).

44. The appellants propose a different categorisation, pursuing a theme pointed up by Rix LJ in *Yukos v Rosneft (No 2)* and by the Court of Appeal in *Belhaj*. According to this categorisation, a domestic court will not adjudicate upon any sovereign or *jure imperii* act committed by a foreign state anywhere abroad. Analytically, this can be viewed either as expanding the scope of the second type of foreign act of state and treating the third type as a particular instance, or (following Rix LJ) as expanding the scope of the third type to "subsume" and treat as non-justiciable not merely special circumstances comparable with, even if not identical to, those involved in *Buttes Gas*, but any sovereign or *jure imperii* act committed by a foreign state anywhere outside the domestic jurisdiction invoked in the relevant proceedings. Whichever view is taken, there is a tension between the proposed categorisation, on the one hand, and Lord

Wilberforce's cautious references to the second and third types of foreign act of state in *Buttes Gas*, followed up by Rix LJ's emphasis in *Yukos v Rosneft (No 2)* on the limited, or "silhouette-like", nature of the doctrine, to which reference has already been made: para 33 above. The appellants' categorisation would lead to a dramatic expansion of the scope of foreign governmental act of state as a bar to domestic adjudication against defendants otherwise amenable to the English jurisdiction.

45. Whatever typology be adopted, the appellants submit that both cases now before the Supreme Court fall into one or both of the second and third types of foreign act of state, properly understood, and that, in so far as they fall within the third type, they belong within the first sub-category. The second type, they submit, should be understood as covering acts relating to the person as well as property. On this basis, the second type would cover, at least, the governmental acts of Malaysian, Thai and Libyan officials within their own jurisdictions. The acts of United States officials on United States aircraft in *Belhaj* or in Iraq where the United States was an occupying power or Afghanistan where it was present by consent should, the appellants submit, likewise be regarded as occurring within United States jurisdiction. But, in any event, they submit that the second type should not be limited territorially, any more than the third. As to the third type, the issues before the Court concern alleged or actual detention and interrogation allegedly agreed between, and involving transfers of the relevant individuals between, states in the context of arrangements made for political or security reasons. This category cannot, the appellants submit, be limited territorially.

VII Analysis of the case law

(i) Carr v Fracis Times & Co

46. *Carr v Fracis Times & Co* falls squarely within the first type of foreign act of state. The seizure of ammunition was lawful because the Sultan of Muscat was an absolute ruler whose word and proclamation were law in that state. The only possible hint of the second type of act of state appears in a dictum near the end of the Earl of Halsbury LC's speech, saying that the lawfulness of what happened

> "rests, and must rest, upon the authority of the sovereign of Muscat; and it appears to me that any other decision would be open to very serious questions of policy if, in every case where the lord of a country has declared what the law of his own country is, it were open to an English tribunal to enter into the question and to determine, as against him, what was the law of his country."

The judgment can, on the other hand, also be read as positively emphasising the significance of establishing a legal base for an act such as expropriation. The same may be said of the earlier authority of *Dobree v Napier* (1836) 2 Bing (NC) 781, where (it appears from the fourth declaration) a vessel supplying the revolutionary Don Miguel

of Portugal was seized in the Portuguese port of St Martinho by Sir Charles Napier as admiral in the service of the Queen of Portugal lawfully under Portuguese law (p 796). (Today, the action against Sir Charles Napier would also be expected to fail on grounds of sovereign immunity, wherever the seizure took place. The fact that the seizure occurred in the context of a civil war might also bring into play the third type of act of state.)

(ii) The United States authorities

47. In relation to the first and second types of foreign act of state, the Court of Appeal in *Luther v Sagor* and *Princess Paley Olga* drew heavily on United States authority, particularly *Underhill v Hernandez* 168 US 250 (1896) and *Oetjen v Central Leather Co* 246 US 297 (1918). As with *Luther v Sagor* and *Princess Paley Olga*, these were cases concerning the acts of revolutionaries who were ultimately successful and became recognised governments. It is, as Dr Mann wrote in *The Sacrosanctity of the Foreign Act of State* in *Studies in International Law* (1973), referring to *Williams v Bruffy* 96 US 176 (1877) and other authority, "well established that recognition has retroactive effect". But one difference between the issues in the two United States and the two English cases appears to have passed unmarked in the latter. In both the United States cases, the issue considered by the court was not whether state conduct fell to be regarded as lawful or valid though unlawful under ordinary domestic law. It was whether state conduct should be regarded as unlawful because it was contrary to international law governing armed conflict. Admittedly, in *Underhill v Hernandez* the plaintiff's case appears to have been that the law of nations was under the Constitution of Venezuela to be enforced in cases of civil war and the defendant was ready to assume that international law was "part of the law of the land where any question arises which is properly the subject of its jurisdiction" (plaintiff's brief pp 27-28 and defendant's brief p 29). But reliance in a domestic court on the law of war to establish the wrongfulness of a revolutionary governmental act is self-evidently more ambitious than reliance on unlawfulness under ordinary domestic law.

48. A precursor of *Underhill v Hernandez* is *Hatch v Baez* (1876) 7 Hun 596, where the claimant sought to sue a former president of the Dominican Republic, now resident in New York, for injuries allegedly suffered as a result of acts done by the former president as president. Gilbert J's judgment contains a sentence in terms echoed in later case law:

> "We think that, by the universal comity of nations and the established rules of international law, the courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its own territory."

But, for the rest and on its facts, *Hatch v Baez* can be seen as a clear case of sovereign immunity, enjoyed, and not so far as appears waived, by the Dominican Republic, as well as a case dating (like the *Duke of Brunswick's* case, which Gilbert J cited) from a time when the strands of state immunity and foreign act of state were not distinctly separated. Similarly, one would today expect the claim in *Underhill v Hernandez* to have been met by a plea of state immunity.

49. In *Underhill v Hernandez*, Underhill, a US citizen, had constructed a waterworks in Bolivar for the government which was eventually overthrown by revolutionary forces, one of whose generals was Hernandez. After Hernandez had captured Bolivar, Underhill sought to leave. Hernandez refused the request and confined Underhill to his house, in order to coerce Underhill into continuing to operate his waterworks and repair works for the benefit of the revolutionary forces. Underhill's claim for damages was dismissed. In *Underhill v Hernandez* Fuller CJ opened his judgment with another broad statement along the same lines as Gilbert J's (p 252):

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

Throughout much of the rest of his short judgment the focus was on the existence of civil war, and it is relevant to note that he went on (p 254):

> "The decisions cited on plaintiff's behalf are not in point. *Cases respecting arrests by military authority in the absence of the prevalence of war*; or the validity of contracts between individuals entered into in aid of insurrection; or the right of revolutionary bodies to vex the commerce of the world on its common highway without incurring the penalties denounced on piracy; and the like, *do not involve the questions presented here*." (italics added)

50. The words which I have italicised open the possibility that the ratio of *Underhill v Hernandez* may be limited to state detention in war-time situations. The recognition in that context by United States courts of what was effectively a right to detain would not necessarily have been a radical step, in view of international humanitarian legal considerations subsequently enshrined in the Geneva Conventions of 1949. For example, the Fourth Convention relative to the Protection of Civilian Persons in Time of War entitles civilians to leave the territory "unless their departure is contrary to the interests of the State" (article 35) and authorises the confinement to residence of a civilian if necessary for security reasons (articles 42 and 78). Hernandez's acts were, in

the light of his success, "the acts of the government of Venezuela" (p 254). True, this was a civil war, but article 3 of the Third Convention itself contemplates that the parties to a non-international armed conflict will endeavour to agree to bring its other provisions into force. It is, at the least, an open question what the attitude of the Supreme Court would have been to a case such as the present where there is no suggestion of any war, international or civil, to serve as the context for the detention or rendition.

51. In *Oetjen*, animal hides were seized and sold to satisfy a monetary assessment to support the revolution, and there was an issue of title between an assignee from the original owner and a person deriving his claim to title from the purchaser from the revolutionary forces. This was resolved by application of Fuller CJ's opening words, with the unsurprising conclusion that the assignee of the former owner failed in its claim.

52. Subsequent consideration of these and other similar cases by the United States Supreme Court in *Ricaud v American Metal Co Ltd* 246 US 304 and *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964) evidences a shift in their rationalisation. Like *Oetjen*, *Sabbatino* concerned competing claims to property (sugar) which had been disposed of in two inconsistent directions as a result of its revolutionary expropriation. The Court cited with approval (p 418) reasoning from *Ricaud* to the effect that act of state:

> "does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision."

Discussing the conceptual basis for this "rule of decision", the court went on (pp 421-422):

> "We do not believe that this doctrine is compelled either by the inherent nature of sovereign authority, as some of the earlier decisions seem to imply, see *Underhill*, supra; *American Banana*, supra; *Oetjen*, supra, at 303, or by some principle of international law. …
>
> That international law does not require application of the doctrine is evidenced by the practice of nations. Most of the countries rendering decisions on the subject fail to follow the rule rigidly …

> If international law does not prescribe use of the doctrine, neither does it forbid application of the rule even if it is claimed that the act of state in question violated international law."

A footnote to the second sentence recorded that a doctrine in similar terms had been articulated in England in *Luther v Sagor* and *Princess Paley Olga*, with which the US Supreme Court compared *Anglo-Iranian Oil Co v Jaffrate (The Rose Mary)* [1953] 1 WLR 246, [1953] Int'l L Rep 316 (Aden Sup.Ct) as endorsing an exception to the doctrine if the foreign act violated international law. The Supreme Court cannot have been informed of Upjohn J's disapproval of that general exception in *In re Helbert Wagg & Co Ltd's Claim* [1956] 1 Ch 323, 346-349. The footnote went on to observe that "Civil law countries, however, which apply the rule make exceptions for acts contrary to their sense of public order."

53. The Court explained its own view of act of state as follows (p 423):

> "The act of state doctrine does, however, have 'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."

54. Subsequent to *Sabbatino*, Congress passed the Hickenlooper amendment, providing that no United States court should in future decline, on the ground of the act of state doctrine, to give effect to the principles of international law, including the principles of compensation, except in any case where the President determined application of that doctrine to be required by the foreign policy interests of the United States. At least at this point, therefore, United States law departed significantly from any principle in English common law. Still more recently, the Supreme Court in *WS Kirkpatrick & Co Inc v Environmental Tectonics Corpn, International* (1990) 493 US 400 endorsed the basis of the doctrine explained in *Sabbatino* (p 404), underlining that it is "not some vague doctrine of abstention but a '*principle of decision*' binding on federal and state courts alike". It endorsed the statement in *Ricaud* that "the act within its own boundaries of one sovereign state … becomes … a rule of decision for the courts of this country" (p 406). However, it went on: "Act of state issues only arise when a court *must decide* - that is, when the outcome of the case turns upon the effect of official action by a foreign sovereign."

55. The issues in *Kirkpatrick* were held not to turn "upon the effect of official action by a foreign sovereign" (p 406). An unsuccessful under bidder sued the successful bidder for a Nigerian construction contract under United States anti-racketeering statutes, on the basis that the contract had been won by bribing officials of the Nigerian Government. Although it was clear that the bribery would have been illegal under Nigerian law, the court held that

> "Regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires."

56. The Supreme Court also addressed instructively the relationship between the considerations underlying the doctrine of foreign act of state and its application:

> "Petitioners insist, however, that the policies underlying our act of state cases - international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations - are implicated in the present case because, as the District Court found, a determination that Nigerian officials demanded and accepted a bribe 'would impugn or question the nobility of a foreign nation's motivations', and would 'result in embarrassment to the sovereign or constitute interference in the conduct of foreign policy of the United States. …
>
> These urgings are deceptively similar to what we said in *Sabbatino*, where we observed that sometimes, even though the validity of the act of a foreign sovereign within its own territory is called into question, the policies underlying the act of state doctrine may not justify its application. We suggested that a sort of balancing approach could be applied - the balance shifting against application of the doctrine, for example, if the government that committed the 'challenged act of state' is no longer in existence. 376 US, at 428. But what is appropriate in order to avoid unquestioning judicial acceptance of the acts of foreign sovereigns is not similarly appropriate for the quite opposite purpose of expanding judicial incapacities where such acts are not directly (or even indirectly) involved. It is one thing to suggest, as we have, that the policies underlying the act of state doctrine should be considered in deciding whether, despite the doctrine's technical availability, it should nonetheless not be invoked; it is something

> quite different to suggest that those underlying policies are a doctrine unto themselves, justifying expansion of the act of state doctrine (or, as the United States puts it, unspecified 'related principles of abstention') into new and uncharted fields."

This passage bears out an earlier observation by Lord Wilberforce in *Buttes Gas* (p 934C) that "United States' courts have moved towards a 'flexible' use of the doctrine [of act of state] on a case to case basis": see para 57 below.

(iii) Buttes Gas v Hammer

57. The reasoning and nuances of United States law have not been constant and are not necessarily transposable to English law. This was also expressly recognised by Lord Wilberforce in *Buttes Gas* at p 936F-G. However, he drew support from reasoning in the United States case law for his conclusion that there was "room for a principle, in suitable cases, of judicial restraint or abstention": p 934C, and see pp 936H-937A. After noting the statement in *Sabbatino* that "international law does not *require* application of the doctrine of 'act of state'", he went on (p 934):

> "Granted this, and granted also, as the respondents argue, that United States' courts have moved towards a 'flexible' use of the doctrine on a case to case basis, there is room for a principle, in suitable cases, of judicial restraint or abstention."

Lord Wilberforce then examined where this approach had led the United States courts in litigation on the very same situation as that before the House. He quoted in extenso from a letter written by the Legal Adviser to the US Department of State, discounting any suggestion that issues relating to disputed territorial jurisdiction should be analysed by reference to "the so-called Act of State doctrine which is traditionally limited to governmental action within the territory of the respective state", and arguing that judicial self-restraint "rather follows from the general notion that national courts should not assume the functions of arbiters of territorial conflicts between third powers even in the context of a dispute between private parties" (p 936B-C). In essence, this was the argument that Lord Wilberforce accepted. He summarised the approach he took in relation to the United States case law as follows (pp 936F-937A):

> "The constitutional position and the relationship between the executive and the judiciary in the United States is neither identical with our own nor in itself constant. Moreover, the passages which I have cited lay emphasis upon the 'foreign relations' aspect of the matter which appeared important to the United States at the time. These matters I have no wish to overlook or minimise. I appreciate

> also Mr Littman's argument that no indication has been given that Her Majesty's Government would be embarrassed by the court entering upon these issues. But, the ultimate question what issues are capable, and what are incapable, of judicial determination must be answered in closely similar terms in whatever country they arise, depending, as they must, upon an appreciation of the nature and limits of the judicial function. This has clearly received the consideration of the United States courts. When the judicial approach to an identical problem between the same parties has been spelt out with such articulation in a country, one not only so closely akin to ours in legal approach, the fabric of whose legal doctrine in this area is so closely interwoven with ours, but that to which all the parties before us belong, spelt out moreover in convincing language and reasoning, we should be unwise not to take the benefit of it."

This led on pp 937-938 to Lord Wilberforce's summary of the complex inter-state issues and to his conclusion, based on a principle of judicial abstention and non-justiciability, set out in para 42 above.

58. Lord Wilberforce's treatment earlier in his speech of foreign act of state in the more limited senses of the first and second types is instructive. Speaking of the category of cases exemplified by *Carr v Fracis Times & Co*, *Luther v Sagor* and *Princess Paley Olga*, he described them (p 931A-B) as:

> "cases which are concerned with the applicability of foreign municipal legislation within its own territory, and with the examinability of such legislation - often, but not invariably, arising in cases of confiscation of property."

He said that Mr Littman (counsel for Dr Hammer and Occidental) had given the House

> "a valuable analysis of such cases …, suggesting that these are cases within the area of the conflict of laws, concerned essentially with the choice of the proper law to be applied."

59. Without more, Lord Wilberforce then simply identified two suggested limitations, one that foreign legislation "can be called in question where it is seen to be contrary to international law or to public policy", the other that "foreign legislation is only recognised territorially - ie within the limits of the authority of the state concerned". He dismissed their relevance not by questioning the existence of the suggested limitations, but on the contrary on the basis, as to the first, that

> "It is one thing to assert that effect will not be given, to a foreign municipal law or executive act if it is contrary to public policy, or to international law (cf *In re Helbert Wagg & Co Ltd's Claim* [1956] Ch 323) and quite another to claim that the courts may examine the validity, under international law, or some doctrine of public policy, of an act or acts operating in the area of transactions between states."

and, as to the second, that

> "The second argument seems to me to be no more valid. To attack the decree of 1969/70 extending Sharjah's territorial waters, ie its territory, upon the ground that the decree is extra-territorial seems to me to be circular or at least question begging."

There is here, in the reference to an "executive act", a possible passing reference, though no more, to the second type of foreign act of state. Lord Wilberforce did not regard this as covering the circumstances before him, because he went on to make clear that he did "not regard the case against justiciability of the instant dispute as validated by the rule [ie the rule governing the second type of foreign act of state] itself" and that any conclusion in favour of non-justiciability would have to be "upon some wider principle": p 931F. A further reference to the first and/or second types of foreign act of state appears in Lord Wilberforce's reference at p 934B to *Sabbatino* as a case of "'act of state' in the normal meaning, viz, action taken by a foreign sovereign state within its own territory". In *Sabbatino*, the United States courts had declined to determine whether the Cuban expropriation decree complied with the requirements of Cuban law: 376 US 398 (1964); 416 FN 17.

60. What is clear, therefore, is that Lord Wilberforce's reliance on reasoning in the United States authorities of *Underhill v Hernandez*, *Oetjen* and *Sabbatino* - as well as on the judgments delivered in the United States in parallel litigation between *Buttes Gas* and *Occidental* - led on his analysis not to an expanded principle of the second type I have identified; rather, it led to a principle of self-restraint or abstention "in suitable cases" (p 934C), which he described as "inherent in the very nature of the judicial process" and which constitutes the third type of foreign act of state. Similarly, Lord Wilberforce treated the older English cases of *Blad v Bamfield* (1674) 3 Swans 603-607 (App) 607 and *Duke of Brunswick v King of Hanover* (1844) 6 Beav 1; (1848) 2 HL Cas 1 as precursors of these United States cases. Indeed, he referred (p 933C-D) to *Underhill v Hernandez* (933C-D) as following the *Duke of Brunswick's* case, which, although not mentioned expressly by Fuller CJ, had been referred to in the Circuit Court of Appeals and certainly finds echoes in Fuller CJ's language in *Underhill v Hernandez*.

61. *Blad v Bamfield* is sometimes treated, on the basis of the report of the first hearing of the case (p 603), as a claim by English traders, Bamfield and others, against Peter Blad, a Dane, for wrongful seizure of their goods in *Iceland* for allegedly fishing contrary to letters patent granted to the defendant by the King of Denmark, as ruler of Iceland. Blad sought an injunction to restrain the proceedings. Bamfield and others' claim was seen by the Privy Council at that point as a question of "private injury" which would depend upon Danish law, "for whatever was law in Denmark, would be law in England in this case" but "if the wrong were done without colour of authority, it was fit to be questioned" (p 604). On that basis, the claim was at Lord Nottingham LC's instance allowed to proceed, and the case stood over.

62. However, a different picture emerges from the report of the second hearing before Lord Nottingham a year later in chancery. It then became clear, first, that the claim "relates to a trespass done upon the high sea" (p 605), and second that

> "the very manner of the defence [to the injunction] offered by [Bamfield and others] had made it directly a case of state; for they insist upon the articles of peace to justify their commerce, which is of vast consequence to the public; for every misinterpretation of an article may be the unhappy occasion of a war; and if it had been known at Board that this would have been the main part of their case, doubtless the Council would not have suffered it to depend in Westminster Hall."

On that basis, Lord Nottingham decreed a permanent stay since it would be "monstrous and absurd" to

> "send it to a trial at law, where either the court must pretend to judge of the validity of the king's letters patent in Denmark, or of the exposition and meaning of the articles of peace; or that a common jury should try whether the English have a right to trade in Iceland, is monstrous and absurd."

The House in *Buttes Gas* understandably saw this reasoning as an early precursor of a concept of non-justiciability. The actual decision can also be seen as an example of the second category of case identified in *Shergill v Khaira* [2015] AC 359, paras 41-42, in so far as Bamfield was attempting to derive private rights from an unincorporated treaty (see para 43(ii) above), and perhaps also as an example of the second type of act of state, if and so far as Bamfield was attempting to challenge "the validity of the king's letters patent in Denmark", granted in favour of Blad "for the sole trade of Iceland".

63. In *Duke of Brunswick*, the King of Hanover was sued for sovereign acts in respect of which it is clear that he had sovereign immunity (once the submission was rejected that he was acting in his private capacity as an English subject). But, drawing directly on words used by Lord Cottenham LC, Lord Wilberforce saw the case also as recognising a general principle of restraint or immunity *ratione materiae*, to the effect that "the courts in England will not adjudicate" or "sit in judgment" upon "acts done abroad by virtue of sovereign authority" (p 932E-F). At p 932F-G, he identified this point in Lord Cottenham's further words:

> "It is true, the bill states that the instrument was contrary to the laws of Hanover and Brunswick, but, notwithstanding that it is so stated, still if it is a sovereign act, then, whether it be according to law or not according to law, we cannot inquire into it."

Lord Wilberforce thus derived from his examination of the *Duke of Brunswick's* case "support, no doubt by reference to the issue in dispute, for a principle of non-justiciability by the English courts of a certain class of sovereign acts" (p 933C). Lord Wilberforce viewed the relevant acts in that case as having been "performed within the territory of the sovereign concerned" (p 933B). But he did not suggest that this limited the principle of self-restraint, and the decision in *Buttes Gas* itself indicates that there can be no such absolute limitation. Lord Wilberforce's view as to where the acts were committed is in fact questionable. The plea was that the King of Hanover had, after succeeding HM William IV in 1837, taken possession of the Duke's personal property "in Brunswick and elsewhere" (p 5). Further, the instrument directly challenged by the claim, under which the King of Hanover claimed to be the lawful guardian of the Duke's personal property, was signed by HM William IV at St James's on 6 February 1833 and by the claimant's brother in Brunswick on 14 March 1833. The Lord Chancellor also observed (pp 19-21) that the challenge to that instrument was itself a challenge to "acts of persons claiming to have the right so to act by virtue of their sovereign authority". That referred to authority claimed under a decree of the Germanic Diet of Confederation, which was established by the Treaty of Vienna 1815 and sat in Frankfurt under Austrian presidency. The Diet had on 2 September 1830 purported to depose the Duke and declare that the throne of Brunswick had passed to his brother. As the Lord Chancellor said, "whether the constitution of Germany authorized it or not, is a question we have no power to interfere with, or to inquire into". The case can be seen on this basis as falling, like *Buttes Gas* itself, into the first category in *Shergill v Khaira*, ie as non-justiciable or requiring judicial abstention.

VIII Application of the first and second types of foreign act of state

64. The appellants can gain no assistance from the first type of act of state. That depends upon establishing the legality of what occurred in the relevant foreign state. They do however invoke the second type of foreign act of state, or the generalised

doctrine which they submit underlies this and the third type of foreign act of state. Leaving aside for the moment any issue as to whether the second type of act of state or any such generalised doctrine can cover acts against the person or acts committed outside the jurisdiction of the state committing them, it is convenient to deal at the outset with the respondents' submission that the respondents are not inviting the English court to adjudicate upon the validity of the conduct of the foreign states allegedly involved, but are only asking the court to find that such conduct occurred as a matter of fact. The respondents rely in this context on the United States authorities of *Kirkpatrick* and *Sharon v Time, Inc* 599 F Supp 538, 546 (SDNY 1984). But in my view validity in the *Kirkpatrick* sense encompasses legality. To that extent, I do not agree with one part of the reasoning of Perram J in The Federal Court of Australia in *Habib v Commonwealth of Australia* [2010] FCAFC 12; (2010) 265 ALR 50, at para 44. On these appeals the respondents' cases on the issues before the Supreme Court depend upon showing illegal conduct by the various States allegedly implicated as well as by the appellants as accomplices.

65. I turn therefore to consider the second type of foreign act of state. This has direct support at Court of Appeal level: para 38 above. But other support for it in English law is noticeably limited, and it is in my opinion unnecessary on this appeal for this Court to reach or endorse a conclusion that it exists in any form at all. Rule 137 of *Dicey, Morris and Collins* makes no reference to it, but, on the contrary, reads:

> "A governmental act affecting any private proprietary right in any movable or immovable thing will be recognised as valid and effective in England if the act was valid by the law of the country where the thing was situated (lex situs) at the moment when the act takes effect, and not otherwise."

The qualifications "if the act was valid by the law of the country" and the final phrase "and not otherwise" confine the scope of rule 137 to the first type of foreign act of state. They might, by themselves, be read as inconsistent with the existence of any second type of foreign act of state. But rule 3 in *Dicey, Morris and Collins* is in terms which it is possible to read widely enough to cover the second type of foreign act of state. It reads:

> "English courts have no jurisdiction to entertain an action:
>
> (1) For the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state; or
>
> (2) founded upon an act of state."

The commentary to rule 3 in *Dicey, Morris and Collins* approves the suggestion made by Lord Keith of Avonholm in *Government of India v Taylor* [1955] AC 491, 511, that enforcement of claims of the sort identified would amount to an extension of the sovereign power which imposed the taxes or law, or as an assertion of sovereign authority by one state within the territory of another. On that basis, sub-rule (2) may be seen inversely as a recognition of the sovereign authority of a foreign state within its own foreign jurisdiction. But a potential problem about such a reading is that it equates sovereignty with executive activity. In states subject to the rule of law, a state's sovereignty may be manifest through its legislative, executive or judicial branches acting within their respective spheres. Any excess of executive power will or may be expected to be corrected by the judicial arm. A rule of recognition which treats any executive act by the government of a foreign state as valid, irrespective of its legality under the law of the foreign state (and logically, it would seem, irrespective of whether the seizure was being challenged before the domestic courts of the state in question), could mean ignoring, rather than giving effect to, the way in which a state's sovereignty is expressed. The position is different in successful revolutionary or totalitarian situations, where the acts in question will in practice never be challenged. It is probably unsurprising that the cases relied upon as showing the second kind of foreign act of state are typically concerned with revolutionary situations or totalitarian states of this kind.

66. The commentary in *Dicey, Morris and Collins* goes on to indicate that sub-rule (2) covers both Crown act of state and foreign act of state. In relation to Crown act of state, *Dicey, Morris and Collins* makes clear that it contemplates acts against person as well as property. In relation to foreign act of state, the text is less specific. At para 5-047 Dicey picks up the citation from *Underhill v Hernandez* quoted in para 49 above and its deployment in *Luther v Sagor* and in *Princess Paley Olga* and then focuses on cases of property seizure:

> "Thus the executive seizure of property by a foreign sovereign within its territory will not give rise to an action in tort in England, either on the basis of this general principle, or because the act was lawful by the law of the place where it was committed. … Nor can a former owner challenge title to property acquired from a foreign government which had been confiscated within its own territory, again either on the basis of the general principle or on the basis of the rule that the validity of a confiscatory transfer of title depends on the lex situs."

In discussing these cases in *Foreign Affairs in English Courts* (1986) p 179, Dr Francis Mann also says - pertinently in my view - that

> "it is clear in English law that the doctrine of act of state is limited to action taken by a foreign state within its own territory *or*,

> *perhaps one should say, in respect of property situate in its territory*." (italics added for emphasis)

In its judgment in *Sabbatino*, the United States Supreme Court laid some stress on the fact that it was limiting itself to a property context. It said at p 428:

> "Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law."

The Court went on to underline what is special about property when addressing the suggested violation of customary international law at p 433:

> "Another serious consequence of the exception pressed by respondents would be to render uncertain titles in foreign commerce, with the possible consequence of altering the flow of international trade. If the attitude of the United States courts were unclear, one buying expropriated goods would not know if he could safely import them into this country. Even were takings known to be invalid, one would have difficulty determining after goods had changed hands several times whether the particular articles in question were the product of an ineffective state act."

As I have already observed, the United States authorities of *Hatch v Baez* and *Underhill v Hernandez*, which might on their facts be taken to be authorities extending the second type of foreign act of state to acts affecting persons as well as property, were both cases which could and would now be seen as involving a straightforward defence of state immunity.

67. Looking elsewhere abroad for assistance on this aspect, German law treats foreign confiscatory acts of state as falling outside normal conflicts principles and subject to special rules. Based on the territorial principle (*Territorialitätsprinzip*) such foreign confiscatory acts fall to be recognised, so long as the confiscated property was at the time of its confiscation within the jurisdiction of the confiscating state. This is subject only to considerations of *ordre public*, according to which the *Rechtsnorm* (legal norm or rule) of another state will not be applied, if it leads to a result inconsistent with fundamental principles of international law, as opposed to purely domestic

constitutional provisions, regarding confiscation. The following two cases illustrate the position.

68. First, in a judgment with wide significance delivered on 23 April 1991, the principles stated in the previous paragraph were held by the German Federal Constitutional Court (*Bundesverfassungsgericht* or "BVerfG") to be consistent with fundamental principles of the German Federal Constitution (*Grundgesetz*). The issue was the constitutionality of provisions in the Agreement dated 15 June 1990 and Treaty of 31 August 1990 (incorporating such Agreement) between the Federal Republic and the German Democratic Republic ("DDR") providing for the reunification of Germany. These provided that confiscations of property effected in the years 1945 to 1949 (the period of Russian occupation before the founding of the DDR) by virtue of the law governing such occupation or act of state were not to be reversed. The Constitutional Court at paras 132-133 explained the principles of what it described as German international confiscation law in the terms identified in para 67 above. It made clear that these principles applied, even if such a confiscation would (for lack of compensation or any other reason) be illegitimate in a domestic context. It regarded the *Territorialitätsprinzip* governing international confiscatory measures as internationally recognised, and, on this basis, it accepted that the confiscatory measures effected in the DDR without compensation both in the immediate post-war period by Russian occupying forces and later during the years 1945-1949 with a view to the establishment of a new socialist order were constitutional in terms of the Federal German Constitution.

69. Second, in an impressively reasoned judgment of 7 January 2005 (1 W 78/04), the Hanseatisches Oberlandesgericht Hamburg elaborated the conceptual basis of the same principles. The claim was by a Zimbabwean farmer, whose harvest had allegedly been illegally expropriated by state officials. He claimed elements of that harvest which he alleged had, as a result of a chain of sales, arrived in Hamburg harbour. The Hamburg Court of Appeal rejected the claim, holding inter alia, in translation (para 7):

> "In the context of worldwide trade, goods arrive daily in Germany from across the whole world for the purpose of further processing, onward sale or end use. Not a few come from states, which do not provide the legal protection which is among the fundamental principles of German law. It is demanding too much of the domestic jurisdiction to give it the task, in the case of a foreign act of state taking place abroad, of offering the legal protection which the foreign state is not ready to provide its own citizens, simply because a chain of sales leads through Germany. Conduct contrary to international law falls to be addressed in other ways, such as through political influence, through the conclusion of treaties between individual states and through the development of the protective legal system of international tribunals."

I note in parenthesis that the Hamburg Court recognised that, in certain situations, this principle might have to give way to considerations of *ordre public*, if the application of the foreign norm led to a result which was inconsistent with fundamental principles of German law (para 6). But it made clear that, for this to be the case, the subject matter would have to involve a substantial German connection, which did not exist in a case of Zimbabwean expropriation.

70. While the principle applied in this case parallels the second type of foreign act of state in a property context, there does not appear to be any authority accepting a similar principle of foreign act of state in German law outside a property context. Two authorities suggest that it is no bar to a claim against the German Federal Republic that it involves determining the lawfulness under international law of the conduct of a third state or an international organisation *outside* the jurisdiction of any such third state: see the judgments in the *Vavarin Bridge* case, of the Oberlandesgericht Köln: Az 7 U 8/04, (28.07.2005) paras 73 to 74 (decided on different grounds on appeal to the Bundesgerichtshof (the "BGH" or German Supreme Court): III ZR 190/05) and in separate proceedings before the BVerfG (the Federal Constitutional Court): 2 BvR 2660/06; 2 BvR 487/07; and the judgment in the *Kunduz Road Tankers* case of the Oberlandesgericht Köln: Az 7 U 4/14 (30.04.2015). Both the *Vavarin Bridge* and the *Kunduz Road Tankers* cases were however concerned with activities of the German armed forces outside Germany (in respectively Kosovo and Afghanistan). So they fall outside the scope of the second type of foreign act of state, as I have defined this, and are better read as authority indicating that a need to adjudicate upon the conduct of a foreign state was not seen in the German courts as a basis for any abstention on the lines of the third type of foreign act of state.

71. For completeness, both cases are also of interest as indicating the existence under German law of a doctrine along the lines of Crown act of state. Thus in the *Vavarin Bridge* case, the BVerfG acknowledged that certain foreign and defence policy decisions were non-justiciable under German law, but confined these within narrow limits - by reference to the high complexity or particular dynamics of the relevant material and the difficulty of implementing any decision with regard to it under domestic law: section IV, para 3(aa); and in the *Kunduz Road Tankers* case the German Supreme Court, overruling the Oberlandesgericht, has recently held, firstly, that an individual foreign victim has no international law right to pursue in a domestic court a claim for alleged violation of international humanitarian law (the law of armed conflict) by the state of that domestic court - rather, any remedy in international law lay through invoking the protection of his own state - and, secondly, that such a victim also has no claim under German domestic law; in the latter connection, the BGH said that the responsibility of state officers under para 839 of the Bürgerliches Gesetzbuch (the "BGB" or German civil code) for intentionally or negligently causing harm to third parties could not be extended to injuries caused by the armed intervention of German forces - since this was essentially an international law matter and any such extension would impact on the area of German foreign policy: II ZR 140/15 (06.10.2016).

72. Lord Sumption refers briefly in para 201 of his judgment to dicta in French and Dutch authority as suggesting a principle very similar to his view of the English act of state doctrine. It is, however, necessary to put such authority in context. All but one of the French cases cited by Lord Sumption were property cases falling within the first or second type of foreign act of state (and the one possible exception, considered in para 72(vi) below, is inconsistent with established United Kingdom case law). Thus:

(i) In *Société Cementos Rezola v Larrasquitu et Ētat espanol* (Cour d'appel de Poitiers) [1938] Sirey Rec Gen iii, 68, the issue before the French courts was whether to recognise the requisitioning by the Republican Government of Spain of a vessel registered in Spain but evidently outside the Spanish jurisdiction at the time of her requisition. In accordance with the Spanish decree ordering the requisition, notice had been placed in the vessel's register by the Spanish consul at Bordeaux. The French Court of Appeal accepted the requisition as effective, thereby, in effect, applying a rule whereby the transfer of merchant vessels depends not on their physical situs, but on the legal position under the law of their registry: compare *Dicey, Morris & Collins, The Conflict of Laws* (15th ed) para 22E-057 for a discussion of the common law position. It is worth noting that the Poitiers Court of Appeal referred to the requisitioning as an exercise of full sovereignty by the Spanish state "qui n'a porté aucune atteinte à l'ordre public de l'Ētat français". The inference is that there could be some circumstances in which a foreign act of state of this nature might be refused recognition, as being contrary to the public policy of the forum state.

(ii) This inference is supported by a decision of the Cour de cassation, *Companie Algérienne de Transit et d'Affrètement Serres et Pilaire (la SATA) v Société Nationale des Transport Routiers (la SNTR)* (10 mars 1979 (No de pourvoi: 77-13943), in which the Chambre commerciale refused to recognise "un acte de puissance public" of the State of Algeria, transferring the property of SATA to SNTR, because it constituted expropriation by a foreign state without payment of appropriate compensation ("une dépossession opérée par un Ētat étranger sans qu'une indemnité équitable ait été préalablement versée"). (For a sharp critique of this decision, advocating an approach to property cases similar in fact to the German, see a note by Paul Lagarde in Revue critique de droit international privé 1981, pp 527-525.)

(iii) *Martin v Bank of Spain* [1952] ILR 202 involved a refusal by the Bank of Spain as agent of the Spanish state to issue in Spain new notes in exchange for old notes which were no longer legal tender. In holding that the acts in question were, even apart from the principle of immunity, "public acts which are not subject to judicial control in France", the Cour de cassation was doing no more, at most, than recognise the second type of act of state, that is the right of a state to deal with property within its own jurisdiction.

(iv) Similarly, in *Époux Reynolds v Ministre des Affaires Étrangères* (1965) 47 ILR 53, the Tribunal de Grande Instance de la Seine was being asked by a building's former owners to adjudicate upon the validity of a confiscation of property by the Hungarian State, and its subsequent assignment to the French Legation in Hungary said to have taken place under an international agreement. Again, the confiscation falls directly within the second type of act of state. The court also said that the French courts were not competent to interpret the provisions of the international agreement (which it was said did not cover the assignment to the French Legation), but, in the light of the confiscation, the claimants can have had no sustainable rights in any event.

(v) *Bank Indonesia v Senembah Maatschappij and Twentsche Bank* (1959) 30 ILR 28 is another case regarding seizure by the Indonesian State in Indonesia of property which was then, apparently, put into the hand of Bank Indonesia acting in a private law capacity, not as a state organ. It was therefore within the second type of act of state. The case is also of particular interest for the Court of Appeal of Amsterdam's statement that "the Act of State doctrine relied on by the Bank Indonesia was not a generally accepted rule of international law, and did not apply when the relevant measures were in conflict with international law". On that basis, although the court said that "as a rule, a court will not, and should not, sit in judgment on the lawfulness of acts *jure imperii* performed by, or on behalf of, a foreign Government, this rule must be subject to an exception when the acts in question can be deemed to be in flagrant conflict with international law". This, the Court went on to hold, they were, because they were unmistakably discriminatory - and also because they were being used as a means to exert pressure in a political dispute over Netherlands New Guinea.

(vi) The Cour de cassation concluded in the case of *Ramirez Sanchez Illich, alias Carlos* (ECLI:FR:CCASS: 1995:CR06093) that Carlos's arrest in Khartoum by Sudan authorities with a view to his return to France for trial constituted an act of sovereignty and that domestic jurisdictions were incompetent to adjudicate upon the conditions under which such authorities had effected such arrest and handed Carlos over to French police in Khartoum to be transported back to France for trial without any arrest warrant or legal procedures. French civil law and common law therefore diverge in this area: see para 73(v) below.

Thus it can be said that, even in relation to property, the general picture is that French and Netherlands case law is not unqualified in accepting the validity of foreign acts of state.

73. That the second type of foreign act of state is, assuming that it exists, subject to significant limitations under English law has become increasingly clear over recent

years. The Court of Appeal was on any view correct in *Yukos v Rosneft* to identify the importance of these limitations. Thus:

(i) The second type of foreign act of state is, by definition, limited to sovereign or *jure imperii* acts, excluding in other words commercial or other private acts.

(ii) It has been held inapplicable to judicial acts, even though such acts can engage the state's responsibility in human rights or international law: *Yukos v Rosneft*, paras 73-91, citing *Altimo* (above). In *Altimo*, the Privy Council held (para 101) that:

> "The true position is that there is no rule that the English court (or Manx court) will not examine the question whether the foreign court or the foreign court system is corrupt or lacking in independence. The rule is that considerations of international comity will militate against any such finding in the absence of cogent evidence."

On that basis, the Court of Appeal in *Yukos v Rosneft* held justiciable the issue whether judicial acts had been part of a "campaign waged by the Russian state for political reasons against the Yukos group and its former CEO" (para 29), where it was alleged that the courts were in a position of "systematic dependency on the dictates or interference of the domestic government" (para 90). Another possible explanation of these cases is, however, that they do not illustrate an exception from the second type of foreign act of state, but reflect the public policy exception to the recognition of foreign judicial acts which exists as a matter of conflicts of law in respect of the first type of foreign act of state: see para 37 above. In an English (or English law based) court, it is not surprising if public policy has a fairly expansive role in relation to foreign judicial acts. If one believes in justice, it is on the basis that all courts will or should subscribe to and exhibit similar standards of independence, objectivity and due process to those with which English courts identify. Given the evidence, a domestic court should be able to detect, and it would be surprising if it were obliged to overlook, accept or endorse, any significant shortfall in this respect.

(iii) The English courts are entitled to determine whether a foreign law is legal, for example under the local constitution; the foreign law will not be regarded as an act of state which cannot be challenged: *Buck v Attorney General* [1965] Ch 745, 770; *Al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758, [2011] QB 773, para 74, per Arden LJ and para 189 per Lord Dyson MR; and see McLachlan, *Foreign Relations Law*, para 12-129; *Dicey, Morris and Collins* para 5-048.

(iv) Acts of officials granting or registering intellectual property rights have been held to be outside any doctrine of foreign act of state: *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39; [2012] 1 AC 208.

(v) (a) In a criminal law context, English courts have had no hesitation about investigating and adjudicating upon the wrongful detention and rendition of individuals by foreign states in conjunction with United Kingdom authorities, in breach of a foreign law. In *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, the House held that kidnapping and abduction from South Africa of a person wanted for trial in England "in violations of international law and of the laws of another state" [ie South Africa] required recognition by the court in order to uphold the rule of law, with the result that the trial was stayed: see eg pages 62G, 67G and 73G. In *R v Mullen* [2000] QB 520, the Court of Appeal Criminal Division followed *Ex p Bennett*, setting aside the conviction of Mr Mullen, who had been deported from Zimbabwe to the United Kingdom as a result of a plan concocted between the United Kingdom and Zimbabwean authorities which involved breaching Zimbabwean extradition law. The Australian High Court decision in *Moti v The Queen* [2011] HCA 50, 245 CLR 456, discussed in para 82 below, has adopted the same approach after expressly considering and rejecting a Crown submission that foreign act of state precluded its adoption.

(b) Lord Sumption suggests (para 246) that *Mullen*, *Bennett* and *Moti* can all be explained on the basis that "any unlawfulness in the conduct of the foreign officials was incidental", that "the unlawfulness of the Australian officials' conduct was enough to justify staying the proceedings against Mr Moti" and that "the unlawfulness of the acts of their foreign collaborators was … irrelevant". This in my opinion misreads all three cases; it inverts their significance. It was an essential step in the reasoning of each that the foreign officials (the primary actors in the illegal deportation in each case) had acted illegally. Far from being "incidental" or "irrelevant", the foreign officials' illegal conduct was in each case the key to the scheme of deportation. Without it, there would have been no illegal deportation at all. If the second type of foreign act of state had any application to personal wrongs of this nature, investigation and condemnation of the British authorities' conduct should have been precluded on the grounds that the direct actors in the illegality were foreign state officials, acting within their own territory, whose conduct was immune from investigation or criticism. In neither of the first two cases did anyone conceive of such an argument, and in the third, where it was raised, it was categorically, and rightly, dismissed. In so far as the present appeals relate to alleged complicity by British officials in illegal conduct by foreign officials within their own foreign jurisdictions, they present exact parallels in a civil context to these three deportation cases in

> a criminal context. It is no answer to this that, on a hypothesis contrary to the actual facts, the British or Australian authorities in these cases might (possibly) have been able to kidnap the wanted individuals from the foreign jurisdictions by themselves without the relevant local authorities' involvement. The doctrine of foreign act of state must depend on the actual facts, not on inapplicable counter-factuals. Indeed, if counter-factuals of this nature were relevant at all, they could presumably also be advanced in the current cases of *Belhaj* and *Rahmatullah*.

All this suggests caution in today's world about recognising the application of the second type of foreign act of state in areas where it has hitherto had no discernible domestic role.

74. The recognition by the Court of Appeal in (in particular) *Princess Paley Olga* of the second type of foreign act of state was not challenged on the present appeal, and I am, as I have said, content for present purposes to proceed on that basis, because of the special characteristics of property, and the special considerations applying to it, in particular the need for security of title and of international trade. Similar characteristics and considerations do not apply to individuals who have been the victim of personal torts, and who can found jurisdiction against a relevant non-state actor outside the territory of any foreign state also implicated in the tortious acts. Recognising title to property is different from refusing to inquire into the justification for the infliction of personal injury. The second type of foreign act of state can and should, in my view, be limited as a matter of principle to sovereign acts seizing or affecting (i) property which is (ii) within the jurisdiction of the state in question at the time when the act takes effect. It is for the common law to define to what extent, if at all, it is prepared to refrain from adjudicating upon an issue involving a foreign state's conduct, when the foreign state is not impleaded and the actual defendant has him- or itself no immunity. I see no reason in this context to go any further than I have indicated by giving the doctrine any wider effect.

75. In the United States, as I have noted, *Hatch v Baez* was and *Underhill v Hernandez* could have been, and would today certainly be, resolved by reference to state immunity. Whether, even in the United States, the reasoning in *Underhill v Hernandez* should be limited to contexts where a plea of state immunity would also be possible, or, as may even be (see paras 49 and 50 above), to situations of detention by the military in times of war, is unnecessary for decision here. On any view, movable property presents special considerations because of its marketability, as all the decided cases on movables (*Oetjen*, *Luther v Sagor*, *Princess Paley Olga* and *Sabbatino*) illustrate. Personal injury or detention does not present these considerations. Crown act of state also presents different considerations, since the Crown cannot claim state immunity in its own courts. In contrast, any proceedings against a foreign state or its officials in the English courts will be barred by state immunity.

76. It is only in particular situations, like the present, that foreign act of state of the second type could conceivably be relevant. I see no reason to extend the doctrine (assuming the second type to exist at all) to cover such situations. On the contrary, to do so would, once again, be on the face of it to render the appellants immune from suit both in their own jurisdiction and anywhere else, while leaving the foreign states at least vulnerable to suit in their own jurisdictions.

77. The appellants submit in response to this last point that foreign act of state would cease to be an objection to English proceedings against the appellants as secondary parties, if and when the respondents had successfully established the relevant facts and the liability of each of the relevant foreign states by proceedings in those states' domestic courts. It is true that General Assembly Resolution 56/83 on *Responsibility of States for internationally wrongful acts* deals in turn with a state which breaches an international obligation (articles 12-15), before dealing with the responsibility of a state in connection with the act of another state. In the latter connection, it addresses situations of aid or assistance (article 16), direction and control (article 17) and coercion (article 18). A régime which insisted on the actual actor being sued first would attach jurisdictional significance to a factor which would not normally have this significance and which might distort the natural course of events: a state aiding or assisting, and certainly a state procuring, directing, controlling or coercing, might be the more culpable party and natural target than the actual actor. There could also be two main actors, or it could be uncertain which state was a main actor and which a secondary participant; eg in the present case, take for example the alleged wrongful rendition from Malaysia by collaboration between Malaysian and United States authorities. So it could be uncertain which should be sued first. It would on any view be optimistic to view the proposed course as a light task. It would make recourse against the appellants dependent upon the operation, in the present case, of up to four separate foreign court systems. In their joint intervention before the Supreme Court, the International Commission of Jurists, JUSTICE, Amnesty International and Redress ("the NGO Interveners") make the point that

> "No rendition to torture case against US officials has, to the knowledge of the NGO Interveners, ever succeeded in a US court since September 11. Such actions are commonly blocked by various other US doctrines to which the appellants refer in their written case, in particular the 'political questions doctrine' and the 'state secrets doctrine'. As Professor Jonathan Hafetz has observed [in *Recapitualising Federal Courts in the War on Terror,* St Louis University Law Journal, Vol 56, 2012, p 21]:
>
> > … Federal courts have repeatedly dismissed actions by noncitizens against US officials seeking damages for arbitrary detention, torture, and other mistreatments. The dismissals, which rest on various grounds, including the

> 'state secrets' privilege, *Biven's* 'special factors', and qualified immunity, typically cite the twin concerns of separation of powers and limited judicial capacity as reasons for denying litigants a federal forum. The decisions portray federal courts as unable to provide remedies for even the most egregious rights violations …"

78. In the upshot, therefore, in relation to the second type of foreign act of state, I consider that Leggatt J was correct in paras 115 and 177 of his judgment in *Rahmatullah* to treat the "traditional foreign act of state doctrine", by which I understand he meant to cover the first and second types of foreign act of state, as limited to acts done within the foreign state's jurisdiction as well as subject to a potential public policy exception. But Leggatt J was, in my view, on less certain ground in so far as he held that the second type of act of state could not apply to acts of the United States in Iraq and Afghanistan, because these were not acts done within US territory where the laws of the United States applied. He did not address, and may not have been asked to address, the basis on which the United States was present in those countries. In the case of Iraq, it was, together with the United Kingdom, an occupying power acting pursuant to Security Council Resolution 1483 (2003) dated 22 May 2003. As such, it had the duty under article 43 of the Geneva Convention IV dated 18 October 1907 to respect "unless absolutely prevented, the laws in force in the country". Nonetheless, it was the relevant state power, and it is certainly arguable that, within the ambit of the second type of foreign act of state, its acts should be recognised. As to Afghanistan, the United States was present there by consent of the Afghan Transitional Authority as part of the International Security Assistance Force: see Security Council Resolution 1510 (2003) dated 13 October 2003. No doubt, it had considerable powers, but it appears much less possible to argue that its acts in that capacity should be regarded as within the ambit of the second type of foreign act of state. Whatever answer is given to these points, however, I would reach the same conclusion as Leggatt J with regard to the second type of act of state, on the basis that (assuming it to exist at all) it is and should be confined to acts affecting property. The second type of foreign act of state therefore has no application in *Rahmatullah*.

79. Similar reasoning applies in *Belhaj*, with regard to any reliance on the second type of foreign act of state. The claims are all for physical detention or rendition or mistreatment and so, I would hold, outside the second type. Those for mistreatment by the United States officials in Thailand and (if such mistreatment be alleged there, which is unclear) Libya also relate to conduct on any view outside United States jurisdiction. In contrast, those for mistreatment on a United States airplane in transit between Thailand and Libya, at least while over areas like the high seas not under the sovereignty of any state, can and should be probably regarded as occurring within United States jurisdiction, assuming the aircraft to have been registered there: see *Dicey, Morris and Collins*, rule 129 exception 2 and compare also the (Chicago) Convention on International Civil Aviation, article 17.

80. The Court of Appeal in *Belhaj* dealt with the issues before it on a different basis, by recognising a public policy exception unrestricted by any need for the facts relied upon to be indisputable or undisputed. Had I regarded the second type of foreign act of state as applicable to personal wrongs, I would have concluded that the Court of Appeal was right in *Belhaj* to recognise such an exception or, as I would prefer to see it, qualification. Lord Wilberforce in *Buttes Gas* recognised in general terms that public policy could constitute a valid basis for refusal to recognise a foreign act of state of either the first or second type: see the quotation from his speech cited in para 59 above. The appellants submit that to recognise such an exception or qualification, when its application would involve investigating disputed facts, goes beyond anything contemplated or decided in the *Kuwait Airways* case. I do not accept that submission. In *Kuwait Airways*, Iraqi Airways was raising a conventional defence by relying on the Iraqi law by which the Kuwait Airways fleet, then in Iraq, was transferred to it. To take itself outside the scope of the first type of foreign act of state, Kuwait Airways had in response to invoke the public policy exception, by relying on matters happening at an international level and involving hostilities between states and the reactions and resolutions of the Security Council. That response raised immediate problems of justiciability, which could however be overcome by pointing to the clarity, indisputability and seriousness of the violations of the United Nations Charter and Security Council Resolutions. Unless a claim for detention or mistreatment by United Kingdom officers in conjunction with foreign state authorities can be regarded as non-justiciable within the third type of foreign act of state, no such considerations arise. Were it (contrary to my view) necessary to identify the scope of such a qualification, it would at least be as extensive as that discussed later in this judgment in the context of non-justiciability or judicial abstention.

81. The Court of Appeal in *Belhaj* found (in paras 96-102) assistance and support for its conclusion in the Federal Court of Australia decision in *Habib v Commonwealth* [2010] FCACA 12; (2010) 265 ALR 50. It saw this, rightly in my view, as based on two distinct lines of reasoning. One, not directly relevant here, was the Australian constitutional position, which was viewed as requiring a remedy. The other was a more general conclusion regarding the scope of the second type of foreign act of state. The Federal Court treated this type as potentially applicable to claims relating to person as well as property. The claim was that Australian officials had aided, abetted and counselled torture of an Australian citizen by foreign officials while he was detained in Pakistan, Egypt and Afghanistan and in Guantanamo Bay. Contrary to the appellants' case, the relevant facts were neither clear nor accepted: see eg paras 58-67 per Perram J and para 110 per Jagot J. Black CJ saw public policy as an answer to any defence of act of state in relation to the claim (paras 7 and 13). Perram J saw the defence of foreign act of state being advanced as a rule of validity (not a rule of abstention or deference), and therefore as one on which "a human rights exception might be hung": see paras 43 and 45. Jagot J accepted that there was a public policy exception, and explicitly rejected any distinction between known and alleged violations, as without support in the authorities or in principle. She added that there were legal parameters in international and Australian law enabling judicial determination of the claims and meaning that this was no "judicial no-man's land": paras 107-110. The case is also of particular interest,

because the claim was, as it is in the issues now before the Supreme Court, for secondary responsibility arising from alleged aid, abetting or counselling by Commonwealth officials in relation to conduct allegedly committed by foreign officials.

82. The Australian High Court returned to this theme in *Moti v The Queen* 245 CLR 456 in a context which has resonance in the present appeals. Mr Moti claimed that he had been deported by officials of the Solomon Islands Government from the Solomon Islands to Australia, where he was wanted for trial. The deportation occurred after the High Commissioner had issued a travel document for Mr Moti and visas for the Solomon Islands officials who were to accompany him on the aircraft bound for Australia, knowing that Solomon Islands law was going to be breached by deporting Mr Moti on the same day without giving him a seven-day opportunity to challenge deportation. The majority judgment, given by French CJ for six out of the seven members of the High Court, held that there was no "general and universally applicable rule that Australian courts may not be required (or do not have or may not exercise jurisdiction) to form a view about the lawfulness of conduct that occurred outside Australia by reference to foreign law" (para 50) and that

> "Here, the question of the lawfulness of the appellant's removal from Solomon Islands, although effected by the Solomon Islands Government, was 'a preliminary' to the decision whether a stay should be granted. The primary judge was not right to conclude that '[i]t is not for this court to express an opinion on these decisions made by the Solomon Islands government'."

The appellants submit that this decision falls within the *Kirkpatrick* exception, as a case where all that mattered was the facts about what happened in the Solomon Islands, not whether these facts involved illegality. I reject that analysis, basically for reasons already given in para 73(v)(b) above. It was critical to establish that there was illegality under Solomon Islands law, with which the Australian High Commissioner had at the least gone along. In the present appeals, the issue whether there was illegal conduct by foreign state officials under their own laws is also a preliminary to a decision on whether the appellants arranged, assisted or encouraged or otherwise connived or joined in such conduct, but that is no reason for an English court to refuse to determine it.

83. There remains the question what considerations could as a matter of public policy require the English court to investigate and adjudicate upon an issue if and to the extent that this would otherwise be impermissible on the ground that it constituted a foreign act of state of the second type. In the property context, to which I consider the second type of foreign act of state should be confined, the relevant considerations are likely to be extreme. In *Luther v Sagor* the Court of Appeal rejected roundly submissions that the confiscatory decree was so immoral and so contrary to the principles of justice recognised in the United Kingdom that no attention should be paid

to it. In relation to the second type of foreign act of state, considered in *Princess Paley Olga*, the arbitrariness of a governmental seizure of property without any legislative footing was even more evident. On the other hand, the Hamburg Court of Appeal case mentioned in para 69 above and the Amsterdam Court of Appeal case of *Bank Indonesia v Senembah Maatschappij and Twentsche Bank* (1959) 30 ILR 28, mentioned in para 72(v) above, both suggest that, even in relation to property, there may be some public policy limits in terms of arbitrariness and discrimination to the foreign state acts which a domestic court should recognise. On the hypothesis, contrary to my conclusion, that the second type of foreign act of state should be seen as extending to sovereign acts against the person, the case for recognising some public policy limits would seem, if anything, even stronger. However, since I do not consider that the second type of foreign act of state has any application to sovereign conduct against the person within the relevant foreign state, it is unnecessary and I think undesirable on these appeals to attempt to be more specific about the circumstances in which public policy could and should entitle a domestic court to adjudicate upon any such conduct.

84. For these reasons, I do not consider that the issues now before the Supreme Court fall within the second type of foreign act of state, assuming this to exist in any form, or that it should not proceed to trial for that reason.

IX Application of third type of foreign act of state

85. In the light of the above, the critical issue becomes the scope of the third type of foreign act of state. On this, the Courts below adopted different approaches. The Court of Appeal in *Belhaj*, paras 53-55, drawing on the analysis of the Court of Appeal in *Yukos v Rosneft (No 2)*, paras 66-67, approached foreign act of state as an over-arching principle of non-justiciability, subject to limitations. It saw it as "founded on the principle of sovereign equality of states" identified in the *Duke of Brunswick's* case (see para 63 above) and by Fuller CJ's statement in *Underhill v Hernandez* (para 49 above). It coupled this with considerations of comity, with the caveat that this should not be confused with the avoidance of embarrassment (para 66). The Court of Appeal noted correctly (paras 65-66) that both these bases for an over-arching principle of non-justiciability had been cited, with approval, by Lord Wilberforce in *Buttes Gas*. It did not accept that this Court's judgment in *Shergill v Khaira* should be read as suggesting that the third type of act of state is limited to situations of lack of judicial competence arising from the principle of separation of powers (para 67).

86. The critical limitation identified by the Court of Appeal in *Belhaj* at paras 83-87 and 114 (and in *Yukos v Rosneft* at para 69) was the public policy limitation identified in *Oppenheimer v Cattermole* and the *Kuwait Airways* case. Those were both cases involving the first type of foreign act of state - the requirement under ordinary conflicts principles for domestic recognition of foreign legislation affecting movable or immovable property within the foreign jurisdiction: see, in relation to *Kuwait Airways*,

para 80 above. As explained in para 80 above, the third type of foreign act of state only arose for consideration in *Kuwait Airways*, because the public policy, on which Kuwait Airways relied in response to prevent the recognition of the Iraqi law, concerned inter-state hostilities and the Security Council's intervention under Chapter VII of the UN Charter. The clarity and seriousness of the breaches of international law involved enabled the House to conclude that Kuwait Airways' response was justiciable.

87. The facts in *Belhaj* are in dispute. They are neither indisputable nor obvious. On its approach to foreign act of state and to the *Kuwait Airways* case, the Court of Appeal in *Belhaj* saw itself as faced with an exception to the foreign act of state doctrine, which had hitherto only been recognised in cases of indisputable and obvious violations of fundamental rights, and which would need to be understood in a wider sense if the claims by Mr Belhaj and Mrs Boudchar were to proceed. It concluded that the limitation was indeed to be understood more widely, drawing on various considerations set out at paras 114-121. They were, in summary, that (i) international law has moved from regulating state-to-state conduct, to regulating human rights for the benefit of individuals, (ii) the allegations in *Belhaj* are of particularly grave violations of human rights, (iii) the respondents are either current or former officials of state in the United Kingdom or government departments or agencies, whose conduct would not normally be exempt from an investigation, in which there is a compelling public interest, and who are only suggested to be exempt because of the alleged involvement of other states and their officials, (iv) there is no lack of judicial or manageable standards, (v) unless the English courts exercise jurisdiction, the allegations will never be subject to judicial investigation and (vi) the risk of displeasing allies or offending other states cannot outweigh the need to exercise jurisdiction.

88. Leggatt J in contrast understood the third type of foreign act of state as a principle of non-justiciability limited to cases where the issues were genuinely "political" in one of the two senses mentioned in *Shergill v Khaira*. I understand by this that he meant that either (i) the court was being asked to adjudicate upon the legality of decisions and acts of sovereign states on the international political stage governed by power politics, or in relation to which there were no manageable or judicial standards, or (ii) the court was being asked to adjudicate in the abstract on international legal issues without there being any domestic "foothold" in the form of a relevant enforceable legal right requiring this to be done. He held that neither was the case: paras 141 and 163.

89. In my view, Leggatt J was correct in *Rahmatullah* to approach the claims on the basis that the question is whether the principle of non-justiciability constituting the third type of foreign act of state applies at all, rather than whether any exception to it exists or should be grafted onto it. The third type of foreign act of state is a principle of non-justiciability or abstention. The Court of Appeal explained the principle as founded on the sovereign equality of states and comity. There is force in the appellants' submission that, if this is the basis of the principle and if it is otherwise engaged by the issues or subject-matter, then a public policy exception to its application is difficult to rationalise.

The graver the alleged violations by foreign state officials, the greater would then be the infringement of the principles of sovereign equality of states and comity if domestic courts were to investigate and adjudicate upon the allegations. For this reason, I prefer to put the focus on the ambit of the third type of foreign act of state. However, I agree with Lord Sumption (para 248) that this difference between us cannot be critical. What matters is how one defines the ambit or any exceptions.

90. It is clear from *Buttes Gas* that the application of the third type of foreign act of state is fact- and issue-sensitive; it needs to be considered on a case by case basis in the light of the issues involved. There is, in this context, no reason why the third type of foreign act of state should be limited territorially. Further, in *Buttes Gas* the House was concerned with a highly unusual situation, and I accept the appellants' submission that it does not follow that the principle is limited to analogous situations. In particular, Lord Wilberforce's reference to an absence of "judicial or manageable standards" (para 42 above) was directed very specifically to the circumstances before him. If and when it is the case that there are no judicial or manageable standards by which to determine an issue, then the case will no doubt be non-justiciable. But an absence of such standards should not be seen as a generalised or exclusive test. In *Shergill v Khaira*, the Supreme Court was concerned with a very different factual situation to the present and it did not have the benefit of the extensive citation of authority and submissions which we have had on the present appeals. The categorisation advanced in paras 41-43 of the Supreme Court's judgment in that case was deliberately not exhaustive (vide, the word "generally"), and neither were the examples given of cases within the two identified sub-categories intended to be exhaustive.

91. As to the Court of Appeal's conclusion (paras 67-68) that this Court's judgment in *Shergill v Khaira* should not be understood as limiting the third type of act of state to situations of "lack of judicial competence arising from the separation of powers", I agree that "lack of judicial competence" is not a helpful qualification. "Judicial abstention" is in contrast a helpful term, and preferable in my view to "non-justiciability". This third type of act of state (described explicitly by Lord Sumption as "international law act of state") has on any view a broad international basis. This was, in *Shergill v Khaira*, identified briefly by the reference in para 40 to the dispute in *Buttes Gas* as trespassing on "the proper province of the executive, as the organ of the state charged with the conduct of foreign relations", and developed more fully in para 42 in *Shergill v Khaira*. Considerations of separation of powers and of the sovereign nature of foreign sovereign or inter-state activities may both lead to a conclusion that an issue is non-justiciable in a domestic court. The problem is to identify more precisely in relation to what issues and when such adjudication is inappropriate.

92. The appellants submit that Leggatt J took too large a view of the issues properly justiciable in a domestic court. In particular, having held that there were judicial and manageable standards to resolve the issues in *Rahmahtullah*, and dismissed in this context any difficulties which might arise if the United States did not cooperate with

evidence or documents, he considered that justiciability depended upon whether examination of the acts of United States officials was necessary in order to decide a question of domestic legal right: paras 153 and 163. In short he circumscribed the circumstances capable of being embraced by the first sub-category, and too readily assumed that, because a claim of right was made, the case fell within the second sub-category, in *Shergill v Khaira* (see para 43 above).

93. In this connection, Leggatt J also treated the previous Court of Appeal decision in *R (Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872 as falling within the second sub-category, and explained the Court of Appeal's refusal there to grant relief on the basis that no claim of right was involved. The claimant in *Noor Khan* was seeking no more than a public "declaration that a GCHQ officer or other Crown agent who passes 'locational intelligence' to an agent of the US may commit an offence of 'encouraging or assisting in a crime' under sections 44-46 of the Serious Crime Act 2007" (para 150). The claimant in *Noor Khan* was the son of a tribal elder killed in a US drone strike in Pakistan pursuant, allegedly, to locational intelligence supplied by GCHQ to the CIA. He maintained that there could be no defence of combat immunity to a charge of murder: GCHQ and CIA officials were not members of the US and UK armed forces and could not be combatants, there was no armed conflict in Pakistan and Al-Qaeda was too incoherent and sporadic in its actions for it to be shown that there was an armed conflict even in Afghanistan. In any event, if there was an armed conflict, it was non-international in nature. Leggatt J explained this case as one where the claimant was "not claiming that he had any legal right which the defendant had violated. The relief sought was, in effect, an advisory opinion on the criminal law." The case, he said, fell therefore into the second sub-category identified in *Shergill v Khaira* (para 43 above).

94. It would seem to follow from this and from para 163 of Leggatt J's judgment that, if the claimant had had some substantive claim (eg for damages in his father's or his own right), the claim would, in Leggatt J's view, have been justiciable. In my opinion, that is unlikely to be correct, though it is unnecessary to reach any firm conclusions in this area. *Noor Khan* was a very particular case: it proceeded on an assumption that, under sections 44-46 of the Serious Crime Act 2007, the liability of UK nationals should be determined not by reference to whether the United States agents whose conduct was said to have been assisted by UK nationals were actually guilty of any offence within the jurisdiction of the UK courts, but by considering whether the conduct so assisted would have constituted an offence within the jurisdiction of the UK courts, if committed by a UK national. Lord Dyson MR, giving the sole reasoned judgment, regarded the claim as non-justiciable, because, quoting (at paras 34 and 35) from and agreeing with Moses LJ's analysis below:

> "The proposition, even if it is right, that a person may be guilty of secondary liability for murder under sections 44-46, although the principal could not, is no answer to the fundamental objection to

> the grant of a declaration: that it involves, and would be regarded 'around the world' … as 'an exorbitant arrogation of adjudicative power' in relation to the legality and acceptability of another sovereign power. … Even if the argument focused on the status of the attacks in North Waziristan (international armed conflict, armed conflict not of an international nature, pre-emptive self-defence) for the purposes of considering whether the United Kingdom employee might have a defence of combatant immunity, it would give the impression that this court was presuming to judge the activities of the United States."

Lord Dyson went on to say (para 37):

> "In my view, a finding by our court that the notional UK operator of a drone bomb which caused a death was guilty of murder would inevitably be understood (and rightly understood) by the US as a condemnation of the US. In reality, it would be understood as a finding that (i) the US official who operated the drone was guilty of murder and (ii) the US policy of using drone bombs in Pakistan and other countries was unlawful. The fact that our courts have no jurisdiction to make findings on either of these issues is beside the point. What matters is that the findings would be understood by the US authorities as critical of them. Although the findings would have no legal effect, they would be seen as a serious condemnation of the US by a court of this country."

95. In substance, therefore, Lord Dyson saw the issue as one of the lawfulness of the use of drones and as non-justiciable, because its resolution would depend upon determining whether there was an armed conflict in Pakistan and/or Afghanistan, whether any such conflict was international or non-international in nature and what rights of action or self-defence existed. All those are issues on which the policy and judgment of the executive and armed forces might be expected to prevail: compare the Court of Appeal Criminal Division's provisional view to that effect in *R v Gul (Mohammed)* [2012] 1 WLR 3432, paras 20 to 23. (The decision in *Gul* was upheld on grounds not referring to this point at [2014] UKSC 64; [2014] AC 1260). It is true that the common law develops and responds to changing times and attitudes, and that a sharp division between the domestic and international legal sphere is less visible today than in the past. The case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 is an example of this development. I also note encouragement given by distinguished international lawyers in article 2 of the Institut de Droit international's resolution *The Activities of National Judges and the International Relations of their State* (Milan, 1993), to the effect that:

> "National courts, when called upon to adjudicate a question relating to the exercise of political power, should not decline competence on the basis of the political nature of the question if such exercise of power is subject to a rule of international law."

Some matters are however better addressed at the international legal level, rather than in domestic courts. In civil as well as common law, it appears unsurprising under present conditions that domestic courts should treat acts of government consisting of an act of war or of alleged self-defence at the international level as non-justiciable and should abstain from adjudicating upon them: see the concurrently issued judgment in the cases of *Rahmatullah* and *Serdar Mohammed* to which reference is made in paras 6 and 8 above; see also para 71 above and the remarks of the majority and of Judge Costa in his concurring judgment in *Markovic v Italy* (2006) 44 EHRR 52, paras 113 -116. Whether, at least apart from the special statutory provisions in *Noor Khan*, there might also have been issues of non-justiciability under the principle of Crown act of state does not require further examination here.

96. However, even if Leggatt J took too limited a view in this respect of the circumstances in which domestic courts should exercise self-restraint and abstain, I have little difficulty with the result he reached on the facts as alleged and assumed for present purposes before him. What is alleged in *Rahmatullah* is wrongful detention combined with severe mistreatment over a period of years by United States authorities, in circumstances for which the United Kingdom is alleged to have secondary responsibility. Whether that case can be made out will depend on identifying the relevant laws in force at the relevant times, whether they be the domestic laws in force in Iraq and Afghanistan or international law, as well as upon investigation of the relevant facts. Apart from the mere fact that the primary actor was the United States, I do not on present material see a basis for concluding that the issues will involve sovereign, international or inter-state considerations of such a nature that a domestic court cannot or should not appropriately adjudicate upon them. The mere fact that Mr Rahmatullah was handed over to the United States under an agreement cannot, I think, suffice to make the claims for alleged wrongful detention combined with severe mistreatment by the United States non-justiciable in respect of either the United States' primary, or the United Kingdom's ancillary, involvement.

97. I would accept that detention overseas as a matter of considered policy during or in consequence of an armed conflict and to prevent further participation in an insurgency could in some circumstances constitute a foreign act of state, just as it may constitute Crown act of state when undertaken by the United Kingdom: see our concurrent judgment in *Rahmatullah* and *Serdar Mohammed*. But here we are concerned, in *Belhaj,* with allegations of apparently arbitrary rendition with a view to forcible handing over to an arbitrary ruler and, in *Rahmatullah*, with allegations of what again appears to have been arbitrary detention without any of the usual forms of legal or procedural protection accompanied by severe mistreatment. Even if one could say

that such treatment reflects some policy of the various foreign states involved, or indeed of the United Kingdom, it goes far beyond any conduct previously recognised as requiring judicial abstention. There is certainly also no lack of judicial and manageable standards by which to judge it.

98. The critical point in my view is the nature and seriousness of the misconduct alleged in both cases before the Supreme Court, at however high a level it may have been authorised. Act of state is and remains essentially a domestic law doctrine, and it is English law which sets its limits. English law recognises the existence of fundamental rights, some long-standing, others more recently developed. Among the most long-standing and fundamental are those represented in Magna Carta 1225, article 29, which reads:

> "No free-man shall be taken, or imprisoned, or dispossessed, of his … Liberties, …, or be outlawed, or exiled, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land. To none will we sell, to none will we deny, to none will we delay right or justice."

Further, torture has long been regarded as abhorrent by English law: see eg *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71; [2006] 2 AC 221, para 11, per Lord Bingham, and individuals are unquestionably entitled to be free of deliberate physical mistreatment while in the custody of state authorities.

99. Sovereign states who without justification and without permitting access to justice detain or mistreat individuals in the course or in relation to their conduct of foreign relations or affairs have sovereign immunity in foreign domestic courts. But I see no reason why English law should refrain from scrutinising their conduct in the course of adjudicating upon claims against other parties involved who enjoy no such immunity there, where the alleged conduct involves almost indefinite detention, combined with deprivation of any form of access to justice and, for good measure, torture or persistent ill-treatment of an individual. This is consistent with the reasoning in *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, where, in the context of a claim judicially to review the Secretary of State for alleged inaction in respect of the plight of a British citizen detained in Guantanamo, the Court of Appeal said that "where fundamental human rights are in play, the courts of this country will not abstain from reviewing the legitimacy of the actions of a foreign sovereign state" (para 53) and that it was not "possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles recognised by both jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a 'legal black-hole'" (para 64).

100. These observations are together sufficient to support a conclusion that Mr Rahmatullah's claims against the Ministry of Defence and the Foreign and Commonwealth Office are not, as presented, barred by reason of the doctrine of foreign act of state. I recognise of course that the whole factual position may appear differently if and when the case is tried on the basis of actual, rather than assumed facts. There will or may then be evidence as to what actually happened and what really motivated those holding and treating Mr Rahmatullah. I also recognise, as Leggatt J did, that there may be practical evidential difficulties in disputing the accounts of what happened to Mr Rahmatullah in US custody. That assumes that the United States will not cooperate with information and evidence. But, even if the United States do not cooperate, evidential difficulties of this nature are, I think, far from what was in mind in *Buttes Gas* or any other of the relevant authorities and are not a basis for concluding that a claim is non-justiciable.

101. Turning to *Belhaj*, on the assumed facts, this appeal too cannot in my view be regarded as raising any issues of a sovereign, international or inter-state nature upon which a domestic court cannot or should not appropriately adjudicate. Simon J at first instance concluded "with hesitation" that there were no clear and incontrovertible standards for deciding both whether the actions of the Chinese state were unlawful by the standards of Chinese law (para 146) and whether the conduct of US authorities outside the United States was unlawful (para 150). The respondents have since made clear that they do not rely on any act or conduct committed by or in conjunction with the Chinese authorities. A hint of the underlying reasons why the United Kingdom may have been willing to supply information to Libya about Mr Belhaj is present in the alleged letter reference to demonstrating "the remarkable relationship we have built over the years", and the respondents themselves add to this an allegation that "the renditions took place as part of a co-ordinated strategy designed to secure diplomatic and intelligence advantages from Colonel Gaddafi". As to this, there is, as I have noted (paras 8 to 10 above) no suggestion that general foreign policy advantages of this nature could justify a plea of Crown act of state. Any attempt to rely on them to support a plea of foreign act of state in respect of the present claims against the United Kingdom for collaboration or connivance in the alleged false imprisonment, rendition from one country to another or mistreatment of individuals such as Mr Belhaj and Mrs Boudchar would at once meet the difficulty that the United Kingdom would be advancing its own breaches of the fundamental rights of those individuals. The letter reference and the respondents' allegation do not therefore represent any basis for regarding the claims as non-justiciable.

102. Essentially, what is relied upon by the appellants is the fact that they were not, while various foreign states were, the prime actors in the alleged false imprisonment, rendition or mistreatment. Bearing in mind the nature and seriousness of the infringements of individual fundamental rights involved, this constitutes no basis for a domestic court to abstain or refrain from adjudicating upon the claims made. I note, once again, that a contrary conclusion would have meant that the claims against the appellants could not be pursued anywhere in the world, in contrast with the claims

against the alleged prime actors. In circumstances, where the alleged letter might, on one reading, suggest that one or more of the appellants in *Belhaj* was aware that the intelligence supplied to Libya about Mr Belhaj would be used to effect his rendition to Libya, even though the United Kingdom did not actually pay for the "air cargo", a distinction between those primarily and secondarily responsible may also prove to be unpersuasive. A similar point applies in *Rahmatullah* where some of the pleaded allegations appear to assert that, even though United States authorities were the actors, the prime instigator was the appellants. Again, the evidential difficulties on which Mr James Eadie QC relied, on the basis that cooperation is unlikely to be forthcoming from the Malaysian, Thai, Libyan and United States authorities or their states, cannot in my view make the claims against the appellants non-justiciable or require judicial abstention.

103. Some reliance has been placed in both sets of proceedings on evidence about the effect on international relations of investigation in English courts of the issues which they raise. The appellants have relied in both sets of proceedings on evidence from Dr Laurie Bristow, a senior diplomat, currently National Security Director in the Foreign and Commonwealth Office. He considered it highly unlikely that the foreign states involved would supply evidence to enable the appellants to defend themselves. He reminded the court of the policy of successive governments to neither confirm nor deny allegations in relation to the intelligence services. Although he had not consulted any of the relevant foreign governments, he considered that there was a real risk that the trial of the proposed proceedings would cause serious harm to, and that findings of the nature sought in respect of United States officials would have a seriously damaging impact on, the United Kingdom's relationship with the United States, and could well lead to a restriction of the unparalleled access and the historic intelligence sharing relationship and national security cooperation which the United Kingdom currently enjoys. He accepted that, given the change in regime in Libya, it is unlikely that the findings sought in respect of Libya would damage relations with Libya, but considered that the allegations in respect of Malaysia and Thailand were highly politically sensitive, and that findings would probably be interpreted as interference or give rise to a strongly negative reaction. In *Rahmatullah* this evidence was countered by the respondent with evidence from a former US diplomat Mr Thomas Pickering, and a former US government official adviser, then director of American Studies at the Department of Politics and International Studies at Cambridge University who expressed the firm belief that adjudicating on Mr Rahmatullah's case was "highly unlikely to cause damage to the relations or national security cooperation between the US and UK" and that to assert that the US would be offended was "to misunderstand the value the United States places on the rule of law and an unbiased and open judicial system".

104. Leggatt J in *Rahmatullah* thought it wrong for a court to become involved in attempting to resolve this sort of issue, and declined to attach weight to the evidence. Simon J in *Belhaj* reached with hesitation his conclusion that foreign act of state applied in reliance both on his view (with which I have already expressed disagreement) that there were no clear and incontrovertible standards for deciding whether United States

officials had acted unlawfully and on the fact that "there is incontestable evidence that such an inquiry would be damaging to the national interest" (para 150). The Court of Appeal noted that, although "deference to executive suggestion as to the likely consequences for foreign relations may well be suited to the very different constitutional arrangements in the United States, it has played no part in the development of the act of state doctrine in this jurisdiction", and that in *Buttes Gas* Lord Wilberforce expressly left aside all possibility of embarrassment in our foreign relations in coming to the conclusion that the issues raised were not justiciable. As to this last point, however, Lord Wilberforce did this at pp 936G and 938A-B, expressly noting by way of explanation that no indication of any embarrassment had been drawn to the House's attention by Her Majesty's Government. The inference is, if anything, that it might have been a relevant factor, had it been shown.

105. The courts are placed in a difficult situation when asked to feed into a judgment about justiciability an assessment of the likely prejudice to the United Kingdom's good relations and security interests with a foreign state, if serious allegations of misconduct involving misconduct by that foreign state are ventilated in the English courts. Such an assessment might also be easier to take into account if the issue was whether a prima facie defence of foreign act of state of the second type was outweighed by public policy considerations, rather than where, as here, the issue is whether a foreign act of state of the third type has been shown, making the case non-justiciable. That said, I would not exclude the relevance to justiciability of a clear governmental indication as to real and likely damage to United Kingdom foreign policy or security interests. But little emphasis was in fact placed before the Supreme Court on such considerations as a relevant, still less a decisive factor. Viewing the appeals together, it can also be seen that Dr Bristow's forcefully expressed views are not unchallenged. Finally, as Dr Bristow recognised, the governmental position in Libya has changed radically, even if not very happily. One might even also add that a different administration holds office in the United States. On the present appeals, I do not consider that the evidence available can lead to a conclusion that the cases should be regarded as non-justiciable or require judicial abstention.

106. Lord Sumption takes a more general view of the third type of foreign act of state (non-justiciability or abstention or, in his terminology, international law act of state). But in paras 249-280 he argues in favour of the recognition in English domestic law of a public policy qualification. He finds it helpful in this connection to consider the scope of certain international law rules with *jus cogens* force, though he does not suggest that domestic public policy in all cases necessarily reflects or corresponds with international law rules having *jus cogens* force: see para 257. On this basis, he concludes that, so far as the allegations made in these proceedings amount to allegations of complicity in torture or of arbitrary detention without any legal ground or recourse to the courts, including enforced disappearance and rendition, a domestic court should not abstain from adjudicating upon them. Not every unlawful detention would, in his view, fall into this category, and nor would the allegations made of other cruel, inhuman or degrading

treatment, but the position on the facts is not at this stage clear to the point where any of the allegations made should be struck out (see paras 278-280).

107. Such difference in approach as there is between Lord Sumption and myself in this area makes no difference to the outcome of these appeals, and seems unlikely to make much if any difference to the outcome of any trial. But I prefer to analyse the qualifications to the concept of foreign act of state by reference to individual rights recognised as fundamental by English statute and common law, rather than to tie them too closely to the concept of *jus cogens*:

(i) The analogy of *jus cogens* would suggest that a domestic court would be able to adjudicate upon an allegation that its national government connived in a serious violation of the claimant's rights by a foreign government, but would be required to abstain from adjudicating upon a less serious violation, such as "mere" unlawful detention or cruel or inhuman treatment not amounting to torture.

(ii) *Jus cogens* is a developing concept notoriously difficult to define, and capable of giving rise to considerable argument. *Oppenheim's International Law* (9th ed) (1995) Vol 1, para 2 said: "Such a category of rules of *ius cogens* is a comparatively recent development and there is no general agreement as to which rules have this character", citing a wealth of authority in a footnote. *Brownlie's Principles of International Law* (8th ed) (2000) notes that "during the 1960s scholarly opinion came to support the view that there can exist overriding norms of international law, referred to as peremptory norms (*ius cogens*)", identified in article 53 of the Vienna Convention on the Law of Treaties as comprising any "norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". *Brownlie's Principles* says that "The least controversial of this class are the prohibition of the use of force in article 2(4) of the [United Nations] charter, of genocide, of crimes against humanity (including systematic forms of racial discrimination), and the rules prohibiting trade in slaves". It goes on to cite the International Law Commission's synopsis in *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* (A/CN.4/L.702, 18 July 2006), which lists "the prohibition of aggression, slavery and the slave trade, genocide, racial discrimination apartheid and torture, as well as basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination". Similarly, Harris and Sivakumaran's *Cases and Materials on International Law* (8th ed) (2015), para 2-033 footnote 68, gives the prohibitions on the use of armed force, torture and genocide as prime examples of *jus cogens* rules. The Report of the United Nations Working Group on Arbitrary Detention, A/HRC/22/44, 24 December 2012), to which Lord Sumption refers in paras 269-271 is clearly a most valuable

and important soft law pronouncement, which is likely to influence the development of generally accepted and recognised norms. But the scope for argument about the precise parameters of even such norms as the Working Group suggests in this area is evident from a full reading of para 38, reading:

> "The Working Group regards cases of deprivation of liberty as arbitrary under customary international law in cases where:
>
> (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty;
>
> (b) the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights;
>
> (c) The total or partial non-observance of the international norms relating to the right to a fair trial established in the Universal Declaration of Human Rights and in the relevant international instruments is of such gravity as to give the deprivation of liberty an arbitrary character;
>
> (d) Asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review of remedy;
>
> (e) The deprivation of liberty constitutes a violation of the international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; disability or other status, and which aims towards or can result in ignoring the equality of human rights."

(iii) If violation of a *jus cogens* were a primary test of whether a domestic court could adjudicate upon an issue which was otherwise non-justiciable and upon which it would otherwise have to abstain from adjudicating, central areas of abstention identified by Lord Sumption would become potentially amenable to adjudication. The prohibition on the use of armed force and on aggression are core examples of *jus cogens*. Yet these are, rightly as would be my present view,

treated by Lord Sumption himself as giving rise to core examples of issues upon which domestic courts should refrain from adjudicating: see eg Lord Sumption's paras 223-224, with references to *Noor Khan*; and see paras 93-95 above.

(iv) If, as Lord Sumption indicates is his view (para 257), not every violation of a peremptory norm of international law is an exception to the foreign act of state doctrine, then it is not clear how one determines when or why *ius cogens* is an appropriate basis for any exception in any particular case.

(v) Ultimately, in an area of judicial abstention, a case-by-case approach, along lines to which Lord Wilberforce referred, is in my opinion always likely to be necessary. Nothing I have said should be taken to mean that the existence of relevant *jus cogens* principles may not be a stimulus to considering whether judicial abstention is really called for in a particular situation. But the doctrine of abstention rests on underlying principles relating to the role of a domestic judge and the existence of alternative means of redress at an international level, which make it difficult to tie too closely to particular rules of international law, however basic and binding at that level.

X Miscellaneous points

108. It follows from my above conclusions that it is unnecessary to reach any final determination upon the respondents' case that, in so far as what is alleged amounts to complicity in torture, the United Nations Convention against Torture (Treaty Series No 107 (1991)) obliges states to provide a universal civil remedy in respect of torture wherever committed in the world, at least when (allegedly) committed by or with the connivance of United Kingdom citizens such as the appellants, and that any otherwise applicable type of foreign act of state should be modified to enable this. The argument turns on the scope of article 14 of the Convention. As the Court of Appeal observed, Lord Bingham in *Jones v Saudi Arabia*, para 25, expressed the clear conclusion, after looking at the drafting history and other background material, that this article does not provide for universal civil jurisdiction, and that it requires a private right of action for damages only for acts of torture committed in territory under the jurisdiction of the forum state. As at present advised, I see no basis for reaching a contrary conclusion, or indeed for treating the concept of jurisdiction in this context in an expanded sense, such as the European Court of Human Rights has been prepared to attach to it in the specific context of article 1 of the European Convention on Human Rights. But it is unnecessary to express any concluded view on this, any more than it was for the Court of Appeal to do so.

109. Another point which can strictly remain undecided is whether article 6 of the Convention rights scheduled to the Human Rights Act 1998 is engaged by and renders impermissible in the present circumstances any reliance by the appellants on either state

immunity or foreign act of state. As regards state immunity, Mr Belhaj and Mrs Boudchar would have faced the initial difficulty of trying to persuade the Supreme Court - in the light of the European Court of Human Rights judgments in *Al-Adsani v United Kingdom* (2001) 34 EHRR 11 and *Jones v United Kingdom* (2014) 59 EHRR 1 - to overrule *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, in which a majority of the House of Lords held that article 6 is not even engaged by a plea of state immunity: see also *Jones v Saudi Arabia* at paras 14 and 64 per Lord Bingham and Lord Hoffmann.

110. As regards foreign act of state, the question would have been whether for similar reasons article 6 was or was not engaged. Foreign act of state, on the other hand, operates, even under the case law of the European Court of Human Rights, as a substantive bar to liability or adjudication: see *Roche v United Kingdom* (2005) 42 EHRR 30; *Markovic v Italy* (2006) 44 EHRR 52). On this basis, foreign act of state, even if it had been otherwise applicable, would not engage article 6.

111. In either case, if article 6 was engaged, the question would then have arisen whether it rendered impermissible any reliance on either state immunity or foreign act of state. But, in view of what I have already decided, it is unnecessary to go further into this.

XI Overall Conclusion

112. As indicated in para 11(vi) above, it follows from the reasoning and conclusions on the issues of state immunity and foreign act of state set out above, that the appeals in both *Belhaj* and *Rahmatullah* should in principle be dismissed - although by reasoning differing in some significant respects from that of both courts below - thus enabling both sets of claims to be further pursued. The Supreme Court will however invite written submissions as to the precise form of order and of any declarations that may be appropriate as well as on costs within 28 days of the handing down of this judgment.

LORD NEUBERGER: (with whom Lord Wilson agrees)

Introductory

113. These two appeals involve allegations that the defendants, in their capacity as officials or emanations of the executive arm of the government of the United Kingdom, facilitated the claimants' unlawful detention, and ill-treatment (and, in the cases of Mr Belhaj and Mrs Boudchar, their kidnapping and rendition), and should pay the claimants compensation accordingly.

114. Mr Belhaj and Mrs Boudchar allege that the defendants assisted United States and Libyan officials in their unlawful kidnapping and detention, their unlawful rendition (accompanied by ill-treatment), and their subsequent incarceration and torture in Libya. Mr Rahmatullah alleges that, following his capture by UK troops in Iraq (and his unlawful detention and ill-treatment), he was handed over to US officials pursuant to a memorandum of understanding (MoU) between the UK and US Governments, and that US officials then unlawfully detained him for ten years and ill-treated and tortured him, and that the defendants facilitated that detention, ill-treatment and torture.

115. As the two claims are against UK government officials and entities, and not against any foreign government officials or entities, there is no question of any relief being sought other than against domestic defendants. Nonetheless, various points of principle have been raised by those defendants as to why the claims cannot or should not be entertained by the courts of England and Wales. Those points of principle must be determined on the assumption that the facts as pleaded by the claimants are true. The points to be determined at this stage are whether the defendants can rely on (a) the doctrine of state immunity or (b) the doctrine of foreign act of state, as defences to the claims.

116. So far as the doctrine of state immunity is concerned, I agree that it cannot assist the defendants for the reasons given by Lord Mance in paras 12-31 above and by Lord Sumption in paras 181-197 below. There is nothing that I can usefully add to their impressive analyses of this issue.

117. The doctrine of foreign act of state ("the Doctrine") raises more troubling issues.

The nature of the Doctrine

118. In summary terms, the Doctrine amounts to this, that the courts of the United Kingdom will not readily adjudicate upon the lawfulness or validity of sovereign acts of foreign states, and it applies to claims which, while not made against the foreign state concerned, involve an allegation that a foreign state has acted unlawfully. In so far as it is relied on in these proceedings, the Doctrine is purely one of domestic common law, and it has all the advantages and disadvantages of a principle that has been developed on a case by case basis by judges over the centuries. Thus, while it is pragmatic and adaptable to changing norms (as Lord Wilberforce pointed out in *Blathwayt v Baron Cawley* [1976] AC 397, 426), it is a principle whose precise scope is not always easy to identify.

119. Another problem of relying on what was said in most of the earlier cases which have been cited to us in relation to the Doctrine is that the legal basis for a judicial decision that a claim could or would not be resolved by a court was not expanded on in

any detail, and was not characterised by an expression such as "act of state" at least as a term of art. Many of the judgments do not distinguish between what are now treated as three separate doctrines, namely Crown act of state, foreign act of state, and state immunity.

The rules identified in the cases

120. It appears to me that the domestic cases, to which we have been referred, suggest that there may be four possible rules which have been treated as aspects of the Doctrine, although there is a strong argument for saying that the first rule is not part of the Doctrine at all, or at least is a free-standing aspect of the Doctrine effectively franked by international law.

121. The first rule is that the courts of this country will recognise, and will not question, the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state.

122. The second rule is that the courts of this country will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state.

123. The third rule has more than one component, but each component involves issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it. Thus, the courts of this country will not interpret or question dealings between sovereign states; "[o]bvious examples are making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory" - per Lord Pearson in *Nissan v Attorney General* [1970] AC 179, 237. *Nissan* was a case concerned with Crown act of state, which is, of course, a different doctrine and is considered in *Rahmatullah v Ministry of Defence* 2017 UKSC 1, but the remark is none the less equally apposite to the foreign act of state doctrine. Similarly, the courts of this country will not, as a matter of judicial policy, determine the legality of acts of a foreign government in the conduct of foreign affairs. It is also part of this third rule that international treaties and conventions, which have not become incorporated into domestic law by the legislature, cannot be the source of domestic rights or duties and will not be interpreted by our courts. This third rule is justified on the ground that domestic courts should not normally determine issues which are only really appropriate for diplomatic or similar channels (see *Shergill v Khaira* [2015] AC 359, paras 40 and 42).

124. A possible fourth rule was described by Rix LJ in a judgment on behalf of the Court of Appeal in *Yukos Capital SARL v OJSC Rosneft Oil Co (No 2)* [2014] QB 458,

para 65, as being that "the courts will not investigate acts of a foreign state where such an investigation would embarrass the government of our own country: but that this doctrine only arises as a result of a communication from our own Foreign Office".

The cases where the rules have been applied

125. The first rule appears to me to be well established and supported by a number of cases, at least in relation to property. It was applied in *Duke of Brunswick v King of Hanover* (1848) 2 HLC 1, where Lord Cottenham LC rejected a challenge to the validity of a Hanoverian bill deposing and replacing the Duke of Brunswick, on the ground that "a foreign sovereign … cannot be made responsible here for an act done in his sovereign character in his own country". It was also relied on in *Carr v Fracis Times & Co* [1902] AC 176, where seizure of ammunition within Muscat territorial waters was effected by a British officer pursuant to a proclamation issued by the Sultan of Muscat, and the validity of the proclamation could not be challenged as, per Lord Halsbury LC at p 179, "the Sultan's authority there [sc Muscat] is supreme, and what he says is law for the purpose of governing all acts which take place within his territory".

126. Another example of the first rule is *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532, where at p 549 Warrington LJ said that the English courts could not "ignore and override legislative and executive acts of the Government of Russia and its agents affecting the title to property in that country" (and see Bankes LJ to the same effect at p 545). The first rule was also applied in *Princess Paley Olga v Weisz* [1929] 1 KB 718 - see Scrutton LJ's first two reasons at pp 722-723, reflected also in the judgments of Sankey and Russell LJJ at pp 730-732 and 732-736 respectively). The first rule was also invoked in *Buttes Gas and Oil Co v Hammer (Nos 2 and 3)* [1982] AC 888, 937, where Lord Wilberforce said that "an inquiry into the motives of the then ruler of Sharjah in making [a] decree" was non-justiciable, because the decree applied within the territory of Sharjah.

127. The second rule also has significant judicial support, but again only in relation to property. Thus, it appears to have been applied in *Blad v Bamfield* (1673) 3 Swans 604, in the light of Lord Nottingham's point that "the validity of the King's letters patent *in Denmark*" was non-justiciable in English courts (emphasis added). Another example is *Dobree v Napier* (1836) 2 Bing NC 781, where Tindal CJ stated that "no one can dispute the right of the Queen of Portugal to appoint *in her own dominions* the defendant … as her officer … to seize a vessel which is afterwards condemned as a prize" (emphasis added). The second rule was also relied on in *Luther v Sagor* (in the passages in the judgments of Warrington and Bankes LJJ cited above), and in *Princess Paley Olga* (see Scrutton LJ's third reason at pp 722-724, reflected in the judgments of Sankey and Russell LJJ at pp 726-730 and 736 respectively).

128. The third rule has been applied in a number of cases, again in relation to property. Examples of the third rule involving transactions between states include *Blad* in the light of Lord Nottingham's view that a trial about "the exposition and meaning of the articles of peace" between two states would be "monstrous and absurd". It also was applied in *Nabob of the Carnatic v East India Co* (1793) 2 Ves Jun 56, which was expressly treated as "a case of mutual treaty between persons acting as states independent of each other" so that it "consequently … not a subject of private, municipal jurisdiction". The third rule is also apparent from Lord Kingsdown's dictum in *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 13 Moo PCC 22 (a decision based on Crown act of state) that "[t]he transactions of independent States between each other are governed by other laws than those which Municipal Courts administer". That point was repeated by Lord Halsbury LC in *Cook v Sprigg* [1899] AC 572.

129. Most of the issues held to be such that the court "would not adjudicate upon" them in *Buttes Gas* by Lord Wilberforce at pp 937-938 seem to me to be examples of the third rule - eg "what was the boundary of the continental shelf between (i) Sharjah and UAQ, (ii) Abu Musa and UAQ, (iii) Iran and both Emirates". As the Court of Appeal said in *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, para 287, "at the heart of the dispute in that case was a boundary dispute between states which made it impossible to say what the territorial limitations of those states were". And, as it was put in this Court in *Shergill*, para 40, "the dispute arose out of the way in which the four states concerned had settled the issue of international law by a mixture of diplomacy, political pressure and force".

130. A more recent example of the application of the third rule, and this time in relation to injury to the person, is in *R (Noor Khan) v Secretary of State for Foreign Affairs* [2014] 1 WLR 872, where the Court of Appeal refused the applicant permission to seek judicial review of the provision of information by the UK intelligence services to the US government to assist it in targeting drone strikes in Pakistan. The argument was that the provision of information for this purpose was "unlawful", as it involved "requiring GCHQ officers to encourage and/or assist the commission of murder" (para 7). At para 29 Lord Dyson MR, giving the judgment of the Court of Appeal, said that "the court will also usually not sit in judgment on the acts of a sovereign state as a matter of discretion". In expressing that view, he was following some remarks of Simon Brown LJ in *R (Campaign for Nuclear Disarmament) v Prime Minister of the United Kingdom* (2002) 126 ILR 727, para 47(ii).

131. As to the supposed fourth rule, it derives support from the United States, whose jurisprudence was said by Lord Wilberforce to be helpful in *Buttes Gas* at pp 936-937. After initially suggesting in *Oetjen v Central Leather Co* 246 US 297, 303-304 (1918) that the Doctrine was based on "the highest considerations of international comity and expediency", the US Supreme Court preferred to explain it by reference to "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of

foreign acts of state may hinder 'the conduct of foreign affairs'" - per Harlan J in *Banco Nacional de Cuba v Sabbatino* 376 US 398, 423 (1964), cited with apparent approval by Scalia J in *WS Kirkpatrick & Co Inc v Environmental Tectonics Corpn, International* 493 US 400, 406 (1990).

132. There is little authority to support the notion that the fourth rule is part of the law of this country, save that, as discussed in the Court of Appeal's judgment in *Kuwait Airways*, paras 340-350, there are certain areas (such as the recognition of foreign governments, and the extent of a foreign government's territory) in which a certificate from the Foreign Office is regarded by the courts of this country as conclusive - see *Luther v Sagor*. But that is rather a different point. However, there is a trace of the fourth rule in the Court of Appeal's reasoning that the application in *Noor Khan* was not to be entertained because, if it succeeded, "it would be understood as a finding that (i) the US official who operated the drone was guilty of murder and (ii) the US policy of using drone bombs in Pakistan and other countries was unlawful", which "would be seen as a serious condemnation of the US by a court of this country" (para 37). If the fourth rule exists, which I doubt (see para 150 below), it would require exceptional circumstances before it could be invoked.

Decisions of foreign courts

133. While other jurisdictions may have developed analogous principles to some or all of the four rules, it seems to me that courts in this jurisdiction should exercise great caution before relying on, let alone adopting, the reasoning of foreign courts in connection with the Doctrine. Decisions of courts in states with a civil law system and with a coherent written constitution seem to me to be as likely to mislead as to help when it comes to analysing the boundaries of a common law rule developed on a case by case basis over the years. However, I accept that any practical explanation by a court for or against judicial abstention is worth considering. In this case, for example, Lord Mance and Lord Sumption have referred to decisions of courts in France, the Netherlands and Germany. In each of those three countries, the courts appear to have developed some legal rules in this area which, while differing from each other (not much in the cases of France and the Netherlands), are, unsurprisingly, comprehensible and principled. Deciding which of those rules would be most appropriate for the courts of this country seems an unnecessarily cumbersome way, and indeed an unnecessarily constraining way, of resolving the question we have to decide.

134. While they were cited with approval in this jurisdiction (most notably by Bankes, Warrington and Scrutton LJJ in *Luther v Sagor* at pp 541-542, 550-551 and 557, by Scrutton and Sankey LJJ in *Princess Paley Olga* at pp 724-725 and 728-729 and by Lord Wilberforce in *Buttes Gas* at pp 933-937), decisions of courts of the United States, which have purported to adopt the Doctrine as initially developed in this jurisdiction, appear to me to be of very limited assistance. This is for three reasons. First, the

constitutional arrangements and conventions in the USA are very different from those in the UK. Secondly, much of the reasoning in the cases where act of state was first referred to as a principle (*Hatch v Baez* (1876) 7 Hun 596 and *Underhill v Hernandez* 168 US 250 (1897)) was really directed to the different doctrine of state immunity. And, thirdly, the justification for the doctrine of act of state has been recast by the US Supreme Court as summarised in para 131 above, which ties in very well with the first reason.

The validity of the first rule in relation to property and property rights

135. There is no doubt but the first rule exists and is good law in relation to property (whether immovable, movable, or intellectual) situated within the territory of that state concerned. Sovereignty, which founds the basis of the Doctrine, "denotes the legal competence which a state enjoys in respect of its territory" (*Brownlie's Principles of Public International Law*, 8th ed, (2012), p 211), and there is no more fundamental competence than the power to make laws. There is no doubt, however, that the first rule only applies to acts which take effect within the territory of the state concerned - see eg *Peer International Corpn v Termidor Music Publishers Ltd* [2004] Ch 212.

The validity of the second rule in relation to property and property rights

136. I find aspects of the second rule in relation to property and property rights more problematical. In so far as the executive act of a state confiscating or transferring property, or controlling or confiscating property rights, within its territory is lawful, or (which may amount to the same thing) not unlawful, according to the law of that territory, I accept that the rule is valid and well-established.

137. However, in so far as the executive act is unlawful according to the law of the territory concerned, I am not convinced, at least in terms of principle, why it should not be treated as unlawful by a court in the United Kingdom. Indeed, if it were not so treated, there would appear something of a conflict with the first rule. None the less, I accept that there are dicta which can be fairly said to support the existence of the rule even where the act is unlawful by the laws of the state concerned (see para 127 above).

138. However, I am not persuaded that there is any judicial decision in this jurisdiction whose ratio is based on the proposition that the second rule applies to a case where the state's executive act was unlawful by the laws of the state concerned. Thus, the *Duke of Brunswick*, *Carr v Fracis*, *Luther v Sagor* and *Princess Paley Olga* cases all involved acts which were apparently lawful according to the laws of the state concerned (being pursuant to a bill or decree), and there is no suggestion of unlawfulness in relation to the acts in *Blad* or *Dobree*. Similarly, there is nothing to suggest that, when Lord Wilberforce suggested in *Buttes Gas* at p 931 that an "act of state" extended to "a foreign

municipal law or executive act", he intended to refer to an executive act which was unlawful by the laws of the state concerned, let alone, where the act took place in the territory of another state, by the laws of that state. At best, therefore, there are simply some obiter dicta which support the notion that the second rule can apply to executive acts which are unlawful by the laws of the state concerned.

139. There is support for the notion that the second rule does not apply to executive acts which are not lawful by the laws of the state concerned in *Dicey, Morris and Collins* on *The Conflict of Laws*, (15th ed (2012)) which at p 1380 sets out Rule 137 in these terms:

> "A governmental act affecting any private proprietary right in any movable or immovable thing will be recognised as valid and effective in England if the act was valid by the law of the country where the thing was situated (lex situs) at the moment when the act takes effect, and not otherwise."

140. Further, it does not appear to me that the common law regards it as inappropriate for an English court to decide whether a foreign state's executive action infringed the law of that state, at least where that is not the purpose of the proceedings. Support for that view is to be found in the judgment of Diplock LJ in *Buck v Attorney General* [1965] Ch 745, 770, and of Arden and Elias LJJ in *Al-Jedda v Secretary of State for Defence* [2011] QB 773; [2010] EWCA Civ 758 at paras 74 and 189 respectively.

141. However, I am unconvinced that cases such as *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42 assist on this point. In that case, the assumed facts (which subsequently turned out to be inaccurate: see 1995 SLT 510) were that the applicant had been kidnapped and brought to this country from South Africa in a joint exercise involving the police of the UK and of South Africa. Accordingly, even if the second rule would otherwise have applied, the courts of this country had jurisdiction to rule on the apparent unlawfulness of the applicant's treatment because of the public policy exception (considered in paras [153ff] below).

142. Having said that, there is pragmatic attraction in the argument that an executive act within the state, even if unlawful by the laws of that state, should be treated as effective in the interest of certainty and clarity, at least in so far as it relates to property and property rights. In relation to immovable property within the jurisdiction of the state concerned, there appear to be good practical reasons for a foreign court recognising what may amount to a de facto, albeit unlawful, transfer of, or other exercise of power over, such property. So far as movable property or other property rights are concerned, if by an executive, but unlawful act, the state confiscates such property within its territory, the same point applies so long as the property remains within the territory of that state. And there is practical sense, at any rate at first sight, if when the property is

transferred to another territory following a sale or other transfer by the state, the transferee is treated as the lawful owner by the law of the other territory. However, there are potential difficulties: if the original confiscation was unlawful under the laws of the originating state, and the courts of that state were so to hold, or even should so hold, it is by no means obvious to me that it would be, or have been, appropriate for the courts of the subsequent state to treat, or have treated, the confiscation as valid.

143. The question whether the second rule exists in relation to executive acts which interfere with property or property rights within the jurisdiction of the state concerned, and which are unlawful by the laws of that state, is not a point which needs to be decided on the present appeal. Property rights do not come into this appeal, and no doubt for that very reason, the point was not debated very fully before us. Accordingly, it seems to me that it is right to keep the point open.

The validity of the third rule in relation to property and property rights

144. There is no doubt as to the existence of the third rule in relation to property and property rights. Where the Doctrine applies, it serves to defeat what would otherwise be a perfectly valid private law claim, and, where it does not apply, the court is not required to make any finding which is binding on a foreign state. Accordingly, it seems to me that there is force in the argument that, bearing in mind the importance which both the common law and the Human Rights Convention attach to the right of access to the courts, judges should not be enthusiastic in declining to determine a claim under the third rule. On the other hand, even following the growth of judicial review and the enactment of the Human Rights Act 1998, judges should be wary of accepting an invitation to determine an issue which is, on analysis, not appropriate for judicial assessment.

145. I believe that this is reflected in observations of Lord Pearson in *Nissan*. Immediately after the passage quoted in para 123 above, he said "Apart from these obvious examples, an act of state must be something exceptional. Any ordinary governmental act is cognisable by an ordinary court of law (municipal not international): if a subject alleges that the governmental act was wrongful and claims damages or other relief in respect of it, his claim will be entertained and heard and determined by the court.". A little later, he explained that where the Doctrine applied "the court does not come to any decision as to the … rightness or wrongness of the act complained of: the decision is that because it was an act of state the court has no jurisdiction to entertain a claim in respect of it", and added that "[t]his is a very unusual situation and strong evidence is required to prove that it exists in a particular case".

146. In *Yukos v Rosneft*, para 66, Rix LJ suggested that "Lord Wilberforce's principle of 'non-justiciability' … has … to a large extent subsumed [the act of state Doctrine] as the paradigm restatement of that principle". If the foreign act of state principle is

treated as including what I have called the first and second rules, then I do not agree. The third rule is based on judicial self-restraint and is, at least in part, concerned with arrangements between states and is not limited to acts within the territory of the state in question, whereas the first and second rules are of a more hard-edged nature and are almost always concerned with acts of a single state, normally within its own territory.

147. Having said that, I accept that it will not always be easy to decide whether a particular claim is potentially subject to the second or third rule. The third rule may be engaged by unilateral sovereign acts (eg annexation of another state) but, in practice, it almost always only will apply to actions involving more than one state (as indeed does annexation). However, the fact that more than one sovereign state is involved in an action does not by any means justify the view that the third rule, rather than the second, is potentially engaged. The fact that the executives of two different states are involved in a particular action does not, in my view at any rate, automatically mean that the third rule is engaged. In my view, the third rule will normally involve some sort of comparatively formal, relatively high level arrangement, but, bearing in mind the nature of the third rule, it would be unwise to be too prescriptive about its ambit.

The validity of the fourth rule

148. As already mentioned, there will be issues on which the position adopted by the executive, almost always the Foreign Office, will be conclusive so far as the courts are concerned - for instance, the recognition of a foreign state, also the territorial limits of a foreign state and whether a state of war exists.

149. However, apart from those types of cases, the fourth rule has no clear basis in any judicial decisions in this jurisdiction, although, at least on one reading, the Court of Appeal in *R (Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872 seem to have accepted that it existed. If a member of the executive was to say formally to a court that the judicial determination of an issue raised in certain legal proceedings could embarrass the Government's relations with another state, I do not consider that the court could be bound to refuse to determine that issue. That would involve the executive dictating to the judiciary, which would be quite unacceptable at least in the absence of clear legislative sanction. However, there is a more powerful argument for saying that such a statement should be a factor which the court should be entitled to take into account when deciding whether to refuse to determine an issue. Some indirect support for such an argument is to be found in *In re Westinghouse Electric Corpn Uranium Contract Litigation MDL Docket No 235* [1978] AC 547, 616-617 and 639-640, and in *Adams v Adams* [1971] P 188, 198. Again, it is a point which does not have to be decided in this case, and was not argued. In fairness to the defendants, there was some evidence to support such an argument, but it was answered in some detail, and in any event it was, rightly in my view, not pressed on their behalf in relation to the application of the Doctrine in these two cases.

Characterisation of the Doctrine:

150. Having discussed the four possible rules which may be said to fall under the umbrella of the Doctrine, it is appropriate briefly to identify the characterisation of the various rules. I agree with Lord Mance that the first rule is a general principle of private international law. The rule was characterised by Upjohn J in *In re Helbert Wagg & Co Ltd's Claim* [1956] Ch 323, 344-345 as:

> "the elementary proposition that it is part of the law of England, and of most nations, that in general every civilized state must be recognized as having power to legislate in respect of movables situate within that state and in respect of contracts governed by the law of that state, and that such legislation must be recognized by other states as valid and effectual to alter title to such movables." (Emphasis added)

To the extent that it exists, the second rule also seems to me to be a general principle, and, at least to some extent, it may be close to being a general principle of private international law.

151. The third rule is based on judicial self-restraint, in that it applies to issues which judges decide that they should abstain from resolving, as discussed by Lord Mance in paras 40-45 and by Lord Sumption in paras 234-239 and 244. It is purely based on common law, and therefore has no international law basis, although, as discussed below, its application (unsurprisingly) can be heavily influenced by international law.

152. I turn now to discuss the limitations of, and exceptions to, the Doctrine. The cases establish that there are limitations and exceptions, each of which apply to some or all of these three or four rules. Many of those limitations and exceptions were fully examined by the Court of Appeal in *Yukos v Rosneft*, paras 68 to 115. But only three are relevant for present purposes.

Limits and exceptions to the Doctrine: Public Policy

153. It is well established that the first rule, namely that the effect of a foreign state's legislation within the territory of that state will not be questioned, is subject to an exception that such legislation will not be recognised if it is inconsistent with what are currently regarded as fundamental principles of public policy - see *Oppenheimer v Cattermole* [1976] AC 249, 277-278, per Lord Cross of Chelsea. This exception also applies where the legislation in question is a serious violation of international law - see

Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5) [2002] 2 AC 883, para 29, per Lord Nicholls of Birkenhead.

154. The circumstances in which this exception to the Doctrine should apply appear to me to depend ultimately on domestic law considerations, although generally accepted norms of international law are plainly capable of playing a decisive role. In his opinion in *Kuwait Airways*, paras 28 and 29, Lord Nicholls emphasised "the need to recognise and adhere to standards of conduct set by international law" and held that recognition of the "fundamental breach of international law" manifested by the Iraqi decree in that case "would be manifestly contrary to the public policy of English law", like the Nazi German confiscatory decree in *Oppenheimer*. However, there is nothing in what Lord Nicholls said which suggests that it is only breaches of international law norms which would justify disapplication of the Doctrine. On the contrary: his reference to "the public policy of English law" supports the notion that the issue is ultimately to be judged by domestic rule of law considerations.

155. The point is also apparent from the opinion of Lord Hope. At para 139, he said that "the public policy exception" is not limited to cases where "there is a grave infringement of human rights", but is "founded upon the public policy of this country" - plainly a domestic standard.

156. The exception to the Doctrine based on public policy has only been considered by the courts in relation to the first of the four rules set out above. However, I cannot see grounds for saying that it does not apply similarly to the second rule, executive acts within the territory of the state concerned.

157. As to the third rule, dealings between states, (as well as the fourth rule - if it exists) it appears to me that in many types of case this exception may be applicable, but in some it may not. In the course of its judgment in *R (Abbasi) v Secretary of State for Foreign & Commonwealth Affairs and Secretary of State for the Home Department* [2003] UKHRR 76, the Court of Appeal effectively suggested that the exception could be applied to the third rule. In paras 32 and 33, they said that "the English court will not adjudicate upon the legality of a foreign State's transactions in the sphere of international relations in the exercise of sovereign authority", but that this was subject to exceptions, as *Oppenheimer* and *Kuwait Airways* demonstrated. The Court was accordingly prepared to hold that the detention of a UK citizen in Guantanamo Bay "subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal" was unlawful, despite his detention being an act of state on the part of the US - see paras 64, 66 and 107. (It is fair to add that, although expressed as if it involved transactions in the field of international relations, it is arguable that the issue before the Court of Appeal in *Abbasi* was not in fact concerned with the third rule, but the second).

Limits and exceptions to the Doctrine: Injury to the person

158. None of the English cases discussed so far (save *Noor Khan* [2014] 1 WLR 872) involved alleged wrongs or acts in relation to the person, as opposed to alleged wrongs or acts in relation to property.

159. As to that, it appears to me to be a very powerful argument for saying that the first rule must apply equally to injuries to the person as it applies to the taking of property. The notion that English courts will respect a sovereign state's right to legislate as it sees fit in relation to the taking of property within its territory (subject always to the exception of legislation which conflicts with public policy) appears to me to be based on the principle that the law in a given territory should generally be treated as being that laid down by the legislature of that territory. In other words, it is either based on, or at least is close to, the choice of law, or proper law, principle which applies in private law conflict cases. That seems to derive support from what Lord Wilberforce said in *Buttes Gas* at p 931, and indeed from the reasoning of Lord Bingham in *R (Al-Jedda) v Secretary of State for Defence (JUSTICE intervening)* [2008] AC 332, paras 40-43, approving the reasoning and decision of the Court of Appeal at [2007] QB 621, paras 105-107.

160. Assuming that the second rule can apply to executive acts in relation to property which are unlawful by the laws of the state in which it occurred, I am unconvinced that it would apply in such a case in so far as the act resulted in injuries to the person. In no English case has it been held, or even suggested, that an executive act, unlawful by the laws of the state in which it occurred, can be subject to the Doctrine in a case where the cause of action is personal injury or death. As discussed in paras 143-144 above, there is a serious practical argument in favour of the second rule applying to unlawful executive acts in so far as they relate to interference with property and property rights, but that argument does not apply to personal harm - whether physical or mental. Bearing in mind that (i) the Doctrine is not concerned with claims against a foreign state, (ii) there is no good practical reason for the second rule to apply to cases of unlawfully causing harm to the person, (iii) there are no judicial decisions or even judicial observations where it has been held so to apply, and (iv) there will be cases of personal harm where the third rule can be invoked, I consider that we should hold that the second rule does not apply to cases where a foreign state executive has caused physical or mental harm to a claimant through an act in the territory of that state which was unlawful under the laws of that state.

161. Further, such recent authority as there is in this jurisdiction tends to support a limited interpretation of the second rule. In *Lucasfilm Ltd v Ainsworth* [2012] 1 AC 208, para 86, Lord Walker and Lord Collins said that "in England the foreign act of state doctrine has not been applied to any acts other than foreign legislation or governmental acts of officials such as requisition", and so refused to apply it to the grant of a patent.

The notion that the second rule only applies to executive acts in relation to property within the jurisdiction of the state concerned is also supported by the editors of *Dicey, Morris and Collins* in the passage cited in para 139 above.

162. In a case where neither the first nor the third rule applies, it seems to me that there is force in the point that, as a matter of elementary justice, if a member of the executive of a foreign state injures a claimant physically in the territory of that state, and the injury was not authorised by the law of that state, a third party who is properly sued in this country on the ground that he was in some way also responsible for the injury should not normally be allowed to rely on the Doctrine as a defence. (I say "normally", because, as already indicated, there will be occasions where the third rule may apply). In other words, the onus seems to me to be very much on those who wish to justify the extension of the second rule to unlawful acts which cause physical or mental damage, and I can see no good reason for doing so.

Limits and exceptions to the Doctrine: Territoriality

163. So far as the cases are concerned, the first, second and third rules have only been applied in relation to acts within the territory of the state concerned. I find it hard to see how it could be argued that the first rule, which is concerned with legislation, could apply to acts which take effect in a location outside the territory of the state concerned. The same applies to the second rule, which is concerned with executive acts. The older cases indicate that both rules are based on sovereign power, and, as mentioned in para 136 above, the nature of sovereign power is that it is limited to territory over which the power exists.

164. Further, a location outside the relevant territory would be in the territory of another state, and normal principles, including the first rule, would indicate that the laws of that other state will normally apply. It is therefore hard to see how the law of the state which committed the act could apply so far as the first rule is concerned. As to the second rule, in the absence of any judicial decision to the contrary, I cannot see any good reason why, if the act in question was unlawful pursuant to the laws of the location in which it occurred, the act of state doctrine should assist a defendant simply because the act was carried out by the executive of another state.

165. The position with regard to territoriality seems to me to be less clear so far as the third rule is concerned. As Rix LJ observed in *Yukos* at para 49, "[i]t is not entirely clear" from what Lord Wilberforce actually said in *Buttes Gas* whether what I have called the third rule "is confined … to what transpires territorially within a foreign sovereign state". However, I also agree with Rix LJ that, at least in some circumstances it could do so, as it is inherent in the nature of the rule that it may apply to actions outside the territory of the state concerned.

The application of these principles to these cases

166. Mr Belhaj and Mrs Boudchar contend that the defendants assisted US officials to kidnap, detain and torture them in Malaysia and Thailand, and to take them to Libya, in order for them to be detained and tortured there by Libyan officials. It is not suggested (at least at this stage of the proceedings) that the alleged detention, kidnapping and torture in Malaysia or Thailand or the alleged rendition to Libya were lawful in Malay or Thai law, or that the alleged rendition was lawful in US law, or that the subsequent detention and torture in Libya were lawful in Libyan law. They were executive actions by members of the executive of the governments of the US and Libya, and it appears, to some extent, members of the executive of the governments of Malaysia and of Thailand.

167. In my view, at least on the evidence available so far, and in agreement with Lord Mance and Lord Sumption, the acts complained of by Mr Belhaj and Mrs Boudchar do not fall within the third rule. There is no suggestion that there was some sort of formal or high-level agreement or treaty between any of the states involved which governed the cooperation between the executives of the various countries concerned. As already mentioned, the mere fact that officials of more than one country cooperate to carry out an operation does not mean that the third rule can be invoked if that operation is said to give rise to a claim in domestic law. It would be positively inimical to the rule of law if it were otherwise.

168. Having said that, even if the third rule otherwise applied, I would still hold that this was a case where, assuming that the claimants were detained, kidnapped and tortured as they allege, the public policy exception would apply. In that connection, Lord Sumption's impressive analysis of the relevant international law is important in the present context because I consider that any treatment which amounts to a breach of jus cogens or peremptory norms would almost always fall within the public policy exception. However, as explained above, because the Doctrine is domestic in nature, and in agreement with Lord Mance and Lord Sumption, I do not consider that it is necessary for a claimant to establish that the treatment of which he complains crosses the international law hurdle before he can defeat a contention that the third rule applies.

169. Given that the third rule does not apply, I consider that it is clear that the Doctrine cannot be relied on as against Mr Belhaj and Mrs Boudchar, and the first rule plainly does not apply. As to the second rule, I consider that it cannot be relied on because (i) the alleged wrong-doing involves harm to individuals and not property, and (ii) the public policy exception would anyway apply, as it would in relation to the third rule.

170. The position of Mr Rahmatullah is arguably a little more nuanced. Although I accept that there is an argument to the contrary, at the moment it does not seem to me that his treatment by the US authorities should be treated as having taken place within

the US jurisdiction, because it was within the Afghan jurisdiction. Quite apart from this, Mr Rahmatullah's allegations involve physical and mental harm. Accordingly, for each of those two reasons, the second rule is not engaged.

171. However, because the defendants were apparently acting pursuant to the MoU between the UK and US governments, there is an argument that, unlike in the case of Mr Belhaj and Mrs Boudchar, the third rule is engaged. I was initially inclined to think that that argument may be a good one. However, I have come to the conclusion that the third rule does not apply in relation to Mr Rahmatullah. As Lord Mance says, the existence and terms of the MoU do not bear on the allegations which are of complicity in unlawful detention and ill-treatment.

172. In any event, even if that is wrong and the third rule was engaged, I consider that Mr Rahmatullah could rely on the public policy exception, essentially for the reasons given by Lord Sumption. To be held without charge or trial for ten years, particularly when coupled with significant mistreatment (even if it did not amount to torture) is sufficient to take Mr Rahmatullah's case into the public policy exception, bearing in mind the severity and flagrancy of the alleged interference with his rights, and the length of time for which it allegedly lasted.

Conclusion

173. Accordingly, I would dismiss the defendants' appeals in so far as they contend that the courts below held that their defences of state immunity and foreign act of state in each of the two actions must be rejected.

LADY HALE AND LORD CLARKE:

174. We agree with the reasoning and conclusion in the judgment of Lord Neuberger. The defences of state immunity and foreign act of state do not apply at all in the two cases before us. This is also the conclusion reached by Lord Mance for essentially the same reasons. It is not necessary for us to express a view on other issues which do not strictly arise for decision in these cases.

LORD SUMPTION: (with whom Lord Hughes agrees)

Introduction

175. These appeals raise questions of some constitutional importance concerning the ambit of the act of state rule. They arise from allegations that British officials were

complicit in acts of foreign states constituting civil wrongs and in some cases crimes and breaches of international law.

176. Yunus Rahmatullah is a national of Pakistan. He was detained in Baghdad in February 2004 by British forces, on suspicion of being a member of Lashkar-e-Taiba, a terrorist organisation based in Pakistan with links to Al-Qaeda. At the time of his detention, the United Kingdom and the United States were occupying powers in Iraq. British forces were part of a multinational force responsible for the security and stabilisation of the country under Resolution 1511/2002 of the Security Council of the United Nations. They were deployed primarily in a designated area of south-eastern Iraq, but Mr Rahmatullah was detained outside that area in a sector under the control of the United States. Accordingly, on the day after his detention he was transferred to United States custody under the terms of a "Memorandum of Understanding" concerning the custody of detainees, which had been agreed between the two occupying powers. The United States removed him shortly afterwards to Bagram airbase in Afghanistan, where he was detained for more than ten years without charge or trial, before he was finally released in May 2014. Mr Rahmatullah alleges that while in the custody of British and American forces he was subjected to torture and other serious mistreatment. The present appeal is not concerned with any mistreatment that may have occurred while Mr Rahmatullah was in British custody. It is concerned only with his case that the United Kingdom is responsible for the acts of United States personnel during the period when he was in their custody. He claims damages from the British government on the ground (i) that his treatment by US personnel was part of a common design or concerted course of action between Britain and the United States, (ii) that United States personnel were in the relevant respects agents of the United Kingdom, and (iii) that the United Kingdom knew or should have known that if delivered into the custody of United States forces he was liable to be unlawfully rendered to other countries, and unlawfully detained, tortured and otherwise mistreated. We are told that *Rahmatullah* is representative of "many hundreds" of claims in the High Court in which the same legal issues arise.

177. Mr Belhaj is a Libyan national. In 2004 he was the leader of the Libyan Islamic Fighting Group, an organisation opposed to the government of Colonel Gaddafi, which is alleged to have been a terrorist organisation at the relevant time. He led an attempted uprising against the Gaddafi regime in 1998, and fled the country when it was suppressed. Mrs Boudchar, his wife, is a Moroccan national. In February 2004 Mr Belhaj and Mrs Boudchar were living in China but wished to come to the United Kingdom to claim asylum. They allege that Chinese officials detained them at Beijing airport as they were about to board a flight to London, and later put them on a flight to Kuala Lumpur in Malaysia. There, they were held for two weeks by the Malaysian authorities. They were then allowed to leave for the United Kingdom but were required to go via Bangkok. On 7 March 2004 they were put on a commercial flight to London via Bangkok. At Bangkok they were taken off the aircraft by Thai officials and delivered to agents of the United States. At some time in the next two days they were flown to Libya in a US-registered aircraft said to have been owned by a CIA front company. In

Libya, they were taken to Tajoura prison. Mrs Boudchar was released in June 2004 after being held there for rather more than three months. Mr Belhaj was held successively at Tajoura and Abu Salim prisons for six years before being released in March 2010. It is alleged that they were tortured and subjected to other serious mistreatment by US officials in Bangkok and in the aircraft carrying them to Libya, and by Libyan officials in Libya. The claimants at one stage relied upon mistreatment by the Chinese authorities, but they no longer do so. The present proceedings are brought in support of a claim for damages against a number of departments and officials of the British government who are said to have been complicit in what happened to them. The defendants include the intelligence services, the departments of state responsible for them, the then Foreign Secretary Mr Straw, and Sir Mark Allen, who is said to have been a senior official of the Secret Intelligence Service. The case against them is that the SIS, having learned that Mr Belhaj and Mrs Boudchar were being detained in Malaysia, passed the information to the Libyan intelligence services and assisted the rendition flight with transit facilities at the British-owned but American operated base at Diego Garcia in the Indian Ocean. It is not alleged that British officials were directly involved in the rendition, torture or mistreatment of the claimants. But it is said that they enabled it to happen, knowing of the risk that the defendants would be unlawfully detained, tortured and otherwise mistreated by the Americans and the Libyans. It is also alleged that British officials took advantage of Mr Belhaj's detention in Libya by interrogating him there at least twice. The defendants, it is said, thereby incurred liability in tort.

178. Both claims were pleaded by reference to English law. But it is now common ground that any liability in tort is governed by the law of the countries where they occurred, ie successively Malaysia, Thailand and Libya, and (in respect of what happened outside those countries on a US-registered aircraft), the United States.

179. It is important to draw attention to the limited character of the issues presently before the Court. The allegations of fact summarised in the two preceding paragraphs are taken from the pleadings. They are no more than allegations. None of them has been proved. The present appeals are concerned with the question whether they would give rise to a cause of action if they were true. That turns on three issues: (i) whether the claims against the British government and its officials indirectly implead Malaysia, Thailand, Libya and the United States, so as to be barred by state immunity; (ii) whether the tortious acts alleged are non-justiciable or non-actionable as acts of state of those countries; and (iii) if the claim is barred or non-justiciable as a matter of domestic law, whether that is consistent with article 6 of the European Convention on Human Rights.

180. In *Belhaj*, Simon J held that there was no state immunity but that the claims were barred as being based on foreign acts of state. He rejected the argument that this outcome was inconsistent with article 6 of the Convention. The Court of Appeal affirmed the judgment on state immunity and accepted that the act of state doctrine was engaged. But it allowed the appeal on the ground that the act of state doctrine was

subject to (i) a limitation to acts of state occurring within the jurisdiction of the state in question, and (ii) an exception on the ground of public policy for grave violations of human rights. In *Rahmatullah*, Leggatt J also rejected the argument based on state immunity. He, however, took a more radical approach to the foreign act of state doctrine, holding that it was not engaged at all. He then made a leap-frog order with a view to enabling the case to be considered by this court together with *Belhaj*.

State Immunity

181. State immunity is a rule of customary international law which requires states to accord each other immunity from the jurisdiction of their domestic courts in respect of their sovereign acts (acts *jure imperii*). In *Jurisdictional Immunities of the State (Germany v Italy, Greece intervening)* [2012] ICJ Rep 99, the International Court of Justice held that the rule derived from the principle of the sovereign equality of states, which was "one of the fundamental principles of the international legal order" (para 57).

182. In the United Kingdom, effect was given to the rule of international law by the common law for some three centuries before it became statutory with the enactment of the State Immunity Act 1978. Section 1(1) of that Act provides that "a state is immune from the jurisdiction of the courts" except in cases specified by the Act. For this purpose, a state includes the sovereign or other head of state in his public capacity, the government of that state and any department of that government: see section 14(1). The same immunity is conferred on a separate entity, in respect of anything which it does in the exercise of sovereign authority, if the circumstances are such that a state would have been immune: section 14(2). The statutory exceptions are for proceedings relating to private, as opposed to sovereign or public acts. They relate broadly to commercial transactions, and other transactions in which a state engages otherwise than in the exercise of sovereign authority: sections 3-11. All of these exceptions depend for their application on the nature or subject matter of the action. To that extent it may be described as a subject matter immunity. But the basic rule, subject to the exceptions, is that state immunity is a personal immunity from the exercise of jurisdiction, which depends upon the identity of the person sued.

183. As a matter of both international and domestic law, the categorisation of an act as sovereign depends on its character, not its purpose or underlying motive: see *Playa Larga (Owners of Cargo lately laden on board) v I Congreso del Partido (Owners)* [1983] AC 244, 262-267 (Lord Wilberforce), where the national and international authorities are reviewed. Lord Wilberforce formulated the test as follows, at p 267:

> "… in considering under the 'restrictive' theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a

> view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity."

184. By this standard there can be no real doubt that the acts alleged against the relevant foreign governments in these cases were sovereign acts, whether they were lawful or not. If Malaysia, Thailand, Libya and the United States had been sued, they would have been immune. However, they have not been sued. Only the government and agents of the United Kingdom have been. They accept that state immunity is not available to them, but none the less invoke it on the basis that the issues engage the interests of the other states. Their argument is based on the very limited categories of cases in which state immunity may apply notwithstanding that the relevant foreign state is not itself a party. Two such categories are well established in English law.

185. The first, which does not arise in these appeals, is the case of a civil claim against an employee or other agent of a state in respect of acts which are attributable in international law to that state. In *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2007] 1 AC 270, the House of Lords held that the agent was entitled to immunity on the same basis as his principal. This is because so far as the agents of a state act in their public capacities, they are identified with the state in international law, so that references in the Act to a state "must be construed to include any individual representative of the state acting in that capacity": para 69 (Lord Hoffmann), cf para 10 (Lord Bingham).

186. The second case comprises actions in which a state, without being a party, is said to be "indirectly impleaded" because some relevant interest of that state is directly engaged. In England, the only cases in which a foreign state has been held to be indirectly impleaded in this way are those involving the assertion of some right over property of that state situated within the jurisdiction of the English courts.

187. The paradigm case of indirect impleader, and the earliest to be considered by the English courts, is an Admiralty action in rem against a state-owned ship. During the period when the United Kingdom applied the absolute doctrine of state immunity it was established that an action in rem against a state-owned ship was barred by state immunity. The principle, adapted to reflect the restricted doctrine of state immunity, is now embodied in section 10 of the State Immunity Act. The reason is that an action in rem is in reality an action against the ship's owner, although the owner is not named. Thus the action may be brought only if at the time when the cause of action arose the owner would have been liable in personam; in current practice it may be brought against

a ship in respect of a liability arising in connection with another ship under the same ownership. A defendant who appears to the writ in rem thereby becomes liable in personam even if he would not otherwise have been. In *The Parlement Belge* (1880) 5 PD 197, Brett LJ, delivering the judgment of the court, said at pp 218-219:

> "In a claim made in respect of a collision the property is not treated as the delinquent per se. Though the ship has been in collision and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot. This is conclusive to shew that the liability to compensate must be fixed not merely on the property but also on the owner through the property. If so, the owner is at least indirectly impleaded to answer to, that is to say, to be affected by, the judgment of the court … To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be so indirectly impleaded, any more than he could be directly impleaded. The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court."

Although the expression "indirect impleader" has passed into common usage, the truth is that proceedings in rem against property are a form of direct impleader, as Lord Wright pointed out in *The Cristina* [1938] AC 485, at p 505.

188. The principle that a state is impleaded by proceedings against its property is, however, based on more than the technicalities of Admiralty procedure. It reflects the broader rule that if the relief claimed would directly affect a foreign state's interest in property, it makes no difference whether the action is framed in rem or in personam, and no difference whether it is brought against the state or someone else who is in possession or control of the property.

189. In *United States of America v Dollfus Mieg et Cie SA* [1952] AC 582, gold bars had been looted by German troops in 1944 from a French bank which was holding them for Dollfus Mieg & Cie. They were recovered by allied forces in Germany and lodged with the Bank of England by a Tripartite Commission comprising the governments of Britain, France and the United States to await the Commission's decision upon their ultimate disposal. Accordingly the allied governments had no beneficial interest in the gold but an immediate right to possession as against the Bank. Dollfus Mieg brought a personal action against the Bank, claiming delivery of the bars still in its possession or

damages for the Bank's act in converting the bars by refusing delivery. The House of Lords held that the action against the Bank for specific delivery of the gold was barred by state immunity. Earl Jowitt considered (p 604) that the two foreign states were neither directly nor indirectly impleaded, but that state immunity should be extended to apply to actions against a state's bailee. He did not expand on the reasons for that extension, but appears to have regarded it as a principle *sui generis* rather than an illustration of some broader rule. It is, however, clear that this was not the view taken by his colleagues. Lord Porter pointed out (p 612) that chattels and other personal property must necessarily be held by states through servants or agents and that bailees were on the same footing as agents. In other words, the Bank was to be identified with the three governments so far as it acted as their bailee. Lord Oaksey (p 614) agreed with Lord Porter. Lord Tucker (pp 621-622) took the same view. Lord Radcliffe, whose analysis is the most complete, approved the statement in the then current edition of *Dicey's Conflict of Laws* that "any action or proceeding against the property of [a foreign sovereign] is an action or proceeding against such person" (p 616). In his view the merit of the rule thus stated was that "it does make it clear that the property of a sovereign enjoys no immunity in legal proceedings except in so far as those proceedings amount in one way or another to a suit against a sovereign." This left unresolved the alternative claim against the Bank in its own right for damages for conversion. Lord Radcliffe rejected that claim also, on the ground that upon discharging any liability for conversion, the Bank would become entitled to set up the plaintiff's title against his bailor. "In other words the court's judgment … would materially affect the existing right of his bailor in respect of the possession and disposal of the chattel": pp 619-620.

190. Similar issues arose in *Rahimtoola v Nizam of Hyderabad* [1958] AC 379. The Nizam sued the former High Commissioner of Pakistan in the United Kingdom, who had received a sum of money paid out of the Nizam's account by a signatory during the Indian invasion of Hyderabad. It was held that the action was barred. The critical point was the capacity in which the High Commissioner had acted. The Court of Appeal had decided that no question of state immunity arose because the High Commissioner was only an agent of the state of Pakistan. In the House of Lords that decision was reversed, but there are some differences in the reasoning of the appellate committee. In my view, the correct analysis was that of Viscount Simonds, who thought that as an agent of Pakistan for the purpose of receiving the money, the High Commissioner was in the relevant respect to be identified with Pakistan. Like Lord Radcliffe in *Dollfus Mieg*, he approved the rule stated in Dicey (pp 393-394), observing:

> "No doubt, if a defendant, by whatever name he is called, can be identified with the sovereign state, his task is easy: he need prove no more in order to stay the action against him. But, as soon as it is proved that quoad the subject matter of the action the defendant is the agent of a sovereign state, that, in other words, the interests or property of the state are to be the subject of adjudication, the same result is reached."

Accordingly, he treated an action to assert a proprietary right in assets under the control of a state as a mode of impleading that state. Addressing an argument that Pakistan held the money in trust for the Nizam or as money had and received to his use, he added at p 397

> "These are matters which directly concern the principal on whose behalf Rahimtoola received the money. They cannot be determined without impleading him. Therefore they cannot be determined at all."

This principle is now implicitly reflected in section 6(4) of the State Immunity Act, which provides that a court may entertain proceedings against a person other than a state relating to property in the possession or control of a state, or in which a state claims an interest, "if the state would not have been immune had the proceedings been brought against it."

191. In these cases, English and international law treated a claim against a state's property as tantamount to a claim against the state. The appellants argue that the true rationale of this rule is broader than this. It is, they submit, that a state is to be treated as indirectly impleaded in any case where the issues would require the court to adjudicate on its legal rights or liabilities, albeit as between other parties. Two matters in particular are urged in support of this argument. The first is that it is said that an analogous principle is applied as a matter of international law by tribunals of international jurisdiction. The second is that the extension for which they contend is recognised in the current draft convention adopted by the United Nations for codifying the international law of state immunity. In both cases, the argument is that English law should conform to the principles of international law which underlie the domestic doctrine of state immunity.

192. In support of the first point, the appellants rely on two decisions of the International Court of Justice, *Monetary Gold Removed from Rome* (1954) ICJ Rep, p 19 and *East Timor (Portugal v Australia)* (1995) ICJ Rep, p 90. The jurisdiction of the International Court over states is founded on their agreement to submit, either specifically in relation to a particular dispute or generally in relation to certain categories of dispute. In both of these cases the Court declined to decide an issue as between the parties because it affected the rights of a non-party state. *Monetary Gold* concerned a claim by the United Kingdom to apply Albanian gold stored at the Bank of England towards satisfaction of a judgment which it had previously obtained from the Court against Albania. A competing claim had been made by Italy to apply the same gold in satisfaction of its own claims against Albania. Italy, however, had no judgment. The court declined to decide the issue as between the United Kingdom and Italy because it could not do so without deciding whether Italy's claims against Albania were well-

founded, something that it could not do in litigation to which Albania was not a party. Giving its reasons at pp 32-33, the court observed:

> "In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject matter of the decision. … It is true that, under article 59 of the Statute, the decision of the court in a given case only binds the parties to it and in respect of that particular case. This rule, however, rests on the assumption that the court is at least able to render a binding decision. Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third state, the court cannot, without the consent of that third state, give a decision on that issue binding upon any state, either the third state, or any of the parties before it."

East Timor concerned a claim by Portugal that Australia had not been entitled to conclude a treaty with Indonesia relating to the exploitation of certain natural resources of East Timor, a Portuguese territory which had been occupied by Indonesia since 1975. Indonesia was not a party. The Court applied the *Monetary Gold* principle. It declined to entertain the dispute because it could not do so without adjudicating in the absence of Indonesia on the lawfulness of its occupation and its right to make treaties concerning the natural resources of East Timor.

193. As the Court pointed out in *Monetary Gold* (p 32), the underlying principle is that a court "can only exercise jurisdiction over a state with its consent." But the point about both of these cases was that the decision would have involved an exercise of jurisdiction over a non-party state without its consent. This was because the resolution of the dispute as between the parties might have conferred upon at least one of them an international right at the expense of the non-party. In *Monetary Gold*, the resolution of the issue in favour of Italy would have enabled Italy to satisfy its claim against Albania's gold, leaving Albania to satisfy the United Kingdom's judgment from other assets. In *East Timor*, the resolution of the issue in favour of Portugal, by binding Australia, would have prevented Australia from implementing its treaty with Indonesia and Indonesia from concluding any other treaty with Australia in right of East Timor. Both cases had two features which in combination account for the outcome. First, the rights or liabilities of the non-party state were the very subject matter of the dispute between the parties. Secondly, although the judgment would have bound only the parties, each of the parties would have been bound to deal with the non-party in accordance with it. Even on the assumption (and it is a large one) that the principle applied in these cases can readily be transposed to the domestic law plane, the mere fact that the rights or liabilities of the non-party were in issue would not be enough.

194. Turning to the appellants' second argument, the United Nations Convention on Jurisdictional Immunities of States and their Property (2004) is an attempt to codify the international law of state immunity. It was drafted by the International Law Commission of the United Nations between 1977 and 2004. The final document was adopted by the General Assembly of the United Nations in December 2004. It will enter into force when 30 states have ratified it. As yet, however, it has been signed by only 31 states and ratified by only 19, not including the United Kingdom. Notwithstanding its uncertain status as a treaty, it has been regarded as an authoritative statement of customary international law. In *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, *supra*, at para 8, Lord Bingham endorsed the view expressed by Aikens J in *AIG Capital Partners Inc v Republic of Kazakhstan* [2006] 1 WLR 1420 (para 80) that the Convention "powerfully demonstrates international thinking." Article 1 of the Convention recites that it "applies to the immunity of a state and its property from the jurisdiction of the courts of another state."

195. Article 6 of the Immunities Convention provides:

> "1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.
>
> 2. A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:
>
> (a) is named as a party to that proceeding; or
>
> (b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State."

Article 6(2)(b) incorporates the concept of indirect impleader. The appellants rely for their case on the breadth of the concluding words of paragraph (2)(b), and notably the extension of the concept beyond a state's property or rights, to its "interests" and "activities". There was an issue before us about how far these expressions can be said to represent the current consensus of nations. Certainly, comments in the course of the drafting suggest that some states considered the final words to be too broad. It is, however, unnecessary to resolve this question, because the scope of the final words of article 6(2)(b) are plainly limited by their context. Article 6(2)(b) is concerned only with cases where the proceedings seek to "affect" the property, rights, interests or activities of a state. It is difficult to envisage a case where this would be true, unless it related to

property within the jurisdiction of the domestic forum in which the foreign state had an interest, especially in the context of a Convention which is expressly concerned only with the immunity of the state *eo nomine* and its property (see article 1). An examination of the *travaux* confirms this. The most illuminating document is the International Law Commission's report to the General Assembly of 1991, which includes a commentary on article 6: see *Yearbook of the International Law Commission*, 1991, ii(2), 23-25. This describes the genesis of article 6(2)(b) in domestic court decisions about state-owned property. It records that the word "affect" was used in order to avoid appearing to create too loose a relationship between the proceedings and their consequences. And the discussion of its meaning relates wholly to "actions involving seizure or attachment of public properties or properties belonging to a foreign state or in its possession or control": see paras 11-13 of the commentary under article 6.

196. The essential point about the property cases is that they have the potential directly to affect the legal interests of states notwithstanding that they are not formally parties. In the case of an action in rem, this is obvious. The court's decision binds all the world. But although perhaps less obvious it is equally true of an action in personam, where the court is asked to recognise an adverse title to property in someone else or award possession of property as of right to another. As Lord Porter and Lord Radcliffe put it in *Dollfus Mieg* (pp 613, 616) the law cannot consistently with the immunity of states require a state to appear before a domestic court as the price of defending its legal interests. None of this reasoning, however, applies in a case where the foreign state has no legal interest to defend because the court's decision in its absence cannot directly affect its legal interests. I would not altogether rule out the possibility that litigation between other parties might directly affect interests of a foreign state other than interests in property. But, as I have observed, it is not easy to imagine such a case. The appellants' argument is in reality an attempt to transform a personal immunity of states into a broader subject matter immunity, ie, one which bars the judicial resolution of certain issues even where they cannot affect the existence or exercise of a state's legal rights.

197. No decision in the present cases would affect any rights or liabilities of the four foreign states in whose alleged misdeeds the United Kingdom is said to have been complicit. The foreign states are not parties. Their property is not at risk. The court's decision on the issues raised would not bind them. The relief sought, namely declarations and damages against the United Kingdom, would have no impact on their legal rights, whether in form or substance, and would in no way constrict the exercise of those rights. It follows that the claim to state immunity fails.

Act of state: foundations

198. In *Nissan v Attorney General* [1970] AC 179, 211-212, Lord Reid observed:

> "I think that a good deal of the trouble has been caused by using the loose phrase 'act of state' without making clear what is meant. Sometimes it seems to be used to denote any act of sovereign power or of high policy or any act done in the execution of a treaty. That is a possible definition, but then it must be observed that there are many such acts which can be the subject of an action in court if they infringe the rights of British subjects. Sometimes it seems to be used to denote acts which cannot be made the subject of inquiry in a British court. But that does not tell us how to distinguish such acts: it is only a name for a class which has still to be defined."

The first task of a court dealing with a contention that the act of state doctrine applies is to clarify what is meant by an act of state, and what legal consequences follow from this categorisation.

199. The act of state doctrine comprises two principles. The first can conveniently be called "Crown act of state" and does not arise in the present cases. It is that in an action based on a tort committed abroad, it is in some circumstances a defence that it was done on the orders or with the subsequent approval of the Crown in the course of its relations with a foreign state. The second, commonly called "foreign act of state", is that the courts will not adjudicate upon the lawfulness or validity of certain sovereign acts of foreign states. For this purpose a sovereign act means the same as it does in the law of state immunity. It is an act done *jure imperii*, as opposed to a commercial transaction or other act of a private law character. These are distinct principles, although they are based on certain common legal instincts.

200. Unlike state immunity, act of state is not a personal but a subject matter immunity. It proceeds from the same premise as state immunity, namely mutual respect for the equality of sovereign states. But it is wholly the creation of the common law. Although international law requires states to respect the immunity of other states from their domestic jurisdiction, it does not require them to apply any particular limitation on their subject matter jurisdiction in litigation to which foreign states are not parties and in which they are not indirectly impleaded. The foreign act of state doctrine is at best permitted by international law. It is not based upon it: see Carreau & Marrella, *Droit International*, 11th ed (2012), 701; Weil, "Le controle par les tribunaux nationaux de la licéité des actes des gouvernements étrangers", *Annuaire français de droit international*, 23 (1977), 16, 30.

201. The policy which the foreign act of state doctrine reflects does, however, have partial analogues in the municipal law of a number of civil law jurisdictions, subject in some cases to extensive public policy exceptions. The question has generally arisen in the context of foreign legislative expropriations. These might have been recognised in

other countries on the basis that the passing of property is governed by the *lex situs*. In fact, however, they are recognised in some civil law countries on the basis that they are acts of state beyond challenge in the domestic courts of another country. The French courts in particular have proceeded in these cases upon a principle based on a lack of competence or jurisdiction to rule on the legality of foreign acts of state, which is quite distinct from the corresponding principle (*acte de gouvernement*) relating to acts of the French government in the conduct of its foreign relations: see *Larrasquitu et l'Etat Espagnol v Société Cementos Rezola* (Cour d'Appel de Poitiers, 20 December 1937), (1938) 8 ILR 196 ("the French jurisdiction is incompetent to consider the regularity of the act of a foreign sovereign, for that would be to judge that act"); *Martin v Banque d'Espagne* (Cour de Cassation, 3 November 1952) (1952) ILR 202 ("the acts in question, even apart from the principle of immunity from jurisdiction, were public acts which are not subject to judicial control in France"); *Epoux Reynolds v Ministre des Affaires Etrangères* (Tribunal de Grande Instance de la Seine, 30 June 1965) (1965) 47 ILR 53 ("a French court has no jurisdiction to adjudicate on the legality of that measure"). The principle is thus expressed in terms which are not confined to expropriation cases, and it has in fact been applied more widely, notably in a well-known decision of the Cour de Cassation in a case involving the lawfulness of the act of a foreign state in deporting a criminal suspect to France: *In re Illich Ramirez Sanchez* (Cour de Cassation, 21 February 1995) ECLI:FR:CCASS:1995:CR06093). So also the courts of the Netherlands: *Petroservice & Credit Minier Franco-Roumain v El Aguila* (Ct App, The Hague, 4 December 1939), (1939) 11 ILR 17 ("A Dutch Court is obliged to refrain from entering into an independent examination of the validity or invalidity of public acts of a foreign government"); *Bank Indonesia v Senembah Maatschappij and Twentsche Bank NV* (1959) 30 ILR 28 (Court of Appeal of Amsterdam, 4 June 1959) ("as a rule, a Court will not, and should not, sit in judgment on the lawfulness of acts *jure imperii* performed by, or on behalf of, a foreign Government", except in cases of "flagrant conflict with international law"). Like the French courts, the Dutch courts have applied the same principle in contexts other than expropriation, for example in addressing allegations of complicity by Dutch companies in the military operations of a foreign state: *Republic of South Moluccas v Royal Packet Shipping Co* (Amsterdam Court of Appeal, 8 February 1951) (1951) 17 ILR 150. German law, on the other hand, arrives at a similar result, by reference to a special rule based on the autonomy of states acting within their own territory: *Unification Treaty Constitutionality Case*, Bundesverfassungsgericht, judgment of 23 April 1991, 94 ILR 42. The German courts appear to have rejected any more general principle limiting the subject-matter jurisdiction of the courts over issues incidentally requiring a determination of the lawfulness or validity of a foreign state's sovereign acts: *Kunduz*, Oberlandsgericht Köln, judgment of 30 April 2015, AZ 7 U 4/14, para 17. In none of these jurisdictions does the question appear to be governed by ordinary principles of the choice of law. Differences between major civil law jurisdictions means that one cannot attach too much weight to the case law of any one of them. None the less, I find the approach of the French and Dutch courts instructive. It reflects a strong juridical instinct in two jurisdictions with a long-standing engagement with international relations, which has an obvious relevance for the United Kingdom.

202. In England, the origin of the foreign act of state doctrine is commonly thought to be the decision of Lord Chancellor Nottingham in *Blad v Bamfield* (1673) 3 Swan 603; (1674) 3 Swan 604, although this view turns more on his expansive turns of phrase than on anything that he actually decided. The dispute arose out of the volatile relations between England and Denmark in the second half of the 17th century. Peter Blad appears to have been the holder of a patent of monopoly from the King of Denmark to trade in Iceland, then a Danish possession. Bamfield was an Englishman whose property was seized on the high seas in 1668 by the authority of the Danish Crown and forfeited by the Danish courts, on the ground that he had been fishing off Iceland in breach of the monopoly. Some years later, Blad made the mistake of visiting England. Bamfield sued him at law, contending that the monopoly was illegal and invalid since it was contrary to a right to trade which had in practice been recognised by Denmark for 50 years before the seizure. Blad contended that he could not be liable because the seizure was an act of state. He initially complained to the Privy Council on the ground that as an act of state it was susceptible of relief only by diplomatic means. Lord Nottingham, who was sitting on the Council, "stood up and said this was not a question of state, but of private injury," and suggested that the matter should properly be brought before the Court of Chancery. But when the case came before him in chancery, Lord Nottingham changed his mind. This was because Bamfield was now contending that reliance on the Danish letters patent was precluded by the terms of the Anglo-Danish commercial treaty of 1670. This, he said, made all the difference:

> "… it is very true that this cause was dismissed from the council board being not looked on there as a case of state, because for aught appeared to them, it might be a private injury, and unwarrantable, and so fit to be left to a legal discussion. But now the very manner of the defence offered by the defendant had made it directly a case of state; for they insist upon the articles of peace to justify their commerce, which is of vast consequence to the public; for every misinterpretation of an article may be the unhappy occasion of a war."

Nottingham restrained Bamfield's action at law on the ground that

> "to send it to a trial at law, where either the court must pretend to judge of the validity of the King's letters patent in Denmark or of the exposition and meaning of the articles of peace; or that a common jury should try whether the English have a right to trade in Iceland, is monstrous and absurd."

What barred Bamfield's case was his reliance on a treaty as invalidating a legal instrument of the Danish Crown relating to commercial operations in a Danish possession. In a later age it would have been held that a treaty operated only on the

plane of international law, and could not give rise to private rights in a citizen. But Lord Nottingham's concern was a different one. He was simply expressing the view, which was still commonly expressed long after his day, that a domestic court was incompetent to construe a treaty.

203. *Nabob of the Carnatic v East India Co* (1793) 2 Ves Jun 56 arose out of the East India Company's controversial relations with the Nabob at a stage when the courts had not yet learned to identify the East India Company with the British government. The company's dealings with the Nabob are the subject of some of Edmund Burke's most famous Parliamentary orations. The facts, in summary, were that the Company had assisted the Nabob, a sovereign ruler, in his wars against neighbouring princes. The Nabob had thereby incurred large debts to them, secured on his public revenues and on part of his territory. The Nabob alleged that they had taken more than he owed them, and sued for an account. The company, although a private person in respect of its trading activities, was treated as a sovereign in relation to its operations as the ruler of a large part of India. The commissioners discharging the office of Chancellor dismissed the claim (p 60):

> "It is a case of mutual treaty between persons acting in that instance as states independent of each other; and the circumstance, that the *East India Company* are mere subjects with relation to this country, has nothing to do with that. That treaty was entered into with them, not as subjects, but as a neighbouring independent state, and is the same, as if it was a treaty between two sovereigns; and consequently is not a subject of private, municipal, jurisdiction."

204. *Dobree v Napier* (1836) 2 Bing NC 781 marked an important development of the law. It arose out of the civil wars of Portugal in the 1830s. The plaintiff's steamship *Lord of the Isles* was captured on the high seas in 1833 while trying to run warlike stores through a blockade of the Portuguese coast maintained by warships loyal to Queen Maria II. The ship was subsequently forfeited by a Portuguese prize court. The Queen's admiral happened to be a British subject, the adventurer Sir Charles Napier ("not to be trusted except in the hour of danger"), and upon his return home he was sued in the King's Bench for trespass. Tindal CJ dismissed the action. The main reason was that the decree of the prize court was a judgment in rem and conclusive. But he went on to reject an argument to the effect that having entered Portuguese service in breach of the Foreign Enlistment Act 1819, Napier was disabled from relying on the authority of the Queen of Portugal or the decision of her prize courts. He did so on the ground that a breach of the Act could not render the acts of the Portuguese state justiciable:

> "… no one can dispute the right of the Queen of Portugal, to appoint in her own dominions, the defendant or any other person she may think proper to select, as her officer or servant, to seize a

> vessel which is afterwards condemned as a prize; or can deny, that the relation of lord and servant, de facto, subsists between the queen and the defendant Napier. For the Queen of Portugal cannot be bound to take any notice of, much less owe any obedience to, the municipal laws of this country … For as we hold that the authority of the Queen of Portugal to be a justification of the seizure 'as prize', there is as little doubt but that she might direct a neutral vessel to be seized when in the act of breaking a blockade by her established, which is the substance of the first special plea, or of supplying warlike stores to her enemies, which is the substance of the second." (pp 796-798)

The decision on this last point was approved by the House of Lords in *Carr v Fracis Times & Co* [1902] AC 176. Lord Halsbury LC analysed the case as follows, at pp 179-180:

> "There, it was an act of state done by command of the Portuguese Crown and done by an English subject. It was an a fortiori case; the act done by the English subject was an act which he was by English law prohibited from doing; to the plea that it was done by the authority of the Portuguese Crown, there was a replication that he was forbidden by the Foreign Enlistment Act to take that part in the proceedings which he was proved to have taken; nevertheless, the judgment of the Court held that that was a perfectly lawful proceeding, that it was an act of State, that it was authorized by the Portuguese Crown, and no action would lie in this country against an English subject who participated in it."

The essential point was that the blockade was, as a matter of international law, a sovereign act of Portugal in the conduct of its relations with the rest of the world, in particular those nations who might, or whose subjects might, seek to run the blockade in support of the Queen of Portugal's domestic enemies.

205. *Duke of Brunswick v King of Hanover* (1848) 2 HLC 1 marked another milestone in the development of this area of the law, not only in England but in the United States, where it would later serve as the point of departure for adoption of the foreign act of state doctrine into their law. The background to this celebrated decision was a revolution in the German state of Brunswick which overthrew the government of the feckless and despotic Duke Charles in 1830. In accordance with a power conferred on them by the Diet of the German Confederation, HM William IV of England, in his separate capacity as King of Hanover, and the deposed Duke's brother William, subsequently joined in two public instruments. The first, of 1831, purported to depose Charles in favour of William. The second, of 1833, purported to deprive him of his assets in Brunswick,

France, England and elsewhere for his own protection and vest them in the Duke of Cambridge as guardian. In 1843 Charles brought an action in Chancery against the current guardian, who was HM William IV's successor as King of Hanover, for an account of his dealings with the property on the footing that these transactions were contrary to the law of Hanover and void. The bill was dismissed by Lord Langdale MR for want of equity. His decision was affirmed on different grounds by the House of Lords. The defendant was entitled to state immunity, and parts of the reasoning appear to be based on that ground. But as Lord Wilberforce later observed in *Buttes Gas & Oil Co v Hammer* [1982] AC 888, 932E-F, it also stands as authority for the foreign act of state doctrine, because the ground of the decision was that the decree of the Diet and the two public instruments could not be challenged in an English court. The Lord Chancellor (Cottenham) said, at pp 21-22:

> "If it were a private transaction …, then the law on which the rights of individuals may depend might have been a matter of fact to be inquired into, and for the court to adjudicate upon, not as a matter of law, but as a matter of fact. … If it be a matter of sovereign authority, we cannot try the fact whether it be right or wrong: The allegation that it is contrary to the laws of Hanover, taken in conjunction with the allegation of the authority under which the defendant had acted, must be conceded to be an allegation, not that it was contrary to the existing laws as regulating the right of individuals, but that it was contrary to the laws and duties and rights and powers of a Sovereign exercising sovereign authority. If that be so, it does not require another observation to shew, because it has not been doubted, that no court in this country can entertain questions to bring Sovereigns to account for their acts done in their sovereign capacities abroad."

The rest of the House agreed, Lord Campbell observing at p 26 that even if the Duke of Cambridge, who was not a sovereign, had been sued "it would equally have been a matter of state", and at p 27 that the Court of Chancery "I presume would not grant an injunction against the French Republic marching an army across the Rhine or the Alps."

206. *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 13 Moo PCC 22 was a case of Crown act of state. The question at issue was the lawfulness of the annexation of the princely state of Tanjore by the East India Company on behalf of the British Crown. However, the Privy Council made no distinction between Crown and foreign act of state for this purpose. Lord Kingsdown, delivering the advice of the Board, formulated the issue (p 77) as being whether the annexation was done under colour of legal right, in which case the existence of that right was a justiciable question, or as an exercise of power, "an act not affecting to justify itself on grounds of municipal law," in which case it was an act of state. Holding that it was the latter, Lord Kingsdown said (p 86):

> "Of the propriety or justice of that act, neither the court below/or the Judicial Committee have the means of forming, or the right of expressing if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no municipal court of justice can afford a remedy."

In *Cook v Sprigg* [1899] AC 572 another case of colonial annexation, Lord Halsbury LC expressed the same principle in terms which would subsequently be taken up by Lord Wilberforce in *Buttes Gas & Oil Co v Hammer* [1982] AC 888, 933F-G:

> "It is a well-established principle of law that the transactions of independent states between each other are governed by other laws than those which municipal courts administer."

207. In *Carr v Fracis Times* [1902] AC 176, the captain of HMS Lapwing, acting on the authority of the Sultan of Muscat, seized a cargo of ammunition within the territorial waters of Muscat. The proclamation which authorised the seizure was lawful by the law of Muscat. The case might have been decided on ordinary choice of law grounds. But the Sultan's proclamation was challenged on the ground that he had made it under a mistake as to the destination of the cargo. This argument was rejected because, mistaken or not, the proclamation was an act of state. Lord Halsbury LC said, at p 179:

> "It is not an act as between person and person; it is an act of state which the Sultan says authoritatively is lawful; and I cannot doubt that under such circumstances the act done is an act which is done with complete authority and cannot be made the subject of an action here."

He went on to say (pp 179-80) that it made no difference that the seizure was carried out by a British naval officer.

208. This was the state of English authority at the time when the foreign act of state doctrine was considered by the courts of the United States in a number of decisions which have proved influential on both sides of the Atlantic.

United States cases

209. Although there are, as always, precursors in earlier dicta about related issues, the foreign act of state doctrine in the United States really begins with the decision of the Supreme Court of New York in *Hatch v Baez* 7 Hun 596 (1876). The issue arose out of a coup d'état in the Dominican Republic in 1868, which resulted in the deposition of the then President and his replacement by Buonaventura Baez. Hatch, who was living at the time in Dominica, was believed to have supported the old regime. As a result, he was arrested and imprisoned and his goods seized by Baez's soldiery. Some years later, after Baez had left office, he settled in New York and Hatch sued him there for trespass to his person and goods on the footing that these things had been done on his orders. Before the New York Supreme Court, Baez admitted that the New York courts had jurisdiction over him, but pleaded act of state, relying on *Duke of Brunswick v King of Hanover*. The court dismissed the claim. It observed, at pp 599-600:

> "We think that, by the universal comity of nations and the established rules of international law, the courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its own territory. Each state is sovereign throughout its domain. The acts of the defendant for which he is sued were done by him in the exercise of that part of the sovereignty of St Domingo which belongs to the executive department of that government. To make him amenable to a foreign jurisdiction for such acts, would be a direct assault upon the sovereignty and independence of his country. The only remedy for such wrongs must be sought through the intervention of the government of the person injured."

210. The issue first came before the Supreme Court in *Underhill v Hernandez* 168 US 250 (1897). This case arose out of another civil war, in Venezuela. General Hernandez had been the local commander of the revolutionary army which enabled Joaquin Crespo to seize power in 1892. Crespo's government was subsequently recognised by the United States as the legitimate government of Venezuela. In November 1893, Hernandez was arrested at a New York hotel and required to post a bond to secure damages for false imprisonment, assault and battery, claimed against him in a civil suit brought by Underhill, an American businessman who lived in Venezuela and owned a commercial waterworks in Bolivar. Underhill alleged that Hernandez had refused him a passport to leave the city and had ordered him to be confined to his house, and that his soldiers had assaulted and abused him, all in order to force him to operate his waterworks in the interest of the new regime. The New York judge directed a verdict for Hernandez, on the ground that he had been "a military commander representing a de facto government in the prosecution of a war". The case was then removed to the Federal Courts, and the judge's decision was upheld by the Second Circuit Court of Appeals, on the ground that "the acts of the defendant were the acts of the government

of Venezuela, and as such, are not properly the subject of adjudication in the courts of another government." The Supreme Court granted a petition to review the decision and upheld it. The judgment of Chief Justice Fuller began (p 252) by rationalising the act of state doctrine on the same basis as the Supreme Court of New York in *Hatch v Baez*:

> "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves. … Where a civil war prevails, that is, where the people of a country are divided into two hostile parties, who take up arms and oppose one another by military force, generally speaking foreign nations do not assume to judge of the merits of the quarrel."

It is clear that for the court the critical factor was the subsistence of armed hostilities. Hernandez was "a military commander representing the authority of the revolutionary party as a government, which afterwards succeeded and was recognized by the United States."

211. In both of these cases, state immunity might have been raised, on the footing that Baez was a former head of state and Hernandez had been acting as an agent of the (subsequently) recognised government of Venezuela. But in both cases, the defendant submitted to the jurisdiction and the matter was dealt with after a trial. Any right to raise state immunity was therefore lost, and foreign act of state was the sole relevant ground of appeal. On the other hand, in *Oetjen v Central Leather Co* 246 US 297 (1918), state immunity never could have been raised. The case arose out of the Mexican civil war of the early 20th century. In 1914, forces loyal to Venustiano Carranza occupied the town of Torreon and seized a large quantity of hides belonging to one Martinez. Subsequently, after the United States had recognised Carranza's government, Martinez's assignee sued a Texan company to whom the hides had been sold, alleging that the title of the original owner subsisted because the hides had been taken contrary to the Hague Convention respecting the Laws and Customs of War on Land (1907). The court dismissed the suit. It doubted whether the Convention applied to a civil war or whether it prohibited seizures in these circumstances. But in order to provide guidance in similar cases, it preferred to base its decision on the fact that the seizure was an act of state. Having held that the recognition of the Carranza government by the United States meant that it fell to be treated as the government of the state of Mexico, the Court continued at pp 303-304:

> "The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as

> applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations'. It is not necessary to consider, as the New Jersey court did, the validity of the levy of the contribution made by the Mexican commanding general, under rules of international law applicable to the situation, since the subject is not open to re-examination by this or any other American court. The remedy of the former owner, or of the purchaser from him, of the property in controversy, if either has any remedy, must be found in the courts of Mexico or through the diplomatic agencies of the political department of our Government."

212. These cases were decided at a time when the courts of the United States adopted an approach to foreign sovereign acts which was very similar to that adopted in England, and largely influenced by it. They proceed on the footing that the act of state doctrine is based on the same concept as state immunity, viz the equality and autonomy of sovereign states. Like Lord Cottenham in *Duke of Brunswick v King of Hanover*, the US Supreme Court objected to the concept of a domestic court "sitting in judgment" upon the acts of another sovereign, even in his absence. More recently, the US Supreme Court in *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964), has viewed the act of state doctrine primarily as an aspect of the constitutional separation of powers under the US Constitution and has closely associated it with the political question rule. This has led it to attach greater significance to the views of the executive about the impact that different outcomes would have on US foreign policy, and to adopt a "flexible" approach to the act of state doctrine depending mainly on the degree of embarrassment that would be caused to the State Department in each case. This development would not be consistent with the accepted principles governing the relations between the courts and the executive in England. English law has continued to act on the original rationale of the US doctrine, and *Underhill v Hernandez* continues to be cited on this side of the Atlantic as a correct statement of the principle.

England: the Russian Revolution cases

213. *Johnstone v Pedlar* [1921] 2 AC 262 did not involve a foreign act of state. It is the leading modern authority for the proposition that Crown act of state is not a plea available to a defendant in relation to acts done in the United Kingdom, even against aliens. But in the course of distinguishing between Crown and foreign acts of state, Lord Sumner summarised the effect of the latter doctrine as follows, at p 290:

> "Municipal Courts do not take it upon themselves to review the dealings of State with State or of Sovereign with Sovereign. They do not control the acts of a foreign state done within its own territory, in the execution of sovereign powers, so as to criticise their legality or to require their justification."

Shortly after this statement was made, the principle stated was applied in a series of cases heard after the United Kingdom's recognition of the Soviet government, which arose from the confiscation of private property in Russia in the aftermath of the Russian Revolution. These raised questions very similar to those which had been considered by the courts of the United States.

214. In *Aksionernoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532, the stock of the plaintiffs' timber mill had been confiscated by a decree of the Russian Republic in June 1918 and sold to the defendants, who subsequently imported it into England. The plaintiffs sued them there for a declaration that the timber remained their property and damages for its conversion. They contended that no effect should be given to the decree of June 1918 because (among other reasons) it was immoral. In the Court of Appeal, all three judges rejected the argument that the decree was immoral. Bankes LJ did so on straightforward choice of law grounds. The passing of property was governed by the *lex situs*, and the decree was part of that law. No question of its morality arose. But Warrington and Scrutton LJJ rejected it on the ground the decree was an act of state. Warrington LJ thought (pp 548-549) that the decree was "entitled to the respect due to the acts of an independent sovereign state", and added that "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", citing *Oetjen v Central Leather Co*. Scrutton LJ thought (pp 558-559) that any criticism of the morality of the decree was the proper function of the executive, not the judiciary.

215. In *Princess Paley Olga v Weisz* [1929] 1 KB 718, the facts were similar except that the goods in question were works of art forcibly removed from the plaintiff's palace at Tsarskoye Selo. The Court of Appeal again dismissed the claim. All three members of the Court held that effect fell to be given to the decree as part of the *lex situs*. But they also upheld a distinct argument that even if, as the plaintiff alleged, the decree did not justify the seizure, it was an "act of state into the validity of which this Court would not inquire": see pp 723-724 (Scrutton LJ); cf pp 729-730 (Sankey LJ), and 723-724. Scrutton LJ (pp 724-725) adopted the statement of principle in *Oetjen v Central Leather Co* on this point as corresponding to the law of England.

Buttes Gas

216. In *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301, a contract for the sale of jute was held to be unenforceable because it involved the shipment of the cargo from

India in breach of an Indian prohibition of exports to South Africa. The House of Lords rejected an argument that the Indian law should be disregarded on the ground that it was "contrary to international law because it is a hostile act directed against a friendly state", and as such contrary to English public policy (see p 307). Commenting on this argument at pp 325-326, Lord Reid said:

> "It was argued that this prohibition of exports to South Africa was a hostile act against a Commonwealth country with which we have close relations, that such a prohibition is contrary to international usage, and that we cannot recognize it without taking sides in the dispute between India and South Africa. My Lords, it is quite impossible for a court in this country to set itself up as a judge of the rights and wrongs of a controversy between two friendly countries, we cannot judge the motives or the justifications of governments of other countries in these matters and, if we tried to do so, the consequences might seriously prejudice international relations. By recognizing this Indian law so that an agreement which involves a breach of that law within Indian territory is unenforceable we express no opinion whatever, either favourable or adverse, as to the policy which caused its enactment."

Lord Keith of Avonholm, concurring, said at p 327:

> "The English courts cannot be called on to adjudicate upon political issues between India and South Africa."

217. *Regazzoni v Sethia* marked a return to concepts of non-justiciability canvassed a century before in the colonial annexation cases. The principal modern landmark in this area of the law is the important and much-debated decision of the House of Lords in *Buttes Gas & Oil Co v Hammer* [1982] AC 888. This was ostensibly an action for slander with a counterclaim for common law conspiracy to defraud. But it was actually a dispute about the extent of the territorial waters of the emirate of Sharjah around the island of Abu Musa in the Persian Gulf. Buttes Gas sued Dr Hammer and Occidental Petroleum for alleging in a press release that it had procured the Ruler of Sharjah to backdate a decree extending the territorial waters of the emirate. Their object was said to be to obtain for themselves the benefit of oil bearing deposits in the extended area, at the expense of Occidental which claimed to hold a concession for the same area from the neighbouring Ruler of Umm al-Qywain. Occidental alleged that the extension of Sharjah's territorial waters was contrary to international law, and counterclaimed damages for an alleged conspiracy to defraud them, to which the Ruler and the United Kingdom were parties. According to the counterclaim the United Kingdom, which was responsible for the foreign relations and defence of both emirates, intervened politically with the Ruler of Umm al-Qywain to forbid Occidental's drilling operations there and

deployed a warship to turn back the company's drilling platform. Buttes applied to have the counterclaim struck out, principally on the ground that it was based on acts of state by the Ruler of Sharjah and the government of the United Kingdom.

218. The House struck out the proceedings. The leading speech was delivered by Lord Wilberforce, with whom the rest of the Appellate Committee agreed. After rejecting the argument that the counterclaim was barred as being based on a claim to title to foreign land, and putting to one side the case law about Crown act of state, he continued, at p 931:

> "A second version of 'act of state' consists of those cases which are concerned with the applicability of foreign municipal legislation within its own territory, and with the examinability of such legislation - often, but not invariably, arising in cases of confiscation of property. Mr Littman gave us a valuable analysis of -such cases as *Carr v Fracis Times & Co* [1902] AC 176; *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532 and *Princess Paley Olga v Weisz* [1929] 1 KB 718, suggesting that these are cases within the area of the conflict of laws, concerned essentially with the choice of the proper law to be applied.
>
> Two points were taken as regards the applicability of this line of authority. First, it was said that foreign legislation can be called in question where it is seen to be contrary to international law or to public policy; the decree of 1969/70 was so contrary. Secondly, it was contended that foreign legislation is only recognised territorially - ie within the limits of the authority of the state concerned.
>
> In my opinion these arguments do not help the respondents. As to the first, it is true, as I have pointed out, that the attack on Sharjah's decree of 1969/70 is not upon its validity under the law of Sharjah, but upon its efficacy in international law. But this brings it at once into the area of international dispute. It is one thing to assert that effect will not be given to a foreign municipal law or executive act if it is contrary to public policy or to international law (cf *In re Helbert Wagg & Co Ltd's Claim* [1956] Ch 323) and quite another to claim that the courts may examine the validity, under international law or some doctrine of public policy, of an act or acts, operating in the area of transactions between states.

> The second argument seems to me to be no more valid. To attack the decree of 1969/70 extending Sharjah's territorial waters, ie its territory, upon the ground that the decree is extra-territorial seems to me to be circular or at least question begging."

219. Lord Wilberforce went on, at pp 931-932, to dismiss Occidental's counterclaim as raising matters which were non-justiciable on wider grounds:

> "… the essential question is whether … there exists in English law a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states. Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle, if existing, not as a variety of 'act of state' but one for judicial restraint or abstention. … In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalised in the law of the United States of America which is effective and compelling in English courts. This principle is not one of discretion, but is inherent in the very nature of the judicial process."

Lord Wilberforce regarded the "general principle" as being derived from a "wider principle" concerning the transactions of sovereign states, of which the cases about the expropriation of property under municipal law were no more than a part. While eschewing arguments about terminology, he appears in this passage to have regarded the "general principle" as something different from the act of state doctrine. It is unquestionably different from the rule about the application to a sovereign act of the sovereign's municipal law, which was I think the only point that he was making. There is much to be said for the view of Rix LJ, delivering the judgment of the Court of Appeal in *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2014] QB 458, para 66, that

> "Lord Wilberforce's principle of 'non-justiciability' has, on the whole, not come through as a doctrine separate from the act of state principle itself, but rather has to a large extent subsumed it as the paradigm restatement of that principle. It would seem that, generally speaking, the doctrine is confined to acts of state."

However, I do not believe, any more than Lord Wilberforce did, that anything is gained by arguments about labels. He proceeded to make good his "general principle" by reference to the decisions in *Blad v Bamfield* and *Duke of Brunswick v King of Hanover*. The latter case, which Lord Wilberforce regarded as "still authoritative", has generally been cited both in England and the United States as turning on the act of state doctrine. Lord Wilberforce regarded it as authority for the proposition that "the courts will not adjudicate upon acts done abroad by virtue of sovereign authority." He considered that

it was the basis of the US Supreme Court's decisions in *Underhill v Hernandez* and *Oetjen v Central Leather Co*, the cases which provided the foundation for the act of state doctrine in the United States, and which he had cited with approval at pp 933-934.

220. In applying this wider principle to the particular facts before him, Lord Wilberforce emphasised (p 938) that the issue before the House turned on questions of international law arising between states:

> "It would not be difficult to elaborate on these considerations, or to perceive other important inter-state issues and for issues of international law which would face the court. They have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which it can be said not to have been drawn to the attention of the court by the executive), there are … no judicial or manageable standards by which to judge these issues, or to adopt another phrase (from a passage not quoted), the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were 'unlawful' under international law."

Recent decisions

221. The detailed application of the principle formulated by Lord Wilberforce in *Buttes Gas* has often been disputed but the principle itself has not. It was restated by Lord Oliver in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry (the Tin Council case)* [1990] 2 AC 418, in a speech with which Lord Keith of Kinkel, Lord Brandon and Lord Griffiths agreed. Rejecting an argument that the treaty creating the International Tin Council could give rise to justiciable private law rights, he held at p 499 that it was "axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law".

222. In *R (Abbasi) v Secretary of State for Foreign Affairs* [2002] EWCA Civ 1598; [2003] UKHRR 76 the Court of Appeal declined to decide that the detention of prisoners in Guantanamo Bay was contrary to the obligations of the Unites States under the 3rd Geneva Convention. At para 32, the court accepted the following statement by Counsel of the general rule:

> "It is well established that the English court will not adjudicate upon the legality of a foreign state's transactions in the sphere of international relations in the exercise of sovereign authority, citing *Buttes Gas and Oil v Hammer* [1982] AC 888 at 932 (per Lord Wilberforce); *Westland Helicopters Ltd v AOI* [1995] QB 282. To do so would involve a serious breach of comity: see *Buck v Attorney General* [1965] 1 Ch 745 at 770-771 (per Lord Diplock) and *R v Secretary of State, Ex p British Council of Turkish Cypriot Associations* 112 ILR 735 at 740 (per Sedley J). [Counsel] observed that the relief sought by the claimants was founded on the assertion that the United States government was acting unlawfully. For the court to rule on that assertion would be contrary to comity and to the principle of state immunity."

223. Apart from the decisions in the present case, the most recent discussion of the principles underlying the foreign act of state doctrine is the decision of the Court of Appeal in *R (Noor Khan) v Secretary of State for Foreign Affairs* [2014] 1 WLR 872. The case raised issues in some ways similar to the present ones. The claimant's father had been killed in Pakistan by a missile fired from an American drone. He applied for judicial review of the decision of the Foreign Secretary to supply intelligence to the United States for use in targeting drone strikes and sought various declarations as to the lawfulness of supplying "locational" intelligence for this purpose. His case was that an official passing intelligence in these circumstances committed an offence by encouraging or assisting an act by the American operators of the drone which would, if committed by a British subject, amount to murder, contrary to sections 44 to 46 of the Serious Crimes Act 2007. The Court of Appeal dismissed the application on grounds of both principle and discretion. Addressing the point of principle, it adopted the following statement of Moses LJ in the Divisional Court as a correct statement of principle:

> "It is necessary to explain why the courts would not even consider, let alone resolve, the question of the legality of United States' drone strikes. The principle was expressed by Fuller CJ in the United States Supreme Court in *Underhill v Hernandez* (1897) 168 US 250, 252: 'Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves' (cited with approval in *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888, 933, and *R v Jones (Margaret)* [2007] 1 AC 136, 163).
>
> The principle that the courts will not sit in judgment on the sovereign acts of a foreign state includes a prohibition against

> adjudication on the legality, validity or acceptability of such acts, either under domestic law or international law: *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1080, para 24. The rationale for this principle, is, in part, founded on the proposition that the attitude and approach of one country to the acts and conduct of another is a matter of high policy, crucially connected to the conduct of the relations between the two sovereign powers. To examine and sit in judgment on the conduct of another state would imperil relations between the states: *Buttes Gas* case [1982] AC 888, 933."

224. Turning to the question of discretion, the Court of Appeal accepted that arguably the offences created by sections 44 to 46 of the 2007 Act did not require a finding that the US operators of the drone had committed murder, but only a finding that they would have done so if they had been British citizens. However, they declined (paras 36-37) to determine the question because the public, especially in the United States, would be unlikely to make or understand that distinction:

> "But none of this can disguise the fact that in reality the court will be asked to condemn the acts of the persons who operate the drone bombs. Whilst for the purposes of the 2007 Act these persons are to be treated as if they are UK nationals, everyone knows that this is a legal fiction devised by Parliament in order to found secondary liability under sections 44 to 46. In reality, the persons who operate the drones are CIA officials and in doing so they are implementing the policy of the US Government. … In my view, a finding by our court that the notional UK operator of a drone bomb which caused a death was guilty of murder would inevitably be understood (and rightly understood) by the US as a condemnation of the US. In reality, it would be understood as a finding that (i) the US official who operated the drone was guilty of murder and (ii) the US policy of using drone bombs in Pakistan and other countries was unlawful. The fact that our courts have no jurisdiction to make findings on either of these issues is beside the point. What matters is that the findings would be understood by the US authorities as critical of them. Although the findings would have no legal effect, they would be seen as a serious condemnation of the US by a court of this country."

Remedies by way of judicial review are of course discretionary. But the only relevance of the discretion to this decision was that it enabled the court to ignore any difference that there might be between the legal analysis and the public perception, and to reject the claim on the ground that it would embarrass Anglo-American relations, a consideration that would be irrelevant to a claim of right. For present purposes, the point

is that the claimant's allegations involved a challenge to the lawfulness under English law of the acts of British officials, who were said to have incurred an accessory liability for murder by US forces. If Mr Khan, instead of applying for judicial review, had claimed damages in tort for personal injury, in his own right or on behalf of his father's estate, no discretion would have been involved. But he would still have lost, on the point of principle identified by Moses LJ and approved in the Court of Appeal. It should be noted that the principle stated by Moses LJ and approved by the Court of Appeal was founded on the rule formulated by Fuller CJ in *Underhill v Hernandez*.

The search for general principle

225. The English decisions have rarely tried to articulate the policy on which the foreign act of state doctrine is based and have never done so comprehensively. But it is I think possible to discern two main considerations underlying the doctrine. There is, first and foremost, what is commonly called "comity" but I would prefer to call an awareness that the courts of the United Kingdom are an organ of the United Kingdom. In the eyes of other states, the United Kingdom is a unitary body. International law, as Lord Hoffmann observed in *R v Lyons* [2003] 1 AC 976 at para 40, "does not normally take account of the internal distribution of powers within a state." Like any other organ of the United Kingdom, the courts must respect the sovereignty and autonomy of other states. This marks the adoption by the common law of the same policy which underlies the doctrine of state immunity. Secondly, the act of state doctrine is influenced by the constitutional separation of powers, which assigns the conduct of foreign affairs to the executive. This is why the court does not conduct its own examination of the sovereign status of a foreign state or government but treats the Secretary of State's certificate as conclusive: *Government of the Republic of Spain v SS "Arantzazu Mendi"* [1939] AC 256, 264 (Lord Atkin). It is why Lord Templeman graphically described the submissions of the claimants in the *Tin Council* case as involving "a breach of the British constitution and an invasion by the judiciary of the functions of the Government and of Parliament": see p 476. To that extent the rationale of the foreign act of state doctrine is similar to that of the corresponding doctrine applicable to acts of the Crown, as Elias LJ observed in *Al-Jedda v Secretary of State for Defence* [2011] QB 773, paras 209-212.

226. When one turns to the ambit of the doctrine, the first point to be made is that there are many cases involving the sovereign acts of states, whether British or foreign, in which the action fails, not on account of any immunity of the subject matter from judicial scrutiny, but because the acts in question are legally irrelevant. They give rise to no rights as a matter of private law and no reviewable questions of public law. It is on this ground that the court will not entertain an action to determine that Her Majesty's government is acting or proposes to act in breach of international law in circumstances where no private law status, right or obligation depends on it: *R (Campaign for Nuclear Disarmament) v Prime Minister* [2001] EWHC 1777 (Admin); *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin). Unlike

Mr Khan, who contended that his father had been killed as a result of breaches of English domestic law, the claimants had, as Cranston J put it in the latter case, at para 60, no "domestic foothold"; cf *Shergill v Khaira* [2015] AC 359 at para 43. By comparison Mr Khan did have a domestic foothold. He had standing to apply for judicial review, and he contended that his father had been killed because of a breach by British officials of English law, but the court declined to treat the matter as governed by ordinary principles of English law because of its subject-matter. The same is true of the present cases. They are concerned with the effect of a foreign act of state in a case where private law rights are engaged, because the claimants rely on the acts of the relevant states as ordinary torts under the municipal law of the countries in which they were committed. The question that we have to decide on this appeal is whether they can do so consistently with the law relating to foreign acts of state.

227. As Lord Wilberforce observed in *Buttes Gas*, at p 930F-G, the main difficulty in identifying a principle underlying that law arises from the "indiscriminate use of 'act of state' to cover situations which are quite distinct and different in law." It is always possible to break down the cases into different factual categories, and deconstruct the law into a fissiparous bundle of distinct rules. But the process is apt to make it look more arbitrary and incoherent than it really is. I think that it is more productive to distinguish between the decisions according to the underlying principle that the court is applying. The essential distinction which Lord Wilberforce was making in *Buttes Gas* was between (i) "those cases which are concerned with the applicability of foreign municipal legislation within its own territory and with the examinability of such legislation" (p 931A-B), and (ii) cases concerning "the transactions of sovereign states" (p 931G-H). This distinction is supported by the case-law extending over more than three centuries which I have reviewed above. It is possible to extract two related principles from it. The first is concerned with the application to a state of its own municipal law, and the second with the application of international law to that state's dealings with other states.

Municipal law act of state

228. The first principle can conveniently be called "municipal law act of state". It comprises the two varieties of foreign act of state identified in the judgment of Lord Mance at paras 11(iii)(a) and (b) of his judgment, although he would limit it to legislative or executive acts against property. The principle is that the English courts will not adjudicate on the lawfulness or validity of a state's sovereign acts under its own law. Municipal courts, as Lord Sumner put it in *Johnstone v Pedlar* [1921] 2 AC 262, 290, "do not control the acts of a foreign State done within its own territory, in the execution of sovereign powers, so as to criticise their legality or to require their justification." In *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)*, *supra*, at para 110, Rix LJ formulated the principle as involving a distinction

> "between referring to acts of state (or proving them if their occurrence is disputed) as an existential matter, and on the other hand asking the court to inquire into them for the purpose of adjudicating upon their legal effectiveness, including for these purposes their legal effectiveness as recognised in the country of the forum. It is the difference between citing a foreign statute (an act of state) for what it says (or even for what it is disputed as saying) on the one hand, something which of course happens all the time, and on the other hand challenging the effectiveness of that statute on the ground, for instance, that it was not properly enacted, or had been procured by corruption, or should not be recognised because it was unfair or expropriatory or discriminatory."

229. Municipal law act of state is by definition confined to sovereign acts done within the territory of the state concerned, since as a general rule neither public nor private international law recognises the application of a state's municipal law beyond its own territory. It has commonly been applied to legislative acts expropriating property: examples include *Carr v Fracis Times*, *Luther v Sagor* and the general principle which served as the starting point of the House of Lords in *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 (see paras 257-258 below). In these cases, title will have passed under the *lex situs* and the expropriation will be recognised in England on ordinary choice of law grounds unless, exceptionally, its recognition would be contrary to public policy. In this context, it is difficult to see that anything is added by calling the expropriation an act of state. However, the fact that the act of state doctrine and ordinary choice of law principles lead to the same result in the case of the legislative expropriations of property, does not entitle one to press the analogy any further. In particular, it cannot follow that municipal law act of state is limited to legislative acts expropriating property. Property is of course special for some purposes. It is likely to be under the exclusive jurisdiction of the state where it is located. It is marketable and may be tradeable internationally. It gives rise to policies favouring certainty of title. Considerations like these go some way to explaining why the *lex situs* of property is generally regarded as the law with the closest connection to an issue about title, and is for that reason designated as the proper law. But it is difficult to see that they have any bearing on the very different problems with which the act of state doctrine is concerned. The rules governing the choice of law are concerned with the law to be applied in determining an issue assumed to be justiciable, while the act of state doctrine in all its forms is concerned with the proper limits of the English court's right to determine certain kinds of issue at all.

230. Thus it is well established that municipal law act of state applies not just to legislative expropriations of property, but to expropriations by executive acts with no legal basis at all. Examples include *Duke of Brunswick v King of Hanover* and *Princess Paley Olga v Weisz*, and the United States decisions in *Hatch v Baez*, *Underhill v Hernandez*, and *Oetjen v Central Leather Co*. These transactions are recognised in

England not because they are valid by the relevant foreign law, but because they are acts of state which an English court cannot question. Strictly speaking, on the footing that the decree authorising the seizure of Princess Paley Olga's palace did not extend to her chattels, the acts of the revolutionary authorities in seizing them were Russian law torts. But once the revolutionary government was recognised by the United Kingdom, it would have been contrary to principle for an English court to say so.

231. Once it is accepted that executive acts may be acts of state, there is no rational reason why the principle should be limited to executive seizures of property, as opposed to injury to other interests equally protected by the municipal law of the place where they occurred. I can see no rational ground for distinguishing between the expropriation of property by executive act and its physical destruction by executive act, and no sensible basis on which the former is to be treated as an act of state and the latter not. For the same reasons, I think that personal injury and other wrongs against the person inflicted by the agents of a foreign state are as much capable of being acts of state as the destruction or detention of property. No such limitation applies to extraterritorial exercises of sovereign authority, whether by the British Crown or by a foreign state. No such limitation was recognised by Lord Wilberforce in *Buttes Gas*, who included executive acts as potentially relevant acts of state (p 931D-E). In *Hatch v Baez*, the plaintiff's main complaint was that he had been imprisoned and assaulted. In *Underhill v Hernandez* the plaintiff claimed to have been imprisoned and intimidated. The decisions in these cases were in terms justified by reference to the act of state doctrine. State immunity not having been claimed, they could not have been decided on any other basis.

232. One might ask why an English court should shrink from determining the legality of the executive acts of a foreign state by its own municipal law, when it routinely adjudicates on foreign torts and foreign breaches of contract. The answer is that the law distinguishes between exercises of sovereign authority and acts of a private law character. It is fair to say that the decided cases on this point generally involved internal revolutions or civil wars leading to a breakdown of law of a kind which could ultimately be resolved only by force. Other countries implicitly recognise the outcome diplomatically with retrospective effect, and their courts follow suit. Similar problems can arise in relation to the acts of totalitarian states where there may be no rule of law even in normal times. But I do not think that the act of state doctrine can be limited to cases involving a general breakdown of civil society or states without law. Quite apart from the formidable definitional problems to which such an approach would give rise, the basis of the doctrine is not the absence of a relevant legal standard but the existence of recognised limits on the subject-matter jurisdiction of the English courts.

233. It is this principle which applies to the alleged act of Malaysia in deporting Mr Belhaj and Mrs Boudchar, and Thailand's act in detaining them and delivering them to the Americans. They were domestic exercises of governmental authority by those two

countries. So was the detention and torture of Mr Belhaj and Mrs Boudchar by Libya in Libyan prisons.

International law act of state

234. The second principle, which can conveniently be called international law act of state, corresponds to the variety of foreign act of state identified in the judgment of Lord Mance at para 11(iii)(c). It is that the English courts will not adjudicate on the lawfulness of the extraterritorial acts of foreign states in their dealings with other states or the subjects of other states: see *Blad v Bamfield, Nabob of the Carnatic v East India Co, Dobree v Napier, Secretary of State in Council of India v Kamachee Boye Sahaba, Cook v Sprigg, Buttes Gas & Oil Co v Hammer, R (Abbasi) v Secretary of State for Foreign Affairs*, and *R (Noor Khan) v Secretary of State for Foreign Affairs*. This is because once such acts are classified as acts of state, an English court regards them as being done on the plane of international law, and their lawfulness can be judged only by that law. It is not for an English domestic court to apply international law to the relations between states, since it cannot give rise to private rights or obligations. Nor may it subject the sovereign acts of a foreign state to its own rules of municipal law or (by the same token) to the municipal law of a third country. In all of the cases cited, the claimant relied on a recognised private law cause of action, and pleaded facts which disclosed a justiciable claim of right. But the private law cause of action failed because, once the cause of action was seen to depend on the dealings between sovereign states, the court declined to treat it as being governed by private law at all. As Tindal CJ observed in *Dobree v Napier*, the English courts could not apply English law to the sovereign acts of the Queen of Portugal on the high seas. Nor, on the same principle, could they have applied the municipal law of some third country. This, as it seems to me, is as true of private law causes of action based on wrongs against the person (as in *Hatch v Baez* and *Noor Khan*) as it is of those based on wrongs against property (as in *Dobree v Napier*). If a foreign state deploys force in international space or on the territory of another state, it would be extraordinary for an English court to treat these operations as mere private law torts giving rise to civil liabilities for personal injury, trespass, conversion, and the like. This is not for reasons peculiar to armed conflict, which is no more than an ill-defined extreme of inter-state relations. The rule is altogether more general, as was pointed out by Lord Wilberforce in *Buttes Gas* (p 931D-E). Once the acts alleged are such as to bring the issues into the "area of international dispute" the act of state doctrine is engaged.

235. *Dicey, Morris & Collins* on the *Conflict of Laws*, 15th ed (2012) write at para 5-049:

> "The act of state doctrine has no application when it is clear that the relevant acts were done outside the sovereign's territory."

The authority cited for this statement is the decision of the Court of Appeal in *Empresa Exportadora de Azucar v Industria Azucarera Nacional CA (The "Playa Larga" and the "Marble Islands")* [1983] 2 Lloyd's Rep 171, 194. The facts of that case were that a Cuban state-owned trading enterprise had sold two cargoes of sugar for delivery at a Chilean port. President Allende's government in Chile was overthrown while one of the ships, the *Playa Larga*, was discharging at Valparaiso and the other, the *Marble Islands*, was on its way. Both vessels were operated by another Cuban state enterprise. The Cuban government arranged for the *Playa Larga* to leave Chile with part of its cargo still on board and for the *Marble Islands* to be diverted elsewhere. In an arbitration under the contract of sale, the tribunal awarded the Chilean buyers damages for non-delivery and conversion of the undelivered part of the cargo of the *Playa Larga*, together with the restitution of the purchase price of the cargo of the *Marble Islands*. Act of state was not raised before the arbitrators, but was said to be available on their findings of fact. It was rejected by the judge and the Court of Appeal on the ground that it was not open to the sellers, and was in any event unsound because there was no act of state. The claim arose from a commercial transaction, not a sovereign act: p 193. But the court went on to deal briefly with other points, including the argument that the act of state doctrine was limited to acts done within the territory of the foreign state, which they accepted: p 194. For this, they relied mainly on statements in *Duke of Brunswick v King of Hanover*, *Underhill v Hernandez* and *Buttes Gas*.

236. In my opinion the statement in *Dicey, Morris & Collins* is applicable to what I have called municipal law act of state but not to international law act of state. As I have observed, where the issue is whether the legislative or executive acts of a foreign sovereign are valid or lawful under its own municipal law, a limit to the sovereign's territory follows as a matter of course from the rule itself. This is because, with limited exceptions, generally governed by treaty, international law does not recognise the right of states to apply its domestic public laws extra-territorially: *France v Turkey (Affaire du "Lotus")* PCIJ, Series A, No 10, at pp 18-19. This limitation is recognised in the municipal law of most states, and is a fundamental principle of English private international law: see *Government of India v Taylor* [1955] AC 491, 511 (Lord Keith of Avonholm); *Ortiz v Attorney General of New Zealand* [1984] AC 1, 21 (Lord Denning MR); *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368, 428, 430-3; *In re State of Norway's Application* [1990] AC 723, 808 (Lord Goff). All of the judicial observations supporting the territorial limitation of the foreign act of state doctrine, including those on which the Court of Appeal relied in the *Playa Larga*, have been made in the context of challenges to the recognition of foreign municipal legislation or to the lawfulness of an executive act of state under the foreign state's municipal law: see *Duke of Brunswick v King of Hanover*, *supra*, at 17; *Hatch v Baez*, *supra*, at p 599; *Underhill v Hernandez*, *supra*, at p 252; *Buttes Gas*, at p 931A-B; *WS. Kirkpatrick & Co Inc v Environmental Tectonics Corporation International*, 493 US 400 (1900) 400, 405; *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4&5)*, at para 135 (Lord Hope); *A Ltd v B Bank* [1997] FSR 165, at para 13.

237. Turning to international law act of state, the position is different. Where the question is the lawfulness of a state's acts in its dealings with other states and their subjects, the act of state doctrine applies wherever the relevant act of the foreign state occurs (save, arguably, if it occurred in the United Kingdom: see *A Ltd v B Bank* [1997] FSR 165 at para 13). The reason is, again, inherent in the principle itself. It is not concerned with the lawfulness of the state's acts under municipal systems of law whose operation, in the eyes of other states, is by definition territorial, but with acts whose lawfulness can be determined only by reference to international law, which has no territorial bounds. In the nature of things a sovereign act done by a state in the course of its relations with other states will commonly occur outside its territorial jurisdiction. States maintain embassies and military bases abroad. They conduct military operations outside their own territory. They engage in intelligence-gathering. They operate military ships and aircraft. All of these are sovereign acts. The paradigm cases are acts of force in international space or on the territory of another state. "Obvious examples", as Lord Pearson observed in *Nissan v Attorney General* [1970] AC 179, 237, "are making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory." In my opinion, subject to the important public policy exception to which I shall come, it is not open to an English court to apply the ordinary law of tort, whether English or foreign, to acts of this kind committed by foreign sovereign states. Thus if, in the *Playa Larga*, the Cuban mode of prosecuting its dispute with General Pinochet's government in Chile had been an act of state, it would have been contrary to principle for an English court to judge its lawfulness according to English (or any other) municipal law, whether it happened in Cuba, Chile or on the high seas. In *Dobree v Napier* the relevant acts occurred on the high seas, but their inherently governmental character made it impossible to treat it as a tortious conversion of goods under English municipal law. In *Buttes Gas*, it was impossible to know in whose territory they had occurred, since that begged the question at issue, but Lord Wilberforce's "wider principle" was applied regardless of the answer to that question. The Court of Appeal proceeded on the same basis in *R (Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs*, where the relevant acts occurred in Pakistan. I think that they were right to do so.

238. Subject to any public policy exception, it is this principle which applies to the acts alleged against United States officials in the present cases. In *Rahmatullah*, they were exercises of governmental authority by the armed forces and officials of the United States, acting as an occupying power in Iraq and a mandatory power in Afghanistan. In *Belhaj*, the claimants' rendition from Thailand to Libya and their mistreatment in the process was also an exercise by the United States of governmental authority. It involved the application of force by United States officials in the course of their government's campaign against international terrorism and in the conduct of their relations with Malaysia, Thailand and Libya. Whatever one may think of the lawfulness or morality of these acts, they were acts of state performed outside the territorial jurisdiction of the United States, which cannot be treated by an English court as mere private law torts, any more than drone strikes by US armed forces can.

Juridical basis

239. The foreign act of state doctrine has commonly been described as a principle of non-justiciability. The label is unavoidable, but it is fundamentally unhelpful because it is applied to a number of quite different concepts which rest on different principles. One, comparatively rare, case in which an issue may be non-justiciable is that although it is legally relevant, the courts are incompetent to pronounce upon it or disabled by some rule of law from doing so. Leaving aside cases in which the issue is assigned to the executive or the legislature under our conception of the separation of powers, most cases of this kind involve issues which are not susceptible to the application of legal standards. The most famous example is *Buttes Gas*, where Lord Wilberforce declined to resolve the issue because there were no "judicial or manageable standards" by which to do so. The court was therefore incompetent to adjudicate upon it at all. As this court pointed out in *Shergill v Khaira* [2015] AC 359 at para 40, this was because the issue was political. But there is another sense in which an issue may be non-justiciable, which is also illustrated by the facts of *Buttes Gas*. It may be non-justiciable because the English court ought not to adjudicate upon it even though it can, because it is not a matter which can properly be resolved by reference to the domestic law of the state. Occidental's contention in *Buttes Gas* was that the mixture of diplomacy and power politics by which the four states involved had eventually resolved the border dispute in a manner unsatisfactory to them, could be characterised as an unlawful conspiracy for the purposes of domestic law. An unlawful conspiracy is in itself justiciable. It is a recognised cause of action in English law. But an English court could not adjudicate upon it because it was parasitic upon a finding that the foreign states involved had acted in breach of international law, being the only law relevant to their acts. This too can fairly be called a principle of non-justiciability, because its effect is that it is not the proper function of the English courts to resolve the issue. But *Buttes Gas* has been widely misunderstood as suggesting that an absence of judicial or manageable standards is the juridical basis of the foreign act of state doctrine in all cases where it is applied to the transactions of sovereign states. It is not. The absence of judicial or manageable standards was simply the reason why the House declined to review the particular facts alleged in that case.

Incidental unlawfulness

240. The act of state doctrine does not apply, in either form, simply by reason of the fact that the subject-matter may incidentally disclose that a state has acted unlawfully. It applies only where the invalidity or unlawfulness of the state's sovereign acts is part of the very subject matter of the action in the sense that the issue cannot be resolved without determining it. There is no real difference between the parties on this point, but it is worth emphasising none the less, for it is of some importance. Some such distinction is essential if the act of state doctrine is not to degenerate into a mere immunity against international embarrassment. The principle is implicit in many of the English cases, but it can best be illustrated by the decision of the US Supreme Court in *WS Kirkpatrick &*

Co Inc v Environmental Tectonics Corpn International, 493 US 400 (1990), which is also the case in which it was first clearly articulated. Environmental Tectonics had succeeded in a competitive tender for a construction contract with the government of Nigeria. The plaintiff, an unsuccessful bidder, alleged that the company had bribed Nigerian government officials, and claimed damages under various US federal statutes. The receipt of bribes was illegal under Nigerian law, but the Supreme Court held that the act of state doctrine did not apply because the legal implications of bribery in Nigerian law were not a necessary part of the plaintiff's case. He had only to prove that the bribes had been paid, and that Environmental Tectonics had thereby committed an act unlawful under US law. That the facts would incidentally disclose offences by the bribed officials was irrelevant. Scalia J, delivering the judgment of the Court held (p 406) that "act of state issues only arise when a court *must decide* - that is, when the outcome of the case turns upon - the effect of official action by a foreign sovereign."

241. There are many circumstances in which an English court may have occasion to express critical views about the public institutions of another country, without offending against the foreign act of state doctrine or any analogous rule of law. In deportation and extradition cases, for example, it may be necessary to review the evidence disclosing that the person concerned would be tortured or otherwise ill-treated by the authorities in the country to which he would be sent. In forum non conveniens cases the court may have to conclude that in some countries the courts are corrupt or controlled by the state. When evidence is said to have been obtained by torture at the hands of officials of a foreign state, a court which is invited to exclude it cannot avoid investigating the allegation and upholding it if the evidence bears it out. I do not regard this as undermining the foreign act of state doctrine, because that doctrine proceeds on a different basis. The foreign act of state doctrine has never been directed to the avoidance of embarrassment, either to foreign states or to the United Kingdom government in its dealings with them. But neither is it concerned with incidental illegality. Where an English court makes findings in a deportation case about, say, the use of torture in a foreign jurisdiction it is not concerned with its lawfulness or unlawfulness, either under the law of the foreign jurisdiction or in international law. It is simply applying its own standards to an exercise of its own jurisdiction.

242. In the present cases the question whether the acts alleged against the relevant foreign states were unlawful is not incidental. It is essential to the pleaded causes of action against the defendants in both actions. This is because the various civil wrongs which are alleged to have caused damage to the claimants are not said to have been committed directly by the defendants. They were committed by the foreign states. If the conduct of the foreign states was lawful, it cannot be tortious for the defendants to have assisted in their commission. The Court of Appeal analysed the various causes of action against the defendants in order to demonstrate that each of them depended on establishing that the conduct of the foreign states was unlawful. I think that their analysis is unanswerable.

The judgment of Leggatt J

243. In his judgment in *Rahmatullah*, Leggatt J accepted that there was a difference between cases which turned on the application to a state's sovereign acts of its own municipal law, and cases concerning transactions between states. Indeed, he regarded them as juridically wholly distinct. Borrowing a concept from the decisions of the United States Supreme Court in *Ricaud v American Metal Co Ltd* 246 US 304 (1918) and *WS Kirkpatrick & Co Inc v Environmental Tectonics Corpn International*, 493 US 400 (1990), 406, he described what he called the "traditional" act of state doctrine as a "rule of decision" applicable to challenges to the lawfulness of an act of state under the state's municipal law. By this he meant that it "requires the court to decide the case on the footing that the relevant acts of a foreign state were valid under its own law" (para 123). By comparison, in cases concerning the transactions of foreign sovereign states, the rule was one of "judicial restraint or abstention". It "prevents a court from deciding or adjudicating upon a case on the ground that its subject matter is not suitable for judicial determination." He regarded judicial restraint or abstention as being required only when there were no "judicial or manageable standards", and that, he thought, could never be the case if a municipal law right was engaged. For this last point, he relied mainly on the decision of this court in *Shergill v Khaira* [2015] AC 359.

244. It will be apparent from what I have already said that I cannot accept this analysis. In the first place, I doubt whether the act of state doctrine, as applied to the sovereign acts of a foreign state, is helpfully described as a "rule of decision". The principle, at any rate in the English case law, is one of non-justiciability. It is that the court will decline to determine the lawfulness of an act of state, not that it will determine its lawfulness on some assumption about the content of the foreign law. Secondly, not all cases in which the foreign act of state doctrine is applied to transactions between states lack "judicial or manageable standards" for their decision. The courts are, for example, perfectly competent to construe treaties, and regularly do so when municipal law rights depend on it: *Republic of Ecuador v Occidental Exploration and Petroleum Co* [2006] QB 432. As Lord Wilberforce pointed out in *Buttes Gas* (p 926F), they are competent to determine the international boundaries of sovereign states and have done so "without difficulty" in proper cases. On the facts of *R (Noor Khan) v Secretary of State for Foreign Affairs*, the courts would have been competent to apply English criminal law to the operators of drones over Pakistan. If the courts, in appropriate cases, decline to do these things, it is usually not because of any lack of legal standards, but because it would be contrary to principle.

245. *Shergill v Khaira* was not an act of state case. The question was whether the court could entertain a claim to enforce the trusts of a religious charity, if that would require it to decide religious issues. It was argued that it could not do so, because such issues were non-justiciable for want of judicial or manageable standards by which to assess them. Lord Neuberger, Lord Sumption and Lord Hodge, in a joint judgment with which Lord Mance and Lord Clarke agreed, distinguished (para 41) between (i) rules of

law such as state immunity which confer immunity from jurisdiction, or rules like the act of state doctrine which protected certain acts from challenge; and (ii) cases "where an issue is said to be inherently unsuitable for judicial decision by reason only of its subject matter". Where a legal right of the citizen or a reviewable question of public law arose, the case could not be regarded as inherently unsuitable for judicial decision. But the case is not authority for the proposition that the application of the foreign act of state doctrine to transactions between states depends on the absence of any municipal law right, nor that it was coterminous with the class of cases in which there were no judicial or manageable standards.

246. Leggatt J's analysis derives some support from the decision of the High Court of Australia in *Moti v The Queen* 245 CLR 456. The facts of this case were somewhat similar to those of the English cases of *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42 and *R v Mullen* [2000] QB 520. In these cases, it had been held that the involuntary deportation of an accused person from a foreign country by British officials to face trial in England, otherwise than by way of lawful extradition, was an abuse of process in English criminal proceedings. In each case, the deportation had been carried out with the co-operation of the police in the foreign country. What made this an abuse of process was the breach of the domestic law of the foreign country and of international law by the British prosecuting authorities or British officials acting in support of them: see *Bennett*, at pp 62G (Lord Griffiths), 67G (Lord Bridge); and *Mullen*, at p 535F. The assumed facts suggested that the local police must also have acted in breach of their own law, but I cannot accept Lord Mance's view that this was critical to the analysis. The removal of the victim to the jurisdiction in which he was brought to trial would have been as much an abuse of process and for exactly the same reasons if the prosecutors had simply kidnapped him with no assistance from local officials. Any unlawfulness in the conduct of the foreign officials was incidental. That was presumably why no point was taken on the foreign act of state doctrine in either of the English cases. Mr Moti's position was exactly the same. He had been illegally deported from the Solomon Islands by a process in which Australian officials in the Islands were involved. His case was that the criminal proceedings should be stayed "because of what Australian officials did in connection with his deportation" (para 9). On this occasion the foreign act of state doctrine was raised. The short answer to this would have been that the unlawfulness of the Australian officials' conduct was enough to justify staying the proceedings against Mr Moti. The unlawfulness of the acts of their foreign collaborators was incidental and irrelevant. But in rejecting the argument, the Court adopted the view of Dr F A Mann, a long-standing critic of the act of state doctrine, that there was no bar to adjudication of the lawfulness of a foreign governmental act if it was necessary to the resolution of an issue within the jurisdiction and competence of the forum: see paras 50-52. In my view this was too wide and certainly wider than anything that was required for the decision of the case.

247. The proposition which the High Court of Australia accepted from Dr Mann is tantamount to the abolition of the foreign act of state doctrine. This was indeed a consummation devoutly wished by that great scholar. He regarded the whole doctrine

as incoherent. Properly understood, I do not think that it is incoherent. What is clear, however, is that to arrive at the view held by Dr Mann it would be necessary to throw over a substantial body of jurisprudence, much of it recent and much of it not considered by the High Court of Australia, including Lord Wilberforce's analysis in *Buttes Gas*.

The judgment of the Court of Appeal

248. The Court of Appeal took a different approach. They considered that while the facts of *Buttes Gas* might be analysed in terms of lack of judicial competence the act of state doctrine was not limited to such situations, even as applied to the transactions of sovereign states. I agree with this. The Court of Appeal accepted that the act of state doctrine was engaged by the claimants' allegations in *Belhaj*, and that it barred the claim unless those allegations fell within one of the recognised exceptions to the doctrine. The exceptions which they regarded as relevant were (i) an exception for cases where the unlawful character of the foreign state's acts was merely incidental to the allegations; (ii) an exception for acts done outside the territory of the foreign state; and (iii) a public policy exception for violations of international law or fundamental human rights. The Court of Appeal held that the second and third exceptions applied. I have already dealt with exception (i), which is uncontentious, and exception (ii), which I consider inapplicable to the kind of act of state relied upon here. The critical point, to my mind, is exception (iii).

Violations of international law or fundamental human rights

249. The Court of Appeal described this as an exception to the ordinary immunity of foreign acts of state. It might equally have been described, as Lord Mance does, as a category of case to which the principle does not apply to begin with. The difference, if there is one, does not seem to me to matter. What matters, on either analysis, is that the principle which underlies this category should be sufficiently clear to make the law coherent and as clear as is consistent with the difficulty of the subject.

250. To say of a rule of law or an exception to that rule that it is based on public policy does not mean that its application is discretionary according to the court's instinct about the value of the policy in each particular case. But rules of judge-made law are rarely absolute, and this one like any other falls to be reviewed as the underlying policy considerations change or become redundant, or as it encounters conflicting policy considerations which may not have arisen or had the same significance before. "Conceptions of public policy," as Lord Wilberforce observed in *Blathwayt v Baron Cawley* [1976] AC 397, 426, "should move with the times and that widely accepted treaties and statutes may point the direction in which such conceptions, as applied by the courts, ought to move." "The acceptability of a foreign law must be judged by contemporary standards", Lord Nicholls added in adopting that statement in *Kuwait Airways*, at para 28.

251. The standards which public policy applies in cases with an international dimension have changed a great deal in the past half-century. In *Hatch v Baez*, *Underhill v Hernandez* and *Oetjen v Central Leather Co* the US Supreme Court declined to consider whether the arbitrary detention of the plaintiff and the expropriation of his property were breaches of international law. In all three cases, this was said to be because any such breach would have been a matter for diplomatic resolution between the United States and the foreign states involved and not for domestic litigation. The court's view on this point reflected the then state of customary international law, which recognised only limited obligations owed by states with regard to the treatment of aliens within their territory. These were generally based on discrimination or denial of justice, as they had been since the middle ages. They were not based on the acceptance of minimum standards for the content of a state's municipal law. A comparison between the first edition of *Oppenheim's International Law* (1905), paras 320-321, and the ninth edition (1992) edited by Sir Robert Jennings and Sir Arthur Watts, paras 404-405, 407, 409, will make the point. Since the Second World War there has been a considerable expansion of the range of matters with which international law is concerned, which now extends to many aspects of the relations between states on the one hand and their subjects or residents on the other. The growing importance of the international protection of human rights is one aspect of this change, but not the only one. International law increasingly places limits on the permissible content of municipal law and on the means available to states for achieving even their legitimate policy objectives.

252. At the same time, the relationship between English law and international law has changed. It used to be said that customary international law is part of the common law. The sentiment dates back to Lord Mansfield in *Triquet v Bath* (1764) 3 Burr 1478, 1481 and Blackstone's *Commentaries,* Bk IV, Chapter 5. The classic example in their day was the recognition at common law of the immunities of states and diplomatic agents. At a time when there was very little overlap between international and municipal law, the assumption of Mansfield and Blackstone had much to be said for it. Today it would be truer to say, as Lord Bingham was inclined to think in *R v Jones (Margaret)* [2007] 1 AC 136 (para 11), that international law is not a part of but is one of the sources of the common law. The same view has been expressed by Professor Brierly, 'International Law in England' (1935) 51 LQR 24, 31, and by the editors of Brownlie's *Public International Law*, 8th ed (2012), 68. English law has always held to the dualist theory of international law. In principle, judges applying the common law are not at liberty to create, abrogate or modify municipal law rights or obligations in accordance with unincorporated norms derived from international law, whether customary or treaty-based. But, as Lord Bingham pointed out in *R v Lyons* [2003] 1 AC 976, at para 13, international law may none the less affect the interpretation of ambiguous statutory provisions, guide the exercise of judicial or executive discretions and influence the development of the common law. Although the courts are not bound, even in these contexts, to take account of international law, they are entitled to do so if it is appropriate and relevant: see, in the context of discretions *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, paras 53-59 (Lord Brown), and *R (Wang Yam) v Central Criminal Court* [2015] UKSC 76, at paras 35-36 (Lord Mance). In those areas which

depend on public policy, the content of that policy may be and in practice often is influenced by international law.

253. These observations are especially pertinent when public policies conflict, as they inevitably do when one seeks to fix limits to a principle of law such as the foreign act of state doctrine. There is a danger that retaining the doctrine while recognising exceptions, will result either in the exception consuming the rule or in the rule becoming incoherent. This concern lies behind the refusal of the US Supreme Court to treat a violation of international law as such as being an exception to the foreign act of state doctrine: see *Banco Nacional de Cuba v Sabbatino*, *supra*, at p 431. Any exception must be limited to violations of international law which can be distinguished on rational grounds from the rest. This was the question with which the House of Lords had to contend in the milestone decisions in *Oppenheimer v Cattermole* [1976] AC 249 and *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883.

254. The question in *Oppenheimer v Cattermole* was whether the English courts should recognise a Nazi decree-law of 1941 which deprived Jews of their German nationality and confiscated their property if they were ordinarily resident outside Germany at the date of the decree. If regard was had to the decree, Mr Oppenheimer lost his German nationality upon its publication, with the result that his pension from the German Federal Republic did not qualify for exemption from income tax in the United Kingdom. The basic rule, at any rate before the Universal Declaration of Human Rights (1948), was not in doubt. In both public and private international law, each state was exclusively entitled to determine who its nationals were in accordance with its own law, subject to limits upon its right to impose its own nationality extra-territorially. The Court of Appeal had held that a relevant foreign law regulating nationality had to be recognised "however inequitable, oppressive or objectionable it may be": [1973] Ch 264, 273 (Buckley LJ). The House of Lords dismissed his appeal on other grounds, without finding it necessary to decide this point. But Lord Cross, with whom Lord Hodson and Lord Salmon agreed, held that had the point arisen the decree would have been disregarded. His analysis includes extensive reference to international law. But the real ground of his decision was not that the decree was itself a violation of international law. It was that the principle of international law which left each state free to determine who were its nationals could not require the courts of other states to recognise determinations repugnant to their own public policy. That raised the question how effect could be given to English public policy. The decree of 1941 could not be regarded as invalid under German law. Nor could the subsistence of German nationality be determined according to some law other than German law. The solution adopted by Lord Cross was that as a matter of English public policy "a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all" (p 278).

255. In *Kuwait Airways*, the House of Lords went further than Lord Cross had done. It held by a majority (Lord Scott dissenting) that in certain circumstances the municipal

law of a state could be disregarded, even in its application to matters within its own territory and notwithstanding the act of state doctrine, on the ground that it constituted a sufficiently serious violation of international law. The issue was whether an English court should recognise a decree-law of the Iraqi government (Resolution 369) extinguishing the existence of Kuwait as an independent state and expropriating its assets, including aircraft belonging to Kuwait Airways Corporation which were then located in Iraq. Iraqi law was the *lex situs*. As such, it was the law designated by ordinary principles of private international law. The argument (summarised by Lord Nicholls at para 24) was that it could not be disregarded as a violation of the law of nations consistently with the foreign act of state doctrine. The violation itself was admitted, and in any event incontestable. Resolution 369 was, in Lord Nicholls' words, "part and parcel of the Iraqi seizure of Kuwait". The seizure had been a flagrant breach of article 2(4) of the United Nations Charter by which states renounce the threat or use of force as an instrument of international policy, a provision which as Lord Steyn (para 115) pointed out had the character of *jus cogens*. The annexation and the seizure of the assets of Kuwaiti nationals had been specifically condemned by successive resolutions of the UN Security Council. Further Security Council resolutions had called on all states to take all necessary measures to protect the assets of the legitimate government of Kuwait and its agencies and to refrain from any action that might be regarded as recognising the seizures. These resolutions were binding in international law on all states, including the United Kingdom. The House declined to give effect to Resolution 369.

256. The leading speech was delivered by Lord Nicholls. Lord Steyn and Lord Hope agreed with Lord Nicholls, adding observations of their own on the exclusion of Resolution 369. Lord Hoffmann also agreed, adding observations on another point. Lord Nicholls' starting point (para 16) was that the rejection of an otherwise applicable foreign law was justified in cases where its application would be "wholly alien to fundamental requirements of justice as administered by an English court." In particular (para 26) the rule that the transactions of sovereign states were not justiciable could not prevent the court from examining them in a case where, because the violation of international law was incontestable, "the adjudication problems confronting the English court in the *Buttes* litigation do not arise." That being so, the court was at liberty to refuse to recognise a foreign law which offended against English public policy. The next question was whether it did. Lord Nicholls regarded Resolution 369 as contrary to public policy for three related reasons, which are summarised at para 29 of his speech. First, it was a "gross violation of established rules of international law of fundamental importance", as repugnant to English public policy as the Nazi decree considered in *Oppenheimer v Cattermole*. Secondly ("for good measure"), the enforcement or recognition of Resolution 369 would be contrary to the obligations of the United Kingdom under the UN Charter (para 29). Third, it would "sit uneasily with the almost universal condemnation of Iraq's behaviour and with the military action, in which this country participated, taken against Iraq to compel its withdrawal from Kuwait." Lord Steyn, while warning (para 114) that not every breach of international law will trigger the public policy exception, gave his own reasons in terms similar to Lord Nicholls. So did Lord Hope. He identified the relevant public policy as being "that our courts should give effect to clearly established principles of international law" (para 139). But he

thought it "clear that very narrow limits must be placed on any exception to the act of state rule" (para 138). He concluded, at para 149:

> "Respect for the act of state doctrine and the care that must be taken not to undermine it do not preclude this approach. The facts are clear, and the declarations by the Security Council were universal and unequivocal. If the court may have regard to grave infringements of human rights law on grounds of public policy, it ought not to decline to take account of the principles of international law when the act amounts - as I would hold that it clearly does in this case - to a flagrant breach of these principles. As Lord Upjohn indicated in *In re Claim by Helbert Wagg Co Ltd* [1956] Ch 313, 334, public policy is determined by the conceptions of law, justice and morality as understood in the courts. I would hold that the effectiveness of Resolution 369 as vesting title in IAC to KAC's aircraft is justiciable in these proceedings, and that such a flagrant international wrong should be deemed to be so grave a matter that it would be contrary to the public policy of this country to give effect to it."

257. The principle which the Appellate Committee applied in *Kuwait Airways* was that the English courts were not precluded from questioning the propriety or otherwise of a foreign legislative act and declining to recognise it, if it offended a "fundamental requirement of justice as administered by an English court." It is the same as the principle which allows an English court to decline to apply a rule of an otherwise applicable foreign law which is contrary to public policy: see, now, section 14(3)(a)(i) of the Private International Law (Miscellaneous Provisions) Act 1995. This is a principle of *English* public policy. But in an international context, it is informed by any relevant norms of international law binding on the United Kingdom as it was in *Kuwait Airways*. Recognition of the influence of international law does not mean that every rule of international law must be adopted as a principle of English public policy, even if it is acknowledged as a peremptory norm (*jus cogens*) at an international level. For my part, I would adopt the cautious observations of Le Bel J, delivering the judgment of the Supreme Court of Canada in *Kazemi Estate v Islamic Republic of Iran* [2014] SCC 62; [2014] 3 SCR 176 at paras 150-151. The issue before the court in that case was whether to recognise a public policy exception to state immunity in cases where this would conflict with the values protected by the Canadian Charter of Rights and Freedoms. Le Bel J pointed out that

> "… not all commitments in international agreements amount to principles of fundamental justice. Their nature is very diverse. International law is ever changing. The interaction between domestic and international law must be managed carefully in light of the principles governing what remains a dualist system of

> application of international law and a constitutional and parliamentary democracy. The mere existence of an international obligation is not sufficient to establish a principle of fundamental justice. Were we to equate all the protections or commitments in international human rights documents with principles of fundamental justice, we might in effect be destroying Canada's dualist system of reception of international law and casting aside the principles of parliamentary sovereignty and democracy."

The role of international law in this field, as he went on to point out, is to influence the process by which judges identify a domestic principle as representing a sufficiently fundamental legal policy:

> "151. That being said, I am prepared to accept that *jus cogens* norms can generally be equated with principles of fundamental justice and that they are particularly helpful to look to in the context of issues pertaining to international law. Just as principles of fundamental justice are the 'basic tenets of our legal system' ..., *jus cogens* norms are a higher form of customary international law. In the same manner that principles of fundamental justice are principles 'upon which there is some consensus that they are vital or fundamental to our societal notion of justice', *jus cogens* norms are customs accepted and recognized by the international community of states from which no derogation is permitted …"

Torture

258. The legal implications of torture in English and international law have been considered by the House of Lords on a number of occasions: *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270. Torture is unconditionally prohibited by article 3 of the European Convention on Human Rights and by the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984). The United Kingdom is a party to these instruments and has given effect to them by statute. The prohibition has the status of *jus cogens erga omnes*. That is to say that it is a peremptory norm of international law which gives rise to obligations owed by each state to all other states and from which no derogation can be justified by any countervailing public interest. In the words of article 2.1 of the UN Torture Convention, "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." In *A v Secretary of State for the Home Department (No 2)*, *supra*, at para 33, Lord Bingham, said:

> "There can be few issues on which international legal opinion is more clear than on the condemnation of torture. Offenders have been recognised as the 'common enemies of mankind' (*Demjanjuk v Petrovsky* (1985) 612 F Supp 544, 566, Lord Cooke of Thorndon has described the right not to be subjected to inhuman treatment as a 'right inherent in the concept of civilisation' (*Higgs v Minister of National Security* [2000] 2 AC 228, 260), the Ninth Circuit Court of Appeals has described the right to be free from torture as 'fundamental and universal' (*Siderman de Blake v Argentina* (1991) 965 F 2d 699, 717) and the UN Special Rapporteur On Torture (Mr Peter Koojimans) has said that 'If ever a phenomenon was outlawed unreservedly and unequivocally it is torture' (Report of the Special Rapporteur on Torture, E/CN 4/1986/15, para 3)."

259. In *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, the House of Lords held that notwithstanding the status of the prohibition of torture as *jus cogens* in international law, the United Kingdom was under no international law obligation to make a civil remedy available for torture committed outside its territorial jurisdiction. There were two reasons for this. The main reason was that as a matter of customary international law breach of a *jus cogens* norm does not itself require civil jurisdiction to be assumed by states. Lord Bingham, with whom the rest of the Appellate Committee agreed, expressed this (para 24) in terms taken from the first edition of Fox, *The Law of State Immunity*:

> "State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement."

Lord Hoffmann, concurring, said, at para 45:

> "To produce a conflict with state immunity, it is therefore necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by way of exception to state immunity, entitles or perhaps requires states to assume civil jurisdiction over other states in cases in which torture is alleged. Such a rule may be desirable and, since international law changes, may have developed. But … it is not entailed by the prohibition of torture."

Lord Bingham and Lord Hoffmann went on to consider whether an obligation to make a civil remedy available could be derived from the Torture Convention. They concluded that it could not. Article 14 of the Torture Convention, which dealt with the state's

obligations in respect of civil remedies, dealt only with remedies for torture committed within the state's territorial jurisdiction.

260. These conclusions have provoked some academic controversy and have been criticised by the respondents on these appeals. But they were supported by the decision of the International Court of Justice in *Democratic Republic of Congo v Belgium (case concerning arrest warrant of 11 April 2000)* (2002) ICJ Rep 3, in which state immunity was held to be available in proceedings based on breach of another peremptory norm of international law, namely the prohibition of war crimes and crimes against humanity. More recently, in *Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening)* [2012] ICJ Rep 99, the International Court of Justice reaffirmed its decision in *Arrest Warrant* and held that Italy and Greece were in breach of customary international law in rejecting claims by Germany to state immunity in respect of massacres and deportations of civilians by German armed forces in Italy and Greece during the Second World War. The Court specifically endorsed the decision of the House of Lords in *Jones v Saudi Arabia*: see paras 85, 87, 96. In its reasoning, the International Court adopted the same distinction between procedure and substance as Lord Bingham at para 24 of his speech in that case:

> "To the extent that it is argued that no rule which is not of the status of jus cogens may be applied if to do so would hinder the enforcement of a jus cogens rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition. A jus cogens rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess jus cogens status, nor is there anything inherent in the concept of jus cogens which would require their modification or would displace their application." (para 95)

Since that decision, the European Court of Human Rights in *Jones v United Kingdom* (2014) 59 EHRR 1, at para 198 and the Supreme Court of Canada in *Kazemi Estate v Islamic Republic of Iran* [2014] SCC 62; [2014] 3 SCR 176 at paras 102-105, 141-167, have both conducted a careful review of the international material and the decisions of national courts, and arrived at the same conclusion on this point as the House of Lords did in *Jones*.

261. I do not propose to re-examine that material once more, because the present question is not the correctness of the decision in *Jones*, but its relevance in the rather different context of the foreign act of state doctrine. In *Jones*, the absence of any international law obligation to make a civil remedy available for torture abroad mattered. This was because states unquestionably have an international law obligation to recognise the forensic immunity in their own courts of other states and their agents.

The International Court of Justice held as much in *Arrest Warrant* and again in *Jurisdictional Immunities*. That international law obligation might have been displaced if there had been a countervailing international law obligation to provide a civil remedy for torture wherever committed. The act of state doctrine, by comparison, does not reflect any obligation of states in international law. It follows that an exception to it does not need to be based on a countervailing international law obligation in order to accord with principle. It is enough that the proposed exception reflects a sufficiently fundamental rule of English public policy.

262. In my opinion, it would be contrary to the fundamental requirements of justice administered by an English court to apply the foreign act of state doctrine to an allegation of civil liability for complicity in acts of torture by foreign states. Respect for the autonomy of foreign sovereign states, which is the chief rationale of the foreign act of state doctrine, cannot extend to their involvement in torture, because each of them is bound *erga omnes* and along with the United Kingdom to renounce it as an instrument of national or international policy and to participate in its suppression. In those circumstances, the only point of treating torture by foreign states as an act of state would be to exonerate the defendants from liability for complicity. The defendants are not foreign states. Nor are they the agents of foreign states. They are or were at the relevant time officials and departments of the British government. They would have no right of their own to claim immunity in English legal proceedings, whether *ratione personae* or *ratione materiae*. On the other hand, they would be protected by state immunity in any other jurisdiction, with the result that unless answerable here they would be in the unique position of being immune everywhere in the world. Their exoneration under the foreign act of state doctrine would serve no interest which it is the purpose of the doctrine to protect.

263. This is not a point which has arisen in any English case apart from *R (Noor Khan) v Secretary of State for Foreign Affairs*. But it was considered by the Supreme Court of Canada in *Omar Ahmed Khadr v Canada* [2008] 2 SCR 125 and by the Federal Court of Australia in *Habib v Commonwealth* (2010) 265 ALR 50.

264. *Khadr* was not a case of torture. The plaintiff had been captured by US forces in Afghanistan and transferred to Guantanamo Bay. The allegation was that Canadian officials had connived in his unlawful detention there by the United States government. The Supreme Court of Canada held that the foreign act of state doctrine had no application for two reasons. First, the US Supreme Court in *Rasul v Bush* (2004) 542 US 466 had held that the indefinite detention without access to a court of persons captured in military operations was a violation of the Geneva Conventions: paras 21-24. That constituted an admission by the United States and made a finding of violation uncontentious. The court declined to consider what the position would have been in the absence of that decision. Secondly, the considerations of comity which underlay the foreign act of state doctrine "cannot be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international

obligations": para 18.This was because (i) Canada was itself party to the Geneva Convention, and under an international law obligation not to countenance the violations in question, and (ii) the right to apply for habeas corpus was a fundamental human right recognised by Canadian law also: paras 25-26.

265. In *Habib*, the plaintiff had been arrested in Pakistan and successively detained there, in Egypt and at Guantanamo Bay. The allegation was that Australian officials aided and abetted officials of the various foreign states involved to torture him. Jagot J, delivering the leading judgment in the Federal Court of Australia, held, at para 114, that the modern cases on the foreign act of state doctrine

> "do not support a conclusion that the act of state doctrine prevents an Australian court from scrutinising the alleged acts of Australian officials overseas in breach of peremptory norms of international law to which effect has been given by Australian laws having extra-territorial application."

She went on to point out that the public policy considerations which justified both the act of state doctrine and the exceptions to it had to be considered

> "in a context where the prohibition on torture forms part of customary international law and those partners themselves are signatories to an international treaty denouncing torture."

266. The purpose of the foreign act of state doctrine is to preclude challenges to the legality or validity of the sovereign acts of foreign states. It is not to protect English parties from liability for their role in it. In itself, that would not prevent them from taking incidental advantage of the foreign act of state doctrine. In *R (Noor Khan) v Secretary of State for Foreign Affairs*, British officials were entitled to take advantage of the doctrine in a case where they were said to have assisted in military action overseas by a foreign sovereign. I think that that decision was correct. But torture is different. It is by definition an act of a public official or a person acting in an official capacity: see article 1 of the Torture Convention. Article 4 of the Convention requires the United Kingdom to criminalise not only torture (as defined) but acts constituting complicity in torture. Article 5 requires the United Kingdom to establish criminal jurisdiction over offences referred to in article 4 wherever in the world they are committed, if they are committed by its nationals or by persons present in its territory. It is no answer to these points to say that these treaty provisions are concerned with criminal law and jurisdiction. So they are. But the criminal law reflects the moral values of our society and may inform the content of its public policy. Torture is contrary to both a peremptory norm of international law and a fundamental value of domestic law. Indeed, it was contrary to domestic public policy in England long before the development of any peremptory norm of international law. It derives its force chiefly from England's long

domestic tradition of abhorrence of torture, even in a period when it was commonplace in other jurisdictions. As Lord Bingham observed in *A v Secretary of State for the Home Department (No 2)*, *supra*, at para 12, the condemnation of torture is not simply an exclusionary rule of evidence. It "is more aptly categorised as a constitutional principle than as a rule of evidence": cf para 51.

267. The Secretary of State submits that unless the facts are undisputed or indisputable, as they were in *Kuwait Airways*, the foreign act of state doctrine precludes any examination of the facts. In my view this submission fails to distinguish between two different inquiries: (i) an enquiry into the lawfulness or validity of the alleged act of state, and (ii) an inquiry into the question whether there is any factual foundation for applying the foreign act of state doctrine at all. Whenever the foreign act of state doctrine is invoked, the court must decide whether it applies. If it cannot do it by reference to the pleadings or admissions, it must examine the evidence. This may involve examining what the state has done, for example where there is an issue as to its responsibility for the acts of its alleged agents. Thus in *Underhill v Hernandez* the application of the foreign act of state doctrine came before the Supreme Court on an appeal from the decision at a trial. The trial court had made findings of fact about the responsibility of the government of Venezuela. The Supreme Court relied on these findings (p 254) without any suggestion that in making them the lower court had been "sitting in judgment" on that government. The same point could be made about *Hatch v Baez* and *Oetjen v Central Leather Co*. The need to establish a factual foundation for the application of the doctrine must equally apply where the issue concerns not the character of the act but the availability of an exception.

268. I conclude that it would not be consistent with English public policy to apply the foreign act of state doctrine so as to prevent the court from determining the allegations of torture or assisting or conniving in torture made against these defendants.

Unlawful detention, enforced disappearance and rendition

269. Article 9 of the Universal Declaration of Human Rights (1948) provides that "no one shall be subjected to arbitrary arrest, detention or exile." The prohibition of arbitrary detention gives rise to problems of definition far more complex than those associated with the prohibition of torture. Torture is always contrary to international law, but not all detention is "arbitrary". On the question what makes it arbitrary, there is as yet no clear consensus. The editors of the American Law Institute's authoritative *Restatement (3rd) of the Foreign Relations Law of the United States* (1987) express the view that "arbitrary detention violates customary international law if it is prolonged and practiced as state policy": see para 702(e) and Comment (h). More recently, in December 2012, the UN Working Group on Arbitrary Detention, after canvassing states on the question what factors qualified detention as arbitrary in their domestic law, concluded that detention might be regarded as arbitrary in customary international law if it lacked any

legal basis, but also in some circumstances even if it did have a legal basis, depending on the reason for the detention and in some cases on its duration: UN A/HRC/22/44, at para 38.

270. These more or less speculative suggestions may indicate that the boundaries of arbitrary detention in international human rights law are not yet fixed. But it is clear that the irreducible core of the international obligation, on which there is almost complete consensus, is that detention is unlawful if it is without any legal basis or recourse to the courts. The consensus on that point is reflected in the terms of the International Covenant on Civil and Political Rights (1966), an expansion in treaty form of the Universal Declaration of 1948, which provides by article 9:

> "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
>
> …
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release …
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

The Covenant has been ratified by 167 states to date, including the United Kingdom, the United States, Thailand and Libya. Malaysia is one of a handful of states which are not a party, but it has declared that it adheres to its principles.

271. The UN Working Group regarded this irreducible core as *jus cogens*: loc cit, para 49. In my opinion they were right to do so. It is fair to say that article 4 of the Covenant does recognise a limited right to derogate from its terms "in time of public emergency which threatens the life of the nation … to the extent strictly required by the exigencies

of the situation", with certain exceptions such as torture, arbitrary killing and slavery. The existence of a right to derogate is normally regarded as inconsistent with the status of *jus cogens*: see article 53 of the Vienna Convention on the Law of Treaties. But this difficulty is more apparent than real. Although expressed as a right of derogation, the exception for public emergencies corresponds to the general exception from state responsibility which international law recognises in cases where an act prohibited by international law is shown to be "the only way for a state to safeguard an essential interest against a grave and imminent peril": see the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, article 25, and the extensive review of judicial decisions and state practice cited in the associated commentary. For this reason the UN Working Group considered that non-derogability in an emergency was consistent with the prohibition being a peremptory norm: UN A/HRC/22/44, at paras 50-51. The same view is expressed in the Reporters' Notes to para 702 of the American Restatement: see Note 11.

272. The significant point for present purposes is that the core prohibition in international law of detention without legal basis or recourse to the courts corresponds to a fundamental principle of English public policy. Like English law's rejection of torture it is an essential feature of our constitutional order. It has traditionally been traced, at any rate since the time of Sir Edward Coke, to the 29th article of Magna Carta. Charles James Fox is not always a useful source of constitutional principle, but most lawyers would agree with his famous description of the writ of habeas corpus as the "great palladium of the liberties of the subject". The principle underlying the writ is that the availability of recourse to a court to test the legality of detention is the hallmark of its constitutionality. Indeed, although the position has in some respects been modified by statute, at common law the reach of the writ of *habeas corpus* has even been held to extend to anywhere in the world where a servant of the Crown or any other person amenable to the personal jurisdiction of the court has detained a person: *Ex p Anderson* (1861) 3 El & El 487. Or appears to be in a position to procure his production: *Rahmatullah v Secretary of State for Defence* [2013] AC 614.

273. I turn to rendition and enforced disappearance, both of which are aggravated forms of arbitrary detention.

274. Rendition is an archaic expression which was once more or less synonymous with extradition. The Oxford English Dictionary, in its Supplement for September 2006, defines "extraordinary rendition" as

> "the seizure and transportation by authorities of a criminal suspect from one country to another without the formal process of extradition. … Sometimes used *spec* with reference to moving a terrorist suspect for interrogation in a country considered to have less rigorous regulations for the humane treatment of prisoners."

I shall take it to have the meaning given to it by the Belhaj claimants in their Particulars of Claim, namely "a euphemism commonly used since about 2001 to describe covert unlawful abduction organised and carried out by state agents, across international borders, for the purpose of unlawful detention, interrogation and/or torture." The context of Mr Rahmatullah's pleading shows that he is using it in the same sense.

275. Enforced disappearance was described by Leggatt J in *R (Al-Saadoon) v Secretary of State for Defence* [2015] EWHC 715 (Admin); [2015] 3 WLR 503, para 209, as

> "a concept recognised in international law and … a practice which is internationally condemned. It involves detention outside the protection of the law where there is a refusal by the state to acknowledge the detention or disclose the fate of the person who has been detained. Its cruelty and vice lie in the facts that the disappeared person is completely isolated from the outside world and at the mercy of their captors and that the person's family is denied knowledge of what has happened to them."

Enforced disappearance is a violation of article 5 of the European Human Rights Convention in the case of persons within the jurisdiction of a Convention state: *Kurt v Turkey* (1998) 27 EHRR 373. In December 2006 the United Nations adopted a draft Convention for the Protection of all Persons from Enforced Disappearance, which seeks to provide more generally for enforced disappearance. The Convention came into force in December 2010. It has to date been signed by 94 states and ratified by 45. But the parties do not include the United Kingdom, the United States, Malaysia or Libya. Thailand is a signatory, but has not ratified. In these circumstances I consider that the Convention has nothing to contribute to the issues on this appeal.

276. However, even in the absence of specific rules of international law relating to rendition and enforced disappearance, a prohibition of these practices is necessarily comprised in the more general prohibition of arbitrary detention by other international instruments, notably article 9 of the International Covenant on Civil and Political Rights. The UN Working Group on Arbitrary Detention was surely right to say (loc cit, para 60) that

> "secret and/or incommunicado detention constitutes the most heinous violation of the norm protecting the right to liberty of human beings under customary international law. The arbitrariness is inherent in these forms of deprivation of liberty as the individual is left outside the cloak of any legal protection."

Likewise, the European Court of Human Rights has had no difficulty in dealing with rendition cases within the jurisdiction of a Convention state under the broader heading of the right to liberty and security of the person protected by article 5: see *El-Masri v Macedonia* (2013) 57 EHRR 25; *Al-Nashiri v Poland* & *Husayn v Poland* (2015) 60 EHRR 16.

277. Historically, rendition is not a complete stranger to English practice. As Lord Hope pointed out in *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, at paras 106-10, in the second half of the 17th century, persons accused of treason were occasionally deported by administrative decision to Scotland, where confessions could lawfully be extracted from them by torture. More recently, administrative deportation of British subjects was practised by British colonial administrations: M Lobban, "Habeas Corpus, Imperial Rendition and the Rule of Law", *Current Legal Problems*, (2015) 68, 27-84. But renditions to Scotland were probably always contrary to the law of England, and colonial renditions were only ever accepted by the courts on the basis that the Crown had power to legislate for the colonies in a manner contrary to fundamental principles of English law: see *R v Earl of Crewe, Ex p Sekgome* [1910] 2 KB 576, 607, 609-610 (Vaughan Williams LJ), 615-617 (Farwell LJ), 627-629 (Kennedy LJ). This digression into history serves mainly to show how much has changed as a result of the adoption of fundamental human rights by English law and, more broadly, its recognition of the broader implications of the rule of law. In the rare modern instances of rendition to the United Kingdom by or with the complicity of British officials, the courts have not been willing to tolerate the consequences. The difference, as Lord Griffiths put it in *R v Horseferry Road Magistrates' Court, Ex p Bennett*, at p 62A, is that

> "the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law."

278. In my opinion the foreign act of state doctrine cannot be applied to the detention alleged to have been inflicted on these claimants by US and Libyan officials, for substantially the same reasons as it cannot be applied to the allegations of torture. They exhibit the same combination of violation of peremptory norms of international law and inconsistency with principles of the administration of justice in England which have been regarded as fundamental since the 17th century. The fact that if the pleaded allegations are correct the claimants were forcibly transported across international borders without any lawful process of extradition is a significant aggravating factor engaging the same considerations of public policy. The position is less clear in relation to the relatively brief periods of detention said to have been inflicted on Mr Belhaj and Mrs Boudchar by the authorities in Malaysia and Thailand, in respect of which the pleaded allegations are thinner. But there can be no justification for striking out that part of the Particulars of Claim in the absence of a trial of the facts.

Other cruel, inhuman or degrading treatment

279. The Torture Convention applies to both torture and "other cruel, inhuman or degrading treatment", but it distinguishes between them. Article 1.1 of the Convention defines torture properly so-called. Article 2.2, which precludes derogations in any circumstances, applies only to torture as defined. The international obligation of states in relation to "other cruel, inhuman or degrading treatment" is defined by article 16. It is to prevent such acts within its jurisdiction. The Convention also imposes on states the ancillary administrative and investigatory obligations laid down by articles 10, 11, 12 and 13 of the Convention. The international obligation upon states to assume universal criminal jurisdiction over torture does not apply to the lesser forms of ill treatment. In *A v Secretary of State for the Home Department (No 2)*, *supra*, at para 53, Lord Bingham acknowledged the significance of these differences:

> "Ill-treatment falling short of torture may invite exclusion of evidence as adversely affecting the fairness of a proceeding under section 78 of the 1984 Act, where that section applies. But I do not think the authorities on the Torture Convention justify the assimilation of these two kinds of abusive conduct. Special rules have always been thought to apply to torture, and for the present at least must continue to do so."

280. In these circumstances, it is difficult to regard the prohibition of ill-treatment falling short of torture as *jus cogens*. Nor does it engage the same fundamental considerations of English public policy which justify treating torture as an exception to the foreign act of state doctrine. The practical consequences of this difference in cases like the present are, however, limited. Like torture, "other cruel, inhuman or degrading treatment" must by definition be committed or authorised by a public official: article 16. It may fall short of torture, either because it is insufficiently severe or because it is not committed for one of the purposes specified in article 1 (obtaining information or a confession, punishment, intimidation, coercion, or other reasons based on discrimination). Given the breadth of the definition of torture, which extends to any intentional infliction of "severe pain and suffering, whether physical or mental", and the wide range of motives which may lead to ill-treatment being classified as torture, the residual category of "other cruel, inhuman or degrading treatment" is in practice likely to be a very narrow one.

Article 6 of the European Convention on Human Rights

281. The conclusion that I have reached on the ambit of the exceptions to the act of state doctrine means that article 6 is only marginally relevant to the present appeals. It could not apply to the detentions themselves. It could apply only so far as the treatment

of the claimants while they were detained amounted to cruel, inhuman or degrading treatment but fell short of torture. I will therefore deal with it briefly.

282. Article 6 might in principle apply so far as the application of the foreign act of state doctrine would constitute a denial of the claimants' right to a court: *Golder v United Kingdom* (1975) 1 EHRR 524. There are circumstances in which an immunity from liability or adjudication will engage article 6. In these cases, it must be justified by reference to the legitimacy of the objective and the proportionality of the means. State immunity is a controversial but well established example in the jurisprudence of the Strasbourg Court: *Fogarty v United Kingdom* (2002) 34 EHRR 12; *Al-Adsani v United Kingdom* (2002) 34 EHRR 11; *Cudak v Lithuania* (2010) 51 EHRR 15; *Sabeh El Leil v France* (2012) 54 EHRR 14. But, except in rare cases where there are no judicial or manageable standards by which to determine an issue, the foreign act of state doctrine is not an immunity. It is a rule of substantive law which operates as a limitation on the subject-matter jurisdiction of the English court. In *Roche v United Kingdom* (2005) 42 EHRR 30 the European Court of Human Rights held that the right to a court protected by article 6 was not engaged by a substantive rule of domestic law excluding liability, but only by a bar which was procedural in nature.

283. The most pertinent illustration is *Markovic v Italy* (2006) 44 EHRR 52. The applicants in this case were relatives of persons who had been killed in the NATO air-raid on Belgrade in 1999. The raid was said to be an act of war in violation of international law. It had been launched from bases in Italy. The Corte de Cassazione had held that by a rule of substantive law the Italian courts had no jurisdiction over acts of war or indeed over any acts of the Italian state which were impugned on the sole ground that they violated international law. The Strasbourg court applied the distinction between substance and procedure that they had formulated in *Roche*. They agreed that the limitation on the jurisdiction of the Italian court was substantive. It followed (para 114) that the decision of the Corte de Cassazione, "does not amount to recognition of an immunity but is merely indicative of the extent of the courts' powers of review of acts of foreign policy such as acts of war."

284. To the limited extent that the foreign act of state doctrine might apply in these cases, it does not in my opinion engage article 6.

Disposition

285. For these reasons I would declare (i) that the claimants' claims are not barred by state immunity, and (ii) that on the facts pleaded the claimants' claims are not barred by the foreign act of state doctrine so far as they are based on allegations of complicity or participation in torture or in detention or rendition otherwise than by legal authority. I would affirm the decision of the Court of Appeal in *Belhaj* that no part of the claim is struck out.