

# FOREIGN ACT OF STATE—A PRACTICAL GUIDE FROM *BUTTES GAS* TO *BELHAJ*

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## Abstract

Foreign act of state, the principle that a domestic court will not ‘sit in judgment’ over the acts of foreign countries, is coming under increasing scrutiny, as illustrated by the recent case of *Belhaj v Straw* (2017). This article traces the emergence of the principle out of traditional rules of private international law that, according to *Belhaj*, continue to constrain the doctrine. The essay provides a practical guide to the doctrine for use by other judges, who will usually come across act of state in the context of a motion to dismiss or to strike out pleadings. The author reviews five key cases which have considered whether a ‘unifying’ doctrine exists apart from choice of law rules of private international law; whether the principle is one of jurisdiction, non-justiciability, or something different; and the nature of the ‘public policy’ exception. She suggests that the ‘disaggregation’ of act of state into four ‘rules’ posited in *Belhaj* will remain the organizing framework of the doctrine in the medium term—despite Lord Sumption’s attempts to condense it into one or two rules. She suggests the Supreme Court is departing from the notion of act of state as a broad and inflexible principle of jurisdiction and from the notion that courts should use it in cases where requested by the government to avoid embarrassment to its foreign policy. The author disagrees with the observation, made in *Yukos Capital SAR v Rosneft Oil Co* (2012), that non-justiciability—the notion that certain issues are inappropriate for domestic courts to adjudicate—has ‘subsumed’ act of state. Rather, it is doubtful that non-justiciability should continue to be regarded as part of the law of act of state.

Whether act of state is restricted to acts taking place within the territory of the foreign state, whether it applies to all types of

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property, whether it applies to injuries to the person, and whether it applies to lawful as well as unlawful executive actions, or to judicial acts, still remain uncertain. The greater significance of *Belhaj* is seen to lie in the Court's adoption of the public policy exception to act of state in certain circumstances. Five of the seven judges agreed that UK courts should adapt to modern conditions in the form of rules of public policy that are 'sufficiently fundamental' to distinguish the conduct in question (in *Belhaj*, alleged complicity in acts of torture) from other violations of international conventions.

**Keywords:** act of state, state immunity, non-justiciability, torture, doctrine, public policy, jurisdiction

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As every student of international law knows, the doctrine of foreign 'act of state'—the principle that domestic courts should not 'sit in judgment' on the laws or conduct of foreign states—has emerged from obscurity in recent years as conflicts between nation states and between states and non-state actors have pushed the traditional boundaries of private and public international law. The globalization of communications, transportation and other industries has weakened the notion of absolute sovereignty. International business dealings have given rise to disputes that, while not involving states directly, may affect their interests. More recently, the recognition of human rights in international conventions has added to the scrutiny accorded to act of state by domestic courts, signalling what some see as a new era of state accountability (see, e.g., Thorroja 2006: 70). Underlying these developments one may find the idea, buried deep in the wording (or between the lines) of some international conventions, that there are circumstances in which state sovereignty may be legally constrained by certain fundamental norms.

As often happens, act of state has taken on greater complexity when seen in the full glare of academic and judicial attention. Uncertainties that were previously tolerated concerning the meaning and limitations of this 'generally confused topic' (Lord Wilberforce in *Buttes Gas* 1982) have become more significant. The recent case of *Belhaj v Straw* (2017) provided an opportunity for the Supreme Court to resolve such uncertainties. But while *Belhaj* has been described as providing a 'measure of clarity' (Dickinson 2018: 12), the judges differed on whether it is a unified, or unifying, principle; two, three or four distinct rules; an 'attitude' of judicial reluctance to adjudicate disputes involving nation states in some way; or a rule of abstention from or—now least likely—lack of jurisdiction over any such involvement. A majority of the Court in

*Belhaj* did agree on the applicability of the ‘public policy’ exception to act of state—a fact that arguably makes their Lordships’ analyses of the doctrine *obiter* and thus fertile ground for future re-evaluation.

One of the purposes of this paper is to show how act of state is being reshaped—if not clarified—by UK courts in response to the new types of conflicts and human rights issues that now arise with some frequency in the context of civil claims. Although a brief recounting of relevant case law will be necessary, I will not pretend to provide an academic discussion of act of state, nor a long and learned analysis of the authorities. That has already been done in various books and articles. Rather, I hope to provide more practical assistance to the busy master or trial judge who is confronted with a case involving a plea of act of state, but who may not have the time or resources to travel the long and winding road that has led to the doctrine as now understood. In addition, I hope to address the questions of whether, post-*Belhaj*, the ‘portmanteau’ idea of act of state remains workable and, if not, what should replace it in the legal taxonomy. The paper will focus on English law, although the occasional reference to Canadian law will appear. To date, the Supreme Court of Canada has not found it necessary to grapple directly with the nature and scope of the doctrine.

## [A] PRELIMINARY MATTERS

A master or judge is likely to come into contact with act of state at an early stage in litigation when a (non-state) defendant asserts the principle as a defence to claims concerning allegedly unlawful or invalid conduct that has taken place outside the forum state, on the part of an official of a foreign state or someone associated therewith. Typically, the defendant will seek an order that the claims are not justiciable or that jurisdiction should be declined by the domestic court.<sup>2</sup> Depending on the governing rules, the matter may fall to be determined solely on the pleadings. *If* act of state is a matter of jurisdiction, the absence of evidence would not normally preclude the court from ruling, but that proposition is controversial; and those judges who have commented on the matter have found that it is preferable in any event to have facts agreed upon or to have some evidence. In *Belhaj*, Lord Sumption expressed the view that the court must find facts at whatever stage the matter arises, and that the

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<sup>2</sup> In *Belhaj* itself, the motion before the court, brought under Civil Procedure Rules, r 3.1(2)(1), was whether the claim should be dismissed ‘on the basis that the court lacks jurisdiction and/or that the claims are non-justiciable’.

doctrine does not preclude the court from examining at this preliminary stage ‘what the state has done’ (*Belhaj v Straw* 2017: para 267).<sup>3</sup>

## Crown Act of State

Where the conduct alleged is that of an official of the court’s *own* state, the applicable principle is that of *Crown* act of state.<sup>4</sup> This paper will be limited to *foreign* act of state and references herein to ‘act of state’ should be taken as referring to the foreign variety.

## State Immunity

Where the defendant is a foreign state, a different defence is likely to be raised—state immunity. It is limited to cases in which the foreign state is impleaded, directly or indirectly, the latter usually occurring where state property is affected (*Belhaj v Straw* 2017: paras 12-31). Act of state is often paired in pleadings with state immunity, but the two are quite different. State immunity is said to be a personal immunity (in the sense that it depends on the status of the person impleaded) or *ratione personae*; act of state arises by reason of the subject-matter of the proceedings and is thus often described as an immunity *ratione materiae*. As a principle of international law, state immunity is grounded in equality among sovereign states, which is enshrined in Article 2 of the UN Charter (see also Dicey et al 2012: rule 26). The origins of act of state certainly include comity of nations but also include separation of powers between the judicial and executive branches of government (Sales 2006: 94-97).

Both doctrines are creatures of the common law, but state immunity has been codified, or at least modified, in most states, to reflect a more ‘relaxed’ approach than did the common law (*Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* 2006, 2007: 280). In their study *The Law of State Immunity* (2015: 169), Hazel Fox and Philippa Webb write that the State Immunity Act 1978 is not a codifying statute, citing part 14 of the Rules of Supreme Court Practice, para 4671. They observe that the Act has nevertheless led UK courts to apply a ‘restrictive rule’ in determining state immunity in accordance with the common law.<sup>5</sup>

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<sup>3</sup> See also *Altimo Holdings and Investment Ltd. v Kyrgyz Mobil Tel Ltd* (2011: paras 80-88).

<sup>4</sup> See *Rahmatullah (No 2) v Ministry of Defence* (2017), decided at the same time as *Belhaj*.

<sup>5</sup> See also *Holland v Lampen-Wolfe* (2000).

Section 1(1) of the Act provides:

- 1(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 (emphasis added).

Section 14(1) provides that references in the Act to a ‘state’ include the sovereign or other head of state ‘in his public capacity’, the government of the state and any department thereof. There are various exceptions to the immunity, including proceedings relating to commercial contracts and proceedings relating to personal injury or damage to property or an interest therein. The Act does not apply to criminal proceedings (s 16 (4)).<sup>6</sup>

State immunity was traditionally regarded as ‘absolute’, in that it immunized the foreign state from scrutiny in respect of any kind of misconduct, criminal or otherwise (see *Jurisdictional Immunities of the State, Germany v Italy* 2012: 142, 144). Even so, international law theorists suggested as early as 1841 that state immunity could not provide a defence to crimes against the rules of war.<sup>7</sup> In the 1990s, the absolute nature of the immunity was challenged when litigation concerning the extradition of Senator Augusto Pinochet, the former head of state of Chile, wound its way through the English courts. Ultimately in 1999, the House of Lords was asked to consider the validity of warrants of extradition and arrest issued in the UK—where Senator Pinochet was visiting—at the behest of Spain in respect of alleged crimes of torture and hostage-taking committed between 1973 and 1990 in Chile and elsewhere. Senator Pinochet asserted state immunity and was successful in arguing that under the State Immunity Act 1978, read together with the Diplomatic Privileges Act 1964, he was entitled as a (former) head of state to immunity from the criminal jurisdiction of the UK for acts done in his official capacity up to 8 December 1988.

By that date, however, the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 had been ratified by virtually all nations, including Chile, Spain and the UK. The Convention defined ‘torture’ to mean the infliction of acts of torture ‘by or at the instigation of or with the consent or acquiescence of a public official or other person *acting in an official capacity*’ (emphasis added). In accordance with its access obligations under the Convention, the UK had also enacted s 134 of the Criminal Justice Act in 1988, effectively criminalizing acts of torture committed in the UK or elsewhere. Given

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<sup>6</sup> In Canada, see the State Immunity Act, RSC 1985, c S-18.

<sup>7</sup> See generally Wright (1947: 71) and Glueck (1946: 421-30), both cited by Lord Millett in *R v Bow Street Metropolitan Stipendiary Magistrates ex p Pinochet Ugarte* (2000: 270-71).

these developments, a majority of the House of Lords rejected the contention that it could be an official function to do something that was now outlawed by international convention when committed by a ‘public official or other person acting in an official capacity’. State immunity was therefore found not to be available to Senator Pinochet in respect of acts of torture alleged to have occurred after 8 December 1988. As Lord Browne-Wilkinson noted, this was the first instance in which a ‘local domestic court [had] refused to afford immunity to a head of state or former head of state on the grounds that there can be no immunity against prosecution for certain international crimes’ (*R v Bow Street Metropolitan Stipendiary Magistrates ex p Pinochet Ugarte (No 3) (Pinochet (No 3))* 2000: 201).

## [B] DEFINITIONS: ACTS OF STATE AND ACT OF STATE

Act of state will be properly pleaded whenever the legality, validity or efficacy of *an* ‘act of state’ is put in issue. Traditionally, an act of state was defined as a prerogative act of policy in the field of international affairs performed by the Crown (or a foreign government) in the course of its relationship with another state or its subjects. Such acts included the making of treaties, declarations of war, the annexation of foreign territory and the seizure of land or goods in right of conquest (*Halsbury’s Laws of England* 2014, vol 20: para 173). In recent decades, however, an act of state has come to refer to any exercise of the powers of a state, including executive or legislative acts, authorized or ratified by the state and (usually) taking place in its territory. In *Nissan v Attorney General* (1970), Lord Pearson said that such acts must be ‘something exceptional’. Since a state can act only through persons or other agencies, executive or legislative acts carried out by such persons in the execution of their duties or in an official or ‘sovereign’ capacity are acts of state. This ‘characterization’ is a key element of the doctrine, just as it was key to the issue of state immunity in *Pinochet (No 3)*.

If nothing else, this paper will show that the definition of the doctrine (if such it be) of act of state is problematic. The classic statement may be found in Dicey et al (15th edn 2012, but dating back to the 4th edition), whose rule 3 states: ‘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*’ (emphasis added).

One of the best-known definitions is that formulated by the US Supreme Court in *Underhill v Hernandez* (1897) and later adopted by the English Court of Appeal in *Luther v Sagor*. ‘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 within its own territory.’ (1921: 548)

*Halsbury’s* states the principle, or ‘rule’, in more absolute terms:

An act of state is essentially an exercise of sovereign power and hence cannot be challenged, controlled or interfered with by municipal courts. Its sanction is not that of law, but that of sovereign power, and the municipal courts cannot question it: it is a catastrophic change, constituting a new departure, and the municipal law has nothing to do with the act of change by which the new departure comes about. Hence the courts have *no jurisdiction to question the validity of an act of state*, and an individual cannot rely upon an act of state in order to found a cause of action (2014, vol 20: para 174; emphasis added).<sup>8</sup>

A more nuanced summary of act of state was provided by Lord Millett in *Pinochet (No 3)*:

*Immunity ratione materiae* ... is a subject-matter immunity. It operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another; and only incidentally confers immunity on the individual .... It is an immunity from the civil and criminal jurisdiction of foreign national courts but only in respect of governmental or official acts .... The immunity finds its rationale in the equality of states and the doctrine of non-interference in the internal affairs of other states .... [The cases] hold that the courts of one state cannot sit in judgment on the sovereign acts of another.

His Lordship described the doctrine as a rule of domestic law that holds the domestic court ‘*incompetent to adjudicate* upon the lawfulness of the sovereign acts of a foreign state’, contrasting it with state immunity, a ‘creature of international law’ that operates as a plea in bar to the jurisdiction of a domestic court (269; emphasis added).

## Private International Law

Historically, discussions of act of state by domestic courts were often obviated, or at least obscured, by specific rules of private international law, which of course focuses on comity and territorial sovereignty. One of the most important contexts in which English courts effectively declined

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<sup>8</sup> The phrase ‘catastrophic change’ comes from the dissenting judgment of Fletcher Moulton LJ in *Salaman v Secretary of State in Council for India* (1906: 640).

to ‘adjudicate upon’ the effect of foreign laws was where a foreign state had confiscated property in its own territory. Under private international law, domestic courts presumed that foreign laws were constitutionally and formally valid and applied the *lex situs* to issues of title and compensation. The courts therefore routinely dismissed claims of trespass brought in England and declined to entertain claims in respect of the seizure of foreign property as lying outside their jurisdiction (see the seminal *Companhia de Mocambique v British South Africa Co* 1892).<sup>9</sup> Act of state, not always by that name, was sometimes relied upon in reaching the same result, but the longstanding *lex situs* rule usually made extended analysis of act of state unnecessary.<sup>10</sup> As noted in *Dicey*:

This principle is sometimes used as an alternative ground for a result which can also be reached by the application of the ordinary rules of the conflict of laws. 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 and thus afforded a defence under the second rule in *Phillips v Eyre* (1870) L.R. 6 Q.B. 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* (Dicey et al 2012: s 5–047).

The same was true of torts committed abroad: they too were governed by the *lex situs* (subject to the double actionability rule in *Phillips v Eyre*) and were generally disposed of on that basis.

Act of state as a principle distinct from the choice of law rules of private international law therefore languished in obscurity for much of the 19th and early 20th centuries. Indeed, one writer notes that for many years act of state was ‘little more than an extrapolation from a small number of disparate and unusual cases, some of them barely reasoned and most of which belong to a very different constitutional era’ (Scott 2015: 367). Writing in 1986, F A Mann stated in *Foreign Affairs in English Courts* that, with only one exception, there had not been a decision in English law that had produced a noteworthy evolution in the law of act of state since the 1920s (1986: 168).

Mann’s statement was perhaps somewhat exaggerated. The ground under state immunity and the inviolability of foreign legislation began to shift after 1945, when the four states that constituted the Nuremberg

<sup>9</sup> This rule against recovery has now been reversed in part by s 30(1) of the Civil Jurisdiction and Judgments Act 1982.

<sup>10</sup> See especially *Luther v Sagor* (1921: 558-59) and *Princess Paley Olga v Weisz* (1929).

Tribunal accepted that the perpetrators of war crimes should not be accorded the protection of state immunity and related doctrines. The fact that the tribunal operated at Nuremberg meant, as Lord Millett noted in *Pinochet (No 3)*, that most of the war criminals were tried in the territories in which their crimes had been committed. But, he continued:

As in the case of the major war criminals tried at Nuremberg, they were generally (though not always) tried by national courts or by courts established by the occupying powers. The jurisdiction of these courts has never been questioned and could be said to be territorial. *But everywhere the plea of state immunity was rejected in respect of atrocities committed in the furtherance of state policy in the course of the Second World War*, and nowhere was this justified on the narrow (though available) ground that there is no immunity in respect of crimes committed in the territory of the forum state. (272; emphasis added)

Lord Millett also quoted extracts from the Nuremberg Tribunal's judgment to the effect that the protection of international law cannot be applied to the acts of representatives of a state that are 'condemned as criminal by international law'.

Other changes took place after the Second World War when certain foreign legislation was found to be 'repugnant' to English public policy. As noted by Martin Buhler, English and Canadian courts refused in some instances to give effect to foreign laws or ruled them 'ineffective', even where property rights were at issue (2001: 346-50). Buhler cites cases dealing with the nationalization of the shipping assets of Estonia after the USSR invaded that country and admitted it into the Soviet Union.<sup>11</sup> In the well-known taxation case of *Oppenheimer v Cattermole* (1976), a majority of the House of Lords indicated in *obiter* that, had it been necessary for the determination of the case, they would have declined to recognize or give effect to a (formally valid) law enacted by Germany in 1941 that had stripped non-resident Jews of their German nationality.<sup>12</sup> I note parenthetically that US courts declined to make a similar exception in *Banco National de Cuba v Sabbatino* (1964). This led Congress to pass the so-called Second Hickenlooper Treaty Amendment, which purported to reverse the Supreme Court's position insofar as the taking of property contrary to international law was concerned.

The exceptions made in the UK to the usual rule, however, could still be explained on the basis of private international law, which recognizes

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<sup>11</sup> See *A/S Tallina Laevaibus v Tallina Shipping Co* (1947) and, in Canada, *Laane and Baltser v Estonian State Cargo and Passenger Steamship Line* (1949). Note that the assets were, however, outside Estonia at the time of seizure.

<sup>12</sup> The law had by 1976 been declared invalid by the German Federal Republic.

an exception where the foreign law is ‘repugnant’ to public policy (Dicey et al 2012: rule 2). Running parallel to these cases was a series of decisions that did not involve foreign legislation *per se* but concerned other matters of international relations such as the territorial boundaries of states and issues arising out of treaties (see Alderton 2011: 12). In these cases, English courts declined to adjudicate regarding ‘transactions of independent states between each other [that] are governed by other laws than those which municipal courts administer’ (*Cook v Sprigg* 1899: 578). Such issues were said to be ‘non-justiciable’, but that term was also used in other cases involving different types of act of state.

As Alderton notes, although these decisions were all founded upon similar principles—comity and the separation of powers—they lacked a ‘clear unifying doctrine’. F A Mann in *Foreign Affairs* observed in 1986 that no English court had considered the rational foundations of the doctrine of act of state. He famously expressed the hope that if and when English courts were presented with a clear case, they would be ‘guided by legal reasoning rather than misconceived maxims of policy’ (1986: 181). Various lower court judges also expressed the view that the terms ‘act of state’ and ‘non-justiciability’ were confusing and required clarification.

## [C] THE KEY CASES

It was not until late in the 20th century that a series of cases—*Buttes Gas and Oil Co v Hammer (No 3)* (1982); *Pinochet (No 3)* (1999); *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* (2002); *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* (2007); *Yukos Capital SARL v OJSC Rosneft Oil Co (No 2)* (2014); and *Belhaj*—led appellate judges to consider whether a unifying doctrine existed apart from and beyond the choice of law rules of private international law. An additional case, *Shergil v Khaira* (2015), provided guidance on the meaning of non-justiciability, albeit in a purely domestic law context.

### *Buttes Gas* (1982)

*Buttes Gas* did not directly involve states or acts of a sovereign state, but arose out of a defamation action between two California corporations in the context of a dispute over gas rights granted to them respectively by different rulers in the Persian Gulf. The plaintiffs sued in London for slander uttered in the UK on the part of the defendant and its chairman concerning the disputed area. The defendants counterclaimed for conspiracy between the plaintiffs and one of the rulers. In order to determine whether the impugned statement had been false, the court

would be required to decide matters (including the validity of the decrees granting the concessions) in dispute between four sovereign states and to pronounce certain transactions unlawful under international law, putting the validity of some official decrees in question. The matter came to court on a preliminary application by the plaintiffs for an order that the court should decline to exercise jurisdiction in respect of certain aspects of the counterclaims, which they characterized as acts of state. It appears that counsel were content to have the court assume that the allegations in the pleadings were true for purposes of the application.

The House of Lords affirmed the stay orders granted by the lower court. In the course of his reasons for the Appellate Division, Lord Wilberforce observed that much of the difficulty of the case arose from the indiscriminate use of ‘act of state’ to cover situations that are ‘quite distinct, and different in law’. One category consisted of actions taken by an officer of the Crown outside the UK against foreigners ‘otherwise than under colour of legal right’. That category (Crown act of state) did not arise in *Buttes Gas*. A second category consisted of cases concerning the applicability of foreign domestic (or ‘municipal’) legislation within a state’s own territory and the ‘examinability’ of such legislation. Lord Wilberforce seems to have agreed with the suggestion that these cases were within the area of conflict of laws, ‘concerned essentially with the choice of the proper law to be applied’ (*Buttes Gas* 1982: 931). Since counsel’s arguments regarding this category did not resolve the issues before the court, his Lordship turned to consider whether:

*apart from such particular rules as I have discussed, viz., those established by (a) the Mocambique ... and by (b) [Luther v Sagor], 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. The respondents’ argument was that although there may have been traces of such a general principle, it has now been crystallised into particular rules (such as those I have mentioned) within one of which the appellant must bring the case – or fail. The Nile, once separated into a multi-channel delta, cannot be reconstituted.*

*In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalized 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 (Buttes Gas and Oil Co v Hammer 1982: 931-32; emphasis added).*

This general principle, Lord Wilberforce said, had first been clearly recognized in the seminal case of *Duke of Brunswick v King of Hanover* (1844), where the court had clearly stated that ‘the courts in England will not adjudicate upon acts done abroad by virtue of sovereign authority’—despite an allegation that the acts in question were illegal by the law of both foreign states. Lord Wilberforce then turned to various American cases on the topic—particularly *Underhill* (in which he said the *Duke of Brunswick* case had been followed) and *Banco Nacional de Cuba v Sabbatino* (1964). In the latter case, the US Supreme Court had given full recognition to laws passed by the revolutionary government seizing certain land in Cuba. His Lordship said the case exemplified the *conflict of laws rule* normally applicable to the expropriation of land—i.e., the doctrine of ‘act of state’ in its ‘normal meaning’ (*Buttes Gas* 1982: 934). As well, the US Fifth District Court of Appeals had declined to adjudicate a dispute resembling that at issue in *Buttes Gas*, recognizing that ‘the political sensitivity of territorial issues, [and] the need for unquestionable US neutrality and the harm to our foreign relations which might otherwise ensue’ were ‘compelling grounds for judicial abstention’.<sup>13</sup>

In *Buttes Gas*, Lord Wilberforce gave a different rationale for judicial abstention: leaving aside any question of embarrassment to the UK that could result from the court’s entertaining the action, there were simply no ‘judicial or manageable standards’ by which a court could decide the issues. The court would be in a ‘judicial no-man’s land’: it 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 (938). Lord Wilberforce did not return to the ‘general principle’ he had mentioned earlier; nor did he explain the connection between that principle and the ‘judicial no-man’s land’ rationale, and the ‘political embarrassment’ cases such as *Sabbatino*. Arguably, this lack of elaboration perpetuated the confusion concerning the scope of non-justiciability and its relationship to act of state which his Lordship had hoped to dispel.

### *Pinochet (No 3) (1999)*

This decision of the House of Lords has already been referred to in connection with state immunity, but act of state was also advanced as a defence by Senator Pinochet. Their Lordships dealt with this argument to varying degrees in their diverse reasons and clearly differed on the

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<sup>13</sup> His Lordship’s reliance on US authorities has been the subject of criticism, see, e.g., Sim (2010).

‘characterization’ issue—whether the acts of torture alleged could constitute a ‘state function’ for purposes of the definition of ‘torture’ in the Convention but not for purposes of act of state. Without trying to summarize the views of each of their Lordships, I note that Lord Millett was of the view that the definition of ‘torture’ in the Convention was ‘entirely inconsistent with the existence of a plea of immunity *ratione materiae*’. In his analysis, the Convention had by implication removed the immunity that would normally attach to an act of official or governmental character. Thus ‘international law [could not] be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose’ (*Pinochet (No 3)* 1999: 273). Lord Saville took a similar view, as did Lord Browne-Wilkinson (205). Lord Hope concluded that immunity *ratione materiae* had been lost from the date on which Chile ratified the Torture Convention. In his words:

Nor would I accept that it was an implied term of the Torture Convention that former heads of state were to be deprived of their immunity *ratione materiae* with respect to all acts of official torture as defined in article 1. *It is just that the obligations which were recognized by customary international law in the case of such serious international crimes by the date when Chile ratified the convention are so strong as to override any objection by it on the ground of immunity ratione materiae to the exercise of the jurisdiction over crimes committed after that date which the United Kingdom had made available* (248; emphasis added).

Lord Hutton considered that Senator Pinochet was not entitled to immunity because:

the commission of acts of torture is not a function of a head of state, and therefore in this case the immunity to which Sen. Pinochet is entitled as a former head of state does not arise in relation to, and does not attach to, acts of torture (263).

Lord Goff dissented, finding no intention on the part of the framers of the Convention to exclude or remove immunity (221). *Buttes Gas* was not discussed.

### *Kuwait Airways Corp v Iraqi Airways Co (2002)*

This case arose from the seizure by Iraq of 10 aircraft owned by Kuwait during the invasion of that country by Iraq in 1990. Through a state-owned corporation (IAC), Iraq proceeded to use the aircraft as part of its own fleet and refused to comply with resolutions passed by the UN Security Council requiring it to withdraw from Kuwait. In the resulting military action against Iraq, four of the Kuwaiti aircraft were destroyed by

bombing. Six were taken to Iran, where they were impounded until the plaintiff paid Iran US\$20 million for their return in 1992. Kuwait sued IAC in the UK (where IAC had offices) for the tort of conversion, claiming delivery of the aircraft and consequential damages for Iraq's unlawful interference with them, or damages equal to the value of the aircraft in accordance with the common law and the Torts (Interference with Goods) Act 1977. In 1995, the House of Lords ruled that, although Iraq enjoyed state immunity for its taking of the aircraft and their removal from Kuwait, its retention and use of the aircraft *from the date on which the UN resolution came into force* were not acts done in the exercise of sovereign authority. These acts were therefore not protected by state immunity from that date. (See *Kuwait Airways Corp v Iraqi Airways Co* 1995.) The action was remitted to the Commercial Court, where issues arose concerning the application of the 'but for' test of causation, double actionability, remoteness and quantification of damages.

The case ultimately reached the House of Lords again in 2002 and reasoned decisions were given by all five members of the Appellate Committee. I will deal with the reasons of only two of their Lordships relating to the recognition of Iraqi law and the public policy exception to the usual rule. Lord Nicholls rejected the defendant's argument that the breach of international law by Iraq was not a ground for refusing to recognize the foreign decree (which of course was a law expropriating property). Counsel asserted the 'rule' that 'the courts will not adjudicate upon the transactions of foreign sovereign states', but Lord Nicholls said this contention took 'the non-justiciability principle too far' (*Kuwait Airways Corp v Iraqi Airways Co* 2002: 1080). He continued:

this is not to say that an English court is disabled from ever taking cognisance of international law or from ever considering whether a violation of international law has occurred. In appropriate circumstances *it is legitimate for an English court to have regard to the content of international law in deciding whether to recognize a foreign law. Lord Wilberforce himself accepted this in the Buttes case at page 931D. Nor does the 'non-justiciable' principle mean that the judiciary must shut their eyes to a breach of an established principle of international law committed by one state against another when the breach is plain* and, indeed, acknowledged. In such a case the adjudication problems confronting the English court in the *Buttes* litigation do not arise. The standard being applied by the court is clear and manageable, and the outcome is not in doubt. That is the present case (1081; emphasis added).

Lord Hope warned that 'very narrow limits must be placed on any exception to the act of state rule'. The rule, he said, applies to the 'legislative or other governmental acts of a recognized foreign state or

government within the limits of its own territory. The English courts will not adjudicate upon, or call into question, any such acts ... [which may be] pleaded and relied upon by way of defence ... without being subjected to that kind of judicial scrutiny' (para 135). On the other hand, the public policy exception to the usual rule was not confined to cases in which there was a 'grave infringement of human rights' (citing *Oppenheimer*). In his analysis:

As I see it, the essence of the public-policy exception is that it is not so constrained. The golden rule is that care must be taken not to expand its application beyond the true limits of the principle. These limits demand that, where there is any room for doubt, judicial restraint must be exercised. *But restraint is what is needed, not abstention. And there is no need for restraint on grounds of public policy where it is plain beyond dispute that a clearly established norm of international law has been violated* (para 140).<sup>14</sup>

In the result, their Lordships concluded (with Lord Scott dissenting on the issue of double actionability), that act of state should not be applied so as to recognize and validate the Iraqi law expropriating the aircraft. Fox and Webb in *The Law of State Immunity* write that respect for the state and its laws over property within its territory as reflected by the *lex situs* rule was:

displaced [in *Kuwait Airways*] by enquiry as to whether the laws were contrary to established rules of international laws of 'fundamental importance', a 'flagrant international wrong', a breach ... of principles of the UN Charter prohibiting the use of force as having the character of jus cogens supported by the universal consensus on the illegality of Iraq's aggression (2015: 65).

### *Jones v Ministry of Interior of Saudi Arabia (2007)*

In this case, the relationship between *state immunity* and the Torture Convention arose in a *civil* context. Three individual plaintiffs sought to base a civil action for damages based on the Convention, alleging they had been tortured while imprisoned in Saudi Arabia. The proceedings were brought against that state and certain officials of the prison in which they had been held. At a preliminary hearing, a master dismissed the claim against the kingdom on the basis of the State Immunity Act 1978 and refused permission to serve the individual defendants outside the jurisdiction, on the grounds that they were state officials. The Court of Appeal upheld the kingdom's claim to immunity but allowed claims against the personal defendants on two bases—that a blanket immunity would be contrary to the plaintiffs' rights under the European Convention

<sup>14</sup> See also Lord Steyn (*Kuwait Airways Corp v Iraqi Airways Co* 2002: paras 114-18).

on Human Rights, and that torture could not be treated as an official act of state so as to attract immunity either in criminal or civil law—essentially an extension of *Pinochet (No 3)* to civil proceedings.

The House of Lords allowed the appeal of the individual defendants. Lord Bingham wrote that, although he would not question the correctness of *Pinochet (No 3)* (1999), it was ‘categorically different’ from *Jones*. *Pinochet* had involved criminal proceedings ‘falling squarely within the universal criminal jurisdiction mandated by the Torture Convention and did not fall within Part 1 of the [State Immunity Act 1978]’. In his analysis:

The essential ratio of the decision, as I understand it, was that *international law could not without absurdity require criminal jurisdiction to be assumed and exercised where the Torture Convention conditions were satisfied and, at the same time, require immunity to be granted to those properly charged*. The Torture Convention was the mainspring of the decision, and certain members of the House expressly accepted that the grant of immunity in civil proceedings was unaffected .... *It is, I think, difficult to accept that torture cannot be a governmental or official act, since under article 1 of the [Convention] torture must, to qualify as such, be inflicted by or with the connivance of a public official or other person acting in an official capacity*. The claimants’ argument encounters the difficulty that it is founded on the Torture Convention but to bring themselves within the Torture Convention they must show that the torture was (to paraphrase the definition) official; yet they argue that the conduct was not official in order to defeat the claim to immunity (*Jones v Ministry of Interior of Saudi Arabia* 2007: 286; emphasis added).

Assuming the pleadings to be true, Lord Bingham said it was clear the individual defendants had at all material times been acting, or purporting to act, as servants or agents of the Kingdom of Saudi Arabia; that no distinction was therefore to be made between the plaintiffs’ claims against the Kingdom and those against the personal defendants; and that none of the exceptions specified in the State Immunity Act 1978 was engaged (283) Normally, it would follow that *all* the defendants would be entitled to the protection of state immunity. As far as the Convention was concerned, there was nothing to indicate that UK domestic courts were required to provide *civil* remedies for breaches of the Convention taking place outside the UK. In fact, the authorities in international law were to the opposite effect. No consensus of judicial opinion existed to the effect that courts are obliged by international law to exercise jurisdiction over alleged breaches of peremptory norms (p 288). The usual rule of state immunity was not displaced.

Lord Hoffman (with whom Lord Bingham also expressed his agreement) also rejected the argument that ‘torture or some other contravention of a

*jus cogens* cannot attract immunity *ratione materiae* because it cannot be an official act'. (Note the apparent reference to act of state.) He explained Lord Millett's reasoning in *Pinochet (No 3)* as having been based on the conclusion that *by necessary implication*, international law had 'removed the immunity' *ratione materiae*. In his words:

It seems thus clear that a state will incur responsibility in international law if one of its officials, under colour of his authority, tortures a national of another state, even though the acts were unlawful and unauthorised. To hold that for purposes of state immunity he was not acting in an official capacity would produce an asymmetry between the rules of liability and immunity.

Furthermore, in the case of torture, there would be an even more striking asymmetry between the Torture Convention and the rules of immunity if it were to be held that that the same act was official for purposes of the definition of torture but not for purposes of immunity (*Jones v Ministry of Interior of Saudi Arabia* 2007: 302).

Lord Hoffman then carried out an examination of various commentaries critical of the notion that acts contrary to *jus cogens* could not be 'official' acts; an examination of the various judgments in *Pinochet (No 3)*; and a brief review of relevant US authorities. He disagreed with suggestions that in allowing service out of the jurisdiction, courts must be 'sensitive' to the position of foreign governments. On this point, he endorsed Lord Millett's statement in *Holland v Lampen-Wolfe* (2000) that state immunity is not a 'self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt' and which it can, as a 'matter of discretion, relax or abandon'. In Lord Hoffman's analysis, state immunity was imposed by international law:

without any discrimination between one state and another. It would be invidious in the extreme for the judicial branch of government to have the power to decide that it will allow the investigation of allegations of torture against the officials of one foreign state but not against those of another (306).

The other members of the division of the Court agreed with both Lord Bingham and Lord Hoffman. In the result, the Appellate Division upheld the assertions to state immunity of all the defendants. *Jones* was followed by the Supreme Court of Canada in *Kazemi Estate v Islamic Republic of Iran* (2014).

### *Yukos Capital SARL v Rosneft Oil Co* (2012)

This was a commercial dispute between private parties to a loan agreement. The plaintiff was a Luxembourg company; the defendant, a

Russian state-controlled company. Their dispute had been referred to arbitration under the rules of the International Commercial Court, which made awards in the plaintiff's favour. When enforcement proceedings were begun in the Netherlands, a Russian court set the awards aside—a ruling upheld on appeal in Russia. The plaintiff convinced the Dutch court that the Russian court had not been impartial and independent but had, in the words of the headnote, been 'guided by the interests of the Russian state' and that its decisions should not be recognized. The plaintiff also began proceedings in London to enforce the awards pursuant to the Arbitration Act 1996, or alternatively to recover the amount awarded as a debt owing.<sup>15</sup> At a trial of preliminary issues, the lower court ruled that the defendant was estopped by the ruling of the Dutch court from denying that the Russian court's decisions were the result of a 'partial and dependent judicial process'. Conversely, the plaintiff was not prohibited from asserting, nor was the court prohibited from adjudicating, any of the issues raised on the grounds of act of state, non-justiciability, or comity.

In the Court of Appeal, Rix LJ, speaking for the Court, described the case as raising the following 'complex and intriguing' issues:

what is the rationale of the act of state doctrine? Is it a narrow doctrine which requires the *validity* [original emphasis] (as distinct from the lawfulness, morality or motives) of the foreign sovereign's acts to be impugned, or else requires some positive remedy to be sought from the English court which is predicated on an attack on those sovereign acts? Or is it a broader doctrine which prevents the English court 'sitting in judgment' on those acts? Does the doctrine apply to judicial acts at all? How is it that the English court does appear regularly to consider the quality of justice in foreign states in cases concerned with the English long-arm statute and issues of *forum non conveniens*, or in cases concerned with extradition? How is it that the English court does regularly consider the persecutory acts of foreign sovereigns, both in the past and potentially in the future, in the context of cases concerned with claims to asylum? How do the act of state doctrines fit with the doctrine of estoppel, where there may be a conflict between rules of public policy? When, on a claim to enforce a foreign arbitration award, there is competing reliance on decisions of the state where the award was made and of another state where the award is taken for enforcement, and when issues of public policy may be said to be involved, should the English court be deciding any issue of public policy for itself, or should it be content to abide by the foreign courts' decision, and if so, which one? (*Yukos Capital SARL v Rosneft Oil Co* 2012: 469)

Not all these questions were answered.

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<sup>15</sup> Much of the award was then paid, but a significant amount of interest remained outstanding.

Beginning at para 40, Rix LJ reviewed the English law relating to act of state, including the cases discussed above and ending with *Lucasfilm Ltd v Ainsworth* (2012). There the Supreme Court had ruled that the grant of a national patent was not an exercise of sovereignty and that the doctrine of act of state ‘should not today be regarded as an impediment to an action for infringement of foreign intellectual property rights, even if [the] validity of a grant is in issue, simply because the action calls into question the decision of a foreign official’ (para 86).

Rix LJ then returned to *Buttes Gas*, suggesting that Lord Wilberforce’s principle of non-justiciability had ‘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’ (para 66). He observed:

The various formulations of the paradigm principle are apparently wide, and prevent adjudication on the validity, legality, lawfulness, acceptability or motives of state actors. It is a form of immunity *ratione materiae*, closely connected with analogous doctrines of sovereign immunity and, although a domestic doctrine of English (and American) law, is founded on analogous concepts of international law, both public and private, and of the comity of nations. It has been applied to a wide variety of situations, but often arises by way of defence or riposte: as where a dispossessed owner sues in respect of his property, the defendant relies on a foreign act of state as altering title to that property, and the claimant is prevented from calling into question the effectiveness of that act of state.

The Court then considered the limitations of the doctrine, which were said to be founded on the ‘very language of the doctrine and in its rationale’. The first was that in general, the impugned act of state must take place within the territory of the foreign state itself. Second, the doctrine ‘will not apply’ to foreign acts of state that are in violation of clearly established rules of international law, or English principles of public policy or in cases of ‘grave infringement’ of human rights. A third limitation on act of state had in the past been that caution must be taken in challenging *judicial* acts; ‘cogent evidence’ was required in such cases. Nevertheless, recent authorities had doubted the existence of any general principle that UK courts would never ‘pass judgment on the judiciary of a foreign country’ (citing *Chieny v Deripaska (No 2)* 2009 and *Berezovsky v Abramovich* (2010); see also *Altimo Holdings* 2011: paras 96-101). Classic definitions of act of state had referred only to legislative and executive acts (para 87). Ultimately, the Court endorsed the statement made in the court below to the effect that there was no rule against ‘passing judgment on the judiciary’ of a foreign country (para 91). This conclusion had obvious implications for the facts of *Yukos* itself.

Another limitation on, or exception to, the act of state doctrine pertained to commercial activities of the foreign state. As already mentioned, an exception of this kind was codified in the State Immunity Act 1978, and Rix LJ seemed to suggest the same reasoning would apply to act of state (paras 92-94). Another exception, this one from US law, was also endorsed—the ‘*Kirkpatrick*’ exception for cases in which the court does not ‘sit in judgment’ on the acts of the foreign state but acknowledges those acts ‘incidentally’—i.e., as acts that have occurred as part of the factual context of the case. This had been famously applied in the US in *Sharon v Times Inc* (1984) and of course in *Kirkpatrick & Co Inc v Environmental Tectonics Corp International* (1990). In the latter case, Scalia J for the Court had emphasized that act of state was not:

some vague doctrine of abstention but a ‘*principle of decision* binding on federal and state courts alike’... Act of state issues only arise where a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine (p 406; original emphasis).

Applying this reasoning in *Yukos*, the Court of Appeal rejected the notion that the plaintiff was not challenging the legality of any act of state of Russia. In fact, the plaintiff had pleaded that Russian law had been deliberately misapplied as a matter of state policy. On that ground, the English court *was* being asked to declare the Russian annulment decisions to be ineffective and invalid (see para 104).

This brought the *Yukos* Court to what it regarded as the most fundamental issue in the case—whether act of state applied only where an English court was asked to decide the *validity* of an act of a foreign sovereign, either by granting a declaration of invalidity or providing a civil remedy. The Court of Appeal disagreed with the lower court’s holding that the ‘pure’ act of state principle is so restricted. Rix LJ again referred to various US cases to illustrate that the *Kirkpatrick* line of cases was not concerned with distinctions between validity, legality, effectiveness, lawfulness, wrongfulness, etc.:

Validity (or invalidity) is just a useful label with which to refer to a congeries of legal concepts, which can be found spread around the cases. Similarly, the word ‘challenge’ is not sacrosanct: the cases refer to the prohibition on adjudication, sitting in judgement on, investigation, examination, and so on. What *Kirkpatrick* is ultimately about, however, is the 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 enquire into them for the purpose of adjudicating upon their legal effectiveness (para 110).

The Court referred to the judgments of the House of Lords in *Kuwait Airways*, noting a ‘possible tension’ between the speeches of Lord Nicholls and Lord Hope. Rix LJ sought to reconcile their approaches in the following terms:

We recognise these differences of emphasis. Lord Hope’s broad restatement as to the general effect of the act of state doctrine, in para. 135, is that ‘[I]t applies to the legislative or other governmental acts of a recognised foreign state or government within the limits of its own territory. The English court will not adjudicate upon, or call into question, any such acts’. *This is the clearest modern formulation of the doctrine at the highest level, but it perhaps needs to be understood as qualified by Lord Wilberforce’s two insights [in Buttes Gas] that his principle of non-justiciability can also extend beyond international boundaries, and that the principle is one of restraint rather than abstinence* (as Lord Hope himself commented). However, it is also proper to have regard to the various limitations on that broad doctrine, only one of which was an issue in that case. We think that on the whole we prefer to speak of ‘limitations’ rather than ‘exceptions’. 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*. That after all would explain why it has become wholly commonplace to adjudicate or call into question the acts of a foreign state in relation to matters of international convention, whether it is the persecution of applicant asylum refugees, or the application of the Rome Statute with regard to international criminal responsibility .... That is also perhaps an element in the naturalness with which our courts have been prepared, in the face of cogent evidence, to adjudicate upon allegations relating to the availability of substantive justice in foreign courts. It also has to be remembered that the doctrine was first developed in an era which predated the existence of modern international human rights law (para 115; emphasis added).

At the end of the day, the Court of Appeal ruled that the doctrine of act of state did not bar any part of the plaintiff’s claims. The essential issue was whether the Russian annulment decisions should be recognized—a ‘judicial question raised in respect of judicial acts’. In seeking to enforce the Dutch arbitration awards, the plaintiff ‘must be entitled to seek to show that such decisions are not worthy of recognition by the English court’. In the words of Rix LJ:

in a world which increasingly speaks about the rule of law, it should not in principle be open to another party to those decisions to claim an immunity from adjudication on the ground that an investigation into those allegations is protected by deference due to the legislative or executive acts of a foreign sovereign. ... We also bear in mind Lord Hope’s comments on the rule of law in [*Kuwait*] at [para] 145 (para 135).

It is now clear, if it was not before, that the judiciary cannot close their eyes to the need for a concerted, international response to these threats to the rule of law in a democratic society.

### *Shergil* (2015)

*Shergil* did not involve act of state. It was a religious dispute between rival factions of a Sikh community in central England as to the successor to the First Holy Saint under the terms of a charitable trust. In the course of its reasons, however, the Court dealt with the circumstances in which an English court will be unable to deal with a disputed issue on its merits. One example noted by Lord Neuberger for the Court was the act of state doctrine, which ‘confer[s] immunity from liability on certain persons for certain acts’. Another example was the common law rule against the enforcement of foreign penal, revenue or public laws (now limited by statute and by the Lugano Convention). However, he said, the term ‘non-justiciability’ refers to something different: ‘It refers to a case where an issue is said to be inherently unsuitable for judicial determination *by reason only of its subject-matter*’ (para 41; emphasis added). These cases, his Lordship said, generally fall into two categories. The first is where the issue in question lies beyond the constitutional competence of courts. These cases are rare and involve transactions of foreign states or proceedings in Parliament. *Buttes Gas* was said to fall into this grouping to the extent it was based on the separation of powers, although the boundaries of the term ‘transactions’ in this context were now less clear than they had been 40 years earlier.

The second group of non-justiciable cases was said to involve claims or defences not based on private law rights or obligations nor on reviewable matters of public law, such as domestic disputes and some issues of international law. A court will not enter upon the latter type of case, usually because no legal right of the citizen is engaged, whether in public or private law—no ‘domestic foothold’ exists (para 43). However, a court will adjudicate if a ‘justiciable legitimate expectation’ depends on it, a convention right depends on it, or a private law liability which depends on such a matter is asserted (citing *R (Gentle) v Prime Minister* 2008: para 8; and a Canadian case, *Bruker v Marcovitz* 2007, a religious dispute between divorcing spouses). This suggestion has received surprisingly little attention in academic commentaries or subsequent cases, but see Lord Dyson at the Court of Appeal stage in *Belhaj* (para 92) and *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* (2002).

## *Belhaj* (2017)

We come finally to *Belhaj*. As noted earlier, it was decided in tandem with *Rahmatullah (No 2) v Ministry of Defence* (2017), which dealt with Crown immunity. In *Belhaj*, the plaintiffs were Mr Belhaj, a Libyan national opposed to the Qaddafi regime, and his wife Ms Boudchar, a Moroccan national. They had been preparing to fly from Beijing to London in March 2004 when they were allegedly deported by Chinese authorities and forcibly taken, via Kuala Lumpur and Bangkok, to Libya. There, Ms Boudchar was detained until June 2004 and Mr Belhaj was detained (and allegedly tortured) until 2010. The plaintiffs pleaded that MI6 had participated by ‘common design’ in this series of events with Libyan and US authorities. They advanced claims in unlawful detention, assault, misfeasance in public office, negligence, cruel and inhuman treatment and torture. The defendants included the UK Foreign Secretary and the Ministry of Defence. None of the USA, Libya, Thailand or Malaysia was impleaded; state immunity was therefore not engaged in this case. The defendants Mr Straw and Sir Mark Allen, an official of MI6, stated through counsel that the Official Secrets Act 1911-1989 precluded them from pleading in their defence. The remaining defendants argued that it would be damaging to the public interest for them to plead to the allegations. In their submission, the ‘prime actors’ in the case were foreign states, and although those states were not impleaded, it would be necessary for the Court to adjudicate upon their conduct (para 4). The defendants thus raised preliminary objections that the issues before the court were ‘inadmissible or non-justiciable on their merits’ by virtue of act of state or state immunity and sought to have the claims dismissed (paras 2 and 7). At this stage, only the plaintiffs’ pleadings were before the Court.

As mentioned earlier, while five members of the Supreme Court were in agreement that the public policy exception to act of state applied (or would have applied if act of state had applied), the judges split three ways in their analysis of act of state itself. It is therefore necessary to summarize the most salient points of each of the considered judgments, which were delivered by Lords Mance, Neuberger (which was technically the majority judgment on act of state *per se*) and Sumption respectively. In hopes of providing practical assistance to trial judges and masters, I will do so in summary or point form only, attempting to avoid the reproduction of lengthy passages from the reasons.<sup>16</sup>

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<sup>16</sup> A summary in table form may be found in the *UK Supreme Court Yearbook* for 2017 in an article by Malek and Miles (2018: 457).

Lords Mance and Neuberger were in agreement that the term ‘act of state’ needed to be ‘disaggregated’ in light of the different ways in which it had been used by courts in the past. Both of their Lordships carried out the ‘disaggregation’ basically along the lines of the traditional categories that underlay the cases discussed above.

### **Lord Mance**

His Lordship identified three ‘types’ of act of state (and a fourth that he rejected outright) under current English law, namely:

- ◇ First, the *rule of private international law* that a foreign state’s legislation will normally be recognized and treated as valid ‘in so far as it affects property, whether movable or immovable’, within the foreign state’s jurisdiction (para 35, citing *Princess Paley* and Dicey et al 2012: rule 137). This rule and the second rule should not be extended to acts of a foreign state taking place anywhere outside the domestic court’s territory. (At para 11(iv).) The first rule is subject to exception where the recognition of the foreign legislation would conflict with a fundamental principle of domestic public policy (citing *Oppenheimer and Kuwait Airways*).
- ◇ Second, the rule, ‘which may be regarded as a rule of private international law’, that domestic courts will not question the validity of any foreign governmental act *in respect of property within the foreign state’s jurisdiction*, ‘at least in times of civil disorder’ (para 11(3)(b)). Lord Mance was prepared to accept the existence of this second category of act of state for purposes of the appeal, mainly because of ‘the need for security of title and of international trade’ (para 74), but emphasized (e.g., at para 65) that it might not exist at all. In any case, it should not extend to the victim of a personal *tort* who can found jurisdiction ‘against a relevant non-state actor outside the territory of any foreign state also implicated in the tortious acts’. The ‘special considerations’ applicable to property do not arise in respect of such personal injuries (para 74). *If* this type of act of state does not extend to such wrongs, the public policy limitation ‘could constitute a valid basis for refusal to recognise a foreign act of state of either the first or second type’ (at para 80).
- ◇ Third, is the principle that a domestic court will treat as non-justiciable, or abstain or refrain from adjudicating upon or questioning, certain categories of sovereign acts by a foreign state abroad, even those occurring outside the foreign state’s jurisdiction (paras 11 and 90). Although the court in *Yukos* had suggested this principle had subsumed the first and second types of act of state, Lord Mance disapproved this

‘blurring’ of the distinction between different types of act of state, which impeded the important task of identifying the ‘scope and characteristics of each type of foreign act of state’ (at para 40). He cited *Buttes Gas* as the leading authority on this category, which he described as fact- and issue-sensitive, and one that should not be restricted to situations analogous to those in *Buttes Gas*. The facts of *Belhaj* did not raise any issues of a sovereign, international or inter-state nature ‘upon which a domestic court cannot or should not appropriately adjudicate’ (para 101).

- ◇ A fourth possible rule—truly a ‘straw man’ in Lord Mance’s analysis—was that act of state should be applied when the court received a request for abstention from Her Majesty’s government in order to avoid embarrassment in the conduct of international affairs. His Lordship saw no basis for giving the government ‘so blanket a power over court proceedings’, although the consequences of a court ruling for foreign relations might well ‘feed in’ to the issue of justiciability (para 41).

Act of state, Lord Mance said, was and remains essentially a domestic law doctrine, and English law sets its limits. Torture has long been abhorrent to English law, and it was also appropriate to take into account fundamental rights, including those ‘more recently developed’ (para 98). Differing somewhat with Lord Sumption’s view of qualifications to act of state, Lord Mance preferred to base his analysis on individual rights rather than to the concept of *jus cogens* (para 107). He saw no reason why English law should refrain from scrutinizing the conduct of foreign states (themselves immune) in the course of deciding claims against ‘other parties involved who enjoy no such immunity [in the UK]’, where the alleged conduct involved ‘almost indefinite detention’, denial of access to justice and torture or persistent ill-treatment (para 99). Ultimately he preferred to take a case-by-case approach to the public policy exception and did not see how the fact that a violation of *jus cogens* was involved would be helpful when, in Lord Sumption’s analysis, not every such violation would justify the exception (subparas 107(iv) and (v)). Lord Mance added:

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 lie too closely to particular rules of international law, however, basic and binding at that level (para 107).

**Lord Neuberger**

Lord Neuberger agreed with his colleagues that state immunity could not assist the defendants; but found that foreign act of state raised ‘more troubling issues’. He defined the doctrine of act of state as follows:

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 century. Thus, while it is pragmatic and adaptable to changing norms ... *It is a principle whose precise scope is not always easy to identify* (para 118; emphasis added).

His Lordship suggested four ‘possible rules’ that have been treated as aspects of the doctrine of act of state:

- ◇ First, English courts will recognize 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. *Buttes Gas* was said to have been decided in accordance with this rule. Lord Neuberger had no doubt that the rule was good law, ‘at least in relation to property’ (at para 125) and saw strong reasons for its application to personal injuries as well, as had been discussed in *R (Khan) v Foreign Secretary* (2014). The rule was based on, or ‘close to’, the choice of law principle applied in private international law (paras 150, 159). At para 168, he concluded that the rule did not apply to this case for two reasons, one being that the wrongdoing involved harm to individuals rather than to property.
- ◇ Second, English courts will recognize and will not question, *the effect of an act of a foreign state executive* in relation to any acts which take place or take effect within the territory of that state. His Lordship described this rule as ‘close to’ a rule of private international law (para 150). The rule is supported by the authorities, again *in relation to property* (citing *Blad v Bamfield* 1674), the facts of which were described by Lord Sumption at para 202. The rule clearly applies to lawful executive acts, but his Lordship was not convinced it should apply to unlawful acts, and cases such as *Buck v Attorney General* (1965) seemed to suggest it did not (paras 137-40). On the other hand, there were good practical reasons for treating as effective executive acts that, even though unlawful, related to property and property rights (para 142). It was not necessary to decide this point.

- ◇ Third, a rule that applies where issues are raised that are inappropriate for English courts 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*’ (para 123; emphasis added). This rule has two components—that the court will not interpret or question dealings between sovereign states (such as making war and peace, making treaties, etc.); and that the court will not, *as a matter of judicial policy*, determine the legality of a foreign government’s acts in the conduct of foreign affairs (emphasis added). These matters, Lord Neuberger said, are ‘only really appropriate for diplomatic or similar channels’. International treaties and conventions cannot be the source of domestic rights or duties and will not be interpreted by domestic courts (para 123, citing *Shergil*). *Buttes Gas*, which he described as a boundary dispute, was said to be a prime example of this rule. There was no doubt about the existence of the third rule in relation to property and property rights, but since it serves to defeat what would otherwise be a valid claim under private law, judges should ‘not be enthusiastic’ in applying it (para 144). Contrary to the Court of Appeal’s suggestion in *Yukos*, if foreign act of state is regarded as including his Lordship’s first and second rules, the idea that non-justiciability had ‘subsumed’ the act of state doctrine was erroneous. In Lord Neuberger’s analysis:

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. (para 146; emphasis added).

At para 151, his Lordship again described his third rule as based on judicial self-restraint and common law, and therefore having no basis in international law, even though it might be influenced thereby. Cases falling into this category usually involve more than one foreign state.

- ◇ Fourth, a ‘possible rule’ that courts will not investigate acts of a foreign state where such investigation would embarrass the government of the UK. This situation would arise only as the result of a communication to the court from the Foreign Office (para 124). This idea was supported by US authority such as *Banco National de Cuba v Sabbatino* and *Kirkpatrick*, but found little support in English law beyond some comments of the Court of Appeal in *Kuwait Airways and R (Khan)*. If it existed (which his Lordship doubted), ‘exceptional’ circumstances would be required before it could be invoked (para 132). In his Lordship’s view, if a member of the executive was to inform a

court formally that the determination of an issue could embarrass the government's relations with another state, the court would *not* be bound to refuse to determine that issue. Such abstention would involve the executive dictating to the judiciary—which would be 'quite unacceptable at least in the absence of clear legislative sanction' (para 149). However, it was not necessary to decide this point.

The public policy exception likely applied to the first and second rules. The authorities were unclear as to the third and fourth rules, assuming the latter existed (para 157). Whether cases involving injury to the person constituted an exception to the doctrine of act of state was also unclear, but where executive acts resulted in such injuries and those acts were unauthorized or unlawful according to the law of the foreign state, Lord Neuberger was 'unconvinced' that the second rule should be available as a defence (para 162).

As for territoriality, the nature of sovereign power is that it is limited to territory over which the power exists; thus it was 'hard to see' how the first and second rules could apply to acts taking place outside the territory of the foreign state (para 161). The position was again less clear with regard to the third rule, but his Lordship agreed with the Court of Appeal 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' (para 165; emphasis added).

Applying the foregoing to the facts in *Belhaj*, Lord Neuberger noted there was no suggestion that the alleged detention, kidnapping and torture of the plaintiffs or their rendition to Libya had been lawful under Malay or Thai law; nor that the alleged rendition was lawful under US law; nor that the subsequent acts of detention and torture in Libya were lawful in that country. The first rule therefore did not apply. Nor, on the evidence available, was there any suggestion that the acts in question had been governed by some high-level treaty or agreement between any of the states involved. Indeed, 'it would be positively inimical to the rule of law if it were otherwise' (para 167). Thus, the third rule was not engaged. The second rule could not be invoked, he said, because the wrongdoing involved harm to individuals and not to property. If any of the rules applied, Lord Neuberger would have applied the public policy exception, essentially for the reasons given by Lord Sumption (see para 172).

### ***Lord Sumption***

Lord Sumption's approach to act of state was much less categorical than those of his colleagues. Indeed, he said:

It is always possible to break down the cases into different factual categories, and to 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. (para 227)

He viewed act of state (which he described at para 200 as ‘wholly the creation of the common law’) as encompassing two principles. The first is Crown act of state, which is concerned with acts done abroad in circumstances where a defence may be provided by the fact it was done with the approval of the Crown in the course of its relations with a foreign state (para 199). This principle has arisen most often in connection with legislative acts expropriating property but also extends to executive acts ‘with no legal basis at all’. It applied to the alleged acts of Malaysia, for example, in deporting the plaintiffs in *Belhaj*, and to the acts of Thailand in detaining and delivering them to the USA (para 233).

The second principle, which he preferred to call ‘international law act of state’, is very similar to the formulation given in *Buttes Gas*: domestic courts will not adjudicate ‘upon the lawfulness or validity of certain sovereign acts of foreign states’, or *jure imperii* (para 199). His Lordship continued:

*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 .... 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 .... 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* .... Once the acts alleged are such as to bring the issues into the ‘area of international dispute’ the act of state doctrine is engaged (para 234; emphasis added).*

His Lordship rejected the contention<sup>17</sup> that act of state does not apply where the relevant acts were done outside a sovereign state’s territory,

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<sup>17</sup> See Dicey et al (2012: s 5-149).

since international law does not generally recognize the right of a state to apply its domestic laws extraterritorially. In his view, this branch of the doctrine applies ‘*wherever the relevant act of the foreign state occurs*’ (emphasis added)—except, arguably, if it occurred in the UK. This was again inherent in the principle of act of state itself—it is not concerned with the lawfulness of the state’s acts under domestic systems of law but with acts whose lawfulness could be determined only by reference to international law, which has no territorial bounds (para 237). Thus in *Belhaj*, act of state applied to the alleged conduct of the US government, which took place outside its territory. In Lord Sumption’s analysis:

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* (para 238; emphasis added).

After tracing the development of act of state in English law at paras 202-08 and in US law at paras 209-12, and the ‘Russian Revolution cases’ at paras 213-15, Lord Sumption turned to Lord Wilberforce’s suggestion in *Buttes Gas* that a ‘more general principle’ exists in English law that the courts ‘will not adjudicate upon the transactions of foreign sovereign states’. In Lord Sumption’s analysis, the point Lord Wilberforce had been making was simply that this general principle was *something different* from the act of state doctrine (para 219). The application of the principle had ‘often been disputed but the principle itself has not’. His Lordship approved the Court of Appeal’s statement in *JH Rayner (Mincing Lane) Ltd v Dept of Trade and Industry* (1990) that courts are not competent to ‘adjudicate upon or to enforce the right arising out of transactions entered into by independent sovereign states between themselves on the plane of international law’, and found that it assisted in understanding what Lord Wilberforce had meant by the word ‘transactions’. As well, he noted *R (Khan)* (2014), where the Court of Appeal adopted the lower court’s statement (paras 14-15) that the rationale for this principle is:

founded upon 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 (para 25 of the Court of Appeal’s reasons; emphasis added).

Under the heading ‘The search for general principle’, Lord Sumption described foreign act of state as based on an ‘awareness that the courts of the United Kingdom are an organ of the United Kingdom’ (a principle he referred to as comity) *and* the constitutional separation of powers ‘which assigns the conduct of foreign affairs to the executive’ (para 225). Of course, many cases involving the acts of foreign states had failed:

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 (para 226).

In such instances, the court declines to treat the matter as governed by ordinary principles of English law *because of its subject matter*.

In *Belhaj* itself, Lord Sumption said, the claimants had a ‘domestic foothold’ in that they had pleaded ordinary torts under the laws of the states in which they had been committed. The question was whether they could do so consistently with the law relating to foreign act of state. At para 238, he answered this question in the negative. In particular, the actions alleged on the part of US officials had involved the application of force in the course of the American government’s campaign against international terrorism and in the conduct of US relations with Malaysia, Thailand and Libya. Whatever one might think of the lawfulness or morality of these acts, they were ‘acts of state performed outside the territorial jurisdiction of the United States, which could not be treated by an English court as mere private law torts, any more than drone strikes by US armed forces can’ (para 238). *Prima facie*, then, act of state applied to block the plaintiffs’ claims.

Lord Sumption found it ‘unhelpful’ to describe act of state as a principle of non-justiciability. That term applies to a number of different concepts that rest on different principles. In addition to cases where the issue is assigned to the executive or legislative branches, many cases of this kind involve issues that are simply not susceptible to the application of legal standards—as in *Buttes Gas*—or issues that *ought not* to be decided by a domestic court because they cannot properly be resolved by the domestic law of the state. As an example, an unlawful conspiracy involving foreign states would itself be justiciable in the sense that conspiracy is a recognized cause of action in English law. However, a domestic court ‘could not adjudicate upon it because it would be 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 is an application of the

principle of non-justiciability, which should not be confined to cases in which the absence of judicial or manageable standards precludes adjudication by a domestic court (para 239).

Lord Sumption went on to observe that act of state does not apply in either form simply by reason of the fact that the subject matter may ‘incidentally’ disclose that the foreign state has acted unlawfully. This is the *Kirkpatrick* exception in the US; in England, see *Buck v Attorney General* (1965). Thus, many circumstances could arise in which an English court might express critical views about the public institutions of another country without offending the act of state doctrine or any analogous rule of law. In any event, the law of act of state ‘has never been directed to the avoidance of embarrassment, either to foreign states or to the United Kingdom’ (para 241).<sup>18</sup>

On the facts of *Belhaj*, however, the illegality of acts alleged against the relevant foreign states was not incidental—it was:

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 (para 242).

His Lordship then turned to the public policy exception, and in this regard was speaking for the majority of the Court. Where violations of international law or fundamental human rights are concerned, he accepted that courts should ‘move with the times and that widely accepted treaties and statutes may point to the direction in which such conceptions, as applied by the courts, ought to move’ (para 250, citing *Blathwayt v Baron Cawley* 1976: 426). The standards applied by public policy in cases with an international dimension have changed considerably in recent decades and international law itself increasingly ‘places limits on the permissible content of municipal law and on the means available to states for achieving even their legitimate policy objectives’ (para 251). Customary international law had historically been seen as part of the common law, but is now seen only as one of the sources of the common law. Although in principle, judges applying the common law may not create, modify or abrogate domestic law rights or obligations in accordance with ‘unincorporated norms derived from

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<sup>18</sup> But compare para 225 in which his Lordship noted with apparent approval the Court’s treatment of a certificate from the Secretary of State as conclusive in *Government of the Republic of Spain v SS ‘Arantzazu Mendi’* (1939: 264).

international law, whether customary or treaty-based', such norms may nevertheless 'affect the interpretation of ambiguous statutory provisions, guide the exercise of judicial or executive discretions and influence the development of the common law' (para 252).

Where this happens and where public policies conflict, Lord Sumption suggested, there is a danger that 'retaining the doctrine [of foreign act of state] while recognizing exceptions, will result either in the exception consuming the rule or in the rule becoming incoherent'. Any exception must therefore be limited to violations of international law which could be distinguished on rational grounds from the rest. The House of Lords had grappled with this difficulty in both *Oppenheimer* and *Kuwait Airways*. After reviewing those cases as well as Jones and the Canadian case of *Kazemi Estate*, he emphasized the 'exceptional' nature of torture, which in the words of the Convention, cannot be justified by any 'threat of war, internal political instability or any other public emergency' (para 258). Jones had turned on an unquestionable international law obligation to recognize the 'forensic immunity' of states, which was codified by statute. In contrast, the doctrine of act of state did not reflect any obligation of states under international law. In Lord Sumption's words:

The act of state doctrine, by comparison, does not reflect any obligation of states and 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* (para 261; emphasis added).

He concluded that it would be 'contrary to the fundamental requirements of justice administered by an English court' to apply act of state to an allegation of civil liability for complicity in acts of torture by foreign states. As well, he emphasized that the defendants were not foreign states or agents thereof and that:

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 an 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* (para 262; emphasis added).

It was not the purpose of foreign act of state to protect English parties from liability for their role in the acts of foreign states. In *R (Khan)*, the Court of Appeal had held that UK officials could rely on act of state in

connection with allegations that they had assisted in military action overseas by a foreign sovereign. Lord Sumption viewed that decision as correct. However, he said:

*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 .... It is no answer ... 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 (para 266; emphasis added).*

It would not be consistent with English public policy to apply foreign act of state ‘so as to prevent the court from determining the allegations of torture or assisting or conniving in torture made against these defendants’ (para 268). Similar reasoning applied to the allegations of forced rendition.

Would the same result have been reached if the defendants had not been English subjects? In theory, the answer should be yes: as long as the English court has jurisdiction over the defendant, the exception should apply to any person who has colluded in acts of torture or violated other peremptory norms. However, the emphasis placed by Lord Sumption on this point and at this stage of his reasons may leave open an argument to the contrary.

## The Tally

In the result in *Belhaj*, Lord Wilson agreed with the reasons of Lord Neuberger. Lady Hale and Lord Clarke agreed with Lord Neuberger that act of state did not apply. They described Lord Mance’s reasons as ‘essentially the same’ as those of Lord Neuberger, and correctly so, although the latter expressed views on some issues on which Lord Mance did not. However, since Lady Hale and Lord Clarke did not expressly agree with both Lords Mance and Neuberger, the latter’s reasons are the majority judgment on act of state *per se*. Lord Sumption, with Lord Hughes concurring, would have held that act of state did apply, but for the public policy exception. Lady Hale and Lord Clarke declined to express a view on the exception. Thus, five of the seven judges were of the view that the public policy exception applied or would have applied if act of state had been engaged. Lord Neuberger (para 172) agreed generally with Lord Sumption’s view of the public policy exception, as did Lord Mance

at para 48; thus, Lord Sumption's analysis of the exception represents the opinion of a majority of the seven judges.

## [D] ANALYSIS

Obviously, a high degree of tentativeness characterized the reasons, especially those of Lord Mance (who doubted the existence of his second and fourth rules) and Lord Neuberger (who was uncertain as to whether his first two 'possible rules' were restricted to property, whether unlawful executive acts were caught by the second rule, and whether the fourth rule existed). This uncertainty is unfortunate, but, in fairness, it is usually prudent for a court to determine only the concrete issues requiring determination in the particular case and to leave other questions for another day—a principle academic commentators often forget.

Their Lordships' disaggregation of act of state does represent a concerted attempt to clarify the nature and scope of each aspect of the doctrine. Their analyses may reflect what the Court of Appeal described in *Yukos* as the tendency of modern courts to define act of state 'like a silhouette, by its limitations' rather than to approach it as 'occupying the whole ground save to the extent an exception can be imposed' (para 115). Their Lordships do seem to depart from the previous readiness of English courts to apply act of state as a broad and inflexible principle of *jurisdiction* (see Dicey et al 2012: rule 3; Halsbury 2014, vol 20: para 174, both quoted above) and from the tendency to accord deference to older US authorities that were informed by different statutory and constitutional circumstances.<sup>19</sup> On the point of jurisdiction, English courts now seem to accept that they exercise a discretion when they decide that an issue is not justiciable. As Lord Goff observed in *Re State of Norway's Application* (1990) concerning the rule of non-justiciability stated in the 1987 edition of Dicey et al (unchanged in the 15th edition):

At all events, the rule cannot, in my view, go to the jurisdiction of the English court. What the English court does is simply to decline in such cases to exercise its jurisdiction, and on that basis the relevant proceedings will be either struck out or dismissed (Dicey et al 2012: 808).

Having said this, it seems one must accept that the separation of act of state into the four 'rules' posited by Lords Mance and Neuberger, or something akin to those rules, will remain the organizing framework of the doctrine in the medium term. Given the precedential significance of

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<sup>19</sup> *Buttes Gas* is perhaps the prime example of this phenomenon; see now the warnings given by Lord Mance at para 57 and Lord Neuberger at para 134 against reliance upon American authorities in discussing act of state.

*Belhaj*, it does not seem possible now for a trial court to reorganize the doctrine into some other order altogether or even into one or two larger principles as Lord Sumption did. Indeed, his formulation of ‘international law act of state’ seems to describe only the principle of non-justiciability in the sense I have adopted. It fails to account for many of the instances in which act of state in its ‘normal meaning’ (to quote Lord Wilberforce) has been applied to facts that do not involve dealings or transactions between sovereign states on the ‘international plane’.

### Fourth Rule: Avoiding Embarrassment

What, then, can the master or trial judge at the preliminary or trial stage of litigation take from their Lordships’ unpacking of act of state? Approaching the rules posited by the majority (Lord Neuberger) in reverse order, it appears that the fourth possible rule—that an English court should comply with a request from the executive to abstain from adjudicating a matter in order to avoid embarrassment to the government in its foreign relations—has been all but laid to rest. As Lord Sumption observed at para 241, the act of state doctrine has ‘never been directed to the avoidance of embarrassment’. It would now take considerable courage on the part of an executive to challenge the court’s *obiter* on this point, which has support only in US law.<sup>20</sup>

The consequences of the falling away of the fourth rule in the UK have in any event been attenuated by the enactment of the Justice and Security Act 2013. It sets out a procedure whereby the government may seek to avoid the disclosure (to the public record and even to the non-governmental party in the litigation) of documents or material where such disclosure would damage the ‘interests of national security’. Once this procedure is invoked, the onus is on the Crown to persuade the court that the use of the ‘closed material procedure’ is in the interests of the ‘fair and effective administration of justice’ (see Akhtar 2016: 374-76).

### Third Rule: Non-justiciability

With respect to the third rule, Dickinson suggests (2018: 17) that all three judgments assumed the existence of a ‘broad principle’ of abstention with a constitutional basis. The Court did make it clear that non-justiciability is not limited to cases like *Buttes Gas* in which a court of law would be operating in a ‘judicial no-man’s land’—i.e., without ‘judicial or manageable standards’ by which to decide them. Certainly, this rubric would also include high-level dealings (‘transactions’) between states that

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<sup>20</sup> See the ‘Bernstein exception’ discussed by Alderton (2011: 5).

are, in Lord Neuberger's words, 'only really appropriate for diplomatic or similar channels' Whether described as beyond the competence of courts or as 'inappropriate' for courts to resolve, these matters are usually not difficult to identify.

It must in my view now be doubted, however, that non-justiciability—the existence of certain issues of law over which it is inappropriate or impossible for domestic courts to adjudicate—should continue to be regarded as *part of the law of act of state*. The fact that non-justiciability is engaged by reason of the subject-matter of the issue at stake does not make it part of the doctrine. Based on the constitutional role and competence of the judiciary, non-justiciability has a different theoretical underpinning than the other 'rules' identified in *Belhaj*; although it may have been obscured in previous centuries by the rules of private international law, it did not grow out of them; as *Shergill* illustrates, it is not confined to cases with an international aspect; and if Lord Sumption is correct, it is not constrained by territoriality but applies 'wherever the act of the foreign state occurs' (para 237, citing *Buttes Gas* and *R (Khan)*). Indeed, as the Court of Appeal suggested in *Belhaj*, to the extent that non-justiciability is concerned with the transactions of states on the international plane, 'territoriality will not always be material', nor easily determined (para 131).

As we have seen, Lord Wilberforce has been taken as suggesting in *Buttes Gas* that the 'more general and more fundamental principle' of non-justiciability unites or underlies the other rules of act of state. But in fact he suggested it should not be considered as a 'variety' of act of state but as a principle 'for judicial restraint or abstention' (931). As also seen above, the Court of Appeal in *Yukos* viewed Lord Wilberforce's larger principle of non-justiciability as not having 'come through' the intervening cases (*Pinochet (No 3)*, *Kuwait Airways* and *Altimo Holdings*) as a doctrine separate from act of state, but as having largely subsumed it 'as the paradigm restatement' of act of state (para 66). Again with respect, this seems doubtful at least in retrospect, given the independent existence of the more 'hard-edged' (and territorially limited) first and second rules of Lords Mance and Neuberger (see *Belhaj*: para 146). It is difficult to disagree with Lord Sumption's observation at para 219 that Lord Wilberforce's general principle is 'unquestionably different from the rule about the application to a sovereign act of the sovereign's municipal law'.

A decent argument could be made that the public policy exception should not apply to non-justiciability—i.e., that the judicial branch of government is either competent or appropriate to adjudicate the issue in

question, or it is not. But Lord Sumption (with whom Lords Mance (para 107) and Neuberger (para 168) generally concurred on this point) met this point directly. He emphasized that there are constitutional aspects to the exception as well as to the rule. Rules of judge-made law, he said, are rarely absolute (para 250); the relationship between international law and domestic law has changed as certain minimum standards for the contents of municipal law have been accepted; and domestic courts have become accustomed to considering, if not directly applying, international law norms in interpreting private law rights and obligations (para 252). As we have seen, he ultimately concluded (and on this point he carried the majority of the Court) that it would (now) be contrary to fundamental justice for an English court to apply act of state to an allegation of complicity in acts of torture by a foreign state (para 262). Non-justiciability does have this exception in common, then, with the first two rules.

## First Rule: Recognizing and Giving Effect to Foreign Legislation

This leaves the first two rules, which it may be useful to recap. According to Lord Neuberger's analysis, the first rule is either based on or is 'close to' the private international law concept of choice of law (para 159; cf. Lord Sumption's statement at para 200 that act of state is 'wholly the creation of the common law'). In Lord Neuberger's judgment, the rule has the following characteristics:

- ◇ It would appear to apply to all types of property, since at para 150, his Lordship quoted with apparent approval a statement from *Re Helbert Wagg & Co Ltd's Claim* (1956: 344-45) that 'in general every civilized state must be recognized as having power to legislate in respect of movables situate within that state',
- ◇ The rule 'only applies to acts which take effect within the territory of the state concerned' (para 135, citing *Peer International Corporation v Termidor Music Publishers Ltd* 2004) and it is 'hard to see' how it could apply to acts in a location outside the subject state (para 163).
- ◇ There is 'a very powerful argument' for the proposition that it applies equally to injuries to the person as to the taking of property; but with one exception, that has not been considered by English courts (para 159).

## Second Rule: Recognizing the Validity of Executive Acts by or on Behalf of Foreign States

The second rule may or may not exist, Lord Neuberger said. He assumed it did for purposes of the appeal. If it does exist, he said, it ‘may be close to being a general principle of private international law’ (para 150). It is ‘valid and well-established’ in respect of acts of state confiscating or transferring property or property rights within the territory of the foreign state where the act is lawful or at least not unlawful. The rule also has the following characteristics:

- ◇ Assuming it ‘can apply’ to property if the executive acts were unlawful, it *should not* apply to personal injuries caused to a plaintiff by an act that was unlawful under the laws of the foreign state (see paras 137-42, 160). At para 169, Lord Neuberger took a more definite view: he said the rule *did not* apply in *Belhaj* because the conduct complained of involved injury to persons rather than property.
- ◇ Again, it was ‘hard to see’ how the second rule could apply to acts taking place outside the territory of the foreign state. Older cases recognize that the rule is based on sovereign power and the nature of sovereign power ‘is that it is limited to territory over which the power exists’ (para 163).
- ◇ It was unnecessary to consider whether the second rule applies to *judicial* acts.<sup>21</sup> (However, I note that this issue was dealt with definitively by the Court of Appeal in *Yukos* and by the *Privy Council in AK Investment CJSC v Kyrgyz Mobil Tel Ltd* (2011) and *Altimo Holdings* 2011 paras 89-102), none of which judgments has been disapproved.)

Of course, the two, or even all three, rules may well overlap in any given factual situation. (*Buttes Gas*, for example, could have been decided under the first rule (as Lord Neuberger suggested it was) or the third.) It might not be possible, at least at the outset of the litigation, to determine whether the impugned act was lawful; both damage to property and personal injury may be featured; and both the efficacy of legislation and the legality of executive acts carried out under the legislation may be challenged. None of the authorities has grappled with overlapping situations of this kind. Where they arise, masters or trial judges would be well advised to raise the matter with defence counsel at an early stage to see if a commitment can be extracted as to which route(s) to act of state they intend to pursue.

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<sup>21</sup> However, I note that this issue was dealt with definitively by the Court of Appeal in *Yukos* and by the Privy Council in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* (2011) and *Altimo Holdings* (2011: paras 89-102), none of which judgments has been disapproved.

If at some future time, English courts decide that *both* the first and second rules either do or do not apply to acts resulting in personal injury, the two rules might well be merged into one—that domestic courts will recognize and give effect to legislative acts (i.e., acts done pursuant to legislation of the foreign state) and executive acts of a foreign state, occurring inside that state (or not) and resulting in the relevant type of damage—subject, of course, to the established exceptions to the doctrine. Such a rule would not be very different from the summary offered by Lord Neuberger at the outset of his reasons:

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 (para 118).

At present, however, this formulation does not reflect the nuanced issues that were left open for future determination.<sup>22</sup>

## [E] CONCLUSION

Their Lordships' reasons in *Belhaj* are learned, thorough and reflective of modern realities. They leave open the door to limitations on act of state that will accord with the greater role being played by international law in the decisions of domestic courts in which the interests or conduct of states are involved, and do so without disrespecting the constitutional limitations on the judiciary's role. In an era in which some states, or state actors, are resorting to extreme measures causing personal injury and even death to individuals, it is to be hoped that domestic courts will continue the trend towards civil, as well as criminal, accountability to the full extent permitted by international law. In the meantime, the first and second rules remain the touchstone for pleas of act of state, and the term 'non-justiciability' may continue to be used—or misused—with reference to 'true' acts of state.

The greater significance of *Belhaj* lies, in my view, in the Supreme Court's treatment of the public policy exception. Through Lord Sumption, five of the seven judges agreed that English courts should adapt to modern conditions in the form of rules of public policy that are 'sufficiently fundamental' to distinguish the conduct in question from other violations of international conventions. The abhorrence of torture represented such a fundamental value in English law, and one having a long history. As a common law principle, the exception will, one hopes, continue to

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<sup>22</sup> Nor, it should be noted, does it purport to include the principle of non-justiciability.

evolve to include the violation of other fundamental and internationally accepted norms.

At the same time, it must be remembered that *Belhaj* and most of the other cases discussed above were decided *at the pleadings stage*. It was not necessary for the Court to investigate or examine the lawfulness of the conduct alleged: the allegations pleaded were accepted as true, and in *Belhaj* there could be no doubt as to the unlawfulness of torture, whatever law was applied (see also *Minister of Justice v Khadr* 2008). The case may not always be so clear, however, and as Lord Dyson MR observed at the Court of Appeal level in *Belhaj*, ‘it is the adjudication, sitting in judgment, examination, challenge or investigation which is an essential element of the mischief’ (para 89). It is in these stages of the litigation that the greatest difficulties will arise in terms of the original objectives of act of state—comity and equality of states. These difficulties will require trial judges to give even fuller consideration to the problematic and changing interface between domestic and international law.

## References

- Akhtar, Zia (2016) ‘Act of State, State Immunity and Judicial Review in Public International Law’ 7(3) *Transnational Legal Theory* 354-82.
- Alderton, Matthew (2011) ‘The Act of State Doctrine: Questions of Validity and Abstention from Underhill to Habib’ 12 *Melbourne Journal of International Law* 1-26.
- Buhler, Martin (2001) ‘The Emperor Has No Clothes: Defabricating the Myth of “Act of State” in Anglo-Canadian Law’ in C Scott (ed) *Torture as Tort* Oxford: Hart Publishing.
- Dicey, A V, J H C Morris & Lawrence Collins (eds) (2012) *Dicey, Morris, and Collins on the Conflict of Laws* (15th edn) London: Sweet & Maxwell.
- Dickinson, Andrew (2018) ‘Acts of State and the Frontiers of International Law’ 14 *Journal of Private International Law* 1-37.
- Glueck, Sheldon (1946) ‘The Nuremberg Trial and Aggressive War’ 59 *Harvard Law Review* 396-456.
- Halsbury’s Laws of England* (2014) ‘Constitutional and Administrative Law’ vol 20 (5th edn) London: LexisNexis.
- Fox, Hazel & Philippa Webb (2015) *The Law of State Immunity* (3rd edn, 2013, as revised 2015) Oxford: Oxford University Press.
- Mann, F A (1986) *Foreign Affairs in English Courts* Oxford: Oxford University Press.

Malek, Ali, & Cameron Miles (2018) 'International Dimensions' in D Clarey (ed) *The UK Supreme Court Yearbook—Volume 8: 2016-2017 Legal Year* Cambridge: Appellate Press.

Sales, Philip (2006) 'Act of State and the Separation of Powers' 11 *Judicial Review* 94-97.

Scott, Paul (2015) 'The Vanishing Law of Crown Act of State' 66 *Northern Ireland Law Quarterly* 367-86.

Sim, Cameron (2010) 'Non-justiciability in Australian Private International Law: A Lack of Judicial Restraint?' 10(1) *Melbourne Journal of International Law* 102-39.

Thorroja, Helena (2006) 'Accountability for Crimes against International Law in Canada' in C Waters (ed) *British and Canadian Perspectives on International Law* Leiden: Martinus Nijhoff.

Wright, Quincy (1947) 'The Law of the Nuremberg Trial' 41 *American Journal of International Law* 38-72.

## Legislation Cited

Arbitration Act 1996

Civil Jurisdiction and Judgments Act 1982 (UK)

Criminal Justice Act 1988 (UK)

Diplomatic Privileges Act 1964 (UK)

Justice and Security Act 2013

Official Secrets Act 1911-1989

State Immunity Act 1978 (UK)

State Immunity Act, RSC 1985 (Canada)

Torts (Interference with Goods) Act 1977 (UK)

UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984

## Cases Cited

*AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7

*Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804

*A/S Tallina Laevaibus v Tallina Shipping Co* (1947) 80 LILR 99 (CA)

*Banco National de Cuba v Sabbatino* 376 US 398 (1964)

- Belhaj v Straw* [2014] EWCA 1394
- Belhaj v Straw* [2017] UKSC 3
- Berezovsky v Abramovich* [2010] EWHC 647
- Blad v Bamfield* (1674) 36 ER 992
- Blathwayt v Baron Cawley* [1976] 1 AC 397 (HL)
- Bruker v Marcovitz* [2007] 3 SCR 607
- Buck v Attorney General* [1965] 1 Ch 745
- Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888 (HL)
- Chieny v Deripaska (No 2)* [2009] 1 All ER 333
- Companhia de Mocambique v British South Africa Co* [1892] 2 QB 358 (CA)
- Cook v Sprigg* [1899] AC 572 (HL)
- Duke of Brunswick v King of Hanover* (1844) 6 Beav 1
- Government of the Republic of Spain v SS 'Arantzazu Mendi'* [1939] AC 256
- Holland v Lampen-Wolfe* [2000] 1 WLR 1573 (HL)
- JH Rayner (Mincing Lane) Ltd v Dept of Trade and Industry* [1990] 2 AC 418
- Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270
- Jurisdictional Immunities of the State, Germany v Italy* [2012] ICJ Rep 99
- Kazemi Estate v Islamic Republic of Iran* 2014 SCC 62
- Kirkpatrick & Co Inc v Environmental Tectonics Corp International* 493 US 400 (1990)
- Kuwait Airways Corp. v Iraqi Airways Co* [1995] 1 WLR 1147
- Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883 (CA)
- Laane and Baltser v Estonian State Cargo and Passenger Steamship Line* [1949] SCR 530; [1949] 2 DLR 641
- Lucasfilm Ltd v Ainsworth* [2012] 1 AC 208
- Luther v Sagor* [1921] 3 KB 532
- Minister of Justice v Khadr* 2008 SCC 28
- Nissan v Attorney General* [1970] AC 179 (HL)
- Oppenheimer v Cattermole* [1976] AC 249

- Peer International Corp v Termidor Music Publishers Ltd* [2004] Ch 212
- Phillips v Eyre* (1870) LR 6 QB 1
- Princess Paley Olga v Weisz* [1929] 1 KB 718
- R v Bow Street Metropolitan Stipendiary Magistrates ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147 (HL)
- R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598
- R (Gentle) v Prime Minister* [2008] 1 AC 1356
- R (Khan) v Foreign Secretary* [2012] EWHC 3728, [2014] 1 WLR 872 (CA)
- Rahmatullah (No 2) v Ministry of Defence* [2017] UKSC 1
- Re Helbert Wagg & Co Ltd's Claim* [1956] Ch 323
- Re State of Norway's Application* [1990] 1 AC 723 (HL)
- Salaman v Secretary of State in Council for India* [1906] 1 KB 613 (CA)
- Sharon v Times Inc* [1984] 599 F Supp 538 (SDNY, 1984)
- Shergil v Khaira* [2014] UKSC 33, [2015] AC 359
- Underhill v Hernandez*, 168 US 250 (1897)
- Yukos Capital SARL v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855, [2014] QB 458