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CHAPTER 40

CROWN AND FOREIGN ACTS OF STATE BEFORE BRITISH COURTS: *RAHMATULLAH*, *BELHAJ*, AND THE SEPARATION OF POWERS

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> [T]here exists a particular aspect of that wide topic which in this country, as opposed to the United States of America, has been somewhat neglected by those interested in first principles, viz. the relationship between the Law and the Executive in foreign affairs. In many respects that relationship has developed in a rather haphazard way, in a spirit of subconsciousness and inarticulateness.[1]

Thus wrote FA Mann in 1943, in one of his first writings on a topic related to international law. That piece, originating in a speech given to the Grotius Society and later published in its *Transactions*, formed the basis of Mann's lifelong interest in the related doctrines of Crown and foreign act of state. One wonders if he considered this interest particularly fruitful. Some five years before his death, he described the wider field of foreign affairs in English courts as displaying "much confusion of thought and lack of precision, about the reason for which one can only speculate."[2] With the benefit of a further quarter-century of jurisprudence and scholarly commentary, it is difficult today to detect more than marginal progress from this position.

In two significant judgments during its 2016–17 judicial year—*Rahmatullah v. Ministry of Defence*[3] and *Belhaj v. Straw*[4]—the Supreme Court of the United Kingdom undertook to demarcate better the relationship between the judiciary and the executive with respect to Crown and foreign act of state. This chapter aims to unpack *Rahmatullah* and *Belhaj* for the reader and further, in the limited space available, to use these decisions to enquire into the constitutional underpinnings of the British act of state doctrines—particularly as they pertain to the separation of powers.

I. *RAHMATULLAH* AND CROWN ACT OF STATE

Rahmatullah concerned actions brought by individuals who claimed to have been wrongfully detained or mistreated by British or American troops during the course of the conflicts in the early 2000s in Iraq and Afghanistan. Rahmatullah was a Pakistani national

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[1] F. A. Mann, *Judiciary and Executive in Foreign Affairs*, 29 GROT. SOC. TRANS. 143 (1943), *reprinted in* F. A. MANN, STUDIES IN INTERNATIONAL LAW ch. XI (1973).

[2] F. A. MANN, FOREIGN AFFAIRS IN ENGLISH COURTS vi (1986).

[3] Rahmatullah v. Ministry of Defence, [2017] 2 WLR 287..

[4] Belhaj v. Straw, [2017] 2 WLR 458.

who had been captured by British forces in Iraq in 2004 and then transported to a American detention facility on the same day and transferred to a further American facility in Afghanistan, where he was kept until his release in 2014. He had brought proceedings against the Ministry of Defence and the Foreign and Commonwealth Office in respect both of his treatment at the hands of UK officials and the UK's alleged complicity in his detention and mistreatment while in American custody. In relation to the second aspect of that claim, the UK government raised the defenses of state immunity and foreign act of state. The arguments relating to these defenses were dealt with in *Belhaj*.

The *Rahmatullah* case also concerned Mohammed, an Afghan national captured in an International Security Assistance Force operation targeting a senior Taliban commander on 7 April 2010 and detained by British troops until 25 July 2010, when he was transferred into Afghan custody. He, too, had claimed that his detention was unlawful under both Afghan law of tort and the Human Rights Act 1998 ("HRA 1998"). The UK Government argued that, in relation to the HRA 1998 claim, his detention was not in breach of Article 5 of the European Convention on Human Rights,[5] as Article 5 must be modified to take account of detention during armed conflict, which is permitted, either under resolutions of the UN Security Council or under international humanitarian law. The argument concerning Article 5 was heard together with a similar argument raised against the Ministry of Defence by Waheed, an Iraqi national detained in the course of the conflict in Iraq.[6] The claims of both Rahmatullah and Mohammed were accompanied by a third class of claims brought by certain Iraqi civilians who were detained in Iraq by British forces and, similar to Rahmattulah, were then transferred to US custody in purported violation of Iraqi tort law.

The questions pertaining to Crown act of state arose only in connection with the tort claims: the human rights claims arising in the proceedings were not subject to the doctrine and fell to be determined according to the HRA 1998.[7] The Supreme Court thus proceeded on the basis that Crown act of state does not run against human rights claims. This is no doubt because, as Lord Bingham held in *Gentle*, in relation to the deployment of troops in Iraq, "if the [claimants] have a legal right it is justiciable in the courts."[8]

The majority judgment of the Supreme Court in *Rahmatullah* was given by Lady Hale, with whom Lord Wilson and Lord Hughes expressly agreed.[9] Her Ladyship began her analysis by asking, "what is this doctrine of Crown act of state?"[10] She cited the definition given in 1934 by ECS Wade, according to which, "[a]ct of state means an act of the Executive as a matter of policy performed in the course of its relations with another state, including its relations with the subjects of that state, unless they are temporarily within the allegiance of the Crown,"[11] a definition that, she observed, had also been cited, albeit

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[5] 4 November 1950, 213 UNTS 222.

[6] Al-Waheed v. Ministry of Defence, [2017] 2 WLR 327.

[7] *Rahmatullah*, *supra* note 3, para. 17.

[8] R (Gentle) v. Prime Minister, [2008] 1 AC 1356, para. 8.

[9] Lord Neuberger gave a separate judgment that also agreed with Lady Hale's reasoning, giving her Ladyship a majority within the panel. *See Rahmatullah*, *supra* note 3, para. 106.

[10] *Id.*, para. 2.

[11] E. C. S. Wade, *Act of State in English Law: Its Relations with International Law*, 15 BRIT. Y.B. INT'L L. 98, 103 (1934).

not entirely approvingly, in the leading case of *Attorney-General v. Nissan*.[12] Lady Hale took from that decision the important point that, although it was a necessary component of the doctrine that the act at issue falls within some such definition, "that does not tell us what the doctrine is, or to what rule or rules of law it gives rise."[13]

Crown act of state is rarely pleaded, and authority for the doctrine is scant.[14] Lady Hale felt it necessary, therefore, to go back to the nineteenth century and beyond to set out the rationale of the doctrine.[15] In that regard, her Ladyship pointed to the fundamental rule of English law, dating to *Entick v. Carrington*,[16] that English law "does not recognize that there is an indefinite class of acts concerning matters of high policy or public security which may be left to the uncontrolled discretion of the Government and which are outside the jurisdiction of the courts."[17] She developed this point by reference to the words of Viscount Finlay in *Johnstone v. Pedlar*, according to which:

> [I]f a wrongful act has been committed against the person or the property of any person the wrongdoer cannot set up as a defence that the act was done by the command of the Crown. The Crown can do no wrong, and the Sovereign cannot be sued in tort, but the person who did the act is liable in damages, as any private person would be.[18]

Against this, the question for the Supreme Court was "whether there is indeed a qualification such as that expressed by Viscount Finlay and, if so, how far that qualification goes."[19] In drawing on the authorities pre-dating *A-G v. Nissan*, said Lady Hale, it was necessary to keep in mind that those were decided "against a legal landscape which was very different from the legal landscape of today."[20] Lady Hale stressed that:

> The conduct of foreign affairs, making treaties, making peace and war, conquering or annexing territories, are all aspects of the Royal prerogative. Until the decision of the House of Lords in *Council of the Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (the *GCHQ* case), the general position was that the courts would review whether what had been done fell within the scope of the Royal prerogative but would not review how that prerogative had been exercised. After that case, the exercise of executive power might be excluded from the scope of judicial review, not

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[12] A-G v. Nissan [1970] AC 179, 212 (Lord Reid), 218 (Lord Morris), 231 (Lord Wilberforce).

[13] *Rahmatullah*, *supra* note 3, para. 2.

[14] *Cf.* Johnstone v. Pedlar, [1921] 2 AC 262; A-G v. Nissan, [1970] AC 179; Al-Jedda v. Secretary of State for Defence (No 2), [2011] QB 773.

[15] *Rahmatullah*, *supra* note 3, para. 3.

[16] Entick v. Carrington, (1765) 19 St Tr 1029.

[17] H. STREET, GOVERNMENT LIABILITY: A COMPARATIVE STUDY 50 (1953).

[18] Johnstone v. Pedlar, [1921] 2 AC 262, 271.

[19] *Rahmatullah*, *supra* note 3, para. 7.

[20] *Id.*, para. 15.

> because of its *source*, whether statute or the prerogative, but because of its *subject matter*.[21]

She also made the point that the pre-*Nissan* cases were largely decided against the backdrop of the principle that "the King can do no wrong," it having being impossible at that time to sue the King in his own courts. The Crown Proceedings Act 1947 abolished the general immunity of the Crown from liability in tort, enabling litigants to sue Government departments, and not only their servants, such as the defendants in *Rahmatullah*.[22]

In *A-G v. Nissan*, Lord Wilberforce had taken the view that the doctrine of Crown act of state encompassed two rules. The first was drawn from the case of *Buron v. Denman*,[23] and was:

> one which provides a defendant, normally a servant of the Crown, with a defence to an act otherwise tortious or criminal, committed abroad, provided that the act was authorized or subsequently ratified by the Crown. It is established that this defence may be pleaded against an alien, if done abroad, but not against a friendly alien if the act was done in Her Majesty's Dominions.

The second rule, Lord Wilberforce said, was

> one of justiciability: it prevents British municipal courts from taking cognizance of certain acts. The class of acts so protected has not been accurately defined: one formulation is "those acts of the Crown which are done under the prerogative in the sphere of foreign affairs" (*Wade and Phillips's Constitutional Law*, 7th ed. (1956), p. 263). As regards such acts it is certainly the law that the injured person, if an alien, cannot sue in a British court and can only have resort to diplomatic protest. How far this rule goes and how far it prevents resort to the courts by British subjects is not a matter on which clear authority exists. From the terms of the pleading it appears that it is this aspect of the rule upon which the Crown seeks to rely.[24]

Having reviewed the case-law, Lady Hale found that the foundations of the rule in *Buron v. Denman* were "very shaky,"[25] and that authority for the core (and arguably antecedent) rule of non-justiciability was on the whole far more certain.[26] Furthermore, her Ladyship said, there were conceptual advantages in confining the doctrine to a rule of non-justiciability, and holding that the rule in *Buron v. Denman* was nothing more than a

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[21] *Id.*, para. 15.

[22] *Id.*, para. 16.

[23] Buron v. Denman, (1848) 2 Exch 167, 154 ER 450.

[24] A-G v. Nissan, [1970] AC 179, 231.

[25] *Rahmatullah*, *supra* note 3, paras. 22, 31.

[26] *Id.*, para. 31.

necessary corollary of the same.[27] Such confinement would, however, require a broad concept of non-justiciability:

> It would have to encompass aspects of the conduct of military operations abroad as well as the high policy decision to engage in them, and perhaps also some other aspects of the conduct of foreign relations, even though their subject matter was entirely suitable for determination by the court. It is necessary that the courts continue to recognise that there are some acts of a governmental nature, committed, abroad, upon which the courts of England and Wales will not pass judgment. They may, of course, have to hear evidence and find facts in order to determine whether the acts in question fall into that category. It is also necessary to confine that category within very narrow bounds.[28]

As such, it appears that the division between the rule in *Buron v. Denman* and the wider rule of non-justiciability identified by Lord Wilberforce in *A-G v. Nissan* remains intact post-*Rahmatullah*. The latter is, according to Lady Hale, confined to certain decisions of "high policy" in the conduct of foreign relations, e.g., the decision to participate in armed conflict. These decisions are deemed to be removed entirely from the court's adjudicative ambit. The former covers all consequential acts carried out by the departments or agents of the Crown in pursuit of that high policy.[29] These are not so removed, and may be subjected to the ordinary forensic processes of the court, which may then determine that the rule in *Buron v. Denman* applies as a defense to tort or crime.

But this left unresolved the central question of Crown act of state: the precise *character* of the acts that will attract the protection of the doctrine. Lady Hale refused to identify the relevant category with precision, noting that "[i]t would be unwise for this court to attempt a definitive statement of the circumstances in which [Crown act of state] might apply."[30] She did, however, provide some general guidance, by noting that the doctrine could be raised only in respect of:

> a very narrow class of acts: in their nature sovereign acts—the sorts of thing that governments properly do; committed abroad; in the conduct of the foreign policy of the state; so closely connected to that policy to be necessary in pursuing it; and at least extending to the conduct of military operations which are themselves lawful in international law (which is not the same as saying that the acts themselves are necessarily authorised in international law).[31]

This was further qualified in three significant ways: (a) the doctrine is not of general application "to all torts committed against foreigners abroad just because they have been authorised or ratified by the British government"; (b) by concession of the Ministry of

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[27] *Cf. id.*, paras. 47, 65, 69 (Lord Mance).

[28] *Id.*, para. 33.

[29] *Rahmatullah*, *supra* note 3, para. 31.

[30] *Id.*, para. 36.

[31] *Id.*, para. 37.

Defence, it does not apply to acts of torture or to the mistreatment of prisoners or detainees; and (c) it does not apply to expropriation, which can always be the subject of compensation.[32] The idea of a broad-based public policy exception to the doctrine was rejected,[33] and the question of the doctrine's application to a British national left open.[34] Lady Hale held on this basis that the defence applied to all three claims at bar—the appeal was accordingly allowed and the matters dismissed.

Lady Hale's reasoning seems to have been based on the rule in *Buron v. Denman* alone, and sought overtly to limit the doctrine of Crown act of state to the narrowest ambit possible while still upholding its existence. The judgments of Lord Mance and Lord Sumption, however, reflect a more searching inquiry, investigating not only the defence to tort and crime provided by *Buron v. Denman* but also the antecedent question of non-justiciability.[35] Lord Mance sought to merge the two rules into a single principle of non-justiciability, arguing that the continued independence of the rule in *Buron v. Denman* created "unnecessary confusion"[36] and that the tort defense was nothing more than the logical corollary of the Court's unwillingness to take cognisance of certain Crown acts, reflecting (in particular) its prerogative over foreign affairs.[37] Lord Sumption held that the division between the two rules should be maintained,[38] and further investigated the precise character of a qualifying state act. Both concurring opinions pointed out that the doctrine of Crown act of state is rooted in the constitutional principle of the separation of powers, in particular the reservation of the "paradigm functions of the state," such as the conduct of warfare, to the Crown, so that it would be "incoherent and irrational" for the courts to acknowledge the Crown's power to conduct foreign relations of a certain kind, and at the same time treat as civil wrongs acts inherent in its exercise of that power.[39]

II. *BELHAJ* AND FOREIGN ACT OF STATE

The UK Government had in *Belhaj* relied on the defense of foreign act of state in relation to various torts in a case in which Belhaj, a Libyan opponent of Colonel Gaddafi, contended that, together with his Moroccan wife, he had been detained at Kuala Lumpur, compulsorily rendered to a CIA black site in Thailand, subjected to inhumane treatment, and then transported to Libya, where he was tortured. Also involved in the case was Rahmatullah, whose claim for the accessorial liability of the Ministry of Defence for torts committed against him by American forces was joined to Belhaj and his wife's appeal. As in *Rahmatullah*, the act of state questions arose only in relation to the tort claims; what was

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[32] *Id.*, para. 36.

[33] *Id.*, paras. 34–35.

[34] *Id.*,, para. 37.

[35] For further analysis, see Ali Malek & Cameron Miles, *International Dimensions*, *in* THE UK SUPREME COURT YEARBOOK, VOLUME 8: 2016–2017 JUDICIAL YEAR 447 (Daniel Clarry ed., 2017).

[36] *Rahmatullah*, *supra* note 3, para. 47.

[37] *Id.*, paras. 65, 69. See in this regard Jenny Martinez, *How National Constitutions Allocate Executive and Legislative Power over Foreign Relations*, Chapter 7 in this volume.

[38] *Rahmatullah*, *supra* note 3, para. 78.

[39] *Id.*, para. 88 (Lord Sumption). *See also id.*, paras. 50–54 (Lord Mance).

at issue was the accessorial liability of certain government agents and the Ministry of Defence for torts committed against the claimants by the third states.[40]

Was the UK Government entitled to rely on the defense of foreign act of state on the basis that Belhaj's claim could not be heard because Malaysia, Thailand, the United States, and Libya would be impleaded and their legal position affected, whether directly or indirectly? Although the primary actor was the United States, there was no basis for concluding that the issues would involve sovereign, international, or inter-state considerations of such a nature that a domestic court could not or should not appropriately adjudicate upon them.[41] The mere fact that an individual is handed over to a state under an agreement could not suffice to make the claims for alleged wrongful detention combined with severe mistreatment by the United States non-justiciable in respect of either the United States' primary, or the United Kingdom's ancillary, involvement.[42] It was accepted that "detention overseas as a matter of considered policy during or in consequence of an armed conflict and to prevent further participation in an insurgency could in some circumstances constitute a foreign act of state, just as it may constitute Crown act of state when undertaken by the United Kingdom."[43] But it was pointed out that the court was concerned, in *Belhaj*, with allegations of arbitrary detention with a view to the individual being forcibly handed over to an arbitrary ruler:

> Even if one could say that such treatment reflects some policy of the various foreign states involved, or indeed of the United Kingdom, it goes far beyond any conduct previously recognised as requiring judicial abstention. There is certainly also no lack of judicial and manageable standards by which to judge it.[44]

In relation to indirect impleading, the Supreme Court rejected the Government's argument based on the *Monetary Gold* doctrine,[45] that is, the international law doctrine according to which an international tribunal will declare inadmissible a claim the very subject-matter of which requires a determination of the rights or interests of a state that is not before the court.[46] The argument was rejected on the grounds that "*Monetary Gold* is not about state immunity, and does not on its facts assist on the issue now before the court, even by way of analogy."[47] The Court did so in spite of the Government[48] having adduced authorities to the effect that the *Monetary Gold* doctrine "is the nearest direct analogue in

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[40] *Belhaj*, *supra* note 4, paras. 1 (Lord Mance), 113 (Lord Neuberger), 175 (Lord Sumption). *See also* Malek & Miles, *supra* note 35, at 448–53.

[41] *Belhaj*, *supra* note 4, para. 96.

[42] *Id.*, para. 96.

[43] ,*Id.*, para. 96.

[44] *Id.*, para. 97.

[45] Monetary Gold Removed from Rome in 1943 (Italy v. France, UK and US), [1954] ICJ Rep 19, 32–3.

[46] *See* JOHN COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW 158-61 (1999).

[47] *Belhaj*, *supra* note 4, para. 27 (Lord Mance).

[48] Joint Case for the Appellants, 24 July 2015, paras. 39–40.

international law to the rule of State immunity,"[49] with the significant addition that, "although the international rule prohibiting adjudication against foreign States without their consent may not apply directly to municipal courts, it has much force as an analogy."[50] The Court's approach was clearly correct: notwithstanding certain theoretical parallels, in the final balance, the *Monetary Gold* doctrine considers the indirectly impleaded interests of a third state to be a question of admissibility arising from the consensual character of international jurisdiction (*ratione voluntatis*); the rule has nothing to do with the jurisdictional immunity of states (*ratione personae*) before domestic courts. As such, however inventive the argument, the Court gave it short shrift, pointing out that if correct it could be used to remove a court's jurisdiction (*ratione materiae*) in any case where state interests could be indirectly raised.[51]

As with Crown act of state, the parameters of foreign act of state can be uncertain.[52] Again, one of the more authoritative earlier statements of the doctrine was given by Lord Wilberforce, in *Buttes Gas v. Hammer*. Two limbs of the doctrine were identified. The first limb involves questions deriving from cases such as *Luther v. Sagor*,[53] which were:

> concerned with the applicability of foreign municipal legislation within its own territory, and with the examinability of such legislation—often, but not invariably arising in cases of confiscation of property. Mr Littman gave us a valuable analysis of [the relevant cases], suggesting that these are cases within the area of conflict of laws, concerned essentially with the choice of the proper law to be applied.[54]

The second limb involves the question of:

> whether . . . there exists in English law a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states. Though I would prefer to avoid argument on terminology, it seems desirable to consider the principle, if existing, not as a variety of "act of state," but one for judicial restraint or abstention . . . . This principle is not one of discretion, but is inherent in the very nature of the judicial process . . . I find the principle clearly stated that the courts in England will not adjudicate upon acts done abroad by virtue of sovereign authority.[55]

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[49] James Crawford, *International Law and Foreign Sovereigns: Distinguishing Immune Transactions*, 54 BRIT. Y.B. INT'L L. 75, 80 (1983).

[50] *Id.*, at 80–81.

[51] *Belhaj*, *supra* note 4, paras. 30 (Lord Mance), 196 (Lord Neuberger).

[52] *See, e.g.*, CAMPBELL MCLACHLAN, FOREIGN RELATIONS LAW 523-45 (2014).

[53] Aksionairnoye Obschestvo AM Luther v. James Sagor & Co., [1921] 3 KB 532.

[54] Buttes Gas and Oil Co. & Another v. Hammer & Another (No 3), [1982] AC 888, 931A.

[55] *Id.*, at 931G–932A.

In developing the category of restraint, the House of Lords in *Buttes Gas* was drawing on influences from the courts of the United States,[56] especially *Baker v. Carr*[57] and *Goldwater v. Carter*.[58] Not mentioned by Lord Wilberforce in *Buttes Gas v. Hammer* in conjunction with the first rule was the closely allied notion that a British court will not question a foreign executive act—as distinct from legislation—on its own territory. This derived not from *Luther v. Sagor* but another case, *Princess Paley Olga*.[59]

Three fully reasoned judgments were delivered in *Belhaj*: by Lord Mance, Lord Sumption, and Lord Neuberger. Lord Mance gave the first judgment and set out the facts—an arrangement that traditionally identifies a judgment as that of the majority. Lord Mance's judgment was, however, a minority judgment, as none of the other justices agreed with his reasoning in its entirety. Rather, Lord Wilson, Lady Hale, and Lord Clarke agreed with Lord Neuberger—whose judgment and reasoning accordingly speaks for the majority by dint of simple arithmetic.[60] To the extent that Lord Neuberger endorsed the reasoning of Lord Mance and Lord Sumption (with whom Lord Hughes agreed), that endorsement also formed part of the ratio.

Lord Neuberger disaggregated act of state into "four rules"—or, rather, four *potential* rules. The first two reflected the private international law rules of *Luther v. Sagor* and *Princess Paley Olga*, whereby a British court will not adjudicate on the validity of a foreign law or executive act on its own territory in connection with moveable or immoveable property.[61] The third rule was the second principle of non-justiciability identified by Lord Wilberforce in *Buttes Gas v. Hammer*, whereby British courts will not interpret or question sovereign dealings of or between states.[62] The fourth rule (which, in fairness, was *not* the subject of argument before the Court and was in fact expressly *denounced* by both parties) was derived from a remark of Rix LJ in *Yukos v. Rosneft*, whereby "courts will not investigate acts of a foreign state where such an investigation would embarrass the government of our own country"[63]—though this could only arise upon a communication of the Foreign and Commonwealth Office.[64] Lord Neuberger explained that the fourth rule had no clear basis in any judicial decision from the UK, and that if a member of the executive was to say formally to a court that the judicial determination of an issue could embarrass the Government's relation with another state, the court would not be bound to refuse to determine the issue: "[t]hat would involve the executive dictating to the judiciary, which

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[56] *See* Lord Mance, *Justiciability*, 67 INT'L & COMP. L.Q. (forthcoming).

[57] Baker v. Carr, 369 U.S. 186 (1962).

[58] Goldwater v. Carter, 444 U.S. 996, 998 (1979).

[59] Princess Paley Olga v. Weisz, [1929] 1 KB 718.

[60] This understanding of *Belhaj* has since been adopted by the High Court of England and Wales, in AAA v. Unilever plc, [2017] EWHC 371 (QB), para. 36 (Laing J).

[61] *Belhaj*, *supra* note 4, paras. 121–22. For the American approach to similar rules, see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); *see also* William S. Dodge, *International Comity in Comparative Perspective*, Chapter 39 in this volume.

[62] *Belhaj*, *supra* note 4, para. 123.

[63] Yukos Capital SARL v. OJSC Rosneft Oil Co (No 2), [2014] QB 458, [65].

[64] *Belhaj*, *supra* note 4, para. 124.

would be quite unacceptable."[65] The end result was that only the first three of Lord Neuberger's rules were held to be part of the positive law.

As pointed out by Bill Dodge,[66] in American law the doctrine is by way of comparison limited to "the official act of a foreign sovereign performed within its own territory."[67] But the American version of the doctrine has no public policy exception: if it is found that the doctrine applies, then an American court is bound to accepts its validity "[h]owever offensive to the public policy of this country" it may be.[68]

As with Crown act of state, this analysis left the substantive application of foreign act of state to be decided. Three questions were of relevance, namely (1) the jurisprudential underpinnings of the doctrine, (2) the type of state acts rendered non-justiciable by its operation, and (3) the scope and character of any public policy exception thereto.

With respect to (1), Lord Neuberger did not delve into the underpinning of foreign act of state in anything more than a transitory sense, but expressed some agreement with both Lords Mance and Sumption, who were more expansive on the point.[69] As to questions (2) and (3), Lord Neuberger said that "it would be unwise to be too prescriptive about [the doctrine's] ambit," although he made some reference to the fact that "in practice, it will almost always apply to actions involving more than one state" and "involve some sort of comparatively formal, relatively high level arrangement."[70] With respect to the scope of the public policy exception,[71] Lord Neuberger applied the same standard as in relation to the first (private international law) rule, noting that the exception depended "ultimately on domestic law considerations, although generally accepted norms of international law are plainly capable of playing a decisive role."[72] In the final balance, his Lordship held that the types of act alleged by both claimants would not attract the doctrine's protection—and, even if they did, the public policy exception would apply.[73]

Rather more clarity was provided by the separate opinions of Lord Mance and Lord Sumption, although their Lordships seemed to differ with Lord Neuberger—and with each other—on several points of principle. Lord Sumption set out the clearest view of foreign act of state, holding that the rule was confined to acts *jure imperii* (with that term bearing

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[65] *Id.*, para. 149.

[66] William S. Dodge, *The UK Supreme Court's Landmark Judgment Belhaj v. Straw: A View from the United States*, JUST SECURITY (19 January 2017), *at* https://www.justsecurity.org/36507/uk-supreme-courts-landmark-judgment-belhaj-v-straw-view-united-states/.

[67] W.S. Kirkpatrick & Co, Inc. v. Environmental Tectonics Corp., 493 U.S. 400, 405 (1990).

[68] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 436 (1964). *But cf.* Kadic v. Karadzic, 70 F.3d 232, 250 (2d Cir. 1995) (noting that it is doubtful that acts of a state official committed "in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterized as an act of state").

[69] *Belhaj*, *supra* note 4, para. 151.

[70] *Id.*, para. 147.

[71] This was already well-established as an exception to foreign act of state in English law. *See* Oppenheimer v. Cattermole (Inspector of Taxes), [1976] AC 249, 278B–C (Lord Cross).

[72] *Belhaj*, paras. 153–57.

[73] *Id.*, paras. 167–68.

the same meaning as it did in relation to questions of state immunity)[74] and was not solely concerned with armed conflict but "altogether more general," concluding that "[o]nce the acts alleged are into the 'area of an international dispute' the act of state doctrine is engaged."[75] On this basis, both claims in *Belhaj* were *prima facie* precluded by foreign act of state.[76] He further held that the public policy exception, while remaining strictly domestic in character, was to be guided by reference to international law, and in particular whether the conduct alleged would violate *jus cogens* norms.[77] Citing the 2012 Report of United Nations Working Group on Arbitrary Detention on the matter,[78] Lord Sumption held that "the irreducible core of the international obligation . . . [is] that detention is unlawful it if is without any legal basis or recourse to the courts."[79] He then concluded that the acts alleged by the claimants in *Belhaj*—encompassing torture, unlawful detention, enforced disappearance and cruel, inhuman and degrading treatment—were subject to the exception as they violated peremptory norms of international law and fundamental principles of the administration of justice in England.[80]

In Lord Mance's view, the critical point was:

> the nature and seriousness of the misconduct alleged in both cases before the Supreme Court, at however high a level it may have been authorised. Act of state is and remains essentially a domestic law doctrine, and it is English law which sets its limits. English law recognises the existence of fundamental rights, some long-standing, others more recently developed.[81]

To that end, his Lordship cited *Abbasi*, where in the context of a claim judicially to review the Secretary of State for alleged inaction in respect of the plight of a British citizen detained at Guantanamo, the Court of Appeal observed that "where fundamental human rights are in play, the courts of this country will not abstain from reviewing the legitimacy of the actions of a foreign sovereign state."[82] On the whole, however, Lord Mance did not speak in terms of principles (i.e., the act of state) versus exceptions (i.e., public policy), but rather held that public policy might persuade or dissuade a court from declaring a matter non-justiciable,

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[74] *Id.*, para. 199.

[75] *Id.*, para. 234.

[76] *Id.*, para. 238.

[77] *Id.*, para. 257.

[78] UN Doc. No. A/HRC/22/44 (24 December 2012), paras. 38–39.

[79] *Belhaj*, *supra* note 4, paras. 270–71.

[80] *Id.*, paras. 238–80].

[81] *Id.*, para. 98. Similarly, it has been argued in the American literature that the act of state doctrine is not a doctrine of international law but one of international comity, the latter describing "an internationally oriented body of domestic law that is distinct from international law and yet critical to legal relations with other countries." William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2077 (2015).

[82] R (Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs, [2002] EWCA Civ 1598, [53].

and that there was no presumption that a court would abstain in respect of any particular state act.[83]

The appeals were upheld and the matters remitted to the High Court for trial.

III. ANALYSIS

The cases of *Rahmatullah* and *Belhaj* presented the Supreme Court with a unique opportunity. The Court was confronted with doctrines that had been historically bedeviled with uncertainty and that the most authoritative statements on both had been given comparatively long ago by Lord Wilberforce in *A-G v. Nissan* (1970) and *Buttes Gas v. Hammer* (1982). Furthermore, Lord Wilberforce was not so fortunate as to be able to deal with both aspects of act of state simultaneously and in the context of cases that shared considerable factual DNA. The Court was clearly aware of its good fortune and arranged itself accordingly. The same panel of seven Justices sat in each, and the decisions were clearly drafted and intended to be read together—indeed, they were handed down *seriatim* on the same day.

While the two judgments do provide clarity in certain vital respects, the upshot of *Rahmatullah* and *Belhaj* is that aspects of both doctrines and the relationship between them remain obscure. The obscurities concern both questions of the *internal* coherence of each doctrine, and also their *external* justification as a matter of constitutional principle.

Internal Coherence: Clarifying the Operation of the Act of State Doctrines

The difficulties identified by many commentators with respect to the act of state doctrines are summed up admirably by Lord Reid's aside in *A-G v. Nissan*: "a good deal of trouble has been caused by using the loose phrase 'act of state' without making clear what is meant."[84] This comment is almost as apt post-*Rahmatullah* and *Belhaj* as it was in 1970. In neither case was clear direction given as to precisely which acts of state would be protected from judicial scrutiny. At the highest level, both doctrines may be said to apply to "acts which are by their nature sovereign acts, acts which are inherently governmental, committed to the conduct of the foreign relations [of the Crown or state in question]."[85] The scope of such acts have been delineated extensively in public international law by the rules on state immunity, which serve as a useful analogy.[86] Less certain is the outer limit of the doctrine. In *Rahmatullah*, Lady Hale held that the rule in *Buron v. Denman* protects acts "so closely connected to [the foreign policy of the state] as to be necessary in pursuing it"[87]—with no explanation given as to what might be considered "necessary" in that context.[88]

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[83] *Belhaj*, *supra* note 4, paras. 89–90.

[84] A-G v. Nissan, [1970] AC 179, 211G.

[85] *Rahmatullah*, *supra* note 3, para. [36] (Lady Hale).

[86] *Belhaj*, *supra* note 4, para. 199 (Lord Sumption).

[87] *Rahmatullah*, *supra* note 3, para. 37. *See also id.*, paras. 56–58 (Lord Sumption), 64 (Lord Mance), 88–93 (Lord Sumption).

[88] *Cf. id.*, para. 92 (Lord Sumption) (referring to the principle of military necessity as a possible analogy).

At the same time, useful clarification was provided with respect to other aspects of the act of state doctrines. The extraterritorial aspect of Crown act of state was confirmed, as was the dual territorial (in the cases of the principle of *Luther v. Sagor* and *Princess Paley Olga*) and extraterritorial (in the case of *Buttes Gas v. Hammer* non-justiciability) of foreign act of state. Also confirmed as removed (or diminished) was the dictum of Lord Wilberforce in *Buttes Gas v. Hammer* that a further case for non-justiciability when considering a foreign act of state is a lack of "judicial or manageable standards" on which to found a decision.[89] This abnegation of a British court's decision to apply international law—trenchantly criticized when handed down,[90] but in reality always blown somewhat out of proportion—was deemed to be irrelevant in *Belhaj*.[91] Given the relative development and wider acceptance of international law by British courts since *Buttes Gas v. Hammer* was decided, the utility of that dictum has likely been reduced to the vanishing point.

Nevertheless, areas of uncertainty remain in respect of both act of state doctrines that disrupt their internal coherence. This may well have been by design, the Supreme Court in both cases having seemed cognizant of the risk of over-precision in relation to the act of state doctrines. Lady Hale noted that "[i]t would be unwise for this court to attempt a definitive statement of the circumstances in which [Crown act of state] might apply."[92] Lord Neuberger urged a similar caution with respect to foreign act of state.[93] This political aspect serves as a neat link between questions pertaining to the internal coherence of the act of state doctrines and their wider (or external) justification from the perspective of constitutional principle.

External Coherence: Rooting the Act of State Doctrines in Constitutional Principle

The greatest principled advance in *Rahmatullah* and *Belhaj* was confirmation by the Supreme Court that the doctrines of Crown and foreign act of state arise from something approximating a common constitutional source.

The Court was at pains in both cases to stress the increasing importance of the principles of the constitutional division of power in the act of state analysis. Further and in addition, the relationship between the branches of power under the constitution goes some way in explaining the difference in outcome in *Belhaj* and *Rahmatullah.* In his judgment in *Rahmatullah*, Lord Mance observed that it would be wrong to suggest that the principle of abstention identified by Lord Wilberforce in *A-G v. Nissan* and *Buttes Gas v. Hammer* applies with the same force or by reference to the same considerations in relation to the two types of act of state:

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[89] Buttes Gas v. Hammer, [1982] AC 888, 938B.

[90] *See, e.g.*, James Crawford, *Public International Law*, 53 BRIT. Y.B. INT'L L. 253, 268 (1982); J. G. Collier, *Transactions Between States—Non-Justiciability—International Law and the House of Lords in a Judicial No-Man's Land*, 41 CAMBRIDGE L.J. 18, 18–21 (1982).

[91] *Belhaj, supra* note 4, para. 90.

[92] *Rahmatullah, supra* note 3, para. 36.

[93] *Belhaj, supra* note 4, para. 101.

> Both Crown act of state and the third type of foreign act of state are based on an underlying perception of the role of domestic courts. The constitutional relationship of a domestic court with its own State differs from its relationship with that of any foreign sovereign state. Crown act of state is reserved for situations of sovereign authority exercised overseas as a matter of state policy. In these circumstances, a straight-forward principle of consistency directly underpins Crown act of state . . . . In contrast, if and when the third type of foreign act of state applies, its underpinning is a more general conception of the role of a domestic court, and, more particularly, the incongruity of a domestic court adjudicating upon the conduct of a foreign sovereign state, even though the foreign state is neither directly or indirectly impleaded or affected in its rights. . . . [I]t must be easier to establish that a domestic court should abstain from adjudicating on the basis of Crown act of state than on the basis of the third type of foreign act of state. The relationship is closer and the threshold of sensitivity lower in the case of the former than the latter.[94]

Lord Mance's comments—echoed by Lord Sumption[95]—make it clear that although the doctrines may *prima facie* encompass the same class of acts, the different origins of each may compel a different result. Foreign act of state is based on a nebulous but elemental conception of how a domestic court operates, and contemplates that there are some substantive questions in respect of which the court is not incompetent to issue an opinion, but from which is should nevertheless refrain. Crown act of state, on the other hand, is animated by a more hard-edged rule drawn from the relationship of the judiciary to the executive in a constitutional democracy. This explains the additional degree of caution animating the Court in *Rahmatullah* and the absence from Crown act of state of the defined public policy exception that was the subject of extended discussion in *Belhaj*.[96]

In other words, with respect to Crown act of state, it would be inconsistent for the common law to give, with the one hand, the function of deploying armed force in the conduct of international relations to the executive only to take away, with the other, by treating as civil wrongs the acts carried out by the executive in that connection. The argument is similar to that which was taken to be good law in relation to judicial review and the Royal prerogative until the landmark *GCHQ* judgment in the mid-1980s, which confirmed the reviewability by the judiciary of the prerogative.[97] In addition to confirming that the exercise of the prerogative could be reviewed, the Appellate Committee of the House of Lords in *GCHQ* established that justiciability depended on the subject matter rather than on the source of the power; the fact that a case concerns the exercise of the prerogative would not automatically take the act or omission out of the scope of judicial review.[98] Lord Mance explicitly pointed out the connection with *GCHQ*.[99]

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[94] *Rahmatullah*, *supra* note 3, paras. 50–52.

[95] *Id.*, para. 88.

[96] Malek & Miles, *supra* note 35, at 462–63.

[97] Council of Civil Service Unions v. Minister for the Civil Service, [1985] AC 374.

[98] R (Abbasi and Juma) v. Foreign Secretary, (2002) 123 ILR 599, 605–06, para. 14 (Richards J).

[99] *Rahmatullah*, *supra* note 3, para. 56.

The old orthodoxy was that, as Sir William Wade put it, "the logical basis for 'act of state'" was geography: "the Crown enjoys no dispensation for acts done within the jurisdiction, whether the plaintiff be British or foreign; but foreign parts are beyond the pale (in Kipling's words, 'without the law')."[100] As will have been seen, the perspective has changed from one of geography—foreign parts having been considered beyond the pale—to one of constitutional competence as regards subject matter, some matters being "beyond the constitutional competence assigned to the courts under our conception of the separation of powers."

This is a welcome development. Sir Philip Sales argued more than a decade ago that it would assist the rational development of the law in relation to the act of state doctrine for separation of powers type analysis to be brought more to the forefront of the courts' reasoning, so that the competing interests and policy considerations might be balanced more explicitly and coherently.[101] Viewing the act of state doctrine through the prism of separation of powers would lead to the suggestion that the doctrine should, as compared to its traditional version, be qualified to some extent.[102] This is indeed what is happening. Prefiguring this move, Lauterpacht observed that, already in the beginning of the twentieth century, one was seeing a gradual development where "the doctrine of separation of powers is being in practice reduced to its *proper proportions*."[103] Some decades later Lord Sumption, speaking extra-judicially, echoed this important point, referring to the developing framework as "the advance of the qualified division of powers theory."[104] There is no doubt that, in the delimitation of executive power in foreign affairs before British courts, the development of the law is aided by the concept of the separation of powers, and that the principle of constitutional separation of powers is a qualified one as compared with the principle that operated in the twentieth century. The separation of powers is no longer only a byword for judicial abstention and the executive enjoying a free reign in foreign affairs.

This may be said to apply with respect to Crown act of state. Important questions still persist, however, in respect of its foreign counterpart. Historically, the jurisprudential underpinning of the doctrine—at least insofar as it reflected a principle of judicial abstention—was, as a matter of English law, unclear. When Mann came to the topic for the first time in 1943,[105] he asserted that it was based upon mere rhetoric, and was reflective of policy preferences that could not be justified as a matter of constitutional principle. As such, it carried little more weight than a legal maxim—a category of aphorism that he considered dangerous, and despised accordingly.[106]

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[100] HWR Wade, ADMINISTRATIVE LAW 230 (1961).

[101] Philip Sales, *Act of State and the Separation of Powers*, 11 JUDICIAL REVIEW 94, 97 (2006).

[102] *Id.* at 94.

[103] HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 398 (1933) (emphasis added).

[104] Lord Sumption, Foreign Affairs in the English Courts since 9/11, at 8 (Lecture given at the London School of Economics, 14 May 2012).

[105] MANN, STUDIES IN INTERNATIONAL LAW, *supra* note 1, at 455–65.

[106] *Id.*, at 420–22.

In returning to foreign act of state some four decades later, Mann did not consider the situation to have improved. He drew an unfavourable comparison between the development that had occurred with respect to the equivalent doctrine in the United States, tracking a jurisprudential shift from an analysis that prioritized comity between states to one that prioritized comity between branches of government.[107] In this, he cited Judge Brieant's remarks in *Banco Nacional de Cuba v. Chemical Bank New York Trust*, that:

> Historically [courts under the foreign act of state doctrine] should respect the acts of foreign sovereigns conducted within their borders . . . . That has since been refined and the doctrine is now cited more as a means of maintaining the proper balance between the judicial and political branches of the government on matters bearing upon foreign affairs.[108]

Mann then went on to note that no such jurisprudential justification had been advanced in English law—indeed, it had been denied in other, related fields.[109] Lord Mance's principled justification of the division between Crown and foreign act of state may now be said to provide that underpinning. But it does so only up to a point. His Lordship's language, referring to "a more general conception of the role of a domestic court, and, more particularly, the incongruity of a domestic court adjudicating upon the conduct of a foreign sovereign state,"[110] is couched in terms broadly redolent of the separation of powers, it is true. But one may ask whether, beyond identifying the constitutional space in which the rule is said to operate, Lord Mance has shed any light upon its basis in anything other than the most general of terms. From where does this "general conception" arise? Is it rooted in precedent? Is it of relevance elsewhere in English law? And why exactly is a domestic court sitting in judgment over a foreign state's acts—in circumstances where the hard rules of state immunity do not apply—so incongruous anyway? In this, his Lordship may be said to have done little more than coin yet another of Mann's dreaded maxims, in respect of which Lord Wright famously said:

> [T]hese general formulae are found in experience often to distract the court's mind from the actual exigencies of the case, and so to induce the court to quote them as offering a ready-made solution. It is not yet safe to act upon them, however, unless, and to the extent that, they received definition and limitation, from judicial determination.[111]

Given the vagueness with which Lord Mance expressed himself, the "definition and limitation" that Lord Wright required before he could deem a maxim safe to act upon is not yet present. As such, from a certain point of view, the opportunity presented to the Supreme Court by *Rahmatullah* and *Belhaj*—being the opportunity to articulate the place of these doctrines within the UK's constitutional framework—has been wasted. But perhaps not completely. In at least identifying the basic root of the doctrine and, to a degree, sketching

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[107] MANN, *supra* note 2, at 176. *See* Dodge, *supra* note 61.

[108] Banco Nactional de Cuba v. Chemical Bank New York Trust, 594 F. Supp. 1553, 1557 (SDNY, 1984).

[109] MANN, *supra* note 2, at 176.

[110] *Rahmatullah*, *supra* note 3, paras. [50]–[52].

[111] Lissenden v. Bosch Ltd., [1940] AC 412, 435.

out its relationship with Crown act of state, Lord Mance may be said to have wrestled the English conception of foreign act of state onto a recognized jurisprudential base. As Sir Philip Sales noted, this is eminently desirable—and may now serve as a seed from which more articulated judicial thoughts may grow.[112] One hopes that the Supreme Court will not need to wait another thirty-five years to tackle the subject.

IV. CONCLUSION

This chapter has attempted to provide a synthesis and criticism of the UK Supreme Court's judgments in *Rahmatullah* and *Belhaj*, and to contextualize both within the wider doctrines of Crown and foreign act of state, as applied by British courts. In the final balance, many of the criticisms made by Mann in 1986 may be said to apply today: a general uncertainty regarding the scope of the doctrines, and a lack of jurisprudential development with respect to their constitutional underpinnings (an observation that rings particularly true with respect to foreign act of state). But it is undeniable that progress, however minor, has been made in these decisions. While the act of state doctrines in English law are not yet as clear and hard-edged as their American counterparts, the scene has been set in *Rahmatullah* and *Belhaj* for further developments—even if litigants will still need to refer to the earlier case law (and particularly the remarks of Lord Wilberforce in *A-G v. Nissan* and *Buttes Gas v. Hammer*) in order to get the full picture.

[112] Sales, *supra* note 101, at 97.