Neutral Citation Number: [2014] EWCA Civ 1394

Case No: A2/2014/0596

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT, QUEEN'S BENCH DIVISION
MR. JUSTICE SIMON
HQ12X02603

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2014

Before :

MASTER OF THE ROLLS
LORD JUSTICE LLOYD JONES
and
LADY JUSTICE SHARP

- -

Between :

(1) ABDUL-HAKIM BELHAJ **(2) FATIMA BOUDCHAR**	Claimants/ Appellants
- and –	
(1) THE RT. HON. JACK STRAW MP **(2) SIR MARK ALLEN CMG** **(3) THE SECRET INTELLIGENCE SERVICE** **(4) THE SECURITY SERVICE** **(5) THE ATTORNEY GENERAL** **(6) THE FOREIGN & COMMONWEALTH OFFICE** **(7) THE HOME OFFICE**	Defendants/ Respondents
- and -	
(1) UNITED NATIONS SPECIAL RAPPORTEUR ON TORTURE **(2) UNITED NATIONS CHAIR-RAPPORTEUR ON ARBITRARY DETENTION** **(3) THE INTERNATIONAL COMMISSION OF JURISTS** **(4) JUSTICE** **(5) AMNESTY INTERNATIONAL** **(6) REDRESS**	Interveners

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Richard Hermer QC, Ben Jaffey and **Maria Roche** (instructed by **Leigh Day and Company**) for the **Appellants**

Rory Phillips QC, Sam Wordsworth QC, Karen Steyn QC and **Peter Skelton** (instructed by the **Treasury Solicitor**) for the **Respondents**

Natalie Lieven QC, Shane Sibbel and **Ravi Mehta** (instructed by **Bhatt Murphy**) for the **First and Second Interveners**

Martin Chamberlain QC and **Zahra Al-Rikabi** (instructed by **Harpreet K Paul** of **The Redress Trust**) for the **Third, Fourth, Fifth and Sixth Interveners**

Hearing dates : 21st, 22nd & 23rd July 2014

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Approved Judgment

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THE MASTER OF THE ROLLS:

I. INTRODUCTION

1. This is the judgment of the court to which all its members have contributed but which has been drafted principally by Lloyd Jones L.J.

The proceedings

2. In these proceedings the appellants seek a declaration of illegality and damages arising from what they contend was the participation of the respondents in their unlawful abduction, kidnapping and removal to Libya in March 2004. The claim includes allegations that they were unlawfully detained and/or mistreated in China, Malaysia, Thailand and Libya, and on board a US registered aircraft. It is alleged that their detention and mistreatment was carried out by agents of China, Malaysia, Thailand, Libya and the United States of America. The claim pleads the following causes of action: false imprisonment, trespass to the person, conspiracy to injure, conspiracy to use unlawful means, negligence and misfeasance in public office.

3. The first appellant, Mr. Belhaj, is a Libyan citizen who is also known as Abu Abdallah Assadaq and Abdullah Sadeq. The second appellant, Mrs. Boudchar, is a Moroccan citizen and is married to Mr. Belhaj. The first respondent was the Secretary of State for Foreign and Commonwealth Affairs from 8 June 2001 to 5 May 2006. As such, he was the Minister responsible for the Secret Intelligence Service. The appellants allege that the second respondent, Sir Mark Allen, was at all material times the Director of Counter-Terrorism of the Secret Intelligence Service, the third respondent. (His status has not been confirmed or denied.) The fourth respondent is the Security Service. The fifth respondent is the Attorney General who is joined pursuant to section 17(3) of the Crown Proceedings Act 1947. The appellants maintain that the sixth respondent, the Foreign and Commonwealth Office, and the seventh respondent, the Home Office, are the appropriate defendants in civil proceedings relating to the acts of officials and servants or agents of those Departments of State.

4. In October 2013 the matter came before Simon J. in the Queen's Bench Division for the determination of two preliminary issues:

   (1) Should the claims set out in the Particulars of Claim (with the exception of certain claims in negligence) be dismissed under CPR 3.1.(2) (l) on the basis that the court lacks jurisdiction and/or that the claims are non-justiciable?
   (2) Insofar as the claims are not dismissed, what are the applicable laws for determining the appellants' causes of action?

5. On the first issue the judge dismissed the plea of state immunity but accepted, with hesitation, that the act of state doctrine operated as a bar to the claims. Accordingly he concluded that the claims, with the exception of certain claims in negligence, should be struck out. On the second issue he concluded that without prejudice to

subsequent reliance on section 14 of the Private International Law (Miscellaneous Provisions) Act 1995 ("the 1995 Act"), the appellants' causes of action were governed by the law of the place where the alleged conduct took place.

6. The appellants now appeal to this court against the rulings on act of state and applicable law. The respondents seek to uphold the order below on the additional ground of state immunity, as appears from the respondents' notice.

The factual assertions forming the basis of the claim.

7. It must be emphasised that the hearings below and on this appeal have been conducted on the basis of the pleadings lodged by the parties. As matters stand these are no more than allegations.

The appellants' pleaded case.

8. In the 1990s Mr. Belhaj was involved in a Libyan group opposed to Colonel Gaddafi and in 1998 he was forced to flee to Afghanistan. In 2003 he moved to China to evade detection by the Libyan intelligence agencies. In about June 2003 Mr. Belhaj married Mrs. Boudchar, who subsequently moved to China to live with him. In early 2004 they became concerned that they were no longer safe in China and decided to seek asylum in the United Kingdom. In February 2004, at which time Mrs. Boudchar was approximately four months pregnant, they tried to take a commercial flight from Beijing to London. They were detained at Beijing airport by Chinese border authorities for two days before being deported to Kuala Lumpur. On arrival in Malaysia they were taken by Malaysian officials to the Sepang Immigration Detention Centre where they were detained for approximately two weeks.

9. It is alleged that the respondents became aware that the appellants were being detained in Malaysia. On 1 March 2004 the Secret Intelligence Service informed the Libyan intelligence services where the appellants were being held. On 4 March 2004 the US Government became aware of the appellants' detention in Malaysia and a plan was then formulated to abduct the appellants and transfer them to Libyan custody without any form of judicial process. On 4 March 2004 US officials sent two faxes to the Libyan authorities. The first stated that US authorities were working with the Malaysian Government to effect the extradition of Mr. Belhaj from Malaysia and to arrange his transfer to US custody. It stated that once they had Mr. Belhaj in custody "we will be very happy to service your debriefing requirements and we will share the information with you". The second fax indicated that US officials were committed to rendering Mr. Belhaj to Libyan custody. It is alleged that on the 6 March the US sent two further faxes to the Libyan authorities. The first was entitled "Planning for the Capture Rendition of [Mr. Belhaj]". It explained that the Malaysian Government had informed the US authorities that they were putting the appellants on a commercial flight from Kuala Lumpur to London via Bangkok on the evening of 7 March 2004. It stated that the US authorities were planning to arrange to "take control" of the appellants in Bangkok and place them on "our aircraft for a flight to your country".

10. In response to the appellants' repeated requests that they be allowed to travel to the United Kingdom they were told by the Malaysian authorities that they could travel to the United Kingdom only via Bangkok. On the evening of 7 March 2004 they

boarded a commercial flight from Kuala Lumpur bound for London via Bangkok. Upon arrival at Bangkok they were removed from the plane by Thai officials and separated. Mrs. Boudchar alleges that she was taken to a van containing US agents who pulled her into the van, forced her onto a bench, blindfolded and bound her. Later she was forced out of the van into a building where she was placed in a cell where she was bound to two hooks. She alleges ill treatment during her detention. After a period of time she was hooded and bound in a painful manner and taped tightly to a stretcher. She was driven to a nearby building where she was released from the stretcher but her eyes and ears remained covered. She was punched in the belly. She was then injected with something which caused her to feel very weak. She was again taped onto a stretcher and driven to an aircraft.

11. Mr. Belhaj alleges that on arrival in Bangkok he was taken by two Thai officials to a van on the airport runway which contained US agents. They pulled him into the van and strapped him onto a stretcher, shackled and hooded him. He was taken in the van to a building and placed in a cell where he was chained to two hooks on the wall. Whilst still hooded he was repeatedly slammed into the wall. He was interrogated and subjected to loud music blasts. He was prevented from sleeping. He was beaten on arrival, when moved from one cell to another and before leaving the building. He was intermittently interrogated by two American men. After about a day he was injected with something which caused him to feel sleepy and confused. He was handcuffed, shackled and hooded and strapped onto a stretcher in a position which was extremely painful.

12. It is alleged that at sometime between 7 and 9 March 2004 Mr. Belhaj and Mrs. Boudchar were carried on stretchers onto an aircraft. They both allege further ill treatment during the flight. Shortly before landing in Tripoli Mr. Belhaj alleges that he was beaten again. Mrs. Boudchar was concerned that as a result of the ill treatment she suffered she had lost her baby. They were separated and driven to Tajoura Prison where they were placed in cells.

13. It is alleged that on 18 March 2004 Sir Mark Allen sent a letter to Mr. Mousa Kousa, the Head of the Libyan External Security Organisation, congratulating him on the successful rendition of Mr. Belhaj. The letter states:

> "Most importantly, I congratulate you on the safe arrival of [Mr. Belhaj]. This was the least we could do for you and for Libya to demonstrate the remarkable relationship we have built up over recent years. I am so glad…[Mr. Belhaj's] information on the situation in this Country is of urgent importance to us. Amusingly, we got a request from the Americans to channel requests for information from [Mr. Belhaj] through the Americans. I have no intention of doing any such thing. The intelligence about [Mr. Belhaj] was British. I know I did not pay for the air cargo. But I feel I have the right to deal with you direct on this and am very grateful to you for the help you are giving us."

14. Mrs. Boudchar was detained in Tajoura Prison where she alleges further ill-treatment. She was released from prison on 21 June 2004 and gave birth to her son on 14 July 2004.

15. It is alleged that on his arrival at Tajoura Prison Mr. Belhaj was met by Mr. Kousa. Mr. Belhaj alleges that after approximately four months in Tajoura Prison his treatment by the Libyans became worse. He was kept in isolation without any natural light. He was subjected to intensive interrogations lasting for several days at a time. He was deprived of sleep by being chained by his wrist to a window in the interrogation room. He was beaten by guards, hung from walls and kept in solitary confinement, including being denied family visits, for much of 2005 and 2006.

16. Mr. Belhaj alleges that whilst detained in Tajoura Prison he was interrogated by British Intelligence Officers on at least two occasions. Mr. Belhaj alleges that he gestured to the British agents that he was being beaten and hung by his arms and showed them his scarred wrists. On another occasion, when he refused to sign a statement in relation to whether a group of Libyans in the United Kingdom had sent money to an armed group in Libya, he was told by a Libyan interpreter that the British team was in Libya waiting for this information and he was threatened with torture by being placed in a mechanical box with an adjustable ceiling that would restrict his movement. He signed the papers. There are further allegations of complicity by agents of the Security Service in interrogations in March and October 2004 and in February 2005.

17. After about three or four years in Tajoura Prison Mr. Belhaj was brought into a room which he was told was a court. Thirteen charges against him were read out. Mr. Belhaj attempted to defend himself against the charges. His defence lawyer simply repeated what Mr. Belhaj had said. Mr. Belhaj was then returned to his cell, the whole process having taken around fifteen minutes. Mr. Belhaj was later transferred to Abu Salim Prison where he was told that he had been found guilty and sentenced to death. At Abu Salim Prison he was kept in total isolation for a year. Conditions were insanitary. He was subjected to beating at the whim of the guards and medical treatment was non-existent. He was eventually released on 23 March 2010.

<u>The respondents' pleaded cases.</u>

18. The first and second respondents have lodged defences denying that they acted unlawfully and stating that by reason of the operation of the Official Secrets Act 1989, they are unable to advance any positive case in response to the substantive allegations made against them. The third to seventh respondents have lodged a defence in which they deny that they acted unlawfully and state that they are unable to advance any positive case in response to the substantive allegations against them. They further state that it is the position of Her Majesty's Government that it would be damaging to the public interest to plead to these paragraphs. Accordingly those paragraphs are neither confirmed nor denied.

19. All of the repondents deny that the claim is justiciable in the English courts. Alternatively they maintain that if the claim is justiciable in the English courts the applicable laws are the laws of the places where the alleged events constituting the torts occurred.

The legal basis of the claim

20. The Particulars of Claim state that the appellants seek declarations of illegality and damages arising out of the respondents' participation in the unlawful abduction, detention and rendition of the appellants to Tripoli, Libya in March 2004 and the respondents' subsequent acts and omissions whilst the appellants were unlawfully detained in Libya. In the Particulars of Claim the appellants define "rendition" as "covert unlawful abduction organised and carried out by State agents, across international borders, for the purpose of unlawful detention, interrogation and/or torture".

21. The letter of 18 March 2004 allegedly from Sir Mark Allen to Mousa Kousa is relied on as showing that:

> "Sir Mark Allen and the UK Security and Intelligence Services were co-conspirators in the unlawful rendition of the appellants. In particular, they provided the intelligence that enabled the rendition. The defendants were fully aware of the operation, supported it and enabled it to take place."

It is further alleged that pursuant to a policy of information sharing and co-operation leading to unlawful rendition, the respondents negotiated, arranged, facilitated, aided and abetted the appellants' rendition to Libya. It is alleged that Sir Mark Allen facilitated the appellants' rendition and that Mr. Straw was aware of and authorised the operation and/or took no steps to prevent the operation.

22. It is alleged that the respondents knew that the US Government operated a covert rendition programme and a network of "black sites" at which detainees were held incommunicado and tortured. It is further alleged that they knew that if the appellants were abducted as part of the US rendition programme there was a real risk that they would be held incommunicado and tortured.

23. The pleaded causes of action are as follows:

(1) False imprisonment. It is alleged that the respondents are jointly liable for the detention of the appellants which they procured by common design with the Libyan and US authorities. The allegation is based primarily on the supply of intelligence. As the judge pointed out, it is not apparent whether this part of the claim covers what is alleged to have occurred in Beijing and Malaysia.

(2) Conspiracy to injure and trespass to the person and conspiracy to use unlawful means. Here it is alleged that the respondents by common design arranged, assisted and encouraged the unlawful rendition of the appellants to Libya and their extra-judicial detention there and generally acted as co-conspirators. It is further alleged that the respondents conspired with Libya and the United States to arrange, negotiate and facilitate the illegal rendition of the appellants. It is further alleged that the respondents conspired in, assisted and acquiesced in torture, inhuman and degrading treatment, batteries and assaults inflicted upon the appellants by the US and Libyan authorities. In particular it is said that the

respondents facilitated and encouraged the rendition of the appellants to Libya, shared intelligence with the Libyan and American authorities in relation to the appellants and their associates, sought intelligence obtained from the appellants, including sending lists of questions, and interrogated Mr. Belhaj. It is said that the respondents took these actions knowing that the appellants were being unlawfully detained, were at real risk of being subjected to torture and incommunicado detention by the Libyan Government and the US Government and at real risk of being subjected to a flagrantly unfair trial and death sentence. It is also alleged that the provision of information about the appellants and the requests for information caused, prolonged and intensified their torture and mistreatment and their unlawful detention.

(3) Misfeasance in public office. It is alleged that the assistance and acquiesence of the respondents in the unlawful rendition of the appellants, their provision of and requests for information and their interrogation of Mr. Belhaj constituted misfeasance in public office in circumstances when the respondents knew of or were recklessly indifferent to the illegality of the extra-judicial rendition of the appellants to Libya, their detention in a US run "black site" in Bangkok and the illegality of their detention in Libya where they would be held without the protection of the law and would be tortured, mistreated and risked being sentenced to death and executed following a flagrantly unfair trial.

(4) Negligence. The appellants make a number of allegations of negligence. The only one which is the subject of the application and the present appeal is the claim that the respondents owed to the appellants a duty not to expose them to a risk of extra-judicial rendition, detention or mistreatment or to a real risk of torture or the death penalty. It is said that such a duty arose from the decision to participate in the rendition operation.

24. The appellants seek a declaration that the acts and omissions of the respondents particularised in the Particulars of Claim were unlawful. They also seek damages, including aggravated and exemplary damages.

The judgment of Simon J.

25. In his detailed and careful judgment, Simon J. held, with regard to state immunity, that the claim does not implead China, Malaysia, Thailand, the United States or Libya or their servants or agents. He considered that their rights would not be "obviously affected" and, in particular, the states concerned would not be put in the position of having to waive their right to immunity or have a judgment in default entered against them, because there could be no judgment in default which could affect them, other than tangentially. Furthermore, he considered that immunity does not apply merely because the court may be invited to consider the actions of a foreign state or its agents.

26. However, the judge upheld the plea of act of state. He stated that there was clear evidence that the determination of the claim had the potential to jeopardise this country's international relations and national security interests. Apart from the claim in negligence, the causes of action depend upon allegations that agents or officials of

foreign states acted tortiously. In relation to the acts alleged to have been carried out by officials of China, Malaysia, Thailand and Libya in those countries, the judge concluded that the act of state doctrine applied and that such claims were non-justiciable. The claims called into question the activity of a foreign state on its own territory, without reference to any "judicial or manageable" or "clear and identifiable" standards by which such acts may be judged and related to the legal validity of those acts within the states' own territory. The judge considered that these difficulties did not arise, or did not arise as starkly, in relation to the claims based on what is alleged to have occurred at the "black site" in Thailand and subsequently in transit to Libya. The acts did not take place in the sovereign territory of the United States and the public policy exception potentially applied "where there is a grave infringement of human rights" or "serious breach of …inviolable human rights". In addition the judge doubted whether a validity issue arose here. However, he concluded, with hesitation, that the respondents were correct in their submission that the case pleaded against them depended on the court having to decide that the conduct of US officials acting outside the United States was unlawful, in circumstances where there are no clear or incontrovertible standards for doing so and where there is incontestable evidence that such an enquiry would be damaging to the national interest. He added:

> "My hesitation arises from a residual concern that (on the basis of the Particulars of Claim) what appears to be a potentially well-founded claim that the UK authorities were directly implicated in the extraordinary rendition of the Claimants, will not be determined in any domestic court; and that Parliamentary oversight and criminal investigations are not adequate substitutes for access to, and a decision by, the Court. Although the act of state doctrine is well-established, its potential effect is to preclude the right to a remedy against the potential misuse of executive power and in respect of breaches of fundamental rights, and on a basis which defies precise definition. It is a doctrine with a long shadow but whose structure is uncertain." (at [151])

27. So far as applicable law is concerned, the judge held that, without prejudice to subsequent reliance on section 14 of the 1995 Act, the appellants' causes of action, insofar as they were not dismissed, were governed by the law of the place where the alleged conduct took place. Accordingly, the applicable law for determining the appellants' causes of action was the law of the place in which the unlawful detention was alleged to have occurred or the injury or damage was alleged to have been sustained. Accordingly, to take one example, he considered that the law of China should apply to any cause of action based on alleged detention or mistreatment in or transfer from China.

The grounds of appeal and respondents' notice.

Act of state.

28. By their notice of appeal dated 24 February 2014, the appellants submit that the judge erred in law in that the act of state doctrine does not make the claims non-justiciable in the circumstances of the present case. They contend that:

(1) The claim concerns the acts and omissions of British officials, acting as such.
(2) There are proper judicial and manageable standards by which to try the claim, namely ordinary claims for common law torts brought as of right to protect individuals from unlawful and oppressive conduct.
(3) Well-recognised exceptions to the doctrine apply, namely:
    (a) Public policy;
    (b) Breach of fundamental rights;
    (c) The territorial exception;
    (d) The *Kirkpatrick* exception.

The appellants further submit that the judgment below places the United Kingdom in breach of its international obligations under Article 14 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 ("UN Convention against Torture") and is inconsistent with the modern comparative jurisprudence on similar facts.

Applicable law

29. The appellants appeal also on the ground that the judge erred in law in that:
(1) The respondents have not sought to plead or identify any specific relevant foreign law, nor identify how such law might differ (if at all) from English law. Before attempting to determine the applicable law, it is for the respondents to seek to identify the provisions of the foreign law that they seek to rely on in their defence.
(2) The judge wrongly concluded that the onus lay on the appellants to plead foreign law in circumstances in which they relied upon the principle that this burden rested on a party who wished to demonstrate that the material content of foreign law materially departed from English law.
(3) It is inappropriate to attempt to determine the applicable law without first determining the relevant facts. The judge prematurely concluded that the applicable law issue under section 12 of the 1995 Act could be fairly or properly determined without the service of any meaningful defence and/or disclosure.

State immunity

30. By their respondents' notice dated 24 March 2014 the respondents seek to uphold the order of the judge on the additional ground that, contrary to the judge's conclusion, the claims which he struck out are also barred by operation of the doctrine of state immunity.

Summary of conclusions on this appeal

31. For the reasons set out below, we have come to the following principal conclusions on this appeal:

(1) State immunity does not bar these proceedings.
(2) Although the act of state doctrine is engaged by these proceedings, they fall within a limitation to the doctrine on grounds of public policy applicable in

cases of violation of international law and fundamental human rights. Furthermore, the alleged conduct of officials of the United States, which is alleged to have taken place outside the United States, falls within a further limitation on grounds of extra-territoriality.

(3) We do not consider that the determination on applicable law was premature and we agree with the judge that, without prejudice to subsequent reliance on section 14 of the 1995 Act, the appellants' causes of action are governed by the law of the place where the alleged conduct took place.

II. STATE IMMUNITY

32. Although the issue of state immunity arises only under the respondents' notice, it is appropriate to address it before considering the wider principle of act of state. This was also the order in which the judge addressed the issues.

Direct and indirect impleader

33. Prior to the enactment of the State Immunity Act 1978, state immunity in this jurisdiction was governed by the common law. In *Compania Naviera Vascongado v. SS Cristina (The Cristina)* [1938] AC 485 Lord Atkin described "two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute":

> "The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.
> The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country, it is in my opinion well settled that it applies to both." (at p. 490)

During the 1970s some inroads were made into the absolute character of these rules with a growing judicial acceptance that commercial transactions should not attract immunity (*The Philippine Admiral* [1977] AC 373; *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] QB 529).

34. The modern law on state immunity is to be found in the State Immunity Act 1978 which was introduced, among other reasons, in order to permit the United Kingdom to become a party to the European Convention on State Immunity. It establishes a general rule of immunity subject to a number of detailed exceptions. Section 1 provides:

> "1. General immunity from jurisdiction.

(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this part of this Act.

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question."

Section 5 provides:

"5. Personal injuries and damage to property.

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

(a) death or personal injury; or

(b) damage to or loss of tangible property,

caused by an act or omission in the United Kingdom."

35. At common law immunity could be pleaded when a state was directly impleaded i.e. when it was named as a party in proceedings. In addition, in an important extension of the rule, immunity could be pleaded by a state if it was indirectly impleaded in the sense that the proceedings were brought in relation to property in its ownership, possession or control (*The Parlement Belge* (1879) 5 PD 197; *The Cristina*). Similarly, under the State Immunity Act a state may plead immunity, subject to the statutory exceptions, if directly or indirectly impleaded in the manner described above. The principle of indirect impleader in cases where the proceedings relate to the property of a state is expressly reflected in section 6(4).

36. A further extension of the principle which does not appear in the State Immunity Act is, nevertheless, well established in the authorities. Where suit is brought against the servants or agents of a foreign state, that state is entitled to claim immunity for its servants or agents as it could if sued itself (*Twycross v. Dreyfus* (1877) 5 Ch D 605; *Zoernsch v. Waldock* [1964] 1 WLR 675; *Propend Finance Pty Ltd. v. Sing* (1997) 111 ILR 611; *R v. Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147, 269, 285-6; *Holland v. Lampen Wolfe* [2000] 1 WLR 1573, 1583; *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270). In the last of these cases Lord Bingham observed:

> "… A state can only act through servants and agents; their official acts are the acts of the state; and the state's immunity in respect of them is fundamental to the principle of state immunity. …" (at [30])
>
> "… It is, however, clear that a civil action against individual torturers based on acts of official torture does indirectly implead the state since their acts are attributable to it. Were these claims against the individual defendants to proceed and be upheld, the interests of the Kingdom would be obviously affected, even though it is not a named party." (at [31])

A similar approach has been taken by courts in Canada, the United States, Ireland and Germany. (See the authorities cited by Lord Bingham in *Jones v. Saudi Arabia* at [10].) Accordingly, it was common ground before us that China, Malaysia, Thailand, the United States and Libya and their servants, agents, officials or functionaries would

all be entitled to plead state immunity if sued in this jurisdiction in respect of the matters alleged in this case. None of the exceptions set out in Part 1 of the 1978 Act applies to their acts, all of which are alleged to have taken place outside the United Kingdom.

The respondents' case on their notice to affirm

37. Mr. Rory Phillips QC on behalf of the respondents seeks to take the argument one step further. He submits that state immunity may also be invoked where, as here, the claim necessarily requires findings of illegality in respect of acts on the part of officials of foreign states for which they could claim immunity if they had been sued directly. He submits that the principle of state immunity prevents the appellants from obtaining via the back door declarations of illegality which they could not obtain if either the states concerned or the officials themselves were directly impleaded in the action. On this basis he submits that the claim indirectly impleads the states concerned because it affects their interests and that, accordingly, state immunity applies to bar the claim.

38. No support for this submission can be found in the structure of the 1978 Act itself. In particular, contrary to the submission of the respondents, section 1(2) has no bearing on the issue of what constitutes impleader. Rather, it simply establishes that in circumstances in which a state is immune from the jurisdiction a court must give effect to state immunity, even if the state concerned does not appear in the proceedings.

39. The respondents' submission would involve an unprecedented extension of state immunity. Mr. Phillips was unable to refer us to any decided case in any jurisdiction where state immunity has been given such a wide application. The respondents' submission is, in fact, contradicted by *Buttes Gas and Oil Co. v. Hammer (Nos. 2 and 3)* [1982] AC 888. There, notwithstanding his conclusion that the subject matter was non-justiciable, Lord Wilberforce expressly accepted a submission on behalf of Occidental that the doctrine of state immunity had no application to that case:

> "The doctrine of sovereign immunity does not in my opinion apply since there is no attack, direct or indirect, upon any property of any of the relevant sovereigns, nor are any of them impleaded directly or indirectly." (at p. 926 C-D)

Similarly, in *Commissioner of Police for the Metropolis and Others, ex parte Pinochet ("Pinochet No. 3")* [1999] UKHL 17; [2000] 1 AC 147 Lord Phillips of Worth Matravers described the relationship of state immunity and act of state as follows:

> "The second explanation for the immunity [ratione materiae] is the principle that it is contrary to international law for one state to adjudicate upon the internal affairs of another state. Where a state or a state official is impleaded, this principle applies as part of the explanation for immunity. Where a state is not directly or indirectly impleaded in the litigation, so that no issue of state

> immunity as such arises, the English and American courts have nonetheless, as a matter of judicial restraint, held themselves not competent to entertain litigation that turns on the validity of the public acts of a foreign state, applying what has become known as the act of state doctrine." (at p. 286 B-C)

In addition, Mr. Martin Chamberlain QC and Ms Al-Rikabi in their written submissions on behalf of the interveners the International Commission of Jurists, Justice, Amnesty International and Redress, have drawn to our attention similar statements in the courts of British Columbia (*United Mexican States v. British Columbia (Labour Relations Board)* 2014 BCSC 54), Australia *(PT Garuda Indonesia Ltd. v. Australian Competition and Consumer Commission* [2012] HCA 33 at [17]) and the United States (*Patrickson v. Dole Food Company Inc.* 251 F.3d 795). Proceedings will not be barred on grounds of state immunity simply because they will require the court to rule on the legality of the conduct of a foreign state.

40. Mr. Phillips places great reliance on two passages in the speech of Lord Bingham in *Jones v. Saudi Arabia* [2007] 1 AC 270. First he draws attention to the statement that:

> "A state may claim immunity for any act for which it is, in international law, responsible, save where an established exception applies." (at [12])

Mr. Phillips submits that the conduct alleged in the present case would give rise to state responsibility in international law and that, accordingly, there is an entitlement to immunity. However, this statement must be read in context. Lord Bingham was considering the circumstances in which a state may claim immunity in respect of the acts of its servants or agents when the servant or agent is sued in the courts of another state. In both of the appeals before the House of Lords public officials were named as defendants. Lord Bingham observed that international law does not require, as a condition of a state's entitlement to claim immunity for the conduct of its servant or agent, that he should have been acting in accordance with his instructions or authority. Then, in the sentence relied on, Lord Bingham went on to make the point that it would be sufficient to enable the state to plead immunity that the conduct in question was conduct for which the state was responsible in international law. The sentence relied on, when considered in context, does not support the proposition that a state may plead immunity in respect of the conduct of its agents for which it is responsible in international law, even if the state or its agents are not parties to the proceedings. The second passage he relies on is the statement of Lord Bingham at [31], cited above, that, were the claims against the individual defendants to proceed and be upheld, the interests of the Kingdom would be obviously affected even though it is not a named party. However, that observation is expressly limited to proceedings in which the agents of the state are sued, a situation which Lord Bingham described as one of indirect impleader.

41. Similarly, the passage in the judgment of Cranston J. in *R (Al-Haq) v. Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin) on which the respondents rely does not support their case. There the claimants alleged that Israel had committed breaches of human rights law and international humanitarian law in Gaza in 2008 and sought, inter alia, declarations to that effect and that the

United Kingdom was in breach of its international obligations by continuing to recognise as lawful situations created by Israel's actions. Not surprisingly, permission to apply for judicial review was refused by the Divisional Court (Pill L.J. and Cranston J.) on grounds of non-justiciability. In his judgment Cranston J. observed:

> "As originally conceived Israel was not a party to the action, although the claimant has subsequently said that it would be content if Israel were to be joined as an interested party. Parliament has conferred on Israel and on other states sovereign immunity through section 1 of the State Immunity Act 1978. Were the matter to proceed, Israel would have to waive that sovereign immunity, or have issues determined it its absence. It is also not without significance that the International Court of Justice would have no jurisdiction to resolve a dispute concerning Israel's actions in Gaza without Israel's consent." (at [52])

The judge was explaining why the matter was unsuitable for determination in this jurisdiction whether or not Israel was a party. There is nothing in this passage to support the view that, in the absence of Israel being joined, it would be entitled to succeed on a plea of state immunity.

42. The respondents rely, by way of analogy, on the decision of the International Court of Justice in *Case Concerning East Timor (Portugal v. Australia)* ICJ Rep 1995 p. 90. There Australia argued that the decision sought from the court by Portugal would inevitably require the court to rule on the lawfulness of the conduct of a third state, Indonesia, in the absence of that state's consent. Upholding the plea, the court explained that it was not necessarily prevented from adjudicating when the judgment it was asked to give might affect the legal interests of a state which was not a party to the case (*Certain Phosphate Lands in Nauru (Nauru v. Australia)*). However, it considered that it could not in that case exercise jurisdiction because in order to decide the claims of Portugal, it would have to rule as a prerequisite on the lawfulness of Indonesia's conduct in the absence of that state's consent. Referring to *Monetary Gold Removed from Rome in 1943*, ICJ Rep 1954, p. 32, it concluded that Indonesia's rights and obligations would constitute the very subject-matter of the judgment and that this would run directly counter to the "well established principle of international law embodied in the Court's Statute, namely that the Court can only exercise jurisdiction over a State with its consent" (at [34], [35]). However, this line of authority in the ICJ casts no light on the scope of state immunity. It simply reflects the fact that the jurisdiction of that court can only be exercised over a state with its consent.

The UN Convention on Jurisdictional Immunities of States and their Property

43. The respondents are able to derive some support for their submission from the provisions of the UN Convention on Jurisdictional Immunities of States and their Property, 16 December 2004. Article 5 provides:

> "State immunity.

A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention."

Article 6 provides:

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

The respondents draw attention to the final words of Article 6(2)(b) and submit that the present proceedings affect the rights, interests and activities of the foreign states involved in a way which requires the court to decline jurisdiction on grounds of state immunity.

44. The Convention was based on preparatory work carried out by the International Law Commission and the ILC Commentary on its Draft Articles is instructive as to the meaning of Article 6(2)(b). Paragraph 13 includes the following statement:

"Subparagraph (b) applies to situations in which the State is not named as a party to the proceeding, but is indirectly involved, as for instance in the case of an action in rem concerning State property, such as a warship. The wording adopted on first reading has been simplified on second reading. First, the clause "so long as the proceeding in effect seeks to compel that …State … to submit to the jurisdiction of the court" was deleted as it was, in the case under consideration, meaningless. The words "to bear the consequences of a determination by the court which may affect", in the last part of the sentence was also deleted (sic), because it appeared to create too loose a relationship between the procedure and the consequences to which it gave rise for the State in question and could thus result in unduly broad interpretations of the paragraph. To make the text more precise in that regard, those words have therefore been replaced by the words "to affect". …"

45. Academic writers have commented on the potentially open-ended extent of the provision and have suggested that the final words of Article 6(2)(b) have to be given a limited reading. In their commentary on the Convention O'Keefe, Tams and Tzanakapoulos state:

> "… [A]lthough the verb "to affect" was introduced in order to narrow the scope of Article 6(2)(b), it is not a verb denoting clear limits. Limits nonetheless are necessary if the provision is to preserve a rational scheme of jurisdiction.
>
> …
>
> The uncertainty, perhaps, is addressed by saying that the effect with which Article 6(2)(b) is concerned is a specifically legal effect, such as the imposition of a lien or a declaration of title, as distinguished from a social, economic or political effect. Interpreted and applied this way, the provision would afford a meaningful scope of protection to States while also recognizing that immunity from jurisdiction cannot serve as a means by which a foreign State can bar any proceeding the prospective outcome of which may not be to its liking." (O'Keefe, Tams and Tzanakapoulos, The United Nations Convention on Jurisdictional Immunities of States and their Property: A Commentary (2013) at pp. 109, 112.)

Similarly, Fox and Webb observe:

> "The proceedings to which the bar of immunity is extended by Article 6(2)(b) is very wide covering claims relating to "interests" as well as "rights" of the State. The ILC Commentary to Article 13, paragraph 4 explains that "the combination of "rights and interests" is used as a term to indicate the totality of whatever right or interest a State may have under any legal system". "Interests" should therefore be limited to a claim for which there is some legal foundation and not merely to some political or moral concern of the State in the proceedings." (Fox and Webb, The Law of State Immunity, 3rd Ed., (2013), 307)

It may perhaps be questioned to what extent assistance may be derived from Article 13(4), which is concerned with the words "any right or interest of the State" in the context of immunity in a proceeding relating to the ownership, possession or use of property, whereas Article 6(2)(b) is not limited to cases concerning state property. Nevertheless, these passages support the view that it is necessary to confine the reference in Article 6(2)(b) to the "interests" of states to legal interests as opposed to interests in some more general sense.

46. It is significant that "State" is defined in Article 2(1)(b)(iv) of the Convention as including "representatives of the State acting in that capacity". Accordingly, the purpose of Article 6(2)(b) cannot be to extend immunity to proceedings to which the representative of the state is a party. Moreover, Mr. Phillips points to the observation of Lord Bingham in *Jones v. Saudi Arabia* (at [31]), considered above, to the effect that if the claims against the individual defendants were to proceed and be upheld "the interests of the Kingdom would be obviously affected". It is highly relevant, Mr. Phillips suggests, that Lord Bingham employed the very words used in Article 6(2)(b). However, Lord Bingham was addressing a situation in which representatives of the state were parties to the proceedings. It does not follow that the interests of the state would necessarily be affected in the same way or at all where that is not the case.

47. In any event, even if the respondents' submission were to hold good under the Convention of 2004, it does not represent the position in the law in force in this jurisdiction. In *AIG Capital Partners Inc. v. Republic of Kazakhstan* [2006] 1 WLR 1420 Aikens J. observed of the Convention, in a different context, that "its existence and adoption by the UN after the long and careful work of the International Law Commission and the UN ad hoc committee, powerfully demonstrates international thinking on the point" (at [80]), an observation which was adopted by Lord Bingham in *Jones v. Saudi Arabia* (at [8]). Clearly the Convention and the work of the International Law Commission deserve great respect. However, in the present instance the materials do not support any international consensus supportive of the respondents' contention. Furthermore, the Convention is not in force. It requires 30 ratifications (or the equivalent) before it can come into force. It has been signed by 28 states, including the United Kingdom, but has been ratified (or the equivalent) so far by only 16 states, not including the United Kingdom. Moreover, in view of this limited participation, even if Article 6(2)(b) does have the effect for which the Respondents contend, it cannot be considered to be reflective of a rule of customary international law.

State immunity and act of state

48. The principles of state immunity and act of state as applied in this jurisdiction are clearly linked and share common rationales. They may both be engaged in a single factual situation. Nevertheless, they operate in different ways, state immunity by reference to considerations of direct or indirect impleader and act of state by reference to the subject matter of the proceedings. Act of state reaches beyond cases in which states are directly or indirectly impleaded, in the sense described above, and operates by reference to the subject matter of the claim rather than the identity of the parties. This is inevitably reflected in the different detailed rules which have developed in relation to the scope and operation of the two principles. In this jurisdiction exceptions to immunity are laid down in the 1978 Act. Limitations on the act of state doctrine, which are not identical, have now become established at common law. (See, in particular, *Yukos Capital Sarl v. OJSC Rosneft Oil Co (No.2)* [2014] QB 458.) The extension of state immunity for which the respondents contend obscures these differences. Such an extension is also unnecessary. Any wider exemption from jurisdiction extending beyond state immunity in cases of direct or indirect impleader is addressed in this jurisdiction by the act of state doctrine and principles of non-justiciability. The extension of state immunity for which the respondents contend would leave no room for the application of those principles.

49. If there were substance in the respondents' submissions on state immunity the court would, by virtue of section 1(2) of the 1978 Act, be required to take the point of its own motion, notwithstanding the facts that China, Malaysia, Thailand, the United States and Libya have made no claim to state immunity which has been communicated to the court and that the respondents have not suggested that they are authorised in any way to make these representations on behalf of those states. However, the respondents' submission lacks any foundation in law. The substance of this appeal lies in the domain of the act of state doctrine.

50. We conclude therefore that the concept of indirect impleader is not as broad as is submitted by the respondents and that it is limited to the categories of case identified at paragraphs 35 and 36 above. In particular, we reject the suggestion that the appropriate test of indirect impleader is whether the rights of the state concerned would be obviously affected. We should also record that we do not agree with the judge's view, expressed at paragraphs 65 and 66 of his judgment, that indirect impleader depends on the foreign state being put in the position of having to waive its right to immunity or have a judgment in default entered against it. Nevertheless, for the reasons set out above we agree with the judge's conclusion that state immunity does not bar these proceedings.

III. ACT OF STATE / NON-JUSTICIABILITY

Act of state in the law of England and Wales

51. The crucial issues in this case lie in an area beyond immunity but where, nevertheless, considerations concerning foreign states and their agents are sometimes capable of preventing adjudication by municipal courts. In this jurisdiction the expression "act of state" is used in different contexts with different meanings. However, here it is used in connection with the executive and legislative acts of foreign states to describe a rule which has developed in Anglo-American jurisprudence limiting the jurisdiction of the courts to entertain an action.

52. The act of state doctrine has its origins in this jurisdiction (*Blad's Case* (1673) 3 Swan. 603 (P.C.); *Blad v. Bamfield* (1674) 3 Swan. 604; *Duke of Brunswick v. King of Hanover* (1844) 6 Beav. 1; (1848) 2 H.L.C. 1). In the last of these cases it was held that the court could not enquire into a sovereign act of a foreign state performed within its own territory. This principle was taken up by the United States Supreme Court (*Underhill v. Hernandez* 168 U.S. 250 (1897); *Oetjen v. Central Leather Co.* 246 U.S. 297 (1918); *Ricaud v. American Metal Co. Ltd.* (1918) U.S. 304), decisions which in turn influenced the Court of Appeal in this jurisdiction (*Luther v. Sagor* [1921] 3 K.B. 532; *Princess Paley Olga v. Weisz* [1929] 1 K. B. 718). However, it was not until the decision of the House of Lords in *Buttes Gas and Oil Co. v. Hammer (Nos. 2 and 3)*, that an act of state principle in this sense became firmly established here, it having been suggested that the earlier authorities in this jurisdiction were explicable on other grounds. Lord Wilberforce, in a speech much influenced by the approach of US courts in the same litigation (*Occidental Petroleum Corporation v. Buttes Gas & Oil*, 331 F. Supp. 92 (1971), affirmed 461 F.2d 1261 (1972); *Occidental of Umm al Quaywayn v. A Certain Cargo of Petroleum*, 577 F. 2d 1196 (1978)), acknowledged one version of act of state "consisting of those cases which are concerned with the applicability of foreign municipal legislation within its own territory, and with the examinability of such legislation – often, but not invariably, arising in cases of confiscation of property" (at p. 931 A-B). However, he considered that the essential question was whether

> " … there exists in English law a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states. Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle, if

> existing, not as a variety of "act of state" but one for judicial restraint or abstention." (at p. 931 G-H)

He concluded:

> "In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalised in the law of the United States of America which is effective and compelling in English courts. This principle is not one of discretion, but is inherent in the very nature of the judicial process." (at p. 932 A-B)

Later in his judgment, having analysed the inter-state issues and the issues of international law which would face the court if the claim and counterclaim were to proceed, he stated:

> "It would not be difficult to elaborate on these considerations, or to perceive other important inter-state issues and/or issues of international law which would face the court. They have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which it can be said not to have been drawn to the attention of the court by the executive) there are – to follow the Fifth Circuit Court of Appeals – no judicial or manageable standards by which to judge these issues, or to adopt another phrase … the court would be in a judicial no-man's land; the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under international law." (at p. 938 A-C)

53. The development and current status of the act of state doctrine in this jurisdiction have recently been considered by this court (Rix, Longmore and Davis L.JJ.) in *Yukos Capital Sarl v. OJSC Rosneft Oil Co.* (No. 2) [2014] QB 458. Having surveyed all of the cases on act of state in the House of Lords, Supreme Court and Privy Council since *Buttes Gas*, the court concluded:

> "In sum, it seems to us that Lord Wilberforce's principle of "non-justiciability" has, on the whole, not come through as a doctrine separate from the act of state principle itself, but rather has to a large extent subsumed it as the paradigm restatement of that principle. It would seem that, generally speaking, the doctrine is confined to acts of state within the territory of the sovereign, but in special and perhaps exceptional circumstances, such as in the *Buttes Gas* case itself, may even go beyond territorial boundaries and for that very reason give rise to issues which have to be recognised as non-justiciable. 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 in 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." (at [66])

54. In *Yukos* the court drew attention to the fact that although the doctrine is often expressed in wide terms, it has its limitations, founded in the very language of the doctrine and in its rationale. First, the act of state must, generally speaking, take place within the territory of the foreign state itself. A second limitation is that "the doctrine will not apply to foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights" (at [69]) (*Kuwait Airways Corpn v. Iraqi Airways Co. (Nos. 4 and 5)* [2002] 2 AC 883). A third limitation is that judicial acts will not be regarded as acts of state for the purposes of the act of state doctrine (*Altimo Holdings and Investment Ltd. v. Kyrgyz Mobil Tel Ltd.* [2012] 1 WLR 1804). A fourth limitation is that the doctrine does not apply where the conduct of the foreign state is of a commercial as opposed to a sovereign character (*Empresa Exportadora de Azucar v. Industria Azucarera Nacional SA (The Playa Larga)* [1983] 2 Lloyd's Rep 171; *Korea National Insurance Corpn v. Allianz Global Corporate & Specialty AG* [2008] 2 CLC 837). A fifth limitation is that the doctrine does not apply where the only issue is whether certain acts have occurred, as opposed to where the court is asked to enquire into them for the purpose of adjudicating upon their legal effectiveness (*Kirkpatrick & Co. Inc. v. Environmental Tectonics Corpn International* (1990) 493 US 400). In *Yukos* the court, emphasising that the principle is one of restraint rather than abstinence, concluded:

> "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." (at [115])

55. We gratefully adopt the court's analysis and conclusions which we take as the starting point for the discussion which follows.

The rationale of the act of state doctrine

56. Since this case was decided at first instance the Supreme Court has delivered its decision in *Shergill v. Khaira* [2014] UKSC 33; [2014] 3 WLR 1. Although that case was concerned with a dispute over property held on trust for certain religious purposes, a subject matter remote from the present case, in the course of their joint judgment Lord Neuberger of Abbotsbury PSC, Lord Sumption and Lord Hodge JJSC, (with whom Lord Mance and Lord Clarke of Stone-cum-Ebony JJSC agreed)

undertook a wide ranging survey of non-justiciability generally which includes some pertinent observations on the act of state doctrine. They stated:

> "41 There is a number of rules of English law which may result in an English court being unable to decide a disputed issue on its merits. Some of them, such as state immunity, confer immunity from jurisdiction. Some, such as the act of state doctrine, confer immunity from liability on certain persons in respect of certain acts. Some, such as the rule against the enforcement of foreign penal, revenue or public laws, or the much-criticised rule against the determination by an English court of title to foreign land (now circumscribed by statute and by the Brussels Regulation and the Lugano Convention) are probably best regarded as depending on the territorial limits of the competence of the English courts or of the competence which they will recognise in foreign states. Properly speaking, 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. Such cases generally fall into one of two categories.
>
> 42 The first category comprises cases where the issue in question is beyond the constitutional competence assigned to the courts under our conception of the separation of powers. Cases in this category are rare, and rightly so, for they may result in a denial of justice which could only exceptionally be justified either at common law or under article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The paradigm cases are the non-justiciability of certain transactions of foreign states and of proceedings in Parliament. The first is based in part on the constitutional limits of the court's competence as against that of the executive in matters directly affecting the United Kingdom's relations with foreign states. So far as it was based on the separation of powers, *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 935-937 is the leading case in this category, although the boundaries of the category of "transactions" of states which will engage the doctrine now are a good deal less clear today than they seemed to be 40 years ago. …"

Their Lordships then referred to the constitutional limits of the court's competence as against Parliament and continued:

> "43 The basis of the second category of non-justiciable cases is quite different. It comprises claims or defences which are based neither on private legal rights or obligations, nor on reviewable matters of public law. Examples include domestic disputes; transactions not intended by the participants to affect their legal relations; and issues of international law which engage no private right of the claimant or reviewable question of public law. Some issues might well be non-justiciable in this sense if the court

were asked to decide them in the abstract. But they must nevertheless be resolved if their resolution is necessary in order to decide some other issue which is in itself justiciable. The best-known examples are in the domain of public law. Thus, when the court declines to adjudicate on the international acts of foreign sovereign states or to review the exercise of the Crown's prerogative in the conduct of foreign affairs, it normally refuses on the ground that no legal right of the citizen is engaged whether in public or private law: *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin); *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin). As Cranston J put it in the latter case, at para 60, there is no "domestic foothold". But the court does adjudicate on these matters if a justiciable legitimate expectation or a Convention right depends on it*: R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76. The same would apply if a private law liability was asserted which depended on such a matter. As Lord Bingham of Cornhill observed in *R (Gentle) v Prime Minister* [2008] AC 1356, para 8, there are

> "issues which judicial tribunals have traditionally been very reluctant to entertain because they recognise their limitations as suitable bodies to resolve them. This is not to say that if the claimants have a legal right the courts cannot decide it. The defendants accept that if the claimants have a legal right it is justiciable in the courts, and they do not seek to demarcate areas into which the courts may not intrude."

57. With regard to the *Buttes Gas* litigation in the United States and in this jurisdiction, their Lordships considered that the reason why the issue was non-justiciable was that it was political. First, it trespassed on the proper province of the executive, as the organ of the state charged with the conduct of foreign relations. Secondly, there was a lack of judicial or manageable standards in that Occidental wished to obtain a judicial ruling that the settlement had been the result of an unlawful conspiracy, which would have involved assessing decisions and acts of sovereign states which had not been governed by law but by power politics. They went on to observe:

> "It is difficult to imagine that such a conclusion could have been reached in any other context than the political acts of sovereign states, for the acts of private parties, however political, are subject to law. The actors are answerable to municipal courts of law having jurisdiction over them and applying objective, external legal standards." (at [40])

58. On this appeal, Mr. Hermer QC on behalf of the appellants places this analysis at the forefront of his submissions. It is, he submits, a most coherent and cogent answer to a problem which has long troubled the courts. He submits that the rationale of the act of state doctrine is the separation of powers under the United Kingdom constitution and

submits that the courts may decline jurisdiction in a case such as the present where the claimants assert legal rights only in the rare circumstances of a lack of constitutional competence. All of the decided cases in this jurisdiction, he says, can be accommodated within this framework. Referring to the statement of Rix LJ in *Yukos* (at [115]) that the act of state doctrine is defined, like a silhouette, by its limitations, he submits that *Yukos* explains the shape of the doctrine and *Shergill* explains why it is this shape.

59. In approaching this issue we note that the rationale of the US act of state doctrine, as expounded by the US Supreme Court, has shifted on more than one occasion. The original formulation of the principle by Fuller CJ in *Underhill v. Hernandez* 168 US 250 (1897) places it firmly on the foundation of the equality and independence of sovereign states:

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

60. In *Oetjen v. Central Leather Co.* 246 US 297 (1918) the emphasis shifted somewhat to considerations of comity. Clarke J. delivering the opinion of the court stated:

> "To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations."

61. However, in *Banco Nacional de Cuba v. Sabbatino* 376 US 398 (1964) the doctrine was explained by the US Supreme Court in very different terms. Harlan J., delivering the opinion of the majority of the court, stated:

> "We do not believe that this doctrine is compelled either by the inherent nature of sovereign authority or by some principle of international law. If the transaction takes place in one jurisdiction and the forum is in another, the forum does not by dismissing an action or by applying its own law purport to divest the first jurisdiction of its territorial sovereignty; it merely declines to adjudicate or makes applicable its own law to parties or property before it. While historic notions of sovereign authority do bear upon the wisdom of employing the act of state doctrine, they do not dictate its existence.
> …
> The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that

> its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."

62. The court went on to suggest that in some situations, even though the validity of an act of state within its own territory was called into question, the policies underlying the doctrine might not justify its application and that a sort of balancing approach could be applied. This is a clear demonstration of the way in which the US act of state doctrine necessarily reflects the very different considerations arising under US constitutional arrangements. (See also, in this regard, the opinion of Rehnquist J., in which Burger C.J. and White J. concurred, in *First National City Bank v. Banco Nacional de Cuba* 406 U.S. 759 (1972).)

63. More recently, in *W.S. Kirkpatrick & Co. Inc. v. Environmental Tectonics Corporation International* 493 US 400 (1990) Scalia J., delivering the opinion of the court, drew attention to the fact that the court's description of the jurisprudential foundation for the act of state doctrine had undergone some evolution over the years (at [7]). On this occasion, referring to *Sabbatino*, emphasis was placed on the fact that "the act of state doctrine is not some vague doctrine of abstention but a "principle of decision binding on federal and state courts alike"" (*Kirkpatrick* at [10]). Scalia J. concluded:

> "The short of the matter is this: courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid."

64. In this jurisdiction there are many judicial statements of high authority which place the principle firmly on the basis of the sovereign equality of states. One of the earliest is to be found in the House of Lords in *Duke of Brunswick v. King of Hanover* (1848) 2 HLC 1 where the Lord Chancellor stated:

> "… a foreign Sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his Sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as Sovereign."

65. Despite the reference to a foreign sovereign coming into this country and the fact that the King of Hanover was directly impleaded, the decision is clearly of wider ambit and an important early authority demonstrating the existence of a principle of act of

state in English law. However, the link with state immunity is here made clear. The formulation of the principle by Fuller CJ in *Underhill v. Hernandez* contains clear echoes of this statement in *Duke of Brunswick v. King of Hanover*. Fuller CJ's formulation in turn has been repeatedly referred to with approval by courts in this jurisdiction, including *Buttes Gas* per Lord Wilberforce at p. 933, *R v. Jones (Margaret)* [2007] 1 AC 136 per Lord Bingham at [30] and this court in *Yukos* at [40]. In the last of these cases this court described the principle in terms which clearly link it to its rationale in the sovereign equality and independence of states:

> "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." (at [66]

66. The passage from the opinion of Clarke J. in *Oetjen*, cited above, explains the US doctrine in terms of international comity. This passage was referred to by Lord Wilberforce in *Buttes Gas* (at p. 933) and by this court in *R (Khan) v. Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 24; [2014] 1 WLR 872 (at [25]-[28]) and in *Yukos*, where it was acknowledged that the potential for the disruption of international relations is one of the philosophical underpinnings of all act of state doctrines (at [41], [65]). However, there is a need for caution in approaching this suggested rationale of the principle. First, comity should not be confused with a principle, sometimes suggested, to the effect that the courts will not investigate acts of a foreign state where such an investigation would embarrass the government of our own country. As Sir Wilfred Greene MR observed in another context in *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham Steamship Company Limited* [1939] 2 KB 544, fear of embarrassment of the executive is not a very attractive basis upon which to build a rule of English law. We agree and consider that this court in *Yukos* (at [65]) was right to be cautious about giving weight to this suggested principle. Secondly, in *A Limited v. B Bank* [1997] I L Pr 586 Leggatt L.J., with whom the other members of the Court of Appeal agreed, while accepting that it is in the interests of comity that the courts of one state will abstain from sitting in judgment upon the internal affairs of another, emphasised that comity is not an independent ground on which the English court can be deprived of jurisdiction which it would otherwise have to decide justiciable issues between private parties in respect of wrongs committed here (at pp. 593-4).

67. We consider therefore that the act of state doctrine, as it has developed in this jurisdiction, is founded on the principle of the sovereign equality of states and, subject to the qualifications mentioned above, the principle of international comity. While we would accept that, given its extraordinary facts, *Buttes Gas* itself may well be explained in terms of a lack of judicial competence arising from the separation of powers and the limits of the judicial function, we do not consider that the act of state doctrine is limited to such situations, nor do we understand this to be suggested by the Supreme Court in *Shergill*. In *Kuwait Airways*, for example, there was no lack of judicial competence arising from the separation of powers or, indeed, any lack of manageable standards. Nevertheless the House of Lords felt constrained to consider whether the proceedings could be brought within an exception to the act of state doctrine before it could permit the rights asserted there to be the basis of proceedings

in this jurisdiction. The same point can be made of *Yukos*. More fundamentally, there could be no exception to the act of state doctrine, for example on grounds of violations of human rights or international law, if its basis is a lack of judicial competence. Yet, the existence of such exceptions is well established.

68. For these reasons we approach this appeal on the basis of the principles stated in *Buttes Gas* and *Kuwait Airways* as helpfully explained in the light of later developments by this court in *Yukos*. In particular, the plea of act of state is not limited to cases where there is a lack of judicial competence arising from the separation of powers. A wider rule of law, as expressed most recently in *Yukos*, may result in a refusal by the English courts to permit the vindication of rights in certain situations in which the validity or legality of certain acts of foreign states and their agents are directly challenged. It is to that rule and the question of its scope that we now turn.

Is the act of state doctrine engaged in the present case? The *Kirkpatrick* limitation

69. On behalf of the appellants Mr. Hermer submits that the act of state doctrine has no application to the present case because the validity of a foreign sovereign act is not in issue. On the contrary, he submits, the only issue requiring adjudication is the factual issue of what the perpetrators actually did. Once that is established, he says, there will be no need to prove that that conduct was unlawful.

70. He relies principally on the opinion of the US Supreme Court in *Kirkpatrick*. In that case the respondent, an unsuccessful bidder for a construction contract from the Nigerian Government, sued under various federal and state statutes, alleging that the petitioners had obtained the contract by bribing Nigerian officials. The petitioners maintained that the suit was barred by the act of state doctrine. This plea succeeded before the District Court which considered that the act of state doctrine precluded judicial inquiry into the motivation of a sovereign act that would result in embarrassment to the sovereign or constitute interference with the conduct of US foreign policy. It granted summary judgment for the petitioners because resolution of the case in favour of the respondent would require imputing to foreign officials an unlawful motivation (the obtaining of bribes) and accordingly might embarrass the executive branch in its conduct of foreign relations. The Court of Appeals reversed the decision, holding that on the facts of the case the doctrine did not apply because no embarrassment of the executive in its conduct of foreign affairs was evident.

71. Delivering the unanimous opinion of the Supreme Court, Scalia J. observed that the case raised the issue whether the act of state doctrine bars a court from entertaining a cause of action that does not rest upon the asserted invalidity of an official act of a foreign sovereign, but which does require imputing to foreign officials an unlawful motivation, namely the obtaining of bribes, in the performance of an official act. The court considered that nothing in the suit required the court to declare invalid and thus ineffective as a rule of decision for US courts the official act of a foreign sovereign and that therefore the factual predicate for application of the act of state doctrine did not exist (at [8]). He continued:

> "9. In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would

> have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory. In *Underhill v. Hernandez,* 168 U.S. 250, 254, 18 S.Ct. 83, 85, 42 L.Ed. 456 (1897), holding the defendant's detention of the plaintiff to be tortious would have required denying legal effect to "acts of a military commander representing the authority of the revolutionary party as government, which afterwards succeeded and was recognized by the United States." In *Oetjen v. Central Leather Co., supra,* and in *Ricaud v. American Metal Co., supra,* denying title to the party who claimed through purchase from Mexico would have required declaring that government's prior seizure of the property, within its own territory, legally ineffective. See *Oetjen, supra,* 246 U.S., at 304, 38 S.Ct., at 311; *Ricaud, supra,* 246 U.S., at 310, 38 S.Ct., at 314. In *Sabbatino,* upholding the defendant's claim to the funds would have required a holding that Cuba's expropriation of goods located in Havana was null and void. In the present case, by contrast, neither the claim nor any asserted defense requires a determination that Nigeria's contract with Kirkpatrick International was, or was not, effective."

He went on to explain that

> "Act of state issues only arise when a court *must decide* – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign." (at [10], original emphasis)

72. The court considered that in the circumstances of that case, regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality was simply not a question to be decided in the suit and there was, therefore, no occasion to apply the rule of decision that the act of state doctrine requires.

73. In this regard, Mr. Hermer also relied on an authority referred to in *Kirkpatrick*, namely *Sharon v. Time Inc.* 599 F. Supp. 538 (SDNY 1984). The defendant, the publisher of Time Magazine, published an article which contained a discussion of the Kahan Commission's findings and recommendations in relation to the deaths of Palestinian civilians in the refugee camps, Sabra and Shatilla, during Israel's occupation of West Beirut. Ariel Sharon, who had been Minister of Defence of the State of Israel, sued for libel. Time pleaded act of state, arguing that the courts could not adjudicate on the case because this would require the jury to pass judgment as to the validity of numerous acts of the States of Israel and Lebanon. It relied on an absence of judicial standards and the potentially adverse impact of the trial and the jury's findings on the foreign relations of the United States. District Judge Sofaer held that the act of state doctrine was inapplicable for two reasons. First, Time did not allege that General Sharon had acted with the authority of the State of Israel. On the contrary, Time had alleged throughout the litigation that he had exceeded his authority. Secondly, the issues in the case did not require the jury to pass on the validity of the acts alleged.

> "The proscription of the doctrine is limited to judicial determinations of the validity of acts of a foreign sovereign and to judicial redress of grievances predicated upon a finding of invalidity."

He referred to *Underhill v. Hernandez* and *Sabbatino* and continued:

> "By contrast the litigation here involves no challenge to the validity of any act of state. With respect to Sharon's alleged acts, no one is suggesting that these acts – by which Time claims Sharon condoned the massacre of unarmed non-combatant civilians – have validity in the sense that they cannot be attacked. All agree – Israel, the United States, and the world community – that such actions, if they occurred, would be illegal and abhorrent. The issue in this litigation is not whether such acts are valid, but whether they occurred.

74. A very similar argument to that of the appellants in the present case was advanced in *Yukos* where it was submitted that the act of state doctrine does not apply in cases where there is no "sitting in judgment on" the acts of state alleged but only a question or acknowledgment of whether certain facts have occurred. It was submitted there that it would not matter that the finding or acknowledgement of such facts involves some inherent impropriety, provided that there needs to be no investigation into the validity, lawfulness or motives of the state's acts. In *Yukos* the Court of Appeal concluded that the allegations were not concerned simply with proving what had occurred. However, it did examine the *Kirkpatrick* limitation in great detail. One particular point to be drawn from that analysis is that the act of state doctrine is not limited to circumstances where the validity of foreign law is in issue but extends to challenges to the legality of a state's conduct. The court examined the reasoning in *Underhill*, *Oetjen*, *Sabbatino* and *Kirkpatrick* and concluded:

> "110 Thus we would again emphasise: the teaching of the Kirkpatrick case (and the cases which follow it) is *not* to do with any difference, were there to be any, between concepts of validity, legality, effectiveness, unlawfulness, wrongfulness and so on. 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 judgment on, investigation, examination, and so on. What the *Kirkpatrick* case 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 inquire into them for the purpose of adjudicating upon their legal effectiveness, including for these purposes their legal effectiveness as recognised in the country of the forum."

We gratefully adopt the analysis of the Court of Appeal in *Yukos* on this point.

75. In *Fish & Fish Limited v. Sea Shepherd UK* [2013] EWCA Civ 544; [2013] 1 WLR 3700 Beatson L.J., with whom the other members of the court agreed, concluded that joint responsibility in the law of tort is more restricted than it is in the criminal law. In particular, the law of tort does not recognise true accessory liability, only joint liability where the person who can be termed the actual perpetrator is the agent of another person. He explained that the requirements for this sort of joint responsibility in tort are, first, that there must be a common design that the acts relied on as tortious should be done by one or more of the alleged joint tortfeasors, the actual perpetrator or perpetrators and that, secondly, the other alleged tortfeasor himself did acts in furtherance of the common design (at [42], [45]). It is an essential feature of this analysis that the conduct of the perpetrator must be wrongful.

76. In the present case, the claims as pleaded cannot easily be accommodated within this analysis. However, it is clear from the Particulars of Claim, summarised earlier in this judgment, that each cause of action relied on by the appellants depends on establishing that the conduct of the actual perpetrators, in each case the agents of a foreign state, is unlawful. First, the claim in false imprisonment will not succeed unless those who are said to have detained the appellants, i.e. the Chinese, Malaysian, Thai, US and Libyan authorities, acted unlawfully in doing so. Secondly, so far as the claims in conspiracy to injure, trespass to the person and conspiracy to use unlawful means are concerned, it is alleged that the respondents conspired with Libya and the United States to arrange, negotiate and facilitate their illegal rendition. This claim cannot succeed unless the US and Libyan officials acted unlawfully. It is also alleged that the respondents conspired, assisted and acquiesced in torture, inhuman and degrading treatment, batteries and assaults by facilitating illegal rendition and by sharing or seeking information. Once again, this claim depends on the conduct of the local perpetrators being held illegal. It is further alleged that the respondents caused, prolonged and intensified the torture, mistreatment and unlawful detention of the appellants by the provision of information and the requests for information. As the judge pointed out, this allegation of intelligence sharing and the allegation of unlawfulness must be founded on the respondents' knowledge that they were facilitating treatment by the US and/or Libyan authorities which was unlawful. Thirdly, the claim in misfeasance in public office is expressly founded on the respondents' alleged knowledge or reckless indifference to the illegality of the appellants' rendition and detention. Fourthly, the claim in negligence founded on the allegation that the respondents facilitated and acquiesced in the unlawful rendition of the appellants depends on establishing that the conduct was unlawful. In the alternative, approached on the basis of joint responsibility expounded in *Fish & Fish*, it is clearly necessary for the appellants to demonstrate that the acts performed pursuant to the common design were tortious. Accordingly, *Kirkpatrick* and *Sharon v. Time Inc.* are readily distinguishable.

77. During the course of argument we suggested to Mr. Hermer that, on his suggested application of *Kirkpatrick*, *Underhill v. Hernandez*, which like this case was concerned with allegations of false imprisonment and assault, would fall outside the scope of the act of state doctrine. He did not shrink from accepting that consequence. (In this regard he might have invoked the statement of Perram J. in *Habib v. Commonwealth of Australia* [2012] FCAFC 12 that "Mr. Habib's contention is that his torture caused him personal injury, not that it was invalid …" (at [44]).) However,

we consider that the issue in *Underhill* was not limited to proving as a fact the conduct of the commander of the revolutionary Venezuelan army. On the contrary, as Scalia J. observed in *Kirkpatrick* itself (at [9]), the claim would have required the court to deny legal effect to that conduct or, as this court observed in *Yukos* (at [112]), would have required it to hold that conduct wrongful or unlawful and on that ground ineffective. We consider that *Kirkpatrick* would not lead to a different result were the facts of *Underhill v. Hernandez* to arise for consideration today. In the same way, the claims in the present case can succeed only if a court rules on the legality of the conduct of the agents of the states concerned. Accordingly, the *Kirkpatrick* limitation does not apply in this case.

Do the alleged acts have the character of sovereign acts?

78. On behalf of the appellants, Mr. Hermer submits that the conduct alleged in these proceedings is not sovereign in character and that accordingly the act of state doctrine can have no application. In support of this submission he relies on statements in a line of authority in the US courts on the Alien Tort Claims Act (*Filartiga v. Pena-Irala* 630 F. 2d 876 (2d Cir. 1980); *Kadic v. Karadzic* 70 F. 3d 232 (2d Cir. 1995); *Sarei v. Rio Tinto* 671 F. 2d 756 (9th Cir. 2011)) to the effect that acts of torture or genocide, contrary to a *jus cogens* prohibition, are not sovereign acts. He might also have drawn attention to the *Pinochet* cases in this jurisdiction where there appear statements that acts of torture cannot be functions of a head of state or governmental or official acts: *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* [2000] 1 AC 61 ("*Pinochet (No. 1)*") per Lord Nicholls at p. 109B, Lord Steyn at p. 116D-F; *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147 ("*Pinochet (No. 3)*") per Lord Browne-Wilkinson at p. 205A, Lord Hutton at pp. 261F -262E, 263, 264B.

79. It is not necessary to examine these decisions in detail because, within this jurisdiction at least, this line of argument has been decisively rejected by the House of Lords in *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270. There Lord Bingham identified an internal contradiction. He observed:

> "It is, I think, difficult to accept that torture cannot be a governmental or official act, since under article 1 of the Torture 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." (at [19]) (See also Lord Hoffmann at [88], [89], [93].)

Furthermore, Lord Bingham, whose observations on this point echo those of Judges Higgins, Kooijmans and Buergenthal in their joint separate opinion in *Democratic Republic of Congo v. Belgium (Case concerning Arrest Warrant of 11 April 2000)* [2002] ICJ Rep 3, para. 48, considered that the US decisions on the Alien Tort Claims Act did not express principles widely shared and observed among other nations (at

[20]). Similarly, Lord Hoffmann considered the cases on the Alien Tort Claims Act to be contrary to customary international law and not in accordance with the law of England (at [99]).

80. We conclude that the acts alleged have the character of sovereign acts for the purpose of the act of state doctrine.

A limitation on grounds of public policy: violation of international law or fundamental human rights

English jurisprudence

81. The act of state doctrine as applied by the courts in this jurisdiction is not an absolute rule. It is established that the doctrine may be disapplied on grounds of public policy where there is a violation of international law or a grave infringement of fundamental human rights.

82. Some indication of the existence of such a limitation is to be found in the speech of Lord Cross of Chelsea in *Oppenheimer v. Cattermole* [1976] AC 249 which includes the following obiter dictum on the effect to be given to a Nazi law which deprived Jewish émigrés of their status as German nationals:

> "A judge should, of course, be very slow to refuse to give effect to the legislation of a foreign state in any sphere in which, according to accepted principles of international law, the foreign state has jurisdiction. He may well have an inadequate understanding of the circumstances in which the legislation was passed and his refusal to recognise it may be embarrassing to the branch of the executive which is concerned to maintain friendly relations between this country and the foreign country in question. But I think - as Upjohn J. thought (see *In re Claim by Helbert Wagg & Co. Ltd.* [1956] Ch. 323, 334) - that it is part of the public policy of this country that our courts should give effect to clearly established rules of international law. Of course on some points it may be by no means clear what the rule of international law is. Whether, for example, legislation of a particular type is contrary to international law because it is "confiscatory" is a question upon which there may well be wide differences of opinion between communist and capitalist countries. But what we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the state passing the legislation can lay its hands and, in addition, deprives them of their citizenship. To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all." (at pp. 277H – 278C)

This statement, although obiter, came to be accepted as establishing an exception, in the case of grave violations of human rights, to the general principles of enforcement and recognition of foreign laws.

83. The issue arose directly for consideration by the House of Lords in *Kuwait Airways Corpn v. Iraqi Airways Co (Nos. 4 and 5)* where the limitation was discussed and applied. Following the Iraqi invasion of Kuwait in August 1990, Iraq passed resolutions proclaiming the integration of Kuwait into Iraq. The Iraqi Government ordered the defendant, which was owned by the Iraqi state, to fly ten of the claimant's aircraft to Iraq. In September 1990 an act of the Revolutionary Command Council of Iraq (Resolution 369) dissolved the claimant and transferred all its property worldwide, including the ten aircraft, to the defendant. The House of Lords held, distinguishing *Buttes Gas*, that in appropriate circumstances where the standard being applied by the court was clear and manageable it was legitimate for an English court to have regard to the content of international law in deciding whether to recognise a foreign law. The enforcement or recognition of Resolution 369 would be contrary to the United Kingdom's obligations under the United Nations Charter and would be contrary to domestic public policy.

84. Lord Nicholls of Birkenhead referred to Lord Wilberforce's conclusion in *Buttes Gas* (at p. 938) that there was in that case a lack of judicial or manageable standards and that the court would be asked to review the transactions of sovereign states. He continued:

> "26 This is not to say 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 recognise a foreign law. Lord Wilberforce himself accepted this in the *Buttes* case, at p 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 not in doubt. That is the present case. "

Against that background he turned to the question whether as a matter of public policy an English court should decline to recognise Resolution 369.

> "28 The acceptability of a provision of foreign law must be judged by contemporary standards. Lord Wilberforce, in a different context, noted that conceptions of public policy should move with the times: see *Blathwayt v Baron Cawley* [1976] AC 397, 426. In *Oppenheimer v Cattermole* [1976] AC 249, 278, Lord Cross said that the courts of this country should give effect to clearly established rules of international law. This

> is increasingly true today. As nations become ever more interdependent, the need to recognise and adhere to standards of conduct set by international law becomes ever more important. RCC Resolution 369 was not simply a governmental expropriation of property within its territory. Having forcibly invaded Kuwait, seized its assets, and taken KAC's aircraft from Kuwait to its own territory, Iraq adopted this decree as part of its attempt to extinguish every vestige of Kuwait's existence as a separate state. An expropriatory decree made in these circumstances and for this purpose is simply not acceptable today.
>
> 29 I have already noted that Iraq's invasion of Kuwait and seizure of its assets were a gross violation of established rules of international law of fundamental importance. A breach of international law of this seriousness is a matter of deep concern to the worldwide community of nations. This is evidenced by the urgency with which the UN Security Council considered this incident and by its successive resolutions. Such a fundamental breach of international law can properly cause the courts of this country to say that, like the confiscatory decree of the Nazi government of Germany in 1941, a law depriving those whose property has been plundered of the ownership of their property in favour of the aggressor's own citizens will not be enforced or recognised in proceedings in this country. Enforcement or recognition of this law would be manifestly contrary to the public policy of English law. For good measure, enforcement or recognition would also be contrary to this country's obligations under the UN Charter. Further, it would sit uneasily with the almost universal condemnation of Iraq's behaviour and with the military action, in which this country participated, taken against Iraq to compel its withdrawal from Kuwait. International law, for its part, recognises that a national court may properly decline to give effect to legislative and other acts of foreign states which are in violation of international law: see the discussion in Oppenheim's International Law, 9th ed. (1992), vol 1, (ed. Jennings and Watts), pp. 371-376, para 113."

85. Lord Steyn considered that the Court of Appeal had been right to extend the public policy exception beyond human rights violations to flagrant breaches of public international law. While emphasising that it did not follow that every breach of international law would trigger the public policy exception, he observed that that case was a paradigm of the public policy exception (at [114]). He also considered that in that case domestic public policy was supported by principles of international public policy. Here he observed that an international public policy had developed in relation to subjects such as traffic in drugs, traffic in weapons and terrorism. In the same way, he considered, there may be an international public policy requiring states to respect fundamental human rights.

86. Lord Hope of Craighead was at pains to emphasise that any such limitation must be narrowly confined:

> "138 It is clear that very narrow limits must be placed on any exception to the act of state rule. As Lord Cross recognised in *Oppenheimer v Cattermole* [1976] AC 249, 277-278, a judge should be slow to refuse to give effect to the legislation of a foreign state in any sphere in which, according to accepted principles of international law, the foreign state has jurisdiction. Among these accepted principles is that which is founded on the comity of nations. This principle normally requires our courts to recognise the jurisdiction of the foreign state over all assets situated within its own territories: see Lord Salmon, at p 282. A judge should be slow to depart from these principles. He may have an inadequate understanding of the circumstances in which the legislation was passed. His refusal to recognise it may be embarrassing to the executive, whose function is so far as possible to maintain friendly relations with foreign states.
> 139 But it does not follow, …, that the public policy exception can be applied only where there is a grave infringement of human rights. This was the conclusion that was reached on the facts which were before the House in the *Oppenheimer* case. But Lord Cross based that conclusion on a wider point of principle. This too is founded upon the public policy of this country. It is that our courts should give effect to clearly established principles of international law. …"

Referring to a submission by counsel for the defendant that there could be no exception for a breach of international law which did not fall within the recognised exception relating to human rights, Lord Hope continued:

> "140 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."

87. He concluded that a legislative act by a foreign state which is in flagrant breach of clearly established rules of international law ought not to be recognised by the courts of this country as forming part of the lex situs of that state:

> "148. … This was the conclusion that Dr F A Mann advocated in his article "International Delinquencies before Municipal Courts" (1954) 70 LQR 181; see also his Further Studies in International Law, pp 177-183. He said, at p 202 of the article:

> "1. When the conflict rule of the forum refers the court to a foreign law (lex causae), the court will not apply the latter if and in so far as it expresses or results from an international delinquency ... 5. The question whether an international delinquency has been committed is to be answered according to the generally accepted principles of international law, but a municipal court will not answer it affirmatively except where both the law and the facts are clearly established."

> 149. I would endorse everything that is said in that passage and I would apply it to this case. Respect for the act of state doctrine and the care that must be taken not to undermine it do not preclude this approach. The facts are clear, and the declarations by the Security Council were universal and unequivocal. If the court may have regard to grave infringements of human rights law on grounds of public policy, it ought not to decline to take account of the principles of international law when the act amounts—as I would hold that it clearly does in this case—to a flagrant breach of these principles. …"

88. The observations of Lord Cross in *Oppenheimer* were an important development in that they recognised that generally applicable rules of private international law might be required to yield to the claims of public policy in cases concerned with grave violations of human rights. Similarly, the decision of the House of Lords in *Kuwait Airways* undoubtedly broke new ground, in holding that the act of a foreign state within its territory may be refused recognition because it is contrary to public international law. However, in one sense these decisions are both very limited. *Oppenheimer* was concerned with legislation which had been declared void ab initio and not law ("Unrecht") by the Constitutional Court of the Federal Republic. *Kuwait Airways* was concerned with conduct and legislation which had been condemned as violations of international law by resolutions of the United Nations Security Council and which were accepted as such in the litigation by the defendants. The violations of human rights and of international law, respectively, were established beyond doubt. As a result, in neither case was it necessary for the courts in this jurisdiction to conduct an investigation into the conduct of the foreign state concerned.

89. This is potentially a matter of some importance because of the emphasis placed in the authorities, both in this jurisdiction and in the United States, on the need to avoid an investigation into the acts of a foreign state or its agents. Thus, for example, in *Buttes Gas* Lord Wilberforce referred to one version of act of state as consisting of those cases concerned with the applicability of foreign municipal legislation within its own territory and the "examinability" of such legislation (at p. 931A). While nothing turns on the precise terms and while different terms will be appropriate having regard to the different types of state conduct, it is the adjudication, sitting in judgment, examination, challenge or investigation which is an essential element of the mischief. Moreover, it is clear from the extract from the speech of Lord Hope in *Kuwait Airways* cited above that the fact that both the law and the facts were clearly

established was influential in his decision. The point can, however, be made that the act of state doctrine would not impose any constraints upon such an investigation or examination by our courts in circumstances where the validity, legality, lawfulness or effectiveness of an act of a foreign state or its agents is not directly in issue in the proceedings (*Kirkpatrick*, *Yukos*). In the present case, by contrast with the position in *Oppenheimer* and *Kuwait Airways*, we are concerned only with *allegations* of violations of international law and human rights. The facts are not established and if the matter were to proceed to trial the facts would have to be investigated and determined by the court.

90. The decision of the House of Lords in *A v. Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221 is significant in this regard. There, the House of Lords held that evidence which had been obtained by torture might not lawfully be admitted against a party to proceedings in the United Kingdom. Although their Lordships disagreed as to the standard of proof, they all agreed that once a plausible issue had been raised that the evidence had been obtained by torture the tribunal was under an obligation to investigate the matter (Lord Bingham at [56], Lord Nicholls at [80], Lord Hoffmann at [98], Lord Hope at [116]-[118], Lord Rodger at [138], Lord Carswell at [155] and Lord Brown at [172]). Lord Bingham expressed the matter as follows:

> "The appellant must ordinarily, by himself or his special advocate, advance some plausible reason why evidence may have been procured by torture. This will often be done by showing that evidence has, or is likely to have, come from one of those countries widely known or believed to practise torture (although they may well be parties to the Torture Convention and will, no doubt, disavow the practice publicly). Where such a plausible reason is given, or where [the Special Immigration Appeals Commission] with its knowledge and expertise in this field knows or suspects that evidence may have come from such a country, it is for SIAC to initiate or direct such inquiry as is necessary to enable it to form a fair judgment whether the evidence has, or whether there is a real risk that it may have been, obtained by torture or not. All will depend on the facts and circumstances of a particular case. …" (at [56])

Similarly Lord Hope stated:

> "Once the issue has been raised in this general way the onus will pass to SIAC. It has access to the information and is in a position to look at the facts in detail. It must decide whether there are reasonable grounds to suspect that torture has been used in the individual case that is under scrutiny. If it has such a suspicion there is then something that it must investigate as it addresses its mind to the information that is put before it which has been obtained from the security services." (at [116])

It is to be noted that Lord Bingham, in addressing the duty of states in relation to torture, expressly linked this to *Kuwait Airways* where "the House refused recognition to conduct which represented a serious breach of international law" (at [34]).

91. Public policy, of course, is not a constant. As we have seen, in *Kuwait Airways* Lord Hope referred (at [145]) to the observations of Lord Wilberforce in *Blathwayt v. Baron Cawley* [1976] AC 397, 426 to the effect that conceptions of public policy should move with the times and that widely accepted treaties and statutes may point in the direction in which such conceptions, as applied by the courts, ought to move. An important factor in addressing this issue of public policy is, in our view, the striking shift in attitude which has taken place in this jurisdiction towards judicial examination of the conduct of foreign states and their agents. Judges in this jurisdiction are now frequently required to determine and rule upon such conduct and, in particular, whether it is compliant with international law and international standards of human rights. Depending on the context, this may be because the act of state doctrine, a rule of common law, has been modified by statute, often reflecting the requirements of a treaty to which the United Kingdom is a party, or because the act of state doctrine is not engaged at all, for example on *Kirkpatrick* grounds, or for some other reason. The following are merely examples.

(1) Judges hearing asylum and deportation cases are daily called upon, as part of the process of assessing the risk to individuals, to determine whether foreign governments have violated human rights standards. Country guidance cases are replete with findings of human rights breaches by certain foreign states. Judges sitting in that jurisdiction are also frequently required to rule on whether other states have complied with their obligations of non-refoulement under international conventions. (See, generally, *RB (Algeria) v. Secretary of State for the Home Department* [2010] 2 AC 110; *DD v. Secretary of State for the Home Department*, SIAC, 27 April 2007.)

(2) In cases concerning selection of forum, enforcement of foreign judgments or security for costs, judges often have to decide issues relating to the independence and integrity of the judiciary of foreign states. (See, for example, *Al-Koronky v. Time Life Entertainment Group Ltd.* [2006] CP Rep 736; *Altimo Holding and Investment Ltd. v. Kyrgyz Mobil Tel Ltd.* [2012] 1 WLR 1804; *Yukos Capital Sarl v. OJSC Rosneft Oil Co (No. 2)* [2014] QB 458.) Such cases are now acknowledged as falling within a judicial acts limitation to the act of state doctrine.

(3) Section 14(3) of the 1995 Act expressly permits the application of principles of public policy in the choice of law in tort and delict. In *Kuwait Airways* Lord Steyn observed (at [114]) that, had this provision been engaged, that case would have been a classic case for its application.

(4) Section 134 of the Criminal Justice Act 1988 establishes a criminal offence of torture triable in this jurisdiction which may be committed by an official of a foreign state outside this jurisdiction. The section enabled the United Kingdom to become a party to the United Nations Convention against Torture**.** It is significant that Parliament has declared torture to be a crime contrary to the law of England and Wales wherever in the world it is committed and has no objection to the investigation and determination of such issues in criminal proceedings in this jurisdiction.

(5) In criminal cases where it is alleged that the defendant was wrongfully brought within the jurisdiction and that the proceedings are accordingly an abuse of process, the courts have been willing to examine and rule on the conduct of

foreign states. (See, e.g. *R. v. Horseferry Road Magistrates' Court ex parte Bennett* [1994] 1 AC 42; *R. v. Mullen* [2000] QB 520 (CA).)

(6) The act of state doctrine has been held not to extend to all sovereign acts of foreign states. In *Lucasfilm Ltd. v. Ainsworth* [2012] 1 AC 208 the Supreme Court concluded that the act of state doctrine should not be an impediment to an action for infringement of foreign intellectual property rights, even if validity of a grant is in issue, simply because the action calls into question the decision of a foreign official.

92. Another line of recent authority demonstrates that when it is necessary to do so for the vindication of justiciable rights, courts in this jurisdiction will be under an obligation to decide issues of public international law. In *R (Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, the claimant, who was detained in Guantanamo Bay without access to a court or to legal advice, sought by judicial review to compel the Foreign Office to make representations on his behalf to the US Government or take other appropriate action. In considering whether the legitimacy of executive action taken by a foreign state was justiciable, Lord Phillips M.R., delivering the judgment of the court, referred to the observations of Lord Cross in *Oppenheimer v. Cattermole* and continued:

> "This passage lends support to Mr. Blake's thesis 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. A more typical support for this proposition can be derived from the exercise that the court has to undertake in asylum cases, where the issue is often whether the applicant for asylum has a well-founded fear of persecution if removed to a third country. In such circumstances consideration of the claim for asylum frequently involves ruling on allegations that a foreign state is acting in breach of international law or human rights."

Having referred to *R. v. Home Secretary ex parte Adan* [2002] 2 WLR 143 Lord Phillips concluded:

> "57. Although the statutory context in which *Adan* was decided was highly material, the passage from Lord Cross' speech in *Cattermole* supports the view that, albeit that caution must be exercised by this court when faced with an allegation that a foreign state is in breach of its international obligations, this court does not need the statutory context in order to be free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights."

93. In *R (Al-Haq) v. Secretary of State for Foreign and Commonwealth Affairs* the claimant, a non-governmental human rights organisation based in Ramallah, sought a declaration that Her Majesty's Government was in breach of its international obligations and orders which, inter alia, would require the government to denounce Israel's actions in the construction of the Wall, to suspend assistance by the United

Kingdom to Israel and to convene an international conference to address Israel's breaches of international law. The Divisional Court, refusing permission to apply for judicial review, observed that the case was distinguishable from those in which a claimant is asserting a readily identifiable right, such as a right in certain circumstances to claim asylum or the right to a fair trial (See Pill L.J. at [45], Cranston J. at [54].) More generally, in *R (Gentle) v. Prime Minister* [2008] AC 1356 Lord Bingham observed (at [8]) that while there are issues which judicial tribunals have traditionally been very reluctant to entertain because they recognise their limitations as suitable bodies to resolve them, this does not mean that if the claimants have a legal right the courts cannot decide it. Similarly, in *Shergill v. Khaira* the Supreme Court, referring to these earlier authorities, observed (at [43] set out at paragraph 56 above) that, save in cases where they are beyond the constitutional competence of the courts, issues of international law must be resolved where they engage a private right of the claimant or a reviewable question of public law.

Other common law jurisdictions

94. It is instructive to consider how similar issues have been resolved in other common law jurisdictions. The following passage appears in the American Law Institute, Restatement of the Foreign Relations Law of the United States (1987), Vol. 1, para. 444c:

> "Applicability of act of state doctrine to cases not involving expropriation. The *Sabbatino* case involved a taking of private property, and the act of state doctrine has been applied predominantly to such acts, whether challenged by claims to title to the property taken or claims for compensation for taking. Challenges in United States courts to other types of acts by foreign states may also bring the doctrine into play. … In general, whether a particular act of a foreign state not involving expropriation comes under the act of state doctrine depends on the extent to which adjudication of the challenge would require the United States court to consider the propriety of the acts and policies, or probe the motives, of the foreign government. A claim arising out of an alleged violation of fundamental human rights – for instance, a claim on behalf of a victim of torture or genocide – would (if otherwise sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts. …"

Lord Steyn drew attention to this passage in *Pinochet No. 1* at p. 117 and in *Kuwait Airways* at [115].

95. At first sight the decision of the Supreme Court of Canada in *Minister of Justice v. Khadr* [2008] 2 RCS 125 provides support for the appellants' case. Mr. Khadr, a Canadian citizen, was detained by US authorities in Guantanamo Bay where he faced prosecution for murder. He sought discovery from the Canadian Crown of documents recording interviews with him conducted by Canadian officials in Guantanamo Bay in 2003. The Minister of Justice opposed the application arguing that the Canadian Charter of Rights and Freedoms did not govern the actions of Canadian officials at Guantanamo Bay. The court held that Mr. Khadr was entitled to disclosure of the

documents on the ground that "[t]he principles of international law and comity of nations, which normally require that Canadian officials operating abroad comply with local law, do not extend to participation in processes that violate Canada's international human rights obligations" (at [2]). However, a critical element in the reasoning which led the court to that conclusion was the fact that the process in place at Guantanamo Bay at the time the Canadian officials conducted the interviews and delivered their product to US officials had been held by the US Supreme Court to violate US domestic law and international human rights obligations to which Canada was a party:

> "In the light of these decisions by the United States Supreme Court that the process at Guantanamo Bay did not comply with either US domestic or international law, the comity concerns that would normally justify deference to foreign law do not apply in this case." (at [3], see also [21], [25], [26])

As a result the court considered that it was not necessary to resolve issues which might otherwise arise as to whether it is appropriate for a Canadian court to pronounce on such issues. The case is, therefore, on all fours with *Kuwait Airways* in that the issue of the legality of the conduct had already been determined.

96. The appellants derive much greater assistance from the decision of the Federal Court of Australia in *Habib v. Commonwealth of Australia*. Mr. Habib, an Australian citizen, alleged that officers of the Commonwealth committed the torts of misfeasance in public office and intentional but indirect infliction of harm by aiding, abetting and counselling his torture and other inhumane treatment by foreign officials while he was detained in Pakistan, Egypt and Afghanistan and at Guantanamo Bay. In order to succeed in this part of his claim Mr. Habib had to prove that the alleged acts of torture and other inhumane treatment were committed by persons who were, or were acting at the instigation of or with the consent and acquiescence of, public officials or persons acting in an official capacity outside Australia in breach of section 6 of the Crimes (Torture) Act 1988 or by or at the behest of agents of foreign states in breach of section 7 of the Geneva Conventions Act 1957. It was a necessary element of the case against the Commonwealth that the agents of foreign states committed the principal offences. The Commonwealth submitted that, by virtue of the common law act of state doctrine, the claims were not justiciable because their resolution would require the determination of the unlawfulness of acts of agents of foreign states within the territories of foreign states. The court held that the common law has evolved in such a way that the authorities did not support the application of the act of state doctrine to that case.

97. Jagot J. concluded that the court had both the power and a constitutional obligation to determine Mr. Habib's claim. She arrived at that conclusion by two distinct lines of reasoning. One turned on the status and effect of the Australian Constitution. Section 61 of the Constitution and the legislation having extra-territorial effect on which the claimant's allegations of unlawful conduct relied founded the jurisdiction of the court under Ch. III of the Constitution. A judge-made doctrine could not exclude that jurisdiction. The other was that the operation of the act of state doctrine did not, in any event, preclude judicial determination of the claim. Having surveyed the US and English authorities on act of state she observed:

> "114. As Mr. Habib said, the consequence of the Commonwealth's submission is that Commonwealth officials could not be held accountable in any court for their alleged breaches of Australian laws having extra-territorial effect. The consequence of Mr. Habib's submissions, in contrast, is that each set of government officials would be able to be held accountable for their actions in their national courts. The cases on which the Commonwealth relied do not support a conclusion that the act of state doctrine prevents an Australian court from scrutinising the alleged acts of Australian officials overseas in breach of peremptory norms of international law to which effect has been given by Australian laws having extra-territorial application. The case law indicates to the contrary.
> 115. In terms of the US jurisprudence, the *Sabbatino* factors show that, first, the prohibition on torture is the subject of an international consensus. Second, Australia's "national nerves", as the Commonwealth intimated, might be attuned to the sensibilities of its coalition partners but this has to be weighed in a context where the prohibition on torture forms part of customary international law and those partners themselves are signatories to an international treaty denouncing torture. Moreover, the claim is by an Australian citizen against the Commonwealth of Australia. Findings will be necessary as facts along the way but no declaration with respect to the conduct of foreign officials is required. Those officials will not be subject to the jurisdiction of an Australian court (or, for that matter, any international court by reason of this proceeding). It is the Commonwealth alone which is the respondent to this proceeding. Insofar as the Commonwealth suggested some unfairness to the (unidentified) foreign officials in question by reason of the foreign states not being parties to the proceedings, it is common ground that those states would have a valid claim for sovereign immunity if sued in an Australian court. Such unfairness as might arise, in any event, is a matter for the trial, not the reserved question. Third, the governments of the foreign states in question all remain in existence. Fourth, and as in *Unocal*, it would be difficult to contend that the alleged violations of international law identified in Mr. Habib's claim were in the public interest.
> 116. In terms of the jurisprudence of the United Kingdom, there is no reason why an Australian court also "should not give effect to clearly established principles of international law" (*Kuwait Airways No. 5* at [139]), particularly where those principles involve protection against the infliction of torture which the Commonwealth Parliament has prohibited."

98. Jagot J. noted that the prohibition on torture is a clearly established principle of international law. The international community had spoken with one voice against torture.

> "118. As the Commonwealth submitted, international comity is concerned not only with the content of the international consensus against torture but also the question of who may judge any contravention of that norm. While this case will involve factual findings about the conduct of foreign officials, the context in which their conduct arises for consideration is inconsistent with the acceptance of the Commonwealth's proposition that international comity might be undermined. The case involves an Australian court considering and determining whether, as alleged, officials of its own government aided, abetted and counselled foreign officials to inflict torture upon an Australian citizen in circumstances where the acts of those foreign officials, if proved as alleged, would themselves be unlawful under Australian laws having extra-territorial effect. Insofar as judicial scrutiny might be thought to give rise to a risk of generalised embarrassment to Australia's foreign relations, the Commonwealth disavowed any suggestion that Australian jurisprudence should adopt an approach of deference to the advice of the executive about the state of foreign relations from time to time (referred to as the *Bernstein* exception, by reference to a US case bearing that name, *Bernstein v N V Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij* 210 F.2d 375 (2d Cir. 1954), discussed in *Sabbatino* at 427-428 and Patterson at 128-129).
>
> 119. The separation of powers rationale cannot be considered in isolation from that of justiciability. Issues for which there are no "judicial or manageable standards" of judgment are outside the reach of the judicial branch (*Buttes* at 938 and see also *Re Ditfort* at 370). But, as Mr. Habib's submissions proposed, in this case there are clear and identifiable standards by which the conduct in question may be judged – the requirements of the applicable Australian statutes and the international law which they reflect and embody. The Court will not be in a "judicial no-man's land" (*Buttes* at 938).
>
> 120. For these reasons, the two considerations of relevance to the content of the doctrine the Commonwealth identified do not support the operation of the act of state doctrine to preclude judicial determination of Mr. Habib's claim."

99. Black CJ agreed with Jagot J. that the common law had evolved to such an extent that the authorities did not support the application of the act of state doctrine in that case. However, he went on to express the view that if the choice were finely balanced, the same conclusion should be reached:

> "7. …When the common law, in its development, confronts a choice properly open to it, the path chosen should not be in disconformity with moral choices made on behalf of the people by the Parliament reflecting and seeking to enforce universally

> accepted aspirations about the behaviour of people one to another.
> 8. Torture offends the ideal of a common humanity …"

100. Parliament had declared torture to be a crime wherever outside Australia it was committed. The Crimes (Torture) Act reflected the status of the prohibition on torture as a peremptory norm of international law from which no derogation was permitted and the consensus of the international community that torture can never be justified by official acts or policy:

> "10. As well, and again, consistently with Australia's obligations under the Torture Convention, the Parliament has spoken with clarity about the moral issues that may confront officials of governments, whether foreign or our own, and persons acting in an official capacity. It has proscribed torture in all circumstances, answering in the negative the moral and legal questions whether superior orders can absolve the torturer of individual criminal responsibility and whether, in extreme circumstance, torture may be permissible to prevent what may be apprehended as a larger wrong: …"

101. Perram J., concurring in the result, decided the case on a different basis. He considered that the Commonwealth's reliance on the act of state doctrine could have no application where it was alleged that Commonwealth officials had acted beyond the bounds of their authority under Commonwealth law. In his view it was not necessary to decide whether the act of state doctrine was subject to an exception where grave breaches of human rights were concerned.

102. In this way a senior court in another common law jurisdiction has concluded, on facts which bear a striking resemblance to those in the present case, that this limitation to the act of state doctrine may be applied notwithstanding the need to investigate the conduct and to rule on the legality of the conduct of foreign states. We should add that we find the judgment of Jagot J. compelling.

Potential to disrupt international relations

103. One countervailing consideration bearing on the possible application of this limitation on the act of state doctrine in the circumstances of the present case is the contention on behalf of the respondents that the exercise of jurisdiction would cause substantial damage to the international relations and the national security interests of the United Kingdom. Dr. Laurie Bristow, a senior member of the Diplomatic Service and currently National Security Director within the Foreign and Commonwealth Office, deals with this matter in considerable detail in his witness statement. He notes that the claims in these proceedings arise principally from allegations that the respondents shared intelligence with certain foreign states in order to assist those foreign states to carry out various illegal acts against the appellants. Accordingly the claims are predicated on the assertion that foreign sovereign states acted unlawfully subsequent to and in reliance on information supplied by the United Kingdom. Furthermore he states that the claims require for their proper determination detailed examination of

any intelligence-sharing arrangements between the United Kingdom and other states, including the United States, and consideration of and evidence upon communications between states on matters of great sensitivity. He considers that there would be a real risk of serious harm to the United Kingdom's international relations and national security interests if the court were to hear these allegations and that if a court were to make the rulings sought by the appellants the consequence would be very serious damage to those interests. He also considers that it would appear necessary for the respondents to obtain evidence from third party states in order to defend themselves against the allegations but that it would be highly improbable that the states concerned would supply this evidence. For the United Kingdom, through its courts, to assume the authority to judge the acts of foreign states abroad would be very likely to be seen as undue interference in their affairs. Furthermore, if the United Kingdom Government were to make assertions in these proceedings about the lawfulness or unlawfulness of actions of foreign states such assertions would be likely to have important political repercussions.

104. Dr. Bristow points out that at the heart of this claim are allegations about the work of the Secret Intelligence Service and the Security Service and in particular allegations relating to foreign liaison relationships. He refers to the policy of successive Governments to neither confirm nor deny ("NCND") allegations in relation to intelligence services. He considers this principle essential to maintaining co-operative intelligence relations between the United Kingdom and its allies and states that if the Government were forced to depart from this principle in this case it would damage foreign liaison relationships and create a clear risk of serious harm to essential UK national security interests.

105. He considers it highly improbable that, as a matter of practice, the UK Government would be able to obtain evidence from any of the foreign state authorities against whom allegations are made enabling the court properly to address them. The court would therefore inevitably be faced with the task of determining the conduct of foreign states without hearing from them.

106. Dr. Bristow points to the fact that the United Kingdom and the United States co-operate very closely on defence matters and have a uniquely close relationship on intelligence including intelligence-sharing. He argues that the United Kingdom's influence in world affairs is inextricably tied to its close relationship with the United States and that maintaining the strength and trust of the relationship is vital to the United Kingdom's national interest. He considers that there is a real risk that if the court were to engage in determining these allegations it would cause serious harm to our relationship with the United States. The very fact that the High Court would be seen to be sitting in judgment on US actions outside the United Kingdom would cause real concern to the United States. If the court were to make findings such as the appellants seek, despite the inevitable absence of any evidence from the United States, this would have a seriously damaging impact on our relationship with the United States. He would expect the United Kingdom Government to receive representations at a very senior level expressing anger and concern. In particular:

    (1) He would expect Congress to be particularly concerned that a court in the United Kingdom had presumed to sit in judgement on US actions outside the United Kingdom.

(2) There would be serious implications for relations between the US administration and the UK Government. Dr. Bristow believes there would be a significant risk of a "cooling off" in the relationship. He considers that in the short term it is very likely that the US administration would express anger and upset. In his view it is quite likely that the unparalleled access which the United Kingdom enjoys to the United States would be restricted.

(3) A judgment upholding the allegations made would significantly harm relations between US and UK intelligence and law enforcement agencies. There is a strong risk that any finding or assumption by a court in the United Kingdom in this case would cause the United States to revisit and perhaps substantially modify the historic intelligence sharing relationship and national security co-operation.

107. So far as the exercise of jurisdiction over the allegations against Libyan officials is concerned, Dr. Bristow considers this a diplomatically sensitive case requiring careful management on the part of the UK Government to seek to avoid harming relations with the Libyan Government. However he accepts that given the change of regime in Libya it is unlikely that there would be damage to relations between the United Kingdom and Libya if the court were to make findings of fact about the conduct of the previous regime to the effect pleaded in the appellants' claims.

108. Dr. Bristow observes that it is uncertain whether any allegations are made against the Chinese authorities and states that it is therefore difficult to predict the impact that hearing this case or a ruling were to have on relations with China. However he emphasises that China is sensitive on issues of sovereignty and that a finding of fact about Chinese involvement could be viewed by the Chinese as interference.

109. Dr. Bristow states that the appellants' allegations in respect of Malaysia are highly politically sensitive. A ruling on these matters would probably be interpreted as interference by a former colonial power in Malaysia's internal affairs and as contrary to international norms of behaviour between sovereign states.

110. Dr. Bristow considers that the allegations against Thailand are no less politically sensitive. Once again they relate to the conduct of Thailand's authorities in its own territory. He considers that any ruling on those allegations would be likely to give rise to a strongly negative reaction from the Thai Government and would be likely to damage relations with the United Kingdom.

111. This statement from Dr. Bristow is an authoritative statement on behalf of the executive which has the conduct of foreign relations. Moreover, it is clear that it has been produced after consultation with experts in the different fields of foreign relations relevant to this case. As such, it is entitled to respect. Setting to one side any consideration of embarrassment of the executive, which in our view would not be a proper basis for declining jurisdiction, the question arises what weight, if any, should be given to these representations concerning possible damage to the foreign relations and security interests of the United Kingdom.

112. At one stage in the evolution of the US act of state doctrine, at least, considerable weight was attached by US courts to the attitude of the executive branch of government. Thus, for example, in *First National City Bank v. Banco Nacional de*

Cuba 406 U.S. 759 (1972) Rehnquist J., in an opinion in which Burger C.J. and White J. joined, concluded "that where the Executive Branch, charged as it is with the primary responsibility for the conduct of foreign affairs, expressly represents to the court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts" (at p. 768).

113. In this jurisdiction, the potential for the disruption of international relations was considered by this court in *Yukos* (at [65]) to be one of the philosophical underpinnings of all act of state doctrines. Moreover, there are undoubtedly areas in which the judicial branch in this jurisdiction will accept an executive statement as conclusive of certain facts of state in the area of foreign relations peculiarly within the cognizance of the Crown. (See, generally, Parry, 7 British Digest of International Law, pp. 202-216.) However, while an approach based on deference to executive suggestion as to the likely consequences for foreign relations of the exercise of jurisdiction, capable of varying according to the issues raised or the foreign state concerned, may well be suited to the very different constitutional arrangements in the United States, it has played no part in the development of the act of state doctrine in this jurisdiction. In *Buttes Gas* itself, where there was no corresponding indication by the executive, Lord Wilberforce expressly left aside all possibility of embarrassment in our foreign relations in coming to the conclusion that the issues raised were not justiciable (at pp. 936 G, 938 A-B). In *A Limited v. B Bank*, this court emphasised that comity is not an independent ground on which the English court can be deprived of jurisdiction which it would otherwise have to decide justiciable issues.

Decision on the act of state issue

114. The central issue for determination is whether this court should go beyond *Oppenheimer* and *Kuwait Airways* and apply the public policy limitation in a case where the court, if it exercised jurisdiction, would be required to conduct a legal and factual investigation into the validity of the conduct of a foreign state. The *ratio decidendi* of *Kuwait Airways* does not confine the limitation to cases where such an investigation is unnecessary. Furthermore, we consider that there are compelling reasons for concluding that the present case does fall within this limitation on the act of state doctrine. In coming to this conclusion we have been influenced in particular by the following considerations, the force of some of which was recognised by Simon J. in his careful judgment.

115. First, a fundamental change has occurred within public international law. The traditional view of public international law as a system of law merely regulating the conduct of states among themselves on the international plane has long been discarded. In its place has emerged a system which includes the regulation of human rights by international law, a system of which individuals are rightly considered to be subjects. A corresponding shift in international public policy has also taken place. (See the observations of Lord Steyn in *Kuwait Airways* at [115].) These changes have been reflected in a growing willingness on the part of courts in this jurisdiction to address and investigate the conduct of foreign states and issues of public international law when appropriate.

116. Secondly, the allegations in this case - although they are only allegations - are of particularly grave violations of human rights. The abhorrent nature of torture and its condemnation by the community of nations is apparent from the participation of states in the UN Convention against Torture (to which all of the States concerned with the exception of Malaysia are parties) and the International Covenant on Civil and Political Rights (to which Libya, Thailand, the United States and the United Kingdom are parties) and from the recognition in customary international law of its prohibition as a rule of *jus cogens*, a peremptory norm from which no derogation is permitted. While it is impermissible to draw consequences as to the jurisdictional competence of national courts from the *jus cogens* status of the prohibition on torture (see, for example, *Jones v. Saudi Arabia* per Lord Bingham at [22] and following, per Lord Hoffmann at [42] and following; *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* ICJ Rep. (2006) 6 at [58], [60], [78]), it is appropriate to take account of the strength of this condemnation when considering the application of a rule of public policy. Moreover, the decision of the House of Lords in *A v. Home Secretary (No. 2)* [2006] 2 AC 221 leaves no doubt as to the attitude of the public policy of the forum towards torture. So far as unlawful rendition is concerned, this too must occupy a position high in the scale of grave violations of human rights and international law, involving as it does arbitrary deprivation of liberty and enforced disappearance.

117. Thirdly, the respondents in these proceedings are either current or former officers or officials of state in the United Kingdom or government departments or agencies. They are not entitled to any immunity before the courts in this jurisdiction, whether *ratione personae* or *ratione materiae*. Furthermore, their conduct, considered in isolation, would not normally be exempt from investigation by the courts. On the contrary there is a compelling public interest in the investigation by the English courts of these very grave allegations. The only ground on which it could be contended that there is any exemption from the exercise of jurisdiction in the present case is because of the alleged involvement of other states and their officials in the conduct alleged. Notwithstanding our view that the present proceedings would entail an investigation of the legality of the conduct of those foreign officials, the fortuitous benefit the act of state doctrine might confer on the respondents is a further factor supporting the application of this public policy limitation.

118. Fourthly, this is not a case in which there is a lack of judicial or manageable standards. On the contrary, the applicable principles of international law and English law are clearly established. The court would not be in a judicial no man’s land.

119. Fifthly, the stark reality is that unless the English courts are able to exercise jurisdiction in this case, these very grave allegations against the executive will never be subjected to judicial investigation. The subject matter of these allegations is such that, these respondents, if sued in the courts of another state, are likely to be entitled to plead state immunity. Furthermore, there is, so far as we are aware, no alternative international forum with jurisdiction over these issues. As a result, these very grave allegations would go uninvestigated and the appellants would be left without any legal recourse or remedy.

120. Sixthly, notwithstanding the evidence of Dr. Bristow that there is a risk that damage will be done to the foreign relations and national security interests of the United

Kingdom, we do not consider that in the particular circumstances of this case these considerations can outweigh the need for our courts to exercise jurisdiction. For the reasons set out above, we consider that there is a compelling case in favour of these proceedings being heard in this jurisdiction. In this particular context, the risk of displeasing our allies or offending other states, and even the risk of the consequences of varying severity which it is said are likely to follow, cannot justify our declining jurisdiction on grounds of act of state over what is a properly justiciable claim.

121. For these reasons, considered cumulatively, we consider that the present case falls within the established limitation on the act of state doctrine imposed by considerations of public policy on grounds of violations of human rights and international law and that there are compelling reasons requiring the exercise of jurisdiction.

Article 6, ECHR

122. So far, this discussion has proceeded entirely by reference to the common law. However, it is also necessary to consider whether Article 6 ECHR has any application to the present issue. The effect of upholding a plea of act of state in the present case would undoubtedly be to deny the claimants access to the courts in this jurisdiction. This issue has to be distinguished from a similar issue in relation to state immunity. We consider that Article 6 is concerned with access to the jurisdiction enjoyed by a national court in accordance with international law and that, accordingly, Article 6 can have no application in situations where international law denies jurisdiction to a national court on grounds of state immunity (*Holland v. Lampen-Wolfe* [2000] 1 WLR 1573, per Lord Millett at p. 1588; *Jones v. Saudi Arabia* per Lord Bingham at [14], per Lord Hoffmann at [101]; c.f. *Al-Adsani v. United Kingdom* (2001) 34 EHRR 273). However, there is no rule of international law requiring the application of the act of state doctrine (*Sabbatino*) and therefore we consider that the rule applicable in this jurisdiction requires to be justified by reference to Article 6.

123. The doctrine of act of state, as applied by the courts in this jurisdiction, undoubtedly pursues a legitimate aim, namely the promotion of comity and good relations between states through the respect for another state's sovereignty (*Al-Adsani* at [54]). Although not required by international law, it is to be found in a number of common law jurisdictions. Furthermore, the doctrine is proportionate to the aim to be achieved. As this court explained in *Yukos*, it is not a blanket rule but is subject to a number of important limitations. In particular, it applies only where a determination of the validity or legality of an act of a foreign state is necessary for the determination of the issues before the court. Similarly, in the area of human rights the rule is subject to an important limitation which makes it susceptible of varying application depending on the facts of each case. Furthermore, it is notable that there have been very few cases in this jurisdiction in which the doctrine has been applied with the result of denying access to the court. However, having regard to the particular circumstances of this case, we do not consider that the act of state doctrine is here capable of outweighing the appellants' Article 6 right of access to the court. In coming to this conclusion we have had regard to all the considerations set out above which have led us to the same conclusion on our analysis of the position at common law.

Article 14, UN Convention against Torture

124. It is convenient to address at this point an argument on behalf of the appellants in relation to Article 14 of the UN Convention against Torture which provides:

> "1. Each state party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
> 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."

On behalf of the appellants Mr. Hermer submits that this provision requires the exercise of jurisdiction in the circumstances of this case.

125. The extent of the obligation imposed by Article 14 was the subject of argument in *Jones v. Saudi Arabia* where Lord Bingham concluded:

> "…[A]rticle 14 of the Torture Convention does not provide for universal civil jurisdiction. It appears that at one stage of the negotiating process the draft contained words, which mysteriously disappeared from the text, making this clear. But the natural reading of the article as it stands in my view conforms with the US understanding noted above, that it requires a private right of action for damage only for acts of torture committed in territory under the jurisdiction of the forum state. This is an interpretation shared by Canada, as its exchanges with the Torture Committee make clear. The correctness of this reading is confirmed when comparison is made between the spare terms of article 14 and the much more detailed provisions governing the assumption and exercise of criminal jurisdiction."

The reference to the US understanding is to the US statement on ratification of the Convention "that article 14 requires a state party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that state party". Lord Bingham in *Jones v. Saudi Arabia* explained that this understanding had provoked no dissent and had been expressly recognised by Germany as not touching on the obligations of the United States as a party to the Convention. He added:

> "Twenty years have passed, but there is no reason to think that the United States would now subscribe to a rule of international law conferring a universal tort jurisdiction which would entitle foreign states to entertain claims against US officials based on torture allegedly inflicted by the officials outside the state of the forum."

126. Mr. Hermer points out, correctly, that in *Jones v. Saudi Arabia* those individuals who were alleged to have participated in torture were not agents of the forum state whereas in the present case the respondents are. On this basis he submits that Article 14 does impose an obligation on the United Kingdom to make redress available in its courts. Before expressing a concluded view on whether this submission is correct we would wish to consider in detail the travaux preparatoires of the Convention. However, in the light of the conclusions to which we have come on other grounds, it will not be necessary to do so.

The territoriality limitation

127. The allegations made in these proceedings against officials of China, Malaysia, Thailand and Libya relate to their conduct within the territory of their respective states. However, the allegations against officials of the United States relate to their extra-territorial acts. In particular they relate to their alleged acts in Thailand and Libya and on board a US registered aircraft outside the United States. On behalf of the appellants it is submitted that any principle of act of state can apply only to the intra-territorial acts of a foreign state and that, accordingly, on this additional ground, the principle can have no application to these allegations.

128. The US authorities on act of state, from *Underhill v. Hernandez* onwards, emphasise that the principle is concerned with the acts of states taking place within their own territory. Thus in *Kirkpatrick* Scalia J. observed:

> "In every case in which we have held the act of state doctrine applicable, the relief sought or the defence interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." (at [8])

In considering the position in this jurisdiction it is necessary to distinguish between act of state in the narrow sense and the wider principle of non-justiciability. In *Buttes Gas* Lord Wilberforce identified one version of act of state as comprising "those cases which are concerned with the applicability of foreign municipal legislation within its own territory, and with the examinability of such legislation – often, but not invariably, arising in cases of confiscation of property" (at p. 931 A-B). He then went on to identify a more general principle of non-justiciability (at p. 932A). However, he rejected a submission that the application of the principle on the facts of that case would result in giving extra-territorial effect to legislation. He considered that to attack the decree extending Sharjah's territorial waters i.e. its territory, upon the ground that the decree was extra-territorial was circular or question-begging (at p. 931 E-F).

129. In *Kuwait Airways* the Court of Appeal (Henry, Brooke and Rix L.JJ,) referred to the territoriality issue in the following terms:

> "It may be observed that *Buttes Gas and Oil Co v Hammer (No. 3)* is not a case concerned with the territorial expropriation of goods. On the contrary, at the heart of the dispute in that case was a boundary dispute between states which made it impossible

> to say what the territorial limitation of those states were." (*Kuwait Airways Corpn v. Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at [287])
> " … [W]hether the sovereign acts within his own territory or outside it, there is a certain class of sovereign act which calls for judicial restraint on the part of our municipal courts. This is the principle of non-justiciability. …" (at [319])

130. These passages were referred to in *Yukos* where this court observed with regard to Lord Wilberforce's more general principle:

> "It is not entirely clear to us whether that more general principle is confined as some of the expressions in those cases would seem to confine it, to what transpires territorially within a foreign sovereign state: but we are of the view, expressed in the judgment of this court in *Kuwait Airways Corpn v. Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, paras. 287, 319, that the principle may even extend to extra-territorial (or perhaps one might speak of transnational) acts, as in the *Buttes Gas* case itself, with its international boundary disputes." (at [49])

Later in its judgment in *Yukos* the court observed:

> "It would seem that, generally speaking, the doctrine is confined to acts of state within the territory of the sovereign, but in special and perhaps exceptional circumstances, such as in the *Buttes Gas* case itself, may even go beyond territorial boundaries and for that very reason give rise to issues which have to be recognised as non-justiciable." (at [66])
> "The first limitation is that, as stated above, the act of state must generally speaking, take place within the territory of the foreign state itself. *Buttes Gas* … is an example where, in the context of boundary disputes between states, the principle of non-justiciability was applied to acts which need not have been confined to territorial limits. Thus Lord Wilberforce appears to have contemplated that in at any rate such special circumstances the doctrine could extend beyond the territorial boundaries of the state. However, that is perhaps a unique example of such an extension." (at [68])

131. It may well be that, to the extent that a plea of non-justiciability relates to a subject matter which is essentially concerned with the transactions of states on the international plane, questions of territoriality will not always be material. Indeed, in the case of such activities it may often be difficult to locate with precision where different elements of the transactions took place. However, in the present case we are concerned with allegations relating to the way in which officials of one state have acted towards nationals of other states and therefore with the narrower principle of act of state. Here, the authorities in this jurisdiction since *Buttes Gas* show that the English doctrine, like the US doctrine, is limited to intra-territorial acts. In *The Playa Larga* [1983] 2 Lloyd's L R 171, this court (Stephenson, Ackner and Sebag Shaw

L.JJ.) was concerned with the conversion of goods by order of a foreign state, those goods being on the high seas at the relevant time. The court rejected a plea of act of state on the ground that acts of state are limited to action taken by a foreign sovereign state within its own territory. In this regard it relied upon *Duke of Brunswick v. King of Hanover, Underhill v. Hernandez* and a letter from the Legal Adviser to the Department of State to the US Attorney-General which was attached to an amicus brief in the *Buttes Gas* litigation before the 5th Circuit Court of Appeals in 1978 and which described the act of state doctrine as "… traditionally limited to governmental actions within the territory of the respective States" (at p. 194). Similarly in *A Limited v. B Bank* [1997] I L Pr 586 Leggatt L.J., with whom the other members of the court agreed, observed:

> "All the authorities in England and the United States emphasise that to be non-justiciable acts must be those of another government done within its own territory. This theme is constantly reiterated." (at [11])

In cases such as the present, as this court observed in *The Playa Larga* (at p. 194), to the extent that it is clear that the acts alleged were carried out outside the foreign state's own territory there seems to be no compelling reason for judicial restraint or abstention.

132. The respondents rely on the recent decision of this court in *R. (Khan) v. Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872; [2014] EWCA Civ 24, as authority for the proposition that the act of state doctrine applies to the extra-territorial acts of foreign states. There, the claimant's father was killed by a missile fired from a drone in Pakistan. He sought judicial review of the decision of the Foreign Secretary to provide intelligence to the United States authorities for use in drone strikes in Pakistan on the ground that if the conduct of firing a drone had been committed by a national of the United Kingdom, it would be capable of giving rise to secondary criminal liability under the Serious Crime Act 2007 of a Crown agent in respect of the provision of locational intelligence. The Divisional Court (Moses L.J., Simon J.) refused permission to bring the claim and the Court of Appeal (Lord Dyson M.R., Laws and Elias L.JJ.) refused permission to appeal. It was common ground that the court would not decide whether the drone attacks carried out by US officials are lawful. The Master of the Rolls, with whom the other members of the court agreed, considered that the substance of the claim was that the court was asked to condemn the acts of the persons who operate the drone bombs and that, accordingly, it was neither justiciable nor to be heard as a matter of discretion in an English court, save in exceptional circumstances, such as where the foreign acts of state are in breach of clearly established rules of international law or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights. Issues of territoriality were simply not raised in those proceedings and, as a result, the decision does not provide any assistance to the respondents in this regard.

133. For these reasons we consider that the act of state doctrine has no application to the extent that these proceedings relate to the conduct of officials of the United States outside the territory of the United States.

IV. APPLICABLE LAW

134. The precise grounds of appeal are set out at paragraph 29 above. In his oral submissions Mr Hermer puts the matter in this way. First, he submits the judge's ruling wrongly puts the burden on the appellants to plead their case on foreign law when they were entitled to rely on the presumption that English law is the same as foreign law. Secondly he says it was premature to reach a decision on the applicable law. The facts were insufficiently clear and the decision should not have been made until a later stage of the proceedings.

135. Before addressing the appellants' grounds of challenge, it is necessary to consider why the issue came before the judge at the stage that it did, and to examine the relevant legal framework and the reasons for his decision more broadly.

136. The appellants did not mention the issue of the applicable law in their Particulars of Claim (albeit in the Claim Form it is said the respondents are liable for the pleaded torts "and/or equivalent causes of action under Malaysian, Thai and/or Libyan law."). However issue was joined between the parties on the point as a result of what was pleaded in the respondents' Defences (which relied on section 11 of the 1995 Act) and the appellants' Reply.

137. Section 11 of the 1995 Act provides the general rule for the choice of applicable law in tort. It says:

> "11. Choice of applicable law: the general rule.
> (1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.
> (2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being-
> (a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual sustained the injury;
> (b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and
> (c) in any other case, the law of the country in which the most significant element or elements of those events occurred.
> (3) In this section "*personal injury*" includes disease or any impairment of physical or mental condition."

138. This general rule can however be displaced by the operation of section 12 of the 1995 Act, which says:

> "12. Choice of applicable law: displacement of general rule.
> (1) If it appears, in all circumstances, from a comparison of-
> (a) The significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and

(b) the significance of any factors connecting the tort or delict with another country,

that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.

(2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events."

139. Section 14 of the 1995 Act disapplies by sub-section (3)(a)(i) the applicable law if it would conflict with public policy. The judge said there was a suggestion that the appellants might be able to rely on section 14, but as no foreign law had been pleaded, the stage at which that section might apply had not arisen. He therefore allowed for the possibility that a decision might need to be made on the point in the future, by the terms of his order. The section provides as follows:

"14. Transitional provision and savings.

(1) Nothing in this Part applies to acts or omissions giving rise to a claim which occur before the commencement of this Part.

(2) Nothing in this Part affects any rules of law (including rules of private international law) except those abolished by section 10 above.

(3) Without prejudice to the generality of subsection (2) above, nothing in this Part-

(a) authorises the application of the law of a country outside the forum as the applicable law for determining issues arising in any claim in so far as to do so-

(i) would conflict with principles of public policy; or

(ii) would give effect to such a penal, revenue or other public law as would not otherwise be enforceable under the law of the forum; or

(b) affects any rules of evidence, pleading or practice or authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum.

(4) This Part has effect without prejudice to the operation of any rule of law which either has effect notwithstanding the rules of private international law applicable in the particular circumstances or modifies the rules of private international law that would otherwise be so applicable."

140. All the respondents denied that the applicable law was the law of the United Kingdom. The respondents pointed out that the events which formed the matter of complaint occurred overseas rather than in the United Kingdom. The respondents pleaded in reliance on section 11 of the 1995 Act that the applicable law should be that of the country where the events said to constitute the torts were alleged to have

occurred or (where events occurred in more than one country) where the appellants alleged they sustained personal injury – that is, China, Malaysia, Thailand and Libya. They alleged there was no basis for disapplying the general rule (under section 12 of the 1995 Act) since it was not substantially more appropriate to apply English law on the facts of the case. In their reply, the appellants said that "reliance on foreign law is inappropriate and otiose not least because…it is to be presumed that the law of all relevant countries will provide a remedy to victims of serious human rights violations." They went on to assert that if the respondents wished to advance a case that foreign law applied they were under an obligation to plead the precise provisions of foreign law on which they relied, failing which the presumption that the substantive dispute should be determined by the laws of England and Wales (sic) should apply.

141. The respondents asked the judge to determine the issue of applicable law as a preliminary issue because, it was said (in their Application Notice), this was not a matter that could properly be left to trial; the parties needed to know at the outset what the applicable law was, so they could plead their cases by reference to it, and no evidence was required to determine the point, which depended on a simple application of section 11 of the 1995 Act to the facts as pleaded by the appellants. Equally, no evidence was required for the purpose of considering whether the general rule should be disapplied by section 12 since the extent to which the claim and the parties were connected to the various states in question was also apparent from the Particulars of Claim.

142. The judge considered that two questions arose. First whether on the application of sections 11 and 12 of the 1995 Act, the applicable law was the law of China, Malaysia, Thailand, the United States and Libya, as the respondents contended, or whether it was English law as the appellants contended. Secondly, if the applicable law was the former, whether the court should apply English law in the absence of pleading and proof that the laws of those states were different. But he also addressed what Mr Hermer had submitted was the logically prior question, which was whether the issue of applicable law was "fact sensitive" and should not be determined at this stage.

143. On the first question, the judge said it was clear from the Particulars of Claim that the key events which formed the basis of the alleged torts took place in China, Malaysia, Thailand, on board a US-registered aircraft and in Libya rather than in England and Wales (which meant that, subject to section 12 of the 1995 Act, the applicable law for determining the appellants' causes of action was the law of the place in which the unlawful detention was alleged to have occurred or the injury or damage was alleged to have been sustained); and, after considering the factors which were material under section 12, he decided that the general rule which would lead to that result should not be displaced.

144. We think the judge's characterisation of the material events was obviously right, as can be seen from the outline of the factual assertions forming the basis of the appellants' claims set out at paragraphs 8 to 17 above. We also think he made no error in applying the relevant sections of the 1995 Act to the material before him. It is to be noted in this context that Mr Hermer had conceded in argument before the judge that it was unlikely that the laws of England and Wales applied, for example, to the

appellants' alleged detention in China and Malaysia (paragraph 124). This was a realistic concession in our view.

145. In relation to the question which arose under section 12 of the 1995 Act, as the judge pointed out (at [133]):

> "[N]one of the places where the appellants alleged they were detained, or from where they were transferred was under British control. The alleged detentions and transfers are said to have resulted from the actions of agents of foreign states. Even in respect of the two causes of action which might be said to have a real link to the United Kingdom (misfeasance in public office and negligence) the basis of the claims is the allegation of unlawful detention in and transfer from various foreign states…Nor are the locations where the Appellants say their injuries occurred under United Kingdom control. It is also pertinent to note that the Appellants are not, and never have been UK nationals, did not have the right to enter or remain in the United Kingdom and were not resident within the United Kingdom during the relevant period."

146. As Mr Hermer accepts, there has to be a strong case for displacing the general rule, which is "not to be dislodged easily" (see *Roerig v Valiant Trawlers Ltd* [2002] 1 WLR 2304, per Waller LJ at paragraph 12(v) and also *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327; [2007] Q.B. 621 at paragraphs 102 to 106).

147. The appellants' point however is that in a case where the respondents' defence is limited to "Neither confirm nor deny" until the court has more information, for example about the United Kingdom's involvement in the events in question, it is premature to determine that the general rule should not be displaced. We are not persuaded by this argument and we think the judge made a proper and fair decision, and that there was more than sufficient material on which to make it. The suggestion that something might later emerge of signal relevance to the issue either after service of a more fully pleaded defence or disclosure, is unconvincing we think, on the facts of this case. As Mr Phillips submits, the appellants have pleaded the locations where the events constituting the torts are alleged to have occurred, including the locations where they are said to have sustained personal injuries; their nationalities and links (or lack of them) to the United Kingdom and their understanding of the role of the respondents. Having regard to the nature of the claims and the appellants' own position, the court was well-placed to consider whether the alleged torts were connected with the United Kingdom or any other country by virtue of the factors relating to the torts or the parties in accordance with section 12 of the 1995 Act; and to consider whether it would be substantially more appropriate to apply the law of England and Wales to the appellants' claims or not.

148. The decision that the general rule should not be displaced was not a marginal one in our view, nor was it premature to take it.

149. We turn next to the issue of the pleading of foreign law and the presumption. Standing back for the moment, it is apparent in our view from the way the case was argued

below, and from Mr Hermer's arguments on this appeal, that the real bone of contention between the parties was not so much whether the issue of applicable law was engaged by the claims, but who should plead their case on (the content of) foreign law first, and as such, it is a different aspect of the appellants' case on prematurity. As Mr Phillips described it during the course of argument, something of a poker game had developed between the parties on the point – and the respondents applied for the determination of the preliminary issue in order to bring this to an end, for good case management reasons.

150. In the court below the appellants contended that the pleading of the applicable law should await findings of fact as to what occurred. But in the meantime, the case should proceed on the basis of the presumption that foreign law was the same as English law: see *Dicey, Morris and Collins, The Conflict of Laws, 15th edition*, Rule 25(2). It was said that in the absence of reliance by either party on foreign law, the court should apply English law (see paragraphs 136 and 139). Mr Hermer cited to the judge (as he has to us) obiter observations in *PT Pan Indonesia Bank Ltd v Marconi Communications Ltd* [2005] EWCA Civ 422 where the Court said at paragraph 70: "…the party who asserts that the application of foreign law would provide a different result bears the burden of satisfying the court that it is so"; and in *Sharp v Ministry of Defence* [2007] EWHC 224 (QB) where Keith J said at paragraph 11: "…foreign law is deemed to be the same as English law in the absence of evidence to the contrary."

151. *PT Pan* was a complex international contract dispute. It concerned an issue of governing law (the choice was between English or Indonesian law). This had to be determined by reference to the Rome Convention as incorporated by the Contracts (Applicable Law) Act 1990, and case law relating to letters of credit. The court went on to deal with a second issue (service out of the jurisdiction pursuant to CPR rule 6.20 (as it was then)) for the sake of completeness only. The observations cited above were made in relation to that second issue. *Sharp* concerned a personal injury action brought by a British soldier against the Ministry of Defence arising from a road traffic accident in Germany. The parties agreed that the case would be governed by English law; neither suggested that German law was applicable or different or likely to be different from English law. Neither of those cases is analogous on their facts to this one in our view.

152. Mr Hermer submits the order made by the judge was unjust and disproportionate because it forced the appellants to incur the cost, inconvenience and delay of seeking expert evidence on several systems of law when they did not seek to rely on any material difference in foreign law, and none was alleged against them. In argument he said the appellants' complaint was that if their claims continued, as a result of the judge's order, the burden had (wrongly) been put on them to set out their case in this respect.

153. Whichever way it is put, we cannot accept this argument. It seems to us to be a wholly artificial and unrealistic way of looking at the case when one considers the nature of the allegations made by the appellants, and of course the concession made by Mr Hermer to which we have referred.

154. The appellants advance no authority for the proposition that the applicability of foreign law cannot be determined at the pleading stage in the absence of either party

pleading a case in foreign law; and we reject the suggestion that the timely resolution of the issue by reference to the 1995 Act, which is plainly raised on the facts and in the pleadings in the way we have indicated, should yield to the (evidential) presumption of similarity, for what might be described as tactical reasons. As we have said at paragraph 76 above, it is clear from the Particulars of Claim, that each cause of action depends on establishing that the conduct of the actual perpetrators (the agents of the foreign state) is unlawful, so that for their claim in false imprisonment, for example, the issue will be whether those who detained the appellants i.e. the Chinese, Malaysian, Thai, United States and Libyan authorities, acting through their agents, acted unlawfully. We do not think it can be sensibly suggested that it is necessary for the respondents to set out in their pleadings the provisions of the laws of China, Malaysia, Thailand, the US and Libya to arrest, detain and deport immigrants and explain where they were different from English law, before the court could determine whether the conduct of the local perpetrators was governed by the laws of those jurisdictions or English law. Nor do we accept that unless and until that is done, the court should otherwise proceed on the inherently improbable basis that English law and the laws of the jurisdictions we have mentioned on the conduct on which the appellants rely and which they must prove to be unlawful, are the same.

155. We are not surprised that the judge was unimpressed by the appellants' arguments on this (pleading) point, which he characterised as evasive, unrealistic and contrary to the overriding objective. We would add that we do not accept that section 14(3)(b) of the 1995 Act (which provides a saving for "any rules of evidence, pleading or practice") affects the position as Mr Hermer argues. The issue of the applicable law is one of substantive law, not procedure.

156. The judge said the observations of the court in *PT Pan* were plainly not part of the court's reasoning, but even if they had been they were of little assistance to the appellants, since no foreign law had been advanced in the present case; and the decision certainly provided no support for the proposition that the parties were entitled to proceed on an unreal basis either that English law applies, or that English law is the same as foreign law. We agree with that view.

157. In view of our conclusions it is not necessary to address some of the broader issues potentially raised by the respondents' arguments on the presumption (including the criticisms made of it in the modern world of pleading and practice which Mr Phillips touched on in his written arguments and to which the judge briefly referred before stating his conclusions) except to say that in our view the presumption of similarity is not one in any event that applies inflexibly, regardless of the circumstances, and is subject to a number of exceptions (see *Shaker v Ali Bedrawi* [2003] Ch 350 at paragraph 64 and *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] 2 CLC 220 at paragraph 428). One exception must be where, as here, the issue of the applicable law is plainly engaged on the pleadings and on the facts, and the court is in a position to adjudicate on the point.

158. The inevitable result of all this, is that the appellants will have to plead their grounds for asserting that the conduct alleged is unlawful in accordance with the judge's order; and if they do not do so, or fail to prove their case on the point, their pleading will be deficient and their claims will fail – subject of course to the important public policy exception in section 14 for which the judge's order catered. This is no more and no

less than is appropriate in our view in accordance with the ordinary rules of pleading which require litigants to set out the material facts which they must prove in order to make good their claim (see CPR 16.4(1)(a)).

159. We do not accept that this result is either unjust or disproportionate. The cost, inconvenience and delay which it is said will occur, is as Mr Phillips says a necessary consequence of the breadth of the appellants' case as they have pleaded it, and must be looked at in the light of the grave allegations that their claims comprehend.

160. The judge's order on the second preliminary issue therefore establishes the correct legal framework for the case. We think it was a sensible case management decision to deal with the preliminary issue and it was correct on the facts. Accordingly, this part of his order should stand, and this ground of appeal is dismissed.

V. CONCLUSION

161. For the reasons set out above:

(1) The appeal in relation to act of state will be allowed;
(2) The respondents' notice to affirm on grounds of state immunity will be dismissed;
(3) The appeal in relation to applicable law will be dismissed.