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Act of State and the Limits of Adjudication

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I. INTRODUCTION

Although ancient prerogatives used to give the British Crown considerable freedom from judicial scrutiny, they have dwindled in number following the constitutional settlements of the seventeenth century. But even now the victim of a tort or human rights violation may find that they have no domestic remedy if the act which caused the wrong was undertaken in pursuance of the Crown’s foreign policy objectives or its overseas military endeavours. The destruction of the Burmah Oil Company’s oil fields by British forces during the Japanese invasion of Burma in 1942 was claimed to be an example of such an act. The Company’s argument was that, in some circumstances, the Crown had a duty to pay compensation to those who suffer damage at its hands, even when acting under the prerogative. In response, the Lord Advocate argued that there should be no remedy available in this situation because it is recognised under the constitution that the judiciary should not have a say in matters relating to the actions of Crown agents in foreign affairs or the conduct of British armed forces abroad, unless empowered to do so by statute. The House of Lords, he submitted, would have to pass judgment on these Crown Acts of State in determining his liability (as the Crown’s representative) and these Acts were non-justiciable. Even though the Lord Advocate (somewhat controversially) lost the case, “the proposition that the executive [should] obey the law as a matter of

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3 The House of Lords was split in its decision, and its judgment “was reversed” by the War Damages Act 1965. For further discussion, see P. Allott, ‘The Courts and the Executive: Four House of Lords Decisions’ (1977) 34 Cambridge Law Journal 255 at 263-264.
grace and not as a matter of necessity" remains a possibility under English law regarding certain Governmental acts in foreign affairs.

It has always been possible for foreign states and their agents to be impleaded before English courts, although they will often be protected from suit by immunities found in both common law and statute. Beyond these immunities, English Courts have occasionally taken the view that they should consider various *Foreign Acts of State* in the factual matrix of a case non-justiciable. For instance, in the well-known dispute between (amongst others) the Buttes Gas and Oil Company and Dr Armand Hammer, the House of Lords would have had to determine the legality of the actions of several states in the Arabian Gulf as well as the United Kingdom, none of whom were party to the litigation, in order to resolve the dispute between the litigants. These state acts were held to be non-justiciable which, in turn, made it impossible for the House of Lords to determine whether what Dr Hammer had said about Buttes Gas’s conduct was fair comment or slander.

That certain state acts may be non-justiciable is, at root, a question concerning the appropriate allocation of power to the judiciary. There are salient reasons, arising in circumstances often relating to the acts of the United Kingdom or foreign states in international relations, why decision-making powers should move from the court to another branch of government. For some legal theorists (often associated with the last gasps of the Weimar Republic) this allocative power is, or should be, held by the sovereign itself, whose prerogative can be

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7 This case is considered in detail at XX-XX.
exercised to render certain matters non-justiciable.\(^8\) Happily, in modern
democratic states, it is settled that the judiciary itself determines its own powers
in accordance with the law. As such, English common law now recognises a
complex body of doctrine which allocates powers in relation to both of the types
of Act of State just described. An early expression of this complexity can be
found in *Salaman v Secretary of State for India* from 1906. Here, Fletcher Moulton
L.J. declared that “[a]cts of State are not all of one kind; their nature and
consequences may differ in an infinite variety of ways, and these differences may
profoundly affect the position of municipal Courts with regard to them.”\(^9\) This
is a familiar judicial theme. Lord Reid said in 1970 that “‘Act of state’ is a phrase
which has often been used, but by no means always with the same meaning.”\(^10\)
In 2012, Rix L.J. said much the same: “the act of state doctrines cannot be
reduced to a single formula.”\(^11\)

There are suspicions that doctrine is not so much “complex”, as vague, irrational,
arbitrary, or incoherent, and, at root, legally uncontrolled. For example, Matthew
Nicholson has argued that the doctrine is “vague and undefined”, which in turn
allows judges to make “a political calculation … rather than an independent legal
judgment when deciding whether to hear a case involving … State acts.”\(^12\) Thus,
judicial decisions are to be explained as the result of the political will and interests
of the Government or judges of the time. This said, we should pause before
freighting sceptical or realist jurisprudence into discussion of this area of law.
Charges of vagueness or incoherence may simply be a consequence of the
director’s perception of the need for flexibility in highly sensitive political

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\(^9\) *Salaman v Secretary of State for India* [1906] 1 K.B. 613 at 639; 75 L.J.K.B 418 at 433.


circumstances. Francis Mann, for instance, sees this need as in part explaining the fragmented or slippery feel of the relevant law, as do Campbell McLachlan and Thomas Poole in more recent works.\textsuperscript{13} Thus, while it is certainly true that the doctrine here is complex and politically sensitive, this does not necessary warrant the conclusion that it is entirely incoherent, arbitrary or reflective of political moods. Indeed, the broad contours of legal doctrine and its normative source can be readily stated. In \textit{Buttes Gas}, just mentioned, Lord Wilberforce likened doctrine on Act of State to the River Nile: “once separated into a multi-channel delta, [it] cannot be reconstituted”.\textsuperscript{14} Thus, litigation now normally concerns circumstances where there is either a Foreign or Crown Act of State in its factual matrix, and there are well-established “channels” of case law which govern each of these circumstances. It is argued in what follows that the common source (to continue Lord Wilberforce’s analogy) of both bodies of doctrine is to be found in a set of shared reasons which explain why some acts, from all those a state might undertake, are to be considered non-justiciable Acts of State. Because these reasons are shared by both Crown and Foreign Act of State doctrine, to proceed down just one “channel” of case law and not the other is likely to reveal an incomplete picture of the limits of the court’s role regarding Acts of State. It is this observation which perhaps motivated the Supreme Court to hand down the leading cases of \textit{Belhaj} (on Foreign Act of State) and \textit{Rahmatullah} (on Crown Act of State) on the same day in 2017.\textsuperscript{15}

Campbell McLachlan has done much to surface the range of shared reasons which allocate authority to branches of government when matters of foreign affairs arise. For instance, he distinguishes juridical rules in both international and domestic constitutional law from issues of functional

\textsuperscript{13} Mann, \textit{Foreign Affairs in English Courts} (1986) Ch.8; C. McLachlan, \textit{Foreign Relations Law} (Cambridge: Cambridge University Press, 2014), Ch.1; T. Poole, \textit{Reasons of State} (CUP, 2015), Ch.8.

\textsuperscript{14} See \textit{Buttes Gas v Oil Co} \textit{v Hammer (No.3)} [1982] A.C. 888 (H.L.) at 931 per Lord Wilberforce.

propriety, thus distinguishing reasons associated with political and epistemic authority in relation to the judicial function. What he writes is largely correct, and it is unnecessary to engage in pen-fighting over relatively minor differences between his position and mine. What follows, instead, is an attempt to provide a finer-grained analytical reconstruction of the normative architecture underlying the doctrine which comes into play when questions relating to the Acts of States in international relations arise. Indeed, both Campbell McLachlan and the Supreme Court (citing McLachlan) recognise this as a necessary and important job.16 I argue that an English Court has been prepared to find a state act non-justiciable where (1) there is a lack of applicable standards; (2) there is an insufficient connection between the Court and the Act; (3) it lacks expertise to pass judgment on certain types of matter in foreign relations; or, (4) the implications of passing judgment would be likely to cause significant injustice extending beyond the litigants. In each of these circumstances, a formal principle, which requires the Court to afford discretion to the Crown, or freedoms to a foreign state, to act in foreign affairs, is particularly weighty. However, these same Courts have worried that by recognising or respecting this discretion, victims of a tort or human rights violation will be left without a remedy and have been prepared to balance the formal principle just stated against another, which is a duty to provide a remedy to those whose rights have been violated. Weight is afforded to both principles depending upon the circumstances: How severe is the alleged rights violation? How profound are the likely prospective implications of the Court deciding for the United Kingdom’s international relations? The Court’s determination of these balances between principles in various circumstances establishes, in effect, the limit of its decision-making power in relation to litigation concerning the United Kingdom’s foreign relations in a way that respects both the need for principled decision-making and

16 Belhaj [2017] A.C. 964 at [33], citing C. McLachlan, Foreign Relations Law (Cambridge: Cambridge University Press, 2014) at [12.129]: “what is required is a ‘much more fine-grained approach – disaggregating the general category in order to achieve the ‘specialization of the principle’ in its application to particular classes of case.’”
political flexibility which both judges and commentators agree to be both the aim of, and inherent within, this area of English law.

My argument begins by illustrating potential sources of indeterminacy in the law by considering the earliest recorded case which considered Acts of State (Blad v Bamfield) before moving to the two most recent and important decisions of the Supreme Court on this matter, just mentioned. Indeterminacy, it will be shown, may operate both at the level of reason and rule: there are a range of reasons justifying doctrine, and the rules which express those reasons can be said to be “semantically open” (II.). That rules may be open, and that there are a range of competing reasons justifying them, in an area of law is not unusual and need not indicate indeterminacy if these rules and reasons can be brought into rational relation. Robert Alexy’s Law of Competing Principles can be applied and adapted to help achieve this end. His view is that the reasons expressed by legal doctrine are best conceptualised as legal principles. Legal doctrine is to be understood as the confluences, in various circumstances, of the two determinate principles set out above. In (IV.) I set out how these principles combine and compete, and thus establish rules, in some leading cases. I make some comments about the appropriate balance of such principles by way of conclusion (V.), which is broadly supportive of the approach which has been adopted in recent years by English courts.

II. THE INDETERMINACY OF ACT OF STATE DOCTRINE

A. Blad v Bamfield (1673)

In the second half of the seventeenth century, relations between England and Denmark were volatile. Blad was the holder of a patent of monopoly from the King of Denmark to trade in Iceland, then in Danish possession. An

17 36 E.R. 992; (1674) 3 Swans. 604.
Englishman, Bamfield, had his property seized on the high seas in 1668 on the authority of the Danish Crown, and forfeited by the Danish courts, as he had been allegedly fishing off Iceland in breach of the monopoly according to Danish law. In the early 1670s, Blad visited England and was sued for trespass and trover at common law by Bamfield. To have proceedings stayed, Blad went to the Privy Council. His argument was that the seizure of Bamfield’s property was sanctioned by Denmark and therefore was an Act of State. For not entirely clear reasons, the case ended up before the Chancery Court. Before this Court, it was Bamfield, rather than Blad, who invited the Court to consider the interstate aspects of the case. Bamfield argued that Blad’s letters patent, issued by the King of Denmark, were contrary to the treaties between England and Denmark and, as a result, were void. In 1674, in Blad v Bamfield, Lord Nottingham held that once Bamfield raised a question about the legality of the acts of the Danish Crown (the issuance of the letters patent) under international law (that is, the treaties between the English and Danish Crowns), the issue could no longer be sent for trial at common law, and he issued a perpetual injunction to permanently stay the proceedings. Why was this?

In 2017 the Supreme Court of the United Kingdom discussed Lord Nottingham’s answers to this question. In Belhaj, Lords Sumption and Mance chose to interpret his judgment as being a matter of jurisdiction, and thus authority for the familiar proposition that “a domestic court was incompetent to

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18 In the Privy Council, Lord Nottingham said the act was not a case of state, but a case of private injury to be considered in a common law court. See D. Yale, Lord Nottingham’s Chancery Cases vol 1. (London: Quaritch, 1957), at pp. 7-8. However, Blad was offered time to gather evidence before the trial. If he exhibited a bill in Chancery, Lord Nottingham would grant him an injunction to delay the common law case. Blad brought a bill and got an injunction. The matter then went to the Chancery, and not the Admiralty, Court. Lord Nottingham held that the Chancery not only had an admiralty jurisdiction per viam appellationis, but (also) per viam evocationis. 19 It is unclear what the relevant treaties are. The most likely candidates are the Concert of the Hague 1659 and or possibly the Treaty of Copenhagen 1670. This said, the latter postdates the dispute, but not the case. 20 36 E.R. 992.
construe a treaty”. 21 Specifically, for these two Justices of the Supreme Court, Lord Nottingham did recognise the validity of Blad’s rights under the Danish letters patent, but then held that it would be an impermissible pretence for the court to determine their validity according to Danish law, and then to determine Danish law according to the treaties between the English and Danish Crowns. The following passage from Lord Nottingham’s judgment appears to reflect this more jurisdictional approach:

“…to send it to a trial at law, where either the Court must pretend to judge of the validity of the king’s letters patent in Denmark, or of the exposition and meaning of the articles of peace; or that a common jury should try whether the English have a right to trade in Iceland, is monstrous and absurd.” 22

There may be grounds for the pretence just described to be considered an absurdity, given some views of the appropriate limits of the English court’s jurisdiction, but it is not obviously monstrous to consider duties under foreign or international law, or the acts of the English Crown or foreign states, when determining private rights under English law. 23 Lord Nottingham, however, provides another reason which explains what would be so abhorrent if the proceedings were allowed to continue. His worry is that in the circumstances, to determine the validity of Denmark’s acts against the underlying treaties would

21 Lord Sumption, Belhaj v Straw [2017] A.C. 964 at [202]. This was also the view taken by Holdsworth, Some Makers of English Law (Cambridge: Cambridge University Press, 1938), at p.147.


23 See, for example, Cottington, an early private international law case from the same period, which Lord Nottingham also decided. (Summarised in Holdsworth, Some Makers of English Law (1938), at p.147) On the reception of foreign law more generally in this period, see H. Nenner, By Colour of Law: Legal Culture and Constitutional Politics in England, 1660-1689 (Chicago: University of Chicago Press, 1977) and W Harrison Moore, Act of State in English Courts (New York: Dutton, 1906), Ch.1.
“be of vast consequence to the public” because “every misinterpretation of an article may be the unhappy occasion of a war”, and serious damage could be caused to relations between the two states:

“But in truth this pretence of articles of peace must needs fail the Defendants; for the articles of free trade are reciprocal, and are understood on both sides, with exception to the laws and customs of each kingdom. Put the case then that a Danish ship should trade to the Barbadoes, or any other of his majesty’s foreign plantations, and were thereupon taken and seized, or should break in upon the privileges granted by his majesty to the East India Company, and were there arrested at Bantam or Fort St. George, doubtless this were no breach of the treaty on our part; and if any of his majesty’s subjects who seized that ship at the Barbadoes, or judges, should be then molested and prosecuted in Denmark, in a private action, for what they did in obedience to the laws of their king and country, it would look like such a breach on their part as might well occasion a further rupture on ours.”

So the case appears to be as much about judicial restraint on the grounds of public policy as being concerned with the problems of jurisdictional overreach. One could conclude that the reasons determining the outcome in this case are rooted in political concerns about the appropriate allocation of powers within the state, rather than being concerned with the application of general legal rules.

B. Rahmatullah

These days, a plea of Act of State may succeed for reasons similar to those discussed in Blad v Bamfield, despite its antiquity. And as in this ancient case, if successful, the plea will render at least certain factual or legal aspects arising in

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those circumstances non-justiciable. This may result in the proceedings being stayed altogether, depending on how close the act is to the “heart” of the case.\textsuperscript{25} So, the existence of an Act of State meant that Bamfield was not able to get his property back, or obtain compensation for his loss. However, in recent cases which involve the acts of the United Kingdom in the wars in Iraq and Afghanistan in the early part of this century, a more worrying prospect emerged. Here, finding an Act of State in the circumstances may have led to proceedings being stayed and, as a consequence, serious personal torts or even human rights abuses going unremedied. This was the concern of Supreme Court in Rahmatullah and Belhaj. In both cases, claimants sought remedies for harms suffered, which were caused by the Crown, the Ministry of Defence, and other representatives of the British Crown, acting in conjunction with foreign governments.

Rahmatullah, a Pakistani national, was captured by British forces in Iraq in 2004, and transported (or ‘rendered’) to a US detention facility, where he was detained for over 10 years. He brought an action in tort against the British Government, claiming mistreatment directly by the hands of British officials, and for being complicit in his detention and mistreatment while in US custody. The Government sought to claim that his detention and mistreatment were Crown Acts of State, and this argument was accepted by the Supreme Court. In broad terms, the relevant rule which the Court applied required that it should abstain from passing judgment on Crown Acts appearing in the factual circumstances of the case which relate to “situations of sovereign authority exercised overseas as a matter of state policy”\textsuperscript{26}.

The Justices’ reasoning conceptualised the matter in subtly different ways.\textsuperscript{27} For example, Lords Mance and Sumption saw the matter narrowly as one of

\textsuperscript{25} See Yukos Capital v Rosneft [2014] Q.B. 458 at [109].
\textsuperscript{26} Rahmatullah v Ministry of Defence [2017] A.C. 649 at [51] per Lord Mance.
justiciability. Lady Hale agreed, describing “certain decisions of high policy in the conduct of foreign relations” as non-justiciable. She also drew a distinction between “high policy” and a wider tort defence that related to the actions overseas by British armed forces and other state agents. She concluded, though, that the relevant acts fell squarely into the first category. All (including the litigants) agreed that violations of the Human Rights Act 1998 could not be Crown Acts of State.

C. Belhaj

Mr Belhaj, a Libyan national and opponent of Colonel Gaddafi (then the dictator of Libya), was rendered, along with his wife, to a CIA black site in Thailand in 2004. He claimed to have suffered various torts and human rights abuses including unlawful detention, rendition, cruel and degrading treatment and assault by government officials from the United States, China, Thailand, Libya and Malaysia. British Government officials were alleged to have been complicit in these acts. In response, the British Government claimed that either the foreign states involved had immunity, or that their actions were non-justiciable as foreign Acts of State, and thus the litigation should not proceed. Although rejecting the immunity argument on the grounds that the foreign governments involved were not party to the dispute and thus their rights were not at stake, the Justices were in broad agreement that there were some foreign state acts which related to “high policy” (as opposed to routine policy) which could indeed be non-justiciable. In the end, though, the Supreme Court held the

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29 This was why the claims made by Serdar Mohammed (an alleged senior Taliban commander), that his detention by the British Government had violated the European Convention on Human Rights, could proceed. Serdar Mohammed’s substantive rights were then determined in a third judgment handed down by the Supreme Court on the same day as Rahmatullah and Belhaj. See Al-Wahed v Ministry of Defence [2017] UKSC 2; [2017] A.C. 821 and see below at XX-XX.
foreign state acts arising in this case did not fall into that category, and so Mr Belhaj’s action in tort could proceed unimpeded.

Following these judgments, the English and Welsh Solicitors Regulatory Authority sought to discipline the lawyers involved in these litigations. While there was evidence of impropriety by the lawyers in other cases relating to the wars in Iraq and Afghanistan, the attempt to discipline the lawyers in Rahmatullah and Belhaj failed. In late-2021 it was reported that the Ministry or Defence had been quietly settling hundreds of claims of those who suffered at the hands of the United Kingdom during these wars.

**D. Open rules on Crown Acts of State**

In Rahmatullah and Belhaj, it is difficult to obtain a clear view of the content of the rules which are applied. This is because these rules either are open textured or because they conflict with other rules.

Both of these familiar ideas were discussed some time ago, with characteristic analytical clarity, by H.L.A. Hart. While legal certainty is a virtue, Hart also recognised “the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case.” 31 Issues or terms within rules may be deliberately left open through the introduction of abstract categories (his examples were “reasonableness”, “fair rate” or “safe systems of work”) and it is natural that previous legal certainties become ambiguous as new circumstances arise. 32

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The rules we seek aim to answer the following question: which, from the totality of state acts, are non-justiciable Acts of State? Lady Hale, who gave the leading judgment in *Rahmatullah*, found in Lord Wilberforce’s judgment in *Nissan* a sense of those acts which are to be classified as Acts of State, while acknowledging the “openness” of the relevant rule:

“The…rule is one of justiciability: it prevents British municipal courts from taking cognisance of certain acts. The class of acts so protected has not been accurately defined: one formulation is ‘those acts of the Crown which are done under the prerogative in the sphere of foreign affairs’.”33

But Lord Reid, also in *Nissan*, explained why this formulation is not enough:

“I think that a good deal of the trouble has been caused by using the loose phrase ‘act of state’ without making clear what is meant. Sometimes it seems to be used to denote any act of sovereign power or of high policy or any act done in the execution of a treaty. That is a possible definition, but then it must be observed that there are many such acts which can be the subject of an action in court if they infringe the rights of British subjects. Sometimes it seems to be used to denote acts which cannot be made the subject of inquiry in a British court. But that does not tell us how to distinguish such acts: it is only a name for a class which has still to be defined.”34

Helpfully, Lady Hale, in *Rahmatullah*, attempted to further define this class. With regard to foreign claimants\(^{35}\) (such as Rahmatullah) the rule

“…cannot apply to all torts committed against foreigners abroad just because they have been authorised or ratified by the British Government. It can only apply to acts which are by their nature sovereign acts, acts which are inherently governmental, committed in the conduct of the foreign relations of the Crown…”\(^{36}\)

Examples of class of Acts she had in mind were drawn from the United Kingdom’s involvement in the wars in Iraq and Afghanistan: the decision to go to war; acts to bring about peace and stability after the armed conflict; engagement with multilateral security operations.\(^{37}\) These governmental acts – and the relevant acts in *Rahmatullah*, were to be regarded as non-justiciable, although other governmental acts may have been. Either way, certain terms in the rule (e.g. “inherently governmental”) remained open (in the Hartian sense) and were to be specified in the circumstances arising in the litigation.

**E. Open rules on Foreign Act of State**

Although strictly speaking Lord Neuberger gave the leading judgment in *Belhaj*, Lord Mance offered a very thorough and systematic analysis of the relevant rules on Foreign Act of State, which has been adopted in subsequent judgments.\(^{38}\) In

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\(^{36}\) *Rahmatullah v Ministry of Defence* [2017] A.C. 649 at [36].


\(^{38}\) *Belhaj v Straw* [2017] A.C. 964 at [11] per Lord Mance. See also *Ukraine v Law Debenture Trust* [2018] EWCA Civ 2026; [2019] Q.B. 1121; *Ukraine v Law Debenture Trust* [2023] UKSC 1; [2023] All ER (D) 41; and, *High Commissioner for Pakistan in the United Kingdom v Prince Muffakham Jaf* [2019] EWHC 2551 (Ch); [2020] Ch. 421. This applies to legislative and executive acts. Courts should exercise “caution” when questioning foreign judicial judgments. See *Yukos Capital v Rosneft (C.A.)* [2014] Q.B. 458 at [87]. For a recent application of the rule, see *Reliance Industries v*
Belhaj, the relevant rule is that the English Court will abstain from adjudicating on matters insofar as they call into question the legality of the “sovereign” and international acts\(^{39}\) of a foreign state outside of the territory of the United Kingdom.\(^{40}\) Lord Mance was very explicit about the open and context sensitive nature of the rule:

> “Whether an issue is non-justiciable falls to be considered on a case-by-case basis. Considerations both of separation of powers and of the sovereign nature of foreign state or inter-state activities may lead to a conclusion that an issue is non-justiciable in a domestic court.”\(^{41}\)

Evidence was offered which suggested that a judicial decision may compromise the security relationships between the United Kingdom and the United States, or it would at least have embarrassed the Government of the United Kingdom.

In his judgment, Lord Mance held that while “clear governmental indication as to real and likely damage to the United Kingdom foreign policy or security interests”\(^{42}\) (often in the “international space”) of deciding could render the relevant acts non-justiciable, possible embarrassment would not.\(^{43}\)

> “[R]eal and likely damage” is an example of an aspect of the relevant rule which remained open. As mentioned, the Supreme Court held that the potential damage of the court deciding was insufficient to warrant the Acts being non-justiciable.

### F. Incomplete rules

\(^{39}\) But not omissions: see AAA and Ors v Unilever [2017] EWHC 371 (Q.B.); [2017] 2 W.L.U.K. 681 at [56].

\(^{40}\) Belhaj v Straw [2017] A.C. 964 at [11]. The other two rules are jurisdictional.


\(^{42}\) Belhaj [2017] A.C. 964 at [105]. See also R (Corner House Research and another) v Director of the Serious Fraud Office [2008] UKHL 60; [2009] 1 A.C. 756 e.g. at [54]-[55].

Hart distinguished the open texture of rules just mentioned from difficulties that arise in conflicts between rules. He argued that conflict is resolved by determining that one or the other rule is to be disapplied in the circumstances. The disapplied rule, however, may well remain valid in other circumstances where there is no conflict. That rules conflict indicates, for Robert Alexy, that they are incomplete.

In both Belhaj and Rahmatullah the Supreme Court acknowledged the possibility of a conflict between Act of State rules and those which codify fundamental domestic and international human rights. Here, English law may permit an exception to rules on Act of State. In Belhaj, Lord Mance held:

“I would accept that detention overseas as a matter of considered policy during or in consequence of an armed conflict and to prevent further participation in an insurgency could in some circumstances constitute a foreign act of state... But here we are concerned, in Belhaj, with allegations of apparently arbitrary rendition with a view to forcible handing over to an arbitrary ruler and, in Rahmatullah, with allegations of what again appears to have been arbitrary detention without any of the usual forms of legal or procedural protection accompanied by severe mistreatment. Even if one could say that such treatment reflects some policy of the various foreign states involved, or indeed of the United Kingdom, it goes far beyond any conduct previously recognised as requiring judicial abstention.”

Although this exception was not applied in Belhaj or Rahmatullah, it was applied by the Court of Appeal in the earlier case of Yukos Capital v Rosneft, as well as

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46 Belhaj v Straw [2017] A.C. 964 at [97].
47 Yukos Capital v Rosneft [2014] Q.B. 458 at [69].
in the subsequent case of Ukraine v Law Debenture Trust. The latter case concerned aggressive acts by Russia against Ukraine, which appeared to be in violation of Art.2(4) of the Charter of the United Nations (which was, in turn, understood to be an jus cogens principle). In 2018, the Court of Appeal refused to allow the existence of these acts of the international plane to be non-justiciable because they constituted serious violations of international law.\textsuperscript{48} In 2023, while coming to the same overall conclusion, the Supreme Court played down the international aspects of the litigation. Rather it saw the matter as being concerning with the extent of the jurisdiction of English Law, to which both parties had consented, and the application of the common law on duress.\textsuperscript{49}

**III. THE LIMITS OF ADJUDICATION**

For Hart, the problem which emerges from rules being open and incomplete is obvious: they give rise to “legally unregulated cases in which on some point no decision either way is dictated by the law and the law is accordingly partly indeterminate or incomplete.”\textsuperscript{50} That is, decision-making may become arbitrary in the sense of being to some extent unbounded or uncontrolled by legal reason at the point of application.\textsuperscript{51} This would be grist to the mill of those taking a realist or critical perspective, who would see this as an obvious feature of the application of general reasons and rules to concrete cases. In this section, this conclusion is resisted. Instead, it is argued that a coherent structure of plausible formal legal principles which underpin judicial pronouncements on Act of State.

It is normally the case that the solution to the problem just described is for judges to attempt to balance substantive interests, values or principles which undergird the applicable rules. This is Hart’s view. Judges must do their best to strike “… a

\textsuperscript{48} Ukraine v Law Debenture Trust [2019] Q.B. 1121 at [173] and [180]
\textsuperscript{49} Ukraine v Law Debenture Trust [2023] UKSC 1.
balance, in the light of circumstances, between competing interests which vary in weight from case to case". Hart takes the example of “safe systems of work” which requires safety to be given moral weight, which is then balanced against the moral weight afforded to efficacy or productivity. Some claim that these values can be given weight against a rationally determinate hierarchy of goods. Finnis considers this balance to be more a matter of legislative choice within an outer moral boundary, but he also strongly endorse formal principles guiding decision-making, such as that one should not depart from established practice without good reason. Thus, when rules are particularly open or are incomplete, those interests or values judged weighty in the past should be judged weighty now, thus maintaining a consistent and coherent interpretative legal framework. However, while our concepts of substantive justice and legal coherence may provide reasons which come into play when rules are open or incomplete, they answer a different question to that faced here. Act of State rules appear more concerned with the formal limits of a court’s jurisdiction and not obviously concerned with weighing substantive goods or coherence once the court has jurisdiction.

A. Polycentricity, Policy and Formal Principles

Lon Fuller provides a well-known account of how decision-making power should be allocated within a legal order. His intuition is that the processes,
methods and competences of different forms of legal or political institution are either more or less appropriate to regulate particular forms of social interaction. Thus, he writes that “…adjudication finds its normal and “natural” province in judging claims of right and accusations of fault”\(^58\) between litigants. Chayes refers to this as a “bipolar” dispute.\(^59\) Adjudication, however, is functionally inappropriate if there is a “predominance of polycentricity”. Polycentricity exists where a decision is likely to cause a significant change to broader social interrelations, beyond those that exist between litigants, as may be the case when issues of appropriate wages, taxes, prices or actions in pursuance of foreign policy emerge.\(^60\) Here it is better to allocate decision taking competence to other forms of social ordering such as contract (including political deals and international agreements) or managerial direction (including, perhaps, diplomacy). A “predominance of polycentricity” is a \textit{prima facie} reason why a court becomes a less appropriate decision-taker than, for example, the diplomatic branch of the executive, and why certain acts should be regarded as non-justiciable by the court. This reason may assist deliberation on the open or incomplete aspects of Act of State rules.

Fuller’s intuition can and should be refined in two ways. First, he refers to “polycentric elements” which emerge in various circumstances which are not appropriate for judicial determination. What is not fully appreciated is that these “elements” may refer to what has already happened (for example, damage to personal property by British armed forces), but they may also have a forward-looking probabilistic aspect concerning the likely implications of the issuance of a judicial decision.\(^61\) For example, a decision itself may embarrass the executive or be a catalyst for a serious diplomatic incident. Second, Fuller accepts that the


existence of such elements may render the court less appropriate, rather than inappropriate, as a decision-maker, but this need not cause the court to not pass judgment.62 That is, many judicial cases will have some polycentric elements, and these elements will be generally undergirded by networks of legal rules. So, contract laws and statutory duties are relied upon by suppliers, buyers and employees in a market economy; the relations between states are governed by international law. Thus, decision-taking competence should only shift where “the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached”.63

What Fuller is pointing to is a context-sensitive balancing act which determines how authority is to be allocated within a legal system. For Fuller, this is not arithmetic. Rather, each polycentric and non-polycentric “element” has a different “significance”, or weight, in the circumstances. Lady Hale gives a good example of what Fuller has in mind in Rahmatullah when she argues that “governmental” acts “committed in the conduct of the foreign relations of the Crown” in the circumstances of the litigation are to be considered more weighty than other sorts of acts undertaken by public servants.64 Although both types of acts could be said to be polycentric, she is clear that the former acts could be non-justiciable, while the latter perhaps not when those acts lead to significant property damage or human rights violations. This also appears to be what Lord Reid was getting at in Nissan when he wrote: “Sometimes [Act of State] seems to be used to denote any act of sovereign power or of high policy or any act done in the execution of a treaty. That is a possible definition, but then it must be observed that there are many such acts which can be the subject of an action in court if they infringe the rights of British subjects.”65 What all have in mind is

64 Rahmatullah v Ministry of Defence [2017] A.C. 649 at [36].
that there are polycentric aspects of the litigation which are normatively relevant and determine the limits of judicial authority.

Arguments along this line are more common than might be thought. Although not well acknowledged, another version of it can be found in Dworkin’s distinction between principle and policy. Principles establish institutional rights, and policy “advances or protects some collective goal of the community as a whole.”66 As they are not deputy legislators, judges should not decide based on policy, and instead decision-making competence to decide questions of policy should shift to other branches of government.67 Dworkin intuits, in a way similar to Fuller, that decisions relating to complex political issues should not be taken by courts: there are good reasons for a matter to be non-justiciable. Dworkin also intuits that arguments of principle and policy interweave.68 But he only glimpses these claims are really reasons to allocate decision-making powers within the state.69 That is, the judge is not simply being asked to weigh individual rights against other collective interests, but rather is asked to determine how the interests and rights in play justify decision-taking power shifting within a legal order. And it would seem that this formal issue is expressed in the paradigm case concerning Acts of State, where individual rights are infringed by a state in pursuance of its foreign policy objectives.

What is more, Fuller and Dworkin only recognised how the polycentric or policy aspects of the circumstances cause acts to be non-justiciable. There is a range of other circumstances – such as the absence of rules, questions of relative

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68 Dworkin, Taking Rights Seriously (1977), at pp.22-23.
69 Dworkin does understand the importance of allocative formal principles within a legal system. He accepts that a court, for instance, should afford significant weight to legislation in its decision-making, even if that legislation is then to be interpreted in accordance with principle. See R. Dworkin, Justice in Robes (Cambridge, Massachusetts: Harvard University Press, 2008) at p.16. Also see pp.128-129 and Ch.5 generally.
epistemic competence, jurisdictional proximity and considerations of international law – which may give the court reason to determine that a state act is non-justiciable and defer to another branch of government.

Alexy largely accepts Fuller’s and Dworkin’s intuitions but presents a theory which is more sensitive to the full range of reasons just mentioned which allocate authority within a well-ordered polity.\textsuperscript{70} For this reason, it is theoretically attractive as a way of rationally reconstructing the case law relating to state acts. Principles (as opposed to rules) are “to be optimized, or realized to the greatest extent possible given empirical and normative constraints.” Thus, Dworkin’s principle and policy are subsumed as reasons to optimise the attainment of certain values. But the principles which underpin Act of State are not substantive (e.g. “every person should have the greatest possible liberty when choosing a profession”). Rather, as just suggested, they concern the allocation of decision-making competence and are thus formal. One example of such a formal principle identified by Alexy is that “the democratically legislature should take as many important decisions for society as possible….”;\textsuperscript{71} another was considered above in the discussion of Finnis’s philosophy of adjudication: a judge “should not depart from established practice without good reason.”\textsuperscript{72} Alexy then explains that “[o]ne significant set of normative constraints is that of all other competing principles.”\textsuperscript{73} Thus, for example, the substantive principle just mentioned about choice of profession may conflict with other principles concerning public safety. By contrast, in cases concerning Acts of State, the maximisation of one formal principle


\textsuperscript{72} R. Alexy, A Theory of Constitutional Rights (2002), at p.58.

\textsuperscript{73} R. Alexy, A Theory of Constitutional Rights (2002), at p.xxviii.
(Pa) (The court should determine as a matter of substantive justice whether a loss or harm suffered was legally justified or not)

may conflict with another

(Pb) (A state\textsuperscript{74} should have the discretion to choose, decide and act in foreign affairs).

Put rather crudely for the moment, (Pa) aims to maximise justiciability in circumstances where state acts violate individual rights, whereas (Pb) aims to maximise non-justiciability when those acts reflect the choices of states in foreign affairs.

B. Balancing formal principles through rules

The relative weight of (Pa) and (Pb) is conditional on the circumstances arising before the court. English courts have often taken the view that if any of the circumstances arising in the case concern the acts of the Crown and its agents in foreign affairs, or the acts of foreign states, (Pb) will outweigh (Pa), and the state acts will be regarded as non-justiciable.\textsuperscript{75} It would appear that seems that this weighting may have changed in recent years in a range of circumstances, normally concerning the most serious human rights abuses or violations of international law. In these circumstances, English courts are now prepared to hold that (Pa) outweighs (Pb), and thus what may have previously been non-justiciable becomes justiciable.

We can add nuance to this formulation by describing a broader range of circumstances ((C)) in which (Pa) and (Pb) have been balanced. For example,

\textsuperscript{74} Meaning the executive or the external representation of a foreign state.

\textsuperscript{75} See for example, Secretary of State v Kamachee Baye Sahaba (1859) 13 Moore P.C.C. 22; 15 E.R. 9. More generally, see E. Smith, “Is Foreign Policy Special?” (2021) 41 O.J.L.S. 1040.
(C₁) could be temporary detention of a foreign national by the armed forces of the United Kingdom during a war. In (C₁), (Pb) takes precedence over (Pa). Alternatively, in (C₂) there is a serious human rights violation by a state agent. Here, (Pa) takes precedence over (Pb). Put formally, (C₁) is the protasis of the norm ((Pb) takes precedence over (Pa)) and (C₂) is the protasis of the norm ((Pa) takes precedence over (Pb)). More straightforwardly, English courts take account of the severity of the rights abuse when determining whether a matter is justiciable. We might then say that the “source” of Act of State doctrine is the relations of precedence between (Pa) and (Pb) in (C₁), (C₂),…(Cₙ).

One of Alexy’s key insights is that the relations of precedence in circumstances (C₁), (C₂),…(Cₙ) can be expressed as a rule. This is named the Law of Competing Principles: the “circumstances under which one principle takes precedence over [i.e. outweighs] another constitute the conditions of a rule which has the same legal consequences as the principle taking precedence.”⁷⁶ Thus, we can state the relative weight of principles in (C₁) and (C₂) as a rule: (RC₁,C₂): “A matter which concerns the acts of the executive conducted abroad in foreign affairs is non-justiciable, except where there is allegation of serious human rights violations or where there is evidence of a serious violation of international law”, which, as it happens, is fairly close to the position set out in Rabmatullabh.⁷⁷ Thus, we have a rudimentary rule on Crown Act of State which covers a “large number of cases which appear free from the need to engage in balancing exercises”.⁷⁸

(RC₁,C₂) is a rule in relation to (C₁) and (C₂), but not in other circumstances. So, when a new circumstance (C₃) comes along, a new balance between (Pa) and (Pb) must be struck and thus the rule becomes (RC₁,C₂,C₃). So, for example, where there is significant damage to foreign owned property by agents of the British Crown what may have been non-justiciable could become justiciable ((Pa) overrides (Pb))

⁷⁷ See XX-XX, below for further discussion.
in \((C_i)\)). This new rule then provides defeasible guidance to judges in subsequent cases, which further aids legal certainty and establishes the coherence of the legal order.\(^7\) But there is always the possibility that circumstances arise which require further specification of the relationship between \((P_a)\) and \((P_b)\), and this is what it means to say rules are open. As new circumstances emerge \(((C_1),\ldots,(C_3))\) it becomes as well to separate a general rule into separate rules concerning Crown from Foreign Act of State, and from a non-justiciability rule and defence in tort.\(^8\) While the source of Act of State doctrine are found in the balance of \((P_a)\) and \((P_b)\), the rules which describe those balances evolve over time as new circumstances arise. Like Lord Wilberforce’s River Nile, what forms is a multi-channel delta of distinctive bodies of rules.

### C. Circumstances

\((P_a)\) serves to “pull” a matter towards the court and reflects the latter’s general jurisdiction.\(^9\) It is likely to be particularly weighty in various circumstances, such as where individuals have been deprived of their life, liberty and right to a fair trial by the extraterritorial actions of the British state or who are the alleged victims of foreign states who have allegedly committed serious violations of international law (hereafter, \((C_i)\)).\(^1\)\(^2\)

\((P_b)\) serves to “push” a matter away from the court. It becomes weighty in at least four circumstances which are not always fully disambiguated. These circumstances are ones in which broader substantive matters of justice arise, but

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\(^8\) See XX-XX.
\(^1\) Positive duties to prosecute those who are alleged to have committed international crimes are contained in the Convention against Torture (art.4) and the Genocide Convention (arts.4-6) also articulate this formal principle. *Jaloud v Netherlands* (47708/08) (2015) 60 E.H.R.R. 29; 38 B.H.R.C. 414, for example. For a related general discussion of the justiciability of rights see O. O’Neill, “The Dark Side of Human Rights” (2005) 81(2) *International Affairs* 427.
also where the constitutional or epistemic competence of the court itself comes into question.

(Co) Absence of legal standards. (Pb) is particularly weighty if there are no legal standards which can be applied to state acts.

Although it is hard to identify genuine examples of circumstances where there are *genuinely* no legal standards in play, *Shergill* comes close, “in the abstract”, albeit in a related context.83 Even here, however, the Supreme Court felt compelled to interpret the religious doctrines shared by the parties in order to ascertain the successor of the founder of a Sikh temple. Only by doing this could the correct interpretation of the terms of a trust be then determined.

(Cd) Deference. (Pb) is weighty when findings of fact about state acts cannot be reliably made by the court. The court then has a reason to refuse to make a determination or should defer to a determination made by another body which is better placed to do so.

Examples of circumstances where this formal principle is particularly weighty is established by rules found in some statutes (e.g. State Immunity Act 1978 s. 21 or Crown Proceedings Act 1947 s. 10.3 and 11.2) or in the common law rules relating to the recognition of foreign governments. English lawyers’ discussion of British recognition policy usually begins with Lord Atkin’s “one voice” principle stated in the *Arantzazu Mendi*, affirmed recently by the Supreme Court in *Maduro Board v Guaidó Board*.84 Both Courts determined they should give effect to the Crown’s intentions when it recognises a foreign government, and consider

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them determinative of the matter. This doctrine can plausibly be represented as an example of judicial deference to communicative Crown Acts of State, in circumstances where the Crown has spoken.85

Then there are the two circumstances discussed by Lord Nottingham in Blad v Bamfield, which, as we will see, form the core of Act of State doctrine. The first is

\[(C)\] Equitable restraint. (Pb) will be particularly weighty in circumstances where to do so would be likely to result in significant injustice.

Specifically, (Pb) is likely to be particularly weighty in two circumstances encompassed by (C). The first is where a determination by the court of the claimant’s rights would cause injustice in a broad sense. Here, questions of justice go beyond the litigants (whose rights are the normal moral concern of judges) to more general “polycentric” considerations of justice (which are admittedly often elided with state self-interest). Although discussed by Locke,86 these circumstances were well expressed in Sekgome, which concerned Crown powers to legislate, through an Order in Council, for a foreign territory under its control.87 Here, Farwell LJ held that “legislation directed against a particular individual and depriving him of the rights given to all the other inhabitants of the country is contrary to natural justice; if it is necessary for the safety of the State, the freedom and even the life of the individual must be sacrificed to it.”88

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85 Where the executive has declined to speak on a fact of state, English courts have found themselves perfectly able to seek out and weigh evidence (the most valuable of which generally came from the Foreign Office). See the discussion in Maduro Board v Guaidó Board [2022] 2 All E.R. 703 at [91]-[105], and also Shergill & Ors v Khaira & Ors [2015] A.C. 359, Diplock LJ in Post Office v Estuary Radio [1968] Q.B. 740 at 758-759 [1967] 3 All ER 663 at 683, and Denning J in Nyalí v Attorney General [1956] 1 Q.B. 1 at 15; [1956] 2 All E.R. 689 at 652.
There is, it should be noted, an implicit democratic formal principle in play here: the fidelity of the Crown to these broader requirements of justice is to be judged by the electorate and not the court. The second circumstance is where the court is likely to put the state of which it is a part in breach of its international legal obligations if it determines the claimant’s rights.

The other circumstance where \( Pb \) is likely to be given significant weight according to Lord Nottingham is best captured using the language of jurisdiction:

\[
(C) \text{ Lack of jurisdiction.} \quad (Pb) \text{ will be particularly weighty in circumstances where the relevant acts or legal standards are too distant from the court.}^{89}
\]

In summary, then, Act of State rules express the balances struck by judges between the court’s duty to uphold individual rights, and its duty to respect the discretion of states to pursue foreign policy objectives, in circumstances where there are: serious rights violations \( (C_r) \); an absence of standards by which to judge the State’s conduct \( (C_o) \); concerns about the court’s competence determine matters of fact \( (C_d) \); broader issues of international justice at stake \( (C_e) \); and, matters which are just too distant from the Court \( (C_j) \).

IV. FORMAL PRINCIPLES IN PRACTICE

The balance between the principles just set out is the rational source of the doctrine relating to Act of State, the doctrine itself is an expression of how these principles have been balanced in various circumstances. This gives the doctrine both coherence and consistency, while retaining a capacity for political flexibility

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\(^{89}\) For further discussion, see *Lucasfilm v Ainsworth* [2012] 1 A.C. 208, [2011] 4 All E.R. 817, e.g. at [105].
as new circumstances arises. This will be illustrated through a discussion of the leading cases, starting with two which are not strictly concerned with Act of State, but which do concern issues relating to the judicial oversight of State agents acting in foreign affairs.

A. CND

In CND,90 Simon Brown LJ declined a request to the Court of Appeal to issue a declaratory judgment on the legality of potential military actions by the United Kingdom according to Security Council Resolution 1441 in the lead up to the Iraq War of 2003. The reason this was not an Act of State case was that it was concerned with the legal implications of potential acts of the United Kingdom. It nevertheless described various circumstances in which the formal principles described above were to be balanced. The Court decided that if it were to grant judicial review it “…would tie the United Kingdom’s hands if and when it has to re-enter the negotiating chamber.”91 Furthermore, “…any declaration by the court would as a matter of practical reality embarrass the government no less than were it to state a definitive view itself.”92 Thus, the circumstances were such that it was likely that injustice in a broad sense would have been likely to occur if the Court had passed judgment (thus, (Pb) outweighs (Pa) in (C3)). Furthermore, the Court was prepared to defer to the Crown in the circumstances when it held that “…the executive is better placed than the court to make these assessments of the national interest with regard to the conduct of foreign relations in the field of national security and defence.” (thus, (Pb) outweighs (Pa) in (C3)).93 Thus, here, relevant circumstances are captured by both (Cw) and (C3).

91 CND [2003] A.C.D. 36 at [41].
This said, Lord Sumption explained in Rahmatullah that the circumstances in CND involved “no relevant ‘rights, interests or duties under domestic law’”.94 If there had been, he speculates, “the court would not have regarded the issues as non-justiciable”. Thus, if the Court was invited to consider acts of British armed forces, which had been undertaken, and which had allegedly caused significant rights infringements, the balance of principles could reverse: the matter could then become justiciable (\(Pa\) would outweigh \(Ph\) in \((C_i)\)).

B. Abbasi

The Court of Appeal was asked to determine whether the Foreign Secretary had a duty to exercise diplomatic protection to secure Mr Abbasi’s release from a detention camp at a US naval base in Guantanamo Bay in Cuba. The Court considered the potential consequences of both the failure by the Government to exercise diplomatic protection and the court requiring it to do so. It came down on the side of the Government and held that the Foreign Secretary had no legally recognised duty to exercise diplomatic protection for the following reason:

“Whether to make any representations in a particular case, and if so in what form, is left entirely to the discretion of the Secretary of State… The Secretary of State must be free to give full weight to foreign policy considerations, which are not justiciable.”95

As with CND, the Court was reluctant to generalise a class of executive choices which were in all circumstances non-justiciable. To explain, the Court accepted the existence of a rule that there is no general duty for the Government to exercise diplomatic protection, as it needs to have the discretion to do justice in

95 R. (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598; [2002] All ER (D) 70 at [99].
a broader sense as the circumstances require. Here, the court should exercise restraint ((Pb) outweighs (Pa) in (Cr)). However, Phillips MR explained that there were possible circumstances where the executive’s choices could give rise to a litigable duty, if not a specific duty to exercise diplomatic protection:

“…it must be a ‘normal expectation of every citizen’ that, if subjected abroad to a violation of a fundamental right, the British Government will not simply wash their hands of the matter and abandon him to his fate.”

Furthermore,

“[t]he citizen’s legitimate expectation is that his request will be ‘considered’, and in that consideration all relevant factors will be thrown into the balance….One vital factor, as the policy recognises, is the nature and extent of the injustice, which he claims to have suffered.”

And if the citizen’s request is not “considered”,

“we would consider that it would be appropriate for the court to make a mandatory order to the Foreign Secretary to give due consideration to the applicant’s case.”

Thus, (Pa) may outweigh (Pb) in circumstances where the executive has refused to even consider the exercise of diplomatic protection, and especially where there is significant injustice suffered by a British national at the hands of a foreign state (hence (Cr)).

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96 Abbasi [2002] All ER (D) 70 at [99].
97 Abbasi [2002] All ER (D) 70 at [104].
This case concerned alleged defamatory comments made by Dr Hammer (an employee of Occidental) claiming fraudulent behaviour by Buttes Gas. To determine whether the comments were indeed defamatory, and not justified or fair comment, the House of Lords would have had to determine whether the acts of several states in the Arabian Gulf as well as the United Kingdom were consistent with those states’ duties under international law.

In the Court of Appeal, Lords Denning MR and Roskill LJ held the matter to be justiciable. This is how the former explained his conclusion:

“The slander was a serious one. It says that Buttes were guilty of improper methods to obtain a decree by the ruler of Sharjah and had ‘cooked’ things up so as to deprive Occidental of their rights. The defendants in their defence pleaded that the words were true in substance and in fact. They gave full particulars of justification. It seems to me that the defendants should be allowed to make this defence. Otherwise what is to happen? Are they to be mulcted in damages for slander on the ground that they have no defence? That cannot be right. Take a hypothetical case—not this one. Suppose ‘The Times’ newspaper published an article alleging that a foreign ruler had been bribed by a great oil company. That the company had put a lot of money into his coffers in order to get a decree which was in their favour. If the oil company were to sue ‘The Times’ for libel, ‘The Times’ should be permitted to plead that what it said was true, and to prove it. If the foreign ruler were himself to sue, again ‘The Times’ ought to be permitted to plead justification…. The doctrine of act of state should not be extended so as to prevent ‘The Times’ from defending itself, even
though incidentally it did mean inquiring into acts done by a foreign power.\footnote{Buttes Gas & Oil Co v Hammer (No.2) [1975] Q.B. 557 at 574; [1975] 2 All E.R. 51 at 58.}

Thus, the right to defend oneself is more important in circumstances \((C_0)\) than the epistemic difficulties which point towards the relevant acts being non-justiciable.

The House of Lords allowed Buttes Gas’s appeal but stayed proceedings in respect of \(\textit{both} \) Buttes Gas’s claim that the employee of Occidental had been defamatory, and also Occidental’s counterclaim that Buttes Gas had committed fraud. Why was this? A number of possibilities were raised both by the House of Lords’ judgment and in its reception. The leading judgment of Lord Wilberforce is commonly thought to be concerned with circumstances where there is an absence of “judicial or manageable standards by which to judge the issues or… the court would be in a judicial no-man’s land” (thus, \((P\beta)\) outweighs \((P\delta)\) in \((C_0)\)).\footnote{Buttes Gas & Oil Co v Hammer (No.3) [1982] A.C. 888 at 938.} But that this was his focus is not a straightforward conclusion. Another possibility was raised by Lords Neuberger, Sumption and Hodge in their analysis of Buttes Gas in \(\textit{Shergill}\).\footnote{Shergill & \textit{Ors} v Khaira & \textit{Ors} [2015] A.C. 359 at [40].} They observed that Lord Wilberforce did not suppose that there was an absence of legal standards. He was “an international lawyer of some distinction” and so would have known that “English courts had on a number of occasions decided issues about the international boundaries of sovereign states ‘without difficulty’.”\footnote{Shergill [2015] A.C. 359 at [40].} Rather, his concern was that any judgment by the Court had the prospect of undermining the “…transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force…”\footnote{Buttes Gas & Oil Co v Hammer (No.3) [1982] A.C. 888 at 928.} if it were to decide whether the comments made by Dr Hammer
were defamatory. Thus, the matter concerns equitable restraint where significant issues of international justice arise \((Pb)\) outweighs \((Pa)\) in \((C_\circ)\). What is more, Lord Wilberforce also explains that a lack of jurisdiction was relevant to his finding that the relevant state acts were non-justiciable. Lord Mance noted this in Belhaj, then he suggests that there were justiciable standards in Buttes Gas, found in international law.\(^{103}\) The issue was that there was insufficient connection between the litigants, the House of Lords and those standards \((Pb)\) outweighs \((Pa)\) in \((C_\circ)\).

Buttes Gas is often regarded as a difficult case. This may be because the House of Lords were asked to decide where there was a confluence of relevant circumstances. However, in each circumstance, \((Pb)\) was considered particularly weighty, and the relevant State Acts non-justiciable.

\[D. \text{Belhaj}\]

We can now return to Belhaj, which is one of the two Supreme Court judgments which frame the discussion in this article. Here, the claimant sought damages in tort from British Government officials, who had allegedly conspired with officials from foreign states to render him to a CIA black site. British officials claimed that the Foreign Acts of State were non-justiciable, thus making it impossible for the action to proceed. The Supreme Court rejected the Government’s argument given the presumed facts.

Drawing on his interpretation of Blad v Bamfield, Lord Sumption initially appears to focus on jurisdictional issues \((C_\circ)\):

“…the basis of the doctrine is not the absence of a relevant legal standard but the existence of recognised limits on the subject-matter jurisdiction of the English courts”

“…English courts will not adjudicate on the lawfulness of the extraterritorial acts of foreign states in their dealings with other states or the subjects of other states…”

“…once such acts are classified as acts of state, an English court regards them as being done on the plane of international law, and their lawfulness can be judged only by that law.”

Lord Mance agreed on this point.

These statements are perhaps best read as attempts to reconcile the rationale employed to decide Belhaj with the jurisdictional reading of Buttes Gas. However, at other points of the judgment the focus switches to the probable consequences for a foreign state or the United Kingdom if the court were to determine the legality of the state acts. Lord Neuberger’s judgment proceeds along these lines. He claims that the “premise” underpinning Foreign Act of State is “respect for the equality of sovereign states”. One aspect of sovereign equality is that a domestic court should not pass judgment on the acts of other states in its courts. Lord Sumption says much the same, in effect reframing his discussion of the jurisdictional aspects of the case in terms of the wrongful acts in public international law that would be the consequence of the Supreme Court’s actions:

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104 Belhaj [2017] A.C. 964 at [232].
105 Belhaj [2017] A.C. 964 at [234].
106 Belhaj [2017] A.C. 964 at [234].
107 Belhaj [2017] A.C. 964 at [57].
“…the courts of the United Kingdom are an organ of the United Kingdom. In the eyes of other states, the United Kingdom is a unitary body. … Like any other organ of the United Kingdom, the courts must respect the sovereignty and autonomy of other states.”

And Lord Mance also ended up making the same point:

“enforcement of claims of the sort identified would amount to an extension of the sovereign power which imposed the taxes or law, or as an assertion of sovereign authority by one state within the territory of another.”

Following this reasoning, the concern was that the Court could place the United Kingdom in violation of its international obligations (thus, (Ca)), and it was not (more narrowly) a matter of domestic court jurisdiction. Moreover, this concern was insufficient to push the matter away from the Court given alleged serious infringement of Mr Belhaj’s rights. Thus, in these circumstances, (Pa) outweighs (Ph). Lord Mance is explicit: “The critical point in my view is the nature and seriousness of the misconduct alleged … at however high a level it may have been authorised.”

E. Law Debenture Trust v Ukraine

The way in which the balance between relevant underlying principles shapes common law rules relating to Acts of State as new circumstances emerge should

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109 Belhaj [2017] A.C. 964 at [65].
110 Belhaj [2017] A.C. 964 at [97].
111 Belhaj [2017] A.C. 964 at [98].
now be coming into focus. Let us continue by considering how the balancing act underpinning Buttes Gas and Belhaj was considered in Law Debenture Trust.

Law Debenture Trust (LDT), a fund controlled by the Russian Government, sought to claim a debt owed to it by Ukraine by bringing an action under English Law. Ukraine refused to repay the debt because Russia had, *inter alia*, threatened it with armed force if it did not accept its money. This threat should now be considered a precursor to recent, profound, and actual acts of aggression undertaken by Russia against Ukraine. However, in this case, Russia – at a time when it was still prepared to defend its interests through law – claimed that its acts were non-justiciable Foreign Acts of State. Ukraine argued in response that because Russia’s acts of coercion on the international plane were illegal under international law, they also constituted duress under English law and thus the debt was voidable (and avoided). Both the Court of Appeal (in 2018) and Supreme Court (in 2023) held in favour of Ukraine, albeit for different reasons, and allowed the defence to proceed to trial.

The Court of Appeal held that Foreign Acts of State which were illegal under international law were “socially and morally unacceptable” and thus would constitute duress under English Law.\(^\text{112}\) There was, then, a jurisdictional foothold in domestic law ((C)) which rendered Russia’s acts on the international plane justiciable in a way deemed not possible in Buttes Gas. The Court then acknowledged that even though problems may be caused for the United Kingdom in international relations if it were to judge Russia’s actions, there was an international legal obligation on the United Kingdom (and the Court of Appeal, which is part of its Government) not to allow Russia to take advantage of a serious violation of international law when it advanced a claim under English law ((C)).\(^\text{113}\) Thus, the Court considered that Russia’s Acts of State were

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\(^\text{112}\) *Ukraine v. Law Debenture Trust* [2019] Q.B. 1121 at [160].

\(^\text{113}\) *Ukraine v. Law Debenture Trust* [2019] Q.B. 1121 at [179]. It is worth noting that Marcus Smith J in *High Commissioner for Pakistan in the United Kingdom v Prince Muffakham Jah* [2020] Ch. 421 at
justiciable, and the circumstances were considered closer to that of Belhaj than Buttes Gas. The majority of the Supreme Court reframed the matter more simply as being entirely concerned with the jurisdiction of English law. While it worried about it extending jurisdiction over Russia’s acts (such as its threats of force, but not other unfriendly acts which remained non-justiciable), what legally mattered to it was whether those same acts also constituted acts of duress under English law. That is, the domestic foothold was that the relevant states had consented to the relevant acts being subject to the jurisdiction of English law and that there was illegitimate pressure put on Ukraine by Russia sufficient to constitute duress. It was irrelevant to the question of justiciability that the acts in question were on the international plane or a violation of international law.

F. Rahmatullah

In the second of the two cases which frame this article, the claimant sought damages from the British Government for mistreatment at the hands of British officials and others. The Government claimed that its acts were Crown Acts of State and were non-justiciable. The Supreme Court accepted the Government’s argument on the basis of the actual and presumed facts presented to it.

Lord Mance’s and Sumption’s judgments centred on the “consistency” between the Executive and the Court. For instance, Lord Sumption held that:

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[312] regarded the judgment in Law Debenture Trust as a balancing exercise along the lines just stated.


115 Lord Carnwath dissented in part.

116 Ukraine v Law Debenture Trust [2023] UKSC 1 at [163-164].
“[i]t would be incoherent and irrational for the courts to acknowledge the power of the Crown to conduct the United Kingdom’s foreign relations and deploy armed force, and at the same time to treat as civil wrongs, and at the same time to treat as civil wrongs acts inherent in its exercise of that power.”117

One might think that this passage indicates that the Court proposed to defer to the judgments of the executive given the nature of the acts arising ((Cd)), but this is not the case. Rather, it has more to do with the fact that the agents of the Crown were acting in pursuance of state policy, and because of this the Court should exercise restraint. Lord Sumption formulates the rule which expresses the balance of principles in this circumstance ((Cd)) as an absence of rights protection in certain circumstances involving State Acts.118 By contrast, Lady Hale’s view is that it is an alleged rights violation which drives the claim in the first place. But in some circumstances involving certain states acts, a determination of those rights violations by the court becomes constitutionally impermissible.119 The distinction between these formulations of the rule is fine, but it is morally significant. As Lady Hale suggests, it is odd to say that the existence of an Act of State implies that there is no rights violation. Rather, there is a potential rights violation, but it is non-justiciable.

Lady Hale also argued that the rule just stated must incorporate circumstances involving serious human rights violations. This finessing of the rule was not construed as an exception, but instead a narrowing even further of state acts which are non-justiciable: such acts were “not inherently governmental”. Rather, she argued, “the Government of the United Kingdom can achieve its foreign policy aims by other means.”120

118 Rahmatullah [2017] A.C. 649 at [80].
120 Rahmatullah [2017] A.C. 649 at [36].
G. Serdar Mohammed

The discussion of Rahmatullah hints at a further quite thorny issue about the interrelationship between Act of State as a constitutional doctrine (i.e. a non-justiciability rule) and substantive defence in tort. How does this defence relate to the formal principles discussed above? What is clear is that if the defence exists, the formal question “Who decides whether a state act is legally justified or excused?” is reframed as a substantive question: “Were the state acts in fact justified or excused?”.

While the possibility of a tort defence goes back to Baron v Denman (1848), the modern discussion of it is found in the various judgments concerning Serdar Mohammed, who was detained by British forces during the Afghanistan war. Both the High Court and Court of Appeal accepted that formally Acts of State should only be relevant in circumstances where there are genuinely no justiciable standards to judge ((Cn)). In Serdar Mohammed, there were rights in Afghan law, which were applicable by virtue of s11(1) of the Private International Law (Miscellaneous Provisions) Act 1995, thus the matter was justiciable. The problem then was whether the Crown’s representatives could take advantage of an Act of State defence.

Leggatt J (in the High Court) held that the Crown’s representatives did have a substantive defence, which was applicable in relation to a limited range of torts authorised by the Crown in foreign affairs:

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121 Baron v Denman (1848) 2 Exch. 167, at 187; 154 E.R. 450, at 458-459.
“It is not the business of the English courts to enforce against the UK state rights of foreign nationals arising under Afghan law for acts done on the authority of the UK government abroad, where to do so would undercut the policy of the executive arm of the UK state in conducting foreign military operations.”

While adopting Leggatt J’s narrow framing of Act of State Rules, the Court of Appeal took the opposite view and refused to allow the Crown’s representatives’ defence: there were no compelling public policy reasons to not apply Afghan tort law. In Rahmatullah, the Supreme Court, considered Serdar Mohammed’s tort claim and held it to be non-justiciable (although his claim under the Human Rights Act was justiciable). Thus, they accepted Leggatt J’s conclusion in the High Court. However, their judgments reframed the relevant law as being concerned with issues of constitutional competence rather than substantive justice. However, as mentioned above, the Justices did discuss the tort defence. Lord Mance considered it to be a “corollary” of a constitutional justiciability doctrine. Lord Sumption’s view was similar. By contrast, Lady Hale accepted the possibility that Act of State doctrine extended beyond a non-justiciability doctrine to a distinctive substantive defence.

The proposal suggested by the Justices is that Acts of State may extend beyond formal questions of justiciability to matters of substantive justice. This is not

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129 Rahmatullah [2017] A.C. 649 at [80].
130 Rahmatullah [2017] A.C. 649 at [37]. Speculatively, Buron v Denman (1848) 2 Exch. 167 (which concerns a claim for damages to the property of a slaver) is best understood as making the same point as Lady Hale in Rahmatullah [2017] A.C. 649, but the other way round: the Crown’s agent is justified or excused under English public policy in destroying a slaver’s property and need not pay him compensation. See A. Perreau-Saussine, “British Acts of State in English Courts” (2007) 78 British Yearbook of International Law 176 at 227.
unfamiliar. The related doctrine of diplomatic immunity, for example, is sometimes thought of as a non-exculpatory defence as well as a reason for the court to decline jurisdiction. For non-exculpatory defences (in criminal law) there are “…reasons [which] are sufficient to override any interest in his being convicted even if he was culpable”\textsuperscript{131} and where the “the societal benefit underlying the defense arises not from his conduct, but from foregoing his conviction”,\textsuperscript{132} and is “based on factors other than the innocence of the defendant”.\textsuperscript{133} Acts of States, it would appear, may be thought of in both formal and substantive terms.

This proposition can be understood in at least three ways:

(1) There is a strict division between the formal and substantive questions. The question of whether a matter is justiciable must be answered before questions of substantive justice can be considered.

(2) The formal and substantive questions are just different ways of approaching the same issue.

(3) There is a division between the formal and substantive questions along the lines of (1). However, the reasons that apply when the formal question is asked persist when seeking to answer the substantive question.

The judgments in \textit{Serdar Mohammed} and Lady Hale’s suggestions in \textit{Rahmatullah} appear to reflect (1). In \textit{Serdar Mohammed}, Acts of State are only non-justiciable


in narrow circumstances relating to an absence of legal standards, and then the Court turns to whether the Crown’s acts were substantively justified. Likewise, Lady Hale seemed prepared to countenance the existence of a separate substantive defence beyond a non-justiciability doctrine in *Rahmatullah*.

(2) is reflected in the judgments of Lords Mance and Sumption in *Rahmatullah*. They argue that the defence is an implication of the justiciability doctrine, perhaps seen from the perspective of the defendant. It may, then, be that the defence is better understood as being strategic or pragmatic rather than a real substantive legal defence. A stronger version of this argument is that that all Acts of State are transposable as either a matter of justiciability or as a matter of substantive justice. This is implausible as the defence is concerned with whether the Crown’s acts were substantively justified, but Act of State doctrine extends beyond these matters to epistemic competence, existence of relevant standards and jurisdiction. Put another way, it seems odd to characterize a lack of epistemic competence in the court as a justification for a rights-violation. Rather, it is that the court feels unable to decide.

The claim just made that the judgments in *Serdar Mohammed* reflect (1) is not entirely straightforward, and they may more reflect (3). To explain, in the High Court, the Crown’s defence was presented not in terms of whether its actions were justified but were more concerned with the freedom it needs to conduct foreign affairs: the rights violation should not be enforced because to do so “would undercut the policy of the executive arm of the UK state in conducting foreign military operations”. Thus, the formal reasons in play appear to bleed into questions of substantive justification, which, as it happens, is also true of other non-exculpatory defences. The argument is, in essence, that the Crown’s actions are justified because of the Crown’s functional role in conducting foreign affairs.

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134 This said, this is where Lord Sumption lands in *Rahmatullah* [2017] A.C. 649, at [80].
Despite contemplating Acts of State having distinctive formal and substantive dimensions, Lady Hale is correct to state the conceptual and practical advantages of Act of State being purely concerned with the formal question, and acknowledges that there are circumstances where the power to judge the actions of the Crown should be transferred from the court to the legislature and electorate. This position at least has the merits of candour. However, English Courts have been unable to hold this hard line when doing so leads to a denial of the rights they are bound to uphold. Here, however, it is preferable that even in these circumstances, the issue remains formal and concerned with the allocation of powers within the state, and not whether the acts were substantively justified. In a strategic and loose sense, though, it is acceptable to consider Act of State as a defence. Lords Sumption and Mance are correct in this regard.

VI. CONCLUSION

As a matter of constitutional law, at the “source” of Act of State doctrine is found two formal legal principles (Pa) (“The court should determine as a matter of substantive justice whether a loss or harm suffered was legally justified or not”) and (Pb) (“A state should have discretion to choose, decide and act in foreign affairs”). These principles are weighed differently according to the circumstances, and the balances produced are articulated by rules. (Pa) is likely to be particularly weighty in circumstances where there are particularly serious human rights abuses, recognised in domestic or international law, or where the existence of an Act of State could lead to a significant imbalance in rights of parties to plead their case. (Pb) is likely to be particularly weighty in

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circumstances where there is an absence of legal standards, where the court will have difficulty determining a particular matter relative to another branch of government, where there is the possibility of a judicial decision causing significant injustice (extending beyond the litigants) or a violation of international law, or where there is little connection between the litigants and their acts and the court.

The formal legal principles set out here have normative weight in any well-ordered polity. The circumstances discussed above are all ones where the general jurisdiction of the court should rightfully come into question. However, in these circumstances, to always allow (Pb) precedence over (Pa) would be to fail to take available steps to guard against the possibility of gross injustice to litigants. On the other hand, to always prioritise (Pa) over (Pb) is to disregard important constitutional and functional limitations on the judiciary. Within these boundaries a range of balances between (Pa) and (Pb) is permissible. This may still seem inadequately imprecise for some, but the point is that what is in play is a defensible set of relevant normative concerns. Balances struck on these concerns, over time, form tributaries of rules. This broadly describes the rules, and the approach taken towards them, by the Supreme Court in Rahmatullah and Belhaj as well as that of the English judiciary more generally, in their attempt to develop common law doctrine on Act of State.