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The Political Unconscious of the English Foreign Act of State and Non- Justiciability Doctrine(s)

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Abstract: This article reviews the history and politics of the English foreign act of state and non-justiciability doctrines in light of recent judgments in *Belhaj* and *Rahmatullah*. It argues that the doctrines have a political unconscious – a term borrowed from literary theorist Fredric Jameson – and that an appreciation of this should inform the Supreme Court’s approach to the forthcoming appeals.

Keywords: Foreign Act of State doctrine; non-justiciability; *Belhaj*; *Rahmatullah*; *Yukos Capital*; *Buttes Gas*; *Kirkpatrick*; political unconscious.

The Court of Appeal’s decision in *Belhaj*, a case concerning the alleged involvement of UK state agents and agencies in the extraordinary rendition of two Libyan nationals from China to Libya, and Leggatt J’s decision in *Rahmatullah*, a case involving the alleged unlawful detention and ill treatment of a Pakistani citizen by UK forces in Iraq and US forces in Iraq and Afghanistan, are the latest in a series of recent decisions on the foreign act of State and non-justiciability doctrines.¹ Permission to appeal the foreign act of state aspects of *Belhaj* to the Supreme Court has been granted and the appeal will be heard in November 2015.² Leggatt J granted a ‘leapfrog’ certificate from the High Court to the Supreme Court on the foreign act of state issues in *Rahmatullah* and the Supreme Court has very recently granted

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¹ *Belhaj v Straw* [2014] EWCA Civ 1394 (30th October 2014); *Yunus Rahmatullah v Ministry of Defence* [2014] EWHC 3846 (QB) (19th November 2014)

² See Redress, ‘Belhaj v Jack Straw, former Head of Counter-Terrorism at MI6 Sir Mark Allen, The Secret Intelligence Service (MI6) and the Security Service (MI5)’, <http://www.redress.org/case-docket/belhadj-v-jack-straw-and-others>; Zahra al-Rikabi (who made written submissions for some of the interveners in *Belhaj*), EJIL Talk, 3 November 2014, ‘English Court of Appeal rejects De Facto Immunity for UK officials & Act of State Doctrine in Torture Claims’, <http://www.ejiltalk.org/english-court-of-appeal-rejects-de-facto-immunity-for-uk-officials-in-torture-claims/>

permission to appeal and ordered that *Rahmatullah* and *Belhaj* be heard together.³ The Court of Appeal heard the separate crown act of state appeal in *Rahmatullah* – the distinction between foreign and crown act of state will be considered shortly – in February 2015 and judgment is awaited.⁴

The foreign act of state and non-justiciability doctrines are potentially applicable to cases involving foreign state conduct and address the question of whether an English court ought to hear cases involving such conduct.⁵ This article contextualises the *Belhaj* and *Rahmatullah* judgments and other recent decisions through a review of the doctrines' history.

The leading cases – *Buttes Gas* and *Yukos Capital* – do not define the doctrines but nevertheless present them as substantive and determinative.⁶ Vague and undefined legal doctrines that are nevertheless determinative present a paradox; how can doctrines whose content, scope and application are uncertain lead to a legal judgment? I argue that this paradox can only be explained on the basis that the doctrine or doctrines – there is, as we will see, a confusion, traceable to Lord Wilberforce's *Buttes Gas* speech, about the question of doctrine or doctrines – exist to enable a judge, where he deems it necessary, to make a political calculation which defers to the views of the British government rather than an independent legal judgment when he decides whether to hear a case involving foreign state

³ See *Rahmatullah* (n 1) [19], which hints at the possibility of a 'leapfrog' certificate.

⁴ I am grateful to Karen Steyn QC, counsel for the Defendants in *Rahmatullah* and *Belhaj*, for confirming the current procedural situation, as set out in this first paragraph, in both cases.

⁵ Lord Collins *et al*, *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, Sweet and Maxwell 2014) 122[5-045] 121: 'The expression "act of state" is ... used in connection with the executive and legislative acts of foreign States. The expression is found in several contexts, and it may not be possible to extract a general principle which will apply to all of them.'

⁶ *Buttes Gas v Hammer* [1982] AC 888; *Yukos Capital v OJSC Rosneft Oil Co (No. 2)* [2013] 3 WLR 1329, 1374 [115]: '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.'

acts.⁷ On the basis of the review of the doctrines' history which follows I argue that despite their legal consciousness the doctrines' unconscious is, therefore, political.⁸

The act of state doctrine is generally regarded as having two branches – foreign act of state and crown act of state, the latter providing a defence to claims arising out of the acts of UK state agents or agencies that take place outside the UK.⁹ This article focuses on the foreign branch of the doctrine but, as we will see in the review of the cases to follow, foreign and British (or 'crown') interests often overlap making the complete separation of the two branches impossible, and I will therefore consider foreign and crown act of state issues where appropriate. As for the non-justiciability doctrine, whilst it is potentially applicable to any litigation before the English courts and not confined to cases involving foreign state

⁷ See FA Mann, 'The Foreign Act of State' (1986) 11 *Holdsworth Law Review* 15, 34: 'if and when English courts are faced with the critical case ... it is hoped [that they will] be guided by legal reasoning rather than misconceived maxims of policy'. Something of this point is conveyed, in more moderate and politic terms, in Richard Hermer QC's submission, in *Belhaj* (n 1) [58], that 'the rationale of the act of state doctrine is the separation of powers under the United Kingdom constitution ... [he] submits that the courts may decline jurisdiction ... where the claimants assert legal rights only in the rare circumstances of a lack of constitutional competence'.

⁸ F Jameson, *The Political Unconscious: Narrative as a socially symbolic act* (Routledge 1981) 4-5: 'To imagine that, sheltered from the omnipresence of history and the implacable influence of the social, there already exists a realm of freedom – whether it be that of the microscopic experience of words in a text or the ecstasies and intensities of the various private religions – is only to strengthen the grip of Necessity over all such blind zones in which the individual subject seeks refuge, in pursuit of a purely individual, a merely psychological project of salvation. The only effective liberation from such constraint begins with the recognition that there is nothing that is not social and historical – indeed, that everything is "in the last analysis" political. The assertion of a political unconscious proposes that we undertake just such a final analysis and explore the multiple paths that lead to the unmasking of cultural artifacts as socially symbolic acts' (paragraph breaks suppressed). On the application of this analysis of 'cultural artifacts as socially symbolic acts' to law see 287: 'The specific problems addressed by literary and cultural interpretation today may thus be expected to present suggestive analogies with the methodological problems of the other social sciences (it being understood that for Marxism, literary and cultural analysis *is a social science*)', and 288: 'In radical legal studies ... the problem of the "text" is ... vivid'. This article engages with 'the problem of the "text"', the texts being English act of state and non-justiciability judgments.

⁹ *Collins et al* (n 5) 122 [5-044]: 'The expression "act of state" is ... used to describe executive acts which are authorised or ratified by the Crown in the exercise of sovereign power. The victim of such an act is in some circumstances denied any redress against the actor because the act, once it has been identified as an act of state, is one which the court has no jurisdiction to examine. The defence can be raised in regard to an act performed outside the United Kingdom and its colonies against the person or property of an alien ... It is an open question whether the defence can apply to acts performed outside the United Kingdom and its colonies against the person or property of a British citizen. The defence is inapplicable to an act performed within the United Kingdom and its colonies against the person or property of a British citizen or of a non-enemy alien present here.' (footnotes omitted); The separation between foreign and crown act of state is reflected in the two pending *Rahmatullah* appeals – one on foreign act of state and the other on crown act of state – see text to n 3 and n 4 above.

acts,¹⁰ this article is only concerned with the doctrine's application to foreign state acts, subject to the caveat that some cases – *Buttes Gas* in particular – are deemed non-justiciable because of the connection between foreign and British state acts.

I. LAW AND POLITICS

The foreign act of state and non-justiciability doctrines are concerned with the political propriety of English courts hearing cases involving foreign state acts.¹¹ The separate issue of whether English courts can lawfully inquire into foreign state acts can be answered by reference to the law of state immunity and the relevant principles of private international law.¹² If a foreign state agent is sued in respect of non-commercial conduct engaged in on behalf of the foreign state she enjoys immunity *ratione materiae*,¹³ and if a foreign state takes legislative or other governmental action within its jurisdiction it will be recognised as valid by the English courts.¹⁴

Received wisdom dictates that for reasons of political propriety the courts and the executive should speak with 'one voice' in matters of foreign relations and that the courts should avoid trespassing on the government's conduct of UK foreign relations.¹⁵ Eyal Benvenisti, commenting on the relationship

¹⁰ See *Shergill v Khaira* [2014] 3 WLR 1.

¹¹ See quotation from Mann in n 7 above. See also P Sales 'Act of State and the Separation of Powers' (2006) 11 *Judicial Review* 94, 97: 'it might assist the rational development of the law for separation-of-powers-type analysis to be brought more to the forefront of the reasoning of the courts, so that the competing interests and policy considerations are balanced more explicitly and within a coherent intellectual framework'.

¹² FA Mann, 'The Sacrosanctity of The Foreign Act of State' (1943) 59 *LQR* 42: 'the solution of these problems is not to be found in ... principles of British constitutional law or Public International Law, nor in any such wide maxims of jurisprudence [i.e. the foreign act of state or non-justiciability doctrines] as have often been relied on for the purpose ... but in established rules of private international law'.

¹³ *Holland v Lampen-Wolfe* [2000] 1 WLR 1573; *Charles Duke of Brunswick v The King of Hanover* (1844) 49 ER 724 (Court of Appeal); (1848) 9 ER 993 (House of Lords).

¹⁴ See *Luther v Sagor* [1921] 3 KB 532; *Princess Paley Olga v Weisz* [1929] 1 KB 718; D. Lloyd Jones, 'Act of Foreign State in English Law: The Ghost Goes East' (1981-1982) *Virginia Journal of International Law* 433, 445; Mann (n 12) 53: 'the rule would be that English Courts must recognize the validity and legality of official acts of a foreign State acting within its jurisdiction'.

¹⁵ On 'one voice' see *Gur Corporation v Trust Bank of Africa* [1987] 1 QB 599, 625, Nourse LJ referring to '[t]he rule that the judiciary and the executive must speak with one voice', cited by Blair J in *British Arab Commercial Bank v National Transitional Council of The State of Libya* [2011] EWHC 2274 (Comm) [25]: 'in the field of foreign relations, the Crown in its executive and judicial functions speaks with one voice'; C. Warbrick, 'British Policy and the National Transitional Council of Libya' (2012) 61 *ICLQ* 247, 262, noting 'the courts ... deferential position ... with respect to executive certificates'. On the prohibition on trespass into the conduct of foreign affairs see *R (Abassi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [37]-[57], accepting the existence of a general prohibition but noting, at [57], an exception where the court 'conceives [there]

between domestic courts and national governments in general, notes that whilst ‘independence [is] granted to the court by the other branches [of government] ... in return for [the court’s] legitimating effect on the executive and the legislature’ that “deal” does not appear to include the granting of judicial discretion in the sphere of foreign affairs’ because an adverse decision in a foreign affairs case ‘could expose the judges to the official and public critique of jeopardizing national interests and assisting enemies and rivals’.¹⁶

Seen in this light, cases involving foreign state acts have the potential to trap judges between the wishes of government and the rule of law’s requirement for independent judicial reasoning.¹⁷ Vague yet determinative act of state and non-justiciability doctrines provide a means of escape from this trap, enabling judges to defer to the government’s wishes whilst concealing the consequences of doing so for the independence of judicial reasoning.¹⁸ When they deem it politically necessary judges employ the act of state and non-justiciability doctrine(s) to conceal the fact that they have decided whether to hear a case involving foreign state acts for political reasons connected with the government’s wishes rather

to be a clear breach of international law, particularly in the context of human rights’; *R (Gentle) v Prime Minister* [2007] QB 689 (Court of Appeal), 712 [33], referring to ‘decisions of policy made in the areas of foreign affairs and defence which are the exclusive responsibility of the executive government’ and noting that, in *Campaign for Nuclear Disarmament* [2002] EWHC 277 the Administrative Court ‘rejected the submission that it would be possible to consider legal questions of international law while respecting the principle of non-justiciability of non-legal issues of policy [and] was in our opinion correct to do so’; *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin), *per* Cranston J at [53]: ‘The authorities clearly establish that the courts are “very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs ... and very slow to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law”: *R v Jones (Margaret)* [2007] 1 AC 136 [30], *per* Lord Bingham ... It is not the case that in the modern administrative State there are no no-go areas for the courts.’

¹⁶ E Benvenisti, ‘Judges and Foreign Affairs: A Comment on the Institut de Droit International’s Resolution on ‘The Activities of National Courts and the International Relations of their State’ (1994) 5 *European Journal of International Law* 423, 425; See also L Collins, ‘Foreign Relations and the Judiciary’ (2002) 51 *ICLQ* 485, 488: ‘It is true that in some cases in the House of Lords involving international law it can be said with confidence that the House reached a result that was consistent with the views of the government, or applied the views of the government’; and at 510: ‘What the cases [including *Buttes Gas* (n 6)] show, in those decisions which are not determined by the binding nature of the Foreign Office certificate, is what may be described as a sensitivity to foreign policy interests, and certainly not deference to the views or objectives of the executive.’

¹⁷ See J Raz, ‘The Rule of Law and Its Virtue’ in J Raz, *The Authority of Law* (Clarendon Press 1979) 210, 216-7, noting that the ‘independence of the judiciary’ implies that judgments will be reached on the basis of law rather than for ‘other reasons’. In foreign act of state cases those ‘other reasons’ might include the views or wishes of the government; see also D McGoldrick, ‘The Boundaries of Justiciability’ (2010) 59 *ICLQ* 981: ‘The principle of justiciability is something of a chameleon but it is important because it delineates the scope of judicial review and ultimately the rule of law.’

¹⁸ See n 17 above on ‘rule of law’.

than as a result of independent judicial reasoning.¹⁹ This, I argue, captures the function and nature of the English act of state and non-justiciability doctrines in decisions from *Buttes Gas* in 1981 to *Rahmatullah* in November 2014.

The recent decisions in *Belhaj* and *Rahmatullah* can, however, be seen as departing from this trend. In *Belhaj* the Court of Appeal ‘disapplied’ the foreign act of state doctrine to the alleged ‘violation of international law [and] grave infringement of fundamental human rights’,²⁰ prompting Human Rights Watch to describe the decision as ‘a rare victory for justice’.²¹ In *Rahmatullah* Leggatt J decided that ‘the court can and indeed must decide whether agents of a foreign state acted unlawfully when to do so is within the court’s competence and necessary as a preliminary to the determination of the claimant’s domestic legal rights’.²² These cases suggest that judges are now prepared to decide whether to hear cases involving foreign state acts on the basis of independent judicial reasoning rather than as the result of political calculation. As I explain in what follows, however, when the overall outcome in each of these cases is considered this superficially plausible reading does not withstand analysis.²³

II. THE ENGLISH CASES FROM *BUTTES GAS* TO *RAHMATULLAH*

A. *Buttes Gas, the Early English Cases and the Trans-Atlantic Exchange*

Buttes Gas involved oil concessions granted in late 1969 by Sharjah and Umm al Qaiwain (‘UAQ’), two states which are now parts of the United Arab Emirates, to American companies *Buttes* and *Occidental* respectively.²⁴ *Occidental* claimed that in February 1970 it

¹⁹ See B Batros and P Webb, ‘Accountability for Torture Abroad and the Limits of the Act of State Doctrine: Comments on *Habib v Commonwealth of Australia*’ (2010) 8 *Journal of International Criminal Justice* 1153, 1167, commenting on the Australian act of state jurisprudence: ‘The act of state doctrine is a principle of domestic law, in some systems, that now focuses far more on protecting the internal distribution and separation of power within those states’; On the tension between rule of law considerations and the crown act of state doctrine see Amanda Perreau-Saussine, ‘British Acts of State in English Courts’ (2007) 78 *British Yearbook of International Law* 176, 252-4.

²⁰ *Belhaj* (n 1) [81].

²¹ I Leghtas, 31 October 2014, ‘Dispatches: A Rare Victory for Justice’ <http://www.hrw.org/news/2014/10/31/dispatches-rare-victory-justice>

²² *Rahmatullah* (n 1) [171].

²³ See text to n 202 and n 234 below.

²⁴ On the *Buttes* litigation see IAE Insley and F Wooldridge, ‘The *Buttes* Case: The Final Chapter in the Litigation’ (1983) 32 *ICLQ* 62.

discovered a drilling site off the island of Abu Musa within the concession granted to it by Sharjah and that, having heard about Occidental's discovery, Buttes sought permission to drill there from the UK's representative in the region (the UK was involved because, until late 1971, it was responsible for Sharjah and UAQ's foreign relations and defence).²⁵

Occidental alleged that after the UK representative refused their drilling request Buttes had their legal adviser appointed as legal adviser to the ruler of Sharjah.²⁶ This, it was claimed, led to the ruler of Sharjah issuing a March 1970 decree which, because it was backdated to September 1969 and before Occidental had been granted its concession, had the effect of indirectly granting the drilling site to Buttes by purporting to extend Abu Musa's territorial waters from three to twelve miles offshore.²⁷ The UK representative wrote to the ruler of Sharjah telling him that this extension of territorial waters was 'not right' and Occidental commenced Californian proceedings against Buttes in June 1970 alleging conspiracy to deprive them of their concession.²⁸

The UK representative changed his position after Iran advised the British government in May 1970 that Abu Musa and its waters, up to twelve miles offshore, were Iranian.²⁹ The ruler of UAQ initially refused to accept the representative's 'recommendation' that he withdraw permission for Occidental to drill in the disputed area,³⁰ capitulating only after Royal Navy personnel disrupted Occidental's drilling and the Royal Air Force flew over his palace.³¹

Buttes commenced English proceedings for slander after Dr Hammer, Occidental's chairman, alleged that Buttes used 'improper methods' to have the March 1970 decree backdated during a London press conference.³² Judge Pregerson dismissed Occidental's

²⁵ *Buttes Gas v Hammer* [1975] 1 QB 557, 570-71.

²⁶ *ibid* 570.

²⁷ *ibid*.

²⁸ *Buttes Gas v Hammer* [1971] 3 All ER 1025, 1026; *Buttes Gas* (n 25) 571.

²⁹ *Buttes Gas* (n 25) 570.

³⁰ *ibid*.

³¹ *ibid* 571.

³² *Buttes Gas* (n 28) 1026; *Buttes Gas* (n 25) 571.

Californian conspiracy claim on act of state grounds in March 1971,³³ and, in 1978, the US Court of Appeals for the Fifth Circuit dismissed a further claim by Occidental, alleging conversion of oil shipped to the US from Abu Musa, with reference to these passages from a State Department letter included in the US government's *amicus curiae* brief:

The extent of territorial sovereignty is a highly sensitive issue to foreign governments. Territorial disputes are generally considered of national significance and politically delicate ... the Department of State considers that it would be potentially harmful to the conduct of our foreign relations were a United States court to rule on the territorial issue involved in this case. We believe that the political sensitivity of territorial issues, the need for unquestionable US neutrality and the harm to our foreign relations which may otherwise ensue, as well as the evidentiary and jurisprudential difficulties for a US court to determine such issues, are compelling grounds for judicial abstention. We do not believe that this judicial self-restraint should turn on such analytical questions as whether the so-called Act of State doctrine which is traditionally limited to governmental actions within the territory of the respective State can apply to an exercise of disputed territorial jurisdiction. It rather follows from the general notion that national courts should not assume the function of arbiters of territorial conflicts between third powers even in the context of a dispute between private parties. As a result, we are of the view that the court should be encouraged to refrain from settling the extent of Umm Al Qaiwain's sovereign rights in the continental shelf between its coast and Abu Musa at the time of its grant of the concession to Occidental.³⁴

³³ *Occidental Petroleum Corp. v Buttes Gas & Oil Co* 331 F. Supp. 92. Judge Pregerson was upheld on appeal – see *Occidental of Umm al Qaiwain v Buttes Gas* 461 F 2d 1261.

³⁴ *Occidental of Umm al Qaiwain v A Certain Cargo* 577 F. 2d 1196, 1204 (paragraphs break suppressed); for background on the letter see Insley and Wooldridge (n 24) 67-8.

The Fifth Circuit court held that hearing the case would involve ‘not only usurp[ing] the executive power, but also intrud[ing] the judicial power beyond its philosophical limits’ and that, in view of the uncertainty surrounding ‘standards ... for the delimitation of territorial waters’ the court ‘would be in a judicial no-man’s land were we to purport to decide the legality of Sharjah’s unilateral extension of its territorial waters or Iran’s twelve mile limit’.³⁵

1. *The Court of Appeal*

In 1971 *Buttes* appealed successfully against the refusal of permission to serve their writ out of the jurisdiction, with Lord Denning insisting that the English claim ought to proceed regardless of Californian proceedings.³⁶ In 1974 *Occidental* appealed successfully against the striking out of its conspiracy counterclaim on foreign act of state grounds and *Buttes* cross-appealed unsuccessfully against a refusal to strike out *Occidental*’s justification defence to *Buttes*’ slander claim on foreign act of state grounds.³⁷

Lord Denning distinguished the English foreign act of state doctrine from its US counterpart – ‘the courts of the United States have carried the doctrine of “acts of state” further than the courts of this country’³⁸ – whilst recognising the connection between them demonstrated by the US Supreme Court’s indirect reference in the 1897 case of *Underhill v Hernandez* to the House of Lords’ 1848 decision in *Duke of Brunswick v King of Hanover*.³⁹ In *Brunswick* the deposed Duke brought English proceedings against the King, who acted as guardian of the Duke’s former possessions in Germany. The House of Lords rejected the Duke’s argument that the King’s appointment as guardian was void and that he was liable to account for moneys derived from the Duke’s former property:

³⁵ *Occidental* (n 34) 1205.

³⁶ *Buttes Gas* (n 28) 1027.

³⁷ *Buttes Gas* (n 25).

³⁸ *ibid* 572.

³⁹ *ibid*; *Underhill v Hernandez* (1897) 168 US 250; *Brunswick* (n 13, House of Lords).

a foreign Sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country ... 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 British subject, but supposed to be done in the exercise of his authority vested in him as Sovereign.⁴⁰

Whilst Lord Denning analysed this passage in terms of the act of state doctrine,⁴¹ *Brunswick* is, as FA Mann argues, a case on immunity *ratione materiae*.⁴² This is clear from Lord Lyndhurst's distinction between 'matters of state' and 'private transactions', with only the latter 'subject to the jurisdiction of the Courts in this country',⁴³ and from the Master of the Rolls' statement that 'it is not necessary for me to give any opinion upon the question whether the act complained of is or is not an act of State' (the Court of Appeal's *Brunswick* decision was upheld without reservation by the House of Lords).⁴⁴

Like *Brunswick*, and again contrary to Lord Denning's 1974 analysis, the US Supreme Court's *Underhill* decision rests on immunity *ratione materiae*.⁴⁵ Hernandez commanded revolutionary forces in Bolivar, Venezuela, and refused to issue Underhill, a US citizen, with a passport. When Underhill eventually left Bolivar, having been granted a passport, he brought proceedings against Hernandez in the US courts. The Second Circuit Court of Appeals decided the case on the basis of immunity *ratione materiae* and concluded that Hernandez was immune from US jurisdiction in respect of the governmental acts affecting Underhill.⁴⁶ The acts were governmental because the revolutionary forces had formed a new government that was recognised by the US, and this approach was, according to the

⁴⁰ *Brunswick* (n 13, House of Lords) 998-9.

⁴¹ *Buttes Gas* (n 25) 572.

⁴² Mann (n 12) 47-8. For a contrary view, with which I disagree on the basis of the analysis to follow, see Lloyd Jones (n 14) 438-9.

⁴³ *Brunswick* (n 13, House of Lords) 1001.

⁴⁴ *Brunswick* (n 13, Court of Appeal) 747.

⁴⁵ *Underhill* (n 39); Mann (n 12) 50, commenting on *Underhill*: 'It thus became settled law in the United States that an immunity *ratione materiae* is attached to official acts in the sense that, even in the absence of personal immunity of the defendant, he cannot be personally made liable for and that consequently it is impossible to 'sit in judgment' in respect of them. It was the true and only purport of Chief Justice Fuller's *dictum*, from which many later judges and writers have taken their text, to state and paraphrase that American rule.'

⁴⁶ *Underhill v Hernandez* (1893) 65 Fed 577.

Second Circuit, consistent with *Brunswick* which was decided ‘upon the principle that no court in England could sit in judgment upon the act of a sovereign, effected by virtue of his sovereign authority abroad’.⁴⁷

Lord Denning’s treatment of *Underhill* is limited to these opening lines from the Supreme Court’s judgment:⁴⁸

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.⁴⁹

Equal attention ought to be paid to a later passage, demonstrating *Underhill*’s immunity *ratione materiae* basis, in which the Supreme Court upholds the Second Circuit’s judgment because ‘[t]he acts complained of were the acts of a military commander representing the authority of the revolutionary party as a government, which afterwards succeeded, and was recognised by the United States’.⁵⁰

Having misread *Brunswick* and *Underhill*, Lord Denning treats the English doctrine as having three branches. The first and third – the doctrine of sovereign immunity, and the crown act of state doctrine – play no role in the 1974 decision.⁵¹ It is the second branch, based on *Luther v Sagor*,⁵² which precludes ‘the courts of this country [from] ... inquir[ing] into the validity of the legislation or decrees of a foreign government which ha[ve] been recognised by the government of this country’,⁵³ that determines the outcome of the 1974 appeal.

⁴⁷ *ibid* 583 and 580.

⁴⁸ *Buttes Gas* (n 25) 573.

⁴⁹ *Underhill* (n 39) 252.

⁵⁰ *ibid* 254; Mann (n 12) 49 quotes this passage, alongside the opening passage of the Supreme Court’s judgment.

⁵¹ *Buttes Gas* (n 25) 573.

⁵² *Luther v Sagor* (n 14).

⁵³ *Buttes Gas* (n 25) 573.

Luther, a Russian company whose assets were seized by the Russian state after the 1918 revolution, sought to recover wood from an English company who bought it from the Russian state. The Court of Appeal held it could not inquire into ‘the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction’ with the later case of *Oppenheimer v Cattermole* confirming an exception to the prohibition, on domestic public policy grounds, where the acts in question conflict with international law.⁵⁴ Luther’s claim was dismissed because the British government recognised the post-revolution authority in Russia as the *de facto* government.⁵⁵ The later decision in *Princess Paley Olga v Weisz*, not considered by Lord Denning, is to similar effect.⁵⁶

This second, *Luther v Sagor* branch of the English doctrine is consistent with the current US doctrine established by the Supreme Court in its 1990 *Kirkpatrick* decision.⁵⁷ *Kirkpatrick* is generally regarded as narrowing the scope of the US doctrine compared with *Underhill*, the US Buttes litigation (see above) and the Supreme Court’s 1964 *Sabbatino* judgment.⁵⁸ *Sabbatino* was the leading US case until *Kirkpatrick* was decided in 1990 and it is surprising that the Court of Appeal does not consider it in 1974.⁵⁹

In *Sabbatino* the US Supreme Court held that the ‘continuing vitality’ of the act of state doctrine, as a ‘principle of decision ... compelled by neither international law nor the Constitution ... depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs’.⁶⁰ It outlined three political considerations bearing on the question of whether the doctrine should bar jurisdiction. The first consideration concerns the clarity and certainty of any relevant international law – broadly, the application of international law will

⁵⁴ *Luther v Sagor* (n 14) 548, per Warrington LJ at 548 and Scrutton LJ at 556; *Oppenheimer v Cattermole* [1976] AC 249 (see, in particular, Lord Cross at 278).

⁵⁵ *ibid* 556, per Scrutton LJ.

⁵⁶ *Princess Paley Olga* (n 14).

⁵⁷ *WS Kirkpatrick & Co v Environmental Tectonics Corp* 493 US 400.

⁵⁸ *Banco Nacional de Cuba v Sabbatino* 376 US 398; on variations and narrowing in the US act of state doctrine over time see H Fox and P Webb, *The Law of State Immunity* (3rd edn, Oxford University Press 2013) 55-57.

⁵⁹ Roskill LJ refers to *Sabbatino* (n 58) in passing in *Buttes Gas* (n 25) 578 but, other than that, it is overlooked entirely in the 1974 Court of Appeal judgment.

⁶⁰ *Sabbatino* (n 58) 427-8.

be less politically sensitive the more well established it is.⁶¹ The second consideration focuses on ‘national nerves’ and establishes that where an issue is not particularly ‘important’ in foreign relations terms there will be little reason for the courts not to determine it.⁶² According to the third consideration a court may consider whether a change of government in the relevant foreign state since the relevant acts occurred ‘may’ have ‘measurably altered’ US ‘political interests’.⁶³ Combined, these considerations led the Supreme Court to conclude that:

rather than laying down or reaffirming an inflexible and all-encompassing rule ... we decide only that the (Judicial Branch) will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleged that the taking violates customary international law.⁶⁴

Kirkpatrick reformed the US act of state doctrine, unravelling the politically inspired vagueness of *Sabbatino*. Rather than a principle of judicial abstention or a political limit on jurisdiction the *Kirkpatrick* doctrine is a ‘choice of law rule’,⁶⁵ analogous to Lord Denning’s second *Luther v Sagor* branch of the English doctrine. In *Kirkpatrick* Scalia J maintained that ‘[a]ct 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’.⁶⁶ For Scalia J the fact that a court may make ‘factual findings’ that ‘suggest’ unlawful conduct by a foreign state does not make the act of state doctrine applicable,⁶⁷ nor is ‘embarrass[ment]’ to ‘foreign governments’ relevant, because ‘[t]he act of state doctrine ... merely

⁶¹ *ibid* 428.

⁶² *ibid*.

⁶³ *ibid*.

⁶⁴ *ibid*.

⁶⁵ Fox and Webb (n 58) 55.

⁶⁶ *Kirkpatrick* (n 57) 406.

⁶⁷ *ibid*.

requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid'.⁶⁸

Lord Denning's 1974 judgment is consistent with Scalia J's 1990 *Kirkpatrick* analysis. He concludes that the *Luther v Sagor* doctrine is not applicable because Occidental's claim was for 'compensation for the consequences' of the Ruler of Sharjah's March 1970 decree and, as such, did not involve a 'challenge' to the 'validity of any foreign legislation or decrees'.⁶⁹ Lord Denning reverses his position in the 1980 appeal, which concerned the disclosure of evidence:

Although the action is framed in slander, conspiracy and libel, nevertheless it is at bottom a dispute between two sovereign rulers – as to their territorial waters – carried on through their powerful oil concessionaires Buttes and Occidental. As such it is – or was – so politically sensitive – that these courts should be very wary before taking any part in it.⁷⁰

This amounts to a move from a narrow *Luther v Sagor* / *Kirkpatrick* validity doctrine in 1974 to a vague, flexible *Sabbatino*-type doctrine driven by political sensitivities in 1980.

In the 1980 appeal the issue was public interest immunity and the disclosure of documents in Buttes' possession which detailed Foreign Office activity, communication between the ruler of Sharjah and Buttes and communication between the British government and other governments.⁷¹ Donaldson and Brightman LJ held that the documents were covered by public interest immunity.⁷² Lord Denning disagreed on public interest immunity but agreed that the appeal should be dismissed because, in his view, the litigation should be disposed of as quickly as possible.⁷³ Donaldson LJ merged public interest immunity and act of state considerations in his judgment. He regarded this statement, in a letter sent by the Foreign Office to the ruler of Sharjah's legal advisers, as significant: '[i]t appears to be open to you

⁶⁸ *ibid* 409.

⁶⁹ *Buttes Gas* (n 25) 573.

⁷⁰ *Buttes Gas* [1981] 1 QB 223, 242. Mann (n 7) 33, footnote 78, prefers Lord Denning's 1974 analysis to the 1980 Court of Appeal decision and 1981 *Buttes Gas* (n 6) House of Lords decision.

⁷¹ *Buttes Gas* (n 70) 260-1, *per* Brightman LJ.

⁷² *ibid* 254-6 and 265.

⁷³ *ibid* 247-8.

to submit to the court that as a matter of general principle confidential communications between states should, in the public interest, not be adduced in evidence without the consent of the states concerned, a principle to which the Foreign and Commonwealth Office would certainly presubscribe'.⁷⁴ Linking this Foreign Office statement with the State Department letter quoted in the 1978 Fifth Circuit judgment,⁷⁵ and noting that '[i]t must be remembered that the Crown was a principal actor in the dispute at an international level',⁷⁶ Donaldson LJ concluded that 'the views expressed [in the State Department letter are] compellingly persuasive regardless of what may be the "act of state" doctrine of the law of the United States'.⁷⁷

In these terms, and in agreement with Lord Denning, Donaldson LJ endorsed a move away from the defined *Luther v Sagor* validity doctrine that found favour in 1974 towards a vague, flexible *Sabbatino*-type doctrine that enables judges to decline to hear cases involving foreign state acts on the basis of ill-defined political considerations such as those referred to in the Foreign Office and State Department letters. That move was completed in Lord Wilberforce's 1981 speech.

2. *The House of Lords*

Occidental appealed against the 1980 decision and, given the doubt cast by the 1980 decision on the 1974 decision, Buttes were allowed to appeal the 1974 decision out of time.⁷⁸ Lord Wilberforce effectively adopted Lord Denning's 1980 analysis of the act of state doctrine and its application to the facts of the case:

the question of title to the location does not arise incidentally or collaterally: it is at the heart of the case. It is essential to Occidental's claim (both in its counterclaim

⁷⁴ *ibid* 253.

⁷⁵ *ibid* 254-5; see text to n 34 for extracts from the State Department letter.

⁷⁶ *ibid* 253.

⁷⁷ *ibid* 255.

⁷⁸ *Buttes Gas* (n 6).

and its defence of justification) to establish that before the intervention of Buttes and Sharjah it had a right with some degree of legal validity over the seabed at the location ... This cannot be decided simply as an issue of fact upon evidence: it calls, on the contrary, for adjudication upon the validity, meaning and effect of transactions of sovereign states.⁷⁹

Occidental conceded that the court would have to ‘consider’ what it labelled ‘the territorial-boundary question’ but anticipated the distinction in *Kirkpatrick* between ‘factual findings’ and validity by arguing that the court need only consider foreign acts of state as ‘part of the factual matrix of the dispute rather than [as] the applicable means of resolving it’.⁸⁰ Lord Wilberforce did not consider this argument. He assumed that a series of cases on the extent to which English courts will adjudicate on title to foreign territory were relevant without first deciding, on the basis of the fact / validity distinction, whether a decision on title to foreign territory was required.⁸¹

Lord Wilberforce reviewed a certificate provided by the Foreign Office affirming Sharjah’s status as a sovereign state whose foreign affairs were conducted by the UK; a May 1970 letter to Occidental’s solicitors detailing the UK government’s reservations regarding the March 1970 decree whilst noting that the decree created an inter-state dispute to which a resolution must be found; and the letter, referred to above, from the UK representative to the ruler of Sharjah objecting to the unilateral extension of territorial waters in the March 1970 decree.⁸² He concluded that this correspondence demonstrated ‘beyond any doubt that Her Majesty’s Government regarded the issues between Sharjah and [U.A.Q.] and between their respective concessionaires, as issues of international law, and involving difficult problems as to the width of territorial waters ... and ... the interests of other states’.⁸³ As the US Fifth Circuit Court of Appeals and Donaldson LJ had in 1978 and 1980 respectively, Lord Wilberforce defers to the views expressed in government correspondence and accepts that ‘[t]he issues are, as Her

⁷⁹ *ibid* 927.

⁸⁰ *ibid* 901 and 906; *Kirkpatrick* (n 57) 406 and 409, and see discussion at n 67 and n 68 above

⁸¹ *Buttes Gas* (n 6) 926-7.

⁸² *ibid* 927-30.

⁸³ *ibid* 930.

Majesty's Government saw them, international issues, and it is in that character that their justiciability by a municipal court must be considered'.⁸⁴

More than any other aspect of the *Buttes Gas* litigation or any other development in the history of the English doctrines, Lord Wilberforce's failure to engage with Occidental's fact / validity argument, coupled with his willingness to accept the Foreign Office / UK government view that the dispute between Buttes and Occidental could not be separated from the inter-state territorial dispute, highlights the political unconscious of the English foreign act of state and non-justiciability doctrines. Caught in the trap between the government's wishes,⁸⁵ as expressed in correspondence, and the rule of law's requirement for independent judicial reasoning Lord Wilberforce follows the path established in the 1980 Court of Appeal decision and shifts the English doctrine from a *Luther v Sagor* / *Kirkpatrick*-type validity doctrine to a *Sabbatino*-type doctrine focused on political considerations. This new political doctrine serves to conceal the fact that Lord Wilberforce has decided to prevent the case being heard out of deference to the government's wishes rather than as the result of independent judicial reasoning.⁸⁶

He labels this new doctrine a 'wider principle', 'a more general principle' – that is, wider and more general than the *Luther v Sagor* / *Kirkpatrick*-type, validity-based foreign act of state doctrine, and the principle that English courts will not adjudicate on title to foreign territory – which dictates that 'the courts will not adjudicate upon the transactions of foreign sovereign states'.⁸⁷ He is not, so far as he is concerned, making new law: 'there is, and for long has been ... a general principle, starting in English law, adopted and generalised in the law of the United States of America which is effective and

⁸⁴ *ibid.* Collins (n 16) 507 notes 'reliance was placed on Foreign Office letters to the rulers emphasising that the dispute involved international issues' but maintains that 'the result [reached by Lord Wilberforce] was perfectly understandable'.

⁸⁵ On this 'trap' see text to n 17 above.

⁸⁶ David Williams, in his Guardian obituary of Lord Wilberforce – 19 February 2003, 'Lord Wilberforce' <http://www.theguardian.com/news/2003/feb/19/guardianobituaries.lords> – notes that 'in the Lords he [Lord Wilberforce] claimed once that "by contrast with most of my judicial colleagues" he had "a little understanding of the ways that government works from the inside".' Quoting from Hansard – HL Deb 26 February 1996, vol 569, col 1298 – the quotation referred to by Williams is, in full: 'many years ago I spent a period in the upper reaches of the Civil Service. Therefore, by contrast with most of my judicial colleagues, I have perhaps a little understanding of the way in which government works from the inside'. Perhaps this time spent 'in the upper reaches of the Civil Service' had some bearing on Lord Wilberforce's approach to the issues in *Buttes Gas*.

⁸⁷ *Buttes Gas* (n 6) 931.

compelling in English courts'.⁸⁸ Admitting the doctrinal shift in his speech would risk revealing its political unconscious so Lord Wilberforce creates an English *Sabbatino*-type doctrine by mischaracterising previous decisions as long-standing authority for the doctrine that he creates anew whilst concealing the close connection between his speech and *Sabbatino*.⁸⁹

The first mischaracterisation involves *Brunswick* and *Blad v Bamfield*.⁹⁰ Repeating Lord Denning's 1974 error,⁹¹ Lord Wilberforce treat *Brunswick* as support for his 'wider principle' when, as discussed, it is a decision on immunity *ratione materiae*.⁹² *Blad v Bamfield*, mischaracterised as an act of state case, is early authority (from 1674) for what became the *Luther v Sagor* validity doctrine.⁹³ The King of Denmark issued *Blad* with letters patent permitting him to trade in Iceland. *Bamfield* argued that *Blad* had interfered with his right to trade in Iceland by seizing his goods. When *Blad* came to England *Bamfield* had him arrested and *Blad* sought an injunction ordering his release. Granting the injunction Lord Nottingham held that 'to send [the case] 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.'⁹⁴ Ignoring Lord Nottingham's emphasis on 'validity', Lord Wilberforce

⁸⁸ *ibid* 932.

⁸⁹ *ibid* 934: 'Upon the much commented case of ... *Sabbatino* ... no extended discussion is here appropriate or necessary'; JG Collier, 'Transactions Between States – Non-Justiciability – International Law and the House of Lords in a Judicial No-Man's Land' (1982) 41 *Cambridge Law Journal* 18, 20: '[i]t cannot be said that Lord Wilberforce's demonstration of [support for his 'general principle'] is very convincing, at least from the evidence he adduces'; Lloyd Jones (n 14) 476: 'The effect of *Buttes Gas* is to establish unequivocally for the first time a principle of English law that renders certain sovereign acts of foreign States and Governments non-justiciable ... While some support for it is also to be found in wide-ranging statements in a number of earlier English decisions ... certain of these authorities are not relevant to the question posed in *Buttes Gas* [and] of the remainder ... many were decided on grounds other than the act of foreign state principle to which they give expression and ... all could have been decided by the application of other, well established legal rules', and 466: 'Lord Wilberforce ... [invokes] and [applies] a notion of non-justiciability akin to the U.S. political questions doctrine, although there is no express statement to this effect.'

⁹⁰ *Brunswick* (n 13); *Blad v Bamfield* 36 Eng Rep 993 (1674).

⁹¹ See text to n 41 and n 42 above.

⁹² *Buttes Gas* (n 6) 932-3.

⁹³ *ibid* 932. See Lloyd Jones (n 14) 437: 'the decision may be explicable on the ground that *Blad*'s acts were lawful by the *lex loci commissi* and therefore not actionable in England'. Lloyd Jones equivocates as to Lord Wilberforce's analysis of the case, however, noting, at 437, that *Blad* 'appears to provide some support for the view that certain acts of foreign sovereigns are not justiciable in the English courts.'

⁹⁴ *Blad* (n 90) 993.

described *Blad* as ‘a decision clearly on justiciability’ despite its compatibility with the *Luther v Sagor* doctrine.

He seeks further support in *Cook v Sprigg*, quoting Lord Halsbury’s dictum that ‘[i]t is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal courts administer’.⁹⁵ In *Cook* the Privy Council refused to inquire into the validity of the annexation of territory by the British government because doing so would interfere in the ‘transactions of independent States’, specifically Pondoland and the UK.⁹⁶ Lord Wilberforce fails to consider the context of his isolated quotation and *Cook*, on a proper analysis, supports the *Luther v Sagor* validity doctrine rather than his ‘wider principle’.

Next, Lord Wilberforce asserts that ‘[a]n earlier recognition, in an appropriate circumstance, of non-justiciability, had been given by Lord Kingsdown in *Secretary of State in Council of India v Kamachee Boye Sahaba*’.⁹⁷ In *Kamachee*, decided in 1859, the Privy Council refused to inquire into the East India Company’s violent expropriation of property and land belonging to the Rajah of Tanjore after his death.⁹⁸ On the basis that ‘it is difficult to suppose that the Government [of India] intended to give a legal right of redress to those who might think themselves wronged ... in the execution of a political measure, to the judgment of a legal tribunal’,⁹⁹ and noting that the East India Company lacked any legal right to the Raj,¹⁰⁰ the Council advised the Queen that the British Government, acting through the East India Company, was not subject to the jurisdiction of the Indian courts.¹⁰¹ As Amanda Perreau-Saussine notes, the Council concludes that a politically motivated and violent act carried out without legal justification is non-justiciable because of its lack of legal justification.¹⁰²

⁹⁵ *Buttes Gas* (n 6) 933; *Cook v Sprigg* [1899] AC 572, 578.

⁹⁶ *Cook* (n 95). On the history of Pondoland see <http://www.sahistory.org.za/places/pondoland>

⁹⁷ *Buttes Gas* (n 6) 933.

⁹⁸ *Kamachee* 19 ER 388 (PC).

⁹⁹ *ibid* 411.

¹⁰⁰ *ibid* 408.

¹⁰¹ *ibid* 411.

¹⁰² Perreau-Saussine (n 19) 194: ‘Precisely because the Privy Council was unable to find “any ground of legal right” for a seizure described ... as “a most violent and unjustifiable measure”, the Company’s actions had to be understood as non-justiciable acts of state’.

A similar situation existed in *Buttes Gas*. The British government, having initially condemned the ruler of Sharjah's purported extension of territorial waters, changed its position after Iran's intervention,¹⁰³ and put pressure on the ruler of UAQ and Occidental through the Royal Navy and the RAF.¹⁰⁴ The British Government used similar methods in *Buttes Gas* to those it employed, via the East India Company, in *Kamachee*, achieving its preferred outcome by force without any apparent concern for legality.

The Foreign Office could not, it seems, allow *Buttes Gas* to reach trial because judicial determination of the dispute between the companies would involve inquiry into the legality of British military action abroad.¹⁰⁵ Whilst it is decided on foreign act of state or non-justiciability grounds *Buttes Gas* is, therefore, and unconsciously, a crown act of state case.¹⁰⁶ The government chose not to play a direct role in the litigation, preferring to influence proceedings indirectly through correspondence, but neither the government nor Buttes wanted the *status quo* altered. The government had no reason to intervene in the case because Buttes was effectively acting as its agent, as the East India Company had in *Kamachee*.

Adopting some the US Fifth Circuit court's language,¹⁰⁷ Lord Wilberforce concludes that:

there are ... no judicial or manageable standards by which to judge these [territorial and inter-state] issues, or to adopt another phrase ... the court would be in a judicial non-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,

¹⁰³ *Buttes Gas* (n 25) 570.

¹⁰⁴ *ibid* 571.

¹⁰⁵ On the definition of the crown act of state doctrine see n 9 above.

¹⁰⁶ See *Buttes Gas* (n 6) 930-1, the only passage in the judgment on crown act of state, in which Lord Wilberforce insists on the contrary view: 'The action taken by officers of Her Majesty's Government, by means of H.M.S. *Yarnton*, and in bringing pressure to bear upon the ruler of U.A.Q., might fall into this [crown act of state] category. They are not directly attacked in these proceedings, but it is part of Occidental's case that they were unlawful. However, the question whether these actions can be described as "acts of state" within this doctrine does not lie at the heart of the dispute and I do not propose to pursue it'.

¹⁰⁷ See text to n 35 above.

after diplomacy and the use of force, and to say that at least part of these were
“unlawful” under international law.¹⁰⁸

He maintains that ‘the ultimate question what issues are capable, and what are incapable, of judicial determination must be answered in closely similar terms in whatever country they arise, depending, as they must, upon an appreciation of the nature and limits of the judicial function’.¹⁰⁹ This is an indirect admission that, as a matter of law, ‘the nature and limits of the judicial function’ in cases involving foreign state acts are, and should be, subject to political control by government because the government’s recognition of judicial independence ‘does not ... include the granting of judicial discretion in the sphere of foreign affairs’.¹¹⁰ In *Buttes Gas* political propriety defines legal doctrine and political considerations trump the value of independent judicial reasoning, and it is on that basis that the House of Lords stays the litigation.

B. The Post-Buttes Cases

1. From *A Limited v B Bank* to *Yukos Capital*

In the 1996 case of *A Limited v B Bank* a UK bank held foreign currency which allegedly infringed the claimant’s UK patent for a type of security paper.¹¹¹ The central bank of the country whose currency was held by B bank argued that the claim was non-justiciable because a finding for the claimant would interfere with the circulation of its currency.¹¹² Relying on *Kirkpatrick* Leggatt LJ held that the court was not asked to adjudicate on the circulation of currency and, expressing his agreement and also relying on *Kirkpatrick*, Morritt LJ held that ‘the principle established in the judgments of the courts in

¹⁰⁸ *Buttes Gas* (n 6) 938.

¹⁰⁹ *ibid* 936.

¹¹⁰ See quotation from Benvenisti in text to n 16 above.

¹¹¹ *A Limited v B Bank and Bank of X* [1997] *International Litigation Procedure* 586, 587-8 [1]-[3].

¹¹² *ibid* 588-590 [4]-[7].

England is limited to the proposition that the courts of England will not adjudicate upon the validity of acts done abroad by virtue of foreign sovereign authority'.¹¹³

In *Kuwait Airways v Iraqi Airways (Nos 4 and 5)* the Court of Appeal, in 2000, and the House of Lords, in 2002, held that the foreign act of state doctrine did not require the English courts to uphold the validity of an Iraqi government order purporting to transfer ownership of planes seized during Iraq's 1990 invasion of Kuwait from Kuwait Airways to Iraqi Airways.¹¹⁴ As *Luther v Sagor*, read together with *Oppenheimer v Cattermole*, establishes that, although ordinarily prescribed, inquiry into the validity of foreign state acts is exceptionally permissible on public policy grounds which include clear breaches of international law, the House of Lords, if not the Court of Appeal, given that *Buttes Gas* is a House of Lords decision, could have applied *Luther v Sagor* to reach this result.¹¹⁵ Both courts preferred and applied the *Buttes Gas* doctrine however.

Echoing the language of Lord Wilberforce's speech, the Court of Appeal avoided an 'inflexible and all-encompassing rule':¹¹⁶

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. It is or leads to a form of immunity *ratione materiae*. It may not be easy to generalise about such acts, and the application of the principle may be fact sensitive. Guidance, however, is to be found in such considerations as whether there are "judicial or manageable standards" by which to resolve the dispute ... whether the court would be in a "judicial no man's land", or perhaps whether there would be embarrassment in our foreign relations ... Sensitive issues involving diplomacy between states, or

¹¹³ *ibid* 592 [13], 592-3 [14], and 596-7 [26].

¹¹⁴ *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883.

¹¹⁵ *Oppenheimer* (n 54); See discussion of *Luther v Sagor* in text to n 54 - n 56 above; Public policy arguments were addressed in *Kuwait Airways* – see *ibid* (Lord Nicholls) at 1080-81 [24]-[26], *ibid* (Lord Steyn) at 1101 [113] and, in the Court of Appeal, *ibid* at 951 [244], 973 [322], and 986 [372] – but they are situated within a *Buttes Gas* (n 6) frame of analysis.

¹¹⁶ 'inflexible and all-encompassing rule' – see quotation from *Sabbatino* in text to n 64. For a critique of the Court of Appeal's judgment see M Davies, 'Kuwait Airways v Iraqi Airways Co: The Effect in Private International Law of A Breach of Public International Law by a State Actor' (2001) 2 *Melbourne Journal of International Law* 523, 534: '[o]nce the English courts had accepted that the issue was justiciable ... it became obvious that they could not recognise [the Iraqi government order], which would presumably have embarrassed the UK Government in its relations with the UN, if not in other diplomatic fora.'

uncertain or controversial issues of international law, may be other examples of situations calling for judicial restraint.¹¹⁷

Political considerations and the views of the British government precluded inquiry into the March 1970 decree in *Buttes Gas*, but those factors necessitate a finding that the Iraqi government order in *Kuwait Airways* is invalid as Lords Nicholls and Steyn recognised in concluding that a finding of validity would contravene the UK's UN Charter obligations and undermine the UK's position as a participant in military action against Iraq.¹¹⁸ It is in this sense that *Kuwait Airways* is a political decision consistent with the political logic of *Buttes Gas*.

In *Berezovsky v Abramovich*, decided by the Court of Appeal in February 2011, Berezovsky brought proceedings against Abramovich for intimidation.¹¹⁹ He claimed Abramovich had demanded that he sell shares to him and told him that in making that demand he was acting on the orders of Russian President Putin who, according to Berezovsky, made similar demands in an earlier meeting.¹²⁰ Abramovich argued that the case could not be decided without inquiry into Russian state acts.¹²¹ The Court of Appeal disagreed on the basis of the fact / validity distinction, concluding that Berezovsky's claim was that certain state acts happened and not that they were 'invalid'.¹²² In taking this *Luther v Sagor* / *Kirkpatrick*-type approach the Court of Appeal relied on its express approval of *Kirkpatrick in A Limited v B Bank*.¹²³

In *Lucasfilm v Ainsworth*, decided by the Supreme Court in July 2011, the producers of the Star Wars films alleged copyright infringement by the designer and manufacturer of helmets used in the films.¹²⁴ The Supreme Court focussed on cases concerning the justiciability of intellectual property

¹¹⁷ *Kuwait Airways* (n 114) 971-2 [319].

¹¹⁸ *ibid* 1081 [29] and 1103 [114]; McGoldrick (n 17) 994-5 prioritises the connection between public policy and international law over the political dimensions of *Kuwait Airways*.

¹¹⁹ *Berezovsky v Abramovich* [2011] 1 WLR 2290.

¹²⁰ *ibid* 2297-2303 [6]-[33].

¹²¹ *ibid.* 2295 and 2316 [87].

¹²² *ibid* 2317 [91], 2318-2320 [93]-[97], and 2320 [101].

¹²³ *ibid* 2319 [95].

¹²⁴ *Lucasfilm Ltd v Ainsworth* [2012] 1 AC 208, 215 [1]-[7].

rights and title to foreign land,¹²⁵ distinguishing *Buttes Gas* because it concerned the ‘related, [but] more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states’.¹²⁶ The analysis of act of state issues nevertheless suggests a shift from *Buttes Gas* towards an emphasis on validity:

in England the foreign act of state doctrine has not been applied to any acts other than foreign legislation or governmental acts of officials such as requisition, and it should not today be regarded as 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.¹²⁷

This recognises a foreign copyright exception to the *Luther v Sagor / Kirkpatrick*-type doctrine. It is significant that the Supreme Court did not undertake a *Buttes Gas / Sabbatino*-type analysis of the courts’ capacity to judge foreign intellectual property rights and the political and foreign relations consequences of doing so.

When the Court of Appeal decided *Yukos Capital* in June 2012,¹²⁸ and notwithstanding the earlier *Buttes Gas / Sabbatino*-type decision of the House of Lords in *Kuwait Airways*, something of a rebellion against *Buttes Gas* was underway in the Court of Appeal (*A Limited* and *Berezovsky*) with some, albeit limited and implicit, evidence of Supreme Court support (*Lucasfilm*). In *Yukos Capital* the Court of Appeal resisted that rebellion, preserving a *Buttes / Sabbatino*-type approach whilst, consistent with its earlier decision in *Ecuador v Occidental*,¹²⁹ mitigating the effects of that approach on the justiciability of arbitration cases.¹³⁰

¹²⁵ *ibid* 229-238 [53]-[92].

¹²⁶ *ibid* 231 [59].

¹²⁷ *ibid* 237 [86].

¹²⁸ *Yukos Capital* (n 6).

¹²⁹ *Republic of Ecuador v Occidental Exploration and Production Co* [2006] QB 432; on commercial litigation and the act of state doctrine see M Singer ‘The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Practice’ (1981) 75 *AJIL* 283.

¹³⁰ *Yukos Capital* (n 6).

The claimant, Yukos, sought enforcement of Russian arbitral awards concerning loan agreements against Rosneft, the defendants, in the English courts.¹³¹ At the time the awards were made and when they were set aside by the Russian courts, Rosneft was ‘effectively controlled by the Russian state’.¹³² Yukos argued that the setting aside of the awards by the Russian courts was a ‘travesty of justice’ resulting from a ‘campaign of state interference’ in which the state secured a judgment in favour of a company it essentially owned.¹³³ That argument was accepted in proceedings before the Dutch courts.¹³⁴

In line with *Buttes Gas* the Court of Appeal blurs the lines between the act of state and non-justiciability doctrines, describing Lord Wilberforce’s ‘principle of “non-justiciability”’ as ‘not so much a *separate* principle [to foreign act of state] as a more *general* and *fundamental* principle’ and ‘the paradigm restatement of [the act of state] principle’.¹³⁵ Echoing the US Supreme Court’s *Sabbatino* refusal to ‘[lay] down or [reaffirm] an inflexible and all-encompassing rule’,¹³⁶ the Court of Appeal insisted that ‘[t]he 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.’¹³⁷

The Court of Appeal denies the incompatibility of this approach with *A Limited v B Bank* and *Berezovsky* on the basis of a revisionist account of those decisions which is similar in method to Lord Wilberforce’s mischaracterisation of the early English cases (*Blad, Brunswick, Cook, and Kamachee*).¹³⁸ *A Limited* is presented as a decision ‘on twin grounds that the use of the banknotes in the United Kingdom was commercial, and that in any event the matters complained of occurred in this country, and not in the territory of the foreign state’,¹³⁹ although it is noted that ‘[t]he judgments also referred to the *Kirkpatrick* case’ as reflecting the English legal position.¹⁴⁰ ‘[A]lso referred’ suggests that the

¹³¹ *ibid* 1335 [1]-[11]

¹³² *ibid* 1337 [15].

¹³³ *ibid* 1335 [4] and 1338 [17]-[18].

¹³⁴ *ibid* 1335 [6] and 1338-39 [19]-[23].

¹³⁵ *ibid* 1347 [48] and 1353 [66].

¹³⁶ See quotation in text to n 64 above.

¹³⁷ *Yukos Capital* (n 6) 1374 [115].

¹³⁸ On Lord Wilberforce’s mischaracterisation see text between n 90 and n 102.

¹³⁹ *Yukos Capital* (n 6) 1367 [101].

¹⁴⁰ *ibid*.

Kirkpatrick elements of *A Limited* are *obiter dicta*,¹⁴¹ a suggestion re-enforced by this statement: ‘[i]t seems to us that the claim to rely on the act of state doctrine was so far outwith the principles of that doctrine as to render its citation of no help in this’.¹⁴² *A Limited* is not, apparently, a decision on the act of state doctrine.¹⁴³

In *Berezovsky* the Court of Appeal expressly approved *A Limited*’s endorsement of *Kirkpatrick* and affirmed that *A Limited* was binding on the Court of Appeal.¹⁴⁴ Glossing over that affirmation, *Yukos Capital* insists that ‘it was pertinent for this court [in *Berezovsky*] to cite the *Kirkpatrick* case in support of its own conclusion that the act of state doctrine was not involved where the only issue was whether certain acts had occurred, not whether they were invalid or wrongful’.¹⁴⁵

This revisionist approach extends to *Kirkpatrick* itself:

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.¹⁴⁶

That analysis cannot be reconciled with *Kirkpatrick*. Scalia J’s judgment defined a doctrine that that US Supreme Court had refused to define, for political reasons, in *Sabbatino*, and *Yukos Capital* sides with *Sabbatino* and *Buttes Gas* against the *Luther v Sagor* / *Kirkpatrick* doctrine. In refusing to recognise the

¹⁴¹ In *Berezovsky* (n 119) 2319 [95], *contra* this assertion by the *Yukos Capital* Court of Appeal, the Court of Appeal stated that the *Kirkpatrick* elements of the *A Limited* decision are ‘part of its ratio’.

¹⁴² *Yukos Capital* (n 6) 1367 [101].

¹⁴³ See discussion at around n 111 above.

¹⁴⁴ *Berezovsky* (n 119) 2319 [95]: ‘we are now bound by authority to say that the act of state doctrine only applies to challenges to the validity of the act of state relied upon, unless there is subsequent higher authority to different effect’. The *Berezovsky* Court of Appeal, at 2319-20 [96]-[97], did, however, express ‘some caution’ about *A Limited* in light of the (later) House of Lords *Kuwait Airways* (n 114) decision.

¹⁴⁵ *Yukos Capital* (n 6) 1367 [102]. When, in *Berezovsky* (n 119) 2320 [97], Longmore LJ states that ‘I cannot think that any question of act of state can arise’ that should, in the context of the judgment as a whole, be read as an indication that the act of state doctrine was not applicable on *Kirkpatrick* grounds because facts rather than validity were at issue and not, as *Yukos Capital* maintains, that ‘the act of state doctrine was not involved’.

¹⁴⁶ *Yukos Capital* (n 6) 1371 [110].

distinction between the *Sabbatino / Buttes Gas* and *Luther v Sagor / Kirkpatrick* doctrines the Court of Appeal reinscribes the political unconscious of Lord Wilberforce's *Buttes Gas* speech onto the act of state and non-justiciability doctrines, resisting the rebellion against the *Buttes Gas* doctrine in *A Limited* and *Berezovsky*.¹⁴⁷

The narrow point decided by *Yukos Capital* is that the decisions of foreign courts are not acts of state,¹⁴⁸ and that the English courts were therefore free to disregard the Russian court order setting the arbitral awards aside and enforce those awards if appropriate on the merits.¹⁴⁹ That the Court of Appeal felt it necessary to undertake an omnibus review of the cases in reaching this narrow decision indicates, in my view, its intention to avoid the political implications of the doctrinal shift towards *Luther v Sagor / Kirkpatrick* favoured by *A Limited* and *Berezovsky*.

2. *Rahmatullah, Khan, Belhaj and Shergill v Khaira*

In *Rahmatullah*, decided by the Supreme Court in October 2012, a Pakistani citizen held by US forces in Afghanistan, having been arrested in Iraq by UK forces who transferred him into the custody of US forces in Iraq, who then transferred him to Afghanistan, made a *habeus corpus* claim.¹⁵⁰ Leggatt J's November 2014 judgment on Mr Rahmatullah's separate claim for damages based on these facts will be considered after the judgments in *Khan, Belhaj and Shergill v Khaira* have been addressed.

The *habeus corpus* claim was based on the argument that through Articles 49 and 45 of the fourth Geneva Convention ('GC4') the British government retained sufficient control over Mr Rahmatullah's

¹⁴⁷ On the basis of the above analysis I disagree with Alex Mills' broadly positive assessment of the decision as bringing clarity to the law on act of state – see 'From Russia With Prejudice? The Act of State Doctrine and the Effect of Foreign Proceedings Setting Aside an Arbitral Award' (2012) 71 *Cambridge Law Journal* 465.

¹⁴⁸ *Yukos Capital* (n 6) 1361 [86], endorsing the Privy Council's decision in *Altimo Holdings v Kyrgyz Mobil* [2012] 1 WLR 1804, and 1362 [87]: 'judicial acts are not acts of state for the purposes of the act of state doctrine ... Sovereigns act on their own plane: they are responsible to their own peoples, but internationally they are responsible only in accordance with international law and internationally recognised norms. Courts, however, are always responsible for their acts, both domestically and internationally. Domestically they are responsible up to the level of their supreme court, and internationally they are responsible in the sense that their judgments are recognisable and enforceable in other nations only to the extent that they have observed what we would call substantive or natural justice, what in the United States is called due process, and what internationally is more and more being referred to as the rule of law.'

¹⁴⁹ *ibid* 1381 [133], 1382 [136].

¹⁵⁰ *Rahmatullah v Secretary of State for Defence* [2013] 1 AC 614, 626-7 [3] and [4].

detention by US forces to secure his release.¹⁵¹ Article 49 prohibits the transfer of ‘protected persons’, such as Mr Rahmatullah, ‘from occupied territory’ – Iraq – to ‘the territory of any other country – Afghanistan.’¹⁵² Article 45 obliges the ‘Detaining Power’ – the UK – to ‘take effective measures to correct the situation or ... request the return of the protected persons’ if the ‘transferee Power’ – the US – ‘fails to carry out the provisions of the present Convention in any important respect’.¹⁵³ On this basis Lord Kerr emphasised that ‘[i]t is the lawfulness of the UK’s inaction in seeking [Mr Rahmatullah’s] return [as opposed to the foreign state acts of the US] that is in issue.’¹⁵⁴ On the basis of correspondence between the UK and US governments in which the US made its intention to continue to hold Mr Rahmatullah clear, the Supreme Court upheld the Court of Appeal’s conclusion that a ‘sufficient return to the writ was made by the Secretaries of State’ and that no further order was appropriate.¹⁵⁵

The Supreme Court’s analysis can be read as consistent with the fact / validity distinction that underpins *Luther v Sagor* and *Kirkpatrick*. The evidence of unlawful US conduct imposed an Article 45 obligation on the UK to act. The issue was the legality of the UK’s apparent inaction and not the apparent collateral illegality of US acts, and the Supreme Court was not prevented from taking any collateral illegality into account as part of the factual basis for determining the legality of the UK’s conduct. To that extent, and whilst, in a narrow sense, a decision that turns on Article 45 of GC4, the Supreme Court’s decision can be read as authority for the proposition that foreign act of state and non-justiciability considerations do not bar the English courts adjudicating on the legality of UK state conduct where the illegality of that conduct depends on alleged, collateral unlawful acts by a foreign state or, in the language of *Kirkpatrick*, on ‘factual findings’ that ‘suggest’ unlawful conduct by a foreign state.¹⁵⁶

¹⁵¹ *ibid* 626-632 [1]-[27] and 632-635 [28]-[40].

¹⁵² Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287, Article 49.

¹⁵³ *ibid*, Article 45.

¹⁵⁴ *Rahmatullah* (n 150) 643-4 [70], *per* Lord Kerr, with Lord Phillips at 651 [98] and Lord Reed at 654-5 [114] expressing their agreement.

¹⁵⁵ *ibid* 645-649 [77]-[85], *per* Lord Kerr. Lord Carnwarth and Baroness Hale, 658 [131], dissented on this point

¹⁵⁶ See discussion in text to n 67 above.

The notion that the foreign act of state doctrine does not bar findings of collateral illegality is consistent with Lord Wilberforce's *Buttes Gas* speech and his distinction between legal issues that arise 'incidentally or collaterally' and those that are 'at the heart of the case'.¹⁵⁷ The inconsistency of this collateral illegality analysis with the 'silhouette' of a doctrine favoured by *Yukos Capital*, along with *Yukos Capital*'s rejection of the fact / validity approach of *Luther v Sagor / Kirkpatrick and A Limited* and *Berezovsky*, explains the fact that this reading of *Rahmatullah* has not influenced subsequent Court of Appeal decisions.

In *Khan*, decided by the High Court in December 2012 and the Court of Appeal in January 2014, the claimant was refused permission to apply for judicial review of a decision by the Foreign Secretary in which he refused to provide details of the provision of information by UK state agents (GCHQ) to US state agents in support of drone strikes in Pakistan.¹⁵⁸ It was argued that to ensure respect for English criminal law the Foreign Secretary was obliged to implement a policy on the provision of such information. According to the claimant statute established that a secondary party providing information to a principal could be guilty of murder or manslaughter even though the principal who fired the shot – a CIA operative – could not be guilty of the offence because they are not subject to English criminal jurisdiction.¹⁵⁹

The High Court and Court of Appeal, rather surprisingly, focused on the potential US reaction to this argument rather than on the question of whether it was legally correct.¹⁶⁰ The Court of Appeal emphasised that '[w]hat matters is that the findings would be understood by the US authorities as critical of them',¹⁶¹ refusing permission to apply for judicial review because 'the claims ... involve serious criticisms of the acts of a foreign state'.¹⁶²

¹⁵⁷ See quotation at n 79 above.

¹⁵⁸ *R (Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 3728 (Admin) (High Court); *R (Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872 (Court of Appeal).

¹⁵⁹ *ibid* [32] (High Court) and 879-880 [10]-[14] (Court of Appeal).

¹⁶⁰ *ibid* [55] (High Court) and 886 [36-37] (Court of Appeal).

¹⁶¹ *ibid* (Court of Appeal) 886 [37].

¹⁶² *ibid* 889 [53].

Khan stands alone in affirming that mere criticism of a foreign state is a sufficient bar to jurisdiction. The claimant's English criminal law argument can be seen as consistent with the fact / validity interpretation of *Rahmatullah* advanced above; that is, as an assertion of collateral illegality by US state agents as a matter of fact rather than as a matter of English criminal law. Whilst the decision in *Khan* can, therefore, be interpreted as inconsistent with the Supreme Court's *Rahmatullah* judgment the fact / validity, collateral illegality interpretation of *Rahmatullah* is, of course, inconsistent with *Yukos Capital*. *Khan*'s ultimate basis is the Court of Appeal's *Yukos Capital* endorsement of a *Buttes Gas / Sabbatino*-type emphasis on political considerations over legal reasoning,¹⁶³ and the *Khan* Court of Appeal respects that emphasis, focussing on the potential US reaction to the claimant's English criminal law argument rather than the merit of the argument itself.

In *Belhaj* the claimants alleged that various current and former UK state agents and agencies, including the former Foreign Secretary Jack Straw, were involved in their extraordinary rendition from China to Libya, *via* Malaysia, Thailand and Diego Garcia.¹⁶⁴ They argued that the seven defendants had 'secondary liability' for the acts of the 'primary tortfeasors [who] are foreign states',¹⁶⁵ having acted 'in furtherance of [a] common design' with foreign state agents.¹⁶⁶ The English rules on joint tortfeasance obliged the claimants to prove a 'common design' between the defendants and the foreign states, that the 'actual perpetrator [foreign state agents] committed a tort' and 'that the alleged participator [the defendants] did acts in furtherance of the common design'.¹⁶⁷

In a December 2013 judgment Simon J held that 'the act of state doctrine applie[d]' to acts carried out in China, Malaysia, Thailand and Libya and that those acts were therefore 'non-justiciable'.¹⁶⁸ He noted, consistent with *Buttes Gas*, that the claims challenged 'the activity of a foreign state on its own

¹⁶³ *ibid* 883 [26] noting that '[n]either party has sought to question the court's analysis [in *Yukos Capital*] of the case law'.

¹⁶⁴ *Belhaj v Straw* [2013] EWHC 4111 (QB).

¹⁶⁵ *ibid* [29].

¹⁶⁶ *ibid*.

¹⁶⁷ *ibid* [31] applying *Fish & Fish v Sea Shepherd* [2013] 1 WLR 3700, 3712 [43]-[45], *per* Beatson LJ. There is a tension between Simon J's application of the English law on common design to claims which he concludes are governed by foreign law (see text to n 173 below) and Leggatt J's view, in *Rahmatullah* (n 1) [33]-[34], that where a claim is governed by foreign law it cannot be assumed that foreign law on 'joint or accessory liability in tort' is the same as the English law on common design (and see also Leggatt J at [39] – [40]).

¹⁶⁸ *Belhaj* (n 164) [146].

territory’ and that there were no relevant “judicial or manageable”, or “clear and identifiable” standards’ on which to base a judgment about that activity, adding the *Luther v Sagor / Kirkpatrick*-type justification that the claims challenged ‘the legal validity of those acts within the states’ own territory’.¹⁶⁹

Simon J also held that inquiry into US state acts was barred on act of state grounds.¹⁷⁰ Whilst the fact that US state agents were acting outside US territory and the possibility of an exception to the act of state doctrine in cases of grave human rights violations made the application of the act of state doctrine to US state acts more complex than in relation to Chinese, Malaysian, Thai and Libyan state acts,¹⁷¹ Simon J was ‘doubtful whether a validity issue ar[ose]’ and concluded that there were ‘no clear and incontrovertible standards’ by which to judge the legality of the US state acts and that there was ‘incontestable evidence that [to do so] would be damaging to the national interest’.¹⁷² As to applicable law, Simon J indicated that he would have held the law of China, Malaysia, Thailand, the United States and Libya applicable had the claim not been barred on act of state grounds.¹⁷³

The Court of Appeal reversed Simon J’s decision and held that the claim was not barred on act of state grounds, whilst upholding Simon J’s conclusion on applicable law and, as the case was not barred from proceeding, ordering the claimants to plead and prove that foreign law.¹⁷⁴ It reached that conclusion not because the doctrine did not apply but because 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’.¹⁷⁵ US state acts were, in addition to the human rights ‘limitation’ which applied to Chinese, Malaysian, Thai and Libyan state acts, also covered by a ‘territoriality limitation’

¹⁶⁹ *ibid* [146].

¹⁷⁰ *ibid* [150].

¹⁷¹ *ibid.* [147].

¹⁷² *ibid* [147] and [150].

¹⁷³ *ibid* [133] and [144].

¹⁷⁴ *Belhaj* (n 1) [31], [51]-[133], and [134]-[160].

¹⁷⁵ *ibid* [81], relying, in particular, on *Oppenheimer v Cattermole* [1976] AC 249 – see [82] – and, at [83], on *Kuwait Airways* (n 114).

restricting the foreign act of state doctrine, as distinct from the ‘wider principle of non-justiciability’ which was not at issue in *Belhaj*,¹⁷⁶ ‘to intra-territorial acts’.¹⁷⁷

The *Belhaj* Court of Appeal approaches *Kirkpatrick* as a ‘limitation’ on the foreign act of state doctrine rather than as a doctrine distinct from that set out in *Buttes Gas* and *Yukos Capital* and, in conflict with *Yukos Capital* but in line with *Berezovsky*, treats the act of state and non-justiciability doctrines as separate.¹⁷⁸ In this way the court seems keen to decide *Belhaj* without resolving the broader doctrinal conflict between *A Limited* and *Berezovsky* and *Yukos Capital*, *Khan* and *Buttes Gas*, and this is indirectly acknowledged in the Court of Appeal’s conclusion that ‘in the particular circumstances of this case’ any potential ‘damage ... to the foreign relations and national security interests of the United Kingdom’ did not ‘outweigh the need for our courts to exercise jurisdiction’.¹⁷⁹

Belhaj does, however, consider the Supreme Court’s reflections on the non-justiciability doctrine in its June 2014 *Shergill v Khaira* decision.¹⁸⁰ *Shergill* involved a religious dispute between trustees of a Sikh charity and the Supreme Court was concerned with the scope and limits of judicial power and the potential non-justiciability of litigation in general, rather than in the specific context of foreign state acts. The Supreme Court observed that the issue in *Buttes Gas* ‘about the international boundaries of sovereign states ... was non-justiciable because it was political’ and that the issue was political because ‘it trespassed on the proper province of the executive, as the organ of the state charged with the conduct of foreign relations’ and because of a ‘lack of judicial or manageable standards’.¹⁸¹ Occidental’s *Buttes* conspiracy claim, according to the Supreme Court, ‘involved assessing decisions and acts of sovereign states which had not been governed by law but by power politics’, but ‘[i]t 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’.¹⁸²

¹⁷⁶ *ibid* [128] and [131].

¹⁷⁷ *ibid* [131].

¹⁷⁸ *ibid* [69]-[77] and [128] and see also *Belhaj* (n 164) [84]-[86] and [116]-[117].

¹⁷⁹ *Belhaj* (n 1) [120].

¹⁸⁰ *ibid* [56]-[57]; *Shergill* (n 10).

¹⁸¹ *Shergill* (n 10) 15 [40].

¹⁸² *ibid*.

The Supreme Court's analysis recognises the political nature of the *Buttes Gas* decision but that does not imply recognition of its political unconscious. The political unconscious of Lord Wilberforce's speech is apparent in his willingness to accept the Foreign Office's view that the issues between *Buttes* and *Occidental* could not be separated from the wider inter-state dispute.¹⁸³ Whether a case involves inquiry into 'the political acts of sovereign states' depends on the court's characterisation of the litigation and that characterisation can, as Lord Wilberforce's deference to Foreign Office views demonstrates, be subject to political influence. What is important is not that the 'political acts of foreign states' are non-justiciable – that much is accepted by the fact / validity distinction in *Luther v Sagor* and *Kirkpatrick* – but how judges determine whether a particular case requires adjudication on the validity of foreign sovereign acts, because that is where the political unconscious bites. By not emphasising the importance of the fact / validity distinction in the characterisation of litigation and the determination of whether a case requires inquiry into 'the political acts of sovereign states' the Supreme Court effectively endorses *Buttes Gas* and its *Sabbatino*-type doctrine. That doctrine recognises the government's entitlement to exert political control over judicial decisions as to whether a case involving foreign state acts should be heard.

Belhaj is decided on the basis of two exceptions to the foreign act of state doctrine – human rights and extra-territoriality – rather than on the basis of the fact / validity distinction and, in that sense, the Court of Appeal walks a line between the *Buttes Gas* / *Sabbatino* and *Luther v Sagor* / *Kirkpatrick* approaches.¹⁸⁴ Had the decision, contrary to the *Shergill* approval of *Buttes Gas* and its *Sabbatino*-type doctrine, been based on the fact / validity distinction a different approach to the choice of law question would, in my view, have resulted.

¹⁸³ See text between n 81 and n 84.

¹⁸⁴ The Court of Appeal's *Belhaj* judgment - (n 1) [1] – notes that it 'has been drafted principally by Lloyd Jones L.J.'. Lloyd Jones LJ's judicial biography – at <https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/court-of-appeal-home/coa-biogs/> – notes that 'from 1975 to 1991 he was a Fellow of Downing College, Cambridge', as was the author of the 1981 article in the *Virginia Journal of International Law* – see Lloyd Jones (n 14) 433, first note: 'Fellow of Downing College, Cambridge'. The mild critique of Lord Wilberforce's *Buttes Gas* speech in that 1981 article matches the Court of Appeal's refusal to endorse or reject the *Buttes Gas* doctrine – the line that the Court of Appeal walks in its *Belhaj* judgment. It seems that Lloyd Jones LJ was the author of the 1981 article and, if that is so, he would appear to be beginning to amend the English foreign act of state doctrine in line with the views set out in his 1981 article.

Simon J and the Court of Appeal, as noted, concluded that the applicable law was that of China, Malaysia, Thailand, the US, and Libya,¹⁸⁵ based on section 11(1) of the Private International Law (Miscellaneous Provisions) Act 1995 which provides ‘the general rule ... that the applicable law is the law of the country in which the event constituting the tort or delict in question occur’ and section 11(2) which provides that ‘[w]here elements of those events occur in different countries ... (a) for a cause of action in respect of personal injury ... the law of the country where the individual sustained the injury’.¹⁸⁶ The claimants relied on section 12 of the 1995 Act which provides for the displacement of the section 11 ‘general rule’ where the ‘factors connecting the tort ... with another country’ – the UK – in comparison with those connecting it ‘with the country whose law would be applicable under the general rule’, make it ‘substantially more appropriate for the applicable law for determining the issues in the case ... to be the law of the other country’, or English law,¹⁸⁷ but the argument was rejected.¹⁸⁸

Applying the fact / validity distinction to *Belhaj* it is apparent that, as in the Supreme Court’s *Rahmatullah* decision, the alleged illegality of the various foreign state acts is collateral in nature and that even that collateral illegality is relevant only because of the English joint tortfeasance rules.¹⁸⁹ Without an allegation of collateral US illegality the *Rahmatullah* claim would have failed and without an allegation of illegal conduct by foreign state agents there would, on joint tortfeasance grounds, be no claim in *Belhaj*. The fact of that collateral illegality does not, however, make the act of state or non-justiciability doctrines applicable. As in *Rahmatullah*, the issue is not the legality of the foreign state acts but the legality of the British defendants’ conduct. The fact that the illegality of the defendants’ conduct would imply the illegality of foreign state acts is immaterial because ‘[the] legality [of those foreign state acts] is simply not a question to be decided’ in *Belhaj*.¹⁹⁰

The need to allege foreign state collateral illegality and to plead foreign law in *Belhaj* is a product of the English rules on joint tortfeasance. Those rules are derived from *Fish & Fish* and it was open to the

¹⁸⁵ See text at n 173 to n 174.

¹⁸⁶ *Belhaj* (n 1) [134]-[158].

¹⁸⁷ *Belhaj* (n 164) [130]; *ibid* [145]-[146].

¹⁸⁸ *Belhaj* (n 1) [147]-[148].

¹⁸⁹ See text to n 167 above.

¹⁹⁰ *Kirkpatrick* (n 57) 406.

Belhaj Court of Appeal to distinguish *Fish* on the basis that it did not concern the legality of UK involvement in multilateral, inter-state operations.¹⁹¹ The claimants in *Belhaj* ought to be required to prove only that the facts, as alleged, occurred; that is all that the joint tortfeasance rules should require by way of ‘common design’. Having established those facts the question is whether the defendants acted unlawfully as a matter of English law.

It is absurd to maintain that the legality of the involvement of UK state agents, including the then Foreign Secretary, in the alleged *Belhaj* rendition operation ought to be governed by the law of China, Malaysia, Thailand, the US, and Libya. When analysed on the basis of the fact / validity distinction, *via* the collateral illegality interpretation of *Rahmatullah*, and on the basis that *Fish & Fish* is to be distinguished, English law is, *per* section 12 of the 1995 Act, the ‘substantially more appropriate’ applicable law.¹⁹²

Requiring the claimants to plead and prove the foreign law of China, Malaysia, Thailand, the US, and Libya places a very substantial procedural hurdle in their path. If not overcome that hurdle will cause their claims to ‘fail’,¹⁹³ and that would achieve the result that would have been achieved had the claim been deemed non-justiciable. In this way requiring the claimants to plead and prove foreign law can be seen as an indirect and unintentional means by which to, in effect, defer to the government’s wishes.

The relevance of the Justice and Security Act 2013 to *Belhaj* must also be considered.¹⁹⁴ The 2013 Act establishes the possibility of civil claims being tried by ‘closed material procedure’.¹⁹⁵ It permits

¹⁹¹ *Fish & Fish* (n 167), and see text to n 167 on the joint tortfeasance rules; for the application of *Fish* by the Court of Appeal see *Belhaj* (n 1) [75]; On the tension between the approach to the applicability of the English law on common design in *Belhaj* and Leggatt J’s reasoning in *Rahmatullah* (n 1) see n 167 above; Since *Belhaj* was decided by the Court of Appeal the Supreme Court has decided *Fish & Fish* on appeal – see [2015] UKSC 10. Whilst the Supreme Court’s decision reverses the outcome in the Court of Appeal it does not change the test on joint tortfeasance – see Lord Toulson [21] and Lord Neuberger [55] in particular.

¹⁹² *Collins et al* (n 5) 1948 [35-108] emphasise that ‘[t]he strength of the case for displacement of the general rule will clearly depend on the circumstances of the particular case’.

¹⁹³ *Belhaj* (n 1) [158].

¹⁹⁴ The potential for a ‘closed material procedure’ trial in *Belhaj* is highlighted in Leigh Day, 29 May 2012, ‘Belhaj lawyers condemn government’s secret trials bill’ <http://www.leighday.co.uk/News/2012/May-2012/Belhadj-Lawyers-Condemn-Government-s-Secret-Trial>; and by A. Patrick, 7 November 2014, ‘Suing the state: judicial competence, restraint and redress in Belhadj’ <http://ukconstitutionallaw.org/2014/11/07/angela-patrick-suing-the-state-judicial-competence-restraint-and-redress-in-belhadj/>

closed civil trials in cases in which ‘sensitive material’ – that is ‘material the disclosure of which may be damaging to national security’ – may be disclosed.¹⁹⁶ Such material is clearly involved in *Belhaj* given the involvement of numerous intelligence and security agencies. CMP trials involve special advocates with access to ‘sensitive material’ who are unable to take instructions from their clients once they have seen that material.¹⁹⁷ Special advocates are ‘not responsible to the party to the proceedings whose interests [they have been] appointed to represent’ and the proceedings themselves can be conducted in private, without a hearing, or ‘in the absence of ... a party to the proceedings’.¹⁹⁸ In a CMP case a court may withhold the reasons for its judgment where the disclosure of those reasons ‘would be damaging to the interests of national security’, only providing those reasons to the special advocate and those who disclosed the ‘sensitive material’.¹⁹⁹

The public interest immunity concerns which led, in part, to the outcome in *Buttes Gas* are addressed by the JSA.²⁰⁰ Whilst the JSA was not directly relevant to the Court of Appeal’s *Belhaj* decision it seems reasonable to suggest that the fact that a trial could be conducted by closed material procedure and on the basis of all relevant evidence including ‘sensitive material’, rather than on the basis of partial evidence, some not having been disclosed on public interest immunity grounds, as would have been the case had *Buttes Gas* gone to trial, is a relevant part of the legal environment in which the decision was taken.

Even if the claimants are able to overcome the procedural hurdle of pleading and proving foreign law there is a significant possibility that any trial and judgment in *Belhaj* will not be public. As such, any trespass into the conduct of foreign affairs and any embarrassment to British or foreign governments may be minimal. In these circumstances, and taken as a whole, it is difficult to regard the

¹⁹⁵ Justice and Security Act 2013 (JSA 2013), Part 2; A Tompkins, ‘Justice and Security in the United Kingdom’ (2014) 47 *Israel Law Review* 305, 309: ‘The core change made by the Justice and Security Act 2013 is to extend the availability of closed material procedure ... and special advocates generally to civil litigation in the UK.’

¹⁹⁶ JSA 2013, ss.6, 8, and 11.

¹⁹⁷ *ibid* s.9; The Civil Procedure Rules (CPR), Part 82.11.

¹⁹⁸ JSA 2013 ss 9(4) and 11; CPR 82.6, 82.16.

¹⁹⁹ JSA 2013 s.11(2)(d); CPR 82.16

²⁰⁰ On *Buttes Gas* and public interest immunity see discussion in text from n 71 above onwards.

Court of Appeal's *Belhaj* judgment as a 'victory for justice'.²⁰¹ It is by no means certain that the claimant will be able to plead and prove foreign law and the requirement for them to do so can, for the reasons set out above, be seen as linked to the Court of Appeal's analysis of the act of state and non-justiciability doctrines. Any trial that does take place may be held on a CMP basis, with all that that entails for the publicness of the process. It seems that procedural and statutory means were available which unconsciously averted the need for the Court of Appeal to reach the unpalatable decision that a claim involving alleged UK state complicity in torture and human rights abuse was barred on foreign act of state grounds, whilst minimising the possibility of embarrassment being caused to the British government by the case being heard. That is the practical reality of the result, and it is a practical reality that cannot be reconciled with the suggestion that political factors played no unconscious part in the Court of Appeal's decision or that the decision is the result of absolutely independent non-political judicial reasoning.²⁰²

In the 2014 case of *Rahmatullah* – the facts and the identity of the claimant are as in the *habeus corpus claim* of the same name, discussed above – Mr Rahmatullah sought damages at common law and under the Human Rights Act ('HRA') from the foreign and defence secretaries for his detention and treatment during detention by UK and US forces.²⁰³ He alleged that his detention and alleged ill treatment by UK forces was unlawful, that, because the defendants ought to have been aware of the risk of torture, his transfer to US custody by UK forces was unlawful, and that the defendants were 'complicit in and ... liable for alleged ill treatment and unlawful detention' by the US.²⁰⁴ A large group of Iraqi civilians made similar allegations concerning their detention by UK forces in Iraq and their transfer into US custody.²⁰⁵ Three Iraqi civilian test cases were joined with Mr Rahmatullah's claim in order to determine preliminary issues on foreign act of state, non-justiciability, and crown act of state.²⁰⁶

²⁰¹ See text to n 21 above.

²⁰² On that suggestion see text at n 20 - n 23 above.

²⁰³ *Rahmatullah* (n 1) [1]-[5]

²⁰⁴ *ibid* [22].

²⁰⁵ *ibid* [10].

²⁰⁶ *ibid* [11]-[15].

Whilst the defendants initially argued that foreign and crown act of state and non-justiciability issues arose in all claims – including those under the HRA and the *Rahmatullah* judicial review application, which sought an order that the defendants investigate his transfer to US custody and their failure to seek his return from US custody – they only pursued those arguments in relation to the claims at common law.²⁰⁷ Leggatt J’s judgment on foreign and crown act of state and non-justiciability deals only with the common law claims made by Mr Rahmatullah and the Iraqi civilians and with Mr Rahmatullah’s application for permission to apply for judicial review, and not with the HRA claims.²⁰⁸

In light of the Court of Appeal’s *Belhaj* judgment the *Rahmatullah* defendants conceded that the foreign act of state doctrine did not bar the claims.²⁰⁹ That made it unnecessary for Leggatt J to give a judgment on foreign act of state, although there remained issues on crown act of state, but he did so because ‘the reasons which persuaded me independently of the Court of Appeal’s decision to reject the defendants’ arguments may still be relevant to the final determination of the present cases’.²¹⁰

Leggatt J disagrees with some aspects of the Court of Appeal’s reasoning in *Belhaj*.²¹¹ It is important to note that whilst the Court of Appeal bases its *Belhaj* decision on the foreign act of state doctrine,²¹² Leggatt J’s *Rahmatullah* decision is based on the separate, at least according to Leggatt J, ‘question of justiciability’.²¹³ Leggatt J accepts that ‘the traditional foreign act of state doctrine is limited to acts done within the foreign state’s territory and is subject to an exception imposed by public policy where serious violations of human rights are alleged’.²¹⁴ In relation to non-justiciability, as opposed to foreign act of state, he concludes that where ‘acts of a foreign state ... do not engage domestic legal rights’ – this being the case, in his view, in *Khan* – then ‘the need to abstain from adjudication upon acts of a foreign state ... [is] just as great when the acts occur or have effects outside the territory of the foreign

²⁰⁷ *ibid* [6] [228]; on the judicial review action see *ibid* [8]-[9].

²⁰⁸ *ibid* [22]: ‘For the purposes of the preliminary issues, the relevant claims in tort made by Mr Rahmatullah and the three Iraqi civilian claimants...’, and see [227]-[233] on the judicial review claim.

²⁰⁹ *ibid* [19].

²¹⁰ *ibid*.

²¹¹ *ibid* 177.

²¹² See text to n 174 and n 176 above.

²¹³ *Rahmatullah* (n 1) [177], and see [116]-[117], [140]-[145], and [177]-[178].

²¹⁴ *ibid* [177].

state’ as when the acts occur inside that territory.²¹⁵ Where, however, and again in relation to non-justiciability, ‘a domestic legal right is engaged and the matter is within the court’s competence, the court has a duty to decide the case whether or not it involves allegations of violations of human rights’.²¹⁶

Much depends on what Leggatt J sees as the distinction between the foreign act of state doctrine and the doctrine of non-justiciability in Lord Wilberforce’s *Buttes Gas* speech.²¹⁷ In emphasising this supposed distinction Leggatt J contradicts the *Yukos Capital* Court of Appeal’s conclusion that Lord Wilberforce’s ‘principle of non-justiciability’ is ‘the paradigm restatement of [the act of state] principle’.²¹⁸ According to Leggatt J:

Lord Wilberforce did not consider the [foreign act of state] doctrine [as it relates to the validity of foreign legislation] to be applicable. That was evidently because the claims of Occidental did not depend upon challenging the validity of any foreign legislation. Nor did the claims involve any contention that any executive act of a foreign state was unlawful under the state’s own laws.²¹⁹

It is difficult to reconcile this analysis with Lord Wilberforce’s insistence that ‘the question of title to the [drilling site] does not arise incidentally or collaterally: it is at the heart of the case’.²²⁰ It seems Leggatt J (mis)reads Lord Wilberforce in *Buttes Gas* in order to make his speech seem consistent with a *Luther v Sagor / Kirkpatrick / A Limited / Berezovsky* approach to foreign act of state. He then makes the tension between the two approaches to the doctrine clear – ‘there is conceptually an important distinction between what I will call the “traditional” [and what I have been referring to as the *Luther v Sagor / Kirkpatrick* approach to the] act of state doctrine and the principle which Lord Wilberforce

²¹⁵ *ibid* [178].

²¹⁶ *ibid*.

²¹⁷ *ibid* [116], [120] and [122].

²¹⁸ *ibid* [123] and see text to n 135 above.

²¹⁹ *ibid* [120], and see [119] for context.

²²⁰ See text to n 79.

preferred to describe as one of judicial restraint or abstention²²¹ – and is unambiguous in his rejection of the *Yukos Capital* ‘silhouette’ non-definition of the *Buttes Gas* doctrine(s):²²² ‘When a rule is said to be defined by its absence, there is reason to wonder whether there is in fact such a rule’.²²³

Leggatt J treats *Shergill* as establishing, albeit in *obiter dicta*, a distinction between the ‘acts of sovereign states on the international political stage which are governed, not by law, but by power politics’ and the question of whether the ‘private law rights of individuals have been violated’,²²⁴ and concludes that the claims in *Rahmatullah* are not barred by non-justiciability because they involve private law rights.²²⁵ The clarity of this analysis masks the point, noted above, that whether a case involves inquiry into ‘the political acts of sovereign states’ depends on the characterisation of the case. Leggatt J treats *Rahmatullah* as a case on private law rights rather than political acts and concludes that if ‘findings on whether violations of the claimants’ rights by agents of the US took place [are required] ... the court would ... be failing in its duty if it refused to adjudicate upon the allegations made’.²²⁶ It is, however, entirely possible that if and when it hears the *Rahmatullah* foreign act of state appeal the Supreme Court will take the opposite view on the basis that the claim’s factual basis involves UK / US co-operation in security and law enforcement operations in Iraq and that such operations and co-operation constitute ‘the political acts of sovereign states’.

It is here that the fact / validity distinction and, in particular, the collateral illegality interpretation of the Supreme Court’s 2012 *Rahmatullah* decision, which I argued above ought to be applied in *Belhaj*, becomes key. That reading of *Rahmatullah* (2012) would mean that in a previous decision, and in a manner consistent with Lord Wilberforce’s *Buttes Gas* distinction between legal issues that arise ‘incidentally or collaterally’ and those that are ‘at the heart of the case’,²²⁷ the Supreme Court has established that act of state and non-justiciability considerations do not bar the English courts adjudicating on the legality of UK state conduct where the illegality of that conduct depends on

²²¹ *Rahmatullah* (n 1) [123].

²²² On the *Yukos Capital* ‘silhouette’ non-definition see text to n 137 above.

²²³ *Rahmatullah* (n 1) [134].

²²⁴ *ibid* [141].

²²⁵ *ibid* [141] and [173].

²²⁶ *ibid* [175].

²²⁷ See discussion at n 157 above.

allegations of collateral unlawful acts by a foreign state.²²⁸ That argument, because it maintains that a fact / validity, collateral illegality approach to foreign act of state was part of the rationale for the Supreme Court's 2012 *Rahmatullah* decision, would overcome the Supreme Court's *obiter dicta* endorsement of a *Buttes Gas / Sabbatino*-type approach in *Shergill* and effectively overturn *Yukos Capital*.

When the Supreme Court hears the *Belhaj* and *Rahmatullah* appeals in November it will, for the reasons set out above, be faced with tensions between the Court of Appeal's decisions in *A Limited* and *Berezovsky* and *Yukos Capital* and *Khan* and between its 2012 decision in *Rahmatullah* and its *obiter dicta* on non-justiciability in *Shergill*.²²⁹ Whilst the Supreme Court may choose to explain *Rahmatullah* (2012) as a GC4 decision and therefore prefer *Shergill*, in the context of the long-running tension in the English cases between a *Luther v Sagor / Kirkpatrick* fact / validity approach and a *Buttes Gas / Sabbatino*-type emphasis on political considerations, the collateral illegality interpretation of *Rahmatullah* set out above deserves to be taken seriously.

In any event, whilst he decided the non-justiciability issues in the claimants favour, Leggatt J held that with the exception of the judicial review claim the common law claims were barred by the crown act of state doctrine.²³⁰ In line with his earlier judgment in *Serdar Mohammed* he formulated the crown act of state doctrine on the basis of the two rules in Lord Wilberforce's *Nissan v Attorney General* speech.²³¹ The first of these rules provides a 'servant of the Crown with a defence to an act otherwise tortious or criminal, committed abroad, provided that the act was authorised or subsequently ratified by the Crown' and the second rule, a 'rule ... of justiciability ... prevents British municipal courts from taking cognisance of certain acts ... [which have not been] accurately defined ... [but which are caught

²²⁸ On the precedential value of prior Supreme Court decisions see Supreme Court Practice Direction 3 [3.1.3], <https://www.supremecourt.uk/procedures/practice-direction-03.html>

²²⁹ As noted at n 4 above, I am grateful to Karen Steyn QC for confirming the current procedural situation in *Belhaj* and *Rahmatullah*.

²³⁰ *Rahmatullah* (n 1) [179] *et seq.*

²³¹ *ibid* [180]-[181]; *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB); *Nissan v Attorney General* [1970] AC 179. The appeal against Leggatt J's *Serdar Mohammed* crown act of state judgment was heard by the Court of Appeal, together with the appeal against Leggatt J's *Rahmatullah* crown act of state judgment, in February 2015 and judgment is awaited (thanks to Karen Steyn QC for confirming this).

by the] formulation ...“those acts of the Crown which are done under the [Royal] prerogative in the sphere of foreign affairs”.²³²

Perhaps Leggatt J’s approach to and application of the non-justiciability doctrine was unconsciously influenced by his approach to and application of the crown act of state doctrine, just as crown act of state considerations were an implicit factor in the foreign act of state decision in *Buttes Gas*.²³³ The claimants’ victory on non-justiciability is, in light of Leggatt J’s decision on crown act of state, hollow and, because the crown act of state doctrine excludes UK state conduct abroad from judicial inquiry for political reasons, it is impossible to see the overall outcome in *Rahmatullah* as the product of absolutely independent non-political judicial reasoning.²³⁴

More generally, the outcome in *Rahmatullah* highlights the importance of the overlap between the foreign act of state, non-justiciability and crown act of state doctrines and the extent of judicial deference to the British government.

3. *The current position and its implications*

In litigation involving allegations of unlawful conduct by UK state agents or agencies carried out abroad and in co-operation or concert with foreign state agents, foreign and crown act of state considerations will overlap, as in *Rahmatullah* (2014). Foreign act of state considerations will effectively collapse into crown act of state considerations because, regardless of the foreign act of state doctrine, the crown act of state doctrine offers a defence to claims involving authorised conduct abroad by UK state agents and agencies.

In disputes between private parties involving foreign state conduct the extent to which not impugning the relevant foreign state conduct would pose difficulties for UK foreign relations will be an important factor in determining whether judges are prepared to impugn the conduct of the foreign state – see the analysis of *Kuwait Airways* above. Where a dispute between private parties involves foreign

²³² *Rahmatullah* (n 1) [181], quoting Lord Wilberforce in *Nissan* (n 231) 231.

²³³ See text to n 106 above.

²³⁴ See text to n 23 above.

state acts and UK foreign policy decision-making judges may characterise the case in a way which makes a decision about the legality of foreign state action seem unavoidable, practically impossible, and legally impermissible because they wish to avoid the political controversy of indirect inquiry into the British government's conduct of foreign policy – see the analysis of *Buttes Gas* above.

Only where UK state agents or agencies engage in conduct within UK territory in co-operation or concert with foreign state agents who act abroad will the foreign act of state doctrine apply without the crown act of state doctrine also applying – see the analysis of *Belhaj* above. As *Khan* demonstrates however (see above), the fact that the relevant conduct by UK state agents takes place within UK territory does not preclude judges from treating any potential for embarrassment to foreign states as a basis on which to bar the claim.

Where, as in *Belhaj*, the fact that a case involves claims against UK state agents acting within UK territory in co-operation or concert with foreign state agents who act abroad means that only the foreign and not the crown act of state doctrines applies, the English rules on joint tortfeasance and choice of law, and the possibility of the claims being tried by closed material procedure, hinder the chances of the claim reaching trial and significantly limit the potential for political embarrassment to the British government – see the analysis of *Belhaj* above.

There have been attempts to challenge some aspects of this pattern of judicial deference to government by reversing *Buttes Gas*, endorsing *Kirkpatrick*, and moving back to the *Luther v Sagor* validity foundations of the English foreign act of state doctrine (see the analysis of *A Limited*, *Berezovsky*, *Lucasfilm*, the Supreme Court's 2012 *Rahmatullah* decision and Leggatt J's November 2014 *Rahmatullah* judgment above). In defiance of those attempts the current, prevailing formulation of the foreign act of state and non-justiciability doctrine(s) in *Yukos Capital* remains faithful to the vague, *Sabbatino*-type, *Buttes Gas* doctrine.

The overall implications of this state of affairs and of the foreign act of state, non-justiciability and crown act of state doctrines in general for the politics, purpose, function and independence of English judicial reasoning in cases involving foreign and / or UK state acts demand review by the Supreme

Court at the next available opportunity. It is, therefore, extremely undesirable for the Supreme Court to hear the foreign act of state appeal in *Belhaj* without joining it to the foreign act of state appeal in *Rahmatullah*, and it is equally undesirable for the Supreme Court to hear those foreign act of state appeals without joining them to the crown act of state appeal in *Rahmatullah*.²³⁵ The Court of Appeal's judgment on the *Rahmatullah* crown act of state appeal is awaited and,²³⁶ in my view, the Supreme Court should, first, postpone the hearing of the appeals in *Belhaj* and *Rahmatullah* until the Court of Appeal has delivered its judgment and, second, join the inevitable appeal from the Court of Appeal's decision to the foreign act of state appeals in *Belhaj* and *Rahmatullah*. Doing anything else risks perpetuating the current doctrinal incoherence.

III. (BACK TO) LAW AND POLITICS: FREDRIC JAMESON AND JUDICIAL DECISION- MAKING AS SOCIALLY SYMBOLIC ACT

In the opening pages of *The Political Unconscious* Fredric Jameson says this:

To imagine that, sheltered from the omnipresence of history and the implacable influence of the social, there already exists a realm of freedom – whether it be that of the microscopic experience of words in a text or the ecstasies and intensities of the various private religions – is only to strengthen the grip of Necessity over all such blind zones in which the individual subject seeks refuge, in pursuit of a purely individual, a merely psychological, project of salvation. The only effective liberation from such constraint begins with the recognition that there is nothing that is not social and historical – indeed, that everything is “in the last analysis” political. The assertion of a political unconscious proposes that we undertake just such a final analysis and

²³⁵ On the current procedural situation in *Belhaj* and *Rahmatullah* see text to n 2, n 3, and n 4 above.

²³⁶ As noted at n 231 above the *Rahmatullah* crown act of state appeal was heard alongside the appeal against the crown act of state judgment in *Serdar Mohammed* (n 231).

explore the multiple paths that lead to the unmasking of cultural artifacts as socially symbolic acts.²³⁷

The current, prevailing formulation of the foreign act of state and non-justiciability doctrines in the Court of Appeal's 2012 *Yukos Capital* judgment, consistent with a *Buttes Gas, Sabbatino*-type approach, seeks to preserve the idea of judicial reasoning as a 'private religion' that is 'sheltered from the omnipresence of history and the implacable influence of the social' in the public imagination – an idea of judicial decision-making as something independent of government and free from political influence – by concealing the social, historical and political forces which inform judicial decision-making in cases involving foreign state acts and foreign policy considerations. Where the British government has strong views on whether the courts should hear such cases – as in *Buttes Gas, Kuwait Airways, Khan, Belhaj* and *Rahmatullah* – 'the implacable influence of the social' reality in which legal decisions are made and the 'omnipresen[t] ... histor[ical]' power of the British government are all too apparent for the court.

Such cases, as argued throughout this article, trap judges between the wishes of government and the rule of law's requirement for independent judicial reasoning in what amounts to a 'social contradiction' between the political power of government and the legal power of the courts.²³⁸ Judges have developed the *Buttes Gas, Sabbatino*-type foreign act of state and non-justiciability doctrines as 'strategies of containment' designed to contain this 'social contradiction'.²³⁹ These strategies are designed, first, to obscure the fact that in cases such as *Buttes Gas, Kuwait Airways* and *Khan* judges contain the 'social contradiction' between the political power of government and the legal power of the courts by deferring to the government's wishes and, second, to hide the 'aporia' in the rule of law – the exception to the rule of law's requirement for judicial reasoning free from political influence – which judges create

²³⁷ Jameson (n 8) 4-5 also quoted in n 8 above, (paragraph break suppressed).

²³⁸ 'social contradiction' – *ibid* 68.

²³⁹ 'strategies of containment' – *ibid* 38.

when they decide to defer to the government.²⁴⁰ The idea that judges are deciding cases involving foreign state acts and foreign policy considerations on the basis of deference to the government's wishes rather than as the result of independent judicial reasoning is a 'logical scandal or double bind', 'unthinkable and ... conceptually paradoxical' from a rule of law perspective that insists on judicial reasoning free from political influence, 'which cannot be unknotted by the operation of pure thought, and which must therefore generate a whole more properly narrative apparatus – the text itself – to square its circles and to dispel, through narrative movement, its intolerable closure'.²⁴¹

The answer to the question of how the foreign act of state and non-justiciability doctrines can be vague and undefined yet determine the outcome to a case, and how it is that doctrines whose content, scope and application are uncertain can lead to a legal judgment is this.²⁴² First, there are no doctrines, in the sense that 'doctrine' implies something substantive and defined, and in place of doctrine(s) there are 'strategies of containment' or a 'narrative apparatus' that goes by the name(s) foreign act of state and non-justiciability doctrine(s). Second, the outcomes and judgments produced by the application of these 'doctrines' are not purely legal – in the sense that 'legal' implies a separation, consistent with conventional rule of law thinking, between law and politics – but political in nature, hence their 'political unconscious'. In *Yukos Capital* the attempt, in *A Limited* and *Berezovsky*, to abolish the *Buttes Gas, Sabbatino*-type 'strategies of containment' or 'narrative apparatus' was quashed because it threatened to deprive judges of the ability to manage the 'social contradiction' between political and legal power in cases involving foreign state acts and foreign policy considerations by deferring to the government's wishes whilst concealing the fact that they have done so. There is more than a little irony in the *Yukos Capital* Court of Appeal proclaiming global rule of law standards whilst defending and

²⁴⁰ Jameson (n 8) 68: 'It seems useful ... to distinguish, from [the] ultimate subtext which is the place of social contradiction, a secondary one, which is more properly the place of ideology, and which takes the form of the *aporia* or *antinomy*'; C Baldack, *The Oxford Dictionary of Literary Terms* (Oxford University Press 2008) 21-22: 'the term [aporia] is frequently used in the sense of a final impasse or paradox: a point at which a text's self-contradictory meanings can no longer be resolved, or at which the text undermines its own most fundamental presuppositions.'

²⁴¹ Jameson (n 8) 68.

²⁴² Those questions are set out in the text at around n 6 above.

preserving doctrines which exist to conceal the absence of English judicial independence from the British government.²⁴³

This article has sought to reveal the ‘strategies of containment’ employed in foreign act of state and non-justiciability judgments. It has done this by ‘unmasking’ those texts as ‘cultural artifacts’, ‘socially symbolic acts’ which are “in the last analysis” political’ because they are products of judicial attempts to contain the ‘social contradiction’ between political power and legal power. The question which remains is what this ‘unmasking’ implies for the future of the English foreign act of state and non-justiciability doctrines.

‘[U]nmasking’ the ‘social contradiction’ between the political power of government and the legal power of the courts as the ‘absent cause’ of the current *Yukos Capital / Buttes Gas, Sabbatino*-type approach to the English doctrine(s) will not prevent that ‘social contradiction’ from continuing to affect judges when they decide whether to hear cases involving foreign state acts and foreign policy consideration; an ‘absent cause’ remains a cause even after its absence in the relevant texts has been presented.²⁴⁴ Through a critique of *Buttes Gas, Sabbatino* and *Yukos Capital* I have argued for a *Luther v Sagor / Kirkpatrick* approach to the doctrine(s) and I am, of course, not the first to do this.²⁴⁵ But to argue that judges should move from ‘political’ decisions based on the *Buttes Gas / Yukos Capital* doctrine(s) to ‘legal’ decisions based on the *Luther v Sagor / Kirkpatrick* doctrine when they decide whether to hear cases involving foreign state acts and foreign policy considerations is to underestimate the inherently political nature of the decision; ignore the continuing relevance of the ‘social contradiction’ between the political power of government and the legal power of the courts; and retreat into the ‘private religion’ of the rule of law and its notion of independent judicial reasoning as a ‘strategy of containment’ that ‘shelter[s] [judicial decision-making] from the omnipresence of history

²⁴³ *Yukos Capital* (n 6) 1362 [87]: ‘Courts ... are always responsible for their acts, both domestically and internationally. Domestically they are responsible up to the level of their supreme court, and internationally they are responsible in the sense that their judgments are recognisable and enforceable in other nations only to the extent that they have observed what we would call substantive or natural justice, what in the United States is called due process, and what internationally is more and more being referred to as the rule of law’.

²⁴⁴ ‘absent cause’ – Jameson (n 8) 68: ‘the social contradiction addressed and “resolved” by the formal prestidigitation of narrative must, however, reconstructed, remain an absent cause, which cannot be directly or immediately conceptualized by the text’.

²⁴⁵ See Mann (n 7), Mann (n 12) and, to a lesser extent, Lloyd Jones (n 14), for example.

and the implacable influence of the social’, trading one political unconscious that denies the link between law and politics for another.²⁴⁶

The reason that a *Luther v Sagor / Kirkpatrick* approach is to be preferred to a *Buttes Gas / Yukos Capital* approach is not that it substitutes ‘legal’ for ‘political’ judgment, not least because the opposition between the two is false. It is because a *Luther v Sagor / Kirkpatrick* approach situates judges as political actors and enables them to wrestle with the ‘social contradiction[s]’ of social and political reality, holding out the possibility of judicial decision-making as a means of advancing efforts to secure justice and a better future. Judicial decision-making can only hope to contribute to such advances if it is willing to decide whether to judge those who exercise the greatest influence over ‘social’ reality and the creation of ‘history’ – the politically powerful, including the government and the agencies and agents of the state – on the basis of defined and declared criteria rather than on the basis of concealed deference to power.

The *Luther v Sagor / Kirkpatrick* approach requires that judges refrain, except in exceptional circumstances,²⁴⁷ from judging the validity and legality of foreign sovereign acts whilst insisting that judges judge the legality of domestic action by the British government, its agents and agencies. Judicial decisions based on that approach are not independent from but part of the apparatus of political power; a way of contesting the current distribution and application of political power by the powerful. The logic of this approach most probably implies substantial reforms to the crown act of state doctrine, as interpreted and applied by Leggatt J in *Serdar Mohammed and Rahmatullah*, but that is an issue for another time lying, as it does, beyond this article’s focus on the foreign act of state and non-justiciability doctrines.

²⁴⁶ See Mann (n 7) 34: ‘if and when English courts are faced with the critical case ... it is hoped [that they will] be guided by legal reasoning rather than misconceived maxims of policy’, also quoted at n 7 above. And see, in similar terms, opposing law to politics, C Sim, ‘Non-Justiciability in Australian Private International Law: A Lack of “Judicial Restraint”’ (2009) 10 *Melbourne Journal of International Law* 102, 140: ‘the judiciary must prioritise of private rights over political concerns and maintain access to the courts’; M Alderton, ‘The Act of State Doctrine: Questions of Validity and Abstention from *Underhill* to *Habib*’ (2011) 12 *Melbourne Journal of International Law* 1, 25-6: ‘Courts should not too eagerly relinquish their judicial function simply because a matter involves a ‘weighty’ matter of state. In too many cases have courts refrained from adjudicating upon matters which are properly within jurisdiction, often placing undue reliance on broad notions found in long-outdated case law.’

²⁴⁷ See the discussion of *Kuwait Airways* and *Luther v Sagor* at n 114 to n 115 above.

The conception of judicial decision-making as part of a broader political effort to secure justice and a better future reflects what Jameson describes as the ‘Utopian’ aspect of ‘radical legal studies’ in which ‘the problem of the “text” is ... vivid’:

There is, in the area of the juridical as the Left conceives it today, an open antithesis between a school based on ideological interpretation – which seeks to unmask existing law as the instrument of class domination – and one working in a Utopian perspective – which on the contrary sees its work as the conception and projection of a radically new form of some properly socialist legality that cannot be achieved within existing institutions, or that is in them merely “emergent.”²⁴⁸

A purely ‘ideological interpretation’ would ‘unmask’ the political unconscious of the ‘existing law’ on foreign act of state and non-justiciability, condemn judicial-decision making for its deference to political power, and offer no alternative. A wholly utopian perspective, on the other hand, would pretend that the ‘political’ judgments produced by the current English foreign act of state and non-justiciability doctrine(s) can be dispensed with in favour of the ‘legal’ judgments which a *Luther v Sagor / Kirkpatrick* approach would produce and, either expressly or implicitly, claim that that this change would resolve or at least contain the ‘social contradiction’ between the political power of government and the legal power of the courts. The utopianism which I favour in calling for a *Luther v Sagor / Kirkpatrick* approach, however, involves what Jameson labels ‘the coordination of the ideological with the Utopian’.²⁴⁹

Because judges are anxious that their decisions cannot resolve the ‘social contradiction’ between political and legal power they have developed the strategies of the *Buttes Gas / Yukos Capital* doctrine(s) to contain the contradiction by deferring to and prioritising the wishes of the politically powerful. The ideological ambition of resolving the ‘social contradiction’ between political and legal

²⁴⁸ Jameson (n 8) 288.

²⁴⁹ *ibid.*

power by judicial decision needs to be modified by substituting engagement with and representation of the ‘social contradiction’ for its resolution. The utopian goal of judicial decisions that control the powerful and secure justice should be modified by the pursuit of efforts to empower everyone to contest perceived injustices involving powerful actors – the alleged complicity of UK state agents and agencies in unlawful rendition in *Belhaj*, or the alleged provision of information in support of US drone strikes in *Khan*, for example – by representing what they imagine justice to be and pursuing change for the better. In this model of judicial decision-making the fact that there are no guarantees of resolving the contradiction between political and legal power and no guarantees of effective judicial control over the powerful does not mean that judges can decide to defer to political power. The representation of social, political and historical reality and of disparate ideas of justice takes precedence over ideological efforts to achieve legal control and it is in this sense that judicial decisions are and should be seen as ‘socially symbolic acts’.²⁵⁰

It is almost certainly hoping for too much to suggest that the Supreme Court, when it hears the appeals in *Belhaj* and *Rahmatullah*, will accept this approach and its ‘coordination of the ideological with the Utopian’. But if the Supreme Court is interested in exploring the politics and political unconscious of texts or judgments on the foreign act of state and non-justiciability doctrines written by English judges this article might offer some assistance.

²⁵⁰ On the prioritisation of representation over control in legal practice see my article, ‘Walter Benjamin and the Re-Imagination of International Law’, forthcoming in *Law and Critique*.