Public International Law in the Supreme Court of the United Kingdom

A selection of cases from the Court's first ten years

London

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Public International Law in the Supreme Court: a collection of cases

As part of the 10th anniversary celebrations of the Supreme Court of the United Kingdom, established in 2009, an invitation was extended to participants of the London Conference on International Law on 3 October 2019 to join a session at the Supreme Court. The session was led by a panel chaired by Lady Hale, President, and also including Lord Reed, Deputy President, Lord Lloyd-Jones and Lady Arden.

This collection was produced for that session by Lord Lloyd-Jones and Lady Arden, with the assistance of Courtney Grafton and Ruth Keating, Judicial Assistants at the Court, to illustrate the contribution that public international law has made to the work of the Supreme Court during the first ten years of its existence.

The Supreme Court of the United Kingdom's history and role:

1 October 2009 was a defining moment in the constitutional history of the United Kingdom. Following the introduction of the Constitutional Reform Act of 2005, judicial authority was transferred away from the House of Lords to the newly created Supreme Court of the United Kingdom.

Before then, the House of Lord's had acted as the country's highest appeal court. This had evolved over more than six hundred years and came originally from the work of the royal court, the "Curia Regis", which advised the sovereign, passed laws and dispensed justice at the highest level.

Originally both Houses of Parliament had heard petitions for the judgments of lower courts to be reversed but after 1939, the House of Commons stopped considering such cases, leaving the work to the House of Lords. (By custom, the whole House of Lords could sit as a court on special occasions, such as the trial of one of their own members).

In 1876, the Appellate Jurisdiction Act was passed to regulate how appeals were heard. It also appointed Lords of Appeal in Ordinary: highly qualified professional judges working full time on the judicial business of the House. These Law Lords were able to vote on legislation as full Members of the House of Lords, but in practice rarely did so.

In 2009, the then Law Lords became the Court's first justices. They remained Members of the House of Lords but were unable to sit and vote in the House. All new justices appointed since October 2009 were directly appointed to the Supreme Court on the recommendation of a selection commission.

It was decided that the former Middlesex Guildhall, a Grade II* listed building in Parliament Square, London, would be the perfect home for the newly created highest court. Located directly opposite the Houses of Parliament and nestled between Westminster Abbey and the Treasury, it meant that the four branches of government (the legislature, the executive, the church and now the judiciary) were all represented in one symbolic location, on a site which had

been associated with the administration of justice for more than two hundred years. The building was refurbished and modernised and was officially opened by Her Majesty the Queen on 16 October 2009.

The building provided three beautiful courtrooms, a magnificent library and plenty of office space for the justices and their staff. It was an ideal space from which the Court could fulfil its role: to hear arguable points of law of general public importance from across the United Kingdom.

The establishment of the highest court as a separate entity from the legislature also provided greater accessibility and transparency as it became much easier for members of the public to visit the Court and observe hearings. The Court also included an interactive exhibition space and, over time, developed a varied education programme.

Ten years later, the Supreme Court of the United Kingdom has heard a range of high-profile cases and given important judgments which have impacted on the lives of people across the country. It has grown in the public consciousness and is now fully established as one of the cornerstones of the British constitution.

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Preface

It is remarkable how often public international law, in some shape or form, features in the case load of the Supreme Court. In part, this is because of our membership of the European Union and the Council of Europe. European Union law continues to feature in many cases and for the time being we continue to make references to the Court of Justice. The European Convention on Human Rights has also featured in many cases since the rights it contains became rights in UK law under the Human Rights Act 1998. But neither of these features, except incidentally, in the cases described in this collection. Nor do the cases arising under the many specialist treaties to which the UK is a party – most numerous amongst these are cases featuring the various Hague Conventions on aspects of private international law, such as international child abduction, but we also regularly encounter cases under the international conventions dealing with the carriage of goods or persons by air, sea, road or rail.

Instead, this volume concentrates on cases illustrating more universal matters – the interpretation of treaties, the obligations arising under the United Nations Treaty and Security Council Resolutions, the scope of diplomatic immunity (upon which there is a treaty) and state immunity (on which there is not), the doctrine (if such there be) of foreign act of state, and the role of customary international law in shaping the common law. The cases concern a wide variety of people – from domestic servants in foreign embassies who allege that they were the victims of human trafficking and modern slavery, to citizens of Iraq and Afghanistan who allege that they were unlawfully detained by British forces there, to a couple who allege that the British government was complicit in their unlawful rendition by the United States and others to Libya where they were detained and tortured, to refugees marooned in the sovereign base areas on the island of Cyprus, to the Chagos islanders fighting to return to their home country, to the survivors of a massacre in Malaya in 1948 who are still seeking a full inquiry into what took place. And, as the authors note, some of the decisions of this Court have also been influential in the decisions of other courts, both national and international.

Whatever the subject and whatever the subject matter, I hope that you will find this collection interesting and engaging.

President of The Supreme Court, The Right Hon the Baroness Hale of Richmond DBE

BRENDA HALE
President, Supreme Court of the United Kingdom

"This volume concentrates on cases illustrating more universal matters – the interpretation of treaties, the obligations arising under the United Nations Treaty and Security Council Resolutions, the scope of diplomatic immunity (upon which there is a treaty) and state immunity (on which there is not), the doctrine (if such there be) of foreign act of state, and the role of customary international law in shaping the common law."

Foreword

In recent years there has been an enormous increase in the number of cases before courts in the United Kingdom concerning public international law and foreign relations law. As is shown by this selection of cases from its first decade, the UK Supreme Court has been called upon to decide a wide range of challenging issues in this field.

The increase in the number of such cases before courts in the United Kingdom may perhaps be explained by three factors in particular.

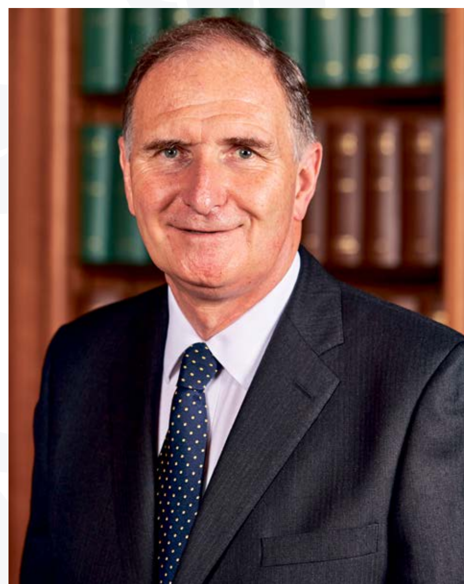
First, this development reflects a fundamental change in the nature of international law. The notion of public international law as a system of law merely regulating the conduct of states among themselves on the international plane has been discarded and in its place has emerged a system which includes the regulation of human rights by international law, a system of which individuals are rightly considered to be subjects.

A second development of great importance in this regard, so far as the United Kingdom is concerned, has been the implementation into domestic law of the European Convention on Human Rights by the Human Rights Act 1998. Not only does this mean that judges in this jurisdiction are required to give effect to the treaty obligations of the United Kingdom under the Convention but, as some of the cases in this collection show, giving effect to the Convention often requires national courts to rule on issues of international law. This in turn has had an influence on what may be considered justiciable before national courts.

Thirdly, there has been a substantial shift in international public policy as a result of which there has been a growing willingness on the part of courts in the United Kingdom to address the conduct of foreign states and issues of public international law when appropriate. As a result, we are seeing a major reconsideration of concepts such as comity and justiciability.

We hope that readers and participants in the meeting at the Supreme Court will find this selection of cases informative. We particularly value dialogue with judges from different jurisdictions.

We thank our judicial assistants, Courtney Grafton and Ruth Keating, for their patient and skilful input into this publication. We also thank the Supreme Court Librarians, Paul Sandles and Rachel Watson, and Karen Lee and Maria Netchaeva of the International Law Reports for their invaluable assistance.



Justice of The Supreme Court, The Right Hon Lord Lloyd-Jones

Justice of The Supreme Court, The Right Hon Lady Arden of Heswall DBE

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1. The First Case in The Supreme Court

HM Treasury v Ahmed and others

This was the first appeal to be heard by the new Supreme Court of the United Kingdom. It held that the UK system implementing the United Nations ("UN") regime for imposing sanctions on suspected terrorists was unlawful because it did not respect fundamental rights embodied in the common law and rights guaranteed by the European Convention on Human Rights ("ECHR").[1]

In response to various incidents of international terrorism the UN Security Council passed resolutions requiring member states to take steps to freeze the assets of designated persons, without any time limit. Designated persons were neither informed of the basis on which they had been designated nor given any right to challenge their designation before an independent judge. The measures imposed severe restrictions on the ability of those persons to deal with their assets and consequently on their freedom, including their freedom of movement.

The UK legislation to give effect to these resolutions included the Terrorism (United Nations Measures) Order 2006 ("TO") and the Al-Qaida and Taliban (United Nations Measures) Order 2006 ("AQO") (collectively, "the Orders"). The Orders had been made by the Treasury under section 1 of the United Nations Act 1946. That Act was designed to enable the UK to fulfil its obligations under the UN Charter, and it provided for orders to be made without Parliamentary scrutiny. Section 1 gave wide powers to the executive to apply measures which were "necessary" or "expedient" to give effect to Security Council resolutions. The five appellants in this case, some of whom were UK nationals or residents, were subject to the Orders, and the effect on them and their families had been severe.

The seven-judge Supreme Court held that the TO and article 3(1)(b) of the AQO were unlawful, with Lord Brown dissenting in relation to the latter. Under the principle of legality, there could be no interference with fundamental rights unless Parliament had made it clear in primary legislation that it intended that interference. That meant that the Orders could not interfere with fundamental rights unless it was "necessary" to do so. The Court concluded that the Orders contained provisions which went further than was necessary. The TO introduced a test of reasonable suspicion which was not in the Security Council resolutions, and under the AQO, the designated person could not challenge his designation by judicial review. Accordingly the TO and article 3(1)(b) of the AQO were *ultra vires* section 1 of the United Nations Act 1946.

Lord Hope observed at [7]:

"Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty".

On the basis that under article 103 of the UN Charter a member state's obligations under that Charter would prevail over obligations in the ECHR, it was for the European Court of Human Rights to give authoritative guidance on the extent to which, if at all, ECHR rights could be held to prevail over obligations under the UN Charter, so that all the contracting states to the ECHR could adopt a uniform position.

HM Treasury asked the Supreme Court to suspend its order until the invalid legislation was replaced. The Supreme Court confirmed that it had power to do this but declined to exercise it because a suspension could not alter the fact that the Orders were ultra vires and of no effect.[2]

By the time the Supreme Court gave its judgment, the Court of Justice of the European Union ("CJEU") had issued its decision in *Kadi v Council of the European Union* in which it decided that persons listed by the UN under its sanctions regime could seek judicial review of their designation under EU law.[3] In *Kadi v European Commission (No 2)*, the General Court of the European Union relied on *HM Treasury v Ahmed*.[4]

UK legislation now gives a designated person the right to apply to a minister to revoke or vary his designation.[5] The decision of the minister may then be open to challenge in the courts. The UN has also made changes to its sanctions regime in order to strengthen individual rights.[6]

[1] [2010] UKSC 2; [2010] 2 A.C. 534; 149 ILR 641.
[2] [2010] UKSC 5 at [4]; [2010] 2 A.C. 534, 689; 149 ILR 641.
[3] Joined Cases C-402/05P and C-415/05P; [2009] A.C. 1225.
[4] Case T-85/09; [2011] 1 C.M.L.R. 24 at [36], [69], [122], [128]-[129], [149]; 149 ILR 167.
[5] Sanctions and Anti-Money Laundering Act 2018, section 23.
[6] See Lord Hope at [78]. The changes included the creation of an Ombudsperson appointed by the Secretary-General to deal with requests for de-listing.

2. Interpretation of Treaties

Al-Sirri v Secretary of State for the Home Department, DD (Afghanistan) v Secretary of State for the Home Department

This decision exemplifies the Supreme Court's approach to the interpretation of an international convention and the Court's interaction with decisions from other leading courts, including Canada, New Zealand, Ireland and Germany. As the appeals concerned refugee status, the Court's decision also illustrates the weight which it attached to the published guidance of the United Nations High Commissioner for Refugees ("UNHCR"), who was given permission to make submissions to the Supreme Court.[7]

The Home Secretary had refused to recognise the appellants as refugees on the ground that the exception in article 1F(c) of the Convention relating to the Status of Refugees (1951) ("the Refugee Convention") applied. This excludes from protection *"any person with respect to whom there are serious reasons for considering that ... he has been guilty of acts contrary to the purposes and principles of the United Nations"*. The issue here concerned the meaning of that exception.

Both the General Assembly and the Security Council of the UN have condemned terrorism as contrary to the purposes and principles of the UN, but neither organ has defined terrorism. The Home Secretary thus argued that member states were free to adopt their own definition. The Supreme Court rejected this argument. It held that the phrase *"acts contrary to the purposes and principles of the United Nations"* must have an autonomous meaning in the Refugee Convention, that is, a meaning for the purposes of the Refugee Convention wherever applied.

As there is no internationally agreed definition of terrorism (nor any court or body established to give authoritative rulings on the Refugee Convention), the Supreme Court considered decisions from several other jurisdictions. It decided that it was appropriate to adopt a cautious approach to the meaning of the relevant exception and so it endorsed the meaning supported by UNHCR guidelines.

The Supreme Court therefore held that crimes had to be capable of having a serious effect on international peace, security and peaceful relations between member states. This could include an attack in Afghanistan on the International Security Assistance Force that had been set up pursuant to a UN Security Council resolution, as had occurred in the case of *DD*. Serious and sustained violations of human rights on any persons would also fall within this exception. In addition, as a matter of general approach, the relevant act should exceed a high threshold of gravity, and there should be serious reasons for considering that the individual involved bore personal responsibility for the act in question.

The Supreme Court remitted the cases to the relevant domestic tribunal for reconsideration on this basis.

The Court's decision was cited in the decisions of the High Court of Australia in *FTZK v Minister for Immigration*[8] and the Supreme Court of Cyprus in *Emam v Director of Central Staff and others*.[9] It was also relied on by the Supreme Court of Canada in *Febles v Canada*.[10]

[7] [2012] UKSC 54; [2013] 1 A.C. 745; 159 ILR 616.
[8] [2014] HCA 26; 158 ILR 441.
[9] App. No. 121/2016.
[10] [2014] SCC 68.

R (on the application of Tag Eldin Ramadan Bashir and others) v Secretary of State for the Home Department

This appeal concerned six refugees living in the Sovereign Base Areas ("SBAs") in Cyprus, and, in particular, whether the UK was bound to resettle the six refugees in the UK.[11]

Until 1960 Cyprus was a colony of the UK, and in the four years leading up to independence in 1960 the Refugee Convention applied to it. After independence, the territory of Cyprus was composed of the island of Cyprus with the exception of two areas – Akrotiri and Dhekelia – which were retained under UK sovereignty as SBAs for the purposes of accommodating military bases.

In October 1998 the six refugees boarded a ship in Lebanon bound for Italy, which ultimately foundered off the coast of Cyprus. They were brought to safety at the SBAs by the Royal Air Force. More refugees arrived in 2000 and 2001. On 20 February 2003, the UK and Cyprus entered into a memorandum of understanding relating to *"illegal migrants and asylum seekers"* ("the 2003 memorandum"). However, the 2003 memorandum did not apply to refugees who had arrived in the SBAs prior to the date of its conclusion, and this included the six refugees.

In 2013, the six refugees formally asked to be admitted to the UK. In a decision dated 25 November 2014, the Secretary of State refused entry. The six refugees challenged that decision on the basis that it was inconsistent with the Refugee Convention. The principal questions in the appeal were whether the Refugee Convention applied to the SBAs and whether the six refugees were entitled to be resettled in the UK, or should be permitted to do so. The six refugees also contended that, in the exceptional circumstances of the case, the Secretary of State should exercise his discretion to admit them.

The Supreme Court gave an interim judgment, inviting further submissions on other matters, including the applicability of the 2003 memorandum to the six refugees. One of the issues covered by the interim judgment was whether the Refugee Convention, which had applied to Cyprus while it was a colony, continued to apply to the SBAs.

The judgment of the Court discusses the relationship between international law and domestic law in this context at [63]:

"Given that until 1960 the [Refugee] Convention unquestionably applied to the territory now comprised in the SBAs, the question is whether the political separation of that territory from the rest of the island brought an end to its application there. This is necessarily a question of international law. But while international law may identify the relevant categories and the principles that apply to them, the question whether a particular territory falls within a relevant category will depend on the facts, and these may include its domestic constitutional law".

The Supreme Court went on to hold that there was no basis in international law for concluding that different rules of treaty succession apply to humanitarian treaties (at [65]). The UK had not at any time made any reservation about the application of the Refugee Convention to the SBAs. The Refugee Convention, in the judgment of the Supreme Court, continued to apply to the SBAs.

However, on its true interpretation, the Refugee Convention did not confer any right on a refugee in the SBAs to be resettled in the UK.

The case was settled before the further submissions were received and the refugees in the SBAs were admitted into the UK.

[11] [2018] UKSC 45; [2019] A.C. 484.

3. Non-International Armed Conflict

Al-Waheed v Ministry of Defence, Serdar Mohammed v Ministry of Defence

In *Al-Waheed v Ministry of Defence* and *Serdar Mohammed v Ministry of Defence* the principal issues were whether there was a legal basis on which British armed forces could detain suspected combatants in the non-international armed conflicts in Iraq and Afghanistan and, if so, the procedural safeguards required for such detention. Mr Al-Waheed had been detained by British armed forces in Iraq for about six weeks and then released. Mr Mohammed was detained by the armed forces in Afghanistan for nearly four months before being transferred to the Afghan authorities. British armed forces were in Iraq and Afghanistan pursuant to UN Security Council resolutions which gave a mandate to a multinational force to contribute to the maintenance of stability and security in those countries.[12]

The majority of the Court (Lord Reed and Lord Kerr dissenting) held that those Security Council resolutions implicitly authorised detention for imperative reasons of security. They held that the Court did not need to decide whether customary international law authorised the detention of combatants in a non-international armed conflict.

The majority then had to decide on the procedural safeguards for detention. Article 5(1) of the ECHR provides that no one shall be deprived of their liberty except in accordance with a procedure prescribed by law, save in six specified cases, none of which applied to armed conflict. Under article 5(3), where a person is detained in order to be brought before the competent legal authority, he must be brought before that authority promptly. Article 5(4) provides that the detainees are entitled to have the lawfulness of their detention speedily decided by a court.

The majority held, applying the jurisprudence of the European Court of Human Rights that article 5(1) of the ECHR permitted the non-arbitrary detention of suspected combatants in an international armed conflict, that article 5(1) of the ECHR similarly permitted such detention in a non-international armed conflict if this was necessary for imperative reasons of security. Thus it would be insufficient to detain a person solely to gain intelligence about the security situation. It might be necessary to adapt the procedural safeguards in article 5 to avoid arbitrariness.

The safeguards were present in the case of Mr Al-Waheed and so his appeal and underlying claim under article 5(1) failed, but in the case of Mr Mohammed the procedures did not afford a detainee an effective right to challenge his detention and so did not comply with article 5(4). His case was remitted to the trial judge for the trial of certain issues to establish the grounds on which he had been detained (after the initial period of 96 hours permitted by the multinational force's guidelines).

Lord Reed and Lord Kerr (dissenting) concluded that international humanitarian law did not authorise the detention of suspected combatants in non-international armed conflict. They held further that detention outside the six cases specified in article 5(1) of the ECHR was not authorised. They adopted a significantly different approach to the interpretation of the Security Council resolutions, holding that they had to be interpreted harmoniously with the ECHR and on the basis of a presumption that the obligations thereby imposed on member states were compatible with international human rights law.

[12] [2017] UKSC 2; [2017] 2 W.L.R. 327; 178 ILR 414. The two appeals were heard together on preliminary issues arising out of actions brought to recover compensation for detention.

4. Diplomatic Immunity and Inviolability

Reyes v Al-Malki and another

Like Benkharbouche (below, page 7), this case concerned a claim by an ex-employee against her employer. This case raised the question of whether diplomatic immunity applied to claims arising out of alleged human trafficking by a former employee, Mrs Reyes, against her former employer, Mr Al-Malki, a diplomatic agent, in circumstances where he had ceased to hold his position prior to the hearing. The Supreme Court rejected Mr Al-Malki's appeal, emphasising that diplomatic immunity was not an immunity from liability, but an immunity from the jurisdiction of the UK courts.[13]

The Vienna Convention on Diplomatic Relations (1961) ("VCDR") was implemented into the domestic law of the UK by the Diplomatic Privileges Act 1964. The Supreme Court unanimously held that the immunity conferred on diplomatic agents and their families under that Convention comes to an end when the diplomatic agent leaves his post. From that moment, he is only entitled to immunity for acts performed in exercise of his diplomatic functions during his posting. As Mr Al-Malki had ceased to hold office, and none of the alleged acts were performed in exercise of his diplomatic functions, he and his wife were not entitled to immunity.

The Supreme Court was divided on the question of whether Mr Al-Malki would have been entitled to immunity if he had not left office. This turned on whether the employment of Mrs Reyes at the diplomat's residence would have been within an exception from immunity for *"[a]n action relating to any … commercial activity exercised by the diplomatic agent … outside his official functions."*[14] Mrs Reyes argued that the exception should be interpreted in the light of the UN Protocol to Prevent, Suppress and Punish Trafficking (2000) (the "Palermo Protocol"), which requires signatory states to recognise a crime and tort of human trafficking, so that the exception from immunity for a *"commercial activity"* includes human trafficking. Lord Sumption, with whom Lord Neuberger agreed, did not accept that, under the Vienna Convention on the Law of Treaties (1969), the VCDR could be interpreted in this way, but Lord Wilson, with whom Lord Clarke and Lady Hale agreed, expressed their doubts as to the correctness of Lord Sumption's approach. Both Lord Sumption and Lord Wilson examined judgments of the International Court of Justice.

Mr Al-Malki also argued that service on him by post at his residential address was in breach of the VCDR, which provides that a diplomat's person and home should be inviolable. The Supreme Court rejected that argument. There was no statutory requirement or requirement in the VCDR that he should be served through diplomatic channels.[15]

[13] [2017] UKSC 61; [2017] 3 W.L.R. 923.

[14] VCDR, article 31(1)(c).

[15] In Republic of Sudan v Harrison et al 139 S.Ct. 1048 (2019), Thomas J of the Supreme Court of the United States, dissenting, cited this part of the decision.

R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)

This case provides guidance on the use of confidential diplomatic correspondence that has become available to a party to litigation.[16]

The appellant was the chair of the Chagos Refugees Group, representing former residents of the Chagos Archipelago ("Chagos") in the British Indian Overseas Territory ("BIOT"). Those residents were removed and resettled elsewhere by the British Government between 1971 and 1973 and were prevented from returning. Following earlier proceedings, it was prohibited under the BIOT Constitution and Immigration Order 2004 for Chagossians to return to BIOT. The appellant challenged a decision of the Foreign Secretary in April 2010 to establish a marine protected area ("MPA") in which there would also be no fishing in the BIOT.

One of the grounds for challenging the decision of the Foreign Secretary was that, as the appellant contended, the Foreign Secretary's decision was motivated by the improper ulterior motive of making future resettlement by the Chagossians impracticable. The appellant wanted to put in evidence a document purporting to be a confidential diplomatic cable from the US embassy in the UK to the US Federal Government in Washington published by WikiLeaks. This was said to set out what was said by US and UK officials at a meeting concerning the creation of the MPA. When his claim was heard it was held that the cable was inadmissible in evidence and his claim was dismissed.

The Supreme Court unanimously held that the cable was admissible in evidence. The confidentiality and inviolability of diplomatic correspondence depended not on its subject-matter or contents, but on its status as part of the archives or documents and official correspondence of a diplomatic mission, protected by Articles 24 and 27(2) of the VCDR. Lord Sumption (at [69]) explained that:

"[i]t has been recognised ever since Vattel … that the basis of the rule of international law is that the confidentiality of diplomatic papers and correspondence is necessary to an ambassador's ability to perform his functions of communicating with the sovereign who sent him and reporting on conditions in the country to which he is posted".

Lord Mance (with whom Lord Neuberger, Lord Clarke and Lord Reed agreed) held that it was not established that the cable had been in the archives of a US mission when it was removed, and so it was not inviolable. Moreover, it had been widely disseminated and was in the public domain. Lord Sumption and Lady Hale considered that the basis of the principle was control and that the documents would enjoy inviolability so long as they remained under the control of the embassy. That control might be exercised by sending copies of it on terms as to how it was to be used.

The Supreme Court nonetheless dismissed the appeal as, in the judgment of the majority, on the facts the cable could have made no difference to the outcome of the challenge.

[16] [2018] UKSC 3; [2018] 1 W.L.R. 973.

[17] These proceedings are not the same as those mentioned in the Advisory Opinion of the International Court of Justice (Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, 25 February 2019) concluding that as the process of decolonising Chagos had not been completed the UK was bound under international law to bring to an end its administration of Chagos as rapidly as possible. The position of the United Kingdom as explained in written ministerial statements to Parliament is that it will abide by an agreement with Mauritius in 1965 to cede sovereignty of Chagos to Mauritius when it is no longer required for defence purposes (see HC Deb 30 April 2019 HCWS 1528, HL Deb 30 April 2019 HLWS1491).

5. State Immunity Act 1978 and State Immunity

In the five cases described below, the Supreme Court has considered the interpretation of the State Immunity Act 1978 ("1978 Act") in light of the customary international law of state immunity.

Benkharbouche v Embassy of the Republic of Sudan

Since the enactment of the 1978 Act, article 6 of the ECHR and article 47 of the EU Charter of Fundamental Rights ("Charter") have come to exercise a considerable influence over the law of state immunity. This inter-relationship has given rise to intriguing issues, most recently in relation to contracts of employment in the case of *Benkharbouche*.[18]

Ms Benkharbouche and Ms Janah, both Moroccan nationals, were employed as domestic workers in London by the Sudanese and Libyan governments, respectively. Both women were dismissed and issued claims against their employers. The Employment Tribunal dismissed the claims on the basis that Libya and Sudan were entitled to state immunity under the 1978 Act. The question at issue in the appeal was whether sections 4(2)(b) and 16(1)(a) of the 1978 Act, which afforded this immunity, were consistent with article 6 of the ECHR and article 47 of the Charter. The answer to this question was dependent on whether these provisions could be justified by reference to any rule of customary international law.

The Supreme Court emphasised that this is not a situation in which a court, considering the international law obligations of the UK, may properly limit itself to asking whether the UK has acted on a tenable view of those obligations. On the contrary, the Supreme Court made clear that, in the present context, the national court has to decide the requirements of international law. As Lord Sumption observed at [35]:

"If it is necessary to decide a point of international law in order to resolve a justiciable issue and there is an ascertainable answer, then the court is bound to supply that answer".

The Supreme Court then embarked on an extensive review of state practice and *opinio juris*, concluding that: (1) there has probably never been a sufficient international consensus in favour of the absolute doctrine of immunity to warrant treating it as a rule of customary international law, (2) the only consensus that there has ever been was in favour of the restrictive doctrine of immunity, and (3) the adoption of the restrictive doctrine has not proceeded by accumulating exceptions to the absolute doctrine.

The Supreme Court emphasised that the true basis of the doctrine was and is the equality of sovereigns, and that basis never did warrant immunity extending beyond what sovereigns did in their capacity as such.

From this starting point, and by reference to the UN Convention on Jurisdictional Immunities of States and Their Property (which is not yet in force), the Supreme Court concluded that there is no basis in customary law for the application of state immunity in an employment context to acts of a private law character because, unless constrained by a statutory rule, the general practice of states is to apply the classic distinction between acts *jure imperii* and *jure gestionis*. In light of the foregoing, the Supreme Court concluded that sections 4(2)(b) and 16(1)(a) of the 1978 Act, so far as they confer immunity, are incompatible with article 6 of the ECHR and will not apply to claims derived from EU law.

[18] [2017] UKSC 62; [2017] 3 W.L.R. 957 ; 180 ILR 575.

NML Capital Ltd v Republic of Argentina

The case of NML raised a series of questions about the recognition of foreign judgments against foreign states. The case concerned bonds issued by Argentina under an agreement waiving state immunity in respect of which it had declared a moratorium in December 2001. NML had purchased these bonds at a considerable discount and obtained summary judgment from a US court for over $284 million. It sought to enforce the judgment against assets held by Argentina in England.[19]

Lord Mance, Lord Collins and Lord Walker held (Lord Phillips and Lord Clarke dissenting) that the exception to state immunity in respect of proceedings *"relating to … a commercial transaction"* within section 3(1) of the 1978 Act did not extend to proceedings for the enforcement of a foreign judgment which itself related to a commercial transaction. Lord Mance observed at [91]:

"It is true that the 1978 Act adopted the restrictive theory of state immunity, but the question before the Supreme Court now is: how far and in respect of what transactions. It is true that it is now well-recognised that no principle of international law renders state A immune from proceedings brought in state B to enforce a judgment given against it in state C. But the question is how far the drafters of the 1978 Act appreciated or covered the full possibilities allowed by international law…".

The majority was of the view that a narrow construction of section 3(1) of the 1978 Act was preferable and thus the commercial exception could not apply. As such, the general principle of immunity under the 1978 Act applied.

However, all of the Justices agreed that section 31(1) of the Civil Jurisdiction and Judgments Act 1982 ("1982 Act") was an alternative scheme for restricting state immunity in the case of foreign judgments. They held that this section reflects and, in part, replaces the exemptions from state immunity set out in the 1978 Act. It allows English courts to enforce a foreign judgment against a foreign state if (1) the normal conditions for recognition and enforcement of judgments are fulfilled, and (2) the foreign state would not have been immune if the foreign proceedings had been brought in the UK (e.g., where the foreign state submits to the jurisdiction). In this case, because the terms in the bonds amounted to a submission to the jurisdiction by Argentina, section 31(1) of the 1982 Act was satisfied and Argentina could not rely on State immunity.

The decision *"achieved, for the first time, a comprehensive and coherent treatment of the issue of state immunity in respect of foreign judgments"* (Lord Mance, at [98]). The decision was subsequently applied by the International Court of Justice in *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*[20] and considered by the High Court of Australia in *Firebird Global Master Fund II Ltd v Republic of Nauru*[21] and *PT Garuda Indonesia Ltd v Australian Competition & Consumer Commission*.[22]

[19] [2011] UKSC 31; [2011] 2 A.C. 495.
[20] Judgment, I.C.J. Reports 2012, p. 99; 168 ILR 1.
[21] [2015] HCA 43; 180 ILR 343.
[22] [2012] HCA 33; 153 ILR 406.

SerVaas Inc v Rafidain Bank

In the following year, the Supreme Court considered immunity from execution as codified in section 13(2)(b) of the 1978 Act (i.e., *"relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property"*). The 1978 Act does, however, admit of limited exceptions, including in respect of *"property which is for the time being in use or intended for use for commercial purposes"* under section 13(4).[23]

SerVaas Inc, a company incorporated in Indiana, had entered into an agreement with the Iraq Ministry of Industry for the supply of equipment, machinery and related services for a factory in Iraq. On 2 August 1990, Iraq invaded Kuwait and SerVaas subsequently terminated the agreement. SerVaas then sought a third party debt order against Rafidain Bank, which was in provisional liquidation in England, as Iraq held a share of its liquidated assets. However, the Head of Mission of the Embassy of Iraq certified that any dividends received from these assets were not intended for use for commercial purposes but were destined for payment to the Development Fund for Iraq established by the UN Security Council.

The central question in the appeal was whether the origin of the debts was relevant to whether the property in question was *"in use or intended for use for commercial purposes"*. In a unanimous judgment, the Supreme Court held that it was not. It surveyed various decisions of courts of appeal in the US and Hong Kong. It held that the words had to be given their ordinary and natural meaning having regard to the context and that this meaning went beyond merely *"relating"* to a commercial transaction: it had to be shown that the bank account in question was earmarked by the state solely for use to settle liabilities incurred in commercial transactions. Because the payment of funds to the Development Fund for Iraq was not *"connected to, or destined for use in, any mercantile or profit-making activity by Iraq"* the Supreme Court concluded it was manifestly not a commercial purpose under section 13(4) of the 1978 Act (at [32]).

[23] [2012] UKSC 40; [2013] 1 A.C. 595 ; 160 ILR 668.

Belhaj v Straw and others, Rahmatullah v Ministry of Defence and another (No 2)

In *Belhaj v Straw and others and Rahmatullah v Ministry of Defence (No 2)*, the Supreme Court considered, inter alia, the scope of the concept of state immunity. Mr Belhaj and Ms Boudchar sued various UK government departments and officials alleging that they had assisted officials of Malaysia, Thailand, the US and Libya in their unlawful rendition to Libya. Mr Rahmatullah brought similar claims as regards a number of alleged abuses by UK and US authorities in Iraq. The defendants argued that the concept of state immunity is wide enough to cover cases where it is integral to the claims made that foreign states or their officials must be proved to have acted contrary to their own laws. This, they said, indirectly impleaded the foreign states allegedly involved because the proceedings sought to affect their *"interests"*. They placed reliance on article 6 of the UN Convention on Jurisdictional Immunities of States and Their Property (though not yet in force) which provides that a proceeding shall be considered to have been instituted against another state if it "*in effect seeks to affect the property, rights, interests or activities of that other State*".[24]

The Supreme Court roundly rejected this submission. Lord Mance, agreeing with various academic commentators, held that "interests" in article 6 should be limited to a claim for which there is some legal foundation and not merely to some political concern of the state in the proceedings. None of the domestic or international cases to which the Court had been referred carried the concept of "interests" so far.

The Supreme Court pointed out that the appeals involved no issues of proprietary or possessory title. All that could be said was that establishing the defendants' liability in tort would involve establishing that various foreign states, through their officials, were the prime actors in respect of the alleged torts. But that would have no second order legal consequences for them. As Lord Sumption observed at [197]:

"No decision in the present cases would affect any rights or liabilities of the four foreign states in whose alleged misdeeds the United Kingdom is said to have been complicit. The foreign states are not parties. Their property is not at risk. The court's decision on the issues raised would not bind them. The relief sought, namely declarations and damages against the United Kingdom, would have no impact on their legal rights, whether in form or substance, and would in no way constrict the exercise of those rights". It follows that the claim to state immunity fails".

As a result, the defendants' reliance on state immunity, which trespassed beyond the outer limits of the concept, failed.

[24] [2017] UKSC 3; [2017] A.C. 964 ; 178 ILR 576.

The United States of America v Nolan

Although the United States did not rely on state immunity in this case, it argued that domestic legislation should be read as subject to an exception or as inapplicable in relation to a foreign state. The Supreme Court roundly rejected this submission: if a state could have pleaded state immunity but does not do so, the courts will not interpret a domestic statute to give the state an exemption.[25]

In 2006 the US closed a military base in the UK. Mrs Nolan was employed there and was dismissed for redundancy the day before it closed. Mrs Nolan complained that the US government had not performed its statutory obligation under UK law to consult with an employee representative when proposing to dismiss her. The US government denied any obligation.

Mrs Nolan succeeded before the Employment Tribunal and subsequently the Employment Appeal Tribunal. The US government did not invoke state immunity. Mrs Nolan was granted an order for remuneration for a one-month period. The Court of Appeal referred to the CJEU for a preliminary ruling the question whether the obligation to consult arose on a proposal or only on a decision to close the base. However, the CJEU declined jurisdiction, holding that the dismissal of staff of a military base fell outside the scope of the relevant EU directive.

When the matter came back before the Court of Appeal, it dismissed the appeal. The US government appealed to the Supreme Court. It argued that the UK's domestic legislation on consultation, the Trade Union and Labour Relations (Consolidation) Act 1992 should, in the light of the CJEU's ruling, be construed as not applying to employment by a public administrative establishment, at least as regards foreign states' non-commercial activity such as closure of a military base. Further, the same result should be reached in the light of principles of public international law and EU law.

By a majority, the Supreme Court held that, although the situation in this case may not have been foreseen by the legislature, this was not a reason for reading into clear legislation a specific exemption which would not reflect the scope of any exemption in EU law.

The Supreme Court also held that neither public international law nor EU law made the US government exempt from obligations to consult on collective redundancy. The submission of the United States amounted, in effect, to reading domestic legislation as subject to an exception or as inapplicable in relation to a foreign state in any circumstances where the foreign state could have relied on a plea of state immunity. Lord Mance, giving the judgment of the majority, rejected this at [36]: "I do not accept that there is any such principle. It would make quite largely otiose the procedures and time for a plea of state immunity". The majority also held that principles of non-discrimination in the ECHR and the Charter are in favour of persons, not states, and could not be relied on by the United States.

[25] [2015] UKSC 63; [2016] A.C. 463 ; 180 ILR 477.

6. Foreign Act of State

Belhaj v Straw and others, Rahmatullah v Ministry of Defence and another (No 2)

In *Belhaj* (above, page 10) the Supreme Court also sought to define the foreign act of state doctrine.[26] The doctrine – although it also has its roots in notions of the independence and sovereignty of states – is not one of customary international law and many states have no such rule. Lord Sumption observed at [200]: *"The foreign act of State doctrine is at best permitted by international law. It is not based upon it"*.

The foreign act of state doctrine includes three (or possibly four) different principles: the Supreme Court was not in total agreement on this point. First, there will be many situations in which the application of established rules of private international law will provide a complete answer and it will not be necessary to have regard to any wider doctrine of foreign act of state. Secondly, there is authority for a doctrine of foreign act of state whereby the court will not inquire into the legality of an act of a foreign government within its own territory. The majority view in *Belhaj* was that, if it exists, this category is limited to acts in relation to property and does not extend to personal torts. Thirdly, there is the wider principle of non-justiciability recognised by Lord Wilberforce in *Buttes Gas v Hammer*[27] relating to transactions of sovereigns on the international plane. And fourthly – although this is highly controversial – the door may not be entirely closed on a possible further category in which a court should decline jurisdiction for fear of embarrassment of the executive or, at least, damaging national interests of the UK.

Lord Mance and Lord Neuberger (with whom Lady Hale and Lord Clarke agreed) were of the opinion that the foreign act of state doctrine did not apply. In his minority judgment, Lord Sumption considered the legal implications of torture in English and international law. He observed that, under customary international law, the breach of a jus cogens norm does not itself require civil jurisdiction to be assumed by states. The European Court of Human Rights relied on *Belhaj* as support for this proposition in *Nait-Liman v Switzerland*.[28] However, Lord Sumption was of the view that the English courts should consider the issues in *Belhaj* because *"it would be contrary to the fundamental requirements of justice administered by an English court to apply the foreign act of state doctrine to an allegation of civil liability for complicity in acts of torture by foreign states"* (at [262]).

[26] 2017] UKSC 3; [2017] A.C. 964.
[27] [1982] A.C. 888.
[28] Judgment, Application No. 51357/07, para 72.

7. Customary International Law

Keyu and others v Secretary of State for Foreign and Commonwealth Affairs and another

In this case, the Supreme Court considered the basis of and extent to which customary international law is received into the common law. In *Keyu*, the Secretary of State had refused to hold a public inquiry into the deaths of 24 civilians killed by a British Army patrol in 1948 when the UK was a colonial power in the former Federation of Malaya. The appellants, who were related to the victims, applied for judicial review of this refusal.[29]

Lord Neuberger (with whom Lord Hughes agreed) sought to identify the relevant customary international law rule. He was of the view that it was only in the past 25 years that international law recognised a duty on states to carry out formal investigations into certain deaths for which they were responsible and which may have been unlawful. He considered it *"inconceivable that any such duty could be treated as retrospective to events which occurred more than 40 years earlier, or could be revived by reference to events which took place more than 20 years before that"* (at [116]), a conclusion with which Lady Hale, Lord Mance and Lord Kerr agreed. Even if that was wrong, he did not think it right to incorporate that principle into the common law because Parliament had expressly provided for investigations into such deaths by statute.

Lord Mance expanded on the issue of the incorporation of customary international law into the common law. He observed that common law judges, on any view, *"retain the power and duty to consider how far customary international law on any point fits with domestic constitutional principles and understandings"* (at [146]), but he was cognisant that they *"face a policy issue in deciding whether to recognise and enforce a rule of international law"* (at [149]). As such, he proffered some general guidance at [150]:

"… in my opinion, the presumption when considering any such policy issue is that [customary international law], once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration".

[29] [2015] UKSC 69; [2016] A.C. 1355.

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