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REVIEW OF EXECUTIVE ACTION ABROAD: THE UK SUPREME COURT IN THE INTERNATIONAL LEGAL ORDER

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Abstract In January 2017, the UK Supreme Court handed down landmark judgments in three cases arising out of the UK government's conduct abroad. In *Serdar Mohammed v Ministry of Defence*, the Court considered whether detention in non-international armed conflicts was compatible with the right of liberty in Article 5 of the European Convention on Human Rights. The second case, *Belhaj v Straw*, involved an examination of the nature and scope of the foreign act of State doctrine, and its applicability as a defence to tort claims arising out of the alleged complicity of the UK Government in human rights abuses abroad. Finally, *Rahmatullah v Ministry of Defence* saw the Court examining the nature and scope of the Crown act of State doctrine, and its use as a defence to tort claims alleging unlawful detention and maltreatment. All three cases raise important doctrinal issues and have significant consequences for government accountability and access to a judicial remedy. At the heart of each decision is the relationship between international law and English law, including the ways in which international norms influence the development of English law and public policy, and how different interpretations of domestic law affect how judges resolve questions of international law. These cases also see the judges grapple with the role of the English court in the UK constitutional and international legal orders.

Keywords: Crown act of State, detention, foreign act of State, human rights, international law and English law, non-international armed conflict, public international law.

I. INTRODUCTION

On 17 January 2017, the UK Supreme Court handed down landmark decisions in three cases arising out of the UK Government's conduct abroad. The first—*Serdar Mohammed v Ministry of Defence*—considered whether the detention of enemy fighters during non-international armed conflicts (NIAC) in Afghanistan

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and Iraq was compatible with the right of liberty in Article 5 of the European Convention on Human Rights (ECHR). The decision has significant implications for the UK and other States that are involved in extraterritorial NIACs. The second—*Belhaj v Straw*—addressed the characterization and scope of the foreign act of State doctrine, which the UK government had invoked in response to tort claims alleging complicity in human rights abuses and breaches of peremptory norms of international law. The final case—*Rahmatullah v Ministry of Defence*—concerned the nature and scope of the Crown act of State doctrine, on which the UK Government relied to defend itself against claims of unlawful detention and maltreatment in Iraq. Both *Belhaj* and *Rahmatullah* have significant implications for the ability to hold the executive to account for involvement in human rights abuses abroad. All three decisions reveal deep disagreement among the judges on the nature and scope of the common law doctrines, on the relationship between different regimes of international law and on the role of the English court in the domestic and international legal orders.

II. *SERDAR MOHAMMED*: RECONCILING DETENTION IN NON-INTERNATIONAL ARMED CONFLICTS WITH ARTICLE 5 ECHR

Serdar Mohammed involved two sets of claims alleging unlawful detention and maltreatment by British forces, contrary to Article 5(1) and (4) ECHR. Article 5 (1) provides that no one shall be deprived of their liberty except in six specified circumstances and in accordance with a procedure prescribed by law.[1] Subparagraph (4) provides that detainees have the right to have a court examine the lawfulness of their detention. Article 5(1) is unusual among international human rights law instruments in that it provides an exhaustive list of circumstances in which the deprivation of liberty is permitted. Both claimants were detained during the course of an extraterritorial NIAC in which the UK was acting under the authority of the UN Security Council.[2] The first—Serdar Mohammed—was captured on 7 April 2010 during a mission carried out by the International Security Assistance Force (ISAF) in

[1] Art 5(1), European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222 (ECHR).

[2] The UK thus exercised 'control and authority' over the detainees: *Al-Skeini v United Kingdom* (2011) 53 EHRR 18, para 137. *Al-Skeini* was applied in the case of *Al-Jedda v United Kingdom* (2011), where the UK argued that UNSC resolution 1546 imposed an obligation on member States to detain and that this obligation must, pursuant to art 103 of the UN Charter, prevail over art 5(1) ECHR. The Grand Chamber rejected this argument on the basis that the resolution merely authorized—and did not oblige—States to intern enemy fighters. In *Serdar Mohammed*, Lord Sumption was critical of *Al-Skeini*, noting that it 'gives rise to serious analytical and practical difficulties, when applied to a state's treatment of enemy combatants outside its own territory, because the practical effect is to apply the Convention to any extra-territorial exercise of force … . It requires the application of the Convention to the conduct of military operations for which it was not designed and is ill-adapted …': *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, para 48.

Afghanistan, of which the UK was a part.[3] In a Memorandum of Understanding (2006) between the UK and Afghanistan, it was agreed that the UK would arrest and detain personnel where authorized to do so under ISAF Rules of Engagement and in accordance with applicable international human rights law.[4] ISAF's Standard Operating Procedures permitted detention for a maximum of 96 hours, whereupon an individual had to be released or transferred to the Afghan authorities for investigation.[5] In 2009, the UK adopted a policy that permitted UK Ministers to authorize detention beyond 96 hours in exceptional circumstances for the purpose of obtaining 'mission critical' intelligence.[6] On the assumed facts of the case, Mohammed's detention consisted of three phases: (1) the first 96 hours, following ISAF detention policy; (2) the period between 11 April 2010 (i.e. after the first 96 hours) and 4 May 2010, during which he was held for intelligence-gathering purposes; and (3) the period between 4 May 2010 and 25 July 2010, after which he was transferred to the Afghan authorities and prosecuted for offences related to the insurgency.[7] The second claimant—Abd Ali Hameed Ali Al-Waheed—was captured on 11 February 2007 at his wife's home in Iraq. He was held at a British army detention centre for six and a half weeks before an internal review concluded that a successful prosecution for offences related to improvised explosive devices was unlikely.[8]

The majority of the Supreme Court held that (1) the relevant UN Security Council resolutions authorized detention for imperative reasons of security, thereby providing the legal basis for detaining Al-Waheed and for detaining Mohammed beyond the 96 hours authorized by ISAF's detention policy; and

[3] ISAF was a multinational force under NATO command that was deployed in Afghanistan with the consent of the Afghan Government and pursuant to a UN Security Council mandate.

[4] Memorandum of Understanding between UK and Afghanistan (23 April 2006) para 3.1. Published by the Select Committee on Foreign Affairs of the House of Commons (10 July 2007) <https://publications.parliament.uk/pa/cm200607/cmselect/cmfaff/44/4412.htm>.

[5] ISAF Standard Operating Procedures 362, para 5. Detention could be extended beyond 96 hours on the authority of the ISAF commander or his/her delegate where 'it is deemed necessary in order to effect [the detainee's] release or transfer in safe circumstances', or where there were logistical difficulties securing release/transfer within the 96-hour period: para 8. Importantly, this exception 'is not authority for longer-term detentions but is intended to meet exigencies such as that caused by local logistical conditions' (ibid).

[6] On 9 November 2009, it was announced in Parliament that 'in the majority of cases, UK forces will operate [in accordance with ISAF policy]' but that where 96 hours was not long enough to obtain 'mission crucial' intelligence, 'Ministers should be able to authorise detention beyond 96 hours, in British detention facilities to which the ICRC has access': Written Statement, The Secretary of State for Defence (Mr Bob Ainsworth), 9 November 2009, Hansard, cols 31–2. Other States also adopted their own detention policies that departed from the ISAF policy: the USA did so via domestic legislation, while Canada entered into an agreement with the Afghan Government: *Serdar Mohammed*, para 341.

[7] Serdar Mohammed was convicted and sentenced to ten years imprisonment.

[8] At a pre-trial review, it was common ground that the judge and the Court of Appeal would be bound to dismiss his art 5 claim by the decision of the House of Lords in *R (Al-Jedda) v Secretary of State for Defence* [2008] AC 332 (art 5(1) ECHR was displaced by the UN Security Council resolutions authorizing military operations in Iraq). Leggatt J therefore granted a leap-frog appeal directly to the Supreme Court.

(2) following *Hassan v United Kingdom*, Article 5(1) ECHR should be interpreted in a way that accommodates the authority to detain in such circumstances, even though preventative detention is not a permitted ground for depriving liberty under Article 5(1). It followed that the claimant's detention was in accordance with Article 5(1), although the majority found that the UK was breach of Article 5(4) for failing to ensure that Mohammed had an effective means of challenging the lawfulness of his detention. Lord Reed (with whom Lord Kerr agreed) delivered a dissenting opinion in which he accepted that the relevant Security Council resolutions could provide the legal basis for detention but, instead of relying on *Hassan v United Kingdom,* he considered that the guidance given by the Grand Chamber of the ECtHR on the interpretation of resolutions in *Al-Jedda v United Kingdom* was the correct starting point. From *Al-Jedda* he concluded that the relevant resolutions should be interpreted as authorizing detention only in circumstances that are compatible with Article 5(1). Accordingly, the dissenting view was that Mohammed's detention between 11 April 2010 and 4 May 2010 for the purposes of *intelligence gathering* was incompatible with Article 5(1).

A. The Legal Basis for Detention

The question whether international humanitarian law (IHL) provides a legal basis for detention in NIACs had been a central and controversial aspect of the *Serdar Mohammed* case at every stage of the proceedings, giving rise to considerable scholarly debate.[9] Both Leggatt J of the High Court and the Court of Appeal rejected the arguments that a right to detain in NIACs can be

[9] For arguments that IHL does provide authorization for detention in NIACs, see TD Gill and D Fleck, *The Handbook of the International Law of Military Operations* (3rd edn, Oxford University Press 2017) 524; J Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87 International Review of the Red Cross 375, 377; S Aughey and A Sari, 'Targeting and Detention in Non-International Armed Conflict: *Serdar Mohammed* and the Limits of Human Rights Convergence' (2015) 91 International Law Studies 60; and D Murray, 'Non-State Armed Groups, Detention Authority in Non-International Armed Conflict, and the Coherence of International Law: Searching for a Way Forward' (2017) 30 LJIL 435, 448. See also the ICRC's 2014 Opinion Paper on 'Internment in Armed Conflict: Basic Rules and Challenges' 7–8; and J Pejic, 'The Protective Scope of Common Article 3: More than Meets the Eye' (2011) 93 International Review of the Red Cross 189, 207. For arguments that IHL *does not* provide a legal basis for detention in NIACs, see G Rona, 'An Appraisal of US Practice Relating to "Enemy Combatants"' (2007) 10 YIHL 232, 241; P Rowe, 'Is There a Right to Detain Civilians by Foreign Armed Forces During a Non-International Armed Conflict?' (2012) 61 ICLQ 697; S Sivakumaran, *The Law of International Armed Conflict* (Oxford University Press 2012) 71; L Hill-Cawthorne and D Akande, 'Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts? EJIL *Talk!* (7 May 2014) and 'Locating the Legal Basis for Detention in Non-International Armed Conflicts: A Rejoinder to Aurel Sari' EJIL *Talk!* (2 June 2014); G Rona, 'Is There a Way Out of the Non-International Detention Dilemma? (2015) 91 International Law Studies 32, 34ff; A Conte, 'The Legality of Detention in Armed Conflict' in A Bellal (ed), *The War Report: Armed Conflict in 2014* (Oxford University Press 2015) 492–8; L Hill-Cawthorne, *Detention in Non-International Armed Conflict* (Oxford University Press 2016) Ch 3.

inferred from common Article 3 and Articles 5 and 6 of Additional Protocol II (the 'implied authorisation' argument)[10] and that customary international law provides a lawful basis for detention in NIACs.[11] In the Supreme Court, only Lord Reed (with whom Lord Kerr agreed) considered the issue in detail. He concluded that (i) while there were 'substantial arguments' for and against the implied authorization argument, those against are 'cumulatively the more persuasive';[12] (ii) customary international law has not yet reached the stage where it confers a right to detain in NIAC, particularly as 'there appears to be a paucity of State practice which is supportive of the contention';[13] *and* (iii) 'international humanitarian law leaves it to states to determine, unusually under domestic law, in what circumstances, and subject to what procedural requirements, persons may be detained in situations of [NIAC]'.[14] He emphasized that his view was of the law as it currently stood, noting that, as customary law is an evolutive body of law, it may reach the stage where IHL authorizes detention in NIACs.[15] Lord Sumption was 'inclined to agree' with Lord Reed but regarded it as 'unnecessary to express a concluded view on the point';[16] the remaining judges appeared to agree with Lord Sumption.[17]

Lord Reed provides a careful analysis of the key arguments in the ongoing debate on detention in NIACs. Although Common Article 3 and Additional Protocol II recognize the *fact* of detention, this is not the same as providing a legal authority to intern individuals.[18] As for customary international law, although there are examples of States detaining individuals in NIACs, there is little evidence of *opinio juris* to suggest that States believe that international law provides an authorization to detain in such circumstances.[19] Lord Sumption thought that the lack of consensus among States 'really

[10] [2014] EWHC 1369 (QB) (Leggatt J), paras 239–253; [2015] EWCA Civ 843 (CA(Civ)), paras 207–212, 214–219 (CA) (although noting that the argument was 'undoubtedly a powerful one': para 214). See also R Goodman, 'The Detention of Civilians in Armed Conflict' (2009) 103 AJIL 48, 55–6.

[11] [2014] EWHC 1369 (QB) (Leggatt J), paras 254–256; [2015] EWCA Civ 843 (CA(Civ)), paras 220–244.

[12] *Serdar Mohammed*, para 274. See the textual arguments (paras 260–261), the contextual arguments (paras 262–263), the arguments against inferential reasoning (paras 264–267) and the arguments based on the absence of adequate protection against arbitrary detention (paras 268–270).

[13] ibid, para 275 ('I have not been persuaded that there exists at present either sufficient *opinio juris* or a sufficiently extensive and uniform practice to establish the suggested rule of customary international law.')

[14] ibid, para 276.

[15] ibid, paras 235, 274–275.

[16] ibid, para 14 (Lord Sumption).

[17] In this respect, Lord Sumption appeared to write for the majority on this issue: Lady Hale explicitly agreed with Lord Sumption (ibid, para 14); Lord Mance states that he is 'closer on this issue to Lord Sumption's than to Lord Reed's' (ibid, para 148); Lord Wilson (ibid, para 113), Lord Hughes (with whom Lord Neuberger agreed; ibid, para 224) and Lord Toulson (ibid, para 231) also appear to have agreed with Lord Sumption. Lord Hodge was not involved in this part of the appeal.

[18] See, eg, L Hill-Cawthorne, *Detention in Non-International Armed Conflict* (Oxford University Press 2016) Ch 3.

[19] ibid and UK Ministry of Defence, *Manual on the Law of Armed Conflict* (Oxford University Press 2004) 403.

reflects differences among states about the appropriate limits of the right to detention, the conditions of its exercise and the extent to which special provision should be made for non-state actors',[20] and that the right to detain in NIACs would eventually be reflected in the *opinio juris* of States, even though some States—notably the UK—do not yet regard detention in a NIAC as being authorized by customary law.[21]

Perhaps the most notable aspect of the majority judgment is not the absence of a conclusion on whether IHL permits detention in NIACs, but the concern that the Supreme Court should not express a final view on an unsettled issue of customary international law. In particular, Lord Mance considered that the role played by domestic courts in developing or establishing a rule of customary international law 'should not be undervalued'.[22] He referred to the work of academics[23] and the ILC's customary international law study,[24] noting that, although the role of the domestic court in the formation of customary law was not the subject of detailed examination before the Court, it 'would merit [examination] in any future case where the point was significant'.[25] He went to say that

> the intermeshing of domestic and international law issues and the law has been increasingly evident in recent years. Just as States answer for domestic courts in international law,[26] so it is possible to regard at least some domestic court decisions as elements of this practice of States, or as ways through which States may express their *opinio juris* regarding the rules of international law. The underlying thinking is that domestic courts have a certain competence and role in identifying, developing and expressing principles of customary international law.[27]

These comments highlight the two-way street of customary law while also hinting at what might seem like an underlying paradox: judges should be aware that their pronouncements might be taken as State practice and/or evidence of *opinio juris*, but this awareness might also make judges reticent to express a view for fear of influencing the development of customary law.[28] In contrast, Lord Sumption emphasized that although decisions of domestic

[20] *Serdar Mohammed*, para 16. [21] ibid. [22] ibid, paras 148–151.

[23] H Lauterpacht, *Decisions of Municipal Courts as a Source of international Law* (1929) 10 BYBIL 65–95; M Kanetake, 'The Interfaces between the National and International Rule of Law: A Framework Paper in the Rule of Law at the National and International Levels' in M Kanetake and A Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart Publishing 2016) 1.

[24] In particular, draft Conclusion 13 and the Second Report dated 22 May 2014.

[25] *Serdar Mohammed*, para 148.

[26] In other words, States may be responsible in international law for the conduct of their courts: see, eg, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, ICJ Rep 2012, at 99, 145 (para 107).

[27] *Serdar Mohammed*, para 148.

[28] See also *Jones v Saudi Arabia* [2016] UKHL 26, para 63, in which Lord Hoffmann explains that '[i]t is not for a national court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states'.

courts may be evidence of State practice or of 'a developing legal consensus', they alone do not establish or develop a rule of customary international law.[29] Perhaps the majority's judicial economy is motivated by a concern that courts should not express a view that might frustrate the government's ability to develop or change its position on detention in NIACs.

B. Security Council Authorization to Detain for Imperative Reasons of Security

The majority held that Security Council resolutions 1890 (2009) (Afghanistan)[30] and 1723 (2006) (Iraq)[31] provided the legal basis for the claimants' detention. Lord Sumption, who wrote the main judgment, reasoned that the authorization to use 'all necessary measures' to fulfil ISAF's mandate in Afghanistan and to contribute to security and stability in Iraq included an implied authorization to detain where necessary for performance of these tasks. As the maintenance of security was integral to carrying out these assignments, he concluded that the resolutions authorized detention for imperative reasons of security.[32] In relation to resolution 1890 (2009) (Afghanistan), the majority were divided on whether the Security Council had authorized ISAF as a separate and distinct entity (Lord Mance)[33] or whether it had authorized each of the troop-contributing States individually (Lords Sumption,[34]

[29] *Serdar Mohammed*, para 14.

[30] Res 1890 (2009) extended the mandate originally conferred by Res 1386 (2001), which authorized 'member states participating in [ISAF] to take all necessary measures to fulfil [ISAF's] mandate' (art 3).

[31] Res 1723 (2006) extended the authority granted in Res 1546 (2004) to 'take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution'. The attached letters included a letter dated 5 June 2004 from the US Secretary of State, which expressed the willingness of the United States to deploy forces to maintain internal security in Iraq. The letter went on to note that activities for the maintenance of security would include 'internment where this is necessary for imperative reasons of security' (*Serdar Mohammed*, para 19).

[32] Lord Sumption, with whom Lady Hale agreed (ibid, paras 27–30) ('if detention is "imperative" for reasons of security, it must be "necessary" for the performance of the mission'); Lord Wilson (para 119, agreeing with Lord Sumption); Lord Mance (paras 152–164, 168); Lord Hughes, with whom Lord Neuberger agreed (para 224, agreeing with the judgments of Lord Mance, Lord Wilson and Lord Sumption); Lord Toulson (para 231, agreeing with the judgments of Lord Mance, Lord Wilson and Lord Sumption); Lord Reed, with whom Lord Kerr agreed (para 233, agreeing in part with the conclusions reached by Lord Sumption). Lord Hodge was not involved in this part of the appeal. As with the Court of Appeal but contrary to Leggatt J in the High Court, Lord Sumption agreed that this authorization to detain was not limited to a short period of time: para 29.

[33] Lord Mance noted that the resolutions were 'replete with reference to ISAF acting and being authorised to act' and that to hold otherwise would have meant that member States were authorized to act independently of ISAF and each other, which would have been 'a recipe for confusion and unlikely to have been intended by the Security Council'. ibid, para 180.

[34] Lord Sumption concluded that 'ISAF is simply the expression used in the Resolutions to describe the multinational force and the central organization charged with coordinating the operations of its national components', but it was 'not authorised, nor did it purport to serve as the delegate of the Security Council for the purpose of determining what measures should prove necessary.' ibid, para 38.

Wilson[35] and Hughes[36]). If the resolutions conferred the authority to detain on ISAF directly, then as Mohammed's detention extended beyond the 96 hours permitted by the ISAF policy, his detention would not have been in accordance with a procedure prescribed by law. In the end, however, the divergence of opinion did not affect the outcome of the appeal as Lord Mance concluded that ISAF had tacitly accepted the UK's position—namely that it was entitled to apply its own policy regarding detention.[37]

As the majority observed, it has 'long been established' that the grounds for detention in Article 5(1) do not include preventative detention where there is no intention to bring criminal charges within a reasonable time.[38] However, in *Hassan v United Kingdom*, the Grand Chamber of the ECtHR held that the power under the Geneva Conventions to detain prisoners of war and civilians who posed a security risk could be accommodated by Article 5(1). The majority in *Serdar Mohammed* applied the reasoning in *Hassan* to detention in NIACs as authorized by the Security Council.[39] Lord Sumption saw 'no reason' to distinguish *Hassan* on the basis of the source of the right to detain, observing that the power to detain under the relevant resolutions was no wider in scope than the equivalent power in the Third and Fourth Geneva Conventions.[40] However, as the resolutions did not provide the same safeguards as the Conventions, he considered that States must specify the conditions on which their armed forces may detain in the course of an armed conflict and they must ensure that detainees can challenge the lawfulness of their detention.[41] Lord Wilson, who agreed with Lord Sumption, also saw 'no reason why, if an authorisation for detention during a NIAC is valid under international law in that it emanates from the Security Council, article 5(1) should hobble the authorisation'.[42] Moreover, his Lordship suggested that, given the role played by the Security Council in maintaining international peace and security, its authorization may have greater significance that even the Geneva Conventions:

> [u]nlike the generalised authorities to detain during every IAC which are to be found in the two Geneva Conventions, the authority to detain in the resolutions was specifically devised by the Security Council to address what it had concluded to be the threat to international peace and security which were constituted by the situations in Iraq and Afghanistan.[43]

[35] Lord Wilson stated that 'ISAF was no more than an umbrella body, which had no independent personality in law, international or otherwise'; moreover, the authority to take all necessary measures 'was qualified: it was not to take all such necessary measures as ISAF might identify'. ibid, para 120.

[36] Although Lord Hughes doubted if it was necessary to express a concluded view on the matter, 'subject only to observing that the authority to troop-contributing member nations is clearly premised on mutual co-operation although not on precise identity of polices, I presently prefer the analysis of Lords Sumption and Wilson'. ibid, para 226.

[37] ibid, para 186; Lord Sumption agreed: para 39.

[38] See *Al-Jedda v United Kingdom*, para 100; *Ireland v the United Kingdom* (18 January 1978) Series A No 25, para 196.

[39] *Serdar Mohammed*, paras 59–63.

[40] ibid, paras 61, 65.

[41] ibid, para 67.

[42] ibid, para 133 (Lord Wilson).

[43] ibid, para 132 (Lord Wilson).

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Mohammed and Al-Waheed's detention was thus held to be compatible with Article 5(1). Although the period during which Mohammed was detained for 'intelligence purposes' did not fall within subparagraphs (a)–(f), provided that his detention was *also* for imperative reasons of security, then it was in accordance with the power granted by the Security Council. The majority also held that the procedural safeguards in Article 5 could be adapted for NIACs 'provided that minimum standards of protection exist to ensure that detention is not imposed arbitrarily'.[44] These included 'an initial review of appropriateness of detention, followed by regular reviews thereafter, by an independent body in accordance with a fair procedure'.[45] However, as Mohammed was not afforded an effective means of challenging the lawfulness of his detention, the majority held that the UK was in breach of Article 5(4).[46]

The majority's decision—like the Strasbourg decision in *Hassan v United Kingdom* before it—resolves the difficulty of applying Article 5(1) ECHR in extraterritorial NIACs. If Article 5(1) could not accommodate detention on a battlefield for imperative reasons of security, then there is little doubt that States would feel compelled to derogate from this obligation.[47] Viewed from this perspective, the majority's decision is a sound compromise: rather than rendering detention in NIACs unlawful for contracting States, it ensures that Article 5 has some role to play in preventing arbitrary detention and in ensuring that basic procedural protections are observed during NIACs. This also means that Article 5(1) is brought in line with other human rights treaties that do not contain an exhaustive list of circumstances in which deprivation of liberty is permitted. Nevertheless, the majority's reasoning is not free from difficulty.

First, the legal authority to detain is based on the rather vague expression 'all necessary measures', which is used primarily to signify authorization of the use of force, rather than to confer rights and powers for the conduct of hostilities.[48] It is not clear that the phrase should be considered sufficiently precise to provide a legal basis for detention, still less one that complies with the principle of legal certainty.[49] In *Medvedyev v France*, French authorities interdicted a Cambodian vessel ('*The Winner*') that had been suspected of drug smuggling. The crew

[44] ibid, para 68(3). [45] ibid. [46] Lord Reed agreed with Lord Sumption on this point.

[47] *Serdar Mohammed*, para 15: 'whether or not it represents a legal right, detention is inherent in virtually all military operations of a sufficient duration and intensity to qualify as armed conflicts, whether or not they are international', per Lord Sumption.

[48] See, on this point, the argument that the Court erroneously conflated *jus in bello* and *jus ad bellum*: A Habteslasie, 'Detention in Times of War: Article 5 of the ECHR, UN Security Council Resolutions and the Supreme Court Decision in *Serdar Mohammed v Ministry of Defence*' (2017) EHRLR 180.

[49] Detention must comply with the principle of legal certainty to be compatible with art 5 ECHR: see, eg, *Baranowski v Poland* (28 March 2000) App No 28358/95, para 52. See also European Court of Human Rights, *Guide on Article 5 of the European Court of Human Rights*, updated 30 April 2018, paras 31–32.

were detained during the subsequent 13-day voyage to a French port and later brought proceedings challenging the legality of that detention under Article 5(1) ECHR. As French domestic law covered only drug-related interdictions authorized by a flag State pursuant to the UN Narcotics Convention 1988 (to which Cambodia was not a party) and as Cambodia was not a party to the UN Law of the Sea Convention 1982, the only possible legal basis for the detention was a Diplomatic Note of the Ministry of Foreign Affairs of Cambodia consenting to the interdiction. However, the Grand Chamber found that the Note did not clearly provide a right to detain the crew, as it only granted a power to 'intercept, inspect and take legal action against' the vessel:

> the fate of the crew was not covered sufficiently clearly by the note and so it is not established that their deprivation of liberty was the subject of an agreement between the two States that could be considered to represent a 'clearly defined law' within the meaning of the Court's case-law.[50]

Even if the Note had dealt with the fate of the crew, it would not have met the 'foreseeability' criterion.[51] Nor had France

> demonstrated the existence of any current had long-standing practice between Cambodia and France in the battle against drug-trafficking at sea in respect of ships flying the Cambodian flag; on the contrary, the use of an *ad hoc* agreement by diplomatic note, *in the absence of any permanent bilateral or multilateral treaty or agreement between the two States*, attests to the exceptional, one-off nature of the cooperation measure adopted in this case.[52]

There are some obvious differences between *Serdar Mohammed* and *Medvedyev*: for one thing, there was clearly a long-standing practice of British troops detaining enemy fighters in Afghanistan and Iraq during the relevant NIACs. At the same time, however, the standard of 'legal certainty' applied in *Medvedyev* suggests that more may be required than an authorization to detain that is implied from the phrase 'all necessary measures'.[53]

Following *Medvedyev*, it is also somewhat surprising that the judges in *Serdar Mohammed* did not consider whether the legal basis for detention could be found in the agreements between the UK and Afghanistan and Iraq respectively.[54] The resolutions concerning Iraq emphasized that the Iraqi

[50] *Medvedyev v France* (29 March 2010) App No 3394/03, para 99. [51] ibid.
[52] ibid, para 100 (emphasis added).
[53] Although in a partially dissenting opinion, Judge Costa *et al.* point out that 'it is scarcely possible to dissociate the crew from the ship itself when a ship is boarded and inspected on the high seas. The actions expressly authorized by Cambodia (interception, inspection, legal action) necessarily concerned the crew members': Joint Partly Dissenting Opinion of Judges Costa, Casadevall, Bîrsan, Garlicki, Hajiyev, Šikuta and Nicolaou, para 7.
[54] A Habteslasie, 'Detention in Times of War' (n 48) 180, 190.

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government had specifically requested the assistance of foreign States.[55] As for Afghanistan, resolution 1386 referred to a letter from the Acting Minister of Foreign Affairs of Afghanistan to the President of the Security Council, in which he reiterated that coordination terms are to be agreed upon in relation to the 'modalities of [the role of forces] on the ground'.[56] The Memorandum of Understanding between the United Kingdom and Afghanistan Concerning the Transfer by the United Kingdom Armed Forces to Afghan Authorities of Persons Detained in Afghanistan specifically governed the issue of detention.[57]

Second, the majority in *Serdar Mohammed* extended the reasoning in *Hassan v United Kingdom* to NIACs without addressing the problematic aspects of that decision. In *Hassan*, the Grand Chamber relied on Articles 31(3)(b) and (c) of the Vienna Convention on the Law of Treaties (VCLT)[58] to interpret the scope of Article 5(1) ECHR. Article 31(3)(b) provides that the interpreter shall consider, together with context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. The relevant practice should be 'concordant, common and consistent',[59] and States should be aware that they are expressing a position on the interpretation of the treaty.[60] In its application of Article 31(3)(b), the Grand Chamber noted that the practice of States was not to derogate from Article 5(1) for the detention of persons in IACs,[61] but it did not establish that this practice was based on an interpretation of Article 5(1) permitting detention in accordance with the Third and Fourth Geneva Conventions. As Lord Reed explains in his dissenting opinion:

> it has to be borne in mind that until the case of *Al-Skeini* it might not have occurred to contracting states participating in military operations overseas that they remained bound by their obligations under the Convention. More importantly, however, a practice of non-derogation is significant only if (1) it has been the practice of contracting states to detain persons during non-international armed conflicts in circumstances not falling within sub-paragraphs (a) to (f) of article 5(1) of the Convention, and (2) if so, that practice has been sufficiently accepted by other contracting states to justify imputing to all of them an intention to modify the obligations undertaken under article 5.[62]

[55] See paras 9–10 of Res 1546 (2004), and preamble and para 1 to Res 1723 (2006).

[56] Letter dated 19 December 2001 from Dr A Abdullah, Acting Minister for Foreign Affairs of the Islamic State of Afghanistan to the President of the Security Council, S/2001/1223.

[57] See (n 4) above.

[58] 1155 UNTS 331 (23 May 1969) entered into force 27 January 1980.

[59] I Buga, *Modification of Treaties by Subsequent Practice* (Oxford University Press 2018) 149.

[60] ibid 62. *Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ Rep 1999, 1094, para 74 ('[t]o establish such practice, at least two criteria would have to be satisfied: first, that the occupation of the Island by the Masubia was linked to a belief on the part of the Caprivi authorities that the boundary laid down by the 1890 Treaty followed the southern channel of the Chobe; and, second, that the Bechuanaland authorities were fully aware of and accepted this as a confirmation of the Treaty boundary'.).

[61] *Hassan v United Kingdom*, para 102.

[62] *Serdar Mohammed*, para 310.

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There was also no consideration of governmental statements that Convention obligations continued to apply in the NIACs in Afghanistan and Iraq.[63] Moreover, although it is generally accepted that subsequent practice in the sense of Article 31(3)(b) can sometimes result in the modification of the treaty, this is not entirely free from difficulty and requires clear practice to that effect.[64] Neither the Grand Chamber nor the majority in *Serdar Mohammed* considered whether it was appropriate for practice to modify a human rights treaty in a way that restricts the scope of a right that benefits third parties. This concern is particularly acute in the context of Article 5 ECHR because it provides an exhaustive list of situations in which States are permitted to deprive liberty.[65]

Article 31(3)(c) VCLT stipulates that, together with the context, any *relevant* rules of international law applicable in the relations between the parties should be taken into account in the interpretation of treaties. However, in the event of a conflict between relevant international rules, this 'symbiotic' approach provides no guidance for why or how one rule should be modified to take account of another: it contains no objectively identifiable normative content to resolve conflicts.[66] Nevertheless, in *Hassan*, the Grand Chamber held that

> [b]y reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict the grounds of permitted deprivation of liberty set out in sub-paras (a) to (f) of [Article 5(1)] should be accommodated as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions.[67]
>
> […]
>
> [Detention should be] in keeping with the fundamental purpose of [Article 5(1)], which is to protect the individual from arbitrariness.[68]

This reasoning may be desirable from a policy perspective, but it is not clear why the presence of (more limited) safeguards in the Geneva Conventions justifies reading down Article 5(1), which clearly contains an exhaustive list of circumstances in which liberty may be deprived. Moreover, even if one accepts that the 'safeguards' provided by IHL are reason enough for Article 5 (1) to be modified, these safeguards are not present in the relevant Security Council resolutions. As Lord Sumption pointed out, they must be provided for by individual States. It should also be recalled that Article 31(3)(c)

[63] ibid, para 311, referring to statements by Germany, the Netherlands and Switzerland.

[64] I Buga, (n 59), Ch 3; J-M Sorel and V Eveno, 'Article 31' in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, vol 1 (Oxford University Press 2011) 825–9.

[65] See Partly Dissenting Opinion of Judge Spano Joined by Judges Nicolaou, Bianku and Kalaydjieva, *Hassan v United Kingdom*, at 59, para 13.

[66] See also L Hill-Cawthorne, 'The Grand Chamber Judgment in *Hassan v UK*' EJIL *Talk!* (16 September 2014).

[67] *Hassan v United Kingdom*, para 104 (emphasis added).

[68] ibid, para 105.

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concerns 'rules of international law'; despite Lord Sumption's conclusion that Security Council resolutions may 'constitute an authority binding in international law to do that which would otherwise be illegal',[69] it is not entirely clear that such resolutions do constitute 'rules' of international law for the purposes of Article 31(3)(c).

C. *Interpreting Security Council Resolutions Compatibly with Article 5(1)*

In contrast to the majority, Lord Reed took Article 5(1) as the starting point for his analysis. Following *Al-Jedda v United Kingdom*, he reasoned that Security Council resolutions are to be interpreted as authorizing detention only in the circumstances enumerated in Article 5(1) unless the resolution expressly provides otherwise.

Lord Reed rejected the majority's reliance on *Hassan v United Kingdom* on the basis that it concerned the powers of detention as authorized by IHL,[70] whereas the present case was concerned with whether and in what circumstances detention had been authorized by the Security Council. In *Al-Jedda v United Kingdom*, the Grand Chamber decided that, in the absence of clear language to the contrary, resolution 1546 (Iraq) intended States to contribute to the maintenance of security in Iraq 'while complying with their obligations under international human rights law'.[71] According to Lord Reed, the Grand Chamber 'required greater precision of international law, when it comes to authorising military detention in situations of armed conflict, than was afforded by [UNSC resolution] 1546', with nothing in *Hassan* casting any doubt on the relevance of this decision to interpreting Security Council resolutions.[72] It followed that the argument based on Article 31(3) VCLT was beside the point. The authorization to detain under resolutions 1546 (Iraq) and 1890 (Afghanistan) were already compatible with Article 5(1)[73] precisely because they did not authorize detention outside the scope of Article 5(1)(a)–(f).[74] As Mohammed's detention between 11 April 2010 and 4 May 2010 was for the purpose of intelligence gathering (which is not one

[69] *Serdar Mohammed*, para 25. See also para 23: '[m]easures taken under Chapter VII of the United Nations Charter are a cornerstone of the international legal order'.

[70] ibid, para 298.

[71] *Al-Jedda v United Kingdom*, para 105. *Al-Jedda* concerned the questions whether there was a conflict of obligations between art 5(1) and the authority to detain inferred from UNSC Res 1546, and if so, whether art 103 of the UN Charter meant that the resolution must prevail to the extent that it conflicted with art 5(1). The Grand Chamber concluded that the authority under Res 1546 to detain in a NIAC in Iraq was not an obligation, and in so doing explained that 'there must be a presumption that the Security Council does not intend to impose any obligation on member states to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council resolution, the court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations … [I]t is to be expected that clear and explicit language would be used were the Security Council to intend states to take particular measures which would conflict with their obligations under international human rights law.' *Al-Jedda v United Kingdom*, para 102.

[72] *Serdar Mohammed*, para 299.

[73] ibid, paras 313–314.

[74] ibid, para 296; and paras 307–316, 324.

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of the permitted grounds of detention), it was incompatible with Article 5(1). Lord Reed agreed with Lord Sumption that the procedural requirements of Article 5(4) had also not been satisfied.

Lord Mance considered that starting with Article 5 ECHR and then reading the resolutions consistently with this provision was 'not sustainable'. This was because (1) the resolution was directed to all member States of the UN but not to State parties to the ECHR specifically; and (2) while it is 'perfectly tenable' to treat a Security Council resolution as intended to comply with general principles of international law, Article 5(1) is not part of 'general international law' (it is unique in providing an exhaustive list of circumstances in which the deprivation of liberty is permitted).[75] For Lord Mance, the starting point is what the law says about detention (whether the Geneva Conventions, customary international law or a UN Security Council resolution); Article 5(1) must then be interpreted 'in harmony' with these rules.[76] Lord Reed 'recognise[d] the force' of Lord Mance's argument but found it to be inconsistent with the way in which the Grand Chamber has approached the interpretation of Security Council resolutions—in particular, *Al-Jedda v United Kingdom.*

Lord Reed's judgment avoids the above-mentioned difficulties that arise from the majority's position. While the majority took as their starting point the authority conferred by the Security Council and sought to accommodate that power within the specific regime set out in Article 5(1), Lord Reed began with Article 5(1) and considered that the correct interpretation of the resolution was one that was compatible with Article 5(1), save where the Council has used clear and express language to the contrary. Lord Reed thus approached the relationship between the ECHR and the Security Council in a similar way to that adopted by some UK judges to the relationship between 'constitutional fundamentals' and the UK Parliament. If Parliament wishes to abrogate fundamental constitutional principles (assuming, for present purposes, that it can),[77] then it must do so in express and unambiguous terms, otherwise UK legislation will be read in a way that is compatible with these rights.[78] Finally, for the purpose of applying domestic law, it is domestic courts that must decide the relationship between different regimes of international law: the divergent approaches in *Serdar Mohammed* show how this can sometimes be a question of domestic law, rather than one of public international law.

[75] ibid, para 161.

[76] ibid, para 162.

[77] See, eg, T Allan, *The Sovereignty of Law* (2013) Ch 4 and 5; J Laws, 'Law and Democracy' (1995) PL 72.

[78] See, eg, *Thoburn v Sunderland City Council* [2003] QB 151, 186–87, para 63 (per Laws LJ); *R v Secretary of State for the Home Dept, ex p Simms* [2000] 2 AC 115, 131 (Lord Hoffmann). See also *Regina (Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, para 83.

III. *BELHAJ*: THE FOREIGN ACT OF STATE DOCTRINE AND THE INFLUENCE OF INTERNATIONAL LAW

In the joined appeals of *Belhaj v Straw* and *Rahmatullah (No 1) v Ministry of Defence*,[79] Abdul Hakim Belhaj, a Libyan national and former political opponent of the Gaddafi regime, and his wife, Fatima Boudchar, alleged that British officials assisted the United States of America in kidnapping, detaining and torturing them in Malaysia and Thailand, before taking them to Libya—on a US-registered jet that refuelled in Diego Garcia—to be detained and tortured by Libyan officials. Boudchar was heavily pregnant at the time. She was released after three months while Belhaj was detained in Libya for nearly six years, during which he was allegedly tortured. Yunus Rahmatullah, the respondent in the second appeal, was a Pakistani national detained by UK forces in Iraq before being transferred to US custody. He was then moved to Afghanistan and detained at Bagram Airbase without charge or trial for ten years, where he is alleged to have been tortured. The respondents brought tort claims against several government officials and departments alleging complicity in these abuses. The Supreme Court held that the claims were not barred by State immunity or the foreign act of State doctrine. Lords Mance, Neuberger (with whom Lord Wilson agreed) and Sumption (with whom Lord Hughes agreed) all gave substantive judgments. In a brief paragraph, Lady Hale and Lord Clarke agreed with the reasoning of Lord Neuberger, thereby establishing his judgment as that of the majority to the extent of any disagreement.[80]

The judges rejected the argument that the claims against the UK government indirectly impleaded the interests of foreign States. The 'legal position' of foreign States would not be affected by the decision of an English court that they were the primary actors in the alleged tortious conduct committed by British officials.[81] Although such a determination could result in reputational damage, this would not constitute a legal interest or amount to indirect impleading. The contrary argument was in effect 'an attempt to transform a personal immunity of states into a broader subject matter immunity'.[82] Lord Mance explained that if the Court had accepted the appellants' argument, then whenever States acted in concert, they would be immune from judicial accountability: before domestic courts because the claims indirectly impleaded other States, and before foreign courts because they could invoke immunity.[83]

Although unanimous as to the result, the judges were divided on both the conceptualization of the foreign act of State doctrine and its application to the facts. In broad terms, Lords Mance, Neuberger and Sumption all drew a

[79] *Belhaj v Straw and Rahmatullah (No 1) v Ministry of Defence* [2017] UKSC 3.
[80] In what is arguably an overstatement, Lady Hale and Lord Clarke also observed that Lords Mance and Neuberger had reached the same conclusions 'for essentially the same reasons': ibid, para 174. [81] ibid, para 31. [82] ibid, para 196. [83] ibid, para 30.

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distinction between (1) rules that normally recognize and treat as valid legislation and executive acts of a foreign State within its jurisdiction; and (2) a common-law doctrine of judicial abstention, pursuant to which an English court will not adjudicate upon certain sovereign acts committed by a foreign State abroad. All three judges rejected a form of the doctrine that would prevent courts from hearing claims that would embarrass the government in its international relations.

A. Legislation and Executive Acts Within a Foreign State's Jurisdiction

Lords Mance and Neuberger distinguished between (1) a rule requiring a foreign State's *legislation* normally to be recognized and treated as valid insofar as it concerned property within the foreign State's jurisdiction (described as a rule of private international law),[84] and (2) a rule that English courts would not normally question a foreign *governmental act* affecting property within the foreign State's jurisdiction (without reaching a concluded view on whether this rule existed).[85] Lord Neuberger considered there to be 'a very powerful argument' that the rule concerning foreign legislation should not be limited to property rights, but both judges agreed that the rule concerning foreign governmental acts does not apply to personal injury.[86] Accordingly, neither rule applied to the claims brought by Belhaj and Rahmatullah, but even if they had, their Lordships considered that their application would have engaged the public policy exception; that is, the act of State doctrine is not applied where it would be contrary to fundamental principles of domestic public policy.[87]

In contrast, Lord Sumption thought the two types of foreign act of State identified by Lords Mance and Neuberger actually comprised a unified doctrine of 'municipal foreign act of state', pursuant to which courts 'will not adjudicate on the lawfulness or validity of a state's sovereign acts under its own law'.[88] The doctrine is limited to the territory of the foreign State, but it applies both to property and to personal injury and other wrongs against the person,[89] which

[84] ibid, paras 35 (Lord Mance: 'a well-established rule of private international law, according to which a foreign state's legislation will be recognized and normally accepted as valid, in so far as it affects property, whether movable or immovable, situated within that state when the legislation takes effect') and 150 (Lord Neuberger).

[85] ibid, paras 11(iv)(a), 35 (Lord Mance: '[i]t may be regarded, like the first type of act of state, as a rule of private international law—though this can hardly be in a literal conflicts of "laws" sense since the effect of the relevant act is determined not by law, but regardless of law… it can, so far as it exists, just as well be understood as a special rule of abstention'), 73, 121, 136–143, 150 (Lord Neuberger: '[t]o the extent that it exists, the second rule also seems to me to be a general principle, and, at least to some extent, it may be close to being a general principle of private international law').

[86] ibid, paras 74, 79–80, 83, 159–162.

[87] ibid, paras 78–84, 169.

[88] ibid, para 228; see generally paras 228–238.

[89] ibid, para 231 ('there is no rational reason why the principle should be limited to executive seizures of property, as opposed to injury to other interests equally protected by the municipal law of the place where they occurred').

meant that Lord Sumption would have applied the doctrine to the acts of the Libyan, Malay and Thai authorities within their own jurisdictions[90] to the extent that the public policy exception did not apply (i.e. where the claims did not allege complicity or participation in torture, unlawful detention and/or rendition).[91] He identified two main considerations underlying the doctrine: comity (which he preferred to call 'awareness that the courts of the United Kingdom are an organ of the United Kingdom')[92] and the constitutional separation of powers, which assigns the conduct of foreign affairs to the executive.[93]

B. Doctrine of Judicial Restraint

Lords Mance and Neuberger considered there to be a 'third type' or 'third rule' of the act of State doctrine where a court cannot address or should refrain from addressing an issue. For example, when asked to determine the legality of interstate transactions, or the acts of a foreign government in the conduct of foreign affairs.[94] In this respect, the doctrine is concerned not only with institutional competence, but also with the proper bounds of the judicial function.[95] Although the doctrine is not mandated by international law, the judges agreed that it is gives effect to the view that some matters are more appropriate for resolution at the international level.[96] Lord Mance, who preferred the term 'judicial abstention' to 'non-justiciability',[97] relied on the decision in *Shergill v Khaira*, in which the Supreme Court distinguished between two, non-exhaustive categories of foreign act of State:

1. issues that go 'beyond the constitutional competence assigned to the courts under our conception of the separation of powers'; and
2. issues of international law in the abstract—that is, issues with no basis in domestic private rights and obligations or 'reviewable matters of public policy'.[98]

While a court should always refrain from adjudicating on matters falling within the first category (even if it would be necessary for determining an issue falling within the court's competence), questions of international law must be addressed where necessary in order to resolve otherwise justiciable

[90] ibid, para 233.
[91] ibid, paras 249–285.
[92] ibid, para 225 ('[l]ike any other organ of the United Kingdom, the courts must respect the sovereignty and autonomy of other states. This marks the adoption by the common law of the same policy which underlies the doctrine of state immunity.').
[93] ibid, para 225.
[94] ibid, paras 101 (Lord Mance), 123 (Lord Neuberger), 237 (Lord Sumption).
[95] ibid, paras 40–42, 62–63, 90–95 (Lord Mance); 123, 129, 133–134 (Lord Neuberger), 175, 225–226, 239, 243, 245 (Lord Sumption).
[96] ibid, paras 98 (Lord Mance), paras 151, 158 (Lord Neuberger) and 200 (Lord Sumption).
[97] ibid, para 91.
[98] ibid, para 43, citing *Shergill v Khaira* [2015] AC 359, paras 41–44. An example of the second category is *R (Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 24.

issues.[99] For Lord Mance, the doctrine has a 'broad international basis' and '[c]onsiderations of separation of powers and of the sovereign nature of foreign sovereign or inter-state activities may both lead to a conclusion that an issue is non-justiciable'.[100] Similarly, for Lord Neuberger, the third rule concerned issues 'which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not to rule on it'.[101] He considered that the rule was justified on the basis that 'domestic courts should not normally determine issues which are only really appropriate for diplomatic or similar channels'.[102]

The judges agreed that the doctrine was not limited to acts performed within a foreign State's territory and that it was subject to a public policy exception, although they disagreed on the role and scope of the doctrine. For Lord Mance, the need to consider the appropriateness of hearing a case meant that public policy considerations—notably 'fundamental rights' in English law—will always play a role in determining the scope of the doctrine, rather than providing an exception.[103] Accordingly, he found that while 'detention overseas as a matter of considered policy' might fall within the doctrine, arbitrary detention and mistreatment 'goes far beyond any conduct previously recognised as requiring judicial abstention'.[104] For Lord Neuberger, the doctrine would 'normally involve some sort of comparatively formal, relatively high-level arrangement'.[105] For this reason, the doctrine did not apply to the facts of Belhaj,[106] but there was an argument that it could apply to Rahmatullah's claims, as his transfer to US custody was governed by a memorandum of understanding between the UK and US. However, Lord Neuberger concluded that (i) the doctrine did not apply because—as Lord Mance pointed out—'the existence and terms of the [Memorandum of Understanding] do not bear on the allegations which are of complicity in unlawful detention and ill-treatment'; and (ii) even if this is wrong, the public policy exception applies: being held without charge or trial for ten years, together with the existence of 'significant mistreatment', is sufficient to

[99] ibid. In an article published in this journal, Lord Mance noted that '[s]peaking generally, it is unusual for civil claims or defences to involve such a foothold. In contrast, public law claims for judicial review have proved increasingly to do so': Lord Mance, 'Justiciability' (2018) 67 *ICLQ* 739, 743.

[100] *Belhaj* para 91, noting also at para 89 that '[t]he Court of Appeal explained the principle [of non-justiciability or abstention] as founded on the sovereign equality of states and comity'.

[101] ibid, para 123.

[102] ibid, para 123, also referring to *Shergill v Khaira* [2015] AC 369, paras 40, 42.

[103] Although Lords Mance and Sumption considered that the difference between them on this issue was not critical: ibid, paras 89, 249.

[104] ibid, para 97.

[105] ibid, para 147.

[106] ibid, para 167 ('[t]here is no suggestion that there was some sort of formal or high-level agreement or treaty between any of the states involved which governed the cooperation between the executives of the various countries concerned … the mere fact that officials of more than one country cooperate to carry out an operation does not mean that the third rule can be invoked if that operation is said to give rise to a claim in domestic law').

engage the public policy exception, 'bearing in mind the severity and flagrancy of the alleged interference with his rights, and the length of time for which it allegedly lasted'.[107]

What Lords Mance and Neuberger referred to as a 'third type' or 'rule' of act of State, Lord Sumption called the 'international law act of state' doctrine—that is, 'English courts will not adjudicate on the lawfulness of the extraterritorial acts of foreign states in their dealings with other states or the subjects of other states'.[108] This is because

> once such acts are classified as acts of state, an English court regards them as being done on the plane of international law, and their lawfulness can be judged only by that law. It is not for an English domestic court to apply international law to the relations between states, since it cannot give rise to private rights or obligations. Nor may it subject the sovereign acts of a foreign state to its own rules of municipal law or (by the same token) to the municipal law of a third country.[109]
> […]
> In my opinion, subject to the important public policy exception … it is not open to an English court to apply the ordinary law of tort, whether English or foreign, to acts of this kind committed by foreign sovereign states.[110]

Lord Sumption accepted that the doctrine applied only where the invalidity or unlawfulness of the sovereign act is 'part of the subject matter of the action in the sense that the issue cannot be resolved without determining it'.[111] As the claims in Belhaj and Rahmatullah depended upon demonstrating that foreign States had acted unlawfully, this meant that the doctrine applied.[112] However, Lord Sumption would have allowed the claims alleging torture and aggravated arbitrary detention (rendition and enforced disappearance) to proceed on public policy grounds. These claims 'exhibit[ed] the same combination of violation of peremptory norms of international law and inconsistency with principles of the administration of justice in England which have been regarded as fundamental since the 17th century'.[113] In contrast, inhumane treatment and other forms of personal injury did not fall within the public policy exception.[114]

[107] ibid, paras 168-172. [108] ibid, para 234. [109] ibid, para 234. [110] ibid, para 237.
[111] ibid, para 240, referring to *WS Kirkpatrick & Co Inc v Environmental Tectonics Corpn International* (1990) 493 US 400.
[112] ibid, paras 238 ('[i]n *Rahmatullah*, they were exercises of governmental authority by the armed forces and officials of the United States, acting as an occupying power in Iraq and a mandatory power in Afghanistan. In *Belhaj*, the claimants' rendition from Thailand to Libya and their mistreatment in the process was also an exercise by the United States of governmental authority… Whatever one may think of the lawfulness or morality of these acts, they were acts of state performed outside the territorial jurisdiction of the United States, which cannot be treated by an English court as mere private law torts, any more than drone strikes by US armed forces can') and 242 ('the question whether the acts alleged against the relevant foreign states were unlawful is not incidental. It is essential to the pleaded causes of action against the defendants').
[113] ibid, para 278. [114] ibid, para 280.

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C. Executive Embarrassment and National Interests

The Supreme Court rejected a form of the foreign act of State doctrine that would prevent courts from hearing claims where the determination of an issue might embarrass the government in its international relations.[115] As Lord Neuberger explained, taking embarrassment into consideration 'would involve the executive dictating to the judiciary, which would be quite unacceptable at least in the absence of clear legislative sanction'.[116] In other words, without a legislative basis, 'giving the Government so blanket a power over court proceedings'[117] would be a problematic breach of the constitutional separation of powers between the judiciary and executive. However, Lords Mance and Neuberger indicated that they might take into consideration a formal government statement that the adjudication of a claim would result in real and serious harm to UK foreign policy or security interests.[118]

D. Comparative Jurisprudence and the Role of International Norms

The three judgments reveal a difference of opinion on the relevance and role of comparative jurisprudence and international norms. The opinions of Lords Mance and Sumption are replete with references to French, Dutch, German and US cases. In contrast, Lord Neuberger urged 'great caution before relying on, let alone adopting, the reasoning of foreign courts,'[119] finding US decisions 'to be of very limited assistance'.[120] Lord Mance noted that US law was 'not necessarily transposable to English law', but thought that the court would 'be unwise not to take the benefit of it'.[121] The *Belhaj* decision provides a compelling illustration of transnational judicial dialogue, not only because Lords Mance and Sumption relied on comparative jurisprudence but because other domestic courts—notably the Court of Appeal for British Columbia,[122] the Court of Appeal of New Zealand[123] and the High Court of

[115] ibid, paras 41, 132, 148–149, 241 (the doctrine has 'never been directed to the avoidance of embarrassment, either to foreign States or to the United Kingdom government in its dealing with them'). In his well-known speech in *Buttes Gas*, Lord Wilberforce left aside 'all possibility of embarrassment in our foreign relations'; however, he also stated that the Government had not drawn to the attention of the House any indication of embarrassment: [1982] AC 888, 938. See also *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2012] EWCA Civ 855; [2014] QB 458, 485 para 65; and *R (Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872. See also FA Mann, *Foreign Affairs in English Courts* (OUP 1986) 182.

[116] ibid, para 149.

[117] ibid, para 41.

[118] ibid, paras 105 ('I would not exclude the relevance to justiciability of a clear government indication as to the real and likely damage to United Kingdom foreign policy or security interests') and 149 (although the court could not 'be bound to refuse to determine an issue… there is a more powerful argument for saying that such a statement should be a factor which the court should be entitled to take into account when deciding whether to refuse to determine an issue').

[119] ibid, para 133.

[120] ibid, para 134.

[121] ibid, para 57.

[122] *Araya v Nevsun Resources Ltd*, 2017 BCCA 401.

[123] *Young v Attorney-General* [2018] NZCA 307 (13 August 2018).

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South Africa[124]—have already engaged with the Supreme Court's decision. This inter-judicial dialogue may play an important role in ensuring that the foreign act of State doctrine does not frustrate efforts to secure the accountability of governments for egregious conduct.[125]

All three judges agreed that the foreign act of State doctrine was derived from domestic law and underpinned by comity and the constitutional separation of powers.[126] As Lord Sumption explained, '[t]he foreign act of state doctrine is at best permitted by international law. It is not based upon it'.[127] They also agreed that the 'third type' or 'international law act of state' doctrine reflected the view that some matters are more suitable for resolution at the international level.[128] Lord Mance appeared to go further when he suggested that 'the doctrine of abstention rests on underlying principles relating to the role of a domestic judge and *the existence of alternative means of redress at an international level*'.[129] In other words, it is not just that some matters are more suited to resolution at the international level, it is also the availability of alternative means of redress—although this does seem to conflate the right to a remedy with the view that domestic courts should not resolve matters that are more appropriate for resolution at the interstate level.

Finally, to varying degrees the judges accepted that international law could influence the development and content of English law and public policy. As with inter-judicial cooperation, international law provides a common language for courts; it not only influences the intrastate relations between courts and the executive, but it may also assist courts in resisting political pressure in controversial cases.[130] At one end of the spectrum, Lord Sumption emphasized the role and importance of *jus cogens* norms in informing domestic public policy:

> English law has always held to the dualist theory of international law. In principle, judges applying the common law are not at liberty to create, abrogate or modify municipal law rights or obligations in accordance with unincorporated norms derived from international law, whether customary or treaty based. But … international law may none the less affect the interpretation of ambiguous

[124] *The Saharawi Arab Democratic Republic et al. v The Owner and Charterers of the MV 'NM Cherry Blossom' et al.*, Case No 1487/17 (15 June 2017).

[125] See E Benvenisti and GW Downs, *Between Fragmentation and Democracy: The Role of National and International Courts* (Cambridge University Press 2017) Ch 5.

[126] *Belhaj*, paras 7, 98 (Lord Mance), 118, 146, 151, 158 (Lord Neuberger), 200, 261 (Lord Sumption).

[127] ibid, para 200.

[128] ibid, para 91 (Lord Mance: '[c]onsiderations of powers and of the sovereign nature of foreign sovereign or inter-state activities may both lead to a conclusion that an issue is non-justiciable in a domestic court'), para 123 (Lord Neuberger: 'domestic courts should not normally determine issues which are only really appropriate for diplomatic or similar channels'), and paras 23, 237 and 239 (Lord Sumption: 'an English court regards … as being done on the plane of international law, and their lawfulness can be judged only by that law. It is not for an English domestic court to apply international law to the relations between states, since it cannot give rise to private rights or obligations.').

[129] ibid, para 107(v) (emphasis added).

[130] Benvenisti and Downs (n 125) 143.

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> statutory provisions, guide the exercise of judicial or executive discretions and influence the development of the common law. Although the courts are not bound, even in these contexts, to take account of international law, they are entitled to do so if it is appropriate and relevant … . In those areas which depend on public policy, the content of that policy may be and in practice often is influenced by international law.[131]

This did not mean that 'every rule of international law must be adopted as a principle of English public policy, even if it is acknowledged as a peremptory norm (*jus cogens*) at an international level'.[132] As a guide, he adopted the observations of Justice LeBel in *Kazemi Estate v Islamic Republic of Iran* (Supreme Court of Canada);[133] namely that (1) *jus cogens* can generally be equated with 'principles of fundamental justice';[134] and (2) the 'role of international law in this field … is to influence the process by which judges identify a domestic principle as representing a sufficiently fundamental legal policy'.[135] After considering the prohibition of torture, Lord Sumption concluded that

> 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. Respect for the autonomy of foreign sovereign states, which is the chief rationale of the foreign act of state doctrine, cannot extend to their involvement in torture, because each of them is bound *erga omnes* and along with the United Kingdom to renounce it as an instrument of national or international policy and to participate in its suppression.[136]

In other words, in outlawing an activity *erga omnes* and requiring States to participate in its suppression, international law has not only limited the policy choices of the UK executive but also the extent to which foreign States are entitled to benefit from the foreign act of State doctrine. This is because the 'chief rationale' of the doctrine is respect for the autonomy of foreign States and these States are already bound with the UK *not* to engage in torture. In this way, internal and interstate considerations are tightly interwoven. Lord

[131] ibid, para 252, citing *R v Lyons* [2003] 1 AC 976, para 13 (Lord Bingham); *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, paras 53–59 (Lord Brown); and *R (Wang Yam) v Central Criminal Court* [2015] UKSC 76, paras 35–36 (Lord Mance).

[132] *Belhaj*, para 257. See also *Kazemi Estate v Islamic Republic of Iran* 2014 SCC 62; [2014] 3 SCR 176, para 150 ('[t]he mere existence of an international obligation is not sufficient to establish a principle of fundamental justice. Were we to equate all the protections or commitments in international human rights documents with principles of fundamental justice, we might in effect be destroying Canada's dualist system of reception of international law and casting aside the principles of parliamentary sovereignty and democracy').

[133] [2014] SCC 62; [2014] 3 SCR 176, paras 150–151 (Le Bel J).

[134] ibid, citing *Kazemi Estate v Islamic Republic of Iran* [2014] 3 SCR 176, para 151.

[135] ibid, para 257.

[136] ibid, para 262. To the extent that the court must investigate the conduct of States (i.e. assess its lawfulness by reference to international rules) before deciding whether the foreign act of State doctrine applies, Lord Sumption might be said to be putting the cart before the horse.

Sumption's reasoning also presents a striking contrast to that of domestic,[137] regional,[138] and international[139] courts on the question whether there exists an exception to State immunity from civil jurisdiction for allegations of torture. The fact that States are bound *erga omnes* to renounce torture and participate in its suppression has not been enough to displace a positive rule of international law granting immunity, except where an English court is exercising *criminal* jurisdiction and the foreign State is also a party to the Convention Against Torture.[140]

Lords Mance and Neuberger were less emphatic about the role of international law in the development of English public policy. Although Lord Mance accepted that *jus cogens* norms may be 'a stimulus to considering whether judicial abstention is really called for in a particular situation', he preferred to look at 'rights recognised as fundamental by English statute and common law, rather than to tie them *too closely* to the concept of *jus cogens*'.[141] In his view, the concept of *jus cogens* is 'notoriously difficult to define, and capable of giving rise to considerable argument'.[142] Moreover, given that not all violations of peremptory norms are an exception to the foreign act of State doctrine, 'it is not clear how one determines when or why *ius cogens* is an appropriate basis for any exception in any particular case'.[143] Lord Sumption's reliance on *jus cogens*

> would suggest that a domestic court would be able to adjudicate upon an allegation that its national governmental connived in a serious violation of the claimant's rights by a foreign government, but would be required to abstain from adjudicating upon a less serious violation, such as 'mere' unlawful detention or cruel or inhuman treatment not amounting to torture.[144]

[137] *Jones v Ministry of the Interior of the Kingdom of Saudi Arabi* [2007] 1 AC 270, paras 24, 45; *Kazemi Estate v Islamic Republic of Iran* [2014] SCC 62; [2014] 3 SCR 176, paras 102–105, 141–167. It also stands in contrast to the view of the UK Supreme Court in other areas of law with constitutional significance. See, eg, *Regina (UNISON) v Lord Chancellor (Equality and Human Rights Commission and another intervening) (Nos 1 and 2)* [2017] UKSC 51, para 68 ('At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.').

[138] *Jones v United Kingdom* (2014) 59 EHRR 1, para 198.

[139] *Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening)* [2012] ICJ Reports 99, para 95.

[140] *Regina v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, paras 204–6.

[141] *Belhaj*, para 107 (emphasis added).

[142] ibid.

[143] ibid.

[144] ibid.

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Lord Neuberger considered that while the foreign act of State doctrine 'is purely based on common law, and therefore has no international law basis… its application (unsurprisingly) can be heavily influenced by international law'.[145] The violation of a *jus cogens* norm 'will always be a relevant public policy consideration' and 'any treatment which amounts to a breach of *jus cogens* or peremptory norms would almost always fall within the public policy exception', but the doctrine is nevertheless 'domestic in nature'.[146] In agreement with Lords Mance and Sumption, he considered it unnecessary for a claimant to cross this international law hurdle.[147]

* * *

Following the Supreme Court's decision, the tort claims in *Belhaj* could proceed to trial. In July 2017, the Queen's Bench Division of the High Court (Popplewell J) ruled that the criteria for a closed material procedure had been satisfied, which meant that the government could apply for sensitive material to be received by the court in private, with the other parties being represented by special advocates to which disclosure of the material would have been made. However, before a trial could take place, the Attorney General announced in Parliament that the parties had reached a settlement and that the claims had been withdrawn.[148] Although the UK government did not admit liability, it did agree to pay Mrs Boudchar £500,000 in compensation (Mr Belhaj did not seek and was not given any compensation). The Prime Minster apologized on behalf of the UK government and acknowledged that

> [t]he UK Government's actions contributed to your detention, rendition and suffering. The UK Government shared information about you with its international partners. We should have done more to reduce the risk that you would be mistreated. We accept this was a failing on our part.[149]

IV. *RAHMATULLAH*: CONCEPTUALIZING THE CROWN ACT OF STATE DOCTRINE

In *Rahmatullah*, the UK Government sought to rely on the Crown act of State doctrine as a defence against tort claims brought by Rahmatullah and Serdar Mohammed. Lady Hale (with whom Lords Wilson and Hughes agreed) gave the lead judgment, although Lord Mance (with whom Lord Hughes agreed) and Lord Sumption also gave detailed judgments. Lord Neuberger (with whom Lord Hughes also agreed) agreed with aspects of all three judgments for 'the reasons that they give'. Lord Clarke agreed that the 'disposition of this appeal should be as proposed by the other members of the court for the reasons that they give'.[150] Although he acknowledged that there were

[145] *Belhaj*, para 151. [146] ibid, para 168. [147] ibid.
[148] The Attorney General (Jeremy Wright), 'Belhaj and Boudchar: Litigation Update', *Hansard* (10 May 2018) vol 640, col 926. [149] ibid, col 927. [150] *Rahmatullah*, para 109.

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differences in the judgments, he did not consider them to be critical for resolving the appeal.[151]

Lady Hale explained that the Crown act of State doctrine included a rule preventing courts from hearing torts claims arising from 'inherently governmental [acts], committed in the conduct of the foreign relations of the Crown'.[152] Although based on 'very shaky foundations',[153] the source of this rule could be traced back to *Buron v Denman* (1848), which is treated as having established a defence for tort claims where the court would otherwise have had jurisdiction.[154] The rule is also justified by 'the context of military operations abroad' (the court was not asked to consider whether the rule existed outside that context).[155] Lords Sumption and Mance broadly agreed,[156] although they thought the rule was justified primarily by the separation of powers doctrine and attendant principle of consistency:

> [t]he law vests in the Crown the power to conduct the United Kingdom's international relations, including the deployment of armed force in support of its objectives. … In the nature of things, the use of armed force abroad involves acts which would normally be civil wrongs not only under English law but under any system of municipal law. People will be detained or killed. Their property will be damaged or destroyed. It would be incoherent and irrational for the courts to acknowledge the power of the Crown to conduct the United Kingdom's foreign relations and deploy armed forces, and at the same time to treat as civil wrongs acts inherent in its exercise of that power.[157]

Lady Hale considered the rule to have a limited scope: 'it cannot apply to all torts committed against foreigners abroad just because they have been authorised or ratified by the British Government'.[158] Specifically, it does not apply to acts of torture or to the maltreatment of prisoners and would not generally apply to the expropriation of property.[159] This meant that

> [w]e are left with a very narrow class of acts: in their nature sovereign acts—the sorts of thing that governments properly do; committed abroad; in the conduct of the foreign policy of the state; so closely connected to that policy to be necessary in pursuing it; and at least extending to the conduct of military operations which

[151] ibid.

[152] ibid, paras 22, 31, 36 (for the quotation). Lady Hale did not doubt that there was also a rule preventing UK courts from reviewing certain decisions of high policy taken by the executive on the conduct of foreign relations: para 22.

[153] ibid.

[154] ibid, para 26. The source of the rule being a direction to the jury by Parke B in *Buron v Denman* (1848) 2 Exch 167, 154 ER 450.

[155] *Rahmatullah*, para 31. At para 32 Lady Hale concludes that 'if act of state is a defence to the use of lethal force in the conduct of military operations abroad, it must also be a defence to the capture and detention of persons on imperative grounds of security in the conduct of such operations. It makes no sense to permit killing but not capture and detention, the military then being left with the invidious choice between killing the enemy or letting him go.'

[156] ibid, para 32 (Lady Hale); para 51 (Lord Mance), para 88 (Lord Sumption).

[157] ibid, para 88 (Lord Sumption); Lord Mance expressly agreed with Lord Sumption (para 51), as did Lord Neuberger (para 104).

[158] ibid, para 36.

[159] ibid, para 36.

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> are themselves lawful in international law (which is not the same thing as saying that the acts themselves are necessarily authorised in international law). For the purpose of these cases, we do not need to go further and inquire whether there are other circumstances, not limited to the conduct of military operations which are themselves lawful in international law, in which the defence might arise.[160]

Lord Sumption agreed with Lady Hale on the essential elements of the doctrine, which were that (i) the act should be an exercise of sovereign power that is inherently governmental in nature; (ii) done outside the United Kingdom; (iii) with the prior authority or subsequent ratification of the Crown; and (iv) in the conduct of the Crown's relations with other States or their subjects.[161] Although there is arguably a subtle difference between their views in that Lord Sumption does not require the act be 'so closely connected with [the State's foreign policy] to be necessary in pursuing it'. For his part, Lord Mance agreed with Lord Sumption's summary.[162] All three judges considered the doctrine to apply 'as much to acts in the execution of policy-makers' decisions as it is to the decisions themselves'.[163] They also agreed that the Crown Proceedings Act 1947 did not displace the doctrine, and that it did not fall foul of the right of access to a court as guaranteed by Article 6 ECHR.[164] The doctrine thus applied both to the claimants' detention during armed conflict and their transfer to the custody of US and Afghan officials.[165]

Although unanimous in the result, the judges disagreed on whether the Crown act of State doctrine should be characterized as a principle of judicial abstention (Lord Mance) [166] or as a substantive defence (Lord Sumption, and it appears, Lady Hale).[167] For Lord Mance, 'Crown decisions and/or activities of a certain nature in the conduct of foreign affairs are not open to question (or are 'not cognisable') in domestic civil proceedings'.[168] This, he explained, is underpinned by same principle that underlies the third type of foreign act of State discussed by Lord Mance in *Belhaj*, although it does not apply 'with the same force or by reference to the same considerations':

> Crown act of state is reserved for situations of sovereign authority exercised overseas as a matter of state policy. In these circumstances a straight-forward

[160] ibid, para 37. The judges noted that the doctrine potentially excluded persons owing allegiance to the Crown. According to Lady Hale 'it does not apply to all torts committed against foreigners abroad just because they have been authorised or ratified by the British Government' and it does not apply to acts of torture or to the maltreatment of prisoners: ibid, para 36.

[161] ibid, para 81 (Lord Sumption).

[162] ibid, para 72.

[163] ibid, para 33 (Lady Hale), para 73 (Lord Mance); para 90 (Lord Sumption).

[164] ibid, paras 41, 46 (Lady Hale, with whom Lord Wilson and Lord Hughes agreed), 76 (Lord Mance), 80, 97 (Lord Sumption, with whom Lord Hughes agreed), 106 (Lord Neuberger, with whom Lord Hughes agreed).

[165] ibid, paras 37 (Lady Hale: '[f]or the purposes of these cases, we do not need to go further and inquire whether there are other circumstances, not limited to the conduct of military operations which are themselves lawful in international law, in which the defence might arise') and 46; paras 75–77 (Lord Mance); para 95 (Lord Sumption).

[166] ibid, para 50.

[167] ibid, paras 80–81.

[168] ibid, para 54.

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> principle of consistency directly underpins Crown act of state … In contrast, if and when the third type of foreign act of state applies, its underpinning is a more general conception of the role of a domestic court, and, more particularly, the incongruity of a domestic court adjudicating upon the conduct of a foreign sovereign state, even though the foreign state is neither directly or indirectly impleaded or affected in its rights. However, concern for the international relations of the domestic with the foreign state, and in that sense a concern that the domestic courts' stance should not be out of line with that of its own state's, may probably in some cases play some part.[169]

It is therefore 'easier to establish that a domestic court should abstain from adjudicating on the basis of Crown act of State than on the basis of the third type of foreign act of State. The relationship is closer and the threshold of sensitivity lower in the case of the former than the latter.'[170] Lord Mance also considered that

> [i]n the case of certain foreign activities of the British state, there is in my view an additional parallel aspect at the international level to their non-justiciability in domestic courts. That is that representations and redress in respect of activities involving foreign states and their citizens may be more appropriately pursued at a traditional state-to-state level, rather than by domestic litigation brought by individuals.[171]

In contrast, Lord Sumption considered that, unlike the 'international law foreign act of state' doctrine, the Crown act of State doctrine went 'to the existence or scope of legal rights'[172] and thus constituted a defence.[173] In other words, the 'liabilities of the Crown in municipal law do not extend to sovereign acts done in the course of military operations outside the United Kingdom'.[174] For Lady Hale, there were 'conceptual advantages in confining the doctrine to a non-justiciability rule' but she also described it as 'clearly a rule of substantive law' in that 'it defines the circumstances in which there may be liability for a particular type of activity'.[175]

The Supreme Court initially left open the question whether the conduct and/or policy authorizing the act in question must be lawful under international law for the doctrine to apply. Lady Hale considered that the doctrine extended '*at least* to the conduct of military operations which are lawful in international law', leaving open whether it applied when the conduct of military operations were unlawful in international law.[176] The Court invited further submissions on the precise form of the declaration to be given, with Lord Mance asking for assistance on 'the effect and appropriateness' of requiring military operations to be lawful in international law.[177] On 12 April 2017, the Supreme Court made the following declaration:

[169] ibid, para 51. [170] ibid, para 52. [171] ibid, para 57. [172] ibid, para 80.
[173] ibid, para 81. [174] ibid, para 88; see also para 80. [175] ibid, para 45.
[176] ibid, para 37 (emphasis added). [177] ibid, para 77.

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> [i]n proceedings in tort governed by foreign law, HM Government may rely on the doctrine of Crown act of state to preclude the court passing judgment on the claim if the circumstances are such as stated in [the judgment of Lady Hale at] paras 36 and 37. For the avoidance of doubt, the conduct and/or policy in question do not have to be lawful in international law.[178]

In the subsequent case of *Alseran v Ministry of Defence*, Leggatt J of the High Court examined the judgments in *Rahmatullah* and the declaration of the Supreme Court, concluding that the Crown act of State doctrine 'does not depend on establishing either the allegedly wrongful act or the wider military operation of which the act formed part or the policy decision to engage in that operation was lawful in international law'.[179] However, he considered the situation to be different in English law: 'in principle an act can only be a Crown act of state if it has been authorised (or ratified) by a government policy or decision which is a lawful exercise of the Crown's powers as a matter of English domestic law'.[180]

In *Rahmatullah*, the government accepted that the Crown act of State doctrine cannot apply to acts of torture or to the maltreatment of detainees.[181] As the doctrine is one of UK law, Lady Hale preferred 'to regard this as an acknowledgment that such acts are not inherently governmental, rather than creating exceptions to a general rule'.[182] However, this characterization could be seen as problematic: the governmental nature of an act does not depend on its legality under international or domestic law. On the contrary, unlawful conduct committed by States that amounts to an international crime or a breach of a *jus cogens* norm often arises out of quintessentially governmental activity, such as the use of armed force abroad or within a State. Moreover, torture is 'by definition a governmental act'[183] under both the Convention Against Torture and Section 134 of the UK Criminal Justice Act 1988.[184] Lord Sumption expressed reservations about Lady Hale's opinion and thought that

[178] Order of 12 April 2017.

[179] *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB), para 56. Leggatt J considered that (1) the word 'conduct' in the declaration encompassed 'not just the particular act complained of by the claimant, such as the act of detaining him, but the conduct of the military operations in the course of which that act occurred'; and (2) the phrase 'policy in question encompassed 'any policy pursuant to which the act was done—whether it be a detention policy applicable at a particular location, or more widely, or a policy decided at the highest level such as the policy decision to invade Iraq'. See also paras 57–61.

[180] ibid, para 75. According to Leggatt J, the principle of consistency does not preclude courts from determining that 'a government policy of a kind which is judicially reviewable is unlawful and *ultra vires* and from treating as civil wrongs acts done pursuant to such a policy which are outside the scope of the government's powers': para 71.

[181] *Rahmatullah*, para 36.

[182] ibid, noting that the Government 'can achieve its foreign policy aims by other means'. Lady Hale also explained that the doctrine also would not apply to expropriation as compensation could always be paid, although 'there could be circumstances in which the expropriation, or more probably the destruction, of property, for example in the course of battle, was indeed a governmental act'.

[183] ibid, para 96 (Lord Sumption).

[184] See also *Jones v Saudi Arabia* [2007] 1 AC 270, 302, paras 81–85.

> [g]iven the strength of the English public policy on the subject,[185] a decision by the United Kingdom government to authorise or ratify torture or maltreatment would not as a matter of domestic English law be a lawful exercise of the royal prerogative. It could not therefore be an act of state. Nor would there be any inconsistency with the proper functions of the executive in treating it as giving rise to civil liability.[186]

Lord Sumption's conclusion is consistent with the view that a policy of the UK government which is unlawful and *ultra vires* under English law cannot be a Crown act of State.[187] In *Alseran*, Leggatt J was not convinced that there was any material difference between the positions taken by Lady Hale and Lord Sumption. He considered that for Lady Hale the concept of acts that are not 'inherently governmental' is 'not descriptive, but normative, referring to the sorts of things that governments properly do' and in the case of the UK government, 'what it may properly do from the standpoint of an English court is established by the laws of this country'.[188]

V. CONCLUSION: THE SUPREME COURT IN THE DOMESTIC AND INTERNATIONAL LEGAL ORDERS

The three cases concerned broadly similar conduct—detention, rendition and complicity in torture—and yet resulted in decidedly different outcomes. In *Serdar Mohammed*, the UK was held not to be in breach of Article 5(1) ECHR: British forces had the power to detain Al-Waheed, and to detain Mohammed in excess of the 96 hours, where necessary for imperative reasons of security; and Article 5(1) accommodated this power as a permissible ground of detention.[189] However, as Mohammed was not provided with effective means for challenging the lawfulness of his detention, the UK was in breach of Article 5(4). The disagreement between the majority and minority in *Serdar Mohammed* turned on the judges' interpretation of Strasbourg jurisprudence. For the majority, it was a question of reconciling ostensibly conflicting international norms, which they achieved by modifying human rights law to accommodate the power to detain in NIACs. For the minority, the government's domestic-law obligations under the HRA and the UK's international obligations under the ECHR took precedence: the power to detain could only be accommodated by human rights law where the Security Council had expressly and clearly intended this result. In *Belhaj*,

[185] See, eg, *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71.
[186] *Rahmatullah*, para 96.
[187] *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB), paras 72, 75.
[188] ibid, para 73 (emphasis in original).
[189] Mohammed's detention after the 96-hour period did not fall within art 5(1)(f), and his detention between 11 April and 4 May 2010 (the second period) did not fall within art 5(1)(c). The question whether his detention during 5 May to 25 July (the third period) was compatible with art 5(3) was remitted for trial.

neither State immunity nor the foreign act of State doctrine could prevent courts from hearing tort claims in which the UK government was alleged to have been complicit in human rights abuses by other States. In contrast, in *Rahmatullah*, the government was entitled to rely on the Crown act of State doctrine as a defence against similar tort claims—unlike *Belhaj*, they arose from the UK's conduct during an armed conflict abroad. From the perspective of access-to-justice and executive accountability, this variation in outcome paints a striking picture.

In all three cases, the judges grappled with the role of the court in both the UK constitutional order and the international legal order. The decisions and judicial disagreement could also sometimes be explained by whether the judges viewed the court in domestic constitutional terms or as an organ of the UK for the purposes of international law. This is clear from the different approaches taken by the majority and minority in *Serdar Mohammed*. The majority refrained from deciding whether IHL provided a legal basis for detention in NIACs. For Lord Mance, this was partly because of a concern that the court's pronouncements may influence the development of an unsettled area of the law. However, it was also not necessary for the majority to decide this question because they started with the view that the UN Security Council had authorized detention beyond the scope of Article 5(1) and then considered whether Article 5(1) could be reconciled with this power to detain. Lord Mance was clear that Article 5(1) should not be the starting point: even if there was a presumption that Security Council resolutions are to be interpreted compatibly with general international human rights law, Article 5 (1) is specific and not part of general law. In contrast, Lord Reed did take Article 5(1) as his starting point and concluded that the relevant Security Council resolutions should be read as authorizing detention within the scope of that right. In his view, whether Article 5(1) is part of general human rights law is beside the point: it is binding on the UK, given effect in UK law through the Human Rights Act 1998 and it is the responsibility of the court to resolve questions of UK law. His conclusion that the resolutions did not authorize detention in circumstances outside of Article 5(1) meant that it was necessary to consider whether IHL authorizes detention in NIACs. This question of international law had to be addressed in order to determine whether the UK was in breach of Article 5(1).

In *Belhaj*, Lords Mance, Neuberger and Sumption all considered that the 'third type' of act of State—or what Lord Sumption called 'international act of state doctrine'—was justified by the fact that 'it is not the proper function of the English court',[190] as an organ of the UK, to resolve issues that are more appropriate for resolution at the international level. All three judges recognized that the public policy exception was domestic in nature, but they disagreed on the extent to which *jus cogens* norms influenced the content of

[190] *Belhaj*, para 239 (Lord Sumption).

that policy. Whereas Lord Mance preferred to consider it 'by reference to individual rights recognised as fundamental by English statue and common law',[191] Lord Sumption—endorsing the opinion of Justice LeBel of the Supreme Court of Canada—thought that the role of international law 'is to influence the process by which judges identify a domestic principle as representing a sufficiently fundamental legal policy'.[192]

In *Rahmatullah*, the Court viewed itself primarily in domestic constitutional terms. Although the judges disagreed on the conceptualization of the Crown act of State doctrine, they all considered that it was underpinned by the constitutional role of the Crown in conducting international relations. In other words, when the UK government is acting as a sovereign State abroad, it cannot be challenged before UK courts. For Lord Mance, the doctrine is based 'on an underlying perception' that it is not the proper role of courts to review such conduct, whereas for Lord Sumption 'liability does not extend' to acts constituting Crown acts of State. Lady Hale took a more traditional approach to the question (drawing on historic jurisprudence) and acknowledged that it is necessary to recognize that there are 'some acts of a governmental nature, committed aboard, upon which the courts of England and Wales will not pass judgment'.[193] She appeared to support Lord Sumption's view that the doctrine functions as a substantive defence.

In both *Belhaj* and *Rahmatullah*, the judges expressed concern over the need for accountability for serious breaches of human rights and other peremptory norms of international law. In *Belhaj*, this manifested itself in the discussion on the scope of the public policy exception. As explained above, Lords Mance and Neuberger preferred to underscore the long-standing policy of the UK of accountability for serious breaches of human rights, while Lord Sumption placed significant emphasis on *jus cogens* norms. In *Rahmatullah*, Lady Hale's apparent suggestion that egregious conduct such as torture should not be considered an act of State sits uncomfortably with the position in international law, which specifically defines such acts as those of the State and requires them to be attributed to a State for the purposes of international responsibility. Lord Sumption preferred to think of any limitation of the Crown act of State doctrine as being a limitation in the scope of the royal prerogative itself.

The three decisions contribute to our understanding of when UK courts will review the overseas conduct of the executive, while also leaving room for future debate and development. At the heart of each judgment is the relationship between the domestic and international legal orders, the precise contours of which may turn on the content of domestic law and how it is interpreted. In

[191] ibid, para 107 (Lord Mance).
[192] ibid, para 257, referring to and endorsing the comments of Le Bel J in *Kazemi Estate v Islamic Republic of Iran* [2014] SCC 62; [2014] 3 SCR 178, paras 150–51.
[193] *Rahmatullah*, para 33 (Lady Hale).

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this light, the decisions also demonstrate that when domestic courts are required to determine the relationship between different regimes and concepts of international law for the purposes of applying domestic law, this can be a matter of constitutional law rather than one of public international law. As domestic and international law continue to 'mesh' together in new ways, and as domestic courts are increasingly relied upon to hold the government to account for its conduct abroad, the Supreme Court will no doubt continue to confront and refine its position in both the domestic constitutional system and the international legal order.