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Case No: HQ12X02603

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2013

Before: The Hon. Mr Justice Simon

Between:

(1) Abdul-Hakim Belhaj **(2) Fatima Boudchar**	**Claimants**
and	
(1) Rt. Hon. Jack Straw MP **(2) Sir Mark Allen CMG** **(3) The Secret Intelligence Service** **(4) The Security Service** **(5) The Attorney General** **(6) The Foreign and Commonwealth Office** **(7) The Home Office**	**Defendants**

Richard Hermer QC, **Ben Jaffey** and **Maria Roche** (instructed by **Leigh Day**) for **the Claimants**
Rory Phillips QC, **Sam Wordsworth QC**, **Karen Steyn**, **Peter Skelton** and **Julian Milford** (instructed by **the Treasury Solicitor**) for **the Defendants**

Hearing dates: 21-24 October 2013

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE SIMON

Mr Justice Simon:

Introduction

1. In this action the Claimants seek a declaration of illegality and claim damages arising from what they contend was the participation of the seven Defendants in their unlawful abduction, kidnapping and illicit removal across state borders to Libya in March 2004. The claim encompasses allegations that they were unlawfully detained and/or mistreated in four foreign states, China, Malaysia, Thailand, and Libya, and on board a US-registered aircraft; and that their detention and mistreatment was carried out by agents of the States concerned.

2. This is the determination of two preliminary issues, pursuant to an order made on 21 May 2013:

   (1) Whether the claims set out in §§89-95, 99(a) and 101 of the particulars of claim should be dismissed under CPR 3.1.(2)(l), on the basis that the Court lacks jurisdiction and/or the claims are non-justiciable?

   (2) In so far as the claim is not dismissed, what are the applicable laws for determining the Claimants' causes of action?

   Issue (1) raises issues about the extent and application of state immunity and act of state doctrines. Although issue (2) was argued as a matter of principle, in practice it was an argument about which party should plead the foreign laws that apply.

3. As I set out in my judgment ordering the hearing of these issues, the First Claimant was a political opponent of the former leader of Libya, Colonel Gaddafi, with whom the British Government had developed friendly relations. As is the nature of international politics, those whose friendship was courted are now regarded with disfavour, and vice versa. Whatever his previous affiliations may have been, the Claimant led the battle for Tripoli in the summer of 2011, ending the war as the Commander of the Tripoli Military Council and is now the leader of a political party in Libya.

4. Although many of the facts relied on by the Claimants are neither admitted nor denied by the Defendants, unusually, some appear to be supported by documents which have come into the Claimants' hands as a result of the change in political fortunes in Libya.

The factual assertions forming the basis of the claim

5. In 2003 the First Claimant (a Libyan national) and his wife, the Second Claimant, (a Moroccan national) were living in China. In mid to late February 2004, they wished to come to this country to claim asylum and tried to take a commercial flight from Beijing to London. While they were at the airport they were detained by the Chinese authorities, and removed to Kuala Lumpur in Malaysia, where they were held for two weeks.

6. On 1 March 2004 the 3rd Defendant (MI6) sent a fax to the Libyan intelligence services informing them that the Claimants had been detained in Malaysia and identifying the place where they were held.

7. By 4 March 2004 the US authorities had also become aware of the Claimants' detention, and a plan was formulated to abduct the Claimants and transfer them to Libyan custody. US officials faxed the Libyan authorities stating that they were,

> ... working energetically to effect the extradition of [the First Claimant] from Malaysia. The Malaysians have promised to co-operate and to arrange for [the First Claimant's] transfer to our custody.

A further fax agreed to a Libyan request that the First Claimant be rendered into their custody.

8. On 6 March 2004 the US authorities sent two further faxes to the Libyan authorities informing them that the Claimants were due to be placed on a commercial flight from Kuala Lumpur to Bangkok, that the abduction and rendition would take place in Bangkok and that they would be placed on a US aircraft for a flight to Libya. The US officials stated that it,

> ... is vital that one of your officers accompany [the First Claimant] and his wife on our aircraft during this leg of the journey (Bangkok to Libya) in order to provide legal custody of [the Second Claimant].

9. A more detailed 'Schedule for the Rendition of [the First Claimant] to the Libyan authorities' was faxed later that day: the Claimants would be abducted in Bangkok, flown to Diego Garcia (a British Indian Ocean Territory) for refuelling of the aircraft, and then on to Tripoli.

10. On 7 March 2004 the First Claimant was informed that he and his wife could only travel to the United Kingdom via Bangkok. The Claimants boarded a commercial flight to Bangkok and, on arrival, were taken off the aeroplane by four Thai officials, before being separated.

11. The First Claimant was pulled into a van on the runway by two US agents wearing balaclavas. He was strapped face down to a stretcher, handcuffed behind his back, shackled, hooded and taken to a 'black site' operated by US agencies within the airport perimeter. He was then hung from hooks attached to chains, and repeatedly slammed into the wall.

12. Having been held for about a day, the First Claimant was hooded and strapped back onto a stretcher. His hands were shackled to his feet using a short chain in a painful stress position, and he was carried on the stretcher to an aircraft whilst blindfolded.

13. The Second Claimant (who was pregnant at the time) had also been forced into a van on the runway. She was blindfolded, had her wrists and lower legs bound and ear defenders put on her. She was then taken to a cell within a building, in which there were two US agents dressed in black wearing balaclavas. She was then chained to the wall by one hand and one leg. Eventually, she was tightly taped to a stretcher making her fear for her baby. Her eyes were taped in such a way that she had severe pain in her right eye. Ear defenders and a hood were placed on her head. She was taken by stretcher to a nearby building where she was poked and punched in the stomach. She was then injected with a sedative, her clothes were changed and she was taped again onto a stretcher and driven to an aircraft.

14. Both Claimants were loaded on board a Boeing Business Jet owned by a CIA controlled front company with the tail number N313P. The Claimants were strapped to the floor of the aircraft, which flew to Tripoli stopping once to refuel. The First Claimant was chained in a stress position leaving lacerations on his wrists and ankles. He was kicked and beaten. The Second Claimant's temperature became raised during the flight. She was doused with water and her headscarf was forcibly removed. She was forced to use the toilet blindfolded.

15. Upon arrival in Tripoli, the First Claimant was beaten again. The Second Claimant could no longer feel her baby move and was concerned that he had died. Both Claimants were taken to Tajoura prison, a detention facility operated by the Libyan intelligence services.

16. In a letter dated 18 March 2004, the Second Defendant wrote to Moussa Koussa, the head of the Libyan External Security Organisation, warmly congratulating him on the successful rendition[1] of the First Claimant.

> Most importantly, I congratulate you on the safe arrival of [the First Claimant]. This was the least we could do for you and for Libya to demonstrate the remarkable relationship we have built over recent years ... The intelligence about [the First Claimant] was British. I know I did not pay for the air cargo. But I feel I have the right to deal with you direct on this and am very grateful to you for the help you are giving us.

17. The Particulars of Claim sets out the ill-treatment which the Claimants allege that they suffered while in Tajoura Prison, as well as the prolonged and severe ill-treatment of the First Claimant, which lasted until 2008. There is an allegation that agents of the 3rd or 4th Defendants saw the First Claimant while he was in prison; and that he told them that he was being beaten and hung by his arms, and showed them his scarred wrists. When he refused to sign a statement in relation to whether a group of Libyans in the UK had sent money to an armed group in Libya, he was told by a Libyan interpreter that the British team were in Libya waiting for this information and was threatened with torture by being placed in a mechanical box with an adjustable ceiling that would restrict his movement. The First Claimant signed the papers. There are further allegations of complicity by agents of the 4th Defendants in interrogations in March and October 2004 and in February 2005. Eventually the First Claimant was tried summarily and sentenced to death. He was transferred to Abu Salim Prison and kept in isolation for a year, in insanitary conditions and subject to beatings. On 23 March 2010 he was released.

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[1] A footnote to §1 of the Particulars of Claim reads, 'rendition' is a euphemism commonly used since about 2001 to describe covert unlawful abduction organised and carried out by state agents, across international borders, for the purpose of unlawful detention, interrogation and /or torture.

The Report of the Intelligence and Security Committee on Rendition (July 2007) gives the following definitions at §7:

'Rendition': encompasses any extra-judicial transfer of persons from one jurisdiction or State to another.

'Extraordinary Rendition': the extra-judicial transfer of persons from one jurisdiction or State to another for the purpose of the detention and interrogation outside the normal legal system where there is a real risk of torture or cruel, inhuman or degrading treatment.

At §8 there is a further definition of Extraordinary Rendition: 'A transfer to a secret facility constitutes cruel and inhuman treatment because there is no access to legal or other representation.'

The legal basis of the Claim

18. The Particulars of Claim (§1) seek,

> ... declarations of illegality and damages arising out of the Defendants' participation in the unlawful abduction, detention and rendition of the Claimants to Tripoli, Libya in March 2004, and the Defendants' subsequent acts and omissions whilst they were unlawfully detained.

19. The 18 March 2004 letter from the 2nd Defendant is relied on (§50a) to show that,

> [The 2nd Defendant] and the UK and intelligence services were co-conspirators in the unlawful rendition of the Claimants. In particular they provided the intelligence that enabled the rendition. The Defendants were fully aware of the operation, supported it and enabled it to take place.

20. It is pleaded (§55) that the extra-judicial rendition of the Claimants was part of a process of cooperation between the UK and Libyan intelligence services. The 1st Defendant is said to have been,

> ... aware of and authorised the operation and/or took no steps to prevent the operation.

The Particulars of Claim also plead (§58) that the Defendants,

> ... abetted the Claimants' rendition to Libya ... [and were] aware of and authorised the operation and/or took no steps to prevent the operation.

On the basis of this and further allegations, it is pleaded (§68),

> Accordingly, at the material dates herein, the Defendants knew that:
>
> a. The US government operated a covert renditions programme and a network of 'black sites' at which detainees were held incommunicado and tortured.
>
> b. If the Claimants were abducted as part of the US renditions programme, there was a real risk that they would be:
>
> i. held incommunicado and unlawfully at a 'black site'; and
>
> ii. tortured.

21. The causes of action are set out under heading K (§§89-95), with a reservation (§89),

> ... the Claimants will seek documentation detailing the supply of information to Malaysia, Libya and the United States relevant to their detention, interrogations and torture in Malaysia, Bangkok and Libya ...

22. The Particulars of Claim addresses the claim for false imprisonment (at §89(1)), and asserts that the Defendants are,

> ... jointly liable for the detention of the Claimants which they procured by common design with the Libyan and US authorities.

23. This plea is primarily based on the supply of intelligence (see §50(a)). It is not apparent whether this part of the claim covers what occurred in Beijing and Malaysia. However, in the course of argument, Mr Hermer QC indicated that the Claimants' view of the matter would depend on whether their detention was contrary to the relevant laws of China and Malaysia. This is a matter to which I will refer later. However, it is clear that this part of the claim will not succeed unless those who are said to have detained the Claimants (the Chinese, Malaysian, Thai, US and Libyan authorities) acted unlawfully in doing so.

24. The claims for conspiracy to injure, trespass to the person and conspiracy to use unlawful means are set out in §90. It is said that the Claimants were subject to unlawful rendition from Bangkok to Libya by agents of the US, which the Defendants participated in by providing information and intelligence. §90e reads,

> The Defendants conspired with Libya and the US to arrange, negotiate and facilitate the illegal rendition of the Claimants.

Again these are allegations which cannot succeed unless US and Libyan officials acted unlawfully.

25. At §91 it is alleged that the Defendants conspired in, assisted and acquiesced in, the Claimants' torture, inhumane and degrading treatment, and assaults by the US and Libyan authorities, by facilitating the Claimants' rendition (§91a) and by sharing or seeking information, (§91c and d). Again, this is an allegation which is based upon a finding that the US and Libyan authorities committed torts under the relevant applicable law.

26. Finally, it is alleged that the Defendants 'caused, prolonged and intensified' the Claimants' mistreatment by the provision of information (§93). This is an allegation concerning intelligence-sharing, and the allegation of unlawfulness must be founded on the Defendants' knowledge that they were facilitating treatment by the US and/or Libyan authorities which was unlawful.

27. The claim for Misfeasance in Public Office is based upon the Defendants' knowledge of, or reckless indifference to, the illegality of the actions of the Thai, US and Libyan authorities (§§94-95).

28. At §§96-100 there is a claim based on negligence, which has been excluded from the determination of the preliminary issues; although Mr Phillips QC argued that the contention (§99a) that the Defendants,

> facilitated and acquiesced in the extra-judicial rendition of the Claimants to Libya and their detention there via a US operated 'black site' in Bangkok,

suffers from the same vice as the other causes of action.

The basis of the alleged liability of the Defendants

29. The Claimants contend that the servants or agents of foreign states are joint and several tortfeasors and that, as with any claim where it is said that damage was caused by more than one tortfeasor, it is open to the Claimants to decide whom to sue. The Defendants initially argued[2] that,

> ... the complaints against the Defendants concern secondary liability: the primary tortfeasors, upon whom the unlawfulness of whose actions the claim against the Defendants depends, are foreign states. If the foreign states are the primary wrongdoers, they should be directly impleaded in the claim; but the Claimants have not done this, in the knowledge that those States would be immune from suit in the domestic courts. Principles of State Immunity cannot be circumvented by making a claim contingent upon the findings of unlawfulness by foreign States, but refusing to make those States parties to the claim.

30. The Claimants submitted that English tort law does not recognise true accessory liability, only joint liability where the person who can be termed the actual perpetrator is the agent of another, see *Fish & Fish Ltd v Sea Shepherd UK and others* [2013] 1 WLR, Beatson LJ at [42].

31. In my view, in order to establish liability, the Claimants must prove first, a common design that the acts relied on as tortious should be done by one or more of the alleged joint tortfeasors, secondly that the actual perpetrator committed a tort, and thirdly that the alleged participator did acts in furtherance of the common design, see *Fish & Fish* at [43-45].

32. Mr Hermer submitted that the Claimants relied on the matters pleaded in the Particulars of Claim to prove the participation of the Defendants in the common design and/or concerted action, and that the identity of the other party (the perpetrator) should not allow the Defendants to escape liability.

33. Criticism can properly be made of the use by the Claimants of the expressions: 'did not seek to prevent', 'facilitating' and 'acquiescence'; and there are other objectionable features of the pleading. However, I am not directly concerned with the detail of the pleading at this stage; and the basis on which the tort claims are advanced

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[2] Defendants' skeleton argument §24.

is not that the Claimants were detained or mistreated by the Defendants, but that the Defendants acted in furtherance of a common design. The basis of the plea of joint liability is the allegation against others who are said to have detained and mistreated the Claimants.

Issue (1): the state immunity and act of state doctrines

34. It is convenient at this stage to attempt a description of these doctrines.

35. State immunity (or sovereign immunity) is a status immunity, *ratione personae*, grounded in a rule of International law, which provides a jurisdictional immunity. So far as domestic law is concerned, it is now governed by the State Immunity Act 1978.

36. Act of state is less easy to define[3] and the confusion is compounded by the use of 'act of state' in a number of different contexts.[4] It is used to mean (1) an act of the Crown performed in the course of its relations with other states, (2) executive acts which are authorised or ratified by the Crown in the exercise of foreign power and (3) legislative or executive acts of foreign states. It is the third of these that is relevant to the present case.

37. This aspect of the act of state doctrine has been created and fashioned by the Common Law in more than one jurisdiction. It is a subject-matter immunity, *ratione materiae*, operating as a rule of domestic law.[5] The two strands of this immunity, both characterised as an exercise of 'judicial restraint or abstention', were described by Lord Wilberforce in *Buttes Gas v. Hammer* [1982] AC 888 at 931A-G. The first,

> ... consists of those cases which are concerned with the applicability of foreign municipal legislation within its own territory, and the examinability of such legislation - often, but not invariably, arising in cases of confiscation of property.

38. This principle, which did not arise in *Buttes Gas*, was to be contrasted with a second strand:

> ... the more general principle that the courts will not adjudicate upon the transactions of foreign states.

39. This strand has recently been the subject of a thorough and authoritative analysis by the Court of Appeal in *Yukos Capital v. OJSC Rosneft Oil* [2013] 3 W:R 1329 at [40]-[104]. At [115] Rix LJ, giving the judgment to which all members of the court[6] contributed, highlighted some of the difficulties of definition.

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[3] 'Even though the doctrine has spawned a wealth of cases and scholarly writings, there has been little agreement as to the exact 'scope of the doctrine or the policies underlying its application.' In fact it has been described as a doctrine of judicial prudence or deference, judicial restraint, judicial abstention, issue preclusion, conflict of laws and choice of law.' Alderton, 'The Act of State Doctrine: Questions of Validity and Abstention from Underhill to Habib,' Melbourne Journal of International Law. Volume 12, Issue 1 (June 2011), citing Bayzler, 'Abolishing the Act of State Doctrine (1986).

[4] See for example, Dicey, Morris and Collins on the Conflict of Laws, 15th Ed. (2012) §§5-043 to 5-045.

[5] See Lord Millett in *R v. Bow Street Magistrate, Ex p. Pinochet (No.3)* [2000] 1 AC at 268-9.

[6] Rix, Longmore and Davis LJJ.

> The important thing is to recognise that increasingly in the modern world the doctrine is being defined, like a silhouette by its limitations, rather than to regard it as occupying the whole ground save to the extent that an exception can be imposed.

40. It will be necessary later in this judgment to look at some of the contours of this indistinct doctrine[7] and, particularly, the form which applies to the present case.

Dr Bristow

41. The Defendants produced a witness statement from Dr Laurie Bristow, the National Security Director of the 6th Defendant. The National Security Directorate has special responsibility for counter terrorism, intelligence and cyber policy. The witness statement was based on his experience over 23 years in the Diplomatic Service (including a posting as HM Ambassador in Azerbaijan), and consultations for the purpose of his evidence with the High Commissioner in Kuala Lumpur, the Ambassadors in Bangkok, Beijing and Tripoli, and the Deputy Head of the North America Team of the Foreign Office.

42. Having viewed the pleadings he concluded that the claims arose principally from allegations that the Defendants shared intelligence with various foreign states (China, Malaysia, the United States, Thailand and Libya) in order to assist those foreign states to carry out various illegal acts against the Claimants. The witness statement continued.

> 4 ...The claims are thus predicated on the assertion that third party sovereign states acted unlawfully subsequent to, and in reliance, on information supplied by the United Kingdom.
>
> 5. The claims also require for their proper determination detailed examination of any intelligence-sharing arrangements between the United Kingdom and other states, including the United States. They require consideration of and evidence upon communications between states on matters of great sensitivity.

43. He set out his conclusion in §7.

> In summary, I consider that there would be a real risk of serious harm to the United Kingdom's international relations and national security interests if the Court were to engage in determining the Claimants' allegations; and if the Court were to make the rulings sought by the Claimants, the consequences would be very serious damage to those interests. I also consider that it would appear to be necessary for the Defendants to obtain evidence from third party states in order to defend themselves against the Claimants' allegations, but it would be highly improbable that the states concerned would supply this.

[7] which 'cannot be reduced to a single formula', see *Yukos* at [113].

44. He also made clear his view that if English Courts assumed authority to judge the acts of foreign states abroad it would be seen as undue interference in their affairs (§10), adding that even where states understood the division between the judicial and executive branches, findings by a UK domestic court retained 'the potential to cause serious damage.' In the later parts of his witness statement he set out his views about the impact of the allegations on the UK's relationship with China, Malaysia, Thailand and the US. His opinion was that each country is sensitive to interference in its internal affairs; and that a forensic investigation of the particular allegations that Thailand and Malaysia were involved in a collusive agreement with the US would be highly corrosive to relations between the UK and those countries, as would an investigation into the conduct of those said to be acting on behalf of the US outside the jurisdictions of the courts of the UK. Although he gave evidence as to the importance of good relations with these countries, his evidence about relations with Libya recognised the realities:

> ... given the change of regime in Libya, it is unlikely there would be damage to relations between the UK and Libya if the Court were to make findings of fact about the alleged actions of the previous regime to the effect pleaded in the Claimants' claims.

45. During cross-examination by Mr Hermer, Dr Bristow accepted that the Government was committed to the Rule of Law and the principle that issues of wrong-doing should be determined by Courts of Law; but expressed the view that there was another principle in play: namely, whether the domestic courts could or should assert jurisdiction over foreign states, and make legal findings in relation to the actions of foreign states outside the United Kingdom. These were, in his view, general principles which applied regardless of the circumstances of the particular case.

46. Mr Hermer referred him to the Special Immigration Appeals Commission (SIAC) decision in *DD & AS v. Secretary of State for the Home Department* (Appeal No. SC/42 and 50/2005). In that case, SIAC made findings that a foreign state (Libya) did not abide by the Rule of Law and carried out acts of torture. Dr Bristow noted that the context of the decision was the need to determine whether it was safe to deport individuals who were subject to the jurisdiction of the English Court to another country where it was said they would or might be tortured.

47. Mr Hermer also drew Dr Bristow's attention to the Report of the Intelligence and Security Committee on Rendition (presented to Parliament in July 2007), which referred to a history of illegal rendition by organs of the US Government; pointed out that such conduct had been condemned by reports of the Council of Europe and the European Parliament; and stated that there were many documents in the public domain which showed what the US Government had been doing. Mr Hermer said that the United States, as a mature democracy, well-understood the concept of the separation of powers and that domestic Courts often made findings for which the Government could not be held responsible. This was more in the nature of a speech than cross-examination; but, having listened to it, Dr Bristow adhered to his view that there was a qualitative difference between this type of report and a domestic Court making an adverse finding in relation to the actions of a foreign state in its own territory. Although he had not consulted the Chinese, Malaysian, Thai, United States

or Libyan governments about their views of the matter, his evidence reflected his best judgement of the matter.

State Immunity

48. It is convenient to start with this doctrine by reference to the way it applies directly by the operation of s.1 of the State Immunity Act 1978.

> General Immunity from jurisdiction
>
> (1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.
>
> (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

49. There are various exceptions to this immunity set out in sections 2-11 which do not apply in the present case, for example, where the State has submitted to the jurisdiction (s.2).

50. The importance of the general rule of state immunity has been described in a recent judgment of the International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening*).[8]

> [56] ... whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.
>
> [57] The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.

[8] ICJ Reports 2012, Judgment of 3 February 2012. At issue was the existence and ambit in International law of the jurisdictional immunity from claims made against Germany in the Italian courts, and from measures taken against its property in Italy, see [52].

51. It is clear from this authority that the immunity is not impugned by the gravity of the alleged (or even admitted) violation of international norms.[9]

52. One of the cases referred to by the International Court of Justice[10] was the House of Lords' decision in *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia and another* [2007] 1 AC 270. The issue in *Jones* was whether the English court had jurisdiction over proceedings brought by claimants against a foreign state and its officials, at whose hands they said that they had suffered systemic torture in the territory of that foreign state.[11] The House of Lords rejected two arguments which had found favour with the Court of Appeal: first, that state immunity did not apply where the claim was made against officials of the state and, secondly, that the allegation of torture took the case outside the general rule of state immunity. In the course of his speech, Lord Bingham (with whom the other members of the appellate committee agreed) held that,

> [30] ... A state can only act through servants and agents; their official acts are the acts of the state; and the state's immunity in respect of them is fundamental to the principle of state immunity. This error [of the Court of Appeal] had the effect that while the Kingdom was held immune, and the Ministry of Interior, as a department of the government, was held to be immune, the Minister of the Interior (the fourth defendant in the second action) was not, a very striking anomaly.
>
> [31] The first error led the court into a second: its conclusion (para 76) that a civil claim against an individual torturer did not indirectly implead the state in any more objectionable respect than a criminal prosecution. A state is not criminally responsible in international or English law, and therefore cannot be directly impleaded in criminal proceedings. The prosecution of a servant or agent for an act of torture within article 1 of the Torture Convention is founded on an express exception from the general rule of immunity. It is, however, clear that a civil action against individual tortures based on acts of official torture does indirectly implead the state since their acts are attributable to it. Were these claims against the individual defendants to proceed and be upheld, the interests of the Kingdom would be obviously affected, even though it is not a named party.

53. Lord Bingham also made clear [at 33] that state immunity was a matter of law and not governed by executive or judicial discretion.

> ... Where applicable, state immunity is an absolute and preliminary bar, precluding any examination of the merits. A

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[9] See *Jurisdictional Immunities case* at [89]. Germany acknowledged that the acts giving rise to the claim were unlawful and the Court proceeded on the assumption that they constituted crimes against humanity, see [52].
[10] See *Jurisdictional Immunities case* at [96].
[11] Lord Bingham at [1].

> state is either immune from the jurisdiction or it is not. There is no half-way house and no scope for the exercise of discretion.

54. The reference in [31] of Lord Bingham's speech to whether allegations of torture 'indirectly implead the state' leads to the argument in the present case as to the reach of the state immunity doctrine; and in particular, what is meant by the word 'implead'.

55. It is clear from the Particulars of Claim that no claim is made against China, Malaysia, Thailand, the United States of America and Libya, or against the officials and agents of those countries. However Mr Phillips QC submitted that where the claim necessarily requires findings of unlawfulness by the agents of a state, and where the state could claim immunity if it were sued directly, state immunity arises as a preliminary bar. The question then is whether, as he put it, the Claimants can obtain 'via the back door' declarations of illegality which they could not obtain if the states or their officers were directly impleaded as defendants in the action.

56. A number of cases were relied on by the Defendants to show that considerations of state immunity will arise where, although there is no direct claim against the state, it has been 'indirectly impleaded', see for example: *The Parlement Belge* (1880) 5 PD 197, Brett LJ at 214-5, *Compania Naviera Vascongado v SS Cristina, The Cristina* [1938] AC 485, Lord Atkin at 490, *Sultan of Johore v. Abubakar Tunku Aris Bendahar and others* [1952] AC (PC) 318 Viscount Simon at 342-344; *USA and the Republic of France v. Dollfus Mieg et Cie SA* [1953] AC 582, Earl Jowitt LC at 603-4 and *Rahimtoola v. Nizam of Hyderabad* [1958] AC 370, Lord Reid 403-4.

57. One aspect of the principle which applies in such cases was summarised in the speech of Lord Wright in *The Cristina* at p.505.

> A judgment *in rem* is a judgment against all the world, and if given in favour of the plaintiffs would conclusively oust the defendants from the possession which on the facts I have stated they beyond question *de facto* enjoy. The writ by its express terms commands the defendants to appear or let judgment go by default. They were given a clear alternative of either submitting to the jurisdiction or losing possession. In the words of Brett LJ the independent sovereign is thus called upon to sacrifice either its property or its independence.

58. Although care must be taken in relying on cases which were decided before the 1978 Act, which 'relaxed the absolutist principle described',[12] it is clear that the doctrine is potentially engaged where the interests of the foreign state are affected by the judgment of the Court, so that the Court is bound to hear the state if it objects;[13] and is clearly engaged where the property rights of the state are in issue, see for example Lord Atkin in *The Cristina* at p.490. However, Mr Phillips submitted that the doctrine extends (by parity of reasoning) to a situation where the claim involves assertions of unlawful acts of detention and torture by a foreign state or its agents, notwithstanding that the state is not a party.

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[12] See Lord Bingham in *Jones* at [8]
[13] The *Sultan of Johore* case at p.243.

59. He referred to the decision of the Divisional Court in *R (Al-Haq) v. Secretary of State for Foreign & Commonwealth Affairs* [2009] EWHC 1910 (Admin), where the claimant alleged breaches of International law by the State of Israel in Gaza and sought declarations based on what was said to be the secondary liability of the defendant for assisting such unlawful acts. Although the claim was decided on issues of non-justiciability rather than state immunity, Cranston J at [52] was of the opinion that issues of state immunity would arise whether or not Israel was a party to the claim.

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

60. Mr Phillips submitted that in the present case, the claim depended on assertions that China, Thailand, Malaysia and Libya carried out unlawful acts in their own territory in order to found the liability of the Defendants. This left these States in the difficulty identified by Cranston J: either they would have to waive their state immunity or the issue of the participation of their agents in the torts alleged in the Particulars of Claim would be determined in their absence. To use the phrase of Lord Bingham in *Jones* at [31], the interests of these States were 'obviously affected', since their acts lay at the heart of the claim; and the declaration sought by the Claimants would involve findings that agents of these states carried out unlawful acts.

61. Mr Hermer accepted that the issue was whether the legal interests of the foreign state were affected; but submitted that no such interest was affected, and certainly no sufficient interest. The Court's task would be confined to deciding whether the Defendants had committed the alleged torts and, in undertaking this task, it would not be necessary for the Court to make any finding that the foreign state was a party to that tort. Furthermore, even if the Court found that the foreign state were party to a tort, it would be of no legal effect, since the foreign state is not a party to the action. It might be embarrassing for the state, but it would have no legal consequences either in English or International law. By reference to the cases to which I have already referred,[14] he submitted that the indirect impleading doctrine as recognised in domestic law is confined to cases where the 'concrete' rights of states (to possession of a ship or title to gold bars) were in issue. The Defendants' argument, that there was an impleading of the foreign state if the action involved consideration of the conduct of that state, was an impermissible extension of the rule.

Consideration and conclusion on state immunity

[14] *The Parlement Belge* (1880) 5 PD 197, *The Cristina* [1938] AC 485, *USA and the Republic of France v. Dollfus Mieg et Cie SA* [1953] AC 582 and *Rahimtoola v. Nizam of Hyderabad* [1958] AC 370.

62. It is clear that the doctrine of state immunity is an absolute jurisdictional bar which, if it applies, admits of no exceptions: even crimes against humanity and the most extreme breaches of human rights, see for example the *Jurisdictional Immunities* case and *Jones v. Ministry of the Interior* (above); and, if the doctrine applies, the Court must give effect to the immunity whether or not the foreign state appears in the proceedings,[15] provided its interests are affected. It follows that it is open to the Defendants to raise the issue of state immunity and invite the Court to dismiss the actions on the basis that the Court lacks jurisdiction.

63. English law recognises that states act through their agents and officials,[16] and that state immunity extends to those agents and officials.[17] Clearly, if this claim had been framed as a claim against the agents or officials of China, Thailand, Malaysia, the USA and Libya, it would be stayed, at least in so far as the claim required the Court to consider acts carried out in the territory of those states. Similarly if it were pleaded that the tortious acts of the Defendants were 'attributable to'[18] any of these foreign states.

64. However, this is not a case in which claims are made either against foreign states, or against agents or officials of those states, so that they are effectively parties to the action.

65. The question then is whether foreign states or the agents and officials of those states have been impleaded by the claim. In this context the term 'impleading' means that the claim requires the foreign state to adopt a position of either having to defend itself and forgo its immunity or have a judgment entered against it, so that it is bound by the judgment.

66. In my view the present claim does not implead either those countries or their agents or servants. Their rights and interests will not be 'obviously affected' in the sense understood by the doctrine of state immunity. The foreign states are not put in a position of having to waive their right to immunity or have a judgment in default, because there could be no judgment in default which could affect them, other than tangentially.

67. The immunity does not apply merely because the court may be invited to consider the actions of a foreign state or its agents, in circumstances where the claim is not made against the foreign state or those who act on its behalf. If it did, it is difficult to see how some of the cases would have been decided in the way they were.[19] What must be affected for the state immunity doctrine to constitute a preliminary bar to proceedings is something more tangible than a state's reputation.

68. That does not mean that the Court will not be alive to the implications of deciding such cases in the absence of the foreign state. On the contrary, issues of public policy

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[15] See s.1(2) of the 1978 Act.
[16] See for example the speech of Lord Porter in the *Dollfus Mieg* case (above) at 612.
[17] See Lord Bingham in *Jone*s (above) at [30].
[18] See again, Lord Bingham in *Jones* (above) at [31].
[19] See for example: *A and others v. Secretary of State for the Home Department (No.2)* [2006] 2 AC 221; *AS and DD (Libya)* SC 42 & 50/2005 (SIAC 2007 Ouseley J); *HT (Cameroon) v. Secretary of State for the Home Department* [2011] 1 AC 596; *SK (Zimbabwe) v. Secretary of State for the Home Department* [2012] 1 WLR 2809.

and comity may be matters which are highly relevant to the application of the different principles characterised by the act of state doctrine.

69. It follows from the above that I reject the Defendants' arguments that state immunity is an absolute bar to the claim.

70. There are three further points to consider. First, reference was made to Article 6 of General Assembly Resolution 59/38, UN Convention on Jurisdictional Immunities of States and their Property (dated 16 December 2004).

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

71. The Convention has no direct application in English law; and I do not accept that the words 'seeks to affect the ... activities' of a foreign state in Article 6.2(b) advances the Defendants' argument. The Particulars of Claim cannot be said to 'seek to affect' the activities of any foreign state: they simply rely on certain activities for the purposes of the claims against the Defendants.

72. Secondly, the Defendants relied on a passage from a decision of the ICJ, *Case concerning East Timor (Portugal v. Australia)* ICJ Reports 1995, where at [29] the judgment adverts to a general principle.

> Whatever the nature of the obligations invoked, the [International Court of Justice] could not rule on the lawfulness of the conduct of a state when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case.

73. I consider that this observation is primarily directed to the confined jurisdiction of the Court, see [26]: 'that it cannot decide a dispute between States without the consent of those States to its jurisdiction.'

74. Thirdly, I should add that I was not persuaded by Mr Hermer that the Court should place a narrow interpretation on the state immunity doctrine, in so far as it imposes restrictions on access to the court or interferes with a person's right to secure justice.

The point was considered in *Jones*. Both Lord Bingham[20] and Lord Hoffmann cast doubt on the decision of ECtHR in *Al-Adsani v. United Kingdom* [2001] 34 EHRR, where the majority of the court held that article 6 of the European Convention on Human Rights was engaged and the rule of state immunity needed to be justified. As Lord Hoffmann put it [at 64],

> ... On the question of whether article 6 is engaged at all, I am inclined to agree with the view of Lord Millett in *Holland v. Lampen-Wolfe* [2000] 1 WLR 1573, 1588 that there is not even a prima facie breach of article 6 if a state fails to make available a jurisdiction which it does not possess. State immunity is not, as Lord Millett said, a 'self-imposed restriction on the jurisdiction of [the] courts' but a 'limitation imposed from without'.

75. Although the observations of Lord Bingham and Lord Hoffman in *Jones* are not binding, they are highly persuasive.

Act of state

76. Mr Phillips drew attention to two features of the present proceedings. First, none of the claims (apart from the claim in negligence) can succeed, unless an agent or official of a foreign state acted unlawfully. Secondly, no attempt has been made to characterise this unlawfulness other than in terms of English law.

77. Although many authorities and commentaries were cited, [21] it is unnecessary to refer to each in the light of the Court of Appeal judgment in *Yukos* (see above), where the Court of Appeal provided a comprehensive review of the case law.

78. In this strand of the act of state doctrine the domestic court exercises judicial restraint in order to avoid adjudicating upon the actions of foreign sovereign states, 'in the area of transactions between states', see *Buttes Gas*, Lord Wilberforce at 931G; *Kuwait Airways v. Iraqi Airways (Nos. 4 and 5)* [2002] 2 AC 883, the judgment of the Court of Appeal at [319]; and *Yukos* at [48]. Although one of the 'philosophical' bases for the act of state doctrine is the potential for political embarrassment,[22] caution should be exercised in giving weight to this consideration, see *Yukos* at [65].[23]

79. In summary,[24] and subject to certain limitations,

> ... the doctrine is confined to acts of state within the territory of the sovereign, but in special and perhaps exceptional circumstances, such as *Buttes Gas* itself, may even go beyond territorial boundaries and for that very reason give rise to issues which have been recognised as non-justiciable. The various formulations of the paradigm principle are apparently wide, and

[20] *Jones* at [14].
[21] In particular: *Underhill v. Hernandez* 168 US 250 (1897), Fuller CJ; *Oetjen v. Central Leather Co* 246 US 297 (1918) Justice Clarke at 245-6; *Buttes Gas and Oil Co v. Hammer (No.3)* [1982] AC 888
[22] See *Oetjen v Central Leather* (above)
[23] In fact this did not arise in *Yukos*, so this observation is not part of the ratio.
[24] *Yukos* at [66].

> prevent adjudication on the validity, legality, lawfulness, acceptability or motives of state actors. It is a form of immunity *ratione materiae*, closely connected with analogous doctrines of sovereign immunity and, although a domestic doctrine of English (and American) law, is founded on analogous concepts of international law, both public and private, and of the comity of nations.

80. The first of the limitations, or defining qualities of the act of state doctrine, is that, although it may extend to consideration of acts outside the territory of the state, it is generally confined to acts within the territory of that foreign state. *Buttes Gas* was 'a unique example' of an extension beyond the territorial boundaries of the state, see *Yukos* at [49] and [68], and *Kuwait Airways v. Iraqi Airways*, the Court of Appeal at [287] and [319].

81. The second potential limitation[25] (see *Yukos* at [69-72]) is that the doctrine,

> ... will not apply to foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights.

This part of the Court of Appeal's judgment referred to a number of passages in the speeches of the House of Lords in *Kuwait Airways v. Iraqi Airways*. It was in this context that the Court of Appeal noted, see *Yukos* at [115],

> ... it has become wholly commonplace to adjudicate or call into question the acts of a foreign state in relation to matters of international convention, whether it is the persecution of applicant asylum refugees, or the application of the Rome Statute with regard to international criminal responsibility ... That is also perhaps an element of the naturalness with which our courts have been prepared, in the face of cogent evidence, to adjudicate upon allegations relating to the availability of substantive justice in foreign courts. It also has to be remembered that the doctrine was first developed in an era which predated the existence of modern international human rights law. The idea that the rights of the state might be curtailed by its obligations in the field of human rights would have seemed somewhat strange in that era.

82. The third limitation (see *Yuko*s at [73-91]) is that judicial acts are not regarded as acts of state for the purposes of this doctrine. The Court of Appeal approved a passage from the judgment at first instance.

> ... we agree with the holding of Hamblen J at [201] below that 'there is no rule against passing judgment on the judiciary of a foreign state': see *The Abidin Daver* [1984] AC 398 and the subsequent decisions reviewed in the *AK Invest[ment] case*.

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[25] *Yukos* at [69]

83. The fourth limitation is that the doctrine does not provide immunity for the state's commercial activities, see *Yukos* at [92-94].

84. The fifth limitation (see *Yukos* at [95-112]) is what is referred to as the *Kirkpatrick* exception, see the judgment of the US Supreme Court in *Kirkpatrick v. Environmental Tectonics Corp International* 493 US 400 (1990), where the essential proposition was stated by Justice Scalia at 409-410.

> The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of sovereigns taken within their own jurisdiction shall be deemed to be valid. That doctrine has no application to the present case because the validity of no foreign sovereign act is at issue.

The Court of Appeal in *Yukos* at [100] noted that the *Kirkpatrick* case had been followed by the Court of Appeal of England and Wales in two cases;[26] and at [110] summarised the effect of the *Kirkpatrick* exception.

> What Kirkpatrick is ultimately about, however, is the distinction between referring to acts of state (or proving them if their occurrence is disputed) as an existential matter, and on the other hand asking the court to enquire into them for the purposes of adjudicating upon their legal effectiveness, including for these purposes their legal effectiveness as recognised in the country of the forum. It is the difference between citing a foreign statute (an act of state) for what it says (or even for what it is disputed as saying) on the one hand, something which of course happens all the time, and on the other hand challenging the effectiveness of that statute on the ground for instance, that it was not properly enacted, or had been procured by corruption, or should not be recognised because it is unfair or expropriatory or discriminatory.

85. While each party took issue with points at the margins of these stated characteristics of the act of state doctrine, and developed arguments based on them, both parties accepted that the law was as set out in *Yukos*, and that in any case I was bound by the decision.

86. The submissions focussed on three of the defining characteristics of the act of state doctrine: the extent to which it applies extra-territorially, the extent to which public policy considerations apply, and the relevance of the *Kirkpatrick* exception.

The territorial limitation

[26] *A Ltd v. B Bank* [1997] ILPr 586 and *Berezovsky v. Abramovich* [2011] EWCA Civ 153.

87. Mr Hermer submitted that in general, the act of state doctrine applied to acts which take place within the territory of the foreign state itself; and that the only exception was *Buttes Gas*. In the present case he pointed out that the claim in relation to the conduct of officials or agents of the US occurred outside the territory of that country. Mr Phillips submitted that the proper analysis of *Buttes Gas* was set out in the judgment of the Court of Appeal in *Kuwait Airways v. Iraqi Airways* at [319],[27]

> ... whether the sovereign acts within his own territory or outside it, there is a certain class of sovereign act which calls for judicial restraint on the part of the municipal courts ... It may not be easy to generalise about such acts, and the application of the principle may be fact sensitive. Guidance, however, is to be found in such considerations as to whether there are 'judicial or manageable standards' by which to resolve the dispute, whether the court would be in 'a judicial no-man's land' ...

88. The passages in quotation marks refer back to the speech of Lord Wilberforce in *Buttes Gas* at 938B.

89. Mr Phillips submitted that there was no reason why the act of state doctrine should be confined to cases where the state acts within its own territory: it would be just as much an arrogation of authority over a foreign state for the English court to judge the act of state outside, as it is within, the state's territory.

The public policy limitation

90. The Claimants relied on a decision of the High Court of Australia: *Habib v Commonwealth of Australia* [2010] FCAFC 12. That case concerned a claim by an Australian citizen that Australian officials had committed various torts (misfeasance in public office and indirect infliction of harm by aiding and abetting, and counselling) in relation to his torture and ill-treatment by agents of a foreign government while he was in Pakistan, Egypt, Afghanistan and Guantanamo Bay. The issue before the Court[28] was whether Mr Habib's case should be dismissed on the grounds that his claims were not justiciable, since their resolution would require a determination of whether agents of foreign states had acted unlawfully within the territories of those foreign states. The leading judgment was given by Jagot J, with whom Black CJ agreed. Although the issue was decided within the framework of the Australian Constitution, in the course of her judgment Jagot J addressed a number of points which the Claimants contend are relevant to the present case.

> [113] ... The fact that the foreign officials could claim sovereign immunity if sued in an Australian court, and the Australian officials if sued in a foreign court, may disclose some incoherence of underlying principle. The same situation, however, arose in *Unocal* when the perpetrators were protected by sovereign immunity but the company on whose behalf the violations were said to have been perpetrated was not protected by the act of state doctrine.

[27] [2002] 2 AC p.971; also set out as part of the judgment in *Yukos* at [113].
[28] See the judgment of Black CJ at [4].

> [114] As Mr Habib said, the consequences of the Commonwealth's submission is that Commonwealth officials would not be held accountable in any court for their alleged breaches of Australian laws having extra-territorial effect. The consequence of Mr Habib's submissions, in contrast, is that each set of government officials would be able to be held accountable for their actions in their national courts ...

A similar point is made on the Claimants' behalf here.

> [115] ... the claim is by an Australian citizen against the Commonwealth of Australia. Findings will be necessary as facts along the way but no declaration with respect to the conduct of foreign officials is required. Those officials will not be subject to the jurisdiction of an Australian court (or, for that matter, any international court by reason of this proceeding) ...
>
> ...
>
> [118] ... While this case will involve factual findings about the conduct of foreign officials, the context in which their conduct arises for consideration is inconsistent with the acceptance of the Commonwealth's proposition that international comity might be undermined. The case involves an Australian court considering and determining whether, as alleged, officials of its own government aided, abetted and counselled foreign officials to inflict torture upon an Australian citizen in circumstances where the acts of those foreign officials, if proved as alleged, would themselves be unlawful under Australian laws having extra-territorial effect.
>
> [119] The separation of powers rationale cannot be considered in isolation from that of justiciability. Issues for which there are no 'judicial or manageable standards' of judgment are outside the reach of the judicial branch (*Buttes* at 938 ...). But, as Mr Habib's submissions proposed, in this case there are clear and identifiable standards by which the conduct in question may be judged - the requirements of the applicable Australian statutes and the international law which they reflect and embody. The Court will not be in a 'judicial no-man's land' (*Buttes* at 938).
>
> [131] Ultimately, the central submission for Mr Habib is compelling. If accepted, the Commonwealth's submissions would exclude judicial scrutiny of the conduct of Australian officials alleged to have involved serious breaches of the inviolable human rights of an Australian citizen in an overseas jurisdiction, even though the alleged conduct, if proved, would contravene Australian law at the time and in the place where the conduct is said to have been committed.

91. The Claimants relied on the similarities with the present case: officials who were amenable to the jurisdiction of the domestic court were implicated in the illegal detention and mistreatment of a claimant by agents of a third party state. They submitted that the reasoning in *Habib* should be followed, and with the same result: the act of state doctrine should not apply so as to bar the claim.

92. For the Defendants, Mr Phillips highlighted the differences between the facts of *Habib* and the assumed facts of the present case: Mr Habib was an Australian citizen who was relying on rights conferred by the Australian Constitution, in relation to the acts of Australian officials;[29] and the Australian courts were not required to make findings of unlawfulness against the agents of third party states, only to make 'factual findings about the conduct of foreign officials'.[30] In addition, the case proceeded on the basis that foreign relations would not be affected by a decision on the claim and the facts were not in dispute.

93. He submitted that the last point was an important distinction since one of the clearest and most authoritative recent statements on the approach to the public policy exception[31] suggests that the Court should adopt a rigorous and confined approach to its application. In the *Kuwait Airways* case, the House of Lords was concerned with an alleged infraction of international law sufficient to justify refusing to recognise a foreign law on public policy grounds.

94. In the course of his speech Lord Nicholls expressed his view as follows.

> [16] … Exceptionally and rarely, a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice as administered by an English court. A result of this character would not be acceptable to an English court. In the conventional phraseology, such a result would be contrary to public policy. Then the court will decline to enforce or recognise the foreign decree to whatever extent is required in the circumstances.
>
> [17] This public policy principle eludes more precise definition. Its flavour is captured by the much repeated words of Judge Cardozo that the court will exclude the foreign decree only when it 'would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal': see *Loucks v Standard Oil Co of New York* (1918) 120 NE 198, 202.
>
> [18] Despite its lack of precision, this exception to the normal rule is well established in English law. This imprecision, even vagueness, does not invalidate the principle. Indeed, a similar principle is a common feature of all systems of conflicts of laws. The leading example in this country, always cited in this context, is the 1941 decree of the National Socialist

29 See the judgments of Black CJ at [4], Perram J at [37] and Jagot J at [121]-[133]).
30 Jagot J at [93].
31 *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19.

> Government of Germany depriving Jewish émigrés of their German nationality and, consequentially, leading to the confiscation of their property. Surely Lord Cross of Chelsea was indubitably right when he said that a racially discriminatory and confiscatory law of this sort was so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all: *Oppenheimer v Cattermole* [1976] AC 249, 277-278. When deciding an issue by reference to foreign law, the courts of this country must have a residual power, to be exercised exceptionally and with the greatest circumspection, to disregard a provision in the foreign law when to do otherwise would affront basic principles of justice and fairness which the courts seek to apply in the administration of justice in this country. Gross infringements of human rights are one instance, and an important instance, of such a provision.

95. Mr Phillips submitted that the strict confines of the public policy limitation are clear from the words and phrases used in the speeches in the House of Lords:[32] it is only where the breach is clear and acknowledged before the proceedings are commenced that the public policy exception can apply. If this were not so, the Court would have to engage in an enquiry into the facts which the doctrine excludes, in order to decide whether the doctrine applies.

96. I see the force of this submission.[33] However, I am not persuaded that the House of Lords was intending to lay down an absolute and invariable test for the public policy exception. The importance of a rigorous test is that there should be principles which the court can apply in order to avoid the adjudication problems which arose in the *Buttes Gas* litigation.[34] This does not mean that a defendant can defeat the public policy exception by denying the facts relied on.

97. In my view the observations of Lord Hope in the *Kuwait Airlines* case at [140] are of general application.

> The golden rule is that care must be taken not to expand the [public policy exception] beyond the true limits of the principle. These limits demand that, where there is room for doubt, judicial restraint must be exercised. But restraint is what is needed, not abstention. And there is no need for restraint on grounds of public policy where it is plain beyond dispute that a clearly established norm of international law has been violated.

98. Although the public policy consideration with which the House of Lords was dealing was a breach of International law, Lord Hope's stringent test is one which answers the paradox raised by Mr Phillips's submission.

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[32] Breaches of International law which were 'plain, and indeed acknowledged', per Lord Nicholls at [26], 'gross', per Lord Steyn at [113] and 'plain beyond dispute.'
[33] While noting that in *Habib* at [110], Jagot J concluded that 'the cases do not support a distinction between known and alleged violations.'
[34] See Lord Nicholls in *Buttes Gas* at [26].

99. Before considering the further submissions on the public policy limitation, it is convenient to consider two passages from the cases referred to in the judgment of Jagot J in *Habib* set out above.

100. The first passage[35] is from the US decision, *John Doe and others v. Unocal Corporation and others* 395 F 3rd (9th Cir, 2002) 14187, where the Federal Court described a four-factor 'balancing test' for determining whether the act of state doctrine applied. The first three factors derived from the US Supreme Court decision in *Banco Nacional de Cuba v. Sabbatino*:[36] (1) the greater the consensus concerning the international law issue, the more appropriate it is for the judiciary to render decisions regarding it; (2) the less important the implications of an issue for foreign relations, the weaker the justification for attaching weight to political or comity considerations; and (3) the potential for the balance to shift if the government which perpetrated the act of state no longer exists. The fourth factor was whether the foreign state was acting in the public interest.[37] This approach with different factors having different weight in a forensic equation suggests that the ultimate decision will be sensitive to the particular facts of the case.

101. The second passage[38] is from the speech of Lord Wilberforce in *Buttes Gas,* at p.938A-C where he gave as a reason for not adjudicating on extra-territorial disputes:

> ... the lack of judicial or manageable standards by which to judge these issues, or to adopt another phrase,... the Court would be in a judicial no-man's land.

102. In my view the following provisional conclusion can be reached at this stage of the argument: where the Court can, by reference to 'established norms' or 'judicial or manageable standards', determine that the application of the act of state doctrine is inconsistent with principles of public policy, it should be prepared to say so and act upon its decision. However, doubts on the matter should be resolved in favour of the application of the act of state doctrine.

103. Mr Hermer submitted that there is no difficulty in applying the appropriate standards in the present case, and referred to parts of the judgment of the Court of Appeal in *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs and another* [2002] EWCA Civ 1598.

104. In that case, the claimant's son was being held at Guantanamo Bay; and the Court had to consider a claim for Judicial Review whose purpose was to compel the Foreign Office to make representations to the US Government or to take other appropriate steps (or at least give an explanation as to why this had not been done).[39] The claim was rejected for a number of reasons relating to the effectiveness of granting the relief claimed.[40] However, in the course of the judgment, the Court of Appeal[41] considered the claimant's argument that, where fundamental human rights were in play, the

[35] [113] in *Habib*.
[36] 376 US 398 (164) at 428
[37] See p.14233.
[38] [119] in *Habib*.
[39] See [1].
[40] See [107].
[41] The judgment of the Court: Lord Phillips MR, Waller and Carnwath LJJ.

Courts of this country would not abstain from reviewing the legitimacy of the actions of a foreign state.[42] The argument was founded on the decisions of the House of Lords in *Oppenheimer v. Cattermole* [1976] AC 249 and *R v. Home Secretary, ex p. Adan* [2001] 2 AC 477.

105. As Lord Nicholls noted in the *Kuwait Airlines case*, *Oppenheimer v. Cattermole* was concerned with a 1941 decree depriving German Jewish '*emigrés*' of their citizenship and property. In the course of his speech[43] Lord Cross made clear what he thought of such a law.

> To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.

106. *Ex p. Adan* posed the question whether it was open to a domestic court to decide that decisions of foreign courts in the interpretation of a multi-lateral Convention were wrong in law. The House of Lords held that the domestic Courts could make such decisions if it were necessary for the purposes of resolving a private right or obligation, even if to do so would hamper international relations and cause embarrassment to the United Kingdom.[44]

107. It was consideration of these two cases which led the Court of Appeal in *Abbasi* to the conclusion which it expressed at [57].

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

108. In *Campaign for Nuclear Disarmament v. The Prime Minister and others* ('the *CND case*') [2002] EWHC 2777 (Admin), the Divisional Court[45] emphasised the importance of any such judicial decision having a 'foothold in domestic law' before any ruling could be given. As Richards J expressed it at [61(iii)]

> By way of exception to the basic rule,[46] situations arise where the national courts have to adjudicate upon the interpretation of international treaties e.g. in determining private rights and obligations under domestic law and/or where statute requires decisions to be taken in accordance with an international treaty;

[42] See *Abbasi* at [53].
[43] At p.278C.
[44] See *R (Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs*, referred to later in this judgment, [2012] EWHC 3728 (Admin) Moses LJ at [21].
[45] Simon Brown LJ, Maurice Kay and Richards JJ.
[46] That international treaties do not form part of domestic law and that national courts have no jurisdiction to interpret them, see Richards J at [61(i)].

> and in human rights cases there may be a wider exception. Those examples feature in the discussion in *Abbasi* at paras 51-57. None of them applies here.

109. The point was further considered in another Divisional Court case, *R (Noor Khan) v. Secretary of State for Foreign and Commonwealth Affairs* [2012] 3728 (Admin), in which Moses LJ at [22], after a brief review of authorities, including *Adan*, *Abbasi* and the *CND case*, stated.

> Those cases demonstrate that the mere fact that the issues are those which the courts 'have traditionally been very reluctant to entertain' will not necessarily be dispositive of the issue of justiciability. If a domestic right or obligation can be identified and can only be vindicated by consideration of the actions of other states under international law, then the courts may be compelled to undertake that task to the extent that it is necessary for that purpose.

110. Mr Hermer submitted that the domestic courts frequently express views about the conduct of foreign states where they are required to do so. In *R v. Mullen* [2000] QB 520 at 535E, the Court of Appeal (Criminal Division), when considering an appeal based on an abuse of process, was prepared directly to impugn the conduct of state officials (in Zimbabwe) acting in complicity with the British authorities.

> In summary, therefore, the British authorities initiated and subsequently assisted in and procured the deportation of the defendant, by unlawful means, in circumstances in which there were specific extradition facilities between this country and Zimbabwe. In so acting they were not only encouraging unlawful conduct in Zimbabwe, but they were also acting in breach of public international law.

111. He also drew attention to *Rahmatullah v Defence Secretary* [2013] 1 AC 614 at [70], where Lord Kerr (giving a judgment with which the majority agreed) drew a distinction between cases where the Court was being asked to consider whether a foreign state was in breach of its international obligations (on the one hand) and the claimant's case that the defendant was directly at fault (on the other).

> ... the legality of the US's detention of Mr Rahmatullah is not under scrutiny here. It is the lawfulness of the UK's inaction in seeking his return that is in issue.

112. The Supreme Court held that it was not concerned with an examination of the legal basis on which the US might justify the claimant's detention; the illegality which was relied on centred on the UK's obligations.[47] It was for the Defence Secretary to secure the production of the claimant, or explain why he could not.

113. Mr Phillips submitted that the rationale of the act of state doctrine rested on considerations of comity, the need for judicial restraint and manageable judicial

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[47] Lord Kerr at [53]

standards; and that the very act of deciding contested allegations which directly implicated a foreign state itself causes the harm that the doctrine is designed to avoid. It was for this reason that the scope of the public policy exception applied only to 'grave breaches of human rights and flagrant breaches of international law', where the breaches were clear;[48] and where the domestic court was not required to investigate, let alone express a view on the legality of the acts of another state, see the reference to the *Abbasi* case by Simon Brown LJ in the *CND case* at [29]. He also observed that *Oppenheimer v. Cattermole* and the *Kuwait Airways (Nos 4 and 5)* were the only cases where the act of state doctrine had been excluded on the basis of the public policy exception.

114. It is clear that, in so far as the act of state doctrine is defined by the application of rules of Public Policy, the Court should bear in mind that 'conceptions of Public Policy should move with the times and that widely accepted treaties and statutes may point in the direction in which such conceptions as applied by the courts, ought to move.'[49] Although there are plainly distinctions to be drawn, I do not accept Mr Phillips's broad submission that the decision in *Habib* is inconsistent with the act of state doctrine as developed here and in the United States. On the contrary, it seems to me that the decision of the High Court of Australia on a developing common law doctrine carries considerable weight.

115. The cases to which I have referred are instances of the application of an aspect of the act of state doctrine whose outline is reasonably clear, but whose precise shape may depend on the circumstances of the case. One of the most important circumstances will be the extent to which the Court is being asked to investigate and express a view about the legality of the conduct of a foreign state and another will be whether there are incontrovertible (or at least clear and established) standards which can form the basis for such an investigation and determination. It is in respect of the latter point that it may be necessary to look at how the parties have approached the pleading of the applicable law.

The *Kirkpatrick* limitation

116. As already noted the *Kirkpatrick* limitation amounts to a recognition that there is a distinction between inviting the Court to adjudicate on the legal effect of an act of state (its validity) and proving an act of a sovereign state within its own jurisdiction as a factual matter (its existence). The act of state doctrine applies to the former and not the latter.

117. Mr Hermer submitted that the Court was only concerned with the acts of foreign states as 'an existential matter'. Mr Phillips's answer was that the Claimants have to do rather more: they have to challenge the legal validity of the acts since, if they are legally valid, there is no arguable tort to which the Defendants were party.

The relevance of the applicable law

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[48] See the earlier references to the speeches of Lord Nicholls, Lord Steyn and Lord Hope in *Kuwait Airways v. Iraqi Airways (nos.4 and 5)*.

[49] Lord Wilberforce in *Blaythwayt v. Baron Cawley* [1976] AC 397, 426, referred to in the judgment of the Court of Appeal in *Kuwait Airways (4) and (5)* at [314]

118. Before forming a final view about how the act of state doctrine impacts on the present case, it is convenient to consider the dispute about the applicable laws for determining the Claimants' cause of action, since this may throw light on the norms of behaviour or legal standards which are said to apply.

Issue (2): Applicable Law

119. Two issues arise on this part of the preliminary issue. First, whether the applicable law is the law of China, Malaysia, Thailand, the US and Libya, or whether it is English law. This issue depends on a consideration of sections 11-12 of the Private International Law (Miscellaneous Provisions) Act 1995 (the '1995 Act'). Secondly, if the applicable law is the former, whether the Court should apply English law in the absence of pleading and proof that the law of those states is different. However, Mr Hermer submitted that there was a logically prior question: whether the issue of applicable law is fact sensitive; and whether for this reason it should not be determined at this stage.[50]

120. At present the Claimants plead,[51]

> ... reliance on foreign law is inappropriate and otiose not least because:
>
> > (i) it is to be presumed that the law of all relevant countries will provide a remedy to victims of serious human rights violations.

121. Alternatively they plead[52] that it would be substantially more appropriate to apply the law of England and Wales to the determination of the dispute. 'Substantially more appropriate' is the language of s.12 of the 1995 Act.

122. In §9 of the Reply the Claimants plead that, if and in so far as the Defendants wish to advance a case that foreign law applies, they should plead such foreign law.

123. It follows that, on the Claimants' pleaded case, there are three possibilities: (a) foreign law supplies a remedy by some undefined mechanism, or (b) English law applies by reason of s.12 of the 1995 Act, or (c) if a foreign law applies, the Defendants should plead it.

124. In the course of argument, Mr Hermer adopted a less evasive and rather more realistic approach, conceding that it was unlikely that the laws of England and Wales applied (for example) to the Claimants' alleged detention in China or Malaysia; and that the real issue was not so much which law or laws applied to the alleged torts, but which side should plead the applicable laws first. This requires consideration of the 1995 Act.

125. Section 11 of the 1995 Act provides:

> 11. Choice of applicable law: the general rule.

[50] See §4.4 of the Claimants' skeleton argument.
[51] §8 of the Reply.
[52] §8(iii) of the Reply.

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

126. It is clear from the Particulars of Claim that the key events which form the basis of the alleged torts occurred in China, Malaysia, Thailand, on board a US-registered aircraft and in Libya, rather than in England and Wales. The general rule in s.11(1) may not provide a clear answer in this case; but to the extent that it is alleged that the events occurred in more than one country, s.11(2) applies. The applicable law for a cause of action in respect of injury caused to an individual is the law of the country where he or she was when he or she sustained injury. On this basis, the applicable law for determining the allegations of false imprisonment is the law of the country in which the Claimants allege they were unlawfully detained. Thus the laws of China would apply to allegations in relation to the events which occurred in China; and the laws of Malaysia in relation to the events which occurred in Malaysia.

127. The general rule under s.11 can be displaced by the operation of s.12 in a case where it is 'substantially more appropriate' for the law of another state to apply.

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

> that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.
>
> (2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events.

128. The burden of showing that the general rule should be disapplied is on the Claimants; and this general rule is 'not to be dislodged easily', see *Roerig v. Valiant Trawlers* Ltd [2002] 1 WLR 2304, Waller LJ at [12(v)].

129. It is important to note that the Claimants have been able to specify with reasonable precision where the events constituting the alleged torts took place, including the places where they sustained personal injury.

130. As already noted,[53] the Claimants argued that it would be 'substantially more appropriate' to apply the law of England and Wales (pursuant to s.12 of the 1995 Act) since the matters of complaint were carried out in purported exercise of state authority and it is probable that the acts and omissions relied upon occurred while the First and Second Defendants were in the United Kingdom.

131. I do not accept that way of looking at the Claim. The events which form the matters of complaint occurred overseas and the Claimants would have to show that it was 'substantially more appropriate' to apply the laws of England and Wales than (for example) Chinese or Malaysian law to the circumstances of their detention in those countries.

132. In *R (Al-Jedda) v. Secretary of State for Defence* [2008] 1 AC 332 the House of Lords had to consider a similar situation (an allegation of illegal detention of a claimant with dual British and Iraqi nationality by British forces in Iraq). In that case Lord Brown stated at [138].

> Unless the appellant can show that it is 'substantially more appropriate' (section 12 of the Private International Law (Miscellaneous Provisions) Act 1995) to apply English law than Iraqi law to the circumstances of his detention, then, under section 11 of the Act, Iraqi law applies. For my part I cannot see why English law should sensibly be the appropriate law to apply here. Not only has the appellant's detention taken place in Iraq but all the circumstances occasioning and surrounding it are circumstances entirely particular to the situation in that country.

[53] §8(iii) of the Reply (and §4.6.3 of the Claimants' skeleton argument).

133. In the present case none of the locations where the Claimants allege they were detained, or from where they allege they were transferred, was under British control. The alleged detentions and transfers are said to have involved, or to have resulted from, the actions of agents of foreign states. Even in respect of the two causes of action which might be said to have a real link to the United Kingdom (misfeasance in public office and negligence) the basis of the claims is the allegation of unlawful detention in and transfer from various foreign states. This is not a case in which it would be 'substantially more appropriate' to apply English law. Nor are the locations where the Claimants say their injuries occurred under United Kingdom control. It is also pertinent to note that the Claimants are not, and never have been UK nationals,[54] did not have the right to enter or remain in the United Kingdom and were not resident within the United Kingdom during the relevant period.

134. There was a suggestion that the Claimants might be able to rely on s.14 of the 1995 Act, which has the effect of disapplying an applicable law in so far as it 'would conflict with principles of public policy'. However, since no foreign law has been pleaded the stage at which s.14 might apply has not arisen.

135. Recognising these difficulties, Mr Hermer submitted[55] that the pleading of the applicable law in relation to the claim based on the Claimants' unlawful detention should wait,

> until the basis for that detention is evidenced. If, for example, it transpires that the Malay authorities held and transferred the Claimants solely for entirely legitimate immigration grounds, then there is unlikely to be a dispute on the legality of that detention and consequently the claim against the Defendants would not be pursued in respect of that period. If, however, the evidence indicates that purpose of detention, or continued detention, and/or transfer of the Claimants was to effect their unlawful kidnap and rendition to Libya, then it is reasonable to assume that this would not be sanctioned by local law.

136. In summary, he argued that the issue of the applicable law was fact sensitive and that the pleading should await findings of fact as to what occurred. He developed this argument by a number of further submissions. First, he relied on what was said by Lord Donaldson MR in *R v. Lancashire CC, ex p. Huddleston* [1986] 2 All ER 941 to support a contention that any determination under s.12 should not be made on the basis of the Particulars of Claim alone. Secondly, he relied on observations by the House of Lords in the case of *Anyanwu v. South Bank Students Union* [2001] 1 WLR 638, deprecating the practice of resolving issues of law without the necessary findings of fact.[56] Thirdly, he argued that, in the meantime, the case should proceed on the basis of the presumption that foreign law was the same as English law, see *Dicey, Morris and Collins*, *The Conflict of Laws*, *15th Edition*, Ch.9 rule 25(2).

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[54] The First Claimant was at all material times a Libyan national and the Second Claimant, a Moroccan national.
[55] Claimants' skeleton argument §4.4.
[56] Lord Steyn at [24] and Lord Hope at [37].

137. So far as the first point is concerned, I do not consider that a general observation based on the assumption that only one party to Judicial Review proceedings is in possession of the facts leads to the conclusion that the pleadings should not form the basis of determining the applicable law. In the present case the Claimants have been able to plead the relevant events with particularity, and these facts should enable them to plead their case on the applicable law.

138. As to the second point, the House of Lords in *Anyanwu* deplored the practice of ordering the determination of preliminary issues of law without the necessary findings of fact, as they have done in many other cases. However, on this application, the question is whether the case should proceed to trial on what is an entirely unrealistic basis, with neither side committing themselves, beyond the denial in (for example) §32-34 of the 1st Defendant's Defence that English law is not the applicable law and the assertion in §9 of the Reply that it is for the Defendants to advance a case that foreign law applies.

139. As to the third point, Mr Hermer submitted that absent any reliance by either party on foreign law, the court should apply English law. He drew attention to the observations of Gray J in *Al-Miznad v. Azzaman Ltd and others* [2003] EWHC 1783 (QB) [37].

> I further accept that it was held in *University of Glasgow v. Economist*, that at least at the pleading stage, a claimant is entitled to rely on the presumption that the foreign laws are the same as English law.

He went on to add.

> The Supreme Court Procedure Committee's Report on Practice and Procedure in Defamation (July 1991) described the presumption as 'quite unrealistic and curiously egocentric in the post-imperial age'.

140. In my judgment the position is as follows:

(a) Although it is open to criticism and subject to exceptions, a court of first instance cannot ignore the rule[57] that, in the absence of evidence, foreign law is presumed to be the same as English law.

(b) On the other hand, I consider that the decision in *University of Glasgow and another v. The Economist and another* is of doubtful continuing authority. The case was decided in 1990 (and reported at [1997] EMLR 495) under the old pleading rules in Order 18. I am doubtful whether the practices of libel pleading should be applied more widely; not least because the double-actionability rule still applies to defamation proceedings.

(c) It is not consonant with the overriding objective of the Civil Procedure Rules, in a case where the 1995 Act applies, for a party either to decline to plead the relevant provisions of the applicable law or to rely on a presumption that a foreign law is the same as English law. Such an approach is evasive. There may of course be an issue as

[57] It has existed since at least the decisions in *Dynamit AG v. Rio Tinto Co* [1918] AC 260, 301 and *The Parchim* [1918] AC 157,161.

to which particular law applies, but that is a different matter. The 'parochial' approach, which 'presupposes that it is inherently just for the rules of the English domestic law of tort to be indiscriminately applied regardless of the foreign character of the circumstances and the parties', is precisely the mischief which the Law Commission sought to remedy, and which was remedied by the 1995 Act, see per Brooke LJ (with whom May and Rix LJJ agreed) in *R (Al-Jedda) v Secretary of State of Defence* [2007] QB 621 at [103], in a judgment which was upheld by the House of Lords ([2008] 1 AC 332).

141. Mr Hermer also referred to what he described as his 'trump card': *PT Pan Indonesia Bank Ltd TBK v. Marconi Communications International Ltd* [2005] EWCA Civ 422. This was a case about service out under CPR 6.20, where the Defendants sought to set aside various orders on the basis (among others) that as a matter of Indonesian law, 'as to which there was some evidence', three of the grounds for service out were held not to be sustainable. At [70] the Court said,

> It will often be the case that the material provided as to the foreign law will be of an incomplete or provisional nature unsupported by detailed authority or by materials of the weight or complexity suitable to a final disposal, but nonetheless sufficient to satisfy the court that an arguable defence or other relevant issue has been established for the purposes of a decision at that stage of the proceedings. Nonetheless, the party who asserts that the application of foreign law would provide a different result bears the burden of satisfying the court that that is so. If the evidence proffered is of such incomplete, inconsistent or unconvincing character that it is sufficient for its purpose, it is not necessary for the opposing party to adduce its own contradictory evidence from an expert.

142. This observation was plainly not part of the reasoning (see [69]); but even if it had been, it is of little assistance to the Claimants since no foreign law has been advanced in the present case; and the decision is certainly no support for the proposition that the parties in the present case are entitled to proceed on an unreal basis either that English law applies, or that English law is the same as the applicable foreign law.

143. The Defendants plead in §28 of the Defence of the 3rd to 7th Defendant, 'It is unclear whether the Claimants contend that their detention (in Beijing by Chinese officials, in Kuala Lumpur by Malaysian officials and in Bangkok by Thai authorities) was unlawful'. The Claimants' failure to plead the applicable law of the torts, taken with Mr Hermer's concession that the detention in China and Malaysia may have been lawful, presents the Claimants with a difficulty in answering the question: on what basis can it be said that the detention, which forms one of the bases of the claim, is unlawful?

144. Subject to the right to rely on s.14 of the 1995 Act, I would have concluded that the applicable law for determining the Claimants' causes of action is as set out in §74 of the Defendants' skeleton argument.

Conclusion on the act of state doctrine

145. There was clear evidence that the determination of this claim has the potential to jeopardise this country's international relations and national security interests. So far as international relations are concerned, this arises primarily from the perception that a forensic investigation of what occurred within the territory of a foreign state is an illegitimate interference with that state's internal affairs. The concern about national security was directed primarily to the sensitivity of any investigation into the conduct of those said to be acting on behalf of the United States outside the jurisdiction of the United States.

146. Apart from the claim in negligence, the causes of action depend upon allegations that agents or officials of foreign states acted tortiously. In relation to the acts alleged to have been carried out by officials of China, Malaysia, Thailand and Libya in those countries, I have concluded that the act of state doctrine applies and such claims are non-justiciable. The claims (a) call into question the activity of a foreign state on its own territory; (b) without reference to any 'judicial or manageable', or 'clear and identifiable' standards by which such acts may be judged; and (c) relate to the legal validity of those acts within the states' own territory. Mr Hermer implicitly acknowledged these difficulties when he accepted that the Claimants would be in difficulties in these parts of their claim if their detention could not be shown to be unlawful by the laws of those countries. As I have already concluded, the Claimants cannot avoid this difficulty by declining to plead the foreign laws which apply to their alleged detention. Once it is clear that the Court is being asked (for example) to judge the actions of the Chinese State by the standards of Chinese law, it is apparent how difficult and inappropriate the Court's task would be.

147. These objections do not arise (at least not as starkly) in relation to the claims based on what is alleged to have occurred at the 'black site' in Thailand and subsequently in transit to Libya. The acts did not take place in the sovereign territory of the United States; the public policy exception potentially applies 'where there is a grave infringement of human rights',[58] or 'serious breaches of ... inviolable human rights';[59] and I am doubtful whether a validity issue arises.

148. An important question then is whether there are judicial or manageable standards by which to judge the conduct in question? The Defendants are not themselves implicated in the use of torture, which enjoys the enhanced status of a *jus cogens* or peremptory norm of International law, which may be regarded for the purposes of the act of state doctrine, if not the state immunity doctrine, as the subject of universal jurisdiction, and from which no derogation is permitted. However, Mr Hermer referred to the decision of the ECtHR in *El-Masri v. Former Yugoslav Republic of Macedonia* (2013) 57 EHRR, where there was an allegation of breaches of Article 3 of the ECHR by reason of the respondent state's involvement in torture at, and rendition by US authorities from, Skopje. The Court held[60] unanimously:

> (5)... the respondent state was responsible for the ill-treatment to which the applicant was subjected at Skopje Airport and that such treatment was classified as torture within the meaning of article 3;

[58] *Yukos* at [69] see above.
[59] *Habib* at [131] see above.
[60] At H1 of the report.

> (6) that the responsibility of the respondent state was engaged with regard to the applicant's transfer into the custody of the US authorities despite the real risk that he would be subjected to further treatment contrary to article 3 ...

149. There are two points of distinction between *El-Masri* and the present case. First, no claim under Article 3 is made against the Defendants. Secondly, the ECtHR's findings were predicated upon proof of the facts 'beyond reasonable doubt', [61] which is not a test which can be satisfied on the basis of pleadings whose content is either not admitted or denied.

150. I have concluded, with hesitation, that the Defendants are correct in their submission that the case pleaded against them depends on the Court having to decide that the conduct of US officials acting outside the United States was unlawful, in circumstances where there are no clear and incontrovertible standards for doing so and where there is incontestable evidence that such an enquiry would be damaging to the national interest. The most recent and authoritative decision, *Rahmatullah*, makes clear at [53] and [70] that this is something that the domestic court should not do.

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

Summary

152. Nevertheless, it follows from the above that I have concluded that:

(1) although the state immunity doctrine does not operate as a bar to the claim,

(2) the act of state doctrine does operate as a bar to the claim; and accordingly,

(3) the claims should be struck out on the basis that they are non-justiciable, save to the extent that they rely on allegations of negligence.

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[61] See [151].