More than “a matter of speculation”

The Limited Application of the Foreign Act of State Doctrine

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Title quote from: FA Mann *Foreign Affairs in English Courts* (Claredon Press, Oxford, 1986) at 164

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Introduction

Analysis of Rahmatullah v The Ministry of Defence

This dissertation will be based around the discussion of the foreign act of state doctrine by Leggatt J in the United Kingdom (UK) High Court case of *Rahmatullah v The Ministry of Defence.*[1] This case involved a Pakistani citizen, Mr Yunus Rahmatullah, who was detained in February 2004 by British forces in Iraq. He was then transferred into the custody of US forces and detained in Bagram Airbase in Afghanistan for 10 years without charge or trial.

Mr Rahmatullah alleges that while in detention he was subjected to torture and other serious mistreatment including severe assaults, incommunicado detention, exposure to extreme temperatures and sounds, tear gas, long periods of darkness, being placed in a tiny 'air lock' cell, being kept naked with other detainees, being beaten on the soles of his feet with rubber flex, and being immersed upside down in tanks of water.[2]

Once released Mr Rahmatullah brought a civil claim for damages against the Ministry of Defence and the Foreign and Commonwealth Office. These claims were brought under the law of tort and the Human Rights Act 1998 (UK).[3] The *Rahmatullah* decision, which forms the basis of this dissertation, was a hearing of preliminary issues including whether the claim could be barred by the foreign act of state doctrine.[4] The defendants submitted that the foreign act of state doctrine precludes an English court from making findings that agents of a friendly foreign state committed acts which were unlawful and that, since the relevant claims that the defendants were complicit in torture and other tortious acts could not succeed without such findings,

[1] *Rahmatullah v The Ministry of Defence* [2014] EWHC 3864 (QB).
[2] At [1].
[3] At [5].
[4] At [7].

the foreign act of state doctrine prevents the court from considering these claims against the defendants.[5]

This dissertation will consider the function and scope of the foreign act of state doctrine in order to determine whether it can be applied to prevent the court from considering these types of claims. It will be argued that this is not the role of the foreign act of state doctrine, and it should not prevent cases questioning the acts of foreign executives, such as *Rahmatullah,* from being heard.

A. Functions of the foreign act of state doctrine

Leggatt J began by noting the confusion in this doctrine. It has been described by FA Mann as "one of the most difficult and perplexing topics which, in the field of foreign affairs, may face the municipal judge in England".[6] Mann further stated: [7]

> The doctrine of the foreign act of state displays in every respect such uncertainty and confusion and rests on so slippery a basis that its application becomes a matter of speculation.

This confusion has also been expressed by the House of Lords in *Pinochet (No 1)*.[8] Lord Slynn noted "the divergent views expressed as to what is covered by the Act of State doctrine".[9] Lord Lloyd stated "Act of State is a confusing term. It is used in different senses in many different contexts."[10] Lord Nicholls refers to the foreign act of state doctrine as "a common law principle of uncertain application".[11]

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[5] At [96].
[6] FA Mann *Foreign Affairs in English Courts* (Claredon Press, Oxford, 1986) at 164.
[7] *Rahmatullah,* above n 1, at [97].
[8] *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No 1)* [2000] 1 AC 61; [1998] 3 WLR 1456; [1998] 4 All ER 897 (HL).
[9] At 86.
[10] At 90.
[11] At 106.

Leggatt J began his analysis by citing the classic statement of the foreign act of state doctrine from *Underhill v Hernandez*:[12]

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not *sit in judgment* on the acts of the government of another done within its own territory.

His Honour continued, citing from *Oetjen v Central Leather Co*:[13]

> To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations'.

Leggatt J notes that this statement is sweepingly wide and also ambiguous.[14] It is unclear what is meant by "sitting in judgment" on the act of a foreign state. His Honour thought it would be useful to distinguish between the three different senses in which that phrase can be understood.[15]

The first sense in which a court could "sit in judgment" is by asserting jurisdiction over the foreign state in relation to the act in question. An example of this would be hearing a cause of action against a foreign sovereign.[16] Leggatt J noted that in so far as the foreign act of state doctrine applies in this manner it adds nothing to the doctrine of state immunity.[17]

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[12] *Underhill v Hernandez* (1897) 168 US 250 at 252, 18 S Ct 83, 42 L Ed 45; cited in *Rahmatullah*, above n 1, at [98] (emphasis added).
[13] *Oetjen v Central Leather Co* (1918) 246 US 297 at 303; cited in *Rahmatullah,* above n 1, at [98].
[14] *Rahmatullah*, above n 1, at [99].
[15] At [99].
[16] At [100].
[17] At [102].

The second sense in which a court could "sit in judgment" is by refusing to recognise a foreign states laws.[18] There are three components to this, each relating to a different arm of the government. Applied to the legislature this would require the forum court to apply foreign legislation if it is determined to be the applicable law based on choice of law rules.[19] An example of this would be if a claimant was injured in New Zealand and, now living in New South Wales, wanted to bring a cause of action in negligence against the defendant. If New Zealand law applied then the claim would be barred by ACC.[20] If New South Wales law was applied then the claim could proceed. The New South Wales court would apply their choice of law rule, being the *lex loci delicti* in tort cases. This would determine that New Zealand law is the applicable law.[21] If the New South Wales court then proceeded to apply their law this would be seen to be "sitting in judgment" of New Zealand's legislature.

The same idea is applied to foreign courts. In this sense it requires the forum court to give effect to foreign judgments.[22] While foreign judgments have no direct operation in New Zealand, they can be enforced at common law or under statute,[23] this allows the successful party to have their foreign judgment enforced in the forum. The reason for this would usually be that the defendant has assets in that country. If the forum court did not enforce a foreign judgment, when its conflict of laws rules indicated it should, this too would be seen as sitting in judgment of the foreign court.

Leggatt J recognised that there are more specific conflict of laws principles that govern each of these situations.[24] Therefore, the foreign act of state doctrine adds nothing to either of these situations and should not be applied. This also applies to the foreign executive. Leggatt J was of the opinion that the operation of the foreign act of

[18] *Rahmatullah*, above n 1 at [103].
[19] At [103].
[20] Accident Compensation Act 2001, s 317.
[21] *Amaca Pty Ltd v Frost* (2006) 67 NSWLR 635 (CA).
[22] *Rahmatullah*, above n 1, at [110]; Lawrence Collins and others (eds) *Dicey, Morris and Collins on the Conflict of Laws* (15th ed, Sweet and Maxwell, London, 2012) at [14R-020], [14R-118] and [14R-152].
[23] See Reciprocal Enforcement of Judgments Act 1934.
[24] *Rahmatullah*, above n 1, at [105] and [110].

state doctrine to this third arm of the government may not be entirely exhausted by ordinary conflict of laws rules.[25] Understood in this way, the foreign act of state doctrine operates as a presumption that acts of a foreign executive done within the territory of that state are lawful under the laws of that state.[26]

The third sense which a court could "sit in judgment" is by "adjudicating upon the lawfulness, validity, effectiveness or wrongfulness of a foreign state's acts".[27] Understood in this way, this is not a rule that requires a court to treat an executive act as legally valid, it is a rule that prevents the courts from judging a case at all.[28]

Disregarding all functions of the doctrine which are fulfilled by other areas of the law this leaves two possible functions that the foreign act of state doctrine could fulfil. The first operates as a presumption that acts of an executive government are valid. This function will be referred to as a "rule of decision" as in order to decide the case it is presumed that acts of the foreign executive are lawful or valid.[29] The second is a rule preventing adjudication when it would require questioning actions of foreign government officials. This will be referred to as a "rule of judicial abstention" as it requires the court to abstain from hearing the case.[30]

Leggatt J concluded that the proper function of the foreign act of state doctrine is to operate as a rule of decision, a presumption that acts of a foreign executive are valid, and that there is no room for this doctrine as a rule of judicial abstention.[31] However, in *Rahmatullah* the "territoriality presumption" applied, the acts in question did not occur in the territory of the executive government performing them,[32] therefore the foreign act of state doctrine would not apply and Leggatt J's argument is really only

[25] At [111].
[26] At [113].
[27] At [116].
[28] At [116].
[29] At [123].
[30] At [123].
[31] At [171].
[32] See *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2014] QB 458 (CA), at [68].

obiter.[33] His Honour did not conclude that this applies in English law. This dissertation will build on Leggatt J's reasoning and consider whether it should be adopted in English law. The first chapter will consider whether there is any room for the doctrine as a rule of judicial abstention. The second chapter will consider the function and scope of the foreign act of state doctrine as a rule of decision.

B. Relevance to New Zealand Law

This dissertation will focus on the foreign act of state doctrine in English law. The reason for this is that the doctrine has only been considered in only a limited number of situations in New Zealand courts. As there is no authoritative guidance on how the foreign act of state doctrine applies in New Zealand law, English law would likely provide guidance as to how this would be applied if the issue arose.

New Zealand cases that have raised this foreign act of state doctrine argument include *Attorney General v Leason* which involved a civil action in trespass.[34] The defendants had broken in to the Waihopai spy base and damaged an antenna used for intercepting satellite communications.[35] While the defendants admitted they damaged the antenna,[36] they raised defences of necessity, self-defence or the defence of another, and public policy on the basis that the intercepted communications were causing harm to civilians in Iraq and Afghanistan.[37] The Court briefly mentioned the foreign act of state doctrine, only referring to it in one paragraph. It was relied on as authority for the point that it is "all but impossible for the defendants to argue as to the legality of actions of another state in the courts of this country".[38]

[33] Rahmatullah, above n 1, at [115].
[34] *Attorney General v Leason*, HC Wellington, CIV-2010-485-1940, 31 August 2011, at [2].
[35] At [5] – [12].
[36] At [2].
[37] At [24].
[38] At [134].

Another New Zealand case that considered the foreign act of state doctrine was *Fang v Zhang*. This involved a jurisdiction issue.[39] The plaintiffs claimed that if they were to bring a cause of action in China, where there were courts that could hear the claim,[40] there was a probability that they would be seriously victimised for doing so.[41] The Court considered Lord Wilberforce's principle of non-justiciability from *Buttes Gas*[42] when considering whether the Court may take into account that a claimant would be deprived of a fair trial in the foreign country.[43]

Attorney General for England and Wales v R is another New Zealand case that raise the foreign act of state issue. This involved an appeal by the British government against the refusal by Salmon J in the High Court to grant an injunction preventing R, a former member of the UK Special Forces, from publishing a book about events in which he was involved in the Gulf War in 1991.[44] There was an issue as to whether there was a contractual relationship between the UK government and R which required confidentiality. McGrath J considered the application of the foreign act of state doctrine. His Honour noted the uncertainty surrounding the function of this doctrine. Neither counsel raised the issue of whether this operated as a rule of abstention so the court did not hear arguments on this.[45] Therefore, his Honour regarded it "undesirable to endeavour to explore any further the limits of the foreign act of state doctrine under the common law of New Zealand in the present context."[46]

In *Peters v Davison* an issue arose as to whether a New Zealand tribunal can inquire into the validity of a Cook Islands tax.[47] The Commission of Inquiry was of the opinion that it was barred by the foreign act of state doctrine from considering the

[39] *Fang v Jiang*, HC Auckland, CIV-2004-404-5843, 17 June 2005, at [6].
[40] At [6].
[41] At [6] and [7].
[42] *Buttes Gas v Hammer (No 3)* [1982] AC 888; (1981) 64 ILR 331; and *Fang, above n 39,* at [33].
[43] Fang, above n 39 at [21] – [35].
[44] *Attorney General for England and Wales v* R [2002] NZLR 91, at [1].
[45] At [138].
[46] At [139].
[47] *Peters v Davison* [1999] 3 NZLR 744, (1999) 19 NZTC 15, at [19].

validity of a Cook Islands tax.[48] On appeal, the High Court held that the Commission had erred in law in deciding that the foreign act of state doctrine prevented an inquiry into the tax arrangements. The Commission was obliged to consider these issues.[49]

Finally, *Air New Zealand v Director of Civil Aviation* considered the foreign act of state doctrine in New Zealand law. This case involved a plane that had been registered in India. The issue was whether the Indian registration should be disregarded as a nullity because it was contrary to Indian law. This would then allow the plane to be registered in New Zealand.[50] It was argued that the registration of the plane in India is an act of state of the Indian government and is immune from consideration in the New Zealand courts.[51] The Court refused to hear the claim.[52] This was due to a range of public policy considerations including state immunity, non-justiciability, act of state and judicial abstention.[53]

In all of these situations the court has briefly considered the foreign act of state doctrine, and the principle of judicial restraint or abstention from *Buttes Gas*. This dissertation will consider the function and scope of the foreign act of state doctrine, which would help New Zealand courts to interpret English authorities such as *Buttes Gas* when these situations arise in the future.

There is also the possibility of allegations similar to that in *Rahmatullah* arising against the New Zealand government when NZ's military forces are involved in foreign wars. An example of this type of situation arose in Afghanistan. There had been allegations that that detainees captured during joint operations between the NZ Special Air Services (SAS) and the Afghanistan Crisis Response Unit have been

[48] At [20].
[49] At [39].
[50] *Air New Zealand Limited v Director of Civil Aviation* [2002] 3 NZLR 796 at [2] and [3].
[51] At [2].
[52] At [66].
[53] At [48].

transferred to the National Directorate of Security (NDS). [54] Patrick Holmes, CEO of Amnesty International Aotearoa New Zealand explained the issue with the NDS:[55]

> Afghanistan's intelligence service, the NDS, has demonstrated a persistent pattern of human rights violations perpetrated with impunity. Dozens of NDS detainees, some arrested arbitrarily and detained incommunicado without access to defence lawyers, families, courts or other outside bodies, have been subjected to torture and other ill-treatment, including being whipped, exposed to extreme cold and deprived of food.

New Zealand had committed to investigating the role of the NZ SAS in the handling of prisoners in Afghanistan and release the findings of reports and legal advice sought in the process.[56] This nevertheless provides an example of how a *Rahmatullah* like scenario could arise in New Zealand.[57] If the NZ SAS captured a detainee and handed them over to the NDS, where they were illegally detained or tortured, it could be possible for this person to bring a cause of action against the New Zealand government if secondary liability could be established.

[54] Amnesty International "Amnesty welcomes Defence Minister's investigation into NZSAS allegations" (17 August 2010) Amnesty International New Zealand <www.amnesty.org.nz>.
[55] Amnesty International, above n 54.
[56] Amnesty International, above n 54.
[57] See also *Habib v Commonwealth* [2010] FCAFC 12 this provides an example of a similar issue occurring in Australian courts.

Chapter 1

Does the foreign act of state doctrine apply as a rule of judicial abstention?

In *Rahmatullah* Leggatt J considered all the possible functions of the foreign act of state doctrine. His Honour narrowed the doctrine down to only two possible remaining functions; a rule of decision or a rule of judicial abstention. His Honour then concluded that the doctrine does not apply as a rule of judicial abstention. This means the only remaining function of the doctrine is to operate as a rule of decision. This chapter intends to build on his Honour's reasoning. It will adopt the principal steps in Leggatt J's argument and will then expand on these. It will first consider what the difference is between these two possible functions of the foreign act of state doctrine; whether the doctrine as a rule of judicial abstention falls within the principle of non-justiciability; what this means for the scope of the rule of abstention; and whether there is any reason for the rule of abstention to be applied separate to the principle of non-justiciability.

A. Distinction between the foreign act of state doctrine as a rule of decision and as a rule of judicial abstention

Traditionally the foreign act of state doctrine has been applied as a rule of decision,[58] operating as a presumption that acts of the executive government of a foreign state done within the territory of that state are lawful under the laws of that state.[59] Following *Buttes Gas*[60] there has been case law to suggest that the foreign act of state doctrine also performs a separate function, operating as a rule of judicial abstention. [61]

[58] *Rahmatullah*, above n 1, at [123].
[59] *Rahmatullah*, above n 1, at [113].
[60] *Buttes Gas*, above n 42.
[61] See *Yukos Capital Sarl*, above n 32, at [66]; see *Belhaj and Boudchar v The Right Honourable Jack Straw, Sir Mark Allen (CMG) and others* [2014] EWCA Civ 1394.

Understood in this way, the foreign act of state doctrine is not a rule that requires the court to decide a case before it by treating an act of a foreign state as legally valid; it is a rule that prevents the court from judging the case at all.[62]

The importance of this distinction lies in the fact that the foreign act of state doctrine applied as a rule of judicial abstention would prevent the court from hearing claims that it otherwise would have jurisdiction to hear, on the grounds that it questions the actions of foreign officials. *Belhaj* provides a good example of this. In this case, the claimant alleged that he was arbitrarily detained, and tortured, by officials of various foreign governments. He brought a cause of action against the UK government alleging that UK officials were complicit in this torture.[63] If the public policy exception had not been applied the doctrine as a rule of judicial abstention would have applied, as it would require the court to question actions of foreign officials. The rule would have applied to bar the claim from being heard. This would leave the claimant with no available remedy.

An example will be helpful to demonstrate the difference between the two functions of the foreign act of state doctrine. In *Luther v Sagor,* the Russian government seized property from the plaintiff company, which was incorporated in Russia, and sold the property to the defendant, a company in England. The issue in this case was which company owned the property.[64] If the foreign act of state doctrine were applied as a rule of decision, this would mean that the actions of the Russian government would be presumed to be valid, and the property would belong to the English company it was sold to. If the doctrine were applied as a rule of judicial abstention then this would mean the English courts could not hear the case at all. The court applied the foreign act of state doctrine as a rule of decision and presumed that the confiscation of the property was lawful under Russian law, and therefore title belonged to the defendant company.[65]

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[62] *Rahmatullah*, above n 1, at [116].
[63] *Belhaj*, above n 61, at [2] – [6].
[64] *Aksionairnoye Obschestvo Dlia Mechanicheskoyi Obrabotky Diereva AM Luther v James Sagor and Company* [1921] 3 KB 532 (*Luther)*, at 532 – 534.
[65] At 544.

It is important to determine what function the foreign act of state doctrine actually fulfils, this would remove the confusion and lack of certainty that has for a long time surrounded this doctrine.[66] F.A. Mann illustrates this point in his text *Foreign Affairs in English Courts* written in 1986: "the doctrine of the foreign act of state displays in every respect such uncertainty and confusion and rests on so slippery a basis that its application becomes a matter of speculation".[67] In order to remove this confusion it is necessary to clarify what functions the doctrine fulfils.

There is a further reason why it is important to understand the respective scope of these functions. The rule of decision and rule of judicial abstention, due to the results they achieve, are necessarily exclusive of one another. The rule of decision applies to assume that foreign executive acts are valid under that country's law. The rule of judicial abstention applies to prevent a foreign court from hearing a claim that questions foreign executive acts. If the rule of judicial abstention prevents a claim from being heard, the rule of decision cannot then assume the act is valid. These lead to opposite results, even though the substantive outcome of the case may be the same. Therefore it must be considered when and if each of these functions is applied.

B. Foreign act of state doctrine as a rule of judicial abstention

The House of Lords decision of *Buttes Gas Oil Co v Hammer* is often seen as authority for the proposition that the foreign act of state doctrine applies as a rule of judicial abstention.[68] This case involved a dispute between two oil companies, Buttes Gas and Oil Co and Occidental Petroleum Corporation, over concessions granted to Buttes for the exploitation of oil reserves near an island called Abu Musa in the Arabian Gulf. This island was located offshore from two neighbouring Arab emirates, Sharjah and Umm al Qaiwann (UAQ). UAQ had granted exclusive

[66] Campbell McLachlan *Foreign Relations Law* (Cambridge University Press, Cambridge, 2014), at 12.127.
[67] Mann, above n 6, at 164.
[68] *Buttes,* above n 42, at 931.

concessions of the oil rights to Occidental Petroleum, and Sharjah had granted the same to Buttes Gas.[69] The issue in this case therefore revolved around which territory Abu Musa belonged to. [70]

In discussing this issue Lord Wilberforce first described the traditional foreign act of state doctrine as: [71]

> … consist[ing] of those cases, which are concerned with the applicability of foreign municipal legislation within its own territory, and with the examinability of such legislation – often but not invariably, arising in cases of confiscation.

The examples provided of this were *Luther v Sagor*[72] and *Princess Paley Olga v Weisz.*[73] Both of these cases involved confiscation of property by the Russian government. The issue was to whom title to the property belonged. In order to decide this issue the English court would need to consider the lawfulness of the confiscation. In both cases the Russian government had passed a decree allowing the confiscation of this property.[74] The foreign act of state doctrine applied in these cases to presume that the actions of the Russian government in confiscating property were lawful under the country's laws. These are the cases that established the application of the foreign act of state doctrine as a rule of decision.

Lord Wilberforce then expressed a separate principle that the courts will not adjudicate upon the transactions of foreign sovereign states.[75] Lord Wilberforce thought this fell within a more general principle of non-justiciability.[76] His Honour stated that it was "desirable to consider this principle … not as a variety of act of state

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[69] At 919 – 921.
[70] McLachlan, above n 66, at [12.173].
[71] *Buttes Gas*, above n 42, at 931.
[72] *Luther*, above n 64.
[73] *Princess Paley Olga v Weisz* [1929] 1 KB 718 (CA).
[74] *Luther,* above n 64, at 533; *Princess Paley Olga*, above n 71, at 722.
[75] *Buttes Gas*, above n 42, at 931.
[76] *Buttes Gas*, above n 42, at 933.

but one for judicial restraint or abstention."[77] In Lord Wilberforce's opinion there is, and has for a long time, been a rule of this sort in English and American law.[78] The House of Lords applied this general principle in *Buttes Gas* and refused to hear the case. The issues in this case involved the interpretation of an interstate agreement, conduct of foreign states, and the intention of the Ruler of Sharjah.[79] These were not justiciable issues.

Campbell McLachlan in *Foreign Relations Law* has described the ratio of this case as:[80]

> Where the central issue in the case necessarily requires the determination of a dispute between sovereign states as to their rights and obligations under public international law, the proceedings before the municipal court may not proceed.

The issue here was how sovereign states resolved a dispute between them. McLachlan is of the opinion that this is an issue that must be determined on the international plane.[81] This is also political, because it is questioning the way in which foreign sovereigns interact with one another.

Lord Wilberforce relied on a line of cases to define this general principle of non-justiciability.[82] These cases have traditionally been used to define the foreign act of state doctrine, particularly *Underhill v Hernandez,* which is seen as the founding case of the foreign act of state doctrine.[83]

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[77] *Buttes Gas*, above n 42, at 931.
[78] *Buttes Gas,* above n 42, at 932.
[79] *Buttes Gas*, above n 42, at 937.
[80] McLachlan, above n 66, at [12.177].
[81] McLachlan, above n 66, at [12.128].
[82] *Buttes Gas*, above n 42, at 932 – 934.
[83] See *Rahmatullah*, above n 1, at [98].

The English cases Lord Wilberforce relied on were *Blad v Bamfield*[84] and *Duke of Brunswich v King of Hanover*.[85] Though neither case referred to the foreign act of state doctrine directly the rationale behind these has been picked up by the US cases and named the foreign act of state doctrine. *Blad v Bamfield* involved the seizure of property of a British subject in Iceland.[86] *Duke of Brunswich v King of Hanover* involved an allegation by the Duke of Brunswich that the King of Hanover was involved in his removal as Duke.[87] Both of these cases were clear examples of a rule of abstention being applied to prevent the case from being heard. Lord Wilberforce relied on these as supporting the existence of a principle of non-justiciability in English law. [88]

Lord Wilberforce then turned to a discussion of the US cases, which adopted this principle. His Honour first considered *Underhill v Hernandez*. This case involved an action brought against Hernandez, a general of the Venezuelan army. This action was brought against him in the US courts for loss caused by the refusal to grant a passport to Underhill, an American citizen who had been contracted by the government to construct a waterworks system.[89] The Court refused to grant relief on the grounds that the actions of the defendant were those of a military commander, representing the government, so he could not be civilly responsible for these. The acts of the defendant were the acts of the government of Venezuela and were not properly the subject of adjudication in the courts of the government of another state.[90]

Lord Wilberforce then considered *Oetjen v Central Leather* this case involved confiscation of property by the Mexican government. [91] While it appears as though this case is very similar to *Luther v Sagor* or *Princess Paley Olga v Weisz*, there is an important distinction here. Unlike in *Luther* and *Princess Paley Olga*, the Mexican

[84] *Blad v Bamfield* (1674) 3 Swan 604.
[85] *Duke of Brunswich v King of Hanover* (1844) 6 Beav 1; (1848) 2 HL Cas 1.
[86] *Blad*, above n 84, at 607.
[87] *Duke of Brunswich*, above n 85, at 2.
[88] *Buttes Gas*, above n 42, at 933.
[89] *Underhill*, above n 12, at 251.
[90] *Underhill v Hernandez* 26 US App 573, 13 CCA 51, and 65 Fed 577 (Circuit Court) as approved by the Supreme Court in *Underhill*, above n 12, at 253.
[91] *Oetjen*, above n 13, at 304.

government in *Oetjen* did not pass any form of decree or regulation allowing the property to be confiscated.[92] It is only the act of confiscation that is being questioned, rather than the validity of a decree authorising this. The United States Supreme Court in *Oetjen* applied the dicta from *Underhill v Hernandez* and refused to hear the case as it would involve questioning the acts of a foreign executive.[93]

The third case his Honour considered was *Banco Nacional de Cuba v Sabbatino.*[94] This case involved the expropriation of property by the Cuban government.[95] The foreign act of state doctrine was applied as a rule of abstention, shown in that the court refused to hear the claim.[96] However, the Court recognised that a rule of decision also existed, and the same result could have been achieved by applying a rule of decision.[97] It was clear that the Court was of the opinion that they were applying a rule of abstention.

These cases demonstrate that the foreign act of state doctrine has been applied to prevent courts from hearing a claim. However, Lord Wilberforce was of the opinion that these should actually be classified as part of the principle of non-justiciability. Essentially whether these cases are referred to as part of the foreign act of state doctrine, or an instance of the more general principle of non-justiciability is a matter of terminology.[98] In substance, the function remains the same, which is to prevent adjudication of issues which are rightly resolved on the international plane.

In summary, Lord Wilberforce in *Buttes Gas* distinguished between the foreign act of state doctrine as a rule of decision, and a separate principle, which his Honour preferred to describe as a more general rule of judicial restraint or abstention. In defining the scope of this general principle, Lord Wilberforce relied on cases that had

[92] *Oetjen*, above n 13, at 300 – 301.
[93] *Oetjen*, above n 13, at 303.
[94] *Banco Nacional de Cuba v Sabbatino* (1964) 376 US 398 (*Sabbatino*).
[95] At 399.
[96] At 439.
[97] At 427 – 428.
[98] *Buttes Gas*, above n 42, at 931.

applied the foreign act of state doctrine as a rule of judicial abstention. His Honour has showed that in substance this is the same principle being applied in each of these situations. Lord Wilberforce was of the opinion that it was preferable to deal with this under the general principle of non-justiciability.

C. If it is accepted that the foreign act of state doctrine as a rule of judicial abstention falls within the principle of non-justiciability, what does this mean for the scope of the doctrine as a rule of abstention?

Campbell McLachlan described the ratio from *Buttes Gas* as; where the central issue of a case requires determination of a dispute between sovereign states as to their rights and obligations under public international law, the forum court cannot hear the proceedings.[99] There are very few situations in which this would actually apply. Therefore the doctrine as a rule of judicial abstention is very limited in scope. It must be considered whether there are other situations where the foreign act of state doctrine could apply as a rule of abstention. This necessitates a consideration of the principle of non-justiciability because in substance the function of the rule of judicial abstention is encompassed within non-justiciability.

The recent Supreme Court decision of *Shergill v Khaira* has authoritatively considered the scope of the principle of non-justiciability. The issue in this case was not one that related to the foreign act of state doctrine. Instead it was concerned with the ability of the court to decide religious issues in order to resolve a trust case.[100] However, it contains powerful and authoritative analysis of Lord Wilberforce's decision in *Buttes Gas.*[101]

[99] McLachlan, above n 66, at [12.177].
[100] *Shergill v Khaira* [2014] 3 WLR 1, at [1].
[101] See *Rahmatullah*, above n 1, at [135].

The Supreme Court defined non-justiciability as referring to cases that were "inherently unsuitable for judicial determination by reason only of their subject matter".[102] Such cases were said to generally fall into one of the following categories:

1. Where the question in issue is beyond the constitutional competence assigned to the courts via separation of powers. *Prebble v TVNZ* provides an example of the limits as against Parliament, a similar limit applies as against the executive. [103]

2. Claims or defences, which are based neither on private legal rights or obligations, nor on reviewable matters of public law. Examples include domestic disputes, transactions not intended by the participants to affect their legal relations, and issues of international law, which engage no private right of the claimant or reviewable question of public law. In some cases these issues will nevertheless be resolved if it is incidental to a cause of action that is otherwise justiciable.

The Supreme Court in *Shergill v Khaira* identified the issue in *Buttes Gas* as arising out of the way that four states settled an issue of international law, about the boundary of the territory of three states, by a mixture of diplomacy, political pressure, and force. [104] The decision was adverse to the interests of Occidental Petroleum. Occidental wished to obtain a judgment that the decision had been the result of an unlawful conspiracy. To determine the issue would involve assessing decisions and acts of sovereign states that had not been governed by law but by power politics. [105] The Court focused on the same points as Campbell McLachlan, that this is really an issue that should be resolved on the international plane.

[102] *Shergill,* above n 100, at [41].
[103] *Prebble v Television New Zealand Ltd* [1995] 1 AC 321.
[104] Shergill, above n 100, at [38].
[105] At [40].

The Court was not of the opinion that this issue was non-justiciable because it raised issues of international law. It noted that Lord Wilberforce "was himself an international lawyer of some distinction" and "he points out … that English courts had on a number of occasions decided issues about the international boundaries of sovereign states "without difficulty"."[106] The issue was non-justiciable because it was political. [107] The Court stated: [108]

> [The issue] was political for two reasons. One was that it trespassed on the proper province of the executive, as the organ of state charged with the conduct of foreign relations. The lack of judicial or manageable standards was the other reason why it was political.

Campbell McLachlan described the issue in *Buttes Gas* as a dispute between sovereign states that must be resolved on the international plane.[109] McLachlan is not to be interpreted as saying that it could not be heard because it raises issues of international law. He is saying that the issue here is how sovereign states have dealt with international law issues, the problem with this is that it is political; it is questioning the way in which sovereign states have conducted their international relations.

The result of this is that instances where a claim may be non-justiciable because it involves a foreign act of state are quite limited and well defined. Following *Buttes Gas* this applies where the central issue the forum court must decide requires determination of a dispute between sovereign states as to their rights and obligations under public international law.[110] This issue is political as it requires an assessment of how sovereign states conduct relations with one another.

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[106] At [40]; See also *Foster v Globe Venture Syndicate F Ltd* [1900] 1 Ch 811; 82 LT 253 and *Duff Development Co Ltd v Government of* Kelantan [1924] AC 797 cited at *Buttes Gas*, above n 42, at 926.
[107] At [40].
[108] At [40].
[109] McLachlan, above n 66, at [12.177].
[110] At [12.177].

It is submitted that the underlying rationale or principle of this doctrine appears to be the allocation of jurisdiction or competence based on the subject matter of the claim, in two different senses. The first is the allocation of competence between the different branches of the government as emphasised in *Shergill v Khaira*. This is concerned with the respective powers of the executive, judiciary and Parliament. The second is the allocation of jurisdiction between the forum court and the international plane, and in some situations a foreign court. [111]

This means that the scope of the foreign act of state doctrine, based on the principle enunciated in *Buttes Gas* and the definition of non-justiciability in *Shergill v Khaira,* is very narrow. The doctrine is limited to situations where the claim raises a non-incidental issue that requires resolution on the international plane, or potentially in a foreign court, because it concerns transactions between sovereign states.

In a *Rahmatullah* type scenario the claimant is asking the UK court to find that the US government tortured them, in order to establish a cause of action against the UK government. It is unlikely that this issue would be one that requires determination on the international plane or in a foreign court as it does not concern transactions between sovereign states. Even if it did come under this doctrine, it is an issue that is incidental to resolving another justiciable issue and so could be heard regardless.[112]

D. Does the foreign act of state doctrine, as a rule of abstention, fall outside the principle of non-justiciability as defined in *Shergill*?

Thus far it has been presumed that the foreign act of state doctrine as a rule of decision does fit within the principle of non-justiciability. However, it is necessary to consider whether there have been cases following *Buttes Gas* where the foreign act

[111] McLachlan, above n 66, at [12.128].
[112] *Shergill*, above n 100, at [43].

of state doctrine has been relied on as a rule of judicial abstention to exclude a claim that would have otherwise been justiciable as defined in *Shergill v Khaira.*

1. Cases following Buttes Gas

The Court of Appeal in *Yukos Capital Sarl* suggested that the foreign act of state doctrine goes beyond the ratio in *Buttes Gas*. The Court stated "The various formulations of the paradigm principle are apparently wide, and prevent adjudication on the validity, legality, lawfulness, acceptability, or motives of state actors."[113] This is a much wider formulation of the rule than what was held in *Buttes Gas*. The Court also suggested that the doctrine serves a different and wider rationale than in *Shergill* in which the rationale related to the allocation of jurisdiction or competence. The Court stated: [114]

> 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.

This shows that the Court had a significantly different understanding of non-justiciability than the Supreme Court in *Shergill v Khaira.* This led the Court of Appeal to the conclusion that the principle enunciated by Lord Wilberforce in *Buttes Gas* had not come through as a separate principle, but had subsumed the traditional foreign act of state doctrine. [115] It is clear that the Court of Appeal in *Yukos Capital Sarl* had a very different opinion on both the definition and rationale behind the foreign act of state doctrine as a rule of judicial abstention. This led them to the conclusion that this performed a separate wider function than the principle of non-justiciability.

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[113] *Yukos*, above n 32, at [66].
[114] At [66].
[115] At [66].

Yukos Capital Sarl is not directly relevant to foreign act of state doctrine; it was concerned with the enforcement of foreign judgments and whether these can be questioned when there have been allegations that the court hearing the case was not independent. [116] However, the reasoning does remain important, as it has been picked up in the later Court of Appeal decision in *Belhaj*.[117] *Belhaj* was heard at the same time as *Rahmatullah* and has similar facts, so it is important in this context.

In *Belhaj* the Court of Appeal never explicitly states that it was applying the foreign act of state doctrine as a rule of judicial abstention. However, its description of the crucial issue makes it clear it is applying the rule in this manner: [118]

> … lying in an area beyond immunity but where, nevertheless, considerations concerning foreign states and their agents are sometimes capable of preventing adjudication by municipal courts. In this jurisdiction "act of state" is used in different contexts with different meanings. However, here it is used in connection with the executive and legislative acts of foreign states to describe a rule, which has been developed in Anglo-American jurisprudence limiting the jurisdiction of the courts to entertain an action.

The court adopted the description of the doctrine from *Yukos* and applied the foreign act of state doctrine as a rule of judicial abstention. On the facts of *Belhaj*, a claim was brought against the UK government for their involvement in the unlawful detention and torture of the claimant. In order to establish that the UK government had secondary liability, [119] it needed to be shown that the foreign governments had

[116] At [1] – [11].
[117] *Belhaj*, above n 61, at [68].
[118] *Belhaj*, above n 61, at [51].
[119] English law recognises a principle of joint liability where two or more people have acted in furtherance of a common design. In order to establish this three criteria are required (1) a tortious act done by one person (the perpetrator); (2) a common design in the sense of an agreement between the perpetrator and other person (the participator) that the act should be done; (3) some act done by the participator to further the common design. See *Rahmatullah,* above n 1, at [33]; see also *Fish & Fish Ltd v Sea Shepherd UK* [2013] 1 WLR 3700, at [40] –

actually tortured the claimant. The foreign act of state doctrine would have been applied to prevent the claim from being heard. However, this case fell within a limitation to the doctrine known as the public policy exception.[120]

This claim is one that would have been otherwise justiciable based on the reasoning in *Shergill v Khaira*. While the issue required questioning acts of foreign government officials, it was not a dispute between sovereign states that required resolution on the international plane or in a foreign court. Therefore, it cannot be suggested that this issue is non-justiciable. This means that the implication of the *Belhaj* case is that it supports a wider role for the foreign act of state doctrine as a rule of judicial abstention, outside of the principle of non-justiciability.

There are three reasons why the Court of Appeal's reasoning in *Belhaj* is flawed. The first is that there are no cases that would support an application of this rationale on the facts, even in *Belhaj* the Court did not apply this due to the application of the public policy exception. The cases that have appeared to apply this doctrine as a rule of abstention can be shown to fall within the principle of non-justiciability. The second is that in defining non-justiciability the Court rely on the formulation from *Yukos Capital Sarl*. The Court has unnecessarily limited the definition of this principle. The third is that the example provided of the principle not working, is a case which applied the foreign act of state doctrine as a rule of decision rather than as a rule of judicial abstention.

The Court of Appeal clearly attributed a wider scope to the foreign act of state doctrine as a rule of judicial abstention than is provided by the principle of non-

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[58]. English law was applied in *Rahmatullah* as in the absence of satisfactory evidence of foreign law the forum court will apply the law of the forum. See *Rahmatullah*, above n 1, at [31]; see also Lawrence Collins and others, above n 22, at [9R-001]. In *Rahmatullah* submissions were only made on the English principle of common design so the court proceeded on that basis, see *Rahmatullah*, above n 1, at [32], *Belhaj* also proceeded on the basis that English law applied, see *Belhaj*, above n 61, at [23].

[120] See *Kuwait Airways Corpn v Iraqi Airways Co* (Nos 4 & 5) [2002] UKHL 19, at [31] per Lord Nicholls, at [114] per Lord Steyn, at [149] per Lord Hope; see also Lawrence Collins and others, above n 22, at [5R-001].

justiciability. However, there are no cases that would support the application of the courts wider scope on the facts. Even in *Belhaj* itself the Court did not apply this wider scope. In *Belhaj* the public policy exception prevented the doctrine from applying in this wider form. The Court of Appeal used the public policy exception to achieve the same result that could have been achieved by applying the doctrine as limited by non-justiciability.

There have been other cases that have purported to apply the foreign act of state doctrine as a rule of judicial abstention. However, these fit within the principle of non-justiciability from *Shergill v Khaira. Noor Khan*[121] was provided as an example of this in *Rahmatullah*.[122] In *Noor Khan* the father of the complainant had been killed in a drone strike in Pakistan.[123] The claimant sought a declaration that any person who passes on information on the location of an individual in Pakistan to an agent of the US Government intelligence, and who foresees a serious risk that information will be used by the Central Intelligence Agency to target or kill that individual, is not entitled to the defence of combatant immunity. Accordingly that person may be liable under the domestic criminal law.[124] The Court relied on the foreign act of state doctrine and refused to hear the claim.[125]

This case could be seen as support for the proposition that there is a wider function of the foreign act of state doctrine as a rule of judicial abstention outside of non-justiciability. However, Leggatt J in *Rahmatullah* reclassified this as falling within the second category of non-justiciability from *Shergill v Khaira*.[126] This can also be seen as coming under the underlying principle of non-justiciability. The sole question in this case is whether actions of US officials are lawful. This is not an issue to be resolved in the UK courts, therefore the courts are lacking jurisdiction and cannot hear the claim. This differs from a case like *Rahmatullah* and *Belhaj* as it is not an

[121] *R (Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872.
[122] *Rahmatullah*, above n 1, at [150] – [153].
[123] *Noor Khan*, above n 121, at [1].
[124] At [4].
[125] At [53].
[126] *Rahmatullah*, above n 1, at [152].

issue incidental to the claim, it is the whole claim. The claimant in *Noor Khan* was essentially seeking an advisory opinion on the criminal law, [127] on which they have no domestic legal footing.[128]

Leggatt J compared *Khan* to the classic examples of non-justiciability provided by the Supreme Court in *Shergill v Khaira*. [129] These do not fall within the foreign act of state doctrine as narrowly defined. In *Campaign for Nuclear Disarmament (CND)* the applicants sought declaratory relief in the form of an advisory declaration of the meaning of the United Nations Security Council Resolution 1441.[130] This was held to be non-justiciable as there were no legal rights or obligations engaged. In *Al-Haq* the claimant sought a declaration that the UK government was responsible for a breach of their international obligations, and for a mandatory order that the government use its best endeavours to meet those obligations. [131] Permission for this claim to proceed was refused on justiciability grounds.

Each of these cases can be seen as non-justiciable because they are beyond the competence of the courts. *CND* and *Al-Haq* do not relate to foreign sovereigns. They are beyond the constitutional competence of the courts as against the executive. *Khan* on the other hand is beyond the jurisdiction of the courts as the sole issue in this case is whether acts of the US government are unlawful. While the Court in *Khan* purported to apply the foreign act of state doctrine, this fits within the principle of non-justiciability. The Court in *Belhaj* did not apply the foreign act of state doctrine separate from the principle of non-justiciability, and there are no other cases supporting this application. This shows that the reasoning in *Belhaj* is flawed.

The Court of Appeal in *Belhaj* also did not correctly identify the definition of non-justiciability. Counsel referred the Court to *Shergill v Khaira*, however, this was in

[127] *Rahmatullah*, above n 1, at [153].
[128] *Shergill*, above n 100 , at [43].
[129] Rahmatullah, above n 1, at [153]; *Shergill*, above n 90, at [43].
[130] *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin).
[131] *R (Al-Haq) v Secretary of State for Foreign and Commonwealth* Affairs [2009] EWHC 1910.

the course of their argument as to the rationale behind the foreign act of state doctrine.[132] The Court was of the opinion that the act of state doctrine was not limited to situations where there is a lack of constitutional competence.[133] However, it appears to have narrowly defined the Supreme Courts definition of non-justiciability. The rationale underlying the Supreme Courts non-justiciability definition is the allocation of competence or jurisdiction. This relates both to the three branches of government within a country, and whether this should be dealt with on the international plane, or possibly by a foreign court. This would apply to a wider range of situations than just when there is a lack of constitutional competence. By unnecessarily limiting the definition of the principle of non-justiciability the Court has not allowed itself to fully consider whether the rule of abstention is encompassed within this principle.

A further flaw in the reasoning in *Belhaj* arises from the fact that the Court has not considered the separate functions of the doctrine and the rationale behind each of these. The Court provided an example to show the foreign act of state doctrine being applied where there was not a "lack of judicial competence".[134] The example that they provided was the House of Lords decision of *Kuwait Airways*.[135] While the Court was correct in pointing out that the issue in *Kuwait Airways* does not fall within the doctrine of non-justiciability, it missed the fact that the doctrine was being applied not as a rule of abstention but as a rule of decision which has never been suggested to come within the doctrine of non-justiciability. This means that the Courts example does not lend any support to its proposition that the foreign act of state doctrine as a rule of judicial abstention has an operation beyond the principle of non-justiciability.

Therefore, the reasoning of the Court of Appeal in *Belhaj* is flawed. There is no case law to support the application of the rule of abstention outside of the principle of non-justiciability. The principle of non-justiciability was not correctly defined, and the separate functions of the foreign act of state doctrine were not considered. Overall,

[132] *Belhaj*, above n 61, at [58].
[133] *Belhaj*, above n 61, at [67].
[134] At [67].
[135] *Kuwait,* above n 120.

the authority relied on in *Belhaj* does not provide a clear principle or rationale for the foreign act of state doctrine other than non-justiciability or the allocation of jurisdiction or competence based on subject matter considerations. Therefore, *Belhaj* should not be used as authority for the proposition that the rule of abstention has any effect outside the doctrine of non-justiciability.

2. Principled Basis for the Distinction

It must then be considered whether there is any principled basis on which the foreign act of state doctrine as a rule of judicial abstention should be applied beyond the doctrine of non-justiciability. In *Rahmatullah*, Leggatt J considered whether the doctrine warranted extension based on the principles of sovereign equality, comity or political embarrassment or harm.[136] His Honour was of the opinion that none of these warranted an extension of the foreign act of state doctrine as a rule of judicial abstention beyond the principle of non-justiciability.

This issue has also been considered by the Court of Appeal in *Belhaj*. The appellants argued, based on the reasoning in *Shergill v Khaira,* that the real rationale behind the foreign act of state doctrine is the separation of powers.[137] The Court reviewed the authorities establishing the foreign act of state doctrine,[138] and concluded that as it is founded in English law the doctrine has developed on the principle of sovereign equality of states and the principle of international comity.[139] These are the same principles that Leggatt J considered. However, the problem with *Belhaj* is that it has conflated the two possible functions of the foreign act of state doctrine and attempted to find a principle that underlies both of these. Leggatt J's reasoning in *Rahmatullah* is far more relevant as his Honour is questioning this from the angle of whether any of these principles warrant the extension of the foreign act of state doctrine as a rule of judicial abstention beyond the principle of non-justiciability.

[136] *Rahmatullah*, above n 1, at [154] and [164].
[137] *Belhaj*, above n 61, at [58].
[138] At [59] – [66].
[139] At [67].

(a) Sovereign equality of states

Leggatt J first referred to the sovereign equality of states, noting that there is no doubt as to the importance of this principle at international law.[140] His Honour relied on the *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* case[141] and the dictum of Lord Wright in *The Cristina*[142] as authority for the point that the doctrine is based at least in part on reciprocity with each state accepting some subtraction from its full sovereignty in return for concessions from others. Based on this idea of reciprocity Leggatt J held:[143]

> It is difficult to see why common law should afford greater respect for the sovereign equality of other states than is required by international law. To recognise an obligation not to adjudicate on acts of a foreign state when the courts of other states do not acknowledge any similar obligation and none exists at international law is not to treat other states as equals. It is to voluntarily adopt a position of inferiority towards other states, which is out of keeping with international norms.

Adopting this reasoning, it is clear that the principle of sovereign equality does not warrant an extension of the foreign act of state doctrine as a rule of judicial abstention further than the principle of non-justiciability. To do so would not be to treat other states as equals, but to adopt a position of inferiority towards other states.

(b) Comity

Justice Leggatt then turned to the principle of comity. Comity is a confusing principle. It has been described by FA Mann as "one of the most ambiguous and multi-faceted conceptions in the law in general and in the realm of international

[140] *Rahmatullah*, above n 1, at [155].
[141] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, IJC Reports 2012, at [56].
[142] *The Cristina* [1938] AC 485, at 502.
[143] *Rahmatullah*, above n 1, at [156].

affairs in particular".[144] However, Mann went on to show that in most cases the meaning of comity is coextensive with public international law.[145] Dicey, Morris and Collins describe comity as "a term of very elastic content. Sometimes it connotes courtesy or the need for reciprocity; at other times it is used as a synonym for the rules of public international law".[146]

Justice Leggatt held that public international law provides no basis for the extension of the foreign act of state doctrine as a rule of judicial abstention. His Honour was of the opinion that:[147]

> In so far as comity merely connotes courtesy it may provide a reason for caution and restraint, which should inhibit a court from making finding critical … of a foreign state if such findings can be avoided. But it cannot override the court's duty to decide questions of legal rights properly brought before it.

This means regardless of the definition of comity that is accepted, the principle cannot be used to justify the extension of the foreign act of state doctrine as a rule of judicial abstention beyond the principle of non-justiciability.

(c) Political Embarrassment or Harm

The third principle considered by Leggatt J was that of political embarrassment or harm. Justice Leggatt noted that this had featured in some United States cases, but that it has not been treated as a reason for judicial abstention in England.[148] Therefore this principle clearly offers no support for the proposition that the foreign act of state

[144] Mann, above n 6, at 134; cited in *Rahmatullah*, above n 1, at [158].
[145] Mann, above n 6, at 136; cited in *Rahmatullah*, above n 1, at [158].
[146] Lawrence Collins and others, above n 22, at [1-008]; cited in *Rahmatullah*, above n 1, at [158].
[147] *Rahmatullah*, above n 1, at [159].
[148] *Rahmatullah*, above n 1, at [164].

doctrine as a rule of judicial abstention should be extended beyond the principle of non-justiciability in *Shergill v Khaira*.

The reasoning from *Rahmatullah* demonstrates that there is no principled basis that requires the extension of the foreign act of state doctrine as a rule of decision beyond the principle of non-justiciability in *Shergill v Khaira.* Further, by applying a wide rationale based on these principles would provide no logical ground on which to resolve potential clashes between the rule of abstention and the rule of decision. It has been shown above that these have opposite effects and cannot both apply at the same time.

E. Effect of Applying the Foreign Act of State doctrine as a rule of abstention

It has been argued earlier in this chapter that the foreign act of state doctrine as a rule of judicial abstention does not perform a role separate from the principle of non-justiciability. However, when this is applied as part of the foreign act of state doctrine, this will often cause confusion and lead to a much wider application than the doctrine actually supports. This is exactly what can be seen by the Courts reasoning in *Belhaj*, the title "foreign act of state" attributes principles such as comity and sovereign equality of states.[149] This confusion can lead to a much wider application of the doctrine than it actually fulfils.

Non-justiciability applies when the issue is inherently unsuitable for judicial determination[150] essentially this applies when a court is not competent or does not have jurisdiction to hear a claim. The foreign act of state doctrine encompassed within this will only apply to situations where the issue requires determination of a dispute between sovereign states as to their public international law rights and

[149] *Belhaj*, above n 61, at [67].
[150] *Shergill*, above n 100, at [41].

obligations that requires determination on the international plane or by a foreign court. [151]

An example of the confusion that can arise when this is applied as part of the foreign act of state doctrine can be seen in *Belhaj* and *Yukos*. The Court of Appeal in *Yukos* described this as a rule preventing "adjudication on the validity, legality, lawfulness, acceptability or motives of state actors".[152] This description was adopted by the Court of Appeal in *Belhaj*.[153]

If the doctrine were to be applied in this way it would have a much wider application than it should. The difference between these can be shown in an example. If in *Rahmatullah* the foreign act of state doctrine had been applied as a rule of judicial abstention as set out in *Yukos* and *Belhaj*, this would have meant the case could not be heard as it questioned the actions of foreign officials. So, applying the foreign act of state doctrine the claim could not have been heard. Applying the rule of abstention as limited by non-justiciability principle instead, this issue would be seen as justiciable, it is not beyond the constitutional competence of the courts, or an issue requiring determination of the international plane. This means that if the foreign act of state doctrine as set out in *Yukos* and *Belhaj*, this will be preventing otherwise justiciable claims from being heard, and denying the claimant a remedy in order to not embarrass foreign governments.

F. Conclusion

The foreign act of state doctrine applies as a rule of decision operating as a presumption that acts of the executive government of a foreign state done within the territory of that state are lawful under the laws of that state. While there have been suggestions that the foreign act of state doctrine has a separate function, also

[151] McLachlan, above n 66, at [12.128] and [12.177].
[152] *Yukos*, above n 32, at [66]; see also *Rahmatullah*, above n 1, at [116].
[153] *Belhaj*, above n 61, at [53].

operating as a rule of judicial abstention, this actually falls within the principle of non-justiciability as was defined in *Shergill v Khaira*. In substance these principles are doing the same thing and this merely comes down to a matter of terminology. The result of this is that the scope of the foreign act of state doctrine as a rule of judicial abstention is narrowed to issues that question the international relations of foreign sovereigns, which are political or rightly resolved on the international plane.

It is submitted that this principle should no longer be referred to as the foreign act of state doctrine. One of the main criticisms of this doctrine is the confusion it causes; limiting it to a rule of decision would remove this confusion. Further if this doctrine is applied as rule of judicial abstention, there is a risk that courts will apply this doctrine with a much wider, literal scope than it has and may be misled as to the rationale of the doctrine.

Chapter 2

Function and Scope of the Foreign Act of State Doctrine as a Rule of Decision

This chapter intends to consider the function and scope of the foreign act of state doctrine as a rule of decision. Leggatt J in *Rahmatullah* provided a very wide description of the rule of decision by reference to US authorities.[154] His Honour described the rule of decision as a presumption that acts of a foreign executive are lawful under the laws of that state.[155] This would prevent a foreign court from inquiring into the validity of those acts. However, the foreign act of state doctrine was not applicable in this case due to the territoriality limitation, and Leggatt J did not conclude on whether the rule of decision in this form is part of English law.[156] This chapter will consider whether the rule of decision in this form is part of English law; and what is the function and scope of the foreign act of state doctrine as a rule of decision under English law.

A. Preliminary Issue: the foreign act of state doctrine is not a choice of law rule

In determining the scope of the foreign act of state doctrine as a rule of decision, there is an important preliminary point which must be noted. The foreign act of state doctrine is not a choice of law rule. Choice of law rules are applied to determine which countries law will govern the cause of action as the applicable law.[157] The foreign act of state doctrine as a rule of decision is not applied as part of this inquiry, it applies once the applicable law has been identified in order to determine the content

[154] *Rahmatullah*, above n 1, at [124] – [127]; see also *WS Kirkpatrick & Co Inc v Environmental Tectonics Corpn International* (1990) 493 US 400.
[155] *Rahmatullah*, above n 1, at [113].
[156] At [115].
[157] See Adrian Briggs *The Conflict of Laws* (Oxford University Press, 2013), at 7.

of the applicable law. This is shown in *Rahmatullah* and *Belhaj*.[158] In each of these cases the applicable law is determined before there is any mention of the foreign act of state doctrine.

Some older cases such as *Carr v Fracis Times* could be seen as applying the foreign act of state doctrine as a choice of law rule.[159] For example, Lord Earl begins his analysis with the foreign act of state doctrine, without first considering what law is applicable. His honours states: "the broad and simple proposition is that the Sultan has authority to declare that the thing done was lawful and the thing done was an act of state".[160] His Honour is focusing his analysis around whether the foreign act of state doctrine applies, rather than first asking what the applicable law is. However, even this case does not provide strong authority for the proposition that the foreign act of state doctrine operates as a choice of law rule. The other law lords, particularly Lord Macnaghten and Lord Lindley, began by applying choice of law rules. [161]

Even if this case was seen as authority for the proposition that the foreign act of state doctrine operates as a choice of law rule, the result can be explained by the application of ordinary choice of law rules anyway. In *Carr*, an officer of the British navy seized ammunition belonging to merchants in the territorial waters of Muscat. The claimant brought an action in tort for conversion of the ammunition.[162] The seizure was lawful under the law of Muscat, as it had been authorised by a proclamation issued by the Sultan of Muscat. Therefore the claim could not succeed. The House of Lords held:[163]

> The broad and simple proposition is that the Sultan has authority to declare that the thing done was lawful, and the thing done was an act of state. It is not an act as between person and person; it is an act of state, which the Sultan says authoritatively,

[158] See *Rahmatullah*, above n 1, at [23]; see *Belhaj*, above n 61, at [29].
[159] *Carr v Fracis Times & Co* [1902] AC 176 (HL).
[160] At p179.
[161] At 182 per Lord Macnaghten and 184 per Lord Lindley.
[162] *Carr*, above n 159, at 178.
[163] McLachlan, above n 66, at [12.155]; citing *Carr*, above n 159, at 182 per Lord Macnaghten.

> is lawful; and I cannot doubt that, under such circumstances, the act done is an act, which is done with complete authority and cannot be made the subject of an action here.

According to McLachlan, the real ratio of this case was a simple application of the private international law rule at the time that an act legal in the country it was committed could not give rise to a cause of action in England.[164] The choice of law rules at the time relating to foreign torts was the double actionability rule. This rule considers whether the action is unlawful in the country in which it was performed.[165] In this case the action would not have been unlawful in Muscat, where it was performed. Therefore an application of ordinary conflict of laws rules would have achieved the same result as the act of state doctrine applied here.

B. What is the real function of the foreign act of state doctrine?

It is clear that the foreign act of state doctrine does not operate as a choice of law rule. In the cases in which the foreign act of state doctrine has been applied, the application of choice of law rules would have had the same effect. Therefore, it must be considered what, if any, function does the doctrine perform separate to choice of law rules. This section is not concerned with the presumption of validity, this issue will be dealt with in a later section.

It has been argued by various commentators, such as FA Mann, that the foreign act of state doctrine does not serve a purpose distinct from that which may be achieved by the ordinary application of the choice of law rules of private international law.[166] A similar argument has been made by *Dicey* that 'this principle is sometimes used as an alternative ground for a result which can also be reached by the application of the

[164] McLachlan, above n 66, at [12.155].
[165] See *Phillips v Eyre* (1870) LR 6 QB 1 at 28-29; see *Red Seas Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190, at 198.
[166] McLachlan, above n 66, at [12.24]; citing from FA Mann "The sacrosanctity of the foreign act of state" (1943) 59 LQR 42, reprinted in FA Mann *Studies in International Law* (Oxford University Press, 1973) at 420, 438.

ordinary rules of the conflict of laws'.[167] However, it will be submitted, based on the argument of Campbell McLachlan, that there is a residual function that the foreign act of state doctrine as a rule of decision performs.

Campbell McLachlan recognised that the foreign act of state doctrine performs an allocative function, determining the applicable law.[168] This is a recognition that the foreign act of state doctrine performs a similar function to the choice of law rules. However, McLachlan argues that there is still a limited separate function that the foreign act of state doctrine performs. McLachlan notes that the issue requiring examination is 'to what extent the exercise of foreign governmental authority affects the applicable law'.[169] In line with McLachlan's argument it is submitted that the foreign act of state doctrine does perform a function separate from existing choice of law rules. Its function is to clarify that executive actions form part of the applicable law.

In his analysis McLachlan notes the difference between public and private international law, and the importance of considering the actions of all three organs of the state when dealing with private international law principles such as the foreign act of state doctrine. McLachlan states: [170]

> Where the foreign state itself sues or is sued, then judged according to the standards of public international law … there can be no distinction between the acts of any of its organs. But, where the questions are ones of private international law – the determination of jurisdiction, applicable law and enforcement of foreign judgments – the acts of the foreign state have to be disaggregated in order to address the specific questions posed by the private international law rules of the forum.

[167] McLachlan, above n 66, at [12.24]; cited from Lawrence Collins and others, above n 22, at [5-047]; approved in *Moti v The Queen* [2011] HCA 50, 245 CLR 456 at [52].
[168] McLachlan, above n 66, at [12.27].
[169] McLachlan, above n 66, at [12.134].
[170] McLachlan, above n 66, at [12.143].

McLachlan recognises that the actions of all three organs of the government are important in private international law. This means that it is just as important to recognise executive actions as part of the applicable law as to recognise actions of the legislature and judiciary. It is submitted that this is the residual function of the foreign act of state doctrine, it recognises that acts of a foreign executive form part of the applicable law. The foreign act of state doctrine applies after the choice of law process has determined which countries law is the applicable law. It is a question of determining the content of the applicable law rather than which law is the applicable law, so it is not a choice of law rule, but a determination of the content of the applicable law.

Luther v Sagor provides a good example of how this would be applied. The issue in this case was who owned the property that had been confiscated by the Soviet Government; the original owner, or the company who had purchased the property from the government.[171] First, the choice of law rules were applied. As this is a proprietary issue the *lex situs* is the relevant choice of law rule.[172] The *lex situs* determined that Russian law was the applicable law. Then the foreign act of state doctrine applied to determine the content of Russian law, it clarified that the acts of the executive authorising this seizure were part of Russian law. However, it was not the foreign act of state doctrine that led to the application of the *lex situs*.

The foreign act of state doctrine as a rule of decision is not a choice of law rule. It is a rule that applies after the applicable law has been decided. It has a separate function to choice of law rules in that it determines the content of the applicable law. Now that the function of this doctrine has been determined, the scope of this doctrine must be considered.

[171] *Luther*, above n 64, at 532 and 533.
[172] Lawrence Collins and others, above n 22, at [24R-001].

C. Does the rule of decision also operate so as to prevent the court from inquiring into the validity of the foreign executive act?

This is really the issue that was left open in *Rahmatullah*. Leggatt J was of the opinion that based on US authorities, the rule of decision would operate so as to prevent inquiry into the validity of executive acts as a matter of that country's law.[173] However, in *Rahmatullah* the foreign act of state doctrine did not apply due to the application of the territoriality limitation,[174] making this analysis essentially obiter. Leggatt J did not make any conclusions as to the application of the foreign act of state doctrine to English law. If this approach was to be adopted in the UK this would mean that in cases like *Rahmatullah* and *Belhaj*, the foreign act of state doctrine would be applied to presume any action of the executive government, such as torture, would be considered lawful under the applicable law.

An example of the application of this rule is shown in *Luther v Sagor* and *Princess Paley Olga.* The issue in each of these cases was who had title to the property that had been confiscated by the Soviet Government.[175] The choice of law rule that applies to property issues is the *lex situs*, the law of the place where the property was situated at the time the relevant transfer occurred.[176] As the property was located in Russia when it was confiscated this means that Russian law was the applicable law. The government had passed a decree allowing the confiscation. But regardless of the decree, the foreign act of state doctrine as explained by Leggatt J would presume that the action of confiscating the property was lawful under Russian law as it was performed by government officials in their territory.

If the doctrine as described by Leggatt J is applied to other types of cases involving executive acts, such as torture cases, torture could be presumed lawful under the laws of that country. As torture is generally accepted to be wrong it is an odd proposition

[173] *Rahmatullah*, above n 1, at [113].
[174] See *Yukos*, above n 32, at [68].
[175] *Luther*, above n 64, at 534; *Princess Paley Olga*, above n 73, at 722.
[176] Lawrence Collins and others, above n 22, at [24R-001].

that torture would be presumed to be lawful under a country's laws. In these cases involving torture, such as *Rahmatullah* and *Belhaj*, the claimant would often bring a cause of action based in tort; various tortious actions would be available to them such as false imprisonment, assault, torture, or negligence. In *Rahmatullah* and *Belhaj* the action was brought against the UK government for their involvement in capturing and torturing the claimant. As the UK government did not directly torture the claimant, secondary liability must be shown. [177] The action is being heard in an English court, but the actions constituting the tort occurred in a foreign country, so the court must first determine the applicable law. In *Rahmatullah* it was agreed the Iraqi law was the applicable law, being the *lex loci delicti*, the law of the place where the wrong occurred.[178] This meant that the claimant must establish a cause of action under Iraqi law.

On the facts of the case the foreign act of state doctrine did not apply, as it was acts of the US government, in Iraq, that were being questioned. The territoriality requirement of the foreign act of state doctrine requires that the actions of the executive government occur in their own country in order to be presumed lawful[179]. In order to understand how the foreign act of state doctrine, as a rule of decision would apply, it is helpful to assume that it was actually the Iraqi government that carried out the torturous acts in Iraq.

If the acts complained of had been performed by the Iraqi government in Iraq, the foreign act of state doctrine as a rule of decision would presume that these actions were lawful under the law of Iraq. As Iraqi law is the applicable law, if this is presumed to be lawful then primary liability of the Iraqi government cannot be established and there can be no secondary liability of the UK government. If the

[177] See *Rahmatullah,* above n 1, at [33].
[178] These claims were governed by the Private International Law (Miscellaneous Provisions) Act 1995 (UK) providing a general choice of law rule requiring reference to the *lex loci delicti*. This has now been largely replaced by the Rome II Regulation; see Regulation (EC) No.864/207 on the law applicable to non-contractual obligations (Rome II) ([2007] O.J L199/40). See also Lawrence Collins and others, above n 22, at [35-015] – [35R-020].
[179] See *Yukos*, above n 32, at [68].

foreign act of state doctrine had not been applied there would have been a cause of action available under Iraqi law, however, the application of this doctrine means that the claimant is now left without a remedy.[180] This approach is problematic as it leaves the claimant without a remedy that they would have otherwise been afforded by the applicable law.

This problem with the approach described by Leggatt J is that it raises the issue whether the rule of decision operates to prevent the court from inquiring into the validity of a foreign executive act. If the foreign executive government is acting *ultra vires* or outside of the law, should a court still be required to treat this action as part of the applicable law?

D. The foreign act of state doctrine does not prevent the Court from questioning the validity of executive acts

Leggatt J's description of the foreign act of state doctrine in *Rahmatullah* suggested that the doctrine prevents the forum court from questioning the validity of foreign executive acts.[181] It will be submitted that it is possible for the forum court to question the constitutional validity of foreign executive acts. Authority for this proposition is found in *Buck v Attorney General*.[182] The plaintiffs in this case were seeking a declaration questioning the legal validity of the constitution of Sierra Leone.[183] The Court refused to grant the declaration on the grounds that the issue was not justiciable.[184] However, Lord Diplock concluded that the reason this case cannot be heard is because the sole issue is the validity of foreign law. If the issue of the

[180] If the UK officials are sought to be held primarily liable, the analysis would change. Iraqi law would still be the applicable law, this would no longer be questioning actions of a foreign government in their own territory and these actions would not be presumed to be valid. However, it may not be possible to show that the actions performed by the UK government amounted to a tort.
[181] *Rahmatullah*, above n 1, at [113].
[182] *Buck v Attorney General* [1965] CH 745, (1965) 42 ILR 11 (CA), at 770.
[183] At 754.
[184] At 768 per Harman LJ, 770 per Diplock LJ, 774 per Russell LJ.

validity of foreign law comes up incidentally, then the court could judge the validity of the foreign law. As stated by Diplock LJ:[185]

> The only subject matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state, in fact, the basic law containing its constitution. The validity of this law does not come into question incidentally in proceedings in which the High Court has undoubted jurisdiction, as for instance, the validity of a foreign law might come in question incidentally in an action upon a contract to be performed abroad. The validity of the foreign law is what this appeal is about; it is about nothing else. This is a subject matter over which the English Courts in my view, have no jurisdiction.

Campbell McLachlan has described this as recognition that the doctrine does not prevent the court from examining the validity, including the constitutional validity, of foreign law where, as a result of the ordinary application of its choice of law rules to a private law question it is obliged to determine the content of foreign law.[186] McLachlan stated that where the court is obliged by its choice of law rules to apply foreign law, it must do so in the manner in which the law would be applied in the foreign country.[187] Citing Bühler[188] McLachlan explains "respect for foreign states requires respect for their constitutions and associated rules of recognition for establishing the validity of their laws."[189] The English Court of Appeal,[190] and Canadian Supreme Court[191] have both accepted this idea.

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[185] At 770.
[186] McLachlan, above n 66, at [12.139].
[187] McLachlan, above n 66, at [12.139].
[188] M Bühler 'The Emperor's new clothes: defabricating the myth of "act of state" in Anglo-Canadian law' in C Scott *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart Publishing, Portland, OR, 2001) 343.
[189] McLachlan, above n 66, at [12.140].
[190] See *A/S Tallinna Laevauhisus v Estonian State Steamship Line ('The Vapper')* (1947) 80 Ll L Rep 99, 13 ILR 12 (CA).
[191] See *Laane v Estonian State Cargo & Passenger Shipping Line ('The Elise'*) [1949] SCR 530, (1949) 15 ILR 176.

This means that a domestic court on applying its choice of law rules and determining the applicable law, is not precluded by the foreign act of state doctrine from determining the validity of foreign laws based on that country's constitution and rules of recognition. Therefore if an executive government is acting *ultra vires* or outside of the law, then the act will not form part of the applicable law for the purposes of the forum's choice of law rules.

E. Application of the Non-justiciability Principle

Practically, there may be limits as to how far the court can go in inquiring into the validity of these actions. As shown in *Buck v Attorney General*, where the validity of the executive act is not incidental to the claim, the issue will come within the principle of non-justiciability.[192] Non-justiciability as defined in *Shergill v Khaira* applies when the issue is unsuitable for the courts determination.[193] The underlying principle or rationale for this is competence or jurisdiction of the court. An issue relating to a foreign state will be non-justiciable if it can only be heard by a foreign state or on the international plane.[194]

The sole issue in *Buck v Attorney General* was the legal validity of the constitution of Sierra Leone.[195] This was not a case which the English courts had jurisdiction or competence to decide. The issue is rightly considered by the Courts of Sierra Leone. If this was an issue incidental to another justiciable claim then it would have been heard. But as this was the sole issue of the case it was non-justiciable.

This means theoretically it is possible for a claimant to bring an action which would question the validity of actions of the executive government. However, if questioning the validity of an executive act is the sole issue of the case, the court would be

[192] *Buck*, above n 182, at 770.
[193] *Shergill*, above n 100, at [40].
[194] McLachlan, above n 66, at [12.128].
[195] *Buck*, above n 182, at 770.

prevented from hearing the case on the grounds of non-justiciability.[196] If the issue must be determined in order to decide another justiciable issue it will generally be heard.[197] While often the doctrine of non-justiciability will apply to these cases, the foreign act of state doctrine itself does not preclude a domestic court from inquiring into the validity of acts of a foreign executive.

F. Will all executive acts be presumed valid?

It has been submitted previously that the foreign act of state doctrine as a rule of decision applies only as a presumption that foreign executive acts form part of the applicable law. As a corollary to this point, it must be considered whether all acts of the executive government form part of the applicable law, or only those purporting to have legal effect. *Rahmatullah* provides a good example of this issue.[198] If the rule is applied to all executive acts then even those such as torture, which were never intended to have legal effect would be part of the applicable law.

On a review of the cases that have applied the foreign act of state doctrine as a rule of decision, all of the acts in question were purporting to have legal effect. In both *Luther v Sagor* and *Princess Paley Olga* the acts in question were decrees passed by the Soviet Government.[199] In *Carr* the act in question was a Proclamation by the Sultan of Muscat.[200] In *Kuwait Airways* the act in question was Resolution 369 passed by the Iraqi government.[201] Each of these is an act performed by the executive that is purporting to have legal effect.

The argument that is being made by the Defendant in these cases is that these acts form part of the applicable law and as such the applicable law provided them with a

[196] See *Buck*, above n 182, at 770; see also McLachlan, above n 63, at [12.138].
[197] *Shergill,* above n 100, at [43].
[198] *Rahmatullah*, above n 1, at [1] – [12].
[199] *Luther*, above n 64, at 533; *Princess Paley Olga*, above n 70, at 722-723.
[200] *Carr,* above n 159, at 179.
[201] *Kuwait Airways,* above n 120, at [2].

defence. The argument is not, because the executive performed certain actions this must be presumed to be lawful. The argument is that the executive passed some form of regulation, or delegated legislation allowing this action to take place, therefore their actions were lawful under the applicable law.

If this is compared to legislative acts, legislation forms a part of the applicable law because it is an act of Parliament that is intended to have legal effect. But acts of individual members of Parliament would not be suggested to form part of the applicable law. It is only the acts of the legislature purporting to have legal effect that are recognised as part of the applicable law. Therefore, this too should apply to the executive.

It is submitted that acts of a foreign executive are not presumed to be valid just because they have occurred. The foreign act of state doctrine is concerned only with actions that purport to have legal effect. This means that executive acts such as torture would not be presumed to be part of the applicable law. The foreign act of state doctrine as a rule of decision is only concerned with executive acts such as passing decrees, or regulations which purport to have legal effect.

G. Public Policy Exception

Another limitation that may apply to this doctrine is the public policy exception. This applies when the act offends against the public policy of the forum.[202] When this exception is applied the offending part of the applicable law will be disregarded, and the remainder of the country's law would be applied. *Kuwait Airways* provides an example. The applicable law in this case was Iraqi law. The issue was whether Resolution 369 should be included as part of the applicable law. It offended against

[202] Lawrence Collins and others, above n 22, at [5R-001].

the public policy of the forum, as it was a serious breach of international law. This meant that Iraqi law still applied, but the Resolution was disregarded.[203]

This exception applies to foreign legislation that would otherwise form part of the applicable law based on conflict of laws rules.[204] This is generally applied where there has been a grave infringement of human rights[205] or where there has been a serious breach of international law.[206] Similarly, a public policy exception applies when recognising the validity of foreign judgments.[207] As this public policy exception applies when recognising foreign legislation, being actions of the foreign legislature, and when recognising the validity of foreign judgments, being actions of the foreign judiciary, this same exception should be applied when recognising actions of the third arm of the government, the foreign executive. There is nothing to suggest that acts of foreign executives should be absolutely presumed to be valid, when actions of other branches of the government are subject to an exception based on English public policy. Therefore this same public policy exception should be applied to the foreign act of state doctrine.

The Court of Appeal in both *Yukos* and *Belhaj* recognised that a public policy exception applied to the foreign act of state doctrine.[208] This was the reason the

[203] Lawrence Collins and others, above n 22, at [5-007].
[204] See Lawrence Collins and others, above n 22, at [5R-001] and [5-002] the rule is described as follows "English Courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English law".
[205] See Lawrence Collins and others, above n 22, at [5-005] an example of this can be seen in *Oppenheimer v Cattermole* [1976] AC 249, where the House of Lords held that decrees depriving Jewish people of their nationality and confiscating their property fell within this category.
[206] See Lawrence Collins and others, above n 22, at [5-013] an example of this can be seen in *Kuwait Airways*, above n 120, where the Iraqi government confiscated planes from Kuwait Airways in breach of a UN security council deadline, this meant the actions were in breach of international law and the decree authorising this was not recognised.
[207] See Lawrence Collins and others, above n 22, at [14R-152] "A foreign judgment is impeachable on the ground that its enforcement or, as the case may be, recognition, would be contrary to public policy."
[208] See *Belhaj*, above n 61, at [81]; see *Yukos*, above n 32, at [69].

foreign act of state defence was not accepted in *Belhaj*.[209] However, in both of these cases the defendant sought to rely on the foreign act of state doctrine as a rule of judicial abstention. This leaves open the question of whether there is any reason this should apply differently to the foreign act of state doctrine as a rule of decision. Both *Yukos* and *Belhaj* relied on the House of Lords decision in *Kuwait Airways* in their discussion of the public policy exception.[210]

The House of Lords in *Kuwait Airways* applied a public policy exception to the foreign act of state doctrine.[211] However, the Court has not gone into an analysis of the different functions of the foreign act of state doctrine. In their discussion the House of Lords appear to be of the opinion that they are applying the foreign act of state doctrine to recognise the validity of foreign legislation.[212] This means that the House of Lords, being of the opinion this was a legislative act, did not accept that this exception applies to executive acts.

The act in question in *Kuwait Airways* was a resolution passed by the Iraqi government;[213] it is unclear from the case whether this would amount to foreign legislation or the act of a foreign executive. If this could be classified as the act of a foreign executive it would show that the exception does apply to the doctrine as it relates to executive acts.

Even if this public policy exception cannot be extended from the reasoning in *Kuwait Airways*, there are still strong reasons as to why the exception should apply to the foreign act of state doctrine as a rule of decision applied to executive acts. It has been argued earlier in this chapter that the foreign act of state doctrine is essentially covered by choice of law rules, and the remaining function of this is to recognise that executive acts are included as part of the applicable law. This means that both

[209] *Belhaj*, above n 61, at [121].
[210] *Belhaj*, above n 61, at [83]; *Yukos*, above n 32, at [69].
[211] *Kuwait Airways*, above n 120, at [31] per Lord Nicholls, at [114] per Lord Steyn, at [149] per Lord Hope.
[212] At [137] and [149] per Lord Hope.
[213] At [2].

legislative and executive acts are now forming part of the applicable law for the purpose of the conflict of laws. Essentially therefore there is no real difference between these two sources of law, they are performing the same function, just coming from a different source. This means that they should be treated in the same manner. As the public policy exception applies to the general choice of law rules that determine when legislative acts are applicable, so too should it apply to the choice of law rules that determine when executive acts are applicable, being the foreign act of state doctrine.

H. Conclusion

Leggatt J's analysis of the foreign act of state doctrine as a rule of decision in *Rahmatullah* relied on US authority in arguing that this doctrine applied as a presumption that acts of a foreign executive government are valid.[214] As the foreign act of state doctrine was not applied in that case this makes his Honours conclusions merely obiter.[215] This chapter intended to consider the function and scope of this doctrine as a rule of decision, and whether Leggatt J's reasoning should be accepted as part of English law.

It is submitted that the foreign act of state doctrine as a rule of decision has a far more limited function that what was suggested by Leggatt J. The residual function that is not performed by choice of law rules, is to clarify that executive acts form part of the applicable law and the court must give effect to it as they would foreign legislation or common law. This does not prevent the court from inquiring into the validity of an executive act as a matter of foreign law, as long as this is not the sole issue of the case, making the claim non-justiciable.[216]

[214] *Rahmatullah*, above n 1, at [124] – [127]; see *Kirkpatrick*, above n 155.
[215] *Rahmatullah*, above n 1, at [115].
[216] *Shergill*, above n 100, at [43]

There is a very limited function that remains for the foreign act of state doctrine as a rule of decision, that is it operates to clarify that executive acts form part of the applicable law insofar as they are acts that were purporting to have legal effect, and do not offend against English public policy. This means that the doctrine only applies to situations such as seizure of property where the government have authorised this act in a document intended to have legal effect, and does not apply to cases such as torture.

Conclusion

The Limited Application of the Foreign Act of State Doctrine

Leggatt J in *Rahmatullah* argued that the foreign act of state doctrine applied, not as a rule of judicial abstention, but as a rule of decision, operating as a presumption that acts of a foreign executive government are lawful under the laws of that country.[217] This doctrine, however, was not applied due to the territoriality presumption, making this conclusion merely obiter.[218] This dissertation has aimed to build on the Leggatt J's reasoning and test His Honours conclusion. The focus of this dissertation has been on *Rahmatullah* as it provided an excellent analysis of the various functions that the foreign act of state doctrine has fulfilled in the past, and how the majority of these are now fulfilled by other more specific areas of the law. However, it left open various questions that required consideration.

The first chapter of this dissertation focuses on the conclusion that the foreign act of state doctrine operates as a rule of decision rather than a rule of judicial abstention. It considered whether there was any scope for the foreign act of state doctrine to apply as a rule of judicial abstention. This chapter concluded that the foreign act of state doctrine does operate as a rule of judicial abstention, but this falls within the doctrine of non-justiciability as defined in *Shergill v Khaira.*[219] The result is that the rule of judicial abstention has a very narrow scope. The underlying principle or rationale from this the competence or jurisdiction of the courts. Therefore a case involving acts of a foreign executive will be considered non-justiciable if it is rightly resolved by a foreign court or on the international plane.[220]

[217] *Rahmatullah*, above n 1, at [113].
[218] At [115].
[219] See *Shergill*, above n 100, at [41] – [43].
[220] McLachlan, above n 66, at [12.128] and [12.177].

It was then argued that because of this limited scope the rule should not be referred to as part of the foreign act of state doctrine. The foreign act of state doctrine performs a separate function and referring to these under the same title creates confusion. There is also a risk that courts will not realise there is a distinction between these and this will lead to the doctrine being attributed a wider scope. This means that while the foreign act of state doctrine has been applied as a rule of judicial abstention in the past, it is also covered by the doctrine of non-justiciability. This rule should no longer be referred to as part of the foreign act of state doctrine, and should just be treated as a part of the principle of non-justiciability.

The second chapter of this dissertation considers the function and scope of the foreign act of state doctrine as a rule of decision. Leggatt J argued in *Rahmatullah* that the rule of decision applied as a presumption that acts of a foreign executive were valid under the laws of that country.[221] However, his Honour did not conclude that this formed part of English law. Due to the application of the territoriality presumption, the foreign act of state doctrine did not apply, making this argument only obiter.[222] It is therefore important to consider whether this is the function of the rule, and what limitations apply.

It is important to note that this is not a choice of law rule. It is a rule that applies once the applicable law has been decided, in order to determine the content of the applicable law. Commentators had argued that the function of this is completely fulfilled by choice of law rules. However, it has been submitted that there is a residual function to this rule. It clarifies that executive acts form a part of the applicable law and must be given effect to, as a court would give effect to foreign legislation or common law. Therefore there is a limited role performed by this doctrine of recognising that executive acts form part of the applicable law.

[221] *Rahmatullah*, above n 1, at [113].
[222] *Rahmatullah*, above n 1, at [115].

In relation to the scope of the doctrine Leggatt J was of the opinion that the foreign court must presume the executive act to be valid.[223] If this were correct then all executive acts would be presumed to be valid. It has been submitted that the foreign act of state doctrine has a much more limited function than this. It does not prevent a court from inquiring into the validity of executive acts as a matter of foreign law, provided the issue is ancillary and does not make a claim non-justiciable. This means a foreign court is able to question the validity of executive acts.

There are further limitations to this doctrine. The doctrine only applies to executive acts that are intended to have legal effect. This means that the doctrine applies in seizure cases, where the executive has passed some form of regulation allowing it to seize property. But it does not apply to torture cases, where the executive does not purport to act with any legal authority. Further, there is a public policy exception which applies to this doctrine. If this is applied then the English court is able to disregard the offending act, and does not have to apply it as part of the applicable law.

Overall the foreign act of state doctrine has a very limited function. Insofar as it applies as a rule of abstention, this is covered by the doctrine of non-justiciability and is better dealt with under this principle than the foreign act of state doctrine. As a rule of decision it is confined to a rule that foreign executive acts, intended to have legal effect, form part of the applicable law, but it does not prevent the foreign court from questioning the validity of these acts, provided the issue is justiciable.

A. Relevance to New Zealand Law

This dissertation has focused on the foreign act of state doctrine in English law. However, the issue remains important to New Zealand law. There have been a small number of cases in New Zealand which have considered the foreign act of state

[223] *Rahmatullah*, above n 1, at [113].

doctrine.[224] These have provided only limited analysis of this doctrine. However, they do demonstrate that the issue is relevant to New Zealand law. There are further hypothetical situations that could arise. New Zealand's military involvement in Afghanistan could lead to *Rahmatullah* type situations arising.[225] It could also be possible for a case such as *Luther* to arise if a New Zealand citizen's property is confiscated in a foreign country.

The rejection of the presumption of validity suggested in *Rahmatullah* would have a significant impact on how this doctrine would be applied if these situations did occur in New Zealand. If this were accepted in New Zealand, it would potentially allow the courts to question the validity of actions of a foreign executive provided the issue was justiciable. In a *Luther* type example this would mean that the New Zealand court could question the validity of the Russian government's actions in confiscating property in Russia.[226]

The New Zealand cases show that this is an issue which has arisen in New Zealand courts in the past, and the hypothetical situations show how this could arise in the future. Each of the New Zealand courts that have considered this have begun their analysis with *Buttes Gas* and noted the confusion that surrounded this doctrine.[227] This shows that there is a real issue in this area of the law that has been recognised in New Zealand courts and has not been settled under New Zealand law. It also shows that New Zealand courts would be likely to adopt the reasoning of the UK cases in this area such as *Buttes Gas*. This dissertation would therefore be relevant to New Zealand cases applying the foreign act of state doctrine in the future, as it provides an analysis of the UK authorities which would likely form the basis of the foreign act of state doctrine under NZ law.

[224] See *Leason,* above n 32; *Fang*, above n 39; *Attorney General for England and Wales v R*, above n 44; *Peters*, above n 47; and *Air New Zealand*, above n 50.
[225] Amnesty International, above n 54.
[226] See *Luther*, above n 64.
[227] See *Leason,* above n 32; *Fang*, above n 39; *Attorney General for England and Wales v R*, above n 44; *Peters*, above n 47; and *Air New Zealand*, above n 50.

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