

## Justiciability

40<sup>th</sup> Annual FA Mann Lecture at Middle Temple Hall, London

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### Introduction

A lecture on justiciability in honour of Francis Mann must begin with the House of Lords decision in 1981 in *Buttes Gas v Hammer and Occidental Oil (Nos 2 and 3)*.<sup>1</sup> In an article in 1983 entitled 'Reflections on English Civil Justice and the Rule of Law',<sup>2</sup> Dr Mann voiced, perhaps one should say vented, various objections to House of Lords procedure. These ranged from complaints about the admittedly remarkable way in which permission to appeal had been granted, after being first refused, to complaints about the House's practice, in the era of Lord Diplock, of delivering a single opinion. He observed, not without justice, that: nothing so much compels deep, clear and independent thought as the necessity of taking pen and paper and setting forth one's own thoughts. Merely to read someone else's essay induces superficiality and intellectual laziness.

It is a vice of which no one could accuse Francis. His article led to an exchange with Lord Roskill.<sup>3</sup> After reading the article, Lord Roskill wrote a four page letter to Francis Mann, noting, mildly, that 'you obviously feel aggrieved about *Buttes*.' Francis Mann's smouldering response was:

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<sup>1</sup> [1982] AC 888.

<sup>2</sup> Published in (1983) CJQ 320.

<sup>3</sup> Which I have by courtesy of the Humboldt University of Berlin and am kindly also permitted to use by Julian Roskill and his sisters as Lord Roskill's executors.

I do not think it is relevant whether 'I feel aggrieved'. I have not said, nor would I think it proper to say, a single word about the merits of the decision.

This was not an attitude which it was in Dr Mann's character long to maintain. Three years later, he published his brilliant work *Foreign Affairs in English Courts*.<sup>4</sup> He described *Buttes Gas* as 'the most puzzling pronouncement on justiciability which can be found in England' (p.69) and submitted 'with great respect' that the doctrine of 'judicial restraint' enunciated in Lord Wilberforce's speech in the case:

rests on so insecure a foundation as to render it impossible to derive any guidance for future cases from the decision and to treat it otherwise than as a freakish one without value as a precedent... (p.70).

Nor did this cool his indignation. As Lawrence Collins revealed in the 25th F A Mann lecture (2001),<sup>5</sup> on re-reading Lord Wilberforce's words as in his own copy of *Foreign Affairs in English Courts*, Francis Mann wrote against them in the margin: 'It was the House of Lords that lacked "judicial restraint"!'.

Francis Mann was a doyen among the German legal emigrées who so enriched this country's legal system for decades from the Second World War. Acting for or against Herbert Smith,<sup>6</sup> it was essential to know what Dr Mann had said on a subject in his academic capacity. On international legal issues, his writings always command respect. It is both a privilege and a pleasure to give this lecture in his honour. In my view, Dr Mann was right to be sceptical about Lord Wilberforce's doctrine of judicial abstinence, and subsequent legal development has been in a direction Dr Mann would have approved. I shall in the main focus, like him, on justiciability in the area of foreign relations, conducted under the Crown prerogative. But, even in purely

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<sup>4</sup> (OUP 1986).

<sup>5</sup> Published as 'Foreign Relations and the Judiciary', (2002) 51 ICLQ 485, 510.

<sup>6</sup> Early in my own career, I managed by my own misjudgement to disappoint him as counsel, and so for a number of years found myself on the opposite side, including in the doughty battle in *Kammgarn Spinnerei v Nova Jersey Knit* [1977] 1 WLR 713 which reached the House of Lords, where we lost 4:1 and Francis Mann was at the end of the day almost alone among the solicitors and experts in the case to be left standing. Later in my career, I enjoyed being instructed by Derek Spottiswood, David Higgins and Lawrence Collins.

domestic contexts, where foreign relations are not involved, issues which we may describe as non-justiciable can arise. These include areas where the Crown prerogative is still relevant. My basic theme will be however that, in all relevant areas, the concept is today steadily and rightly diminished in significance. It is being replaced by a more nuanced and balanced understanding of the respective roles and competences of the executive and judiciary.

### **Buttes Gas**

Let me start with foreign relations and *Buttes Gas*. The claim by Buttes was for slander, and need not concern us.<sup>7</sup> The counterclaim was by Hammer and Occidental Oil against Buttes for damages for conspiracy to cheat Hammer out of an oil concession received from the Arab Emirate of 'Umm Al Qaiwain (UAQ)' on 10 November 1969. The concession was in in the continental shelf nine miles off the island of Abu Musa, which was the subject of a territorial dispute between the Emirate of Sharjah and Iran. UAQ in granting it had relied on the uncertain effect of an agreement reached in 1964 with Sharjah showing only 3 mile territorial waters around Abu Musa. However, on 29 December 1969 Sharjah purported to grant a competing concession to Buttes, on the basis that it had extended its territorial waters to 12 miles by a decree dated September 1969, i.e. two months before the UAQ concession. On that basis, even assuming that Abu Musa belonged to Sharjah, Hammer and Occidental's concession was questionable. Hammer and Occidental confronted this difficulty by a counterclaim which asserted that the Sharjah decree dated September 1969 had only been executed in March or April 1970, and backdated to undermine their concession.

The United Kingdom Government never took a position on the rights, wrongs or date of Sharjah's extension, but eventually intervened by force in May 1970 to turn back a drilling rig sent by Occidental to its concession. An agreement was in 1973 reached between Iran and Sharjah on 12 mile territorial waters around Abu Musa, and that Buttes should operate its concession from Sharjah, but share some of the profits with UAQ.

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<sup>7</sup> Although it could have given rise to similar difficulties to those which, the House held, faced the counterclaim.

In his much-cited speech, Lord Wilberforce pointed<sup>8</sup> to the multiplicity of international legal issues which the counterclaim would involve, and went on:

They have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which can be said not to have been drawn to the attention of the court by the executive) there are... no judicial or manageable standards by which to judge these issues, or to adopt another phrase ..., the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were “unlawful” under international law.<sup>9</sup>

The House therefore refused to adjudicate upon a civil counterclaim for conspiracy. It did so, because of the nature of the international and inter-State issues which adjudication would involve.<sup>10</sup> A refusal to adjudicate upon the merits of a civil claim is unusual. Domestic courts are there to adjudicate upon domestic rights and liabilities. Hence, Francis Mann’s coruscating comment that it was the House that lacked restraint. However, as to what he would have expected the House to do, there is perhaps a paradox. In *Foreign Affairs in the Courts*<sup>11</sup> he said that the issue of ante-dating the Sharjah decree was a question of fact and that all the other questions posed by Lord Wilberforce would have been solved by the courts obtaining a Foreign Office certificate.<sup>12</sup> At the same time he accepted that if the Foreign Office had refused a certificate,<sup>13</sup> the courts could not have decided the case. One way or another, therefore, he was ready to accept that certain matters are non-justiciable, either because the executive’s certificate is final or because, without any such certificate, a domestic court must refrain from adjudication.

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<sup>8</sup> N 1, 937.

<sup>9</sup> N 1, 938.

<sup>10</sup> For good measure, I should record that the House also indicated that it would also have had to consider whether it was fair to allow Buttes’ claim to proceed in these circumstances, had it not been withdrawn by consent.

<sup>11</sup> At 71, footnote 29.

<sup>12</sup> British courts have in the past applied to the executive branch of Government on matters such as the status of a foreign State or Government, diplomatic status and the existence of a state of war M Shaw, *International Law* (CUP 2014, 7th edn) 139. Such matters have traditionally, though I think erroneously, been described as ‘facts’.

<sup>13</sup> As Lawrence Collins also suggests, in the article mentioned at (n 5) above, 507-508, there were contemporary Foreign Office comments, from which Lord Wilberforce may well have concluded that, if the case went to trial, the Foreign Office would refuse to express a view on the boundaries.

## Defining Justiciability

What then do we mean by non-justiciability? If we are really only concerned with situations where there are ‘no judicial or manageable standards’, there is no diminution of the judicial role at all. Judges cannot be expected to do things which are not judicial or manageable. But, if we are concerned with true restraint, a self-imposed limitation of the ordinary judicial role, then we are into the realm of setting policy and criteria. In a recent case, *Mohammed and Rabmatullah v Ministry of Defence*,<sup>14</sup> Lord Sumption described ‘non-justiciability’ as a treacherous word, because of its lack of definition, and because it is commonly used as a portmanteau term encompassing a number of different legal principles with different incidents. In *Shergill v Khaira*,<sup>15</sup> the Supreme Court identified a category distinction between (1) issues with no domestic law basis and (2) issues upon which a domestic court will refrain from adjudicating for reasons associated with the separation of powers and executive competence. The second category often, though not always, relates to circumstances falling within the Crown’s exercise of its prerogative, whether domestic or foreign. On a traditional view, the prerogative was immune from domestic law review – ‘It begins where legal rights end’. That phrase comes from *de Freitas v Benny*,<sup>16</sup> where the House, without calling on opposing counsel, rejected Mr Louis Blom-Cooper QC’s submission that a prisoner on death row in Trinidad was at least entitled to see the basis on which clemency had been refused. As will appear, this is one of many areas where Privy Council jurisprudence on the death penalty has subsequently taken a turn for the better.

## The need for a Domestic Foothold

Taking the first category, cases with no domestic law basis: the role of domestic courts is to decide domestic law disputes. To describe as ‘non-justiciable’ an issue *solely* based on some moral or international legal principle is banal. But the emphasis is on ‘solely’. If there is some foothold in domestic law, making it necessary to refer to such a principle, domestic courts do so. Speaking generally, it is unusual for civil claims or defences to involve such a foothold. In contrast, public law claims for judicial review have proved increasingly to do so. Further, where an issue is within the United Kingdom’s ‘jurisdiction’ in the broad sense that term has acquired under the Human Rights Convention, the courts have quite often found themselves having to work out how Convention principles relate to more general public international law.

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<sup>14</sup> [2017] UKSC 1, [2017] AC 649 [79].

<sup>15</sup> [2014] UKSC 33, [2015] AC 359.

<sup>16</sup> [1976] AC 239, 247G.

After *Buttes Gas* it became not uncommon to argue that, although international law had a domestic foothold, the case was within the second category, upon which the court should refrain from adjudicating. Cases in the first category are therefore of interest in illuminating the boundaries of the second category. A prominent example in a civil claim is *Kuwait Airways Corp v Iraqi Airways Co*.<sup>17</sup> Iraqi Airways had taken over from Saddam Hussein the Kuwait Airways aviation fleet, by then in Iraq after the invasion of Kuwait. Iraqi Airways relied upon an Iraqi law passed by Saddam Hussein. Title to movables is normally determined by the law of their situs, but there is an exception where the foreign law is contrary to domestic public policy. The courts at all levels held that, as Saddam Hussein's law was in flagrant disregard of Security Council Resolutions and international law, it would be contrary to domestic public policy to recognize it.<sup>18</sup>

In public law, if there is sufficient standing, there must still also be a domestic foothold, before the United Kingdom's international obligations are relevant. There was not even a toe-hold for an allegation that Israel was in breach of international law in military operations in and relating to the Gaza strip and that the United Kingdom should accordingly suspend supplies of military equipment and assistance to Israel: see *R (Al Haq) v Secretary of State for Foreign and Commonwealth Affairs*.<sup>19</sup> There was no basis for a claim for (in effect) an advisory declaration as to United Kingdom alleged involvement in acts said to amount to murder under domestic law or to unlawful killings outside the course of hostilities under international law in *R (Khan) v Secretary of State for Foreign and Commonwealth Affairs*.<sup>20</sup> In *R (Gentle) v Prime Minister*,<sup>21</sup> the claim by the mothers of two servicemen killed in Iraq sought to find a foothold, by reference to the European Convention on Human Rights (ECHR). The House held that the Article 2 duty to protect individual life did not require domestic courts to rule on the legality of the use in Iraq of force which would or might create the risk of individual loss of life, or therefore to institute an inquiry into its legality. The restraint traditionally shown by courts in ruling on matters of high policy –

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<sup>17</sup> [2002] UKHL 19, [2002] 2 AC 883.

<sup>18</sup>A second example is provided by *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116, [2006] QB 432, where the scope of an arbitration commenced by Occidental against Ecuador depended necessarily on the meaning of the relevant Bilateral Investment Treaty by reference to which Ecuador had agreed to submit to arbitration. In *Sbergill v Khaira* (n 15) the Supreme Court observed at [42] that 'the boundaries of the category of "transactions" between States which will engage the doctrine [in *Buttes Gas*] are a good deal less clear today than they seemed 40 years ago'.

<sup>19</sup> [2009] EWHC 1910 (Admin).

<sup>20</sup> [2014] EWCA Civ 24, [2014] 1 WLR 872.

<sup>21</sup> [2008] UKHL 20, [2008] 1 AC 1356.

peace and war, the making of treaties, the conduct of foreign relations – militated against any such interpretation. For that reason, there was again no enforceable domestic right.

In contrast, a limited domestic foothold may exist if the Government has by domestically announced policy created a legitimate expectation that it will give effect to a particular international obligation. The immigration sphere provides examples. So too does *R (Abassi) v Secretary of State for the Foreign and Commonwealth Affairs*,<sup>22</sup> where the Court of Appeal held that the Foreign Office had accepted a limited role in protecting the rights of British citizens abroad (in that case in Guantanamo) by making diplomatic representations to avoid an apparent miscarriage or denial of justice.<sup>23</sup> In *R (Youssef) v Secretary of State for the Foreign and Commonwealth Affairs*<sup>24</sup> the Supreme Court also held judicially reviewable the Foreign Secretary's decision to remove a hold placed on the designation of the applicant as a person whose assets were to be frozen under a Security Council Resolution, to which domestic law gave automatic effect.

Judicial review of the exercise of executive discretion is another area where the United Kingdom's international obligations may have no domestic foothold. It is not generally a ground of review that the person exercising discretion failed to take the United Kingdom's international obligations into account.<sup>25</sup> On the other hand, if a domestic law decision-maker does take

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<sup>22</sup> [2002] EWCA Civ 1598.

<sup>23</sup> A similar challenge, but on this occasion by former residents with indefinite leave to remain in the United Kingdom but without United Kingdom nationality, failed in *R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279, [2008] QB 289, for similar reasons: the Foreign Secretary's judgment that approaches to the US authorities would be ineffective and counterproductive could only be challenged if shown to be 'frankly perverse' [141].

More recently, in the sad case of Mrs Sandiford, still under pending sentence of death in Indonesia, the Supreme Court was asked to review the Foreign Secretary's refusal to provide her with a lawyer for an appeal: *R (on the application of Sandiford) v The Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, [2014] 1 WLR 2697. The refusal was pursuant to a formulated blanket policy, whereby the United Kingdom determined that its accepted international law role of providing consular assistance did not involve the provision of legal assistance. The Supreme Court was prepared to accept that such a policy could be reviewable, if irrational, because (unlike the position in *Abassi* and *Al Rawi*) it did not raise any real issues of foreign policy. But the Foreign Office had in fact considered whether to make, and decided not to make, an exception for Mrs Sandiford, and any challenge to the policy must fail on that ground alone.

<sup>24</sup> [2016] UKSC 3, [2016] AC 1457.

<sup>25</sup> It is true that in *R (Hurst) v London Northern District Coroner* [2007] UKHL 13, [2007] 2 AC 189 I expressed some doubts about this, and both Lord Steyn in the earlier case of *Re McKerr* [2004] UKHL 12, [2004] 1 WLR 807 [49]-[50] and Lord Kerr more recently in *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] UKSC 1449 [235] and [254], went further by suggesting that the executive should be bound at the domestic level by human rights commitments undertaken at the international level. However, even Lord Kerr recognized that as in conflict with 'constitutional orthodoxy'.

international law into account, then judicial review lies to ensure that he understands and applies it correctly: see *Abassi*,<sup>26</sup> and *R v DPP, ex p Kebilene*.<sup>27</sup>

## Judicial Restraint

Let me turn directly to the second category – cases where there is a domestic issue, but the courts pull back from adjudication. In identifying this category, the House in *Buttes Gas* was influenced by United States case law, from which it drew its reference to a lack of ‘judicial or manageable standards’. In *Baker v Carr*,<sup>28</sup> Brennan J had spoken of ‘political questions’ as non-justiciable, giving six heavily over-lapping alternative insignia.<sup>29</sup> These, including references to the respect due to co-ordinate branches of Government and the potentiality for embarrassment from multifarious pronouncements by ‘various departments’ as grounds of non-justiciability, could suggest a very muted view of the judicial role. In *Goldwater v Carter*,<sup>30</sup> Powell J suggested a more digestible synthesis: (i) whether the issue involved resolution of questions committed by the text of the Constitution to a co-ordinate branch of the Government, (ii) whether its resolution would demand that the court move beyond areas of judicial expertise and (iii) whether prudential considerations counsel against judicial intervention? The actual issue was whether the President had power to terminate a defence treaty with Taiwan without Congressional authorisation – a sort of precursor to the recent case of *Miller v Secretary of State for Exiting the European Union*,<sup>31</sup> where it is worth noting, in passing, that arguments about non-justiciability did not survive to reach the Supreme Court. Again, it is clear that Powell J’s criteria operate at different levels, and are not wholly replicable on the United Kingdom scene. We have no formal written Constitution, and we no longer regard even Crown prerogative as committed invariably to executive judgement. Lack of judicial expertise finds an echo in *Buttes Gas*. But ‘prudential’ considerations take us straight to policy, without giving us further guidance about what that policy might be. Neither this synthesis, nor, as Dr Mann pointed out, *Buttes Gas* itself, provide

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<sup>26</sup> N 22.

<sup>27</sup> [2000] 2 AC 326, 341 and 367E-H.

<sup>28</sup> 369 US 186 (1962).

<sup>29</sup> They were (i) a textually demonstrable constitutional commitment of the issue to another political branch; or (ii) a lack of judicially discoverable and manageable standards for resolving it, or (iii) a need to make an initial policy determination clearly for non-judicial discretion, or (iv) the impossibility of a court decision without expressing lack of respect due to co-ordinate branches of Government; or (v) an unusual need for unquestioning adherence to a political decision already made; or (vi) the potentiality for embarrassment from multifarious pronouncements by various departments on one question.

<sup>30</sup> 444 US 996, 998 (1979).

<sup>31</sup> [2017] UKSC 5, [2017] 2 WLR 583.

clear guidance about the reach of non-justiciability. What is required is a more ‘fine-grained’ or disaggregated approach, distinguishing particular instances.<sup>32</sup>

### **The Royal Prerogative and ‘no go’ areas**

Let me start by amplifying a point just made about Crown prerogative. In *Council of Civil Service Unions v Minister for the Civil Service*,<sup>33</sup> (‘the *GCHQ* case’), Mr Blom-Cooper, who had been counsel in *de Freitas v Benny*, had at least the satisfaction of persuading the House to discard an absolutist view of the immunity of the Crown prerogative decisions from judicial scrutiny.<sup>34</sup> The *GCHQ* case concerned the domestic use of the prerogative to vary, without prior consultation, GCHQ staff’s terms of employment so as to forbid membership of a trade union, for reasons of national security. The prerogative was held reviewable, though the claim failed on the facts, because the court would not second-guess the ministerial assessment that prior consultation would have imperilled national security.

Nevertheless, the common law moves cautiously, and in a much quoted passage Lord Roskill suggested that there remained ‘many examples...of prerogative powers which as at present advised’ he did ‘not think could properly be made the subject of judicial review’:

Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process.<sup>35</sup>

Subsequent history shows the law taking a more discriminating approach even in these areas. As to the making, or unmaking of treaties, I do not think we had cited to us, or the majority might have quoted in the *Miller* case, a passage in *Foreign Affairs in the Courts*, where Dr Mann notes the

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<sup>32</sup> Borrowing Professor Campbell McLachlan’s phrases from a slightly different context: see *Foreign Relations Law* (CUP 2014), para 12.129, cited in *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964 [33].

<sup>33</sup> [1985] AC 374.

<sup>34</sup> In its later decision in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453, the House affirmed that it also followed that the use of the prerogative to legislate for a British Overseas Territory was in principle judicially reviewable.

<sup>35</sup> At 418.

possibility of ‘extreme cases in which the Executive’s right to conclude treaties comes into conflict with another principle of constitutional law which is of the highest significance’,<sup>36</sup> the principle in short that treaties cannot change domestic law. I will come back to the prerogative of mercy itself.

## Foreign Relations

Let me continue for the moment to focus on the area of foreign relations and the ambit of *Buttes Gas*. Much of the relevant case law has in the past been grouped under the heading Act of State. That is another protean term. In *Foreign Affairs in English Courts*<sup>37</sup> Francis Mann said that the doctrine of foreign act of State displays so much uncertainty and confusion and rested on so slippery a basis that its application becomes a matter of speculation’ (p.164), although the difficulty of identifying and defining a foreign act of state would probably be less aggravating if an established meaning could be attributed to the British [*Crown*] act of State. This, unfortunately, is not the case”. (p.183)

The Supreme Court has made some recent attempts at systematizing both doctrines in three cases: *Mohammed and Rahmatullah v Ministry of Defence*<sup>38</sup> and *Belhaj v Straw*<sup>39</sup> and *Rahmatullah and Mohammed v Ministry of Defence (No 2)*.<sup>40</sup> Re-reading these cases, I am conscious that they too might be described as protean, even if I feel that Dr Mann would generally have approved their result.<sup>41</sup>

Although the different judgments may not be entirely consistent on the point, my own view was and is that Act of State, where it exists as a response to otherwise maintainable claims, involves non-justiciability, rather than a substantive defence. It involves a refusal to adjudicate upon what would otherwise be an ordinary civil issue. There are two relevant types of Act of State for present purposes. Crown Act of State operates as a response to claims made in respect of the exercise of British sovereign power abroad. Foreign Act of State operates as a response to a claim which, although not against a foreign State (or that State would be able to rely on state immunity), involves adjudicating upon the conduct of that State. Crown Act of State was relied

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<sup>36</sup> At 73.

<sup>37</sup> N 4.

<sup>38</sup> N 14.

<sup>39</sup> N 32.

<sup>40</sup> N 14.

<sup>41</sup> *Foreign Affairs in English Courts*, (n 4) 181, in particular appears as a precursor to *Belhaj v Straw* (n 32).

on by the British Government in *Rahmatullah (No 2)*. The claimants there were detained as suspected insurgents in the course of the armed conflicts in Iraq and Afghanistan. They sued the United Kingdom in tort for alleged wrongful detention. The Government's reliance on Crown Act of State was upheld by the Supreme Court. We identified as its preconditions: (i) an exercise by the UK Government of sovereign power, (ii) outside the UK (iii) with the prior authority or subsequent ratification of the Crown and (iv) in the conduct of the Crown's relations with other States or their subjects. We left open whether such a response is only available to claims by aliens. We did not need to examine closely the parameters of sovereign power. The conduct of armed operations abroad is the classic instance of Crown Act of State, and we thought it clear that the detention of suspected insurgents in the course of armed conflict was likewise. But it is notable that there was no plea by the British Government of Crown Act of State in *Belhaj v Stram*.<sup>42</sup> The claim there was that the United Kingdom was party to the illegal rendition of Mr Belhaj and his wife to the tender care of Colonel Gaddafi's Libya. It was, presumably, felt that alleged involvement in kidnapping and forced deportation is not the sort of exercise of sovereign power which Crown Act of State contemplates.

In *Rahmatullah and Mohammed (No 2)*<sup>43</sup> we also held the doctrine of Crown Act of State to be consistent with the ECHR, citing the Strasbourg authority of *Markovic v Italy*.<sup>44</sup> There, the Italian Court of Cassation had had before it claims by relatives of persons killed in the NATO bombing of Belgrade, in which Italian forces had participated. Categorizing the impugned act as an act of war, the Italian Court of Cassation said that 'since such acts were a manifestation of political decisions, no court possessed the power to review the manner in which that political function was carried out'.<sup>45</sup> The European Court of Human Rights (ECtHR) upheld this approach under the Convention.<sup>46</sup>

There was no suggestion in *Markovic* that the bombing of Belgrade involved an act within the jurisdiction of Italy in a sense making the ECHR applicable. Any such suggestion would have

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<sup>42</sup> N 32.

<sup>43</sup> N 14.

<sup>44</sup> (2007) 44 EHRR 52.

<sup>45</sup> At [106].

<sup>46</sup> It said, at [114], that 'the Court of Cassation's ruling ... does not amount to recognition of an immunity but is merely indicative of the extent of the courts' powers of review of acts of foreign policy such as acts of war. It comes to the conclusion that the applicants' inability to sue the State was the result not of an immunity but of the principles governing the substantive right of action in domestic law.'

been inconsistent with the ECtHR's decision in *Banković v Belgium*<sup>47</sup> cited in *Marković*.<sup>48</sup> The Strasbourg Court has in this area therefore arrived at a somewhat remarkable position regarding the applicability of the Convention. Taking *Banković* and the Court's later decision in *Al-Skeini v United Kingdom*<sup>49</sup> together, it appears that a victim in State A of bombing *from the air* by State B is not within the jurisdiction of State B. In contrast, a victim in State A of a shooting by soldiers *on the ground* from State B is within the jurisdiction of State B. In contrast to the position in *Marković v Italy*,<sup>50</sup> military action towards Mr Rahmatullah and Mr Mohammed was on the ground. So, although their tort claims failed because of Crown Act of State, they remained able to pursue Convention claims based on the same facts. On this basis, in *Al-Wabeed v Ministry of Defence*,<sup>51</sup> Mr Mohammed had a measure of success. Here is another paradox. Just as the Supreme Court was finally confirming Crown Act of State as consistent with the Convention, at the same time it was acknowledging that the Convention provides a Convention cause of action, in any case affecting the right to life, ill-treatment or liberty. Convention law treads further than the common law would by itself go, albeit with a somewhat differing purpose and differing approaches to causation and damages. Managing and where possible integrating these competing legal strands is a continuing challenge for today's judiciary.

Foreign Act of State is discussed extensively in *Belhaj v Straw*.<sup>52</sup> The term has been used in three senses.<sup>53</sup> Only one is presently relevant and it was at the heart of the issues in *Belhaj v Straw*. Mr Belhaj's and his wife Ms Boudchar's claim was that they were in February/March 2004

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<sup>47</sup>(2007) 44 EHRR SE5.

<sup>48</sup> N 44.

<sup>49</sup> (2011) 53 EHRR 18.

<sup>50</sup> N 44.

<sup>51</sup> [2017] UKSC 2, [2017] AC 821.

<sup>52</sup> N 32.

<sup>53</sup> The other two senses which can in the present context be discarded are:

(i) cases where United Kingdom courts recognize foreign confiscatory or expropriatory decrees: these are not cases of non-justiciability and they are better not described as cases of Act of State. They reflect the ordinary private conflicts of law rule, that title to movables is normally determined by the law where the relevant movables are at the relevant time, the *lex situs*: see *Luther v Sagor* [1921] 3 KB 532; *Princess Paley Olga v Weis* [1929] 1 KB 718; and *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368;

(ii) the few, doubtful cases indicating that English courts will recognize a confiscatory or other act occurring not under, but contrary to, the *lex situs*. In *Belhaj v Straw* (n 32) [38] and [65-74], Lord Neuberger and I thought, with some support from a comment by Francis Mann in *Foreign Affairs in the Courts* (n 4) 179, as well as carefully reasoned decisions of the German courts, that, if there is any such rule, it is and should be confined to cases relating to property, and not extended to for example acts of violence against individuals. Any such extended rule is difficult to reconcile with authority which establishes that English courts are entitled to consider whether a foreign law is lawful under the constitution of the relevant foreign State: *Buck v A-G* [1965] Ch 745, 770; *Belhaj v Straw*, [73](iii). If they can do that, why cannot they examine whether a foreign executive act would be held illegal by the foreign domestic courts? If the country is one where the rule of law means anything, one might think that this should be possible.

unlawfully detained by Malaysian officials in Kuala Lumpur and by Thai officials and United States agents in Bangkok, before being put on board a US airplane which took them to Colonel Gaddafi's Libya, where they were further detained, in her case until June 2004, in his case until March 2010. While in the hands of United States and Libyan authorities, they were, they alleged, subjected to mistreatment amounting to torture. All this, they alleged, happened by common design which the United Kingdom arranged, assisted and/or encouraged. The United Kingdom Government argued that the claim fell within *Buttes Gas* and was incapable of adjudication in a United Kingdom court, because of the alleged involvement of the Malay, Thai and/or United States authorities. The Supreme Court accepted that some foreign State conduct outside the territory of the relevant foreign State might be non-justiciable – but not conduct of the nature alleged here. Illegal rendition would involve a fundamental violation of liberty (see Article 29 of the Magna Carta 1225) and torture had been illegal for centuries (see *A v Secretary of State for the Home Department (No 2)*).<sup>54</sup> The precise reasoning in the judgments differs, but there are common themes. There were judicial and manageable standards with which to address the issues. There had been no suggestion that some general policy advantage of cooperation with the United States or with Colonel Gaddafi's regime could justify a plea of Crown Act of State. Such evidence as there was of potential embarrassment to this country's relations with the United States did not justify a conclusion that United Kingdom courts should refrain from adjudicating upon them. The United States Government had in fact changed since the events. It has of course changed again since then – making any judicial attempt to appraise the likely effect on inter-State relations of a particular adjudication seem more than a little evanescent as an exercise. Dr Mann was incidentally scathing about any suggestion that it was a function of Foreign Act of State not only to avoid embarrassment to United Kingdom interests, but also 'to eschew offence to foreign States, their institutions, laws or policies' (*Foreign Affairs in English Courts*, p.182) – although no doubt there can be a connection.

*Belhaj v Straw* shows that any claim to invoke a doctrine of non-justiciability or judicial abstention requires close attention to the particular facts. As a contrasting example, we were cited the Court

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<sup>54</sup> [2005] UKL 71, [2006] 2 AC 221 [11] per Lord Bingham. Such conduct on British territory would therefore clearly be illegal, as Lord Hoffmann noted in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* (n 34) [35], where he observed that the idea that conduct on British territory, involving use of Diego Garcia as a base for two extraordinary renditions or of it or a ship in the waters around it 'as a prison in which suspects have been tortured', could be legitimated by executive fiat was 'not something which I would find acceptable'. The issue in *Belhaj v Straw* (n 32) was, therefore, whether United Kingdom authorities could without judicial scrutiny be involved in such conduct abroad.

of Appeal's decision in *R (Khan) v Secretary of State for Foreign and Commonwealth Affairs*.<sup>55</sup> The son of a tribal elder killed in a United States drone strike in Pakistan claimed that the United Kingdom had been responsible for the relevant intelligence, that there was no armed conflict, or at any rate no international armed conflict on foot in Pakistan at the relevant time, and that the United Kingdom agents responsible for the intelligence had committed murder within the terms of sections 44-46 of the Serious Crime Act 2007. The Court of Appeal held that the matter was non-justiciable as a Foreign Act of State. The claimant was not seeking any relief save, in effect, an advisory opinion, but Leggatt J at first instance in *Rahmatullah*<sup>56</sup> suggested that, if the claimant had had some substantive claim for damages, eg for a dependency, it could have been justiciable. So long as *Bankovic* stands,<sup>57</sup> there would be no Convention claim in respect of such a death. One can understand the desire to invoke the common law in such a case. On the other hand, an issue regarding the lawfulness of the use of drones could depend upon determining whether there was an armed conflict in Pakistan and/or Afghanistan, whether any such conflict was international or non-international in nature and what rights of action or self-defence existed – all issues on which the policy and judgement of the executive and armed forces might be expected to prevail. If there is one core area of the prerogative which remains effectively immune from judicial scrutiny, as Lord Roskill suggested, one might expect it to be the defence of the realm, including by the engagement of the armed forces in warlike activity abroad or collaboration with the armed forces of another friendly State in mutual self-defence.

Finally, it seems logical<sup>58</sup> to suppose that the threshold for treating an issue as non-justiciable on account of a Foreign Act of State is higher than it is for treating conduct of one's own State as non-justiciable on account of Crown Act of State. Putting the point the other way round, the impetus for judicial restraint is lower when all that can be said is that there are implications for, or for good relations with, a foreign State.

### **Other areas giving rise to Non-Justiciability in Domestic Law**

Let me at this point turn away from the area of foreign relations, to consider other areas in which issues of non-justiciability may arise. The principal, but not the only, areas fall within the Crown

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<sup>55</sup> N 20.

<sup>56</sup> [2014] EWHC 3846 (QB).

<sup>57</sup> N 47.

<sup>58</sup> As I suggested in *Rahmatullah No 2* (n 14) [52].

prerogative and Lord Roskill's dictum. But first let me identify some other cases which appear to me to fall within the concept, even if it is not commonly applied to them:

State immunity, based on customary international law and now the State Immunity Act 1978, or diplomatic immunity. The court is precluded from adjudicating upon the merits, by a rule of immunity possessed by the State or person. Beyond the involvement of a foreign State, there need of course be no foreign relations element. Various important exceptions have of course developed, particularly in the commercial sphere, and most recently in the employment sphere.<sup>59</sup>

Article 9 of the Bill of Rights 1689, prohibiting the impeaching or questioning in any court or place outside Parliament of any debates or proceedings in Parliament was identified as a statutorily based instance of non-justiciability in *Shergill v Khaira*,<sup>60</sup> citing *Prebble v Television New Zealand Ltd.*<sup>61</sup> In *Prebble* the television station's defence to a defamation action relied on statements by the plaintiff in Parliament which, it alleged, were calculated to mislead or improperly motivated. The Privy Council struck out that part of the defence, effectively as non-justiciable.<sup>62</sup>

There are other rare situations in which all or part of the merits cannot be fairly tried: see eg *Carnduff v Rock*,<sup>63</sup> where a police informer's claim for remuneration allegedly promised was not justiciable, because its trial would require the police to disclose and the court to investigate and adjudicate upon information which should in the public interest remain confidential to the police; this principle is further discussed in *Al Rami v Security Service*,<sup>64</sup> and could have provided a basis in *Buttes Gas* for dismissal of the claim, had it not been voluntarily withdrawn once the defence and counter-claim were held non-justiciable. A complaint by Mr Carnduff to the ECtHR was rejected as inadmissible.<sup>65</sup>

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<sup>59</sup> *Reyes v Al-Malki* [2017] UKSC 61, [2017] 3 WLR 923; *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2017] 3 WLR 957.

<sup>60</sup> N 15 [42].

<sup>61</sup> [1995] 1 AC 321.

<sup>62</sup> While holding that sufficient of the defence of justification remained to enable a fair trial.

<sup>63</sup> [2001] EWCA Civ 680, [2001] 1 WLR 1786.

<sup>64</sup> [2011] UKSC 34, [2012] 1 AC 531 [15-17], [86], [108] and [157].

<sup>65</sup> Application No. 18905/02, judgment of 10 February 2004 (unreported).

The rule of illegality recognized by Lord Mansfield in *Holman v Johnson*<sup>66</sup> is in substance a principle of non-justiciability, whereby: ‘no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.’

Lord Mansfield went on to make clear that the rule operated independently of the merits.<sup>67</sup> Since the Supreme Court’s recent decision in *Patel v Mirza*,<sup>68</sup> it may be that this should no longer be seen as a kind of non-justiciability. Instead, the issue of illegality has been effectively subsumed within the merits of the claim. It is an additional factor in determining whether the claim or defence should succeed and in what sense.

Non-justiciability has also been identified as the basis on which a court will refuse to review or second-guess governmental policy decisions. This was how Visc Radcliffe expressed himself in *Chandler v DPP*,<sup>69</sup> where CND activists entered an airfield used by United States airplanes which were kept there combat ready and on station alert, as part of NATO’s nuclear deterrent. The aim was to immobilize the airfield by preventing aircraft taking off. The activists were charged with committing and conspiring to commit a prohibited act, namely entering the airfield ‘for a purpose prejudicial to the safety or interests of the State’. Their defence was that the country would be better off without nuclear weapons and that their reasonably held belief was that their conduct would be to its benefit, and they wanted - but were refused permission - to call evidence in support of that view. Visc Radcliffe spoke of the non-justiciability of ‘the question whether it is in the true interests of this country to acquire, retain or house nuclear armaments’.<sup>70</sup> But I think that Lord Devlin demonstrated that it was unnecessary to resort to that rationale. In referring to the State’s or any person’s interests, the statute must be taken to be referring to those interests as they actually were, not as they might or ought to have been, and such interests were defined by the State’s or person’s policies at the time.<sup>71</sup> Contrast with this domestic statutory scheme that applicable under Article 15 of the ECHR, which required the House of Lords in *A v*

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<sup>66</sup> (1775) 1 Cowp 341, 343.

<sup>67</sup> Stating: ‘if, from the plaintiff’s own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*.’

<sup>68</sup> [2016] UKSC 42, [2017] AC 467.

<sup>69</sup> [1964] AC 763.

<sup>70</sup> *Ibid*, 798.

<sup>71</sup> Lord Devlin added ‘even though judged *sub specie eternitatis*, that policy may be wrong’. In *Chandler* (n 69) the State’s policy and so its interests were proved to have been to keep its airfields operational. No other evidence was relevant or therefore admissible. As to whether the defendants’ conduct was prejudicial to such interests, the facts spoke for themselves.

*Secretary of State for the Home Department*<sup>72</sup> (‘the *Belmarsh* case’) to decide whether there was a threat to the life of the nation, justifying a derogation from the Convention. The House undertook the exercise, while giving great weight to the Home Secretary’s judgment, and concluded (Lord Hoffmann dissenting) that there was such a threat, although the actual derogation was disproportionate and discriminatory.

Leaving aside the last head, we are therefore quite familiar with some cases of non-justiciability in ordinary domestic law contexts. But each is ultimately the ad hoc result of policy decisions by Parliament or the common law as to the appropriate role of domestic courts. Let me return therefore to the more general area of the royal prerogative, and look at what has become of some of Lord Roskill’s special categories. The making of treaties, presumably, includes the unmaking of treaties. But the *Miller*<sup>73</sup> case shows, as I have pointed out, that even here it is not always possible to exclude judicial review. Take the area of national security and defence of the realm, it will often be unnecessary to speak in terms of a no-go area. It may be, as it was in *Chandler*<sup>74</sup> and the *GCHQ* case<sup>75</sup> be sufficient to recognize that the only authority which can define the United Kingdom’s policies and interests is the United Kingdom executive. Even where a domestic court is obliged to undertake the role of assessing such interests for itself, as the ECHR obliged the House in the *Belmarsh* case,<sup>76</sup> the executive’s expertise in and responsibility for these matters will militate strongly against successful judicial review. To take a third example, the question who is the appropriate recipient of an honour, or who should be appointed as a minister is of such intensely subjective a nature that no recognized ground of judicial review would ordinarily apply. Suppose however that it were shown that an honour had been procured by bribery? Is it clear that all possibility of judicial review could still be absolutely excluded? Usually, it will be possible and better to adopt a more refined approach, using conventional tools of judicial review, rather than the blanket approach of excluding all possibility of judicial review because of the subject matter.

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<sup>72</sup> [2004] UKHL 56, [2005] 2 AC 68.

<sup>73</sup> N 31.

<sup>74</sup> N 68.

<sup>75</sup> N 33. Just the same can apply in a context which has nothing to do with the prerogative. Take *R v Secretary of State for the Environment, ex p Hammersmith and Fulham LBC* [1991] 1 AC 521, where the House held that a Secretary of State’s power to designate local authorities with ‘excessive budgets’ was incapable of judicial review, short of proof of bad faith, improper motive or manifest absurdity.

<sup>76</sup> N 72.

## The Prerogative of Mercy

Developments in relation to the prerogative of mercy offer a further case-study of the shift towards justiciability. The position up to 2003 is examined valuably by Professor B V Harris in an article entitled ‘Judicial Review, Justiciability and the Prerogative of Mercy’.<sup>77</sup> Following the *GCHQ* case,<sup>78</sup> the English Divisional Court departed from the Privy Council’s approach in *de Freitas v Benny*<sup>79</sup> in *R v Secretary of State, ex p Bentley*.<sup>80</sup> The *GCHQ* case, it said:

made it clear that the powers of the court cannot be ousted merely by invoking the word “prerogative”. The question is simply whether the nature and subject matter of the decision is amenable to the judicial process. Are the courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they are ill equipped to do so? Looked at in this way there must be cases in which the exercise of the Royal prerogative is reviewable in our judgment. If, for example, it was clear that the Home Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and in our judgment would be entitled to do so.<sup>81</sup>

Bentley had been hanged for murder despite the jury recommending leniency. The Home Secretary took the view that he should not have been hanged, but had refused to grant any pardon, not appreciating that he had power to substitute a posthumous conditional pardon to reflect the fact that a life sentence should have been substituted. The Divisional Court ordered the Home Secretary to reconsider his decision.

The Privy Council did not immediately change course.<sup>82</sup> But, in 2000, in one of many turns – usually for the better – in its death penalty jurisprudence, it held in *Lewis v Attorney-General of Jamaica*<sup>83</sup> that the decision whether or not to exercise the prerogative should be exercised by fair procedures. It established a series of requirements, designed to inform the prisoner, enable him

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<sup>77</sup> (2003) CLJ 631.

<sup>78</sup> N 33.

<sup>79</sup> N 16.

<sup>80</sup> [1994] QB 349.

<sup>81</sup> At 363.

<sup>82</sup> It initially affirmed the non-justiciability of a refusal to grant a pardon in death penalty cases in *Reckley v Minister of Public Safety (No 2)* [1996] AC 527.

<sup>83</sup> [2001] 2 AC 50.

to make representations and have them considered and to know the reasons for whatever decision was reached.<sup>84</sup> At that stage, the Board continued to assert that the *merits* of any decision whether or not to exercise the prerogative were not reviewable.

However, since 2003, the extent to which the prerogative of mercy may be reviewable on its merits has been further developed. In *Pitman v The State*,<sup>85</sup> the Board said that judicial review could lie to prevent the execution of a defendant who since conviction had developed significant mental abnormality. That postulates its availability on substance.

The prerogative of mercy is also available when the carrying out of a death sentence becomes unconstitutional due to delay. In *Pratt v Attorney General of Jamaica*,<sup>86</sup> the Board held that it would generally be cruel and unusual or inhuman punishment to carry out such a sentence after five years on death row. Some form of commutation was then required. The Board indicated that this could be achieved using the prerogative. In *Lendore v Attorney General of Trinidad and Tobago*,<sup>87</sup> the Privy Council affirmed this,<sup>88</sup> while accepting that, prior to any prerogative commutation, a prisoner might also apply to a court for constitutional relief to fix an appropriate alternative sentence. The existence of these alternative routes to commutation opens the possibility that an executive exercise of the prerogative should also be judicially reviewable to ensure general compatibility with the sort of commuted sentence that a court would have passed on a motion for constitutional relief. The Board also recognized that there might be cases where the use of the prerogative to preclude access to a court was reviewable, eg if it was deployed to forestall an appeal against sentence to the Court of Appeal.<sup>89</sup>

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<sup>84</sup> More particularly: a) notice should be given to the prisoner when the process is to be operated; b) the notice should be sufficient to give him or his advisers due opportunity to prepare representations in writing (or orally if that is the local procedure); c) all documents which are to be before the relevant decision-maker should be made available to the prisoner, to enable the representations to be made regarding their content before any decision has been taken (even one subject to review) or any clear opinion has been formed; d) the relevant decision-maker is bound to give due consideration to any representations made; and e) the decision-maker should give full reasons for whatever decision is reached. A summary or gist will not suffice in this regard.

<sup>85</sup> [2017] UKPC 6, [2017] 3 WLR 790.

<sup>86</sup> [1993] UKPC 1, [1994] 2 AC 1.

<sup>87</sup> [2017] UKPC 25, [2017] 1 WLR 3369.

<sup>88</sup> However, the commuted sentences under consideration in *Lendore* (n 87) had been substituted by the President in batches, without offering any opportunity for individualized representations. This was procedurally irregular and the case was remitted for the President to receive individual representations, with a view to setting substitute sentences in the light of all the circumstances [78 – 80].

<sup>89</sup> N 87. It said: “The Board would not altogether rule out the legal possibility that the exercise of the power of pardon and substitution of alternative sentence could in certain very limited circumstances infringe a prisoner’s right under the Constitution to the protection of the law. One could theoretically envisage the purported exercise of the power of

## Conclusion

Drawing together the threads, my thesis is that, for the most part, courts can and should adjudicate upon civil claims and public law claims, without it being necessary or appropriate to resort to a doctrine of non-justiciability. There are a few ad hoc situations where an international law principle, in the form of State immunity, or a domestic law principle, such as Article 9 of the Bill of Rights, debars the courts from fulfilling their ordinary function. But the nature of ordinary civil claims makes non-justiciability a very rare phenomenon. Judicial review can in contrast range wider, into areas which may potentially be thought to throw up problems of justiciability, but it is subject to other controls – such as standing, institutional competence, discretion – which commonly make it unnecessary to grasp at so blunt a response. The credibility of a common law principle of abstinence in areas involving the rights to life and liberty and freedom from ill-treatment is also diminished, when these are areas into which the ECHR now often requires domestic courts to enter.<sup>90</sup>

It continues to be the area of foreign relations in which respect for institutional or constitutional competence may most easily tip over into outright non-justiciability. There can here be no single litmus test. The political question doctrine has faded from English common law thinking. But very often it will be unnecessary and inappropriate to accept the blunt argument of a no-go area. There is a continuing shift to a more nuanced recognition that each case must be approached on its own merits, weighing all relevant factors to decide whether the particular issue is really non-justiciable, or whether any relief by way of judicial review should as a matter of discretion be granted. This shift will be promoted by fuller recognition that the intensity of any judicial review should always reflect the respective institutional competence and expertise of the original decision-maker compared with that of any court asked to review the original decision. The four-stage test of proportionality identified in *Bank Mellat v Her Majesty's Treasury*<sup>91</sup> - sometimes

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pardon and substitution in the case of a convicted prisoner who has a viable right of appeal against sentence to the Court of Appeal. Theoretically the position could arise in which the substituted sentence attached to a pardon was more severe than the one which the Court of Appeal might, if it allowed the appeal, order. In such a case, the power of pardon might indeed deprive the prisoner of an existing legal right to appeal and to the normal operation of the criminal justice system, and to that extent might deprive him of the protection of the law' [34].

<sup>90</sup> It is not without interest that, in *Smith v Minister of Defence* [2013] UKSC 41, [2014] AC 52, the majority conclusion that the Convention required domestic courts to adjudicate upon claims by the relatives of British soldiers killed in Iraq by allegedly inadequate vehicles or equipment was accompanied by a conclusion that the concept of combat immunity did not extend to this situation at common law either. One may perhaps wonder, if the only claim had been the common law claim for negligence, whether the same conclusion would have been so likely.

<sup>91</sup> [2013] UKSC 39, [2014] AC 700 [74]. The four stage test was: '(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it

thought to require equivalently intrusive review in every case – must be read in this light. Elliott and Thomas’s *Public Law*<sup>92</sup> makes the very pertinent comment that ‘justiciability and deference may be thought of as different points on a continuum’. I would prefer to speak not of ‘deference’ but of ‘respect for institutional or constitutional competence’, but otherwise I entirely agree; and the modern tendency is to give weight to institutional and constitutional competence, rather than grasp at the lock-out of non-justiciability.

That said, some specific no-go areas of foreign policy decision making and activity are currently well-established. Decisions to make or unmake treaties are an example - save in a rare type of situation exemplified by the *Miller* case.<sup>93</sup> The conduct of armed operations overseas, whether by way of armed intervention or by way of self-defence against another State or against non-State actors targeted by Security Council Resolutions, is the conventional case of non-justiciable Crown Act of State. However, as *Belhaj* illustrates,<sup>94</sup> this is not *carte blanche* for alleged State involvement in acts of force against individuals, such as kidnapping, torture or inhuman treatment, whatever their motives. Such acts bear no resemblance to any conventional, or one may add acceptable, use of sovereign authority.

Finally, with particular reference to Foreign Act of State, any domestic court will naturally always think hard before reaching any decision which might be seen as inconsistent with and undermining of the policy and interests of its own Government at an international level, in a context where the judicial and executive branches should normally speak with one voice; that includes any decision which would inflict serious damage on this country’s international relations with another State or States. It will no doubt also bear in mind the legitimate interests of any friendly foreign State. But such considerations alone cannot axiomatically lead to a conclusion of non-justiciability. The impulse towards recognising non-justiciability in the form of Foreign Act of State is considerably less powerful than it is in respect of Crown Act of State. The modern focus on individual rights and freedoms, both at common law and under the ECHR, makes it increasingly difficult for domestic courts simply to withdraw from adjudication upon issues arising out of State activity on the international plane. In an era, when domestic recourse is in

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applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.’

<sup>92</sup> (OUP 2017, 3rd edn), 563.

<sup>93</sup> N 31.

<sup>94</sup> N 32.

reality often the only practicable means by which an individual, as opposed to a State, may obtain redress for alleged misconduct on the international plane (as *Belhaj v Stran*<sup>95</sup> once again illustrates), the legal position as it is currently emerging seems on the whole desirable. Dr Mann, with his belief in, indeed enthusiasm for, domestic adjudication, would, I believe, also welcome it.

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<sup>95</sup> N 32.