THE BOUNDARIES OF JUSTICIABILITY

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Abstract This article examines the application of the principle of justiciability principally where it has been invoked in the context of claims in the UK courts related to foreign affairs or public international law. It is submitted that the modern judicial trend is to find that issues are justiciable and focus instead on the degree and intensity of the review exercised. The trend is directed and supported by the growing importance of human rights and the rule of law.

I. INTRODUCTION

The principle of justiciability is something of a chameleon but it is important because it delineates the scope of judicial review and ultimately the rule of law.[1] This article examines the application of the principle principally where it has been invoked in the context of claims in the UK courts related to foreign affairs or public international law.[2] Attempts to litigate claims related to foreign affairs of the United Kingdom, and of other States, in the courts of the UK are a well-established historical and legal phenomenon.[3] They have grown significantly as the jurisdiction of the UK courts has been expanded to provide a link for events that have little or no factual connections with the national system.[4] Such litigation is often complex both in terms of procedure and substance. It can involve a heady mix of domestic law,[5] European human rights

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I am grateful to Colin Warbrick and John Bell for their comments on earlier drafts. Responsibility for the views expressed is mine alone.

[1] '[J]usticiability is one of the moral principles that determine the ideal content of the rule of law' T Endicott, 'The Reason of Law' (2003) 48 American J Jurisprudence 83–106, at 97.

[2] A related question is whether rules and principles of public international are justiciable in the UK system in the sense of allowing rights or obligations to be based on them, see P Sales and J Clement, 'International Law in Domestic Courts: the Developing Framework' (2008) 124 LQR 388–421; KR Thomas, 'The Changing Status of International Law in English Domestic Law' (2006) 53 Netherlands International Law Review 371–398.

[3] See FA Mann, *Foreign Affairs in the English Courts* (Oxford, Clarendon, 1986); L Collins, 'Revolution and Restitution: Foreign Affairs in National Courts' (2007) 326 Receuil Des Cours 9–72.

[4] See A Johnson, 'Interim Injunctions and International Jurisdiction' (2008) 27(4) Civil Justice Quarterly 433–444. In *Kuwait Airways Corp v Iraqi Airways Co* (n 89) the link was that Iraqi Airways Co had a registered office in the UK. No issue was taken as to jurisdiction.

[5] Claims may have to be formulated and analysed in terms of the relevant domestic forums' concepts of tort, property or crime.

[*ICLQ* vol 59, October 2010 pp 981–1019] doi:10.1017/S002058931000059X

https://doi.org/10.1017/S002058931000059X Published online by Cambridge University Press

and European Union law,[6] private international law[7] and, increasingly, public international law.[8] In many cases the claims related to foreign affairs have been novel and ambitious and it was probably expected that the litigation would fail.[9] However, they have served an alternative purpose of highlighting particular causes and alleged violations of fundamental international law standards, particularly in the environmental, human rights and labour spheres.[10] In one sense the jurisprudence is often frustrating because final decisions are rarely made on the point of substance. Rather the cases usually turn on intricate questions of jurisdiction and immunities,[11] fall foul of the doctrine of act of State[12] or, the principal focus of this article, the principle of justiciability.[13]

This article outlines the nature of, and rationales for, the principle of justiciability (Part II). It examines recent jurisprudence on justiciability in the UK courts in the context of claims related to foreign affairs or public international law (Part III). The leading cases are examined through a number of broad overlapping categories, *viz*, Political Decisions; the Acts and Transactions of Foreign States; Exceptions for flagrant violation of rules of international law of fundamental importance; the Interpretation of International Law; Foreign

[6] See eg *R (Saeedi) v Secretary of State for Home Department* [2010] ECHC 705 (Admin).

[7] The doctrine of justiciability was central in *Mbasogo v Logo Ltd and Others* [2005] EWHC 2034, (2005) 102(39) LSG 32 (an attempt to litigate a particular foreign affair, an attempted coup in Equatorial Guinea) and in *Islamic Republic of Iran v Barakat Galleries* [2007] EWCA Civ 1374, [2009] QB 22 (a State seeking to recover antiquities belonging to its national heritage). See CA Whomersley, 'Foreign States and British Courts' (2009) 125 LQR 227–233; A Scott, 'The Non-justiciability of Foreign Sovereign Claims' (2007) Lloyd's Maritime and Commercial Law Quarterly 296–301.

[8] See S Fatima, *Using International Law in Domestic Courts* (Hart, Oxford, 2004).

[9] Nonetheless, many of them have been allowed to proceed to a hearing and issues as a more generous approach to standing has been followed. There is a trend for standing to be considered as part of the legal and factual context of the whole case: see *R (Al-Haq) v Secretary of State for Foreign & Commonwealth Affairs* [2009] EWHC 1910 (Admin) paras 47–48, 61–62 (denying a foreign NGO standing); *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin) (claimant was a peace activist opposed to the wider presence of UK and US armed forces in Afghanistan. Accepted that claim brought in the public interest). In the *CND Case* (n 108) the court, for the first time, made a pre-emptive costs order.

[10] This has also been the case for example with some of the litigation in the US. See S Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, London, 2004), 21–64.

[11] Eg on State immunity with respect to alleged torture see *Jones v Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270. See M Tomonori, 'Denying Foreign State Immunity on the Grounds of the Unavailability of Alternative Means' (2008) 71 Modern Law Review 734–752.

[12] In *Kuwait Airways Corporation v Iraq Airways Corporation* [2002] 2 AC 883, at para 265, the CA stated that 'the non-justiciability principle can only be understood in relation to earlier authority on the act of State doctrine, to which it is related'. In *Attorney-General v Nissan*, [1970] AC 179, Lord Wilberforce suggested that act of State included within itself two different conceptions or rules, one being justiciability. It prevented British municipal courts from taking cognisance of certain acts of the Crown which are done under the prerogative in the sphere of foreign affairs. On the differing rationales see A Perreau-Saussine, 'British Acts of State in English Courts' (2007) 78 BYIL 176–254. Courts do not always distinguish between acts of State and non-justiciability, see P Cane, 'Prerogative Acts, Acts of State and Justiciability' (1980) 29 ICLQ 680–700. See also *Al-Jedda* (No. 2) (n 199).

[13] See M Shaw, *International Law* (6th edn, CUP, Cambridge, 2008) 179–92.

https://doi.org/10.1017/S002058931000059X Published online by Cambridge University Press

Affairs and International Relations; Defence; and National Security. Finally, there is an assessment of the trends in the jurisprudence and an appraisal of the current boundaries of the principle (Part IV). It is submitted that the modern judicial trend is to find that issues are justiciable. Thus the more critical issues are the degree and intensity of the review exercised.

II. THE PRINCIPLE OF JUSTICIABILITY

A. Justiciability and Jurisdiction

An issue is considered to be justiciable in a particular forum if it is capable of being decided in that legal forum and it is considered appropriate to do so. Such a description has elements of circularity. If an issue is suitable for judicial determination it is said to be justicibable. If it is not so suitable it is said to be non-justiciable. However, conceptions of capability, fora[14] and appropriateness may change over time.[15] It is arguable that justiciability is neither a concept nor a principle, but merely a category of argument into which a number of specific arguments fit. In the language used by courts and commentators, it is often unclear whether the principle of justiciability is distinct from that of jurisdiction (the court has no competence or there is another more competent court).[16] If a legal decision-maker does not have jurisdiction to make determinations then the justiciability or otherwise of the issues should be irrelevant. However, the distinction between jurisdiction and justiciability is not that simple. The threshold question of whether a UK court has jurisdiction is answered by the court applying common law rules. Justiciability may be a consideration of policy that goes to whether or not a court considers that it has jurisdiction at all. The weight of that policy may vary from context to context. Justiciability may also be a consideration of law about whether or not it exercises that jurisdiction. Sometimes the terms jurisdiction and justiciability appear to be used interchangeably.[17] In the context of private international law a rule that has long-been stated as a rule of jurisdiction is now suggested to be not a rule of jurisdiction at all but rather one which goes to the justiciability or admissibility of the claim.[18]

[14] Justiciability in a court may differ from justiciability or arbitrability before an arbitral tribunal: *The Republic of Serbia v Imagesat International NV* [2009] EWHC 2853 (Comm), para 120 (noting the unavailability of sovereign immunity or act of State defences to a state which has agreed to submit a dispute to arbitration).

[15] See G Marshall, 'Justiciability' in AG Guest (ed), *Oxford Essays in Jurisprudence* (OUP, Oxford, 1961); Ben-Naftali and Micheali (n 49); Mann (n 3) 63–83.

[16] See *CND Case* (n 108); *Mbasogo Case* (n 7). Lack of jurisdiction because of immunity from suit (ie the action cannot be brought without the other party's consent) is a conceptually clearer category.

[17] See *CND case*, text to (n 32) below, where the court refers to its 'assumption of jurisdiction'.

[18] See *Tasarruf Mevduati Sigorta Fonu v Demirel* [2006] EWHC 3354 (Ch); [2007] 2 All ER 815, para 62, per Lawrence Collins J.

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B. Justiciability as a Judicial Doctrine

Justiciability is a judicial doctrine and therefore subject to judicial evolution. It can also be directed or displaced if a constitution or a legislative body expressly directs that particular provisions are justiciable or non-justiciable. If the constitution or the legislative body has directed the judicial forum to examine particular issues then they may see less need to resort to conceptions of justiciability. The Human Rights Act (1998) specifically gives to the UK courts the power to make decisions on the compatibility with European Convention on Human Rights (ECHR) of legislation and the acts of public authorities, though it does not technically make the ECHR rights 'justiciable' in the different sense of creating a cause of action or providing a defence.[19] Issues of justiciability are an element of the debate on a British Bill of Rights and Responsibilities, particularly with respect to the incorporation of economic, social and cultural rights and their subsequent interpretation by the courts.[20] Conversely, article 45 of the Irish Constitution provides for 'Directive Principles of Social Policy' which are, 'intended for the general guidance of Parliament. The application of those principles in the making of laws shall be the care of Parliament exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.'[21]

It has been judicially asserted that justiciability engages rules of law rather than purely discretionary considerations.[22] It reflects rules that the, 'courts have imposed upon themselves in recognition of the limits of judicial expertise and of the proper demarcation between the role of the courts and the responsibilities of the executive under our constitutional settlement'.[23] However, it is always necessary to consider the context in which judicial pronouncements have been made. In the *Buttes Case* Lord Wilberforce described the non-justiciability principle as, 'not one of discretion, but . . . inherent in the very nature of the judicial process'.[24] However, the context of that case was one of foreign sovereign acts and disputed questions of public international law. In other cases the non-justiciability may be for more substantive reasons, for example, that the appropriate allocation of government resources cannot

[19] See ID Leigh and RMW Masterman, *Making Rights Real: the HRA in its First Decade* (Oxford, Hart, 2008). 'While the HRA remains in full force, Convention rights partake of the nature of what in other constitutional environments are considered to be entrenched rights': *Re Arthur's Application* [2010] NIQB 75, para 31. On UK immigration rules as a source of justiciable rights, see *Secretary of State for the Home Department v Pankina* [2010] EWCA Civ 719, para 21.

[20] See Green Paper on 'Rights and responsibilities' (UK. Department of Justice, Cm 7577), March 2009, ch. 4 (analysing possibilities in terms of the spectrum of justiciability) <http://www.justice.gov.uk/publications/docs/rights-responsibilities.pdf>; JA King, 'The Justiciability of Resource Allocation' (2006) 70 MLR 327–46.

[21] See also J Usman, 'Non-Justiciable Directive Principles: A Constitutional Design Defect' (2007) 15 Mich St J International Law 643–696.

[22] Richards J in *CND Case* (n 108); similarly, Maurice Kay J. in the *CND Case*, para 50.

[23] Per Maurice Kay J, ibid.

[24] See *Buttes Gas & Oil Co v Hammer* (No.3), [1982] A.C. 888 at p. 932.

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be judged by the courts. Lord Wilberforce also observed that, the ultimate question of 'what issues are capable, and what are incapable, of judicial determination must be answered in closely similar terms in whatever country they arise, depending, as they must, upon an appreciation of the nature and limits of the judicial function.'[25] To the extent that this is true it makes decisions based on justiciability of wider comparative interest.[26]

C. Rationales for Justiciability

Justiciability can be rationalized from procedural, institutional or substantive perspectives or a mixture of them.[27] From a procedural perspective it can encompass elements of jurisdiction, standing, mootness, ripeness, admissibility of evidence and even the appropriateness of remedies.[28] From an institutional perspective it can encompass elements of democracy and of the separation of powers[29] and relative institutional competence within a particular constitutional system.[30] Doctrines of justiciability commonly appear as attempts to determine the limits of judicial or quasi-judicial functions and to distinguish them from 'political' functions and processes.[31] As such resort to justiciability can expressly or implicitly reveal the decision-makers' perception of the nature and limits of their role and function. In the *CND case*, considered below, the Court asked itself, 'How could our assumption of jurisdiction here

[25] ibid 936.

[26] On justiciability in the Australian constitutional context, particularly the suggestion that constitutional questions of executive power are arguably justiciable, see *Hicks v Ruddock* [2007] FCA 299. On developments in Australia, Canada and the US see C Sim, 'Non-Justiciability in Australian Private International Law: A Lack of "Judicial Restraint"?' (2009) 10 Melbourne Journal of International Law 102–40.

[27] For an excellent example relying on a combination of rationales see *R (Al-Haq) v Secretary of State for Foreign & Commonwealth Affairs* [2009] EWHC 1910 (Admin) (27 July 2009). See generally H Woolf, J Jowell and A Le Sueur, *De Smith's Judicial* (6th edn, Sweet and Maxwell, London, 2007) 15–26.

[28] See RH Fallon, Jr, 'Justiciability and Remedies—And Their Connections to Substantive Rights' (2006) 92 Virginia Law Review 633–705; JS Harbison, 'Private Enforcement of Public Values in US Courts: Justiciability Barriers in Environmental Law' (2001) 4 Environment Law Review 264–281.

[29] See Sir Anthony Clarke in *Gentle*, [2007] QB 689 at para 267; Cranston J. in *Al-Haq* (n 81) para 59; Lord Hoffman in *Jones* (n 192) para 65; Lord Bingham in *A (FC) and others (FC) v Secretary of State for the Home Department, (Belmarsh Detainees Case)*, [2004] UKHL 56, [2005] 2 AC 68, para 42; *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409, [2008] ACD 70, discussed in AJ Tucker, 'Legitimate Expectations and the Separation of Powers' (2009) 125 LQR 233–238.

[30] See *Al-Haq* (n 81) para 55–57, per Cranston J; *Roth GmbH v Secretary of State for Home Department* [2002] EWCA Civ 158, para 85, per Laws LJ. See also JA King, 'Institutional Approaches to Judicial Restraint' (2008) OJLS 409–41, particularly at 420–423; D Wiseman, 'The Charter and Poverty: Beyond Injusticiability' (2001) 51 Univ Toronto LJ 421–458.

[31] US jurisprudence is partially framed in terms of 'political questions' which are assigned to the political branch. See *Sarei v Rio Tinto*, No. 02-56256, 487 F.3d (12 April 2007); Collins (n 3) 39–57. See also *Gamogab v Akiba* [2007] FCAFC 74 (18 July 2007) (Australian High Court divided on the non-justiciability of political questions); Sim (n 26).

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be regarded around the world as anything other than an exorbitant arrogation of adjudicative power?'[32] From a substantive perspective justiciability can encompass the complex or polycentric legal, political or policy nature of the right, interest, decisions or questions at issue.[33] Cross-cutting elements within these three perspectives are whether the court has 'judicial or manageable standards'[34] or the requisite 'expertise' to judge the issues,[35] whether there would be embarrassment in foreign relations and the national or international ramifications of making a particular decision.[36] The normative weight of a particular factor towards non-justiciability will vary from context to context. Procedural aspects will tend to be of lesser weight than substantive or institutional ones.

D. The Effects of Non-Justiciability

As a threshold matter justiciability is often decided at the striking out stage or determined as a preliminary issue.[37] Justiciability may be resorted to in response to the arguments of parties before the court or sometimes on the court's own volition. When the justiciability principle is applied the effect is that the decision maker will not make a determination on a particular issue.[38] Hence in a US context the language sometimes used is 'issue preclusion'.[39] The effects of the non-determination of a particular issue will depend on the

[32] *CND Case* (n 108) para 37. See also L Collins, 'Foreign Relations and the Judiciary' (2002) 51 ICLQ 485–510.

[33] See JA King, 'The Pervasiveness of Polycentricity' (2008) Public Law 101–24.

[34] Without which it is left in a 'judicial no-man's land', *per* Lord Wilberforce, *Buttes Gas* (n 24) 938. In *Boris Berezovsky v The Russian Television and Radio Broadcasting Company, Vladimir Terluk*, [2008] EWHC 1918 (QB) the court accepted a form of 'non-justiciability' argument to prevent a matter being litigated on a false footing, para 10. On the facts there was not sufficient evidence to establish this scenario. On the approach to manageable standards in Australia see Sim, (n 26).

[35] See Laws LJ in *Marchiori v The Environment Agency and Others* [2002] EWCA Civ 03, [2002] *Env LR* 4 (non-justiciability of UK defence policies); *Al-Rawi* (n 150), (referring to the absence of 'tools to evaluate' decisions) *Al-Haq* (n 81) paras 55–57 (limits of judicial expertise). Questions of religious doctrine, traditions and practice are non-justiciable, *His Holiness Sant Baba Jeet Singh Ji Maharaj v Eastern Media Group and Hardeel Singh* [2010] EWHC 1294 (QB).

[36] *Kuwait Airways Corporation v Iraq Airways Corporation* [2002] 2 AC 883, para 319, CA. On the approach in Australia to the question of executive embarrassment, see Sim (n 26).

[37] A decision at this stage can encourage the settlement of the case.

[38] Thus it has been said that non-justiciability, 'is or leads to a form of immunity *ratione materiae*', *Kuwait Airways Corporation v Iraq Airways Corporation* [2002] 2 AC 883, para 319, CA. It is not an immunity in the normal sense because it cannot be waived, though the effect might be the same if non-justiciability is not pleaded and the court does not take it up *ex-officio*. King (n 30) describes non-justiciability as 'a rather nuclear option' that 'creates zones of legal unaccountability', 421–422.

[39] For US practice see D Akande, 'The Act of State Doctrine in the United States' <http://www.law.georgetown.edu/faculty/events/userfiles/file/IntlLegTheoColl/Akande%20Paper.doc>; RW Galloway, 'Basic Justiciability Analysis' (1990) 30(4) Santa Clara Law Review 911–34 (jurisprudence on justiciability can often be inconsistent, ad-hoc and results-oriented) 932.

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circumstances of the case. First, the effect may be that the court considers that the whole case cannot be determined at all because the central issues are non-justiciable.[40] Secondly, it may be that only certain issues in the case are non-justiciable. This is the situation where the courts consider that they cannot make determinations of the legal validity of the acts of sovereigns within their own jurisdiction. The effect is that such acts and laws are treated as valid and the courts decision is then made on that basis.[41] If, exceptionally, the court does make a determination on the validity of the acts or laws of sovereigns within their own jurisdiction, and determines them invalid, it then proceeds to make a decision on that basis.[42] Thirdly, it may be that the courts make no determination of the validity or otherwise of the acts or laws of the foreign sovereign but will not allow themselves to be used to assist the enforcement of particular acts or laws of foreign States outside of their own jurisdiction. This is the case when the UK courts will not enforce, for example, the revenue or penal laws of another State.[43]

E. Focus on Substance and Suitability

In contemporary UK jurisprudence on justiciability there has been an increasing concentration on substance and subject matter rather than source or form. Justiciability depends, 'not on general principle, but on subject matter and suitability in the particular case'.[44] Thus aspects of prerogative powers in the UK are now viewed as justiciable whereas previously they were not.[45] The ambit of what had previously been considered as 'forbidden areas' is not immutable.[46] One of the considerations which determine which prerogative powers, or more precisely, which aspects of them lay within the jurisdiction of the courts is whether or not it is justiciable. Non-justiciability may arise for any or more of the reasons discussed in the previous section. Even the involvement of a high-level strategic policy document will not as such preclude judicial intervention if the promise that has allegedly been

[40] See *Buttes Case* (n 24) at 931.

[41] *Aksionairnoye Obschestvo A. M. Luther v James Sagor & Co* [1921] 3 KB 532 (effect was given to Russian laws vesting property in the Russian State).

[42] See *Oppenheimer v Cattermole* [1967] AC 249 (n 85); *Iraqi Airways Case* (n 89).

[43] See the examples cited above (n 7).

[44] *R (Abbasi & Anor.) v Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department*, [2002] EWCA Civ. 1598, [2003] UKHRR 76, para 85.

[45] See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *R v Secretary of State for Foreign Affairs ex p Rees-Mogg* [1994] QB 552 (decision to ratify a treaty not reviewable); *R v Secretary of State for Foreign & Commonwealth Affairs, ex parte Everett* [1989] QB 811 (the refusal of a passport was reviewable); *Abassi* and *Al-Rawi*, below (on diplomatic representations); *R (Bancoult) v Secretary of for Foreign and Commonwealth Affairs*, [2008] UKHL 61, [2008] 4 All E.R. 1055 (on prerogative legislation). On developments in Australia see C Horan, 'Judicial Review of Non-Statutory Executive Powers' (2003) 31(3) Fed Law Rev 551–572.

[46] Per Maurice Kay J in *CND Case* (n 108).

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broken has also been made at the highest level, for example, in a Government White Paper.[47]

Many applications will not succeed but this will not be because of their being completely precluded from judicial consideration and analysis. Rather it is because, for example, the policy or foreign affairs nature of some issues means that the courts will afford substantial deference to political decisions. In some cases non-justiciability just reappears at a later stage but with a different face.[48] Moreover, a national court may avoid the term justiciability even though it applies the essence of the doctrine.[49]

F. Legal and Factual Characterizations

It is necessary to identify (in accordance with English law), the substance of the claim sought to be enforced rather than focus on the cause of action or the form of the claim.[50] The views of the executive on the requirements of national security may be viewed as non-justiciable or as justiciable but falling within an area where substantial deference is afforded to the view of the executive. The end result may be the same but the latter approach leaves open the possibility that there may be circumstances where the courts will ultimately decide not to defer. The factual and legal characterization of issues by the decision-maker can be crucial. The most controversial new measures in the UK's Anti-terrorism, Crime and Security Act 2001 (ATCSA) were those in Part 4, titled 'Immigration and Asylum', permitting indefinite detention for foreign nationals suspected of being international terrorists.[51] The UK government described the measures as 'exceptional immigration powers'. However, the House of Lords did not accept this classification. Rather they viewed the issue as one of security. This looked even less promising for the applicants. The threshold question was whether there was a 'Public Emergency'.

[47] See *R (Greenpeace Ltd) v Secretary of State for Trade and Industry*, [2007] EWHC 311, [2007] Env LR 29. Sullivan J stressed that in the development of policy in the environmental field consultation was no longer a privilege to be granted or withheld at will by the executive, para 49. See K Morrow, 'On Winning the Battle But Losing the War' (2008) Environment Law Review 65–71.

[48] '. . . I see no reason in principle why, today, prerogative legislation, too, should not be subject to judicial review on ordinary principles of legality, rationality and procedural impropriety. Any challenge of that kind must, of course, be based on a ground that is justiciable'; Lord Rodger in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61; [2008] 4 All E.R. 1055, para 105.

[49] See O Ben-Naftali and KR Michaeli, 'Justice-Ability: A Critique of the Alleged Non-Justiciability of Israel's Policy of Targeted Killings' (2003) 1 Journal of Int Criminal Justice 368–405.

[50] See *Huntington v Attrill* [1893] AC 150 at 155 per Lord Watson; *Government of India v Taylor* [1955] AC 491; *Peter Buchanan Ltd v McVey* [1955] AC 516; *Brokaw v Seatrain* [1971] 2 QB 476; *Schemmer v Property Resources Ltd.* [1975] Ch 273.

[51] See generally C Mikaelson, 'Derogating from International Human Rights Obligations in the "War Against Terrorism"-A British-Australian Perspective' (2005) 17 Terrorism and Political Violence 131–155.

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In *A and others v Secretary of State for the Home Department* (*Belmarsh Detainees*)[52] all but one member of the House of Lords rejected a challenge to the Government's determination of the existence of a public emergency.[53] One of the three reasons for this given by Lord Bingham concerned the distinction between judicial and political questions and the 'relative institutional competence' to deal with them. He regarded the question as being very much at the 'political end of the spectrum'.[54] The House of Lords then proceeded to characterize the substantive detention issue as one of discrimination based on national origin. It regarded discrimination as a matter over which it could appropriately make a determination and it proceeded to do so. Once that issue was characterized as one of discrimination it was viewed as justiciable.[55]

G. International Jurisprudence on Justiciability

Unsurprisingly, parallel issues of justiciability have arisen with respect to international legal forums. For example, it has been central to debates on the nature and enforcement of international human rights, particularly economic, social and cultural rights,[56] and on affording jurisdiction to international courts or other forums over certain kinds of political issues. This has been the case, for example, with respect to a proposed optional protocol on individual petitions under the International Covenant on Economic, Social and Cultural Rights (finally adopted in 2008).[57] However, once jurisdiction is granted to an international forum then claims of non-justiciability of international law issues in international courts or tribunals, for example because of their political nature, or the absence of applicable legal norms, are normally rejected.[58]

[52] [2004] UKHL 56, [2005] 2 AC 68. See M Elliott, 'UK: Detention Without Trial and the "War on Terror"' (2006) 4 International Journal of Constitutional Law 553–566.

[53] Although there were some misgivings, see eg Lord Bingham, para 26; Lord Scott, para 154.

[54] See (n 52) para 29. The Grand Chamber of the European Court of Human Rights followed the majority of the House of Lords in holding that there had been a public emergency threatening the life of the nation, *A and Others v the United Kingdom*, Appn. No. 3455/05, (2009) 49 EHRR 29.

[55] See M Arden, 'Human Rights in the Age of Terrorism' (2005) 121 LQR 604–627. Legal characterization was similarly crucial in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 (housing legislation regulating surviving tenancies discriminatory on grounds of sexual orientation).

[56] See S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP, Oxford, 2008) 92–123.

[57] See Report of the UN Human Rights Council, UN Doc A/63/435, 28 November 2008. See also C Mahon, 'Progress at the Front: The Draft Optional Protocol to the ICESCR' (2008) 4 Human Rights Law Review 617–66.

[58] See H Lauterpacht, 'The Doctrine of Non-Justiciable Disputes in International Law' (1928) 24 Economica 277–317; R Higgins, 'Policy Considerations and the International Judicial Process' (1968) 17 ICLQ 58–84; A Coleman, 'The ICJ and Highly Political Matters' (2003) 4 Melb JIL 29–75. For rare references to justiciability in the European Court of Human Rights see Judge Zupančič in *Sciarrotta and Guarino v Italy* (2002) 35 EHRR 12 and *Guisset v France* (2002) 34 EHRR 47. The European Court may treat a finding of non-justiciability by a domestic court as a finding of fact for which it will not normally substitute its own assessment, see *A.D and OD v UK*, Appn. No. 28680/06, (2010) 51 EHRR 8, pr. 104.

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Their focus tends to be on questions of jurisdiction and immunities, which are always seen as justiciable issues.

III. JUSTICIABILITY IN THE UK COURTS OF CLAIMS RELATED TO FOREIGN AFFAIRS OR PUBLIC INTERNATIONAL LAW

UK jurisprudence is increasingly testing and limiting the boundaries of justiciability. The major cases will be considered in broad categories but, as noted above, the focus of the courts' enquiry is on substance rather than form or categorization.

A. Political Decisions

The courts may consider that an issue is non-justiciable or virtually non-justiciable because it is unwilling to substitute its judgment for that of a political body and so considers that the appropriate accountability is in the political rather than the legal sphere.[59] In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*[60] the House of Lords considered the legislative powers that were traditionally conferred on the legislature of a colony with the requirement that laws had to be made for the 'peace, order and good government' of the territory. Although their Lordships were unanimous that prerogative legislation should be subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action,[61] by a 3-2 majority it was held that the critical words had never been construed as words limiting the power of a legislature.[62] They had always been treated as apt to confer plenary law-making authority. The courts would not inquire into whether legislation within the territorial scope of the power was in fact for the 'peace, order and good government' or otherwise for the benefit of the inhabitants of the territory.[63]

For Lord Rodger it was not open to the courts to hold that legislation enacted under a power described in those terms did not, in fact, conduce to the peace, order and good government of the territory. Equally, it could not be open to the courts to substitute their judgment for that of the Secretary of State advising Her Majesty as to what could properly be said to conduce to the peace, order and good government of British Indian Ocean Territory (BIOT).

[59] See *Re A* (n 52) with respect to the existence of a public emergency. See P Daly, 'Justiciability and the "Political Question" Doctrine' (2010) Public Law 160–78.

[60] [2008] UKHL 61; [2009] 1 AC 453. The case has now been brought before the European Court of Human Rights.

[61] See M Cohn, 'Judicial Review of Non-statutory Executive Powers after *Bancoult*: a Unified Anxious Model' (2009) Public Law 260–86.

[62] For severe criticism of the decision see M Elliott and A Perreau-Saussine, 'Pyrrhic Public Law: Bancoult and the Sources, Status and Content of Common Law Limitations on Prerogative Power' (2009) Public Law 697–722.

[63] [2008] UKHL 61, paras 48–51, 107–09 and 127–30.

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This was simply because such questions were not justiciable. They were for the determination of the responsible ministers rather than judges. The sanction for inappropriate use of the legislative power was political, not judicial.[64] However, judgments as to what is a political decision for which there should only be political accountability differ. In *Bancoult* itself, one High Court judge, three members of the Court of Appeal and the two dissenting members of the House of Lords, all considered that they could judicially determine the issues.[65] The issues both fell within the court's jurisdiction and were justiciable.

The subject-matter, nature and context of an issue may be considered to place it in the realm of politics, not of the courts, and so be non-justiciable. In *R (Wheeler) v Office of the Prime Minister*[66] the Court doubted whether the correctness of an assessment by the government of the differences between two treaties, the Treaty establishing a Constitution for Europe (2004) and the Treaty of Lisbon (2007), was a 'justiciable issue at all'.[67] At best, it was a matter to be approached on a *Wednesbury* basis,[68] and on that basis the Court was far from persuaded that the assessment was an unreasonable one. There was proper scope for a different assessment in relation to the Lisbon Treaty.[69] Even if there had been a promise to hold a referendum in respect of the Lisbon Treaty, it would not have given rise to a legitimate expectation enforceable in public law, such that the courts could intervene to prevent the expectation being defeated by a change of mind concerning the holding of a referendum. This was because the 'subject-matter, nature and context of a promise of this kind place it in the realm of politics, not of the courts, and the question whether the government should be held to such a promise is a political rather than a legal matter'.[70]

As to the extent to which a decision to ratify a treaty was amenable to judicial review at all, the court did not have to reach a decision. Such a decision was not altogether outside the scope of judicial review as it was conceded by the Secretary of State that a decision to ratify the Lisbon Treaty without parliamentary approval would be amenable to review. This was because section 12 of the European Parliamentary Elections Act 2002 made statutory approval a condition precedent to the ratification of any treaty which

[64] ibid para 109. Lord Hoffman also observed that, 'Policy as to the expenditure of public resources and the security and diplomatic interests of the Crown are peculiarly within the competence of the executive', ibid para 58. See also Lord Carswell on essentially political judgments, ibid para 130.

[65] It was not claimed that national security made the issues non-justiciable.

[66] [2008] EWHC 1409, [2008] ACD 70.

[67] ibid para 37.

[68] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

[69] In any event the claimant had failed to satisfy the Court that the differences were immaterial and that the Lisbon Treaty was to be regarded as having equivalent effect to the Constitutional Treaty for the purposes of the putative implied representation as to the holding of a referendum, *Wheeler*, para 38.

[70] ibid para 42. As the decision on the holding of a referendum lay with Parliament, it was for Parliament to decide whether the government should be held to any promise previously made.

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provided for an increase in the powers of the European Parliament. The Court noted that the challenge in this case related to the procedure followed in reaching the decision to ratify rather than to any potentially sensitive issue of policy involved in the decision itself. Nevertheless, it considered that the limits of reviewability should be determined on a case by case basis if and when the need arose.[71] That is, there was jurisdiction because of the 2002 Act and whether the question might be justiciable was dependent on the circumstances.

B. The Acts and Transactions of Foreign States

There is a long-established 'general principle' that issues which require courts to adjudicate upon the acts and transactions of foreign sovereign States are non-justiciable.[72] The impediment arises from judicial self-restraint and is a principle of English law.[73] The central rationales are that 'the principles of law applicable to such transactions is not the domestic law (including private international law) of England, the courts in England could not compel observance of their orders outside England and any attempt to do so might cause embarrassment to the United Kingdom in the conduct of its foreign affairs'.[74] When it applies the principle of justiciability cannot be ousted by the consent of parties to the domestic litigation.[75] In this context the principle of non-justiciability seeks to 'distinguish disputes involving sovereign authority which can only be resolved on a State to State level from disputes which can be resolved by judicial means'.[76] The application of this principle may mean that the issues in a particular case are non-justiciable. In *Buttes Gas*[77] the pleadings in private litigation raised issues involving the court in reviewing transactions in which four sovereign States were concerned and being asked to find at least part of those transactions unlawful under international law.[78] In *R (Gentle) v Prime Minister*,[79] the issue of the legality under international law of the invasion of Iraq in 2003 was similarly described as belonging to the area of relations between States. It was not part of domestic law reviewable either in the UK or in the European Court at Strasbourg.[80]

[71] ibid para 55. See also para 57 on relief. See also *Rees-Mogg Case* (n 45).
[72] *Buttes* (n 24). [73] Per Lord Wilberforce, ibid 938.
[74] *AY Bank Ltd v Bosnia and Herzegovina and Others* [2006] EWHC 830 (Ch), para 32.
[75] *R v Prime Minister of the United Kingdom, ex parte Campaign for Nuclear Disarmament* [2002] EWHC 2777, para 57 per Simon Brown LJ. The correctness of this was left open in the *AY Bank* case, (n 120) para 50.
[76] *Kuwait Airways Corporation v Iraq Airways Corporation* [2002] 2 AC 883, para 319, CA.
[77] See (n 24).
[78] Lord Wilberforce found that there were 'no judicial or manageable standards by which to judge these issues' and 'the court would be in a judicial no-man's land', 938b.
[79] [2008] UKHL 20; [2008] 1 AC 1356.
[80] ibid para 24, per Lord Hope. See also Lord Bingham, para 8.

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In *R (Al-Haq) v Secretary of State for Foreign & Commonwealth Affairs*[81] the applicant, a foreign non-governmental organization, sought a declaration that the UK Government was responsible for a breach of the UK's international obligations and for a mandatory order that the Government use its best endeavours to meet those obligations. The obligations were said to be under customary international law in respect of the Government of Israel's actions in the course of Operation Cast Lead in Gaza since 27 December 2008. Permission to apply for judicial review was refused on the basis that it was not arguable that the claimant would obtain the relief sought. The controlling factor was subject matter and here that was the conduct of Israel and whether Israel was in breach of its international law obligations. For the courts to decide whether Israel was in breach of its international obligations and, if so, the extent and nature of the breach or breaches, was beyond their competence.[82] Here justiciability went to the subject-matter with which the court was unwilling to deal.[83]

C. Flagrant Violation of Rules of International Law of Fundamental Importance

The *Buttes* case established a principle, not a 'categorical rule'.[84] In very exceptional cases the UK courts will not give effect to a foreign law because it considers that it constitutes a flagrant violation of rules of public international law of fundamental importance. *Oppenheimer v Cattermole*[85] is explicable on this basis. A November 1941 Nazi Government decree purported to deprive German Jews of their German nationality. It was treated as ineffective by the House of Lords because it constituted so 'grave an infringement of human rights that the courts of this country ought to refuse to recognize it as a law at all'.[86] The House of Lords accepted that the UK courts should be very slow to refuse to give effect to the legislation of a foreign State in any sphere in which, according to accepted principles of international law, the foreign State had jurisdiction.[87] The comity of nations normally required our courts to recognize the jurisdiction of a foreign State over all its own nationals and all assets situated within its own territories. Ordinarily, if the UK courts were to refuse

[81] [2009] EWHC 1910 (Admin).

[82] Pill LJ, para 41, citing Lord Wilberforce in *Buttes* (n 24). It is submitted that alleged torture during a conflict might be justiciable because of the provision for prosecution in s. 134 Criminal Justice Act 1988.

[83] Cranston J noted that that Israel would be entitled to State immunity before the UK courts and that the ICJ would have no jurisdiction to resolve a dispute concerning Israel's actions in Gaza without Israel's consent, para 52.

[84] *Kuwait Airways Corpn v Iraqi Airways Co* (Nos. 5 and 6) [2002] 2 AC 883, 1101, per Lord Steyn. See also *R v Secretary of State for the Home Department, Ex parte Launder (No 2)* [1998] QB 994.

[85] [1976] AC 249.

[86] Per Lord Cross, 278. The consequence was that the decree did not deprive Oppenheimer of German nationality. However, it was later lost by a different method.

[87] ibid.

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to recognize legislation by a sovereign State relating to assets situated within its own territories or to the status of its own nationals on the ground that the legislation was utterly immoral and unjust, this could obviously embarrass the Crown in its relations with a sovereign State whose independence it recognized and with whom it had and hoped to maintain normal friendly relations. However, it could not be regarded as embarrassing to the government in its relationship with any other sovereign State or contrary to international comity or to any legal principles hitherto enunciated for the UK courts to decide that the 1941 decree was so great an offence against human rights that they would have nothing to do with it.[88] The judgment referred to human rights at a very abstract level. There was no indication of which international instruments or customary norms were violated or at what time, that is, whether it was in 1941 or at some subsequent date.

Following Iraq's invasion of Kuwait in 1990, the Iraqi government had passed Resolution 369 by which it purported to dissolve Kuwait Airways Corporation and transfer its assets to Iraqi Airways Co. In *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*[89] the House of Lords held that Resolution 369 had amounted to a gross breach of the established rules of international law and accordingly, as a matter of public policy, that it would decline to recognize it.[90] As the standard being applied by the court was clear and manageable it was legitimate for an English court to have regard to the content of international law in deciding whether to recognize a foreign law. The acceptability of a provision of foreign law had to be judged by contemporary standards. Resolution 369 had been adopted as part of Iraq's attempt to destroy Kuwait as a separate State. It followed that to enforce or recognize the Resolution would be contrary to public policy and would, furthermore, be contrary to the obligations of the United Kingdom under the UN Charter.[91] As a matter of public policy a national court could decline to give effect to legislation or the acts of a foreign State where that State was in flagrant violation of rules of international law of fundamental importance.[92]

The *Iraqi Airways* decision stands as an exception to the normal rule that the UK courts will not adjudicate upon the transactions of a foreign State.[93] Its exceptional nature cannot be over-stressed. It is founded on a public policy rule as a matter of English law. The rule does not extend to any violation of

[88] ibid 282. Lord Pearson dissented on this issue.
[89] [2002] UKHL 19, [2002] 2 AC 883.
[90] Lord Scott dissented on the consequences with respect to the law of tort.
[91] See JN Carruthers and EB Crawford, (2003) 52 ICLQ 761–74; E Peel, 'The Scope of Double Actionability and Public Policy' (2003) 119 LQR 108; Thomas (n 2).
[92] See in particular Lord Hope on 'Justiciability' at paras 135–49. As a matter of private international law national courts have a discretion to refuse to apply a foreign law or enforce a foreign judgment on the grounds of inconsistency with public policy. Such a refusal makes no judgment about the validity of the law in its own legal system. See A Mills, 'The Dimension of Public Policy in Private International Law' (2008) 4 Journal of Private International Law 201–236.
[93] *Per Buttes* (n 24).

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international law generally or of human rights in particular. Lord Steyn reserved his position as to whether every breach of international law would necessarily 'trigger the public policy exception' and he emphasized the flagrancy of the breach in question and degree of international consensus about it.[94] The breach was described as 'plain' and 'acknowledged' and the standard being applied by the court was considered to be 'clear and manageable'.[95] So too in *Abassi* (concerning arbitrary detention in Guantanamo Bay) where the breach was 'clear to the court'.[96] Subsequent cases have referred to the need for a 'flagrant breach of international law'[97] or 'very grave breaches of fundamental universal human rights'.[98] In *Al-Haq*,[99] concerning alleged violations of fundamental humanitarian rules by Israel, the *Iraqi Airways* case was distinguished because the breach of international law in the latter was plain and acknowledged.[100] In *Meletios Apostolides v Orams and Orams*[101] no 'plain breach of international law' had been committed by the courts of Cyprus in rendering decisions relating to property located in Northern Cyprus and it was not manifestly contrary to public policy in the UK to enforce the obligation under EU law to recognize and enforce the judgments of those courts. It is doubtful if UK courts would ever decline to give effect to legislation or the acts of the UK in pursuit of foreign policy decisions even where they were, arguably, in flagrant violation of rules of international law of fundamental importance, for example, with respect to the Iraq War in 2003.[102]

[94] *Iraqi Airways*, HL, 1102 F. Cf the discussion of non-justiciable political questions and act of State in *Sarei v Rio Tinto*, No. 02-56256, 487 F.3d (12 April 2007), (the alleged acts of racial discrimination could not constitute official sovereign acts because they violated *jus cogens* norms). In the case the US Department of State asserted that continuation of the lawsuit 'would risk a potentially serious adverse impact . . . on the conduct of [United States] foreign relations'. The decision was reheard on the issue of exhaustion of remedies.

[95] ibid, per Lord Nicholls, para 26 and Lord Steyn, para 113, referring to 'gross breaches of international law'. Few instances of the use of force between States would satisfy these descriptions but Iraq's invasion was as close to the paradigm case as imaginable. Lord Steyn noted that Iraq had accepted the illegality of the annexation and of Resolution 369, ibid 1101.

[96] See (n 130).

[97] *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58; [2008] 1 AC 332, para 71.

[98] *Empresa Nacional de Telecommunications SA v Deutsche Bank AG* [2009] EWHC 2579 (QB), [2010] 1 All. ER (Comm.) 649 (no rule of international law, whether in the nature of a human right or otherwise, that property could not be compulsorily acquired by a State without compensation, at least where there was no element of racial or religious discrimination involved, para 22).

[99] [2009] EWHC 1910 (Admin) (27 July 2009).

[100] In September 2009 a UN Mission of Inquiry published an extensive report evidencing grave violations of international human rights and humanitarian law and possible war crimes and crimes against humanity by both sides: see *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, UN Doc A/HRC/12/48.

[101] [2010] EWCA Civ 9. The UK government may express its view on public policy for the purpose of an EU Regulation but it cannot dictate it to the court, para 65, per Pill LJ. International obligations under treaties and SC Resolutions were limited to the realm of international governmental action and did not have any impact on private legal proceedings, per Lloyd LJ, para 116.

[102] The (unadopted) Constitutional Renewal Bill [HL] 2008–09 made provision for Parliamentary approval before participating in war, international armed conflict, or international peace-keeping activities (Clause 24). Effectively the actions would have to be so against international law as not to be recognisably a decision of, or an Act of, Parliament at all. A theory of

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The UK courts should not refuse to give effect to the national laws of another State merely on the grounds that they are incompatible with international obligations undertaken by the UK.[103] In *Al Jedda (2)* it was emphasized that a foreign law whose purpose was to ensure that basic human liberties are protected could not be an affront to fundamental principles of fairness and justice.[104]

D. Interpretation of International Law

The acts and transaction of States and other international legal persons are often formalized in international instruments. The operation of the principle that such acts and transactions are non-justiciable (sections B–C above) is reduced to the extent that the instruments formalising the acts and transactions may, to some extent, be justiciable.[105] Consistent with the general principle, the UK courts will not declare the meaning of an international instrument operating purely on the plane of international law unless it is has been incorporated into domestic law or it is necessary to do so in order to determine rights and obligations under domestic law (that is, there is a sufficient domestic foothold).[106] The spirit of cooperation and respect between sovereign States, that is comity, precludes any such determination.[107] In *The Campaign for Nuclear Disarmament v The Prime Minister of the United Kingdom and Others*[108] CND sought an advisory declaration as to the true meaning of Security Council Resolution 1441 (2002) (the ultimatum in respect of disarmament) particularly as to whether it authorized States to take military action in the event of non-compliance by Iraq with its terms. The Court held that it had 'no jurisdiction' to declare the true interpretation of an international instrument that had not been incorporated into English domestic law and which it was unnecessary to interpret for the purposes of determining a person's rights or duties under domestic law.[109] The domestic courts were for the surety of the lawful exercise of public power only with regard to domestic law. They were not charged with policing the United Kingdom's conduct on the international plane.[110] Deciding

substantive competence has not yet developed in the UK. *R v Horseferry Road Magistrates Court Ex p. Bennett (No.1)*, HL, [1994] 1 AC 42 suggests that lower level executive decisions might be tested against international law standards.

[103] *Al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758 (*Al-Jedda 2*), para 178.

[104] ibid para 174, per Elias LJ, concerning an Iraqi law which required judicial oversight of the detention of any person.

[105] Of course the foreign State itself may be able to rely on State immunity under the State Immunity Act 1978.

[106] *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418; *R(KTHV and CTA) v Secretary of State for Transport and Republic of Cyprus* [2010] EWCA Civ 1093, para 15. See Fatima (n 8) paras 8.5–8.7. In *Re McKerr*, [2004] UKHL 12, [2004] 1 WLR 807, Lord Steyn suggested that this approach might need to be reconsidered in light of the growing support for the view that human rights treaties enjoyed a special status, see paras 51–52.

[107] *Westland's Helicopters Ltd v Arab Organisation for Industrialisation* [1995] QB 282, per Colman J.

[108] [2002] EWHC 2777, [2003] ACD 36.

[109] ibid paras 35–47, Simon Brown LJ.

[110] ibid para 36.

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questions as to the State's obligations under unincorporated international law is generally viewed as undesirable, particularly where the Contracting Parties to a convention have chosen not to provide for the resolution of disputed questions of construction by an international court but rather by creating continuing processes through which it was hoped a consensus view would emerge.[111] For a national court to itself assume the role of determining such a question (with whatever damaging consequences that may have for the State in its own attempts to influence the emerging consensus) was not to be countenanced save for compelling reasons.[112]

Although the courts will not adjudicate on the transactions of foreign States and will not declare the meaning of an international instrument operating purely on the international plane, the conclusion of an international treaty and its terms are matters of fact and a treaty may be referred to where it is necessary to do so as part of the factual background against which a particular issue arises[113] and a degree of interpretation may be necessary to determine rights and obligations under domestic law. The treaty itself may give direct rights. As Mance LJ stressed in *Republic of Ecuador v Occidental Exploration & Production Co*,[114] 'Context is always important.' It is notable that here it was the private investor (Occidental), rather than the State (Ecuador), that was arguing that the claim was non-justiciable. The Court held that it had had jurisdiction to interpret an international instrument which had not been incorporated into English law where it was necessary to do so in order to determine a person's rights and duties under domestic law. In determining whether such interpretation was necessary, account had to be taken of the special character of a bilateral investment treaty and the agreement to arbitrate which was recognized under English private international law and which, because London was the place of arbitration, was subject to the Arbitration Act 1996. The Court considered that it was the intention of the signatories to the bilateral investment treaty to create rights in favour of private investors capable of enforcement in consensual arbitration against one or other of the signatory States. National courts should aspire to give effect to that aim because it had been agreed by States at an international level. There was no good reason why any arbitration held pursuant to the arbitration agreement should be categorized as being concerned with transactions between States so as to invoke the principle of non-justiciability.[115] Where the States party to the treaty deliberately chose to provide for a mechanism

[111] *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756, Lord Bingham, para 44 and Lord Brown, paras 65–68.

[112] Id, Lord Brown. In June 2009 the UK government decided that there would be an independent inquiry into the Iraq war, see <http://www.iraqinquiry.org.uk>

[113] *JH Rayner* (n 106) 499–500, per Lord Oliver.

[114] [2005] EWCA Civ 1116, [2006] QB 432, para 31. See R O'Keefe, 'A Bit Justiciable' (2006) 65 Cambridge Law Journal 259–263 who suggested that the case 'marks a further stage in the slow death of *Buttes* non-justiciability', 263.

[115] ibid para 41.

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for dispute resolution which invoked consensual arbitration, with its domestic legal connotations, this was a factor which should make the English court hesitate long about subjecting such arbitration proceedings to 'special principles of judicial restraint developed in relation to international transactions or treaties lacking any foundation or incorporation in domestic law'.[116]

The approach in the *Ecuador Case* was followed in *The Republic of Serbia v Images at International NV*[117] to reject the argument that whether Serbia was the successor or a continuator State was a non-justiciable issue before an English court considering a challenge under the Arbitration Act 1967. The Court pointed to a number of cases in which the courts had made a determination about whether a government or a State existed. Otherwise there would have been a significant gap in the court's supervisory powers: the non-justiciability of the issue would mean the court would not be in a position either to uphold the challenge and set aside the Award or to conclude that the challenge is not well founded. The arbitrator's provisional determination would thus be deprived of substance and rendered illusory. In addition, it would be wrong to allow a State to escape liability under a commercial contract merely by pronouncing that it was not an original party to the contract, and then sheltering behind a cloak of non-justiciability in order to prevent an arbitration or adjudication based on the true legal position.[118] However, had the context of the case not been an arbitration on a commercial contract, the question would have been non-justiciable in the absence of clear standards of international law from which a domestic court could conclude that there was a principle of customary international law on the matter.[119]

The courts may go to some lengths to find a 'domestic foothold'. In *AY Bank Ltd v Bosnia and Herzegovina and Others*[120] it was held that Security Council Resolution 1022 (1995) inviting the domestic courts of the relevant States to make provisions under their domestic law for resolving competing claims between States and by or against States and third parties could not, of itself, provide an exception to the principle of non-justiciability. It imposed no obligation and was, to some extent, superseded by the entry into force of an International Agreement on Succession Issues (ASI) (2004). It did though form part of the 'context', as did the conduct and actions of the relevant States. The Court held that the ASI could not have been intended to have effect only on the plane of international law. The provisions which specified the respective percentages of foreign financial assets of the successor States was

[116] ibid para 47. Mance LJ noted that courts in other countries had also 'exercised or assumed that it was open to them to exercise equivalent supervisory power to review the jurisdiction of arbitrators appointed under investment treaties', citing *Czech Republic v CME Czech Republic BV* (2003) 42 I.L.M. 919 and *Canada (Attorney General) v SD Myers Inc* [2004] 3 FCR 368.

[117] [2009] EWHC 2853 (Comm).

[118] ibid paras 123–6, per Beatson J.

[119] ibid paras 130–135.

[120] [2006] EWHC 830 (Ch), [2006] 2 All ER (Comm) 463.

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an essential element in a successor State's proof of title in domestic law to the percentage of a foreign exchange account. If the relevant committee constituted under the ASI invited or directed successor States to submit proofs, and they did so, then the domestic court should not be hampered in its ability to deal with disputes arising out of them. In addition, the principle of non-justiciability had no application because the dispute now involved the enforcement of private law rights. The resolution of the remaining issues involved the interpretation and enforcement of the ASI as between the successor States rather than its recognition and implementation as envisaged by the ASI itself and as encouraged by UN Security Council Resolution 1022. The issues which affected the amount of the debt due by the Bank were issues of private law because they affected the rights of the Bank and other unsecured creditors. The other issues did not involve the interpretation or enforcement of the ASI or interference with the dispute resolution procedure set up by the ASI but the application of rules of English law, including where appropriate principles of private international law. For the judge it did not matter whether it was described as an exception to the general principle of non-justiciability or, as he preferred, an example of an area to which such principle did not extend.[121] Either way the nature of the issues arising in the liquidation and the evident intention behind both the ASI and the UN Resolution all went to show that all such issues were justiciable.[122]

The *AY case* is also authority for the proposition that even where the English courts will not adjudicate upon the merits of a dispute between foreign States, they may nonetheless grant protective measures so as to preserve the *status quo* pending the outcome of such disputes provided that it does nothing to determine the issue on the merits.[123] The principle was applied in *Republic of Croatia v Republic of Serbia*[124] holding that Croatia had a sufficient interest in a property to enable it to be entered in the Land Registry. The judge considered that to apply the non-justiciability principle in a way which would preclude English law from recognizing or taking account of such an agreement, whether stated in the ASI or determined as a result of the agreed principles and machinery of the ASI, would amount to a 'slavish application of the rule without regard either to its proper purpose, or to the exceptions to it which have been identified . . .'.[125]

Finally, the principle of non-justiciability of unincorporated international instruments may not apply in the exceptional circumstances where the UK is

[121] ibid para 57. This parallels the uncertainty in the area of national security as to whether such issues are non-justiciable or rather areas where substantial deference or weight is afforded to the views of the executive as a matter of relative institutional competence. See Part II, F above and Part III, G below. The modern trend seems to prefer the latter analysis.

[122] ibid.

[123] ibid para 54.

[124] [2009] EWHC 1599 (Ch).

[125] ibid para 62.

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required to respect international obligations imposed by a resolution of the Security Council under Chapter VII of the UN Charter.[126] However, while domestic implementing measures are open to challenge, the legitimacy of such Resolutions are not as such justiciable at the domestic level.[127]

E. Foreign Affairs and International Relations

Foreign affairs and international relations remains as one of the areas which is generally forbidden in terms of justiciability.[128] Institutional competence and separation of powers are important rationales.[129] However, the courts seem intent on asserting at least a limited scope for judicial review. In *R (Abbasi & Anor) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department*[130] it was submitted that Abbasi, a British national detained by the United States in Guantanamo Bay, was subject to a violation by the US of one of his fundamental human rights and that, in those circumstances, the Foreign Secretary owed him a duty under English public law to take positive steps to redress the position, or at least to give a reasoned response to his request for assistance. It was submitted that the increased regard paid to human rights in both international and domestic law required that such a duty should be recognized.[131]

The Secretary of State submitted that the there were two insuperable barriers to the relief claimed: (1) the English court would not examine the legitimacy of action taken by a foreign sovereign State; (2) the English court would not adjudicate upon actions taken by the executive in the conduct of foreign relations.[132] However, the Court of Appeal found that it was not possible to approach the claim for judicial review other than on the basis that, 'in apparent contravention of fundamental principles recognized by both jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a "legal black-hole"'.[133] It was 'objectionable' that Mr Abbasi had no opportunity to challenge the legitimacy of his detention before any court or tribunal.[134] The facts of the case brought it within the class of exceptional

[126] See *Kuwait Airways Corpn v Iraqi Airways Co* (Nos. 5 and 6) [2002] 2 AC 883 at paras 23 and 141; *Al-Jedda 1* (n 197). There are explanations of those cases that do not rely on the justiciability of the SC resolutions as such.

[127] *Her Majesty's Treasury v Ahmed and Others* [2010] UKSC 2, para 217. See also Tzanakopoulos (n 258).

[128] See *Abassi*, CA, (n 106), at para 106(iii).

[129] An aspect of this is that a state should not be considered to speak with two voices on a matter of foreign policy (or at least on a high act of policy), the judiciary saying one thing and the executive another. See *British Airways Board v Laker Airways Ltd* [1984] 1 QB 142, 193B-D, *per* Sir John Donaldson, M.R.; *CND Case* (n 108) para 43; Collins (n 32) 487–93; *Al-Jedda* (No 2), CA (n 200).

[130] [2002] EWCA Civ. 1598, [2003] UKHRR 76. See S Palmer, 'Arbitrary Detention in Guantanamo Bay: Legal Limbo in the Land of the Free' (2003) 62 Cambridge Law Journal 6–9.

[131] ibid para 25.

[132] ibid para 26.

[133] ibid para 64.

[134] ibid para 66. On this point see now *Rasul v Bush*, 542 US 466 (2004).

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cases where the court was then willing make a judgment on the legality of the actions of a foreign State in its own territory.[135]

Three considerations led the Court to reject the proposition that there was no scope for judicial review of a refusal to render diplomatic assistance to a British subject who was suffering violation of a fundamental human right as the result of the conduct of the authorities of a foreign State.[136] First, the development of the law of judicial review in relation to (i) the doctrine of legitimate expectation and (ii) the invasion of areas previously immune from review, such as the exercise of the prerogative.[137] Secondly, to a degree, the FCO had promulgated a policy which was capable of giving rise to a legitimate expectation. The policy was that where there was evidence of miscarriage or denial of justice the 'UK Government would . . . consider making direct representations to third governments on behalf of British citizens where we believe that they were in breach of their international obligations'.[138] Thirdly, in the light of that policy it must be a 'normal expectation of every citizen' that, if subjected abroad to a violation of a fundamental right, the British Government would not simply wash their hands of the matter and abandon him to his fate.[139]

The Court stressed that the British nationals' expectation was of a very limited nature. Where certain criteria were satisfied, the government would 'consider' making representations.[140] Whether to make any representations in a particular case, and if so in what form, was left entirely to the discretion of the Secretary of State who was free to give full weight to foreign policy considerations, which were not justiciable. The alleged nature and extent of the injustice was a vital factor but even where there had been a gross miscarriage of justice, there could be overriding reasons of foreign policy which might lead the Secretary of State to decline to intervene.[141] Although decisions affecting foreign policy remained a 'forbidden area',[142] that did not mean that the whole process was immune from judicial scrutiny. The citizen's legitimate expectation was that his request would be 'considered' and that in that consideration all relevant factors would be thrown into the balance.[143] An obligation to consider the position of a particular British citizen and consider the extent to which some action might be taken on his behalf, seemed unlikely itself to impinge on any forbidden area.

[135] In *R (Hilali) v Westminster Magistrates' Court*, [2008] EWHC 2892, the court stated that it was 'difficult to conceive that our courts would grant relief against a foreign state if the alleged breach of human rights can be properly investigated and, where appropriate, redress given in the courts of that state', ibid para 45. An alleged breach of the specialty rule came nowhere near engaging this exceptional jurisdiction against a foreign sovereign State.

[136] *Abassi* (n 130) para 80.

[137] ibid para 85.

[138] ibid para 90.

[139] ibid para 98.

[140] ibid para 92.

[141] ibid para 100.

[142] ibid para 106.

[143] ibid para 99.

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On the facts the Court held that *Abassi* was not entitled to relief.[144] First, the FCO had considered his request for assistance. Secondly, on no view would it be appropriate to order the Secretary of State to make any specific representations to the US, even in the face of what appeared to be a clear breach of a fundamental human right, as it was obvious that this would have an impact on the conduct of foreign policy, and an impact on such policy at a particularly delicate time. Thirdly, the position of detainees at Guantanamo Bay was to be considered further by the appellate courts in the United States.[145] Fourthly, the Inter-American Commission on Human Rights had taken up the case of the detainees and it was unclear what the result of the Commission's intervention would be. What was particularly interesting about *Abassi* was the length the Court went to find a sliver of scope for justiciability to operate in an area the courts had traditionally considered non-justiciable.[146] It pushed the 'imposition of the rule of law on the executive as far as it can be pushed'.[147] To even countenance a mandatory order against a Foreign Secretary was quite a step forward.[148]

If the decision in *Abassi* was interesting in terms of judicial scrutiny, the detailed consideration in *R (Al-Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs*[149] was even more striking. *Al Rawi* concerned the position of three individuals detained at Guantanamo Bay who were long-term residents in the UK, but not British nationals. The detainees claimed that in addition to the underlying arbitrary nature of the detention, which in itself breached their fundamental human rights, the conditions of detention amounted to breaches of the United Nations Convention on Torture (1984), and article 3 of the ECHR, or at the very least gave rise to a real risk of their being exposed to such breaches.[150] Their first claim was that their connection with the UK was such that they had a legitimate expectation that the British government would make a formal and unequivocal request for their return to this country, in the same way as it did in relation to British nationals, who were returned after such requests in March 2004, and January 2005. The second and third applicants were refugees and it was argued that refugees

[144] ibid para 107.

[145] On the litigation see T Otty, 'Honour bound to defend freedom? The Guantanamo Bay litigation and the fight for fundamental values in the War on Terror' (2008) EHRLR 433–453.

[146] See Endicott (n 1) at 95–100. The CA in *Abassi* also rejected an enforceable duty to protect the citizen based on international law or on the ECHR, as incorporated by the HRA 1998, (n 130) para 106. The approach in *Abassi* was followed by the Constitutional Court of South Africa in *Kaunda v The Republic of South Africa*, (CCT 23/04), 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (courts must give particular weight to the government's special responsibility for and particular expertise in foreign affairs). It was distinguished in a number of respects in *Hicks v Ruddock* [2007] FCA 299.

[147] Endicott (n 1) 100.

[148] See also C Warbrick, 'Diplomatic Representations and Diplomatic Protection' (2002) 51 ICLQ 723–33.

[149] [2006] EWHC 972 (Admin), [2006] HRLR 30.

[150] ibid para 27. In *Evans* (n 9) the court made clear that it was for the court to make its assessment of the risk, rather than to review the assessment made by the Secretary of State pr. 240.

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should be afforded diplomatic protection by the State that had accepted that status.

Given the limited decision in *Abassi* it might be thought that the application would be given short shrift. Yet the CA itself asked the question: 'What has been the engine of so painstaking a review in an area which in recent years was thought barely apt for judicial review at all?'[151] Its answer was that it was, 'legal and ethical muscle of human rights and refugee status'.[152]

The High Court dismissed the application on the basis that the Foreign Secretary had no duty either in domestic or international law to accord the same rights to the three claimants as non-nationals as to nationals such as *Abbasi*.[153] After emphasizing that decisions affecting foreign policy was a context in which the courts had consistently trod cautiously,[154] it concluded that it could not require the first defendant to make a formal request. That would be an interference in the relationship between sovereign States which could only be justified if a clear duty in domestic or international law had been identified.[155] The real problem was the UK's judgment that any formal request as claimed would be ineffective and counter productive. Such judgments were 'taken in the context of a foreign policy decision which the court simply does not have the tools to evaluate'.[156]

The Court of Appeal rejected the appeal in *Al-Rawi* on a number of grounds.[157] First, the applicants did not really confront the Foreign Secretary's central factual position, namely that any formal representations to the United States on behalf of the detainee claimants would be ineffective and counter-productive.[158] Secondly, the appellants submissions fell foul of two principles: (1) they invited the court to enter into what in *Abbasi* was described as a 'forbidden area' that is, the conduct of foreign relations; (2) what was and what was not a relevant consideration for a public decision-maker to have in mind was (absent a statutory code of compulsory considerations) for the decision-maker, not the court, to decide.[159] The court was a judge of the legality of the government's action. To think that it was making a judgment on the wisdom of the government's action was an elementary mistake.[160] In the area of the government's responsibility to make decisions touching the conduct of foreign relations, the class of factors which were neither compulsory nor forbidden, but which it was open to the decision-maker to treat as relevant or not, had to be particularly wide. The claims of fundamental human rights and

[151] *Al-Rawi*, CA (n 157) para 3.
[152] ibid para 4.
[153] *Al Rawi*, High Court, para 65.
[154] Citing *Abassi* and the decision in *R v Jones* [2006] UKHL 16, [2006] 2 WLR 1424.
[155] *Al Rawi*, High Court, para 90. See also paras 92–93.
[156] ibid para 92.
[157] *R (Al Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA 1279, [2008] QB 289. He was subsequently returned to the UK in 2007. In August 2007 he joined a civil suit filed under the United States' Alien Tort Statute.
[158] ibid para 120.
[159] ibid paras 131–41.
[160] ibid para 137.

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refugee status had not transformed the, 'constitutional nature of judicial review of the government's conduct of foreign relations'.[161]

Finally the Court indicated that it had approached the issues in *Al Rawi* on the basis that the courts had a special responsibility in the field of human rights. It arose in part from the impetus of the HRA, in part from the common law's jealousy in seeing that intrusive State power was always strictly justified. The elected government has a special responsibility in what may be called strategic fields of policy, such as the conduct of foreign relations and matters of national security. It arose in part from considerations of competence, in part from the constitutional imperative of electoral accountability.[162] In support of this approach it cited Lord Hoffman's view in *Rehman* on the need for democratic legitimacy.[163] The case involved issues touching on both the government's conduct of foreign relations and national security, though pre-eminently the former. In these areas the common law assigned the duty of decision upon the merits to the elected arm of government—all the more so if they combined in the same case. This was the law for constitutional as well as pragmatic reasons. But it was the Court's duty to decide where lay the legal edge between the executive and judicial functions.[164]

It now seems clear that *Abassi* and *Al-Rawi* represent a very limited extension of the courts review in the area of foreign affairs. In *R* (*Al-Haq) v Secretary of State for Foreign & Commonwealth Affairs*[165] the applicant sought a declaration that the UK Government was responsible for a breach of the UK's international obligations and for a mandatory order that the Government use its best endeavours to meet those obligations. The Court considered that the subject matter was in one of the forbidden areas identified in *Abbasi*, namely decisions affecting foreign policy. The Government was aware of its international obligations and it was for the Government, and not the courts, to decide what actions were appropriate to comply with those obligations. The object of the claim was to compel a change in government foreign policy. The 'toe-hold' established in *Abbasi* did not entitle the court to declare or direct what action the Government was to take upon this assumed breach of international law by Israel.[166] This case was readily distinguishable from those in which a claimant was asserting a readily identifiable right, such as a right in certain circumstances to claim asylum or the right to a fair trial. Constitutionally, the conduct of foreign affairs was exclusively within the sphere of the executive.[167] While there might, exceptionally, be situations in which the court would intervene in foreign policy issues, this case was far from being one of them. The nature of the underlying claim, condemnation of

[161] ibid para 140.
[162] ibid para 147.
[163] *Secretary of State for the Home Department v Rehman*, [2001] UKHL 47, [2003] 1 AC 153, para 62.
[164] *Al-Rawi*, CA, para 148.
[165] [2009] EWHC 1910 (Admin) (27 July 2009).
[166] ibid para 44.
[167] Citing *Jones, Gentle* in the Court of Appeal, and *Abbasi*.

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Israel, and the nature of the claim against the Government, a direction or declaration as to what foreign policy it should follow, operated together to demonstrate that the court should not be prepared to consider it.[168] It was beyond their competence for the courts to decide whether Israel was in breach of its international obligations and, if so, the extent and nature of the breach or breaches.[169] That was so whether or not Israel were to decide to contest the allegations before the court. Unlike the *Iraqi Airways Case*, this was not a case in which the breach of international law was plain and acknowledged or where it was, as in *Abbasi*, clear to the court.[170] There had been no authoritative judgment upon the Israeli military operation which could have served as a starting point for the court's consideration of whether to act.[171] The application failed because it was not arguably justiciable. The claim trespassed onto matters of 'high policy' and had no domestic 'foothold'.[172] No domestic foothold had been created by Parliament (as in the *Wheeler* Case) or by the executive creating a legitimate expectation (as in the *Abassi* case).

The courts will decline to embark upon the determination of an issue if to do so would be damaging to the public interest in the field of international relations.[173] Whether such judicial abstinence was properly to be regarded as a matter of discretion or a matter of jurisdiction was considered immaterial by the court in the *CND Case*. Either way the substantive question raised was non-justiciable.[174] Foreign policy and the deployment of armed forces remained 'non-justiciable'. They were 'forbidden areas' even if their ambit was not immutable and had been reduced.[175] For Richards J the objections on grounds of non-justiciability provided a separate and additional reason for declining to entertain the CND's claim.[176]

Diplomatic material is a crucial part of foreign policy and international relations. A court will not make an irrevocable order preventing a Secretary of State from disclosing material to a foreign State in any circumstances in advance of the Secretary seeing that material, because of the impact of such an

[168] *Al-Haq*, para 46.

[169] ibid para 41, citing Lord Wilberforce in *Buttes Case* (n 24).

[170] cf *Hicks v Ruddock* [2007] FCA 299 where the Federal Court of Australia considered that the deprivation of H's liberty for over five years without valid charge was an even more fundamental contravention of a fundamental principle than in the *Iraqi Airways Case*, and was such an exceptional case as to justify proceeding to hearing, para 91.

[171] ibid para 42. The UN Inquiry (n 100) was not a judicial inquiry. *Quaere* whether it might have been considered to represent an 'authoritative judgment' if the claim had been brought after it.

[172] Per Cranston J. See also his comments questioning whether, in terms of modern constitutional law, customary international law should have any purchase in domestic law without specific transposition, ibid para 60. On whether customary international law rights would be justiciable as part of, or a source of, the common law see R O'Keefe, 'The Doctrine of Incorporation Revisited' (2008) 78 BYIL 7–85.

[173] *CND Case* (n 108), paras 41–47, per Simon Brown LJ. Followed in *Horgan v An Taoiseach*, 132 ILR 407 (Irish High Court).

[174] ibid para 47(b).

[175] ibid para 50 (Maurice Kay J.).

[176] ibid para 60.

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order on the UK's diplomatic relations.[177] Diplomatic assurances contained in Memoranda of Understanding do not give rise to points of law and are beyond review by the courts.[178]

Reference is made to the risk of embarrassment in inter-state relations in a number of the justiciability categories and it is an important part of the context.[179] The assessment of risk is made by the courts.[180] They do not seek guidance from the executive as to whether there is actually any risk of embarrassment in any particular case. Moreover, there is no general rule that if an allegation might embarrass a foreign sovereign it follows that that will also embarrass diplomatic relations with the UK and that such embarrassing issues are non-justiciable.[181] Where, in a commercial context, allegations were made against the State, not in relation to some sovereign act carried out in its own jurisdiction but in relation to acts which affected the rights of a party under a commercial contract, the court should not exercise restraint to the extent of not being prepared to decide the same, at least without some indication from the executive that a decision would embarrass the diplomatic relations between the UK and that State.[182] A case may be firmly in the commercial sphere even if it involves borrowing by a sovereign borrower. In *NML Capital Ltd v Argentina*[183] a claim was for the enforcement of a judgment debt did not require the English court to consider, or express a view upon, the appropriateness of the state's acts leading up to its debt restructuring, or on the restructuring itself.[184]

F. Defence

As noted, the courts will decline to embark upon the determination of an issue if to do so would be damaging to the public interest in the field of defence or national security.[185] In C*ouncil of Civil Service Unions v Minister for the Civil Service*[186] defence was one of a number of executive acts which by its nature and subject matter was considered to be either not justiciable in public law or at most was justiciable only on narrow grounds.[187] Where it applies it is

[177] *W (Algeria) and Others v Secretary of State for the Home Department* [2010] EWCA Civ 898.

[178] *RB (Algeria) (FC) v Secretary of State for Home Department* [2009] UKHL 10, [2009] 2 WLR 512. Their reliability and effectiveness can be assessed, see *Evans* (n 9).

[179] See e.g. the references to embarrassment in the *Buttes* (n 24), *Iraqi Airways* (n 89) and *Mbasogo* (n 7) cases.

[180] 'There could be no embarrassment to diplomatic relations in our taking this view', per Lord Hope in *Iraqi Airways Case* (n 89) para 147.

[181] *Korea National Insurance Corporation v Allianz Global Corporate & Speciality AG*, Court of Appeal, [2008] EWCA Civ 1355, para 30.

[182] ibid para 32.

[183] [2009] EWHC 110 (Comm), [2009] 2 WLR 1332.

[184] The state did not pursue that argument on appeal, see *Republic of Argentina v NML Capital Limited* [2010] EWCA Civ 41; [2010] 1 CLC 38. The appeal was allowed on other grounds.

[185] *CND Case* (n 108) paras 41–47, per Simon Brown LJ.

[186] [1985] AC 374. See also *Chandler v DPP* [1964] AC 763.

[187] ibid 418, per Lord Roskill.

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obviously a more substantive category for non-justiciability. The courts are not the place to determine whether the armed forces should be disposed in a particular manner.[188] The disposition of armed forces and the defence of the realm, whether exercised inside[189] or outside of the UK, remain areas which are generally forbidden in terms of justiciability.[190] In *R v Jones (Margaret)*[191] the House of Lords reaffirmed that it would be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services,[192] and slow to adjudicate on rights arising out of transactions entered into between sovereign States on the plane of international law.[193] The discretionary nature or non-justiciability of the prerogative power to wage war was one of the reasons why aggression was not a crime in domestic law.[194]

The non-justiciability of the disposition of armed forces extends to their contribution to and activities as part of multinational forces if they are regarded as an act of state.[195] Where it applies, the effect is that the act in question is not cognisable in the English courts. It is irrelevant that the substantive law of the claim may be a foreign law. The rule only has application to acts done outside the jurisdiction. This was exemplified in *R (Al-Jedda) v Secretary of State for Defence*[196] *(Al-Jedda 1)*. Al-Jedda (J), who had both Iraqi and British nationality, had been held in custody by British troops at a detention facility in Iraq. In 2007 the House of Lords dismissed J's claims regarding the legality of his detention holding that he had been detained pursuant to a duty under international law which overrode any obligation under the European Convention on Human Rights 1950, and that any claim in tort in relation to J's detention was governed by Iraqi law. In the subsequent proceedings, *Hilal Abdul-Razzaq Al Jedda v Secretary of State for Defence*[197]

[188] ibid. In the United States the conduct of military operations is 'so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference': *Harisiades v Shaughnessy*, 342 US 580, 589 (1952). See also *Arar v Ashcroft*, 585 F 3 d 559, 590 (2d Cir 2009) on whether the judiciary should create a cause of action for extraordinary rendition.

[189] Though with respect to the disposition of forces within the UK the Civil Contingencies Act (2004) may have superseded any prerogative powers.

[190] *R (Abbasi & Anor) v Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department*, [2002] EWCA Civ. 1598, [2003] UKHRR 76, at para 106(iii).

[191] [2006] UKHL 16, [2007] 1 AC 136. See P Capps, 'The Court as Gatekeeper: Customary International Law in English Courts' (2007) 70(3) Modern Law Review 458–471 ('the House had to jettison the principle by which customary international law automatically gives rise to equivalent justiciable standards under English law', 458).

[192] See ND White, 'International Law, the UK and Decisions to Employ Troops Overseas' (2010) ICLQ 814–823.

[193] Per Lord Bingham, para 30. See Part II, B–D above.

[194] Lord Hoffman, ibid para 67. See Capps (n 192) 470.

[195] Members of the forces may enjoy a limited degree of protection under the HRA (1998), see *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29; [2010] 3 WLR 223.

[196] [2007] UKHL 58; [2008] 1 AC 332.

[197] [2009] EWHC 397 (QB).

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(Al-Jedda 2) J claimed that even if Iraqi law was applicable, his detention was unlawful under that law. The case raised a number of complex issues, two of which are of interest for our purposes. First, the High Court rejected an argument that it should refuse to rule on J's challenge to the validity of a Coalition Provisional Authority memorandum, according to which his detention was lawful, having regard to rules of comity and the absence of judicial or manageable standards by reference to which the court could determine the lawfulness of J's detention. Considerations of comity did not prevent the court from determining issues that were necessary for the resolution of a valid claim over which it had unquestioned jurisdiction. Such a state of affairs would be particularly unsatisfactory if, as the Secretary of State claimed, he enjoyed immunity in the courts of Iraq. Also, there were judicial or manageable standards. Indeed, there was no conceptual difficulty about applying the Iraqi law.[198] The CA agreed:[199] the provisions of the Iraqi Constitution provided judicial and manageable standards.[200] English courts were familiar with constitutional interpretation, and the issues did not involve a challenge to the validity of the Constitution of Iraq.[201] That Iraq was another sovereign State did not preclude the court from adjudicating on Al-J's claim. The issue of interpretation only came in incidentally in proceedings in which the court plainly had jurisdiction. The ruling had no effect on the courts of Iraq. Nor did it infringe comity for the court to hear the claim.

Secondly, it was submitted that J's detention was an act of State and so the court had no jurisdiction to consider it. The High Court held that not every act of policy done by the Crown abroad was an act of State. Rather, the rule was confined to acts of a character such that it would be, 'wrong in principle for the court to seek to adjudicate on them'.[202] Although the decision in the leading case of *Attorney-General v Nissan*[203] was not considered to provide an easily applicable criterion for identifying the boundary between justiciable and non-justiciable, the decision to contribute British forces to the multinational force (MNF) was considered to be 'plainly an act of state'.[204] It was quintessentially a policy decision in the field of foreign affairs. Internment was a specific part of the task which the MNF was invited by the Government of Iraq, and mandated by the Security Council, to undertake. Indeed, once it accepted

[198] ibid paras 34–37. The *Buttes* case (n 24) was distinguished as being of a wholly different character.

[199] [2010] EWCA Civ 758.

[200] ibid paras 70–75 (Arden LJ), 184–91 (Elias LJ).

[201] Distinguishing *Buck v Attorney-General* [1865] Ch. 745 (issue in case non-justiciable because it would call into question the terms of the Constitution of a foreign sovereign State).

[202] [2009] EWHC 397 (QB), para 75.

[203] [1970] AC 179.

[204] [2009] EWHC 397, QB, para 76. *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 A.C. 153 was distinguished as being only concerned with the specific question of the territorial reach of the ECHR and of the HRA (1998). The court also rejected an argument that it would be an abuse for the Secretary of State to be able to rely on the defence of act of state. It had not been pleaded in the earlier *Al-Jedda* case (n 197) or in *Al-Skeini*.

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the invitation to contribute to the MNF, internment where necessary for imperative reasons of security constituted a positive obligation on the UK. Although the act of State rule might apply even in the absence of such an obligation, its justification was clearer in such a case. Individual acts of internment, such as that of J, were done either in performance of the decision to contribute forces or had a sufficiently close link with that decision.[205] They were thus an act of State and non-justiciable. An argument that J's individual internment was not a necessary part of the MNF's operations was rejected on the basis that internment was an essential part of the obligations undertaken. Battlefield operations were generally regarded as the paradigm of an act of State and that although the decision whether to destroy or occupy this or that building or to bomb this or that facility would necessarily be discretionary, it could not for that reason become justiciable.[206] For the High Court, if the acts done by the Crown abroad in the conduct of foreign relations were of their nature not cognisable in the English courts, there was no reason in principle why the position should be any different where the person injured happened to be a British citizen.[207] The nature of the act was the same. In conclusion, even if J's detention was unlawful as a matter of Iraqi law it was non-justiciable in the English courts. However, the Court was anxious to put limits on the issues that were non-justiciability. In particular it was stressed that the reasoning would not prevent the English court adjudicating on any claim, for example, that the requirements of the relevant Regulations of the CPA were not satisfied or that British forces were guilty of ill-treatment in the course of J's detention.[208] The line between unlawful detention and ill-treatment in detention is obviously rather a thin one.

In the Court of Appeal, Arden and Elias LLJ agreed that internment could qualify as an act of state.[209] Whether the defence could be invoked against a British national[210] was more complex.[211] For Arden LJ the normal rule would be that it could not. However, the act here was distinguishable because it was done abroad as part of a general policy of internment carried out under the authority of the UN for imperative reasons of security.[212] If courts held States liable in damages when they comply with resolutions of the UN designed to secure international peace and security, the likelihood was that States would be less ready to assist the UN to achieve this task and this would be

[205] ibid para 76. Though act of State defence would, 'plainly be unavailable in cases of wanton or unjustified violence', ibid para 85.
[206] ibid para 77.
[207] ibid paras 80–82. This important issue had been discussed in the *Nissan* Case but had been left undecided.
[208] ibid para 87.
[209] *Al Jedda 2*, CA (n 199) paras 75, 195.
[210] In December 2007 the Secretary of State made an order depriving him of his British citizenship. The order has been challenged: see *Al-Jedda v Secretary of State for the Home Department* [2010] EWCA Civ 212.
[211] Sir John Dyson preferred to express no view on the act of State issue which raised points of 'very considerable difficulty', para 127.
[212] ibid para 109.

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detrimental to the long-term interests of states.[213] Elias LJ considered that the decision in the *Nissan* case was not decisive either way.[214] However, since *Nissan* there had been striking developments which had fundamentally altered the relationship between the courts and the executive. One was the development of sophisticated principles of administrative law. Another was the growing importance given to the protection of human rights. Acts of State were akin to prerogative powers. If a claim of act of State was successful it removed the power of the courts to consider the issue. The legality of the act was immaterial because the court had no jurisdiction to consider the issue. This was not because the nature of the act rendered control inappropriate although sometimes that might be the case.

One reason for the courts deferring to the executive even in areas where the issue in dispute would be amenable to judicial process was that courts and crown should speak with one voice. Whatever the merits of that principle in a case where the act in question was a high act of policy, it ought not to carry much weight in a case where the act in question was specifically directed at a particular individual and deprived him of his liberty. It was difficult to see how even the interests of State can justify the arbitrary and uncontrolled internment of a British subject. A vital role of the courts has been to protect the individual against the State, as Lord Reid's judgment in *Nissan* recognized. The courts ought to scrutinize the act to ensure that the rights of the individual have been properly protected. The courts would be failing in their constitutional duty if they were to leave the executive with unfettered powers to intern British citizens merely because there the act of internment occurred abroad. The shield of *Entick v Carrington* ought to protect a British citizen at least in a case of this nature, where his personal liberty was at stake, even if foreign nationals would not be similarly protected. Accordingly, the courts ought not to defer to the executive in a case of this nature. Elias LJ also suggested that an alternative approach might be for the court to question the way in which that power was exercised as with any other exercise of prerogative power. The court could, for example, satisfy itself that detention was proportionate to the risks at stake, and ensure at least elementary principles of fairness in the detention process.[215]

G. National Security

National security can encompass defence but it is a broader category. One context will shade into another.[216] There is a distinction between a deportation decision affecting a specific individual (as in *Rehman*)[217] and a decision of

[213] ibid paras 93–110.
[214] ibid paras 192–226.
[215] ibid para 218.
[216] *Marchiori v The Environment Agency & Others* [2002] EWCA Civ 03, per Laws LJ.
[217] See (n 224). Similarly with respect to the detention of an individual, even in another state, see *Evans* (n 9).

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defence policy (such as those concerning the continued maintenance of *Trident* nuclear weapons),[218] though both involved matters of national security.[219] Matters of defence policy are, within the constitutional framework, for the government to decide. In *Marchiori* an argument that the defence policy was justiciable because production and maintenance of nuclear weapons violated humanitarian law and was repugnant to the law of nations was rejected on the basis that this was not the proper reading of the Advisory Opinion in the *Nuclear Weapons Case*.[220] A court's willingness to intervene would very much depend on the nature of the material which it was sought to disclose.[221] The disclosure of documents bearing a high security classification and where there was apparently credible unchallenged evidence that disclosure was liable to lead to the identification of agents or the compromise of informers was at one end of the spectrum. The disclosure of the material that may cause embarrassment or arouse criticism, but would not damage any security or intelligence interest would be at the other.[222]

The modern cases evidence an assumption of jurisdiction and focus on the appropriate level of the intensity of judicial review. This depends on the domestic or international context of the particular case and how the courts choose to categorize the issues. In *Secretary of State for the Home Department v Rehman*[223] the issue before the House of Lords was the proper approach of the Special Immigration Appeals Commission (SIAC) to the determination of whether the presence in the UK of a foreign national was likely to be a threat to national security. The opinions made clear that although SIAC had powers of review, due weight had to be given to the assessment and conclusions of the Secretary of State in the light of his responsibilities, the means at his disposal of being informed of and his understanding of the problems. He was in the best position to judge what national security required.[224] As Lord Hoffmann explained, under the UK constitution issues of national security were issues of judgement and policy for the executive branch of the State and were not for judicial decision. A court should not therefore differ from the opinion of the Secretary of State on such an issue, provided there was an evidential basis for that opinion.[225] This approach may have been overtaken

[218] *Marchiori* (n 217). M's application was in respect of certain authorizations granted by the Environment Agency which permitted the discharge of radioactive waste by contractors from two nuclear sites at which Trident nuclear warheads were manufactured.

[219] ibid para 39.

[220] ibid paras 46–48. In January 2009, Scott Baker LJ refused permission to appeal a decision not to grant permission to claim judicial review of the Government's 2006 Defence White Paper and its decision to renew the Trident nuclear weapons system: *R (Nuclear Information Service) v Secretary of State for Defence and Secretary of State for the FCO* (unreported).

[221] *R v Shayler*, [2002] UKHL 11; [2003] 1 AC 247, per Lord Bingham, para 33.

[222] ibid.

[223] [2001] UKHL 47, [2003] 1 AC 153.

[224] See Lord Slynn, ibid, para 26 and Lord Steyn, paras 28 and 31.

[225] National security considerations will prevail over common law rights if Parliament has clearly confronted the issues and so decided: *W (Algeria) and Others v Secretary of State for the Home Department* [2010] EWCA Civ 898.

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by the less deferential approach adopted under the Human Rights Act (1998). In *A and Others v Secretary of State for the Home Department*[226] Lord Hoffman was the only dissentient on the critical issue of whether there was a public emergency. In *R (Corner House Research) v Director of the Serious Fraud Office*[227] it was again emphasized that the duty of decision in relation to an assessment of the public interest/national security context lay with the executive. Their Lordships considered that D was a prosecutor with no access to representatives of the relevant foreign state (Saudi Arabia). He was obliged and entitled to rely on the expert assessment of others.[228] There was also the discussion in *Corner House* of whether national and international security was a permissible consideration under article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) and whether it would have been proper for the court to adjudicate on that question.[229]

Other cases illustrate the difficulty of determining whether a national security case should effectively be categorized as non-justiciable. The *Bancoult* case[230] considered above, concerned the banishment of the inhabitants from the British Indian Ocean Territory. The claimant (B) sought a declaration that the British Indian Ocean Territory (Constitution) Order 2004 and the British Indian Ocean Territory (Immigration) Order 2004, made by the Queen by Order in Council, acting upon the advice of the Secretary of State, were unlawful. B, a member of the Ilois population living in the British Indian Ocean Territory, had been exiled from the territory to Mauritius. The applicants succeeded before the High Court which considered that challenge to the orders in the instant case did not involve government policy of the kind envisaged in the *CCSU* decision, nor did it involve matters on which the court could not adjudicate. They also succeeded before the Court of Appeal which considered that there was nothing in the Orders in Council or in the nature of the claim for judicial review which made the issues non-justiciable on the grounds of subject matter.[231] No such claim was even made by counsel. However, a majority of three to two in the House of Lords held that the courts could not inquire into whether legislation within the territorial scope of the power was in fact for the 'peace, order and good government' or otherwise for the benefit of the inhabitants of the territory.[232] Such 'questions are not justiciable. The law

[226] [2004] UKHL 56; [2005] 2 AC 68. On assessing national security in the context of a fair trial see *Secretary of State for the Home Department v F* [2009] UKHL 28; [2009] 3 WLR 74; *A v United Kingdom* (n 54); *Secretary of State for the Home Department v AF* [2010] EWHC 42 (Admin); *Al Rawi v Security Service* [2010] EWHC 1496 (QB) and [2010] EWCA Civ 482.

[227] [2008] UKHL 60, [2009] 1 AC 756.

[228] ibid para 64.

[229] ibid 46–47, 51, 56, 67, 68–69.

[230] See (nn 60–65).

[231] [2007] EWCA Civ 498, [2008] QB 365.

[232] The approach of Lords Rodger and Carswell has been criticised for being 'infused . . . with deference verging on a characterization of the matter as a non-justiciable one', Elliott and Perreau-Saussine (n 62) 716.

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cannot resolve them: they are for the determination of the responsible ministers rather than judges'.[233]

More striking in terms of judicial willingness to treat determinations of national security by the executive as justiciable was the *Binyam Mohammed* Case.[234] In February 2009 the High Court held that there was no basis on which the judgment of the Foreign Secretary as to the danger to national security posed by a real risk of loss of intelligence could properly be questioned in the circumstances. However, the rule of law required that the determination of where the balance of the public interest lay was ultimately for the decision of the court. At that time it concluded that the balance was served by maintaining the redaction of certain paragraphs from an earlier judgment of the court which dealt with the treatment of BM by US authorities while he was held in Pakistan. The redacted paragraphs summarized accounts given by the US intelligence services to the British security services about the treatment of B whilst he was in custody and about an interview by a member of British security. The paragraphs were highly material to an allegation by B that he had been subjected to torture and cruel, inhuman or degrading treatment and to the commission of criminal offences. However, in October 2009 the High Court concluded that, in the light of further information and developments, the public interest in making the paragraphs public was overwhelming, and as the risk to national security judged objectively on the evidence was not a serious one, it should restore the redacted paragraphs to its first judgment.[235] The Court specifically rejected the Foreign Secretary's opinion that there was a serious risk to intelligence sharing between the US and the UK. It also concluded that a statement made by US Secretary of State Clinton that intelligence sharing would be affected was made without a proper analysis or understanding of what the paragraphs contained. The judgment of October 2009 was itself in redacted form because the executive maintained its view that placing the paragraphs in the public domain would give rise to damage to national security and wished to ensure that the Secretary of State's position on appeal was not prejudiced.

After the High Court reached its decision, a US court found as a matter of public record, in proceedings brought by B in the US, that B had been subjected to torture. The Secretary of State contended that publication of the paragraphs would be contrary to the control principle, namely that if the US intelligence services disclosed confidential information to the UK intelligence services, or vice versa, the confidentiality of the information was vested in the country which disclosed the information. Publication would inevitably lead to a review of the intelligence sharing between the US and the UK that might

[233] *Bancoult*, para 109, per Lord Rodger.

[234] See *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152, paras 72–107, [2009] 1 WLR 2653. See also Pt III, F above.

[235] ibid.

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lead to a less productive intelligence-sharing regime that would be contrary to the public interest in national security.

The Secretary of State's appeal was dismissed.[236] The executive, not the judiciary, was responsible for national security and public protection and safety from terrorist activity. The judiciary would defer to it on those issues, unless it was acting unlawfully, or unless in the context of litigation the court concluded that the claim by the executive for public interest immunity was not justified. B had a personal interest in seeing the full reasoning of the High Court, and there was also, in particular in litigation between the executive and a citizen, a public interest in open justice, the rule of law, freedom of expression and democratic accountability. Whilst the publication of the redacted paragraphs would result in a review of intelligence-sharing arrangements, that review would only possibly produce a change. Whilst there was a clear risk that any review would culminate in new and, from the point of view of national security, disadvantageous arrangements, that risk was the inevitable concomitant of any occasion when a court decided to reject the claim to preserve confidentiality on public interest immunity grounds. Publication of the redacted paragraphs would not reveal information which would be of interest to a terrorist, or disclosure of which would be contrary to national security. Having regard to the US judgment, the information contained in the paragraphs was essentially already in the public domain. It was hard to conceive of a clearer case for the disapplication of the control principle. Its application would partially conceal the full reasons why the High Court had found that those for whom the UK executive was ultimately responsible were involved in or had facilitated wrongdoing in the context of the practice of torture.

IV. APPRAISING THE BOUNDARIES OF JUSTICIABILITY

This examination of the jurisprudence on justiciability has revealed it to be a complex principle or category of argument, with multiple rationales, and which is applied in a wide array of legal contexts. It wide and disparate application makes justiciability difficult to assess. As applicants have sought to litigate more foreign affairs and international law issues in the UK courts, the contours of the principle are being reassessed in a modern constitutional context. It is helpful to conclude this article by highlighting the themes that emerge from the current jurisprudence and some of the critical issues that remain open.

[236] *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, [2010] 3 WLR 554. In 2011 the government will publish a Green Paper 'seeking views on a range of options designed to enable the courts and other oversight bodies to scrutinise modern day national security actions without effectively compromising our security in the process', *National Security Strategy* Oct 2010, Civ 7593, 23.

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The (unadopted) principle of justiciability is clearly continuing to evolve in the UK courts in a direction which reduces its application in the various categories of cases to which it is applied.[237] It does so in a context in which it has been authoritatively submitted that judicial review has developed to the point that no power is any longer inherently unreviewable.[238] The scope of judicial review has pushed further and further into what had been the largely non-justiciable interstices of prerogative powers (*CCSU Case*, *Abassi*; *Al Rawi; Bancoult*). Standards of judicial review are becoming more refined and demanding (*Abassi*, *Re A (Belmarsh Detainees Case), Al-Rawi*). The nature of judicial review proceedings is changing to accommodate the kinds of human rights complaints that are now being brought (*Al-Sweady*).[239] There are more foreign cases in which the allegation is of systematic violations and the remedy sought is a public inquiry which complies with duties to investigate alleged breaches of articles 2 and 3 ECHR.[240] Courts are displaying a greater receptivity to standards of public international law generally[241] and human rights standards in particular.[242] They are also playing an increased role in protecting human rights, particularly since the Human Rights Act (1998).[243] They are asserting a special role and responsibility for the protection of human rights (*Al-Rawi; Al-Jedda (No. 2); Binyam Mohammed*) and a relative institutional competence over human rights within the context of a democratic dialogue (*Re A (Belmarsh Detainees) Case*; *Al-Rawi*).[244] There is also

[237] So too in Australia: see *Hicks v Ruddock* [2007] FCA 299 (modern law in relation to the meaning of 'justiciable' and the extent to which the court will examine executive action in the area of foreign relations and Acts of State was far from settled, black-letter law', para 95). See also *Mbasogo* and *Barakat* (n 7) in which the critical element seems to be whether it is considered to be the extra-territorial assertion of sovereign prerogative rights by a foreign State, with the courts finding positive reasons of policy to support claims made by foreign States concerning their public laws.

[238] See Woolf et al (n 27) 15.

[239] See *R (Al-Sweady and Others) v Secretary of State for Defence* [2009] EWHC 2387 (Admin) (eg on allowing cross-examination of witnesses and disclosure especially as they concern human rights complaints which involve factual disputes) where the Court made withering criticism of the Secretary of State's failures in terms of proper disclosure. See also *Evans* (n 9) on the use of special advocates and closed judgments and the suggestion of Elias LJ in *Al-Jedda* (No. 2), (n 200) on judicial review as an alternative to tort. See generally T Hickman, *Public Law after the Human Rights Act* (Hart, Oxford, 2010).

[240] See eg *Ali Zaka Mousa and others v Secretary of State for Defence*, [2010] EWHC 1823 (Admin) (application on behalf of 102 men claiming ill-treatment while detained in Iraq). Two inquiries (Baha Mousa and Al-Sweady) and two investigations (the Iraq Historic Allegations Team and the Iraq Historic Allegations Panel) have already been established.

[241] 'In the future, . . . domestic non-justiciability may not withstand the pressure, especially in relation to human rights cases, for executive acts in foreign affairs to be judicially reviewed by the standards of public international law': Thomas (n 2) 398.

[242] See Lord Justice Richards, 'The International Dimension of Judicial Review' (2006) <http://www.judiciary.gov.uk/publications_media/speeches/2006/sp070606.htm>

[243] See A Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP, Cambridge, 2009).

[244] This may be enhanced now the UK formally has a Supreme Court (since October 2009). See Lord Hope, 'The Creation of the Supreme Court—was it worth it?' (2010) available at <http://www.supremecourt.gov.uk/docs/speech_100624_v2.pdf>.

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evidence of a more assertive judicial function in making rather than simply reviewing assessments of risk (*Evans*) or embarrassment (*Iraqi Airways*) and a stronger judicial conception of the implications of ensuring democratic accountability and the rule of law (*Re A (Belmarsh Detainees) Case; Corner House; Her Majesty's Treasury v Ahmed; Binyam Mohammed*).[245] It could be that the UK is incrementally evolving towards a system of constitutional supremacy under which fundamental rights would not be subject to executive or Parliamentary removal.[246]

Within this rapidly evolving constitutional context, judges' modern inclination is to find that issues are justiciable. Thus justiciability depends, not on general principle, but on subject matter and suitability in the particular case (*Abassi*). It is necessary to identify, in accordance with English law, the substance of the claim sought to be enforced and not to focus on the cause of action or the form of the claim (*Mbasogo*). The factual and legal characterization of issues by the decision-maker can be crucial to the operation of the principle (*Re A (Belmarsh Detainees*). The courts will decline to embark upon the determination of an issue if to do so would be damaging to the public interest in the field of international relations, national security or defence (*CND Case*) but mere embarrassment is unlikely to be sufficient (*Shayler*; *Korea National Insurance*).

The general principle remains that issues which require courts to review the acts and transactions of sovereign states on the international plane are non-justiciable (*Buttes; Al-Haq*). Considerations of competence, comity and the avoidance of embarrassment all play a role. However, the principle is being more and more confined. In very exceptional cases the UK courts will not give effect to a foreign law because it considers that it constitutes a flagrant violation of human rights or of rules of public international law of fundamental importance (*Oppenheimer; Iraqi Airways*) because to do so would violate a rule of public policy of English law. The acts and transactions of sovereign States that are non-justiciable are reduced to the extent that the instruments formalizing the acts and transactions may, to some extent, be justiciable. The courts are exercising a more intense review over international law issues if they can find a domestic foothold for doing so (*Occidental)*, particularly concerning human rights (*Abassi*; *Al-Rawi*). The courts will not declare the

[245] See also *A v The Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2006] 2 AC 221 (prohibition on admission of evidence derived from torture); *R (C) v Upper Tribunal* [2010] EWCA Civ 859 (referring to the constitutional role of the High Court as the guardians of standards of legality, para 35); Lord Bingham, 'The Rule of Law' (2007) 66 CLJ 67–85. The doctrine now has legislative support in The Constitutional Reform Act (2005).

[246] See D McGoldrick, 'Terrorism and Human Rights Paradigms—The UK After 11 September 2001', in A Bianchi and A Keller (eds), *Counterterrorism: Democracy's Challenge* (Hart, Oxford, 2008) 111–231. *Quaere* how far the UK judiciary is from developing a theory of substantive competence.

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meaning of an international instrument operating purely on the plane of international law unless it is has been incorporated (*JH Rayner*; *CND Case*). However, they will do so if it is necessary to do so in order to determine rights and obligations under domestic law (*Al-Haq*; *AY Bank Case*; *Republic of Croatia v Republic of Serbia*). A court may grant protective measures so as to preserve the *status quo* pending the outcome a dispute between foreign States provided that it does nothing to determine the issue on the merits (*AY Bank*).

The subject-matter, nature and context of an issue may be considered to place the duty of decision on the merits in the realm of politics, not of the courts, and so be non-justiciable (*Al Rawi*; *Wheeler*). Going to war, decisions to ratify treaties and the conduct of foreign relations are still considered matters of 'high policy' and the presumption is of non-justiciability (*Marchiori; Greenpeace*; *Wheeler*; *Jones; Al-Haq; Al Rawi*). The defence of the realm, whether exercised inside or outside of the UK, remains as one of the most forbidden areas in terms of justiciability. A government decision to declare war or to authorize the use of armed force against a third country is a non-justiciable decision (*CND*; *Jones; Gentle*). The non-justiciability of the disposition of armed forces may extend to their contribution to and activities as part of multinational forces if they are regarded as an act of State. However, the scope of acts of State remains uncertain, particularly in relation to what would now be classed as human rights violations. Acts of detention might be covered but not wanton or unjustified violence (*Al-Jedda (2)*; *Gentle*). Their applicability to British nationals has also been questioned (*Al-Jedda (2)*). The making of treaties is not justiciable unless Parliament has attached a condition precedent or breached a legitimate expectation (*Wheeler*).[247]

Yet even matters of 'high policy' will be justiciable if the government has made a specific high level promise (*Greenpeace; Wheeler*) or created a legitimate expectation (*Abassi*; *Al-Rawi*). Although decisions affecting foreign policy remain a forbidden area, that does not mean that the whole process is immune from judicial scrutiny and there can be a degree of review in exceptional cases (*Abassi; Al-Rawi*). Similarly decisions with respect to national security may be considered to be issues of judgment and policy for the executive branch (*Rehman*; *Corner House; Bancoult*) but again the context in the particular case may lead the courts to exercise a limited degree of review, particularly if human rights of individuals are involved (*Marchiori*; *Shayler; Bancoult*; *Binyam Mohammed*). Thus references to forbidden areas are accompanied by comments that their ambit is not immutable and have been reduced (*CND Case*). The language used is that the courts will be 'very

[247] The Constitutional Renewal Bill [HL] 2008–09 made provision for treaties to be laid before Parliament before ratification (Clauses 20–23).

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slow' to review rather than not review at all (*Jones*). The modern trends of judicial decision making are a 'progressively increasing focus on intensity of review, rather than justiciability'[248] and the removal of areas from the 'shadow of primary justiciability'.[249]

In the diminishing number of cases where the courts do still have recourse to the principle of justiciability, there remains a degree of uncertainty as to the proper rationale. Is it a judicial rule of constitutional law rather than a matter of discretion? Or in some contexts is it better understood as a rule of private or public international law or even a combination thereof?[250] The weight of authority might suggest that is most properly understood as a judicial rule of constitutional law.[251] It has a firm basis in democratic principles, particularly with reference to the separation of powers and relative institutional competence. Particularly in the human rights area though the judiciary is asserting its own power and competence and this has a knock-on effect on its approach to justiciability. However, a principled reconsideration of justiciability might suggest that it is too complex a concept to be captured a single principle. It might then be better to seek to distinguish the governing rationales in the different categories of application considered in Part III above.

The categories in which the UK courts cannot review the acts of their own government at all are being radically reduced. The modern jurisprudential trend in relation to acts and decisions of the UK executive is to prefer an analysis of issues by reference to relative institutional competence or variable degrees of deference or weight rather than to non-justiciability.[252] An argument that there should not be any 'no-go' areas is more consonant with modern ideas on the proper judicial role in a constitutional democracy,[253] common law constitutionalism,[254] the rule of law,[255] and perhaps most

[248] *Dunn, Re Judicial Review* [2010] NIQB 54 (29 April 2010), para 18, citing *Lewis v Attorney General of Jamaica* [2001] 2 AC 50 (Privy Council).

[249] Daly (n 59) 168.

[250] cf Akande (n 39) on the proper basis of act of State.

[251] See Part II, C above.

[252] See Kavanagh (n 244) 167–268; ibid, 'Defending Deference in Public Law and Constitutional Theory' (2010) LQR 222–250, particularly at 240–243; King (nn 20 30); Hickman (n 240) 57–97, 128–172. Canada has moved away from non-justiciability and towards a merits-based approach: see *Operation Dismantle* [1985] 1 SCR 441 (the Court had a constitutional obligation under the Canadian Charter of Rights and Freedoms to decide whether any particular act of the executive violated or threatened to violate any right of the citizen). See also Sim (n 26) who submits that there are 'strong reasons to doubt the desirability of the doctrine of non-justiciability'.

[253] See J Jowell, 'Democratic Necessity of Administrative Justice' (2006) Acta Juridica 13–22. The case for acts of foreign States not taking place in the UK and not in the *dominium* area (ordinary contract or property) being the subject of litigation in the UK is weaker in domestic constitutional terms.

[254] See Hickman (n 240) 81–89; BV Harris, 'Government "Third Source" Action and Common Law Constitutionalism' (2010) 126 LQR 373–402.

[255] See Endicott (n 1); T Bingham, *The Rule of Law* (London, Allen Lane, 2010) 110–129.

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significantly, the 'legal and ethical muscle of human rights'[256] that has been invoked in so many of the leading cases. This is so even when such a trend will inevitably impact on relations and engagements with other states and international actors. Developing ideas of an 'international constitutional order' and an 'international community' also militate in favour of a more extensive degree of control and review by domestic[257] (and regional courts)[258] courts of the international conduct of States.[259] In drawing the boundaries of that review and control the principle of justiciability is rightly playing a lesser role.

[256] See Laws LJ, text to (n 153).

[257] See A Tzanakopoulos, 'Domestic Court Reactions to UN Security Council Sanctions' in A Reinisch (ed), *Challenging Acts of International Organizations Before National Courts* (OUP, Oxford, 2010) 54–76.

[258] See PJ Cardwell, D French and ND White, '*Kadi v Council of the European Union'* (2009) 58 ICLQ 1 229–240.

[259] See E de Wet, 'The International Constitutional Order' (2006) 55 ICLQ 1 53–76; E Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 AJIL 241–74.

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