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Foreign act of state and empire

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Abstract

The judicial restraint limb of the foreign act of state doctrine is presented as a time-worn doctrine dating back to the seventeenth century. Its legitimacy is indelibly wedded to its historical roots. This article demonstrates that this view is misguided. It shows that the cases which are said to form the foundation of the judicial restraint limb primarily concern the Crown in the context of the British Empire and are of dubious legal reasoning, resulting in a concept trammelled by the irrelevant and the obfuscating. It has also unnecessarily complicated important questions relating to the relationship between English law and public international law. This article suggests that the judicial restraint limb of the foreign act of state doctrine ought to be understood on the basis of the principle of the sovereign equality of states and conceptualised accordingly.

Keywords: foreign act of state; non-justiciability; British Empire.

Introduction

> Rules and practices created as servants of the exigencies of Britain's expanding empire need to be re-evaluated in order to see whether the principles that underlie those rules remain relevant today.
>
> Campbell McLachlan, *Foreign Relations Law* (n 2) at xxi.

In general terms, the foreign act of state doctrine comprises two limbs. The first limb is of a hard-edged nature according to which an English court will recognise and not question the effect of legislation and executive acts of a foreign state which take place or effect within the foreign state's territory (hereinafter referred to as 'municipal law act of state').[1] In broad terms, this limb supports a result dictated by the ordinary operation of the rules of private international law.[2] The second limb provides that it is 'inappropriate' for the

* The views expressed in this article are the author's own and do not reflect those of the Foreign & Commonwealth Office.

1 *Belhaj v Straw* and *Rahmatullah (No 1) v Ministry of Defence* [2017] UKSC 3, [2017] AC 964 [121]–[122], [146].

2 Campbell McLachlan, *Foreign Relations Law* (Cambridge University Press 2014) 524. The rules of private international law are not wholly analogous because private international law does not require an uncritical application of foreign law. It allows the forum court to decline to apply a foreign law on the basis that it is contrary to public policy.

courts of the UK to resolve certain issues because they involve 'a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it'.[3] This article is largely concerned with the latter limb, sometimes referred to as a principle of non-justiciability.[4] However, this article characterises the limb as one of judicial restraint because its application is a matter of discretion,[5] as recognised by the UK Supreme Court in *Belhaj*,[6] 'in that it applies to issues which judges decide that they should abstain from resolving'.[7] The application of the limb results in a substantive bar to adjudication.[8]

Part 1 of this article offers a deliberative explanation of the historical context of the cases which are said to form the foundation[9] of the judicial restraint limb in an effort to 'liberate us from the tyranny of the old, from the sway or hold of the past'.[10] The method adopted is one of factual and legal disaggregation. There has been the occasional advocate for disaggregation in the context of the foreign act of state doctrine. Commenting in 1943, F A Mann lamented the notion that 'foreign acts of state are entitled to some kind of sacrosanctity'.[11] He argued that 'its very generality and vagueness involves obvious dangers. What is required is … specialization.'[12] However, legal disaggregation in the absence of factual disaggregation is of limited use. Indeed, legal disaggregation must be informed by factual disaggregation: as Milsom observed, 'neither in the single case nor in the mass and over the centuries are the law and facts so separate that either can be seen as the fixed background to an examination of the other'.[13] In the context of the judicial restraint limb, it is clear that this exercise is necessary.

3 *Belhaj* (n 1) [123] (Lord Neuberger).

4 It is generally accepted that an issue is justiciable if it is 'proper to be examined in a court of justice'. See Bryan A Garner (ed), *Black's Law Dictionary* (10th edn, Thomson Reuters 2014). See also G Marshall, 'Justiciability' in A G Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press 1961) 265, 267–268. Lord Sumption described 'non-justiciability' as a 'treacherous word' in *Rahmatullah v Ministry of Defence and another* [2017] UKSC 1, [2017] AC 649 [18].

5 F A Mann observed that 'a finding of non-justiciability involves a very special responsibility and is certainly not a matter of discretion'. See F A Mann, *Foreign Affairs in English Courts* (Clarendon Press 1986) 69.

6 Lord Mance, Lord Neuberger (with whom Lord Wilson agreed) and Lord Sumption (with whom Lord Hughes agreed) each gave detailed judgments in *Belhaj*. Lady Hale and Lord Clarke agreed with the reasoning of Lord Neuberger, thereby establishing his judgment as the *ratio* to the extent of any disagreement.

7 *Belhaj* (n 1) [151] (Lord Neuberger). To this end, Lord Neuberger directs that judges should 'be wary of accepting an invitation to determine an issue which is, on analysis, not appropriate for judicial assessment'. See ibid [144]. See also ibid [40] (Lord Mance).

8 Ibid [144] (Lord Neuberger). See also James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019) 70.

9 In *Belhaj,* Lord Neuberger and Lord Sumption substantiated the judicial restraint limb on the basis of six cases, all discussed in this article. See *Belhaj* (n 1) [128]–[129], [234]. (Lord Sumption also relied on *Dobree v Napier* ((1836) 2 Bing NC 781)). Lord Mance did not trace the judicial self-restraint limb in the same manner but instead relied heavily on *Buttes Gas & Oil Co v Hammer (No 3)* [1982] AC 888 (HL) and *Shergill v Khaira* [2015] AC 359.

10 J W F Allison, 'History to understand, and history to reform, English public law' (2013) 72 Cambridge Law Journal 526, 531. The invocation of history to understand and reform the law is an increasingly prominent approach in English public law. See, for instance, the approaches of Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press 2010); M Loughlin, *Foundations of Public Law* (Oxford University Press 2010); and P Craig, 'Proportionality and judicial review: a UK historical perspective' in S Vogenauer and S Weatherill (eds), *General Principles of Law: European and Comparative Perspective*s (Hart 2017).

11 F A Mann, 'The sacrosanctity of the foreign act of state' (1943) 59 Law Quarterly Review 42, 43.

12 Ibid. See also McLachlan (n 2) 524–525.

13 S F C Milsom, 'Law and fact in legal development' (1967) 17 University of Toronto Law Journal 1, 1.

First, the limb is increasingly defined by its exceptions, including a public policy exception,[14] a commercial exception[15] and an incidental unlawfulness exception.[16] Commenting on the scope of the foreign act of state doctrine in *Yukos v Rosneft*, the Court of Appeal observed, '[t]he important thing is to recognise that increasingly in the modern world the doctrine is being defined, like a silhouette, by its limitations, rather than to regard it as occupying the whole ground save to the extent that an exception can be imposed'.[17] The problem is that, when the courts increasingly carve out exceptions, it weakens the foundation upon which the doctrine relies.

Second, the judicial restraint limb has become increasingly abstract, rendering the limb incapable of reflecting significant normative differences between factual situations. When a court is tasked with deciding a case, it characterises the facts at various levels of generality.[18] The level of abstraction of facts informs the norm articulated. On occasion, subsequent judges rely on norms articulated in prior cases to craft a more general norm.[19] However, a norm will be recognisable as too abstract whenever its enunciation requires us to mischaracterise or ignore the facts of the prior cases which were central to its establishment.[20] In applying the judicial restraint limb today, the courts mischaracterise or ignore the facts of cases integral to the development of the judicial restraint limb. This article will seek to demonstrate that factual and legal disaggregation is necessary in order to delineate the contours of this 'protean' conceptualisation of restraint.[21]

The exercise of disaggregation in Part 1 will demonstrate that the cases which are said to form the foundation of the judicial restraint limb concern the actions of the Crown in the context of the British Empire – i.e. a Crown act of state. A Crown act of state is an act which is inherently governmental in nature, committed outside the UK with the prior authority or subsequent ratification of the Crown in the conduct of the Crown's relations

14 The judicial restraint limb does not apply to acts which are in breach of fundamental principles of public policy (*Oppenheimer v Cattermole* [1976] AC 249 (HL) 277–278) or serious violations of international law (*Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883 [29] (Lord Nicholls)).

15 The judicial restraint limb only applies to sovereign or *jure imperii* acts and not to commercial or other private acts (*Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855, [2014] QB 458 [92]–[94]).

16 The judicial restraint limb 'does not apply … simply by reason of the fact that the subject matter may incidentally disclose that a state has acted unlawfully. It applies only where the … unlawfulness of the state's sovereign acts is part of the very subject matter of the action in the sense that the issue cannot be resolved without determining it'. See *Belhaj* (n 1) [240] (Lord Sumption). This exception is most clearly articulated in the case of *WS Kirkpatrick & Co Inc v Environmental Tectonics Corp International* (1990) 493 US 400.

17 *Yukos* (n 15) [115].

18 Julius Stone, 'The *ratio* of the *ratio decidendi*' (1959) 22 Modern Law Review 597, 603.

19 For example, this was the approach adopted by Lord Neuberger in *Belhaj* (n 1) [128]–[130].

20 Relatedly, Eugen Ehrlich has observed that norms can 'become so general and so abstract, by the uninterrupted process of extension and of enrichment of their context in the course of the millennia that … [the norms] function in situations for which they were not created, and to which therefore they were not adapted'. See *Fundamental Principles of the Sociology of Law* (first published 1936, Routledge, Taylor & Francis Group 2017) Part VI.

21 Lord Mance admitted that, in re-reading the judgment in *Belhaj*, he is 'conscious that [the case] might too be described as protean'. See Lord Mance, 'Justiciability' (40th Annual F A Mann Lecture at Middle Temple Hall, London, 27 November 2017) 10 <https://www.supremecourt.uk/docs/speech-171127.pdf>.

with other states or their subjects.[22] The Crown act of state doctrine is intertwined with the exercise of the prerogative powers of the Crown ('making treaties, making peace and war, conquering or annexing territories').[23] Prior to 1985, the courts could not review how the prerogative had been exercised,[24] only the extent of the power and whether a proper occasion for its exercise had arisen.[25] The exercise of the prerogative was 'by definition a non-justiciable matter',[26] and the appropriate forum for control of the prerogative power of the Crown was Parliament.[27] It was in light of this strict separation between domestic and foreign affairs of the Executive that the concept of Crown act of state emerged. It was accepted that acts done 'in foreign parts' were 'beyond the pale (in Kipling's words, "without the law"), and there the Crown has a free hand'.[28] However, the Crown prerogative is of no relevance in foreign act of state cases as the dispute concerns the actions of two foreign states. As Lady Hale remarked in *Rahmatullah* (the first case in which the courts applied the Crown act of state doctrine since the nineteenth century),[29] 'act of state' is used in a 'completely different context' in foreign act of state cases.[30]

Part 2 relies on *Buttes Gas* to formulate a conceptualisation of the judicial restraint limb premised on the sovereign equality of states: judicial restraint should only be exercised where the central issue(s) in the case require the courts to determine the validity of the acts of foreign states arising on the plane of public international law. In other words, the judicial restraint limb should be understood on the basis that there exists 'a sphere of action or transactions between states where redress ought to be sought at the

22 *Rahmatullah* (n 4) [81]. Crown act of state has also been conceptualised as a distinct defence in tort, although in *Rahmatullah* Lady Hale (with whom Lord Wilson and Lord Hughes agreed) was of the view that the foundations upon which such a defence rests are 'very shaky', and Lord Mance (with whom Lord Hughes also agreed) was of the view that it was unnecessarily confusing to suggest that a tort defence exists. See ibid [22], [47].

23 Ibid [15] (Lady Hale). See also [3], [19] (Lady Hale); [56]–[57] (Lord Mance); [96], [101] (Lord Sumption). Lady Hale also observed that the old Crown act of state cases were 'decided against the backdrop of the principle that the "King can do no wrong"'. See, for instance, Chitty's observation in 1820 that 'there can be no doubt that … since the reign of Edward I the Crown has been free from any action at the suit of its subjects' in *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and rights of the Subject* (J Butterworth & Son 1820) 339.

24 Chitty (n 23) 257.

25 Peter Cane, *Administrative Law* (5th edn, Oxford University Press 2011) 272. This general position changed after *Council of the Civil Service Unions v Minister for the Civil Service* [1985] AC 374, where the House of Lords decided that exclusion of the prerogative from judicial review was dependent on the subject matter and nature of the prerogative (rather than the source). However, Lord Roskill observed that prerogative powers 'relating to the making of treaties, the defence of the realm … as well as others' were still exceptions precisely because 'their nature and subject matter are such as not to be amenable to the judicial process'.

26 Amanda Perreau-Saussine, 'British acts of state in English courts' (2007) 78 British Yearbook of International Law 176, 185; Crawford (n 8) 68. Peter Cane argues that the Crown act of state cases which concern justiciability are 'indistinguishable' from the unreviewable exercise of prerogative powers. See 'Prerogative acts, acts of state and justiciability' (1980) 29 International and Comparative Law Quarterly 680, 680.

27 Blackstone highlighted this check on the prerogative: 'lest this plenitude of authority should be abused to the detriment of the public, the constitution (as was hinted before) hath here interposed a check, by the means of parliamentary impeachment … [a]nd the same check of parliamentary impeachment, for improper or inglorious conduct … is in general sufficient to restrain the ministers of the crown from a wanton or injurious exertion of this great prerogative'. See Blackstone, *Commentaries on the Laws of England* (9th edn, Strahan, Cadell & Prince 1783) 259.

28 William Wade, *Administrative Law* (1st edn, Clarendon Press 1961) 230.

29 *Rahmatullah* (n 4) [18].

30 Ibid. See also [89] (Lord Sumption). Cf. [51] (Lord Mance).

international level rather than through domestic courts'.[31] Such restraint should be exercised not because the English courts are unable to apply international law, but because it would not be appropriate to do so on the basis of the principle of sovereign equality of states.

1 Jurisprudence of empire

It is commonly thought that the origin of the judicial restraint limb is the decision of Lord Chancellor Nottingham in *Blad v Bamfield*,[32] particularly in light of his expansive turns of phrase.[33] However, the inclusion of this case in any discussion of the judicial restraint limb is misguided. The confusion derives from a fundamental misunderstanding of the facts of the case and the relationship between the Chancery and the common law courts in the 1670s.

In the seventeenth century, Danish merchants were granted patents by the King of Denmark to trade in Iceland.[34] The dispute in *Blad v Bamfield* arose as a result of Bamfield and others, British subjects, fishing off the coast of Iceland in 1668, allegedly in breach of a patent to Blad, a Danish subject, for the sole right to trade in that area of Iceland. In response to the alleged breach of the patent, Blad seized Bamfield and others' goods under the authority of the Danish Crown, and the goods were subsequently forfeited by the Danish courts.[35]

Bamfield and others brought several actions against Blad for trespass and trover for the seizure of their goods in the common law courts. Blad subsequently visited England where he was arrested. Blad petitioned the Court of Chancery (i.e. a court of equity) to stay all actions against him on the basis that the seizure was 'a case of state'.[36] Bamfield and others argued that they had a 'right of fishing' in the area and the 'articles of peace' between Charles II and Christian V justified their fishing off the coast of Iceland.[37]

In *Belhaj*, the Supreme Court was of the view that the judicial restraint limb was applied in *Blad v Bamfield*.[38] This is not accurate. Lord Chancellor Nottingham did not exercise judicial restraint: he adjudicated on the acts of a foreign state – i.e. on the seizure by Blad under the authority of the Danish Crown and in respect of the articles of peace. Lord Chancellor Nottingham held that 'never was any cause more properly before the Court than the case in question; first, as it relates to a trespass done upon the high sea ...;

31 Dapo Akande, 'Non-justiciability: reappraisal of Buttes Gas in the light of recent decisions' (British Institute of International and Comparative Law conference on Non-justiciability, Act of State and International Law, London, 15 January 2007) 4.

32 *Blad v Bamfield* (1674) 3 Swan 604, 36 ER 992.

33 See, for instance, *Buttes Gas* (n 9) 932 (Lord Wilberforce); Crawford (n 8) 58; McLachlan (n 2) 540; Matthew Nicholson, 'The political unconscious of the English foreign act of state and non-justiciability doctrine(s)' (2015) 64 International and Comparative Law Quarterly 743, 756–757.

34 Gisli Gunnarsson, 'Monopoly trade and economic stagnation: studies in the foreign trade of Iceland 1602–1787' (1983) 38 Ekonomisk Historiska Foreningen 1, 27.

35 *Blad v Bamfield* (n 32) 605, 992, referring to *Blad's Case* (1673) 3 Swan 603, 36 ER 991.

36 *Blad's Case* (n 35) 603, 991.

37 Ibid 606, 992. The 'articles of peace' were the Articles of Alliance and Commerce between the Most Serene and Potent Prince, Charles the Second, By the Grace of God, King of Great Britain … and the Most Serene and Potent Prince Christian the Fifth, by the Grace of God, King of Denmark (concluded 11 July 1670) ('Articles of Alliance and Commerce').

38 *Belhaj* (n 1) [61] (Lord Mance); [128] (Lord Neuberger); [234] (Lord Sumption).

secondly, as it had relation to articles of peace'.[39] He was of the view that the 'pretence of articles of peace' failed the defendants. Article V of the articles of peace stated:

> ... [i]t shall be lawful for the Subjects of both Kings with their Commodities and Merchandise both by Sea and Land, in time of Peace without licence or safe Conduct General or special to come to the Kingdoms, Provinces, Mart-towns, Ports and Rivers of each other, and in any place therein to remain and trade, Paying Usual Customs and Duties; *Reserving nevertheless to either Prince his Superiority, and Regal jurisdiction in his kingdoms, Provinces, Principalities and Territories respectively.*[40]

In light of Article V, Lord Chancellor Nottingham concluded that 'certainly no case was ever better proved' due to the 'letters patent from the King of Denmark for the sole trade of Iceland; a seizure by virtue of that patent; a sentence upon that seizure; a confirmation of that sentence by the Chancellor of Denmark; an execution of that sentence after confirmation; and a payment of two thirds to the King of Denmark after that execution'.[41] It was only 'after all this' (i.e. his interpretation and application of the articles of peace) that Lord Chancellor Nottingham observed it would be 'monstrous and absurd' to send the case 'to a trial at law'.[42] As such, he granted a 'perpetual injunction' to stay Bamfield and others' 'suit at law' on the basis that he had determined in a court of equity the same legal issues which were at issue in the common law courts.[43] An injunction such as this was not unusual at the time.[44] In fact, the seventeenth century was a particularly acrimonious period between the common law courts and the Chancery, when common law judges were 'disturbed' by the 'capricious granting of injunctions'.[45] F A Mann also acknowledges that *Blad v Bamfield* is exemplary of nothing more than the use formerly made by the Lord Chancellor of his powers of injunction.[46]

If *Blad v Bamfield* is severed from any discussion of the judicial restraint limb, we must then turn to *Nabob of the Carnatic*[47] – the next case (chronologically speaking) on which the judicial restraint limb is said to rest.[48] This case arose in the wake of tumultuous relations between the East India Company and the Nabob of the Carnatic[49] (i.e. an Indian prince, also referred to as a 'glittering puppet' through which the East India Company 'could exercise sovereignty in India').[50] The East India Company and others had assisted the Nabob in various territorial wars in the eighteenth century, during which time the Nabob accrued a substantial debt to the East India Company and private

39 *Blad v Bamfield* (n 32) 605–606, 992.

40 Articles of Alliance and Commerce (n 37) Article V (emphasis added).

41 *Blad v Bamfield* (n 32) 606–607, 993.

42 Ibid 606, 992.

43 Ibid 607, 993.

44 At the time, a party had to seek equitable and legal remedies in separate courts, and it was common to seek a specific remedy from the Lord Chancellor, irrespective of whether proceedings were pending at common law: J H Baker, *Introduction to English Legal History* (4th edn, Butterworths LexisNexis 2002) 109–111.

45 D W Raack, 'A history of injunctions in England before 1700' (1986) 61 Indiana Law Journal 539, 572.

46 Mann (n 11) 'The sacrosanctity of the foreign act of state' 45.

47 *Nabob of the Carnatic v East India Company* (1793) 2 Ves Jr 56, 30 ER 521. See also another report of the same case: *Nabob of Arcot v The East India Company* (1793) 4 Bro CC 180, 29 ER 841. Arcot was the capital of the Carnatic region. For a detailed historical account of the background to this case, see Perreau-Saussine (n 26) 187–191.

48 *Belhaj* (n 1) [128] (Lord Neuberger); [234] (Lord Sumption).

49 Muhammad Ali Khan Wallajah was the Nabob of the Carnatic from 1749–1795.

50 Thomas Babington Macaulay, *Critical and Historical Essays,* vol III (5th edn, Longman, Brown, Green & Longmans 1848) 123.

creditors (including 14 members of Parliament)[51] at rates of interest as high as 25 per cent.[52] In 1781, to pay the debt to the East India Company, the Nabob reluctantly entered into an agreement with Lord Macartney to assign revenue from certain districts of the Carnatic to the East India Company. Thereafter, private creditors sought repayment of their debts from the East India Company out of the revenue it collected on the Nabob's behalf. The Board of Control of the East India Company controversially agreed to repay these creditors on behalf of the Nabob, prompting Edmund Burke to give his celebrated oration in the House of Commons. He remarked that the Nabob's 'debt to the company … forms the foul, putrid mucus in which are engendered the whole brood of creeping ascarides, all the endless involutions, the eternal knot, added to a knot of those inexpungable tape-worms which devour the nutriment and eat up the bowels of India'.[53] And, of the Nabob and others liked him, Burke observed that:

> … these miserable Indian princes are continued in their seats, for no other purpose than to render them in the first instance objects of every species of extortion, and in the second, to force them to become, for the sake of a momentary shadow of reduced authority, a sort of subordinate tyrants, the ruin and calamity, not the fathers and cherishers of their people.[54]

In 1785, the East India Company restored the Nabob to possession of his territories and receipt of the revenue, but private creditors claimed that many of their debts (albeit, 'both doubtful in origin and exaggerated in amount')[55] remained outstanding. Therefore, the Nabob prayed an account to establish that the revenues that had been received by the East India Company on behalf of him should have been more than sufficient to repay the creditors their debts.[56]

The dispute first came before Lord Chancellor Thurlow in the Court of Chancery. The Attorney General argued that the prerogative of making war and peace had been delegated to the East India Company, so the agreements with the Nabob were 'treaties' which could not 'be a subject for the municipal jurisdiction of any Court in the country of either of the contracting parties'.[57] In other words, the East India Company argued that the Court of Chancery could not challenge its decision not to repay any debts it might owe to the Nabob and/or private creditors. Lord Chancellor Thurlow did not indulge this argument, and considered it 'quite a new plea':[58]

> … this plea says, expressly, that *the party has no remedy in any court of municipal jurisdiction whatever* … The plea, therefore, as I take it, is a plea in bar, not a plea to the jurisdiction of a particular court, but of all courts: and a plea to the jurisdiction of all courts, I take to be absurd, and repugnant in terms.[59]

That is, the Lord Chancellor found it an absurd and repugnant contention to argue that either the parties to the agreement or the subject matter of the agreement could bar a plea

51 C H Philips, *The East India Company 1784–1834* (Manchester University Press 1940) 36, 41.

52 Perreau-Saussine (n 26) 187.

53 James Burke (ed), *The Speeches of the Right Hon Edmund Burke*, 'Speech on the Nabob of Arcot's Debts' (speech delivered on 28 February 1785, James Duffy, Sons & Co 1854) 336–337.

54 Ibid 342.

55 Philips (n 51) 37.

56 Or rather, his creditors prayed an account, as the Nabob knew no more of his case 'than of what is passing at Vienna'. See *Nabob of Arcot v The East India Company* (1791) 3 Bro CC 292, 309; 29 ER 544, 553.

57 *Nabob of the Carnatic v East India Company* (1791) 1 Ves Jr 371, 372; 30 ER 391, 392.

58 Ibid 388, 400.

59 *Nabob of Arcot* (1791) (n 56) 301, 549 (emphasis in the original).

in all municipal courts.[60] He also observed that the Attorney General could provide 'no instance … of an issue at all parallel to this' and 'of such general propositions tendered'.[61] Lord Chancellor Thurlow therefore held that the 'the plea was bad in every view'.[62]

This particular case was summarised in two nominate reports: Vesey's Chancery Reports and Brown's Chancery Reports.[63] History has overlooked the latter, despite the fact that it contains much greater detail.[64] This is unfortunate because, in the latter report, we are told that Lord Chancellor Thurlow also queried whether the agreements in question could accurately be described as 'between sovereigns'.[65] He commented that the Nabob was a prince of the Carnatic, one of 'many palatine jurisdictions, which are, as to all subordinate relations … like kingdoms'.[66] In other words, he acknowledged that the matter was of 'inter-imperial origins'.[67]

In 1792, the East India Company put in an answer to address its relationship vis-à-vis the Crown. The Attorney General referred 'to the several charters, letters patent, and acts of parliament, by which they were from time to time invested with the powers … to enter into federal conventions with princes or people that are not Christians … on their own behalf as that of the British nation, as they should see fit …'.[68] The East India Company did not, however, disrupt Lord Chancellor Thurlow's finding on the status of the Nabob (nor could it, as the 'official British view' at the time was that the Carnatic 'possessed no international status').[69]

The final judgment was unfortunately delivered in rushed circumstances.[70] As a consequence, the decision lacked any substantive reasoning. However, the central finding is clear: the court dismissed the bill on the basis that the East India Company was acting on behalf of the Crown,[71] making 'the whole … a political transaction'.[72] In other words, the Court of Chancery exercised restraint on the basis that the East India Company's exercise of the Crown prerogative was inherently political, and as such, not a matter for

60 His concern for a lack of redress is shared by Lord Mance in *Belhaj* (n 1) [107].

61 *Nabob of the Carnatic* (1791) 393, 402.

62 Ibid.

63 In the eighteenth century, reporting was left to the unregulated market. There were often multiple reports of a single case, 'none of which were complete verbatim records of what transpired', but rather summaries of the proceedings 'with varying degrees of accuracy and completeness'. See Peter M Tiersma, 'The textualization of precedent' (2007) 82 Notre Dame Law Review 1187, 1201. See also, Lord Carnwath, 'Judicial precedent – taming the common law' (2012) 12 Oxford University Commonwealth Law Journal 261, 262.

64 For instance, this report was not considered in *Belhaj v Straw* (n 1).

65 *Nabob of Arcot* (1791) (n 56) 304, 550.

66 Ibid 304–305, 550–551.

67 F A Mann, 'The enforcement of treaties by English courts' (1958) 44 Transactions of the Grotius Society 29, 58.

68 *Nabob of Arcot* (1793) (n 47) 180, 841.

69 Lord McNair, *International Law Opinions*, vol 1 (Cambridge University Press 1956) 64.

70 As the court was proceeding to deliver its judgment in 1792, counsel for the East India Company indicated that dispatches were received from Lord Cornwallis, Governor General of Bengal, intimating that a new agreement had been entered into between the Nabob and the East India Company, which rendered the suit unnecessary. The case was adjourned to the next term. On 28 January 1793, when the Lord Commissioners resigned the Great Seal, and immediately before the court rose, counsel for the Nabob declared that 'there was no ground for what had been stated by the [East India Company] concerning a treaty' and prayed judgment. As a consequence, Lord Commissioner Eyre did not give 'the reasons of our judgment fully'. See *Nabob of the Carnatic* (1793) (n 47) 59–60, 522–523.

71 Ibid 60, 523.

72 *Nabob of Arcot* (1793) (n 47) 198, 849.

an English court.[73] In the early 1800s, this was precisely how the case was understood.[74] Today, however, this case is consistently mischaracterised and misunderstood. McLachlan, for instance, argues that *Nabob of Arcot* provides an example of a dispute that the courts would not determine because the central issue involved the determination of the rights and obligations of states arising on the plane of public international law.[75] Such a reading is difficult to sustain. It requires one to recognise the Carnatic as a state, which it was not, and fails to acknowledge that the court was asked to challenge the exercise of the Crown prerogative, not the acts of a foreign state.[76]

In the period after the decision of *Nabob of the Carnatic*, the East India Company drastically expanded its mandate and its territorial reach in India. Whereas in the late eighteenth century the East India Company had focused on revenue collection, by the mid-nineteenth century the East India Company had realised the economic value of India as a market for British goods and for the production of raw materials and agriculture.[77] In 1839 the English courts officially accepted that the East India Company was 'invested with powers and privileges of a twofold nature': those of a merchant and those of the Crown.[78]

In Tanjore, the East India Company had entered into a series of treaties with the Rajah, Shivaji Bhonsle. In the third of such treaties, signed on 25 October 1799, the Rajah 'transferr[ed] sovereignty of his country to the Company'.[79] The ideological justification for doing so at the time was summarised by the historian Edward Thornton, writing in 1842. He observed that this arrangement:

> … was undoubtedly beneficial to the interests of Great Britain; but it is no exaggeration to say that it was far more beneficial to the people of Tanjore. It delivered them from the effects of native oppression and European cupidity. It gave them what they had never before possessed – the security derived from the administration of justice.[80]

In 1855, the Rajah of Tanjore died without a male heir. Upon his death, the East India Company declared the dignity of the Rajah to be extinct and invoked the doctrine of lapse (i.e. the East India Company annexed the property of the Rajah). In response, the eldest widow of the Rajah, who was entitled to his private estate (i.e. 'real estate, cash, jewels, horses, etc')[81] under Hindu law, brought an action in the Supreme Court of

73 Perreau-Saussine suggests that this is one (of three) iterations of the Crown act of state doctrine (and the frankest) (n 26) 191, 252.

74 See the fifth edition of John Comyns and Anthony Hammond, *A Digest of the Laws of England*, vol 8 (Strahan 1822) 58.

75 McLachlan (n 2) 282

76 McNair (n 69) 64.

77 Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge University Press 2004) 150–151.

78 *Gibson v The East India Company* (1839) 5 Bing NC 262, 274; 132 ER 1105, 1110.

79 Treaty with the Rajah of Tanjore, for transferring the sovereignty of his country to the Company in Select Committee on the Affairs of the East India Company: VI (Political or Foreign), *Minutes of Evidence* (House of Commons 1832). See also, H H Dodwell (ed), *The Cambridge History of the British Empire: British India 1497–1858*, vol iv (Cambridge University Press 1929) 361.

80 *The History of the British Empire in India*, vol 3 (WH Allen & Co 1842) 104.

81 *Secretary of State for India v Kamachee Boye Sahaba* (1859) 7 Moo Ind App 476, 523; 19 ER 388, 405.

Madras,[82] no doubt hoping to be a recipient of Mr Thornton's lauded British 'administration of justice'.[83]

The Supreme Court of Madras considered the case a few months after the Sepoy uprising broke out.[84] At the hearing, the East India Company insisted that its treaties with the Rajah and the subsequent seizure were acts which concerned the 'political relations between the East India Company, acting in trust for Her Majesty'.[85] This plea was unsuccessful. The Chief Justice, Sir Christopher Rawlinson, declared that the seizure of the private property of the Rajah 'cannot be considered an act of state'.[86]

The case was appealed to the Privy Council. In the interim period, two important events occurred. First, the administration of British India was placed under the direct authority of the Crown (rather than that of the East India Company).[87] Second, the Sepoy uprising ended. In the course of 18 months, as many as 6000 Europeans had died and hundreds of thousands of Indians (many of them, civilians).[88] The widespread (and exaggerated) reporting of the siege at Cawnpore, where many British women and children were killed (e.g. 'a place … covered with blood like a butcher's slaughter-house'),[89] left many British soldiers outraged. The British troops, in turn, indulged in excessive acts of cruelty, torture and sexual violence. For instance, one British officer at the time described the siege on Delhi as follows:

> … [a]ll the city's people found within the walls of the city of Delhi when our troops entered were bayoneted on the spot, and the number was considerable. … These were not mutineers but residents of the city, who trusted to our well-known mild rule for pardon. I am glad to say they were disappointed.[90]

In light of the coverage by the press, there was 'a national mood of despair and retribution' which resulted in 'almost universal approval in Britain of the often ferocious measures taken to put down the uprising'.[91] It is against this political backdrop that the Privy Council considered *Secretary of State for India v Kamachee Boye Sahaba*[92] – the next case on which the judicial restraint limb is said to rest.[93]

In his judgment, Lord Kingsdown set out a very broad 'general principle'[94] which has caused a great deal of confusion in the centuries since:

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82 The Supreme Court of Madras had jurisdiction over matters involving British subjects and East India Company employees. It did not specifically exclude the local population. See Government of India Act 1800 (39, 41 Geo 3 c79).

83 See (n 80).

84 The uprising commenced on 10 May 1857 and the case was heard in the Supreme Court of Madras on 29–30 September and 1 October 1857.

85 *Kamachee* (n 81) 490, 393.

86 Ibid 504, 398.

87 John Clark Marshman, *History of India* (first published in 1876, Cambridge University Press 2010) 519–520.

88 The latter figure is more difficult to determine. See Douglas Peers, 'The Sepoy Mutiny (1857–1859)' in *The Encyclopedia of War*, vol 1 (Blackwell Publishing 2012).

89 *Illustrated London News* (1857) in Rosie Llewellyn-Jones, *The Great Uprising in India, 1857–58* (Boydell Press 2007) 160.

90 Letter from anonymous British officer (September 1857) in ibid.

91 Dennis Judd, *The Lion and the Tiger: The Rise and Fall of the British Raj, 1600–1947* (Oxford University Press 2005) 87.

92 *Kamachee* (n 81).

93 *Belhaj* (n 1) [128] (Lord Neuberger); [234] (Lord Sumption).

94 *Kamachee* (n 81) 529, 407.

> … [t]he transactions of independent States between each other are governed by other laws than those which Municipal Courts administer: such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make.[95]

The reference to 'other laws' has been understood as a reference to international law.[96] This is an incorrect interpretation. Lord Kingsdown was referring first to transactions governed by *no* law. This is evident in his judgment. Lord Kingsdown accepted that the East India Company was acting on behalf of the Crown in seizing the property of the late Rajah and then queried the 'character' of the seizure:

> … [w]as it a seizure by arbitrary power on behalf of the Crown of Great Britain, of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal law? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Rajah of Tanjore …? If it were the latter, the defence set up [i.e. act of State], of course, has no foundations.[97]

In other words, Lord Kingsdown would have adjudicated on the seizure by the East India Company if the act was carried out in accordance with rules of law (i.e. 'under colour of legal title of the property'). It was only if the East India Company sought to act *outside* the law (i.e. 'a seizure by arbitrary power') that he would exercise restraint.

On applying the facts, Lord Kingsdown concluded that 'the seizure was an exercise of Sovereign power effected at the *arbitrary* discretion of the Company, by the aid of military force'[98] carried out 'according to their *own notions* of what was just and reasonable, and not according to any rules of law to be enforced against them by their own Courts'.[99] Thus, he concluded, 'an act so done, with its consequences, is an act of state over which the Supreme Court of Madras has no jurisdiction':

> … [o]f the propriety or justice of that act, neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of justice can afford a remedy.[100]

In other words, the Privy Council found that it should exercise restraint not simply because the Crown had seized property, but because it had done so in a lawless manner: the seizure was 'beyond the pale (in Kipling's words "without the law")'.[101] In any event, the case did not involve a challenge to the lawfulness of the act of a foreign state: the case concerned a seizure of personal property by the Crown in its own colony,[102] and there existed 'no machinery in existence for the decision of legal disputes between members of the British Commonwealth of Nations'.[103]

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95 Ibid 529, 407.

96 See, for example, *Belhaj* (n 1) [128] (Lord Neuberger).

97 *Kamachee* (n 81) 531, 408.

98 Ibid 537, 410 (emphasis added).

99 Ibid 539, 411 (emphasis added).

100 Ibid 540, 411.

101 William Wade, *Administrative Law* (4th edn, Clarendon Press 1977) 648.

102 Treaty with the Rajah of Tanjore (n 79).

103 F A Mann, 'The enforcement of treaties by English courts' (n 67) 58.

It would, of course, be absurd to apply the reasoning in *Kamachee* to cases in which the judicial restraint limb is said to arise. Consider, for instance, its application to the facts in *Belhaj*: an English court could consider the actions of the USA in detaining a suspect outside its borders if it purported to act in accordance with applicable law, but the court could not consider these same actions if the USA expressed, either directly or indirectly, an intention to act outside the law. Decisions like *Kamachee* give teeth to the notion that 'in the heyday of imperial expansion … judges often seemed to be as executive-minded as the Executive'.[104]

Kamachee also exemplifies why judges should be wary of self-proclaimed general principles. Even though Lord Kingsdown characterised his statement as a 'general principle', it could hardly be considered as such. He cited only two cases to support his statement: *Nabob of Arcot* and *The East India Company v Syed Alley*.[105] The foibles of the former have been discussed in detail above.[106] In the latter case, the Privy Council did interpret and enforce a transaction (i.e., a treaty) between so-called 'independent states' (albeit, not two foreign states) in *favour* of the Crown. The Privy Council held that the treaty in question 'did vest the rights of Sovereignty in the East India Company' such that the treaty and subsequent actions carried out in furtherance of the treaty prevailed over the local law of the Carnatic.[107] In light of its shortcomings, Lord Kingsdown's judgment might have been forgotten had he not couched his statement as a 'general principle'.[108] Instead, his principle was relied upon with vigour in subsequent colonial annexation cases, including in *Cook v Sprigg*[109] – the final colonial case on which the judicial restraint limb is said to rest.[110]

The facts of *Cook v Sprigg* concerned the Crown's annexation of property in the Cape Colony, which had become a British possession in 1814. In 1894, the Prime Minister of the Cape Colony, Cecil Rhodes, annexed the territory that bordered the Cape Colony, Eastern Pondoland, from the Chief of Pondoland, Sigcau.[111] Cook and another, both citizens of the Cape Colony, claimed that Sigcau had granted them 'certain railway, mineral, township, land, forest, trading and other rights' in Eastern Pondoland prior to its annexation.[112] They brought an action to enforce these rights against Sir Gordon Sprigg, who had succeeded Cecil Rhodes as Prime Minister in 1898.

The Supreme Court of the Cape of Good Hope, applying the 'native customs' of Pondoland, held that Sigcau had not created 'legal obligations which could be enforced in a court of law against the Government of Cape Colony'.[113] It therefore found in favour of Sprigg. The claimants appealed. In the Privy Council, Lord Halsbury LC eschewed the discussion of 'native customs', concluding that 'there is a more complete answer': '[t]he

104 S A de Smith, *Constitutional and Administrative Law* (3rd edn, Penguin 1981) 132.

105 (1827) 7 Moo Ind App 555, 19 ER 417.

106 Lord Kingsdown appears to have borrowed a phrase from the pleadings of the East India Company in *Nabob of Arcot* in crafting his 'general principle': 'matters arising from transactions between independent states, are not the proper subjects of municipal jurisdiction'. See (n 47) 188, 844.

107 *Syed Alley* (n 105) 577–578, 430.

108 *Kamachee* (n 81) 529, 407.

109 *Cook v Sir James Gordon Sprigg* [1899] AC 572 (PC).

110 *Belhaj* (n 1) [128] (Lord Neuberger); [234] (Lord Sumption).

111 The British had previously 'informed' Sigcau (and the chief of Western Pondoland) that 'by reason of their inability or unwillingness to maintain peace in their borders, their rule was at an end', but it was the Pondoland Annexation Act that 'consummated' this annexation. See L C A Knowles and C M Knowles, *The Economic Development of the British Overseas Empire*, vol 3 (George Routledge & Sons 1936) 59.

112 *Cook v Sprigg* (n 109).

113 Ibid 573.

taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State'.[114] He paraphrased the *dicta* of Lord Kingsdown to support his conclusion: '[i]t is a well-established principle of law that the transactions of independent states between each other are governed by other laws than those which municipal courts administer'.[115] He held that such an obligation could not be enforced and dismissed the appeal.[116]

This decision was subject to sustained academic criticism at the time. The authors of the January 1900 edition of Law Quarterly Review observed that the judgment was 'not only uninstructive but perplexing' and neither 'sound nor convenient': it can be read 'only as meant to lay down that on the annexation of territory, even by peaceable cession, there is a total abeyance of justice until the will of the new annexing Power is expressly made known'.[117] William Harrison Moore similarly found it 'startling'.[118]

At its highest level, *Cook v Sprigg* is authority for the proposition that, despite 'the well-understood rules of international law [that] a change of sovereignty by cession ought not to affect private property',[119] the English courts will not adjudicate in respect of an annexation by the Crown and the subsequent denial of private property rights within the Crown's annexed territory.[120] In other words, the case did not involve foreign states, but the Crown in its colony,[121] and the Privy Council opted to apply no law, rather than the relevant rules of international law.[122]

The historical antecedents discussed above are more than just a Tennysonian 'wilderness of single instances':[123] they form the very foundation of the judicial restraint limb.[124] However, from this exercise of disaggregation, it is apparent that these cases should be severed from further discussions of the judicial restraint limb. *Blad v Bamfield* is authority for the proposition that the English courts can interpret the actions of sovereign states. In *Nabob of the Carnatic*, the Court of Chancery was asked to challenge the exercise of the Crown prerogative – not the acts of a foreign state. And neither *Kamachee* nor *Cook v Sprigg* concerned a foreign state at all: the Privy Council was asked to scrutinise Crown actions in a British colony. At best, each of these cases (with the exception of *Blad v Bamfield*) was decided on the basis of the Crown prerogative; at worst, the loose rhetoric of 'act of state' obscured an imperial impetus where the law in its operation was 'paper thin'.[125]

114 Ibid 578.

115 Ibid.

116 Ibid.

117 Frederick Pollock (ed), 'Notes' (1900) 16 Law Quarterly Review 1, 1–2.

118 William Harrison Moore, *Act of State in English Law* (John Murray 1903) 79–80.

119 *Cook v Sprigg* (n 109) 578.

120 Robert Jennings and Arthur Watts, *Oppenheim's International Law,* vol 1 (9th edn, Longman 1996) 368.

121 The incongruence of the *dicta* of Lord Halsbury LC with the facts in *Cook v Sprigg* is recognised by J G Collier in 'Transactions between states – non-justiciability – international law and the House of Lords in a judicial no-man's land' (1982) 41 Cambridge Law Journal 18, 20.

122 *Cook v Sprigg* (n 109) 578.

123 Eirik Bjorge, 'Can unincorporated treaty obligations be part of English law?' (2017) Public Law 571, 572, quoting Lord Tennyson, 'Aylmer's Field' (1793).

124 As set out above, in *Belhaj*, Lord Neuberger and Lord Sumption substantiated the judicial restraint limb on the basis of six cases, all discussed in this article. See (n 1) [128]–[129], [234], although Lord Sumption also relied on *Dobree v Napier*.

125 Thomas Poole, *Reason of State* (Cambridge University Press 2015) 190.

2 The end of empire

It was only as the British Empire shuddered to a halt that the House of Lords exercised judicial restraint in respect of the acts of foreign states. *Buttes Gas* is the subject of extensive learned discussion,[126] much of which this article will not reprise, save to make the observation that the reasoning of Lord Wilberforce has been vehemently criticised. Collier noted, 'with the greatest respect, this sort of judgment is not much contribution to the science of jurisprudence, nor to the law of nations, nor to English law',[127] and F A Mann described the decision as a 'freakish one without value as a precedent'.[128]

The facts of *Buttes Gas* concerned the last vestiges of the British Empire. The underlying dispute arose in the wake of the British decision to withdraw from the Trucial States[129] in 1968[130] (a decision which prompted the US Secretary of State to exclaim, '[f]or God's sake, act like Britain!').[131] The UK had assumed responsibility for the defence of the Trucial States in 1835 to ensure the safety of its ships along the Gulf coast.[132] In 1892 (wary of the encroachment of the French), the British government signed treaties with the various chiefs of the Trucial States. The treaties bound the Trucial States into exclusive political relations with the UK, and the chiefs ceded control of external affairs to the British government.[133] This strategic arrangement allowed the British to establish a '*cordon sanitaire*' to protect British India, and, even when the British government opted to withdraw from India in 1947, it decided to stay in the Gulf in order to protect its oil supply.[134] This arrangement placed the Trucial States 'informally within the British Empire'.[135]

126 See, for instance, Collier (n 121); I A E Insley and Frank Wooldridge, 'The Buttes case: the final chapter in the litigation' (1983) 32 International and Comparative Law Quarterly 62, 81; Martin Bühler, 'The emperor's new clothes: defabricating the myth of "act of state" in Anglo-Canadian law' in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart 2001) 343–372, 356; and Cameron Sim, 'Non-justiciability in Australian private international law: a lack of judicial restraint' (2002) 10 Melbourne Journal of International Law 102, 110–111.

127 He added that 'on the brighter side, with any luck, the courts will not be troubled again by quarrelsome American oil companies and Arab sheikhs'. See Collier (n 121) 21. See also a stinging criticism of *Buttes Gas* by Rosalyn Higgins in 'International law and the avoidance, containment and resolution of disputes' (1991) 230 Recueil des Cours 273–274.

128 F A Mann, *Foreign Affairs in English Courts* (n 5) 70. F A Mann's uncensored feelings about the case were revealed in a handwritten note in his own copy of *Foreign Affairs in English Courts*: '[i]t was the House of Lords which lacked "judicial restraint"!'. See Lawrence Collins, 'Foreign relations and the judiciary' (2002) 51 International and Comparative Law Quarterly 485, 510.

129 Seven former Trucial States comprise the United Arab Emirates: Dubai, Abu Dhabi, Sharjah, Ajman, Umm al Qaiwain, Fujairah and Ras Al Khaimah.

130 Despite Harold Wilson's desire to remain in the Gulf States, the 1968 financial crisis in the UK caused a 'sudden volte-face' in the Labour government. The UK officially withdrew in November 1971. See Peter Mansfield, *A History of the Middle East* (Penguin 1992) 282.

131 Foreign Office Telegram, Washington to London, 11 January 1968, PREM 13/1999 in W Taylor Fain, *American Ascendance and British Retreat in the Persian Gulf Region* (Palgrave Macmillan 2008) 141. The USA feared that the Soviets would seize the opportunity to establish a presence in the region, threatening the access of the West to Gulf oil.

132 James Onley, 'Britain and the Gulf shaikhdoms, 1820–1971: the politics of protection' (Occasional Paper No 4 ISSN 2072-5957, Center for International and Regional Studies, Georgetown University School of Foreign Service in Qatar, 2009).

133 Agreements with the Trucial Chiefs and also with the Chiefs of Bahrain in British Library India Office Records and Private Papers, IOR/R/15/1/191.

134 James Onley, 'Britain's informal empire in the Gulf, 1820–1971' (2005) 22 Journal of Social Affairs 29, 42. Or as Judge Morgan observed, '[i]n the early 1960's … the Persian Gulf was becoming hot property'. See *Occidental of Umm al Qaywayn Inc v A Certain Cargo* (1978) 517 F2d 1196, 1199.

135 Onley (n 134) 32.

Following the British decision to withdraw, Sharjah and Umm al Qaiwain (UAQ), neighbouring Trucial States, invited bids for oil concessions to their offshore seabeds. Buttes Gas Oil and Co ('Buttes Gas') obtained a concession from Sharjah; Occidental Petroleum Corporation ('Occidental') obtained a concession from UAQ. In 1970, the British political agent in Dubai became aware that both companies intended to drill in approximately the same area off the island of Abu Musa (i.e. the purported boundaries of the territorial waters of UAQ and Sharjah overlapped).[136] In November 1971, days before the British withdrew from the Gulf, the UK brokered an understanding whereby Buttes Gas was deemed the concessionaire, and Iran, Sharjah and UAQ agreed to share the revenues from the exploitation.[137] As the only party not reaping profits, Occidental commenced multiple proceedings against Buttes Gas in the US courts.[138]

In the UK, Buttes Gas brought an action against Occidental and its chairman, Mr Hammer, for slander because Mr Hammer had stated in a press conference in London that Buttes Gas had colluded with the ruler of Sharjah to backdate a decree extending the territorial waters of Sharjah. Occidental submitted a defence and counterclaims. The case rattled through the courts, arriving at the House of Lords in 1980. Buttes Gas argued that the court should not exercise jurisdiction in respect of 'certain specified acts being acts of state of the Governments of Sharjah, UAQ, Iran and the United Kingdom'.[139] To this, Lord Wilberforce observed, quite rightly, that 'difficulty has lain in the indiscriminating use of "act of state" to cover situations which are quite distinct, and different in law'.[140] He acknowledged that one 'version' concerned actions of the Crown abroad (i.e. Crown act of state), whilst 'a second version' concerned the applicability of a foreign state's legislation within its own territory (i.e. the first limb of the foreign act of state doctrine, municipal law act of state).[141] But he held that the facts of the case did not fall within the remit of either version because the case was not about the validity of Sharjah's decree under the law of Sharjah, but about its efficacy under international law. He therefore queried if, apart from these situations, there existed in English law 'a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states' – one of 'judicial restraint or abstention'.[142] He sought to substantiate such a principle on the basis of 'a rather eclectic survey of a collection of judicial decisions and apophthegms'.[143] In addition to the cases discussed above,[144] he considered three other

136 Sharjah, UAQ and Iran each claimed that the island of Abu Musa was within its territorial waters. Occidental then attempted to move into the disputed area. The UK government intercepted the barge 'thus averting what seemed likely to be a major international incident'. See Insley and Wooldridge (n 126) 63–65.

137 Memorandum of Understanding as attached to the Letter from the Ruler of Sharjah to the UK Foreign Secretary (18 November 1971). Sharjah and Iran both retained their claim to sovereignty over Abu Musa.

138 See, for instance, *Occidental* (n 134) 1203.

139 *Buttes Gas* (n 9) 920.

140 Ibid 930.

141 Ibid 930–931.

142 Ibid 931.

143 Collier (n 121) 19.

144 Lord Wilberforce did not consider the case of *Nabob of the Carnatic* (1793) (n 47).

English cases, *Luther v Sagor*,[145] *Princess Paley Olga v Weisz*[146] and *Duke of Brunswick v King of Hanover*,[147] each of which concerned the municipal law act of state limb.[148]

However, the facts of the cases he surveyed could not support his 'general principle' – it was only the facts in *Buttes Ga*s itself which required the court to adjudicate on 'transactions of foreign sovereign states' (i.e. the actions of Sharjah, Iran and UAQ).[149] Lord Wilberforce was, in fact, making law by creating a new basis on which an English judge should exercise restraint. Unfortunately, his unwillingness to admit as much entrenched mischaracterisations of the cases on which he relied and the basis on which he made his decision. For instance, Nicholson argues that *Buttes Gas* is 'unconsciously, a crown act of state case' where 'political propriety defines legal doctrine and political considerations trump the value of independent judicial reasoning'.[150] Others argue, in light of Lord Wilberforce's distracting invocation of pithy phrases from US cases – i.e. 'no judicial or manageable standards by which to judge these issues'[151] or 'judicial no-man's land'[152] – that the House of Lords in *Buttes Gas* simply had no legal standards on which to rely.[153] Neither view is tenable. The case did not directly concern the actions of the Crown, and it is a bridge too far to suggest as much; and there were clear judicial standards on which to decide the central issue in the case – international law.

The question that Lord Wilberforce had to consider was whether the issues raised in *Buttes Gas* were appropriate to be decided by a domestic court, rather than an international court. This is evident in his reasoning. If the House of Lords had adjudicated, Lord Wilberforce observed that it would have been necessary to determine the lawfulness of such transactions not 'under any municipal law … but under international law'.[154] This required 'an inquiry into important inter-state issues and/or issues of international law'.[155] In particular, in order to adjudicate on the defence in the slander claim and on the counterclaims, the House of Lords had to determine, *inter alia*, which state had sovereignty over Abu Musa and the extent of the territorial waters of Sharjah, Iran and UAQ. However, Lord Wilberforce did limit the ambit of his 'general principle': he held that 'it would be too broad a proposition to say that mere emergence in an action here of a dispute as to the boundaries of states is sufficient' to preclude judgment by an English

145 [1921] 3 KB 532 (CA).

146 [1929] 1 KB 718 (CA).

147 (1848) 2 HL Cas 1, 9 ER 993.

148 In respect of *Luther v Sagor* and *Princess Paley*, see *Belhaj* (n 1) [35] (Lord Mance); [126]–[127] (Lord Neuberger); [229]–[230] (Lord Sumption); Collier (n 121) 20; Shaheed Fatima, *Using International Law in Domestic Courts* (Hart 2005) 389. In respect of *Duke of Brunswick*, see *Belhaj* (n 1) [125] (Lord Neuberger); William S Holdsworth, 'The history of acts of state in English law' (1941) 41 Columbia Law Review 1313, 1318; Collier (n 121) 20. Because a foreign sovereign was directly impleaded in *Duke of Brunswick* (i.e. the King of Hanover), the case can also be considered in light of his sovereign immunity. See Collier (n 121) 20; F A Mann, 'The foreign act of state' (1990) 106 Law Quarterly Review 352, 352; and Nicholson (n 33) 750.

149 *Buttes Gas* (n 9) 938.

150 Nicholson (n 33) 763.

151 *Buttes Gas* (n 9) 938. See *Baker v Carr* (1962) 369 US 186, 217.

152 *Buttes Gas* (n 9) 938. See *Occidental* (n 134) [30].

153 Daniel Amoroso, 'Judicial abdication in foreign affairs and the effectiveness of international law' (2015) 14 Chinese Journal of International Law 99, 119; Matthew Alderton, 'The act of state doctrine: questions of validity and abstention from *Underhill* to *Habib*' (2011) 12 Melbourne Journal of International Law 1, 13.

154 *Buttes Gas* (n 9) 938.

155 Ibid 937–938.

court – only if such an issue was 'at the heart of the case' should an English court exercise restraint, as was the case in *Buttes Gas*.[156]

Taken together, these statements suggest that Lord Wilberforce exercised judicial restraint because the central issues in *Buttes Gas* required the English courts to determine the validity of the acts of foreign states arising on the plane of public international law – e.g. territorial disputes and allegations of breaches of international law. These issues, which were integral to the defence in the slander claim and to the counterclaims, were issues which should be settled on the international plane by those states involved. Lord Wilberforce would have been entering into a field in which he was 'simply not competent to adjudicate', as an English court is, after all, 'not an international court'.[157] As such, he stayed the counterclaims and, because Buttes Gas had offered to submit to a stay of the slander claim if the counterclaims were stayed, Lord Wilberforce directed that Buttes Gas should be held to its offer.[158]

Buttes Gas is the basis on which we should understand the judicial restraint limb, and it is important not to lose sight of the caveats to Lord Wilberforce's 'general principle'. It is equally important to understand the rationale that underpins a decision not to adjudicate in circumstances such as those encountered in *Buttes Gas*. The English courts often do, for instance, criticise the acts of foreign sovereign states, implicitly and explicitly, in circumstances in which no such issues of restraint are said to arise. Courts considering immigration and deportation claims have to assess whether a person was tortured in a country or if a person would be at risk of torture or an unfair trial upon return;[159] criminal courts assess whether to stay proceedings because acts of a foreign state in securing extradition were unlawful;[160] and civil courts assess whether or not foreign courts are corrupt, including due to the influence of politicians.[161] Higgins suggests that there is no reason why an English court should not pronounce upon an international law obligation that is relevant for purposes of litigation between private persons.[162] However, there is a fundamental difference in the examples above, where there is no dispute between states, and those cases, such as *Buttes Gas*, which require the English courts to be the arbiter of an international dispute between two or more foreign states. In the latter category of case, the principle of sovereign equality of states is of paramount importance.

The principle of sovereign equality of states is one of the basic principles of international law.[163] It can be traced back to the fourteenth-century Italian jurist, Bartolus, who wrote, '[*n*]*on enim una civitas potest facere legem super alteram, quia par in parem non habet imperium*'.[164] The principle of sovereign equality of states is the basis for the

156 Ibid 927.

157 *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No 1)* [2000] 1 AC 61 (HL) 103.

158 *Buttes Gas* (n 9) 938.

159 See, for instance, the castigating remarks by the Special Immigration Appeals Commission about the former Libyan government in *AS & DD v Secretary of State for the Home Department* [2007] UKSIAC 42/50.

160 *R v Horseferry Magistrate's Court, ex parte Bennett* [1994] 1 AC 42 (HL); *R v Mullen (Nicholas Roberts)* [2000] QB 520 (CA).

161 *Yukos* (n 15).

162 Higgins (n 127) 273–274.

163 Charter of the United Nations, Article 2(1).

164 'For it is not for one city to make the law upon another, for an equal has no power over an equal' (author's translation).

immunity of states from the jurisdiction of other states.[165] A corollary of the sovereign equality of states is the duty on each state not to intervene in the internal affairs of another state.[166] The judicial restraint limb should be understood through the prism of these customary international law principles.[167] That is, where an English court is asked to *determine* the validity of the acts of foreign states arising on the plane of public international law, the UK would be intruding on the sovereign equality of the states in question if it adjudicated. If, by contrast, the international community recognises a clear breach of international law and the English courts simply rely on this breach, an intrusion on the sovereign equality of states cannot be said to arise.[168]

The failure of the English courts to recognise the principle of the sovereign equality of states as the basis of the judicial restraint limb (or to recognise any basis at all) explains much of the confusion that has pervaded the jurisprudence of the English courts since the decision in *Buttes Gas*. Twenty-five years later, in the most recent UK Supreme Court decision on the foreign act of state doctrine, the court displayed not only 'substantial disagreement over the interpretation and characterisation of past jurisprudence' but was also 'divided on both the conceptualisation of the foreign act of state doctrine and its application to the facts'.[169]

This conceptual confusion is problematic for the lower courts. It has resulted in the misinterpretation of Lord Wilberforce's 'general principle' under the guises of the judicial restraint limb in the same manner as Lord Kingsdown's 'general principle': the generality of Lord Wilberforce's expressions in *Buttes Gas* are being (mis-)interpreted as 'expositions of the whole law' rather than 'governed and qualified by the particular facts'.[170]

Perhaps the most worrying example of such a misinterpretation occurred in *R (Khan) v Secretary of State for Foreign and Commonwealth Affairs*.[171] The facts of the case are striking. Noor Khan's father had been presiding over a peaceful council of tribal elders in Pakistan on 17 March 2011 when a missile was fired from a drone, allegedly operated by the USA Central Intelligence Agency.[172] His father was one of over 40 persons killed. Khan sought judicial review of the decision of the Secretary of State for the Home Department to provide USA authorities with intelligence for use in drone strikes in Pakistan. The remedy sought was admittedly unusual.[173]

In the Court of Appeal, Lord Dyson MR was of the view that 'the courts would not even consider, let alone resolve, the legality of the United States' drone strikes'.[174] He

165 Dapo Akande and Sangeeta Shah, 'Immunities of state officials, international crimes, and foreign domestic courts' (2011) 21 European Journal of International Law 815, 824.

166 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits, Judgment) [1986] ICJ Rep 14, paragraph 202.

167 See Lord Sumption's comments to this effect in *Belhaj* (n 1) [200].

168 *Kuwait Airways* (n 14) [113] (Lord Nicholls). It should therefore be emphasised that a clear breach of international law recognised as such by the international community should not be viewed as an exception to the judicial restraint limb but should be understood to delineate the scope of the limb.

169 Andrew Sanger, 'UK government cannot hide from complicity in human rights abuses' (2017) 76 Cambridge Law Journal 223, 224–226, commenting on *Belhaj* (n 1).

170 *Quinn v Leathem* [1901] AC 495 (HL) 506 (Lord Halsbury).

171 *R (on the application of Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 24, [2014] 1 WLR 872.

172 Ibid [1].

173 Ibid [6]. Mr Khan sought, *inter alia*, a declaration that a British national who kills a person in a drone strike in Pakistan is not entitled to rely on the defence of combatant immunity.

174 Ibid quoting *R (on the application of Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 3728 (Admin), [2013] ACD 23 [14]–[15] (Moses LJ).

came to this conclusion largely in reliance on the reasoning of Moses LJ in the High Court, much of which was fundamentally flawed. Moses LJ had held that *Buttes Gas* is authority for the proposition that 'to examine and sit in judgment on the conduct of another state would imperil relations between states',[175] but Lord Wilberforce supported no such view. He also woefully misread the judgment of the House of Lords in *Kuwait Airways* by attributing a quote from Lord Nicholls' summary of the arguments of Counsel – that the principle in *Buttes Gas* includes 'a prohibition against adjudication on the legality, validity or acceptability of such acts, either under domestic law or international law' – to Lord Nicholl's himself,[176] who had expressly stated that Counsel's argument had pressed the principle in *Buttes Gas* 'too far'.[177] Lord Dyson MR then compounded the problem by extrapolating from the flawed reasoning of Moses LJ to conclude that the court will 'usually not sit in judgment on the acts of a sovereign state as a matter of discretion', 'save in exceptional circumstances'.[178] It was exactly these types of statements that Lord Wilberforce warned against in *Buttes Gas* when he said that 'such general phrases as "sitting in judgment on," "inquiring into" or "entertaining questions" must be read in their context [and] are not to be used without circumspection: the nature of the judgment, or inquiry or entertainment must be carefully analysed'.[179] Lord Dyson MR also ignored the facts in *Buttes Gas* completely. The House of Lords exercised restraint in *Buttes Gas* precisely because of the exceptional factual matrix. Perhaps most concerning is that Lord Dyson MR (quoting Moses LJ) felt it necessary to add that he saw no 'incentive' to adjudicate because it 'would give the impression that this court was presuming to judge the activities of the United States'.[180] Lord Dyson MR stated that 'a finding by our court that the notional UK operator of a drone bomb which caused a death was guilty of murder would inevitably be understood (and rightly understood) by the US as a condemnation of the US' – it would be 'critical of them'.[181] He therefore concluded that the claim was 'fundamentally flawed' because it involved 'serious criticisms of the acts of a foreign state', and it is 'only in certain established circumstances that our courts will exceptionally sit in judgment of such acts'.[182]

The result in *Khan* may not have differed had *Buttes Gas* been properly interpreted, but the reasoning most certainly would have. The purpose for which the claim was brought was to establish that the reported policy and practice of the UK government in transferring locational intelligence to the USA government is unlawful because it gives rise to various offences under domestic law.[183] In order to determine this issue, it would have been necessary to determine the validity of the acts of the USA arising on the plane of public international law – e.g. whether the USA had a right under international law to use force in self-defence in Pakistan at the relevant time. If the UK courts had determined these issues, it is certainly arguable that they would have been intruding upon the sovereignty of the USA. That being said, an argument could perhaps be made that the drone strikes carried out in Pakistan at the relevant time by the USA were recognised by

175 *Khan* (n 171) [22] quoting *Khan* (n 174) [15].
176 Ibid.
177 *Kuwait Airways* (n 14) [25].
178 *Khan* (n 171) [28]–[29].
179 *Buttes Gas* (n 9) 933.
180 *Khan* (n 171) [34] quoting *Khan* (n 174) [55].
181 Ibid [37].
182 Ibid [53].
183 Ibid [7].

the international community as a clear violation of international law.[184] Such a conclusion would have allowed the UK to avoid intruding on the sovereignty of the USA, much as the House of Lords did in respect of Iraq's breach of international law in *Kuwait Airways*.[185]

The highly questionable analysis in *Khan* demonstrates why it is necessary for the Supreme Court to explain the proper basis of the judicial restraint limb. The Supreme Court has been presented with the opportunity to reconsider the judicial restraint limb in the recent appeal of *The Law Debenture Trust Corporation plc v Ukraine*.[186] By way of brief background, the Law Debenture Trust Corporation plc ('Law Debenture') is the trustee of notes, which were constituted by a trust deed to which the named parties were Law Debenture and Ukraine, with a nominal value of US$3 billion. The trust deed is expressed to be governed by English law, and Ukraine waived state immunity in the trust deed. The sole subscriber of the notes was the Russian Federation ('Russia'), acting by its Ministry of Finance (i.e. Russia is the beneficial owner of the notes). The principal amount of the notes fell due for payment, together with the last instalment of interest, on 21 December 2015. Ukraine refused to make the payment. In February 2016, Law Debenture issued enforcement proceedings in the English courts at the direction of Russia. Ukraine has not challenged the jurisdiction of the English courts to determine the claim against it, but it served a defence and resisted the application for summary judgment on a number of grounds, including duress. In short, Ukraine alleges that the issue of the notes was procured by unlawful and illegitimate threats, and pressure exerted, by Russia, such as to vitiate the consent of Ukraine and to constitute duress as a matter of English law. Law Debenture contends that Ukraine is unable to show that it was subject to illegitimate pressure because to do so would require examination of the conduct of Russia on the international plane, which is something an English court cannot embark upon.

To adjudicate in respect of the defence of duress, the court would need to consider whether Russia threatened to use force in violation of *jus cogens* norms of international law and/or whether Russia violated various treaty obligations in force between Russia and Ukraine. Like *Buttes Gas*, the central issue here involves the determination of the validity of the acts of foreign states arising on the plane of public international law. However, unlike in *Buttes Gas* and similar to *Kuwait Airways*, the international community regards many of the actions of Russia in question as clear violations of Russia's obligations under international law (at least insofar as the presence of Russian troops in Crimea is contrary to the national sovereignty, political independence and territorial integrity of Ukraine).[187] In light of such agreement, it cannot be said that the UK would be intruding on the sovereignty of either state if its courts adjudicated in respect of the dispute. It is also noteworthy that Russia has not agreed to submit the dispute to the International Court

184 Some support for this argument could be derived from the UN Human Rights Council, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (2014) UN Doc A/HRC/25/59. See also Jemima Stratford QC and Tim Johnston, 'The Snowden "revelations": is GCHQ breaking the law?' (2014) 2 European Human Rights Law Review 129, 138.

185 In *Kuwait Airways* (n 14) [113] (Lord Nicholls), the House of Lords was satisfied that the relevant conduct by Kuwait 'was a flagrant breach of international law' on the basis of UN Security Council Resolutions. It might be said that UN Security Council resolutions are more reflective of the views of the international community than the sources which would have been available to the claimant in *Khan*.

186 [2018] EWCA Civ 2026.

187 See, for example, UN General Assembly Resolution 68/262 (27 March 2014); and UN General Assembly Resolution 73/194 (23 January 2019). A UN Security Council draft resolution to affirm Ukraine's sovereignty and national borders was vetoed by Russia in 2014.

of Justice, despite Ukraine's willingness to do so, and it was Russia itself (through Law Debenture) which submitted the dispute to the English courts. It is hoped that the Supreme Court will seize the opportunity in *Law Debenture Trust* to identify the proper basis and scope of the judicial restraint limb.

Conclusion

This article has shown that the present conceptualisation of the judicial restraint is misguided. In Part 1, it was demonstrated that the cases which are said to form the foundation of the judicial restraint limb primarily concern the Crown in the context of the British Empire and are of dubious legal reasoning, resulting in a concept trammelled by the irrelevant and the obfuscating. In Part 2, it identified the origin, and proper basis, of the judicial restraint limb. The judicial restraint limb of the foreign act of state doctrine ought to be understood on the basis of the principle of the sovereign equality of states: the English courts will exercise restraint where the central issue(s) in a case require the English courts to determine the validity of the acts of foreign states arising on the plane of public international law.

The conceptualisation of the judicial restraint limb advocated for in this article will ensure that the limb is liberated from any suggestion that it was a servant of the exigencies of the British Empire. It will also ensure that vague notions of 'act of state' are not reprised (and unjustifiably expanded) in cases like *Khan* which concern the British Empire's closest cousin: the British facilitation of US actions abroad.[188]

188 Conor Gearty, 'Not in the public interest?' (14th Annual Sir David Williams Lecture, 21 February 2014).