Liability for Complicity: State Responsibility for Torture
Case Note - Belhaj v Straw, Rahmatullah v Ministry of Defence

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INTRODUCTION

This case note considers the recent joint judgment in *Belhaj & Anor v Straw & Ors* and *Rahmatullah (No 1) v Ministry of Defence,*[1] delivered by the Supreme Court in its opening session of 2017. Both cases concern the liability of British authorities and officials for their complicity in torture, unlawful rendition, false imprisonment, and other rights-violating torts committed by foreign authorities in overseas jurisdictions. In a comprehensive judgment, the court held that neither the rules of State immunity, nor the foreign act of State doctrine, would prevent a civil claim from being brought against the United Kingdom (UK) for its responsibility in rights-violating torts committed by foreign States. *Belhaj* and *Rahmatullah* establishes a significant precedent, defining boundaries to the applicability of State immunity, and affirming the primacy of fundamental rights over the rules of foreign act of State.

Analysis of the judgment and its impacts will be split across the two doctrines. The court's rejection of State immunity claims, based on a narrow construction of 'indirect impleading' circumstances, will be considered in light of the principle of sovereign equality.[2] As for foreign act of State, the structural divergences between Lord Mance, Lord Neuberger, and Lord Sumption's interpretations will be highlighted, alongside an explanation of why Lord Mance's ought to be favoured as a matter of conceptual clarity.

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[1] [2017] UKSC 3.

[2] The sovereign equality of States is a foundational principle of the international community, as enshrined in Article 2(1) of the Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

I. CONTEXT

State Immunity

The immunity of States from foreign municipal courts is a well-established rule of customary international law. As most recently reaffirmed by the International Court of Justice in the *Jurisdictional Immunities* case, State immunity is 'one of the fundamental principles of the international legal order',[3] based upon the principle of sovereign equality of all States. The rule has been recognised as part of the common law since the late 19th century,[4] and has been placed on statutory footing within the UK since 1978.[5]

Foreign Act of State

The doctrine of foreign act of State encompasses a range of situations, where English courts will not adjudicate upon the lawfulness or validity of an action taken by another State. The precise scope and rationale of the doctrine is unclear, thus the significance of *Belhaj* and *Rahmatullah* in part lays with the Supreme Court's clarification of what is meant by an invocation of foreign act of State. Although it shares a similar function with State immunity, foreign act of State is a separate doctrine – a purely domestic creation with roots in the common law that can be traced back to the 17th century.[6] Whereas State immunity precludes an action from being brought against foreign States in domestic courts, the rules of foreign act of State are engaged whenever an enquiry into the validity of a foreign State's actions constitutes a necessary element of the adjudication.

II. THE CASE

[3] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (Judgement) [2012] ICJ Rep 99 [57].
[4] *The Parlement Belge* [1880] 5 PD 197.
[5] State Immunities Act 1978.
[6] *Blad v Bamfield* [1674] 36 ER 992.

Facts of *Belhaj*

In early 2004, Mr Belhaj, a Libyan citizen and political opponent of Libyan dictator Colonel Gaddafi, was detained in Malaysia alongside his wife, Mrs Boudchar.[7] UK intelligence services became aware of the situation and shared this information with Libyan authorities, as part of an alleged strategy to secure diplomatic and intelligence advantages with Colonel Gaddafi.[8] Mr Belhaj and Mrs Boudchar were then delivered to US agents in Thailand, who flew them to Libya, where Mr Belhaj was imprisoned for six years, whilst his wife was held in prison for three months.[9]

During this period, it is alleged that they were subject to torture and other serious mistreatment at the hands of US officials throughout the illegal rendition and by Libyan officials during their false imprisonment in Libya.[10] It is not alleged that UK officials were directly involved in the torture, rendition, or other serious mistreatment; rather, the action is being brought for the UK officials' complicity (secondary responsibility) in designing, arranging, assisting, and encouraging the alleged torts committed by US and Libyan officials (the prime actors).[11]

Facts of *Rahmatullah*

Mr Rahmatullah, a Pakistani citizen, was detained by British armed forces in February 2004 during the UK and US occupation of Iraq.[12] Initially detained on suspicions of being a member of a terrorist group with links to Al-Qaeda, Mr Rahmatullah was later passed onto the custody of US forces under a memorandum of understanding (MoU). Mr Rahmatullah was transferred to the infamous Bagram Airbase in Afghanistan, where he was subsequently kept in US detention for over ten years without trial or charge.[13]

Mr Rahmatullah alleges that he was subject to serious mistreatment amounting to torture during his unlawful detention by US and UK forces.[14] The

[7] *Belhaj* and *Rahmatullah* (n 1) [3].
[8] ibid [4].
[9] ibid [3].
[10] ibid [4].
[11] ibid.
[12] ibid [6].
[13] ibid.
[14] ibid.

direct liability of UK officials and the availability of the Crown act of State defence are dealt with by the Supreme Court in a concurrent judgment.[15] The case discussed herein concerns the UK's complicity to the alleged torts committed by US personnel whilst he was in US custody.[16]

Legal Issue

Both cases are actions brought directly against the UK for its complicity in the tortious actions of the prime actor States. There is no claim pursued against the prime actor States themselves.

The appellants, various UK officials and authorities in *Belhaj* and the Ministry of Defence in *Rahmatullah*, assert that both cases are inadmissible or non-justiciable by reason of State immunity and/or the rules of foreign act of State.[17] The claim is that their secondary responsibility cannot be established without determining the validity or legality of the alleged torts by the prime actor States. Such an investigation is precluded by the fact that the prime actor States themselves would have had State immunity from the proceedings, and in any case an assessment of their actions is barred by the doctrine of foreign act of State.

III. THE JUDGMENT

A seven-strong panel of the Supreme Court unanimously rejected the appellants' claims, holding that neither State immunity nor the doctrine of foreign act of State would be a procedural bar to the claims made in *Belhaj* and *Rahmatullah*.

State Immunity

On the claim of State immunity, Lord Mance and Lord Sumption analysed the matter in depth, with the rest of the court concurring with the conclusions. Their Lordships were in agreement that the appellants' claim of State immunity

[15] *Rahmatullah (No 2) v Ministry of Defence & Ors* [2017] UKSC 1.
[16] *Belhaj* and *Rahmatullah* (n 1) [6].
[17] ibid [7].

was an argument of 'indirect impleading'.[18] Indirect impleading refers to a situation when a foreign State would be affected by the outcome of the case despite not being a named party.[19] Where it can be established that a foreign State would be indirectly impleaded, that foreign State's immunity bars progression of the case onto the merits stage.

Lord Mance viewed that State immunity would only be applicable in situations of indirect impleading if the outcome creates second-order legal consequences upon the foreign State's property rights.[20] The appellants' argument that indirect impleading should be given a broader understanding, in order to be inclusive of circumstances where the action would affect the 'interests' of the foreign State, was firmly rejected.[21]

Lord Sumption, on the other hand, was receptive to a wider reading of indirect impleading, as encompassing situations where legal interests beyond property were affected.[22] However, the operative factor is that a legal interest needs to be impacted upon. Since no potential outcome in the present cases would alter any rights or liabilities of foreign States, the situation did not amount to indirect impleading and State immunity would not be applicable as a procedural bar.[23]

Foreign Act of State

A large portion of the judgments delivered by Lord Mance, Lord Neuberger, and Lord Sumption focused on 'foreign act of State', in recognition that the scope and the principles underlying the doctrine have become rather vague and obscure.[24] All three judges concur that 'foreign act of State' would not apply in the present cases. However, the reasoning and the understanding exhibited by Lord Mance and Lord Neuberger (with whom Lady Hale, Lord Wilson, and Lord Clarke agree) contrasts with that of Lord Sumption (with whom Lord Hughes agrees).

[18] ibid [15] (Lord Mance SCJ), [186] (Lord Sumption SCJ).
[19] Zachary Douglas, 'State Immunity for the Acts of State Officials' (2012) 82(1) BYBIL 281.
[20] *Belhaj* and *Rahmatullah* (n 1) [31].
[21] ibid [29].
[22] ibid [196].
[23] ibid [197].
[24] ibid [119].

Lord Mance identifies three types of claims made under the foreign act of State doctrine in English law:

1) The first type is an established rule of private international law, according to which English courts will recognise and accept as valid foreign State legislation relating to property within that foreign State's jurisdiction.[25]
2) The second type is likewise a rule of private international law, that English courts will not question the validity of foreign governmental action in respect of property within that foreign government's territory.[26]
3) The third type applies to situations where, due to the subject matter, domestic courts will treat the case as non-justiciable and abstain from adjudication.[27]

Within this framework, Lord Mance rejected the appellant's argument that the second type of foreign act of State, properly understood, expands to foreign government action against persons.[28] Lord Mance was also of the opinion that the third type of 'foreign act of State' was not applicable to the present cases.[29] The third type is an act of judicial abstention – it is an exception to the ordinary course of judicial proceedings; thus, an invocation of 'foreign act of State' requires a high level of justification.[30] Since the alleged torts amount to violations of fundamental rights recognised in English law, an invocation of foreign act of State could not be justified in the present cases.[31]

Lord Neuberger's judgment broadly agrees with the tripartite outline of the doctrine presented by Lord Mance,[32] albeit with a different understanding of the operative reasoning behind the third principle.[33]

Contrary to the approach taken by Lord Mance and Lord Neuberger, Lord Sumption presents a more expansive view of foreign act of State. For Lord Sumption, there are two main principles underlying the doctrine:

[25] ibid [35].
[26] ibid [38].
[27] ibid [38].
[28] ibid [83].
[29] ibid [101] – [102].
[30] ibid [91].
[31] ibid [99].
[32] ibid [121] – [123].
[33] ibid [147].

1) The principle of municipal law act of State: English courts will not question the validity of foreign legislative and governmental action within that foreign State's territory.[34]
2) The principle of international law act of State: English courts will not adjudicate upon the lawfulness of extraterritorial acts by foreign States.[35]

Where the subject matter cannot be resolved without determining the validity of a foreign State action, the doctrine is engaged as a matter of default.[36] However, both principles are subject to a public policy exception.[37] Since the alleged torts in *Belhaj* and *Rahmatullah* amount to a transgression of fundamental domestic rights and *jus cogens* norms of international law, the public policy exception is engaged, suspending the application of foreign act of State.[38]

IV. ANALYSIS

Limits to the Applicability of State Immunity

Belhaj and *Rahmatullah* represents a significant precedent in establishing the liability of the UK for its complicity *vis-à-vis* the actions of foreign States. Rather than eroding the principle of State immunity, the court limited the circumstances of its relevancy. By rejecting an expansive view of what amounts to a situation of indirect impleading, the court ensured State immunity could not be utilised as an oblique defence to prevent actions against the UK for its secondary responsibility. It is exclusively when the property rights (Lord Mance)[39] or legal interests (Lord Sumption)[40] of a non-named party State are affected, would that State be considered to be indirectly impleaded and State immunity would prevent the case from proceeding to merits. The government cannot rely on State immunity as a *carte blanche* to preclude its accessory liability for torture, rendition, arbitrary detention, and other rights-violating torts committed by foreign States.

[34] ibid [228].
[35] ibid [234].
[36] ibid.
[37] ibid [248].
[38] ibid [268], [272], [278], [280].
[39] ibid [29].
[40] ibid [196].

Basis of State Immunity

The court aptly rejected the appellants' argument that indirect impleading should incorporate a broader concept of interests, as such an argument misconstrues the basis of State immunity. The core principle underlying the doctrine of State immunity is the sovereign equality between all States, as enshrined in Article 2(1) of the UN Charter. The corollary to the sovereign equality of States is that no State is in a position of superiority over another. For one State to be subjected to obligations and liabilities in the court of another State, means to present the latter in a position of authority over the former, *ergo* the principle of State immunity from the jurisdiction of foreign municipal courts.[41]

As Lord Mance recognises, adjudication upon the merits of the present cases may cause 'reputational or like disadvantages'[42] upon the prime actor States; however, this does not mean that foreign States are being subjected to the jurisdiction of an English municipal court. Jurisdiction is the power to create binding legal decisions; causing reputational or like disadvantages is a far cry from the imposition of obligations or liabilities over a foreign State. Taken to its logical conclusion, the appellants' claim is effectively that jurisdiction of domestic courts is precluded whenever the mere trial, not even the outcome, would cause embarrassment to another State. This argument incorrectly equates respecting the *interests* of foreign States with respecting the *sovereign equality* of foreign States. If the infringement upon the interests of a foreign State represented a failure to respect sovereign equality, every State would be in transgression of the UN Charter. Border taxes on imports, regional co-operation agreements, strategic positioning of military bases – these actions are all examples of standard State behaviour that involve a certain degree of violating another State's interest. The inherent chess-like nature of international diplomacy invariably entails States treading upon each other's interests, however this does not mean the sovereign equality of States has been in any way compromised.

Clarification of the Doctrine of Foreign Act of State

[41] In so far as the State is acting in a sovereign capacity (*acta jure imperii*), State immunity does not extend to acts of a private nature (*acta jure gestionis*).
[42] *Belhaj* and *Rahmatullah* (n 1) [29].

Belhaj and *Rahmatullah* represents an important attempt by English courts to coalesce the range of disjointed authorities that invoke the notion of foreign act of State.[43] Although there is substantial common ground between them, Lord Mance, Lord Neuberger, and Lord Sumption present subtly different understandings of the doctrine.

Lord Mance and Lord Neuberger on Foreign Act of State

Lord Neuberger's framework resembles Lord Mance's tripartite outline.[44] However, Lord Neuberger differs on the rationale for judicial abstention in the aforementioned third type of foreign act of State. Both agree that its application to legal proceedings is the exception rather than the norm. The mere fact that proceedings may involve assessment of foreign State actions does not result in the doctrine being engaged as a matter of default. Rather, it is an extraordinary act of 'judicial abstention'[45] for Lord Mance, or an exercise of 'judicial self-restraint'[46] for Lord Neuberger. Thus the operative question for their Lordships was what circumstances justified the doctrine's application.

For Lord Mance, English courts will abstain from adjudication if the matter is better addressed at the international level.[47] The present cases concern, *inter alia,* the alleged infliction of torture and arbitrary detention, which constitute violations of fundamental rights recognised in English law.[48] These are matters manageable within domestic law and thus, there is no reason why English courts ought not to preside over the present cases. In fact, for the courts to shy away from adjudicating, would represent a failure by the judiciary to perform its constitutional role as the guarantor of rights.

On the contrary, for Lord Neuberger, the basis of judicial self-restraint is where the subject matter involves the presence of a 'comparatively formal, relatively high level agreement or treaty' between States.[49] This criterion was not met in *Belhaj*, where, at best, there was an informal agreement of cooperation

[43] ibid [119].
[44] ibid [121]-[123].
[45] ibid [89].
[46] ibid [151].
[47] ibid [95]. Examples of such subject matter include the legality of a declaration of war and the recognition of a claim to statehood.
[48] The right against arbitrary detention dates back to the Magna Carta 1225, whilst the common law right against torture has been most recently affirmed in *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71.
[49] *Belhaj* and *Rahmatullah* (n 1) [147].

between UK and Libyan intelligence services.[50] The same applies to *Rahmatullah*, where the MoU between UK and US forces did not provide for unlawful detention or torture.[51] Both cases fell beyond the remit of circumstances that justify invoking the third type of foreign act of State. Lord Neuberger's reasoning appears to be grounded in a separation of powers point, requiring judicial deference whenever the case's subject matter intersects with foreign affairs of a certain import or significance.

Between their differing understandings, Lord Mance's conception seems to better capture the essence of the third type of foreign act of State. It is a more accurate reflection of the reasoning invoked in past authorities, such as *Buttes Gas*[52] and *Noor Khan,*[53] where the doctrine has been applied. In *Buttes Gas*, adjudication upon merits would have positioned the court to establish the disputed maritime boundaries between four sovereign States.[54] In *Noor Khan*, resolution of the case would have required the court to determine if there was a situation of armed conflict in Pakistan and/or Afghanistan.[55] The exercise of judicial restraint, where the subject matter is better addressed at the international level, seems to be a truer reading of *Buttes Gas* and *Noor Khan* than Lord Neuberger's understanding. There is nothing within the facts of either case which suggests that his 'agreement or treaty' criterion would have been met. Furthermore, the threshold of a 'comparatively formal, relatively high level agreement or treaty' itself is problematic, as it remains ambiguous what exactly would satisfy such a standard. This difficulty was evinced within Lord Neuberger's own doubts as to whether the MoU between the US and the UK forces in *Rahmatullah* constituted a sufficiently high level agreement.[56] When contrasted to the simpler query proposed by Lord Mance – whether the matter is better resolved at the international legal level, Lord Mance's understanding seems favourable as a matter of practical application.

Lord Sumption on Foreign Act of State

[50] ibid [167].
[51] ibid [171].
[52] *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 188 (HL).
[53] *R (Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872 (CA).
[54] *Buttes Gas* (n 52) 938.
[55] *Noor Khan* (n 53) [34]-[35].
[56] *Belhaj* and *Rahmatullah* (n 1) [171].

Although Lord Sumption's first principle roughly corresponds with the first and second types of foreign act of State under Lord Mance's conception, Lord Sumption's notion of municipal act of State is far more expansive in scope. It covers *all* legislative and executive action (rather than just actions that pertain to property) within that foreign State's territory, as a logical derivation from the territorial principle of sovereignty.[57] Lord Sumption's second principle, international law act of State, correlates with the third type of foreign act of State as identified by Lord Mance. The two seem to be grounded in similar roots – matters concerning the international plane are better dealt with at the international level.[58] However, the application of Lord Sumption's doctrine is an inversion of Lord Mance's judicial abstention: where it is relevant, foreign act of State is engaged as a matter of default, requiring a public policy justification for the doctrine's inapplicability.[59]

Lord Sumption presents an understanding of the foreign act of State doctrine that is structurally different to Lord Mance's. It captures a wider range of actions within its two principles, and the doctrine is automatically applied once it is established that the merits of the case would involve an assessment of a foreign act of State. Although initially wider, the scope of foreign act of State is cut back by giving a larger role to the public policy exception, which precludes the doctrine's application. Thus, despite their divergence in structure, it is unlikely that Lord Mance and Lord Sumption would reach different conclusions in any given case.[60]

The essential difference between Lord Sumption and Lord Mance is the scope given to the public policy exception. Lord Sumption's view of this exception is wider, as it incorporates the international law notion of *jus cogens* norms,[61] whereas Lord Mance strictly focuses on rights recognised as a matter of domestic law.[62] Lord Sumption's intuitive pull towards international legal norms, where the case concerns an international context, ought to be resisted. It loses sight of the fact that foreign act of State is essentially a domestic doctrine, whose bounds are defined by the common law. To intertwine foreign act of State with the notion of *jus cogens* is an open invitation for confusion. As recognised by Lord Mance, there is little agreement and much uncertainty in regard to what amounts to a *jus cogens* norm.[63] Aside from a small irreducible

[57] ibid [229].
[58] ibid [234].
[59] ibid [250].
[60] ibid [107].
[61] ibid [257].
[62] ibid [99].
[63] ibid [107].

core,[64] there is no consensus as to what norms of international law have obtained this peremptory status.[65] This problem was demonstrated within Lord Sumption's judgment, as he attempted to establish the dubious existence of a *jus cogens* prohibition against rendition and enforced disappearances.[66] There is a risk involved when the concept of *jus cogens* is enveloped within foreign act of State; it introduces an uncertain and unnecessarily complex layer of assessment into the doctrine. The public policy exception should be delinked from *jus cogens* norms and purely assessed on the basis of domestic rights considerations. In this regard, Lord Mance's outline of foreign act of State ought to be preferred for its conceptual clarity.

CONCLUSION

The judgement in *Belhaj* and *Rahmatullah* represents an affirmation by the judiciary of their constitutional role as the supreme protector of rights within the UK. Through a restrictive construction of what amounts to indirect impleading, circumstances where the UK government may invoke the State immunity of foreign States as an oblique defence has been strictly limited. Likewise, the application of foreign act of State has been caveated by a public policy exception when fundamental rights are at stake. Carrying this significant precedent onwards into the future, Lord Mance's understanding should be preferred due to its conceptual clarity and ease of application.

Although 13 years have elapsed since the initial facts, Mr Belhaj, Mrs Boudchar, and Mr Rahmatullah's ordeals are far from unique. As a 2009 Parliamentary Report into the matter suggests, instances where the UK has been alleged to design, arrange, assist, and encourage rights-violating torts by foreign States are far more common than one might hope to expect.[67] Where previously all means of compensation were shut, the Supreme Court has now opened the door to legal redress for those victims. Post *Belhaj* and *Rahmatullah*, UK authorities and officials who are complicit in torture and other rights-violating torts will be held legally liable; their impunity has been superseded by accountability.

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[64] Examples of uncontroversial *jus cogens* include the right to self-determination, the prohibition of genocide, torture, slavery, and unlawful use of force.

[65] Gennady Danilenko, 'International *Jus Cogens*: Issues of Law-Making' (1991) 2(1) EJIL 42.

[66] *Belhaj* and *Rahmatullah* (n 1) [273]-[278].

[67] Joint Committee on Human Rights, *Allegations of UK Complicity in Torture* (2009, HL 152, HC 230) 7-12.