

NARROWING FOREIGN AFFAIRS NON-JUSTICIABILITY

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Abstract The UK Supreme Court’s decision in *Belhaj v Straw* defined foreign affairs non-justiciability and unearthed its constitutional foundations. However, two decisions since *Belhaj*—*High Commissioner for Pakistan v Prince Muffakham Jah* and *The Law Debenture Trust Corpn plc v Ukraine*—have called *Belhaj* into doubt, narrowing non-justiciability to give effect to ordinary private law rights. This article analyses these decisions and argues that their general approach of subjecting issues involving transactions between sovereign States to private international law’s framework is desirable, because the constitutional foundations of non-justiciability identified in *Belhaj* are shaky. Yet, it is suggested that private international law itself may require courts to exercise judicial restraint on these issues, given its goal of upholding the efficient resolution of international disputes in appropriate fora.

Keywords: private international law, non-justiciability, *Belhaj v Straw*, foreign act of State, separation of powers, *forum non conveniens*.

I. INTRODUCTION

The common law has long accepted that certain issues involving transactions between sovereign States should be non-justiciable, even if they arise in civil proceedings.¹ The precise boundaries of foreign affairs non-justiciability, however, remain ‘shot through with indeterminacy’.² In 2017, the UK Supreme Court in *Belhaj v Straw*³ boldly sought to give shape to foreign affairs non-justiciability, collectively endorsing its existence and systematising its various limbs. Though the Court was divided, a limited consensus on important aspects of the law was discernible: in particular, Lord Neuberger’s majority judgment defined non-justiciability as a rule barring adjudication on

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¹ See Lord Mance, ‘Justiciability’ (2018) 67 ICLQ 739, 756; D McGoldrick, ‘The Boundaries of Justiciability’ (2010) 59 ICLQ 981, 992–3.

² P Scott, *The National Security Constitution* (Hart 2018) 237.

³ [2017] 2 WLR 456 (SC).

certain sovereign acts performed in high-level inter-State transactions, subject to a public policy exception for certain breaches of fundamental norms. The Court also identified the constitutional separation of powers as the rule's theoretical foundation. *Belhaj*, then, seemed to give foreign affairs non-justiciability new life and a relatively firm position in international litigation.⁴

Less than half a decade later, however, this picture of a reinvigorated rule seems to be coming undone. In two important decisions since—*High Commissioner for Pakistan v Prince Muffakham Jah*⁵ and *The Law Debenture Trust Corp plc v Ukraine*⁶—the High Court and Court of Appeal respectively narrowed foreign affairs non-justiciability, beyond the substance of the majority judgment in *Belhaj*. This, as their reasoning suggests, is attributable to courts' reluctance to obstruct ordinary rules of private law with what they see as a redundant rule. This article traces and analyses these decisions. It argues that the general approach taken by these courts, turning to private international law for answers on inter-State transaction disputes, is defensible because *Belhaj*'s theoretical foundations based on the constitutional separation of powers are shaky. Judicial restraint, however, remains appropriate for these inter-State disputes: private international law itself provides sound reasons for restraint, arising from values like efficiency in dispute resolution which underlie in the doctrine of *forum non conveniens*.

II. TAKING STOCK: FROM *BUTTES GAS* TO *BELHAJ*

Foreign affairs non-justiciability has its roots in the heretofore undifferentiated mass of rules collectively known as the 'foreign act of state doctrine'. In *Duke of Brunswick v King of Hanover*, the House of Lords held that courts 'cannot sit in judgment upon an act of a [foreign] Sovereign, effected by virtue of his Sovereign authority abroad'.⁷ In its early years, the doctrine was indistinguishable from a plea of sovereign immunity, under a public international law that recognised a very broad notion of State sovereignty.⁸ Post-World War II, the doctrine was frequently invoked in property disputes in States experiencing revolutions and civil wars, to preclude claims that title to property situated overseas had been vested by constitutionally-suspect foreign decrees.⁹

⁴ See eg A Dickinson, 'Acts of State and the Frontiers of Private (International) Law' (2018) 14 *JPrivIntL* 1, 3–4, 25; E Smith, 'Acts of State in *Belhaj* and *Rahmatullah*' (2018) 134 *LQR* 20, 26; E Bjorge and C Miles, 'Crown and Foreign Acts of State before British Courts: *Rahmatullah*, *Belhaj*, and the Separation of Powers' in C Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019) 731–2; W Dodge, 'Belhaj v Straw: A View from the United States' (Just Security, 19 Jan 2017) <<https://www.justsecurity.org/36507/uk-supreme-courts-landmark-judgment-belhaj-v-straw-view-united-states/>>. ⁵ [2020] 2 *WLR* 699 (HC).

⁶ [2019] 2 *WLR* 665 (CA).

⁷ *Duke of Brunswick v King of Hanover* (1848) 2 *HL Cas* 1, 17.

⁸ *ibid.*

⁹ See eg *Luther v Sagor* [1921] 3 *KB* 532 (CA); *Princess Paley Olga v Weisz* [1929] 1 *KB* 718 (CA).

A. *The Background: Buttes Gas and Kuwait Airways*

Only in *Buttes Gas & Oil Co v Hammer*¹⁰ did English courts start tackling the ‘foreign act of state doctrine’ in earnest. *Buttes* and *Occidental* were issued concessions to exploit an oil-rich area by two States, Sharjah and Umm al Qaiwain respectively, which had competing claims to sovereignty over the area. When *Occidental* claimed that *Buttes* had conspired with Sharjah to harm its rights, *Buttes* sued in defamation, and *Occidental* pleaded justification and brought a counterclaim in unlawful means conspiracy. In response, *Buttes* argued, *inter alia*, that *Occidental*’s defence and counterclaim should be struck out on the basis of the doctrine of sovereign immunity and a rule of non-justiciability.¹¹ Lord Wilberforce, for the House of Lords, swiftly rejected *Buttes*’ argument on sovereign immunity, reasoning that *Occidental*’s pleadings did not contain any ‘attack, direct or indirect, upon any property of any of the relevant sovereigns, nor [were] any of them impleaded directly or indirectly’.¹²

The ‘foreign act of state doctrine’, however, was broader than sovereign immunity, and could apply even in cases where a foreign State was not directly or indirectly impleaded. Outside situations where an act of the Crown was impugned, which was not squarely the case in the dispute before the court,¹³ the doctrine could be separated into two rules. First, there was a rule which required the forum court to presume the validity and legality of foreign legislative and executive acts carried out within the foreign State’s territory.¹⁴ This rule fell ‘within the area of the conflict of laws’, being ‘concerned essentially with the choice of the proper law to be applied’, and was subject to a public policy exception.¹⁵ This rule, though, was inapplicable to the dispute before the court, because *Occidental*’s arguments on Sharjah’s acts were not based on municipal law but public international law.¹⁶

Second, there was also a ‘wider principle’ of ‘judicial restraint or abstention’, which required courts to refrain from ‘adjudicat[ing] upon the transactions of foreign sovereign states’.¹⁷ Lord Wilberforce called this ‘a principle of non-justiciability by the English courts of a certain class of sovereign acts’.¹⁸ He also described it as an ‘immunity from jurisdiction *ratione materiae*’,¹⁹ but this could not have been a reference to the immunity afforded to former State officials for acts performed in the course of their official functions,²⁰ since neither of the parties before the court had held such positions; instead, the ‘immunity’ from adjudication in question was purely one which covered

¹⁰ [1982] AC 888 (HL).

¹¹ *ibid* 925.

¹² *ibid* 926.

¹³ *ibid* 930–1. To the extent that this rule, later recognised as the ‘Crown act of state doctrine’, is distinct from the principle of non-justiciability, it is beyond the scope of this article; see *Mohammed (Serdar) v Ministry of Defence* [2017] 2 WLR 287 (SC) [33], [36]–[37], per Baroness Hale, and [81], [88]–[89], per Lord Sumption, cf [50]–[55], per Lord Mance.

¹⁴ *Buttes Gas (HL)* (n 10) 931.

¹⁵ *ibid*.

¹⁶ *ibid*.

¹⁷ *ibid*.

¹⁸ *ibid* 933.

¹⁹ *ibid*.

²⁰ *R v Bow Street Magistrate, ex parte Pinochet* (No 3) [2000] 1 AC 147 (HL).

the subject matter of parties' dispute,²¹ rather than the parties themselves. Moreover, unlike the above rule of presumed validity and legality, Lord Wilberforce did not contemplate that this principle could be subject to a public policy exception. It was this principle of non-justiciability that applied to the facts: Lord Wilberforce agreed with Buttes and stayed proceedings entirely, on the grounds that the parties' claims required the court to 'review transactions in which four sovereign states were involved', reached through 'diplomacy and the use of force'.²²

After *Buttes Gas*, the 'foreign act of state doctrine' arose again in *Kuwait Airways Corp'n v Iraqi Airways Co (Nos 4 and 5)*.²³ The House of Lords faced a dispute involving Iraq's annexation of Kuwait and its transfer and confiscation by decree of Kuwaiti aircraft in favour of its national airline. Kuwait Airways sued Iraqi Airways for conversion, which raised the question whether the Iraqi decree effectively vested title over the aircraft in Iraqi Airways. That question implicated both rules identified by Lord Wilberforce in *Buttes Gas*. The fact that the confiscatory decree was issued after Iraq moved the aircraft into its territory implicated the rule that English courts could not declare foreign legislation applicable within a foreign State's territory invalid. However, this rule of presumed validity could be circumvented if courts simply applied private international law's public policy exception to deny recognition of, without denying the validity of, the Iraqi decree. Yet, because the grounds upon which Kuwait Airways sought to invoke the exception was the infringement of Kuwait's territorial sovereignty by Iraq's annexation of it, the issue before the court also implicated the rule that certain transactions between sovereign States, particularly those involving aggression and annexation, were non-justiciable.

To entertain Kuwait Airways' arguments on public policy, then, the House of Lords would have to qualify *Buttes Gas*' principle of non-justiciability. Lord Nicholls of Birkenhead (with whom Lord Hoffman and Lord Scott of Foscote agreed on this point)²⁴ and Lord Hope of Craighead thus held that even the principle of non-justiciability was subject to a public policy exception, and set out to define its content.²⁵ In this they were joined by Lord Steyn, who saw the issue as a simple matter of invoking the public policy exception to the property choice of law rule.²⁶ All three accepted that the exception was clearly available for breaches of fundamental human rights, referring in this regard to *Oppenheimer v Cattermole*,²⁷ where a Nazi decree discriminating

²¹ See *Belhaj* (n 3) [282] per Lord Sumption ('the foreign act of state doctrine is not an immunity. It is a rule of substantive law which operates as a limitation on the subject matter jurisdiction of the English court.')

²² *Buttes Gas (HL)* (n 10) 938.

²³ [2002] 2 AC 883 (HL). ²⁴ *ibid* [125], [171]. ²⁵ *ibid* [25]–[26], [135]–[137].

²⁶ *ibid* [113]–[114]. Lord Steyn adopted this perspective because he read the principle in *Buttes Gas* as applying only when no identifiable rules of international law governed the issue, but this was an erroneous interpretation of the principle; see (nn 45–49) and accompanying text.

²⁷ [1976] AC 249 (HL), cited in *Kuwait Airways* (n 23) [18], [114], [137].

against Jews by depriving them of their German citizenship and thus their property in Germany was deemed ‘so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all’.²⁸ They also all accepted that *Buttes Gas* remained good authority;²⁹ and then attempted to extrapolate from *Oppenheimer* a more general basis of public policy based on certain breaches of international law, which would cover Iraq’s acts of aggression and annexation but not those alleged in *Buttes Gas*. Lord Nicholls noted that Iraq had committed ‘a gross violation of established rules of international law of fundamental importance’, as ‘evidenced by the urgency with which the UN Security Council considered this incident and by its successive resolutions’.³⁰ Likewise, Lord Steyn and Lord Hope highlighted the ‘flagrant’ nature of Iraq’s breach³¹ and the ‘clearly established’ nature of the norm it breached respectively,³² given the Security Council Resolution before them.³³ *Kuwait Airways* thus recognised both facets of the ‘foreign act of state doctrine’ identified in *Buttes Gas*, and also recognised a narrow, relatively well-defined public policy exception thereto: while acts of aggression and annexation were *prima facie* non-justiciable, they may trigger the public policy exception if condemned by the Security Council.

B. The Current State of Play: Belhaj

After *Buttes Gas* and *Kuwait Airways*, the law descended into confusion. Lower courts, introducing multiple qualifications and exceptions to *Buttes Gas*’ rules, turned the ‘foreign act of state doctrine’ into a ‘vague and undefined’³⁴ set of rules with apparently arbitrary results. This unfortunate situation continued until *Belhaj*. The plaintiffs had sued the UK government for assisting various foreign governments in their detention, rendition and torture of the plaintiffs, in various foreign States and onboard foreign aircraft. The cause of action they relied on was joint tort liability for furthering a common design, pleaded under English law.³⁵ The parties accepted that, to satisfy an element of that tort, the wrongfulness of the acts of the foreign governments involved had to be established under the corresponding foreign *leges loci delicti*.³⁶ The UK government then applied to strike out the plaintiffs’ claims on the basis of the ‘foreign act of state doctrine’.

In *Belhaj*, the Supreme Court collectively acknowledged the ‘foreign act of state doctrine’ described in *Buttes Gas* and disaggregated it further into three

²⁸ *Oppenheimer*, *ibid* 278. ²⁹ *Kuwait Airways* (n 23) [25], [113], [135]. ³⁰ *ibid* [29].

³¹ *ibid* [114]. ³² *ibid* [140]. ³³ *ibid* [114], [141]–[143].

³⁴ M Nicholson, ‘The Political Unconscious of the English Foreign Act of State and Non-Justiciability Doctrine(s)’ (2015) 64 ICLQ 743, 744.

³⁵ See *Fish & Fish Ltd v Sea Shepherd UK* [2013] 1 WLR 3700 (SC), pleaded in *Belhaj v Straw* [2013] EWHC 4111 (QB) [29]–[32] and *Rahmatullah v Ministry of Defence* [2014] EWHC 3846 (QB) [33]–[39]. ³⁶ *Belhaj* (n 3) [178].

rules. The first and second rules required courts to presume the validity and legality of foreign legislation and executive acts respectively, if executed in the foreign State's territory. The third rule—foreign affairs non-justiciability—rendered certain transactions between States non-justiciable. The Court also agreed on the outcome of the government's application: it was dismissed. However, Lords Neuberger, Sumption and Mance, who gave substantive reasons for their decisions, disagreed on the specific form each of the three rules should take. Ultimately, Lord Neuberger carried the Court by a 4:3 majority; Lord Sumption was joined only by Lord Hughes, and Lord Mance stood alone. Lord Neuberger's reasoning is thus particularly important, although Lord Mance and Lord Sumption's reasoning also provides useful context.

As regards the first and second rules, Lord Neuberger's reasoning was clear. The first rule barred courts from assessing the validity or legality of all foreign legislative acts, because respect for a foreign State's 'sovereignty' required this.³⁷ In this, he was joined by Lord Sumption.³⁸ The second rule, also 'close to being a general principle of private international law',³⁹ precluded assessments of the validity or legality of foreign executive acts, but only those involving property situated within the foreign State's territory.⁴⁰ In this, he was joined by Lord Mance.⁴¹ Lord Neuberger and Lord Mance agreed that the first and second rules were rules of 'private international law';⁴² while Lord Sumption believed they were undergirded by 'comity' and the 'separation of powers'.⁴³ All agreed, however, that whatever the scope of the first and second rules, they were subject to a public policy exception.⁴⁴

As regards the third rule, Lord Neuberger confirmed that a principle of non-justiciability applied to acts 'of such a *nature* that a municipal judge cannot or ought not rule on it',⁴⁵ 'defeat[ing] what would otherwise be a perfectly valid private law claim'.⁴⁶ In support, Lord Neuberger cited *Shergill v Khaira*,⁴⁷ where the Supreme Court had held that claims with 'domestic footholds' (involving 'private legal rights' or 'reviewable matters of public law')⁴⁸ may still be non-justiciable if they involve acts 'beyond the constitutional competence assigned to the courts under our conception of the separation of powers', like 'certain transactions of foreign states'.⁴⁹ Beyond this, however, Lord Neuberger was more circumspect, believing it 'unwise to be too prescriptive about [the third rule's] ambit'.⁵⁰ Yet, he did note that the rule 'almost always ... appl[ie]d to actions involving more than one state', such as 'dealings between sovereign states' or 'acts of a foreign government in the conduct of foreign affairs',⁵¹ and it would 'normally involve some sort of comparatively formal, relatively high level arrangement'.⁵² Lord Sumption

³⁷ *ibid* [135], [159]. ³⁸ *ibid* [228]–[229]. ³⁹ *ibid* [150]. ⁴⁰ *ibid* [142], [160].

⁴¹ *ibid* [66], [74]–[76]. ⁴² *ibid* [35], [38], [150]. ⁴³ *ibid* [225].

⁴⁴ *ibid* [80], [153]–[156], [249]–[257]. ⁴⁵ *ibid* [123] (emphasis added).

⁴⁶ *ibid* [144]; see also [234], per Lord Sumption. ⁴⁷ [2015] AC 359 (HL).

⁴⁸ *ibid* [43]. ⁴⁹ *ibid* [42]. ⁵⁰ *Belhaj* (n 3) [147]. ⁵¹ *ibid* [123]. ⁵² *ibid* [147].

adopted a broader, more categorical conception of the third rule, which nevertheless overlapped considerably with that of Lord Neuberger: courts could not adjudicate on ‘the extraterritorial acts of foreign states in their dealings with other states or the subjects of other states’.⁵³ Lord Mance, by contrast, preferred a narrower ‘fact- and issue-sensitive’ third rule,⁵⁴ with some clear parameters: ‘act[s] of war or of alleged self-defence at the international level’ would be non-justiciable;⁵⁵ while breaches of ‘fundamental rights’ would not.⁵⁶ Lord Neuberger was cryptic concerning the third rule’s theoretical foundations, noting only that it was ‘purely based on common law’ and ‘judicial self-restraint’.⁵⁷ Lord Mance and Lord Sumption, by contrast, rooted the third rule in the constitutional ‘separation of powers’.⁵⁸

The third rule was also subject to a public policy exception. Lord Neuberger recognised that this exception depended ‘ultimately on domestic law considerations, although generally accepted norms of international law are plainly capable of playing a decisive role’.⁵⁹ Thus, ‘a breach of *jus cogens* or peremptory norms would almost always fall within the public policy exception’,⁶⁰ although domestic ‘fundamental principles of public policy’ could trigger the exception too.⁶¹ Lord Sumption broadly agreed: the exception was limited to ‘sufficiently fundamental legal policy’,⁶² and in that regard ‘*jus cogens* norms’ could ‘generally be equated with principles of fundamental justice’.⁶³ As regards the exception’s precise content, both agreed that breaches of fundamental human rights like those in *Oppenheimer* provided clear grounds for the exception’s use.⁶⁴ Conversely, both also recognised that acts of aggression and annexation were ‘obvious examples’ of non-justiciable issues;⁶⁵ could such acts ever trigger the public policy exception? Lord Mance reasoned that if they could, this would remove ‘core examples of issues upon which domestic courts should refrain from adjudicating’ from the scope of foreign affairs non-justiciability.⁶⁶ Lord Sumption, recognising the ‘danger ... in the exception consuming the rule’,⁶⁷ thus ‘limited [the public policy exception] to violations of international law which can be distinguished on rational grounds from the rest’,⁶⁸ such that even breaches of *jus cogens* norms might not always trigger it.⁶⁹ Lord Neuberger expressed roughly similar sentiments: he did not state that every breach of *jus cogens* would justify the exception; limited the exception’s domestic law content to ‘fundamental principles of public policy’; and noted that the exception would apply less readily to the third rule than the first and

⁵³ *ibid* [234], [237]. ⁵⁴ *ibid* [90]. ⁵⁵ *ibid* [95]. ⁵⁶ *ibid* [98]–[99]. ⁵⁷ *ibid* [151].

⁵⁸ *ibid* [91], [225]. ⁵⁹ *ibid* [154]. ⁶⁰ *ibid* [168]. ⁶¹ *ibid* [153]–[155].

⁶² *ibid* [257].

⁶³ *ibid*, citing *Kazemi Estate v Islamic Republic of Iran (Canadian Lawyers for International Human Rights intervening)* [2014] 3 SCR 176 (SCC) [151]. ⁶⁴ *Belhaj* (n 3) [157], [254].

⁶⁵ *ibid* [123], [237], citing *Nissan v Attorney General* [1970] AC 179 (HL) 237.

⁶⁶ *Belhaj* (n 3) [107(iii)]. ⁶⁷ *ibid* [253]. ⁶⁸ *ibid* [253]. ⁶⁹ *ibid* [257].

second.⁷⁰ As authority, both Law Lords cited *Kuwait Airways*,⁷¹ suggesting, as had the House of Lords, that when it came to acts of aggression and annexation, only a condemnation by the Security Council would trigger the public policy exception.⁷² Lord Mance, by contrast, believed that these difficulties suggested that it would be wise not to recognise any exception to the third rule at all;⁷³ instead, the need to protect ‘fundamental rights’ was in fact a qualification of the rule itself.⁷⁴

Belhaj, as the division in the Court outlined above illustrates, is evidently not the clearest of authorities. Nevertheless, we can glean from *Belhaj* some relatively clear propositions:

- (1) *Under the first rule, courts are precluded from assessing the validity or legality of all foreign legislation applicable within the territory of the foreign State in question.* Lord Neuberger and Lord Sumption constituted the majority here,⁷⁵ while Lord Mance limited this rule to foreign legislation involving property.⁷⁶
- (2) *Under the second rule, courts are precluded from assessing the validity or legality of foreign executive acts only if they involve property situated in that foreign State.* Lord Neuberger and Lord Mance formed the majority here,⁷⁷ while Lord Sumption applied this Rule to all foreign executive acts.⁷⁸
- (3) *Under the third rule, courts should refrain from adjudicating upon certain high-level transactions between States carried out in their sovereign capacities.* Lord Neuberger held that the third rule would ‘almost always’ involve sovereign acts performed in inter-State transactions, and that these transactions would ‘normally’ have to be ‘high level’ arrangements.⁷⁹ Similarly, Lord Sumption favoured a rule precluding adjudication over sovereign acts performed in the course of a State’s foreign relations.⁸⁰ By contrast, Lord Mance preferred a fact-sensitive rule, uncontroversially covering only acts of war or self-defence.⁸¹
- (4) *Finally, all rules are subject to a public policy exception for breaches of certain fundamental international or domestic norms.* Lord Neuberger noted that breaches of *jus cogens* norms would ‘almost always’ trigger the exception, and breaches of domestic ‘fundamental principles of public policy’ could also do so.⁸² Lord Sumption limited the exception to violations of some, but not all, *jus cogens* norms.⁸³ For both, breaches of fundamental human rights were clear grounds for the exception, while acts of

⁷⁰ *ibid* [154], [157].

⁷³ *Belhaj* (n 3) [89], [107].

⁷⁶ Mance (n 1) 749, fn 58; cf *ibid* [64].

⁷⁸ *ibid* [230]–[231].

⁸² *ibid* [153].

⁷¹ *ibid* [157], [255]–[257].

⁷⁴ *ibid* [98]–[99].

⁷⁷ *Belhaj* (n 3) [74]–[76], [142], [160].

⁷⁹ *ibid* [147].

⁸⁰ *ibid* [234].

⁷² See (nn 30–33).

⁷⁵ *ibid* [228]–[229], [159].

⁸¹ *ibid* [90], [95].

⁸³ *ibid* [253].

aggression and annexation could only trigger the exception if condemned by the Security Council.⁸⁴ By contrast, Lord Mance believed that only the first and second rules were subject to a public policy exception; his third rule was narrow enough to avoid important fundamental norms.⁸⁵

Belhaj, therefore, contained a limited consensus on the foreign act of State doctrine's three rules and its public policy exception. *Belhaj* has since proved influential: it has been cited and applied in a dozen or so common law decisions since,⁸⁶ and its first and second rules have been applied with little difficulty.⁸⁷ However, on the third rule—foreign affairs non-justiciability—and its public policy exception, *Belhaj* has not fared as well. In *Prince Muffakham Jah* and *Law Debenture*, propositions (3) and (4) above were implicitly read down: the third rule is much attenuated, and the public policy exception significantly expanded. Parts III and IV dissect these cases, showing how foreign affairs non-justiciability has apparently been narrowed since *Belhaj*.

III. NON-JUSTICIABILITY: AN ELUSIVE CATEGORY OF SOVEREIGN TRANSACTIONS

Foreign affairs non-justiciability rose squarely for consideration in *High Commissioner for Pakistan v Prince Muffakham Jah*.⁸⁸ During 13–18 September 1948, India annexed Hyderabad in a 'police action' codenamed 'Operation Polo'.⁸⁹ On 17 September, Hyderabad's sovereign (the Nizam) acquiesced in India's occupation and dissolved his Government. On 20 September, Hyderabad's erstwhile Finance Minister (Moin), transferred funds belonging to Hyderabad to the English bank account of Pakistan's High Commissioner in the UK (Rahimtoola).⁹⁰ Moin initiated the transfer on apparent authority from the Nizam;⁹¹ while Rahimtoola accepted the funds as Pakistan's representative, on his Foreign Minister's instructions.⁹² The purpose of this transfer 'was to keep the Fund away from India – to safeguard it', in light of 'the Nizam VII's and Moin's views as regards India's intentions toward Hyderabad, including Operation Polo'.⁹³ Later, on 26 January 1950, however, the Nizam took an oath of loyalty, and was sworn in as Ruler of

⁸⁴ *ibid* [157], [254]–[257].

⁸⁵ *ibid* [80], [98]–[99].

⁸⁶ Other than in the two cases surveyed here, *Belhaj* was cited and applied in the UK in *Chugai Pharmaceutical Co Ltd v UCB Pharma SA* [2017] Bus LR 1455 (HC), *Reliance Industries Ltd v The Union of India* [2018] 2 All ER (HC) and *Central Bank of Venezuela v Governor and Company of the Bank of England* [2021] 2 WLR 1 (CA); in Australia in *Lighthouse Corporation v Timor Leste* [2019] VSC 278; in Canada in *Araya v Nevsun Resources Ltd* (2017) 408 DLR (4th) 383 (BCCA); and in New Zealand in *X v Attorney-General* [2017] NZHC 768.

⁸⁷ See *Reliance Industries*, *ibid* [106]–[109]; *Prince Muffakham Jah* (n 5) [200]; *Chugai Pharmaceutical*, *ibid* [61]–[68]; and *Araya*, *ibid* [165]–[173].

⁸⁸ *Prince Muffakham Jah* (n 5).

⁸⁹ *ibid* [186].

⁹⁰ Although the funds belonged to the Nizam, since the Nizam was the 'absolute ruler' of Hyderabad, the funds were indistinguishable from the property of Hyderabad itself; *ibid* [165].

⁹¹ *ibid* fn 60; cf [199]–[201], [221]–[230].

⁹² *ibid* [240]–[242].

⁹³ *ibid* [313].

Hyderabad, under the Constitution of India.⁹⁴ Though the UK had initially recognised Hyderabad as a sovereign State prior to, during and after Operation Polo, it changed its position after January 1950 when it recognised Hyderabad as having acceded to the Union of India.⁹⁵

In 1954, the Nizam and Hyderabad instituted proceedings in the UK to claim the funds transferred by Moin. This claim was dismissed by the House of Lords in *Rahimtoola v Nizam of Hyderabad*,⁹⁶ holding that Pakistan's bare legal title entitled it to State immunity. However, half a century later in *Prince Muffakham Jah*, Pakistan itself brought proceedings to claim beneficial ownership of the funds under English law.⁹⁷ Pakistan argued that the court could adjudicate only upon the legal nature of the relationship between itself and the English bank—not the background through which that relationship had come into being, the 1948 transfer. This transfer, Pakistan maintained, was non-justiciable, because it was an agreement between sovereign States provoked by a third State's armed invasion.⁹⁸ In the alternative, Pakistan argued that its claim should be non-justiciable in its entirety.⁹⁹

Marcus Smith J first held that an issue's justiciability depended on the justiciability of other issues 'closely intertwined' with it;¹⁰⁰ since here the nature of Pakistan's title to the funds was inseparable from the nature of the 1948 transfer that gave rise to it, it was 'all or nothing'—both issues were either justiciable or non-justiciable.¹⁰¹ He thus proceeded to Pakistan's alternative argument, that both issues were non-justiciable.¹⁰² Smith J then distilled from Lord Neuberger's judgment in *Belhaj* a definition of foreign affairs non-justiciability, which he believed Lord Sumption also supported: 'dealings or disputes by or between a sovereign state or states' which 'involve actions by such states operating on the plane of public international law' were non-justiciable.¹⁰³ Under this rule, Pakistan's claim was justiciable because it raised only 'private law issues, concerning the nature of the Transfer and the manner in which the Fund is held', and 'no issue of public international law or state action on the plane of public international law'.¹⁰⁴

Smith J's reasoning primarily focused on the *nature* of the transaction before him, not the existence of private law rights: non-justiciability arose in 'those cases where ... there is a "foothold", that is a claim prima facie justiciable in English courts' but 'an issue arises regarding the lawfulness of a state's conduct that is inherently non-justiciable'.¹⁰⁵ He was correct to do so: this description of foreign affairs non-justiciability resonated with Lord Neuberger's approach in *Belhaj* as well as the Supreme Court's in *Shergill*.¹⁰⁶ But what was the test for determining whether an act's nature

⁹⁴ *ibid* [195(3)].

⁹⁵ *ibid* [192]–[196].

⁹⁶ [1958] AC 379 (HL).

⁹⁷ *Prince Muffakham Jah* (n 5) [260(i)].

⁹⁸ *ibid* [297].

⁹⁹ *ibid* [301].

¹⁰⁰ *ibid* [304].

¹⁰¹ *ibid* [305].

¹⁰² *ibid*.

¹⁰³ *ibid* [306], [309].

¹⁰⁴ *ibid* [313(2)].

¹⁰⁵ *ibid* [309].

¹⁰⁶ See (nn 45–49) and accompanying text.

renders it non-justiciable? Smith J reasoned that the Nizam, through Moin, was ‘dealing with private law obligations: he was transferring a chose in action, owed to him by ... the Bank’.¹⁰⁷ This led to his finding that, because it only raised ‘private law issues’, Pakistan’s claim was wholly justiciable.¹⁰⁸ However, this was a conclusion in need of a premise, since the very question before Smith J was whether the 1948 transfer was a private or a sovereign transaction. Lord Neuberger’s judgment in *Belhaj* should have supplied that premise since it identified three features which paradigmatic non-justiciable acts shared. As has been said, for Lord Neuberger foreign affairs non-justiciability ‘almost always’ applied to (1) ‘sovereign acts’; (2) ‘involving more than one state’; within (3) a ‘comparatively formal, relatively high level arrangement’.¹⁰⁹ Lord Sumption, endorsing the first two of Lord Neuberger’s criteria, noted that ‘a sovereign act done by a state in the course of its relations with other states’ was non-justiciable.¹¹⁰

Had Smith J applied Lord Neuberger’s three criteria in *Prince Muffakham Jah*, however, he should not have found the 1948 transfer justiciable. Criteria (2) and (3) were surely met, since the 1948 transfer was a high-level transaction between two States in their foreign relations with each other: it was between the sovereign of Hyderabad and Pakistan’s High Commissioner in their respective capacities. Rahimtoola acted intentionally in his official capacity, doing so on direct instructions of Pakistan’s Foreign Minister;¹¹¹ and while Moin acted only with apparent authority from the Nizam as an erstwhile Finance Minister, such authority suffices for the attribution of sovereign acts to States.¹¹² Thus, Smith J himself noted that the 1948 transfer was akin to other ‘dealings ... at a high level’ between Hyderabad and Pakistan.¹¹³ This was unlike *Belhaj*, where the inter-State transactions alleged were instances of *ad hoc* cooperation between officers in the foreign services of various States.¹¹⁴

Critically, under criterion (1), the 1948 transfer also surely comprised a ‘sovereign act’ carried out between States, or in Lord Sumption’s words, acts ‘done *jure imperii*, as opposed to a commercial transaction or other act[s] of a private law character’.¹¹⁵ This issue had, in fact, long been decided: in *Rahimtoola*, Lord Denning held that Pakistan was entitled to State immunity in the restrictive sense, since the 1948 transfer was not a ‘commercial transaction’, but ‘an inter-governmental transaction’ to ‘be solved by inter-governmental negotiations’.¹¹⁶ Although Lord Denning was ahead of his

¹⁰⁷ *Prince Muffakham Jah* (n 5) [268]. ¹⁰⁸ *ibid* [313(2)]. ¹⁰⁹ *Belhaj* (n 3) [147].

¹¹⁰ *ibid* [237]. ¹¹¹ *Prince Muffakham Jah* (n 5) [112].

¹¹² *Jones v Saudi Arabia* [2007] 1 AC 270 (HL) [12]–[13].

¹¹³ *Prince Muffakham Jah* (n 5) [225].

¹¹⁴ *Belhaj* (n 3) [167]. While some have argued that Lord Neuberger’s ‘high level’ standard requires an inter-State transaction to be in writing (see Scott (n 2) 258), this sits uneasily with his citation of in *R (Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872 (CA) as an example of foreign affairs non-justiciability, where an alleged unwritten ‘policy’ of the UK to share intelligence with other States was non-justiciable. ¹¹⁵ *Belhaj* (n 3) [199].

¹¹⁶ *Rahimtoola* (n 96) 422–3.

time in endorsing restrictive State immunity in *Rahimtoola*,¹¹⁷ his application of the relevant test was correct. The nature of the 1948 transfer itself, being an agreement to safeguard funds indefinitely with no apparent commercial or financial character, is at least ambiguous. In such situations, the transfer's purpose becomes relevant in determining its nature,¹¹⁸ and a transfer of property from one State to another to safeguard it from a third State's armed invasion is surely a sovereign or governmental purpose. Moreover, the securing of public funds from aggressors was not the indirect or downstream outcome of the 1948 transfer, but rather its entire purpose. By virtue of its singular purpose, then, the 1948 transfer was an act *jure imperii* between Hyderabad and Pakistan.

The 1948 transfer should thus have been non-justiciable under *Belhaj's* third rule, as formulated by Lord Neuberger and Lord Sumption—it was a high-level inter-State transaction, not a private law agreement. Two reasons were given by Smith J to avoid this conclusion, but both are irrelevant under Lord Neuberger's conception of foreign affairs non-justiciability.

The first reason was that, to resolve Pakistan's claim, it was 'unnecessary for [the court] to decide whether Operation Polo was lawful in international law or not'.¹¹⁹ His understanding, then, was that foreign affairs non-justiciability applied only to issues which required courts to assess the validity or legality of sovereign acts under public international law. However, this reasoning conflates *Belhaj's* third rule with its first and second rules; while the application of the first and second rules are contingent on arguments that sovereign acts are invalid or illegal, the third rule is not. Smith J's reasoning here thus cannot be squared with Lord Neuberger's explicit holding in *Belhaj* that the third rule prevents the interpretation of treaties not incorporated into domestic law.¹²⁰ Treaty interpretation does not require a court to pronounce on the validity or legality of sovereign acts under public international law, and yet Lord Neuberger called it an 'obvious example' of non-justiciability.¹²¹

Importantly, as his citation of the relevant paragraphs in *Shergill* make clear,¹²² Lord Neuberger considered treaty interpretation issues non-justiciable because of a court's limited constitutional competence, not that it was non-justiciable for the lack of a domestic foothold;¹²³ treaty interpretation non-justiciability arises despite the existence of private law rights like those being asserted by Pakistan. Indeed, this was the very form of non-justiciability which should have arisen in *Prince Muffakham Jah*: under

¹¹⁷ cf *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 (CA).

¹¹⁸ *I Congreso del Partido* [1983] AC 244 (HL) 272; *Benkharbouche v Embassy of the Republic of Sudan* [2017] 3 WLR 957 (SC) [58].

¹¹⁹ *Prince Muffakham Jah* (n 5) [313(3)], [319]–[323].

¹²⁰ *Belhaj* (n 3) [123].

¹²¹ *ibid* [123], [237].

¹²² *ibid* [123], citing *Shergill* (n 47) [40], [42]. See also [202], per Lord Sumption, differentiating non-justiciability arising because 'a Treaty operated only on the plane of international law, and could not give rise to private rights in a citizen' from non-justiciability arising because 'a domestic court was incompetent to construe a Treaty'.

¹²³ *Contra* Scott (n 2) 256.

Lord Neuberger's three criteria in *Belhaj*, Smith J's task of constructing the 1948 transfer was not to interpret a private law agreement between Moin and Rahimtoola, but to interpret a treaty or inter-State agreement between Hyderabad and Pakistan.

The second reason given by Smith J, however, sheds light on a deeper concern underlying his conclusion. Pakistan's argument on non-justiciability had to be rejected because it suggested that 'the ordinary private law consequences of a sovereign state's actions do not attach in the proceedings that follow a waiver of sovereign immunity'.¹²⁴ This concern rests on apparently weighty considerations of private justice—it seems intuitively wrong for Pakistan to bring a claim yet object to its background facts being adjudicated, and downright silly for Pakistan to do so but then object to adjudication *in toto*. However, this concern misapprehends foreign affairs non-justiciability as understood from *Buttes Gas* to *Belhaj*, which focuses not on the identity of the parties before the court, or even the official functions those parties once discharged, but instead focuses entirely on the nature of the transaction at issue regardless of the parties to it.¹²⁵ Moreover, these private justice concerns can have weight only if we ignore the theoretical justification for non-justiciability espoused in *Belhaj*, which was to prevent the adjudication of claims which were beyond the court's constitutional competence, since that justification remains relevant even when a foreign State consents to jurisdiction.¹²⁶ *Prince Muffakham Jah*, therefore, rests on a conception of foreign affairs non-justiciability at odds with Lord Neuberger's in *Belhaj*; and the private justice concerns that supported it can only be given weight by disregarding *Belhaj*.

IV. PUBLIC POLICY: A RULE-SWALLOWING EXCEPTION

The public policy exception to foreign affairs non-justiciability came to the fore in *Ukraine v Law Debenture Trust Corpn*.¹²⁷ An English trust company had entered into a trust deed with Ukraine, and the trust was comprised wholly of interest-bearing Eurobond notes subscribed to by Russia. The trust deed, governed by English law with English courts having exclusive jurisdiction, empowered Russia to direct the trust company to enforce Ukraine's obligations to them. When Ukraine defaulted on several of its interest payments, Russia directed proceedings to be brought for breach of contract. In defence, Ukraine pleaded duress under English law, arising from 'massive, unlawful and illegitimate economic and political pressure' exerted by Russia to compel Ukraine to accept financial support from it in the form of, *inter alia*, the Eurobond notes.¹²⁸ The particulars of this duress included Russia's annexation

¹²⁴ *Prince Muffakham Jah* (n 5) [263].

¹²⁵ See (nn 18–21) and accompanying text.

¹²⁶ H Fox and P Webb, *The Law of State Immunity* (3rd edn, Oxford University Press 2013) 70.

¹²⁷ *Law Debenture* (n 6). ¹²⁸ *ibid* [4].

of Crimea and alleged support for Ukrainian separatists. The trust company counterargued that Ukraine's defence had no real prospect of succeeding as it required an investigation into the lawfulness of Russia's sovereign acts, which was caught by foreign affairs non-justiciability. Ukraine responded that Russia's alleged acts fell within the public policy exception, because 'the threat of use of force by one state against another' was 'in violation of a general norm of international law with the status of *ius cogens*',¹²⁹ and so its plea of duress was justiciable.

Ukraine's argument, however, flatly contradicted *Buttes Gas*, the 'principal modern landmark in this area of the law'¹³⁰ which Lord Neuberger and Lord Sumption both affirmed in *Belhaj*.¹³¹ Just as in *Law Debenture*, in *Buttes Gas* both parties relied on English private law claims and defences¹³² (defamation, justification and unlawful means conspiracy), the resolution of which necessarily implicated preliminary questions of territorial sovereignty governed by public international law. Moreover, as in *Law Debenture* in *Buttes Gas* it was the initial plaintiff, *Buttes*, which argued that the proceedings should be considered non-justiciable, in whole if necessary.¹³³

Since in that case non-justiciability won out and no public policy exception was even considered, *Buttes Gas* stands for the proposition that issues involving the use of force, such as aggression or annexation, are generally non-justiciable. As has been said,¹³⁴ subsequent cases continued to endorse *Buttes Gas* even as they developed the public policy exception to non-justiciability. *Kuwait Airways* established that aggressions and annexations, while *prima facie* non-justiciable, may trigger the public policy exception but only if condemned by the Security Council. Likewise, in *Belhaj*, Lord Neuberger and Lord Sumption, citing *Oppenheimer* and *Kuwait Airways* in support, focused on breaches of *jus cogens* norms such as breaches of fundamental human rights and acts of aggression or annexation condemned by the Security Council. This was precisely because acts of aggression and annexation were typically 'obvious examples' of non-justiciable issues,¹³⁵ and because a broader exception encompassing all such acts, even those not condemned by the Security Council, would 'consum[e] the rule' in *Buttes Gas*.¹³⁶

In *Law Debenture*, however, the court was faced with precisely such an act: Ukraine's defence alleged acts of 'aggression and armed conflict' initiated by Russia on Crimea, which Russia itself had blocked the Security Council from condemning. At first instance,¹³⁷ Blair J found Ukraine's defence non-justiciable, noting that the issues involving 'aggression and armed conflict' raised by Ukraine's defence were 'paradigm cases' for the third rule.¹³⁸ He also disagreed with Ukraine's arguments on the public policy exception,

¹²⁹ *ibid* [165]. ¹³⁰ *Belhaj* (n 3) [217], per Lord Sumption. ¹³¹ *ibid* [129], [216]–[220].

¹³² See *Buttes Gas & Oil Co v Hammer* [1975] 1 QB 557 (CA) 575.

¹³³ *Buttes Gas (HL)* (n 10) 938.

¹³⁴ See (nn 24–33, 65–74) and accompanying text.

¹³⁵ *Belhaj* (n 3) [123], [237].

¹³⁶ *ibid* [253].

¹³⁷ [2017] 3 WLR 667 (HC).

¹³⁸ *ibid* [308(x)]–[308(xii)].

on the grounds that, on the facts, ‘the violations [of public international law] are disputed’ and ‘it is of some weight that there is no UNSC resolution’.¹³⁹

The Court of Appeal, however, unanimously overturned Blair J’s decision. Capitalising on the fact that Lord Neuberger’s judgment in *Belhaj* technically left the public policy exception open-ended,¹⁴⁰ the Court invoked the exception by taking into account and balancing six separate factors. An analysis of the Court’s reasoning, however, reveals that the factors it considered departed significantly from those in *Belhaj* and *Kuwait Airways*, drastically widening the public policy exception and thus eroding the core of foreign affairs non-justiciability.

The first category of reasons given by the Court involve the fact and nature of the breaches of public international law alleged by Ukraine, which contradict *Belhaj*. The Court noted that domestic public policy recognised a ‘strong international public policy’ that *jus cogens* norms should be ‘respected and given effect’.¹⁴¹ Since Ukraine had a *prima facie* case that Russia threatened to use armed force against it, this weighed in favour of the exception operating.¹⁴² Though Lord Neuberger had not said that such breaches of *jus cogens* could trigger the exception, the Court thought it ‘significant that [he] did not confine his reasoning to the particular norms relevant in that case, but stated the position more widely by reference to the category of *ius cogens* itself’.¹⁴³ This reasoning, however, forgets that Lord Neuberger, agreeing with Lord Sumption, did not state that all breaches of *jus cogens* norms would trigger the exception.¹⁴⁴ It also neglects the context of Lord Neuberger’s reasoning, in particular his endorsement of *Buttes Gas*, which precludes acts of aggression and annexation not condemned by the Security Council from triggering the exception.¹⁴⁵ The Court also noted that there was nothing ‘unmanageable in the legal standards’ applicable to breaches of *jus cogens* norms, since they were standards of public international law.¹⁴⁶ However, it is unclear how this can be squared with *Buttes Gas*, where the very same issue was said to lack ‘judicial and manageable standards’.¹⁴⁷

A second category of reasons arose from the Court’s concern to be reactive to domestic and foreign State interests. These reasons also contradict *Belhaj*. The Court noted that concerns of ‘constitutional competence’ did not preclude justiciability, since the UK government had publicly condemned Russia’s acts.¹⁴⁸ Neither did ‘comity’, because the interests of Russia and Ukraine cancelled out each other.¹⁴⁹ However, while it used the labels ‘constitutional competence’ and ‘comity’, the Court was evidently considering and weighing domestic and foreign State interests here and concluded that those interests weighed in favour of adjudication. And crucially, none of the Law Lords in

¹³⁹ *ibid* [308(vii)].

¹⁴² *ibid* [164]–[165].

¹⁴⁶ *Law Debenture* (n 6) [178].

¹⁴⁸ *Law Debenture* (n 6) [179].

¹⁴⁰ *Law Debenture* (n 6) [173], [180].

¹⁴³ *ibid* [180].

¹⁴⁴ *Belhaj* (n 3) [168].

¹⁴⁷ *Buttes Gas (HL)* (n 10) 938.

¹⁴¹ *ibid* [180]

¹⁴⁵ *ibid* [129].

¹⁴⁹ *ibid* [176]

Belhaj would have found a dispute justiciable on those grounds. Lord Sumption objected to *ad hoc* deference to domestic or foreign governmental interests: a court must apply ‘its own standards’ to determine a dispute’s justiciability, since ‘[t]he foreign act of state doctrine has never been directed to the avoidance of embarrassment, either to foreign states or to the United Kingdom government in its dealings with them’.¹⁵⁰ While Lord Neuberger and Lord Mance adopted less categorical approaches to non-justiciability, and saw embarrassment to the UK government as ‘a relevant factor’,¹⁵¹ this could only be a factor weighing *against* justiciability—neither contemplated the possibility that domestic or foreign State interests could lean *in favour* of justiciability if the third rule otherwise applied.

Finally, the third category of reasons given by the Court evinced a desire to give effect to private law rights, through private international law’s ordinary rules of jurisdiction and choice of law. The Court noted first that Russia, through the trust company, ‘has chosen to submit to the jurisdiction of the English court’. This appealed to ‘[t]he strong willingness of English courts to apply rule of law standards to do substantive justice between parties to a contract governed by English law’,¹⁵² and so leaned in favour of the public policy exception operating. Second, adjudicating over the dispute would do ‘justice ... between Russia and Ukraine in a private law dispute’,¹⁵³ which also leaned in favour of the exception. This was because Russia (through the trust company) had chosen to bring this claim in English courts, rather than before the International Court of Justice as Ukraine desired, so English courts were the only available fora in which the legal questions surrounding Ukraine’s defence could be resolved.¹⁵⁴ These two reasons both evince the Court’s inclination to give effect to domestic English law rights. However, they are hard to square with Lord Neuberger and Lord Sumption’s holding that only breaches of domestic ‘fundamental principles of public policy’ could trigger the public policy exception.¹⁵⁵ Though the private law rights which the Court sought to protect here were undoubtedly of commercial importance, they scarcely qualify as norms of fundamental domestic public policy on par with those at stake, for example, in *Oppenheimer*.

The upshot of *Law Debenture* seems to be that acts of aggression or annexation, even if not condemned by Security Council Resolutions, may *still* trigger the public policy exception if the balance of State interests and private law values at stake justifies it. This departs from the unbroken consensus from *Buttes Gas* to *Belhaj*, that the exception could only be invoked for breaches of fundamental international or domestic norms, which acts of aggression and annexation not condemned by the Security Council are not. The Court of Appeal’s holding was evidently based, at least in part, on its inclination to favour private rights—adjudicating on Ukraine’s defence would

¹⁵⁰ *Belhaj* (n 3) [241].

¹⁵³ *ibid* [177].

¹⁵¹ *ibid* [104]–[105], [149].

¹⁵⁴ *ibid* [153], [185].

¹⁵² *Law Debenture* (n 6) [175].

¹⁵⁵ *Belhaj* (n 3) [153].

uphold ‘substantive justice’ in a ‘private law dispute’.¹⁵⁶ More specifically, to the Court, since ‘Russia chose to submit any claim by Law Debenture to the jurisdiction of the English court’, it had ‘taken the risk with its eyes open that the court would apply the English law of duress as a substantive matter’—‘as a matter of basic justice’, Russia could not ‘have this contract claim vindicated in an English court without that court proceeding to scrutinise the defence of duress which is arguably available to Ukraine’.¹⁵⁷ Intuitively, this logic is appealing: Russia, having apparently forced Ukraine into an English law agreement subject to the jurisdiction of English courts, should be held to its bargain by being compelled to subject the entirety of its dispute, including Ukraine’s defence, to English courts under English law. Nevertheless, the result of the Court’s decision is stark: the public policy exception now drastically reduces the scope of foreign affairs non-justiciability, even in its paradigm cases involving acts of aggression and annexation.

V. THE SHAKY CONSTITUTIONAL FOUNDATIONS OF FOREIGN AFFAIRS NON-JUSTICIABILITY

Prince Muffakham Jah and *Law Debenture* have chipped away at *Belhaj*’s definition of foreign affairs justiciability: the former decision narrowed the category of non-justiciable inter-State transactions caught by foreign affairs non-justiciability, while the latter broadened the scope of the public policy exception. In both, courts did this explicitly to prevent the obstruction of ordinary (English) private law claims: *Prince Muffakham Jah* preserved the ‘ordinary private law consequences of a sovereign state’s actions’;¹⁵⁸ and *Law Debenture* sought to uphold ‘substantive justice’ in a ‘private law dispute’.¹⁵⁹

Are these decisions justified in effectively departing from *Belhaj*, to give effect to private law rights? They are somewhat troubling from a formal perspective, since *Belhaj* was binding authority. But from an external perspective, one can hardly fault Smith J in *Prince Muffakham Jah* and the Court of Appeal in *Law Debenture* for pivoting toward the ordinary rules of private law and private international law. Enforcing a rule of law without sound theoretical justifications is never an attractive option—and despite the Supreme Court’s best efforts, *Belhaj*’s attempt to define the theoretical foundations of foreign affairs non-justiciability leaves much to be desired.

Foreign affairs non-justiciability is typically justified on two alternative theoretical bases: public international law and domestic constitutional law.¹⁶⁰ Public international law, however, evidently does not support this rule of non-justiciability; as Lord Neuberger and Lord Sumption recognised in

¹⁵⁶ *Law Debenture* (n 6) [175], [177]. ¹⁵⁷ *ibid.* ¹⁵⁸ *Prince Muffakham Jah* (n 5) [263].

¹⁵⁹ *Law Debenture* (n 6) [175], [177].

¹⁶⁰ A Mills, ‘Fear and Mayhem in Equatorial Guinea: Justiciability in Public and Private International Law’ (2007) 66 CLJ 3.

Belhaj, non-justiciability is a common law rule with ‘no international law basis’.¹⁶¹ Domestic constitutional law, on the other hand, just might: many commentators have noted since that *Belhaj* excavated ‘constitutional underpinnings’ for foreign affairs non-justiciability.¹⁶² Yet, *Belhaj* did so only in the broad and unhelpful sense of calling non-justiciability a constitutional rule without adequately explaining why this was so—as Eirik Bjorge and Cameron Miles note, the Court merely defined the rule ‘in terms broadly redolent of the separation of powers’, and so did little ‘beyond identifying the constitutional space in which [it] is said to operate’.¹⁶³ Lord Neuberger’s judgment was thoroughly unhelpful in this regard: he noted that foreign affairs non-justiciability was based on ‘judicial restraint’ and the ‘common law’,¹⁶⁴ but that merely describes the rule without saying anything meaningful about its theoretical foundations. Lord Sumption and Lord Mance, by contrast, explicitly cited the constitutional separation of powers as the basis of non-justiciability. However, a close examination of their reasoning shows not only that they adopted two different understandings of the separation of powers, but also that neither understanding can support foreign affairs non-justiciability on its own—both can only do so if courts make certain non-self-evident assumptions about the nature of inter-State transactions.¹⁶⁵

To Lord Sumption, foreign affairs non-justiciability rested in part on ‘the constitutional separation of powers, which assigns the conduct of foreign affairs to the executive’.¹⁶⁶ This was a categorical understanding of the separation of powers, which distributes ‘legislative’, ‘executive’ and ‘judicial’ functions absolutely and exclusively between different organs of State,¹⁶⁷ which explains why Lord Sumption articulated foreign affairs non-justiciability as a categorical rule. However, it is doubtful that a categorical understanding of the separation of powers could support a rule of non-justiciability which can be set aside on substantive public policy grounds. Instead, one might reason, as Côté J did in the Supreme Court of Canada’s decision in *Nevsun Resources Ltd v Araya* on this issue, that ‘[t]he public importance and fundamental nature of the values at stake cannot render justiciable that which is otherwise not within the judiciary’s bailiwick’.¹⁶⁸ Moreover, a categorical understanding of the separation of powers by itself cannot explain why courts should ever refrain from adjudicating upon issues

¹⁶¹ *Belhaj* (n 3) [151], [200].

¹⁶² See Dickinson (n 4) 17–18; Bjorge and Miles (n 4) 716; Smith (n 4) 25–6; A Sanger, ‘Review of Executive Action Abroad: The UK Supreme Court in the International Legal Order’ (2019) 68 ICLQ 35, 55.

¹⁶³ Bjorge and Miles (n 4) 730–1. ¹⁶⁴ *Belhaj* (n 3) [151].

¹⁶⁵ See W Gummow, ‘The Selection of the Major Premise’ (2013) 2 CJICL 47, 51–4, highlighting the role of these assumptions in ‘act of state’ cases involving foreign intellectual property rights.

¹⁶⁶ *Belhaj* (n 3) [225].
¹⁶⁷ A Kavanagh, ‘The Constitutional Separation of Powers’, Ch 11 in D Dyzenhaus and M Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016) 223–5.

¹⁶⁸ 2020 SCC 5 [301].

involving inter-State transactions. Few matters are categorically ‘legislative’, ‘executive’ or ‘judicial’ in nature:¹⁶⁹ the respective exclusive competences of the executive and judiciary probably cannot be described in greater detail than by saying that the former deals with ‘policy’, while the latter deals with ‘law’. The viability of basing non-justiciability on this understanding of the separation of powers is thus contingent upon characterising issues involving inter-State transactions as exclusively ‘policy’ or ‘legal’ in nature.¹⁷⁰ Neither choice is logically sustainable: it is trite that international disputes have both political and legal elements, and that an issue arising in such disputes does not have less of one element because it has more of the other.¹⁷¹ Thus, basing foreign affairs non-justiciability on a categorical understanding of the separation of powers requires courts to make the non-self-evident assumption that issues involving inter-State transactions are ‘policy’ questions for the executive, and not ‘legal’ questions for the judiciary.

To Lord Mance, on the other hand, foreign affairs non-justiciability was defined by the relative ‘institutional or constitutional competence[s]’ of the executive and the judiciary.¹⁷² Accepting that foreign relations issues have both political and legal elements, Lord Mance thus noted that foreign affairs non-justiciability would involve complex ‘fact- and issue-sensitive’ enquiries, balancing the executive’s expertise and institutional advantages in conducting foreign affairs with those of the judiciary in protecting individual rights.¹⁷³

However, an institutional understanding of the separation of powers also cannot by itself support a conclusion that certain issues involving inter-State transactions should be non-justiciable. For a start, it may be contradictory to acknowledge that inter-State transactions have both political and legal elements and yet insist that courts should sometimes be categorically excluded from addressing such issues. Instead, an institutional understanding of the separation of powers—under which any given branch of government may discharge any of the functions of law making, enforcement and application when it is most well-equipped to do so in the circumstances¹⁷⁴—might be said to demand inter-institutional comity and cooperation, rather than the mutually exclusive zones of competence envisioned by non-justiciability.¹⁷⁵

¹⁶⁹ R Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge University Press 2011) 18; Kavanagh, ‘Separation of Powers’ (n 167) 225–7.

¹⁷⁰ McGoldrick (n 1) 988–9.
¹⁷¹ H Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 2011) 161–8. See R Michaels, ‘Post-critical Private International Law: From Politics to Technique’, Ch 3 in H Muir Watt and D Arroyo, *Private International Law and Global Governance* (Oxford University Press 2014) 63–7 for a similar view in private international law.

¹⁷² Mance (n 1) 756–7.

¹⁷⁴ Kavanagh, ‘Separation of Powers’ (n 167) 230–3.

¹⁷³ *Belhaj* (n 3) [99].
¹⁷⁵ A Kavanagh, ‘Defending Deference in Public Law and Constitutional Theory’ (2010) 126 LQR 223–6, 240–3; cf J King, ‘Institutional Approaches to Judicial Restraint’ (2008) 28 OJLS 409, 420–2.

Moreover, one also cannot support non-justiciability with an institutional understanding of the separation of powers without relying on a questionable assumption about the nature of issues arising from inter-State transactions—just that this time, the choice is not between ‘political’ and ‘legal’ issues, but between ‘public law’ and ‘private law’ issues. After all, in public law, institutional competence considerations may weigh in favour of deference because courts consider themselves secondary decision-makers on these issues;¹⁷⁶ but in private law, the judiciary is generally assumed to be institutionally competent to deal with issues involving private law rights on their merits.¹⁷⁷

Institutional competence concerns can only tell us the amount of deference to be accorded to the executive on a particular issue if first we identify that issue’s nature;¹⁷⁸ but it is unclear whether issues involving inter-State transactions are ‘public law’ issues by virtue of their potential ramifications on international and foreign relations, or ‘private law’ issues because they are elements of or incidental questions to civil claims. Thus, institutional competence concerns can only support deference to the executive on issues involving inter-State transactions if courts first make the non-self-evident assumption that such issues, even in civil disputes, are necessarily public law issues.

Belhaj’s account of the theoretical basis of foreign affairs non-justiciability leaves much to be desired; although Lord Sumption and Lord Mance both cited the constitutional separation of powers as the basis of non-justiciability, they left the link between the two highly ambiguous. One thus fears that *Belhaj*’s attempt to reorient foreign affairs non-justiciability toward domestic constitutional law may not have brought us any closer to sound theoretical answers.

In this regard, there is perhaps something to be learnt from the US’ experience with the American ‘act of state’ doctrine, which inspired Lord Wilberforce’s decision in *Buttes Gas*.¹⁷⁹ Since *Banco Nacional de Cuba v Sabbatino*,¹⁸⁰ American courts and commentators have struggled to define precisely what in the US Constitution demands that doctrine’s existence,¹⁸¹ which has led to difficulties in its application.¹⁸² Unless English courts wish to embark on a similar theoretical wild goose chase, it may be wise to simply abandon the

¹⁷⁶ Kavanagh, ‘Deference’, *ibid* 228.

¹⁷⁷ Mance (n 1) 741 (‘A refusal to adjudicate upon the merits of a civil claim is unusual. Domestic courts are there to adjudicate upon domestic rights and liabilities.’), 756 (‘the nature of ordinary civil claims makes non-justiciability a very rare phenomenon’).

¹⁷⁸ Kavanagh, ‘Separation of Powers’ (n 167) 231.

¹⁷⁹ *Buttes Gas (HL)* (n 10) 936–7.

¹⁸⁰ (1964) 376 US 398.

¹⁸¹ See eg L Henkin, ‘The Foreign Affairs Power of the Federal Courts: *Sabbatino*’ (1964) 64 *ColumLRev* 805, 814–19 (arguing that the ‘constitutional underpinnings’ identified in *Sabbatino* referred to the judiciary’s authority to develop federal common law, and not to institutional competence concerns in matters involving foreign affairs); W Dodge, ‘International Comity in American Law’ (2015) 115 *ColumLRev* 2071, 2092, 2101–2 (arguing that a constitutional justification for the doctrine obscures its true principled underpinnings in comity).

¹⁸² See J Harrison, ‘The American Act of State Doctrine’ (2015) 47 *GeoJIntL* 507, outlining the messy jurisprudence and suggesting that the ‘act of state’ doctrine contains only a rule of validity (akin to *Belhaj*’s first and second rules) and not a rule of abstention (akin to the third rule).

search for the elusive constitutional foundations of foreign affairs non-justiciability now, and admit that we still do not quite know why the rule exists. From this perspective, then, *Prince Muffakham Jah* and *Law Debenture* can hardly be faulted—it is difficult to adhere to the strict letter of *Belhaj*, when theoretical justifications for doing so are weak, and when strong private justice concerns pull in the opposite direction.

VI. CONCLUSION: A PRINCIPLE OF PRIVATE INTERNATIONAL LAW?

Prince Muffakham Jah and *Law Debenture* have narrowed foreign affairs non-justiciability. They have apparently done so to protect private law rights, under private international law's ordinary rules of jurisdiction and choice of law. And, at least from a theoretical perspective, these decisions are hard to fault, given that the ostensible constitutional foundations of foreign affairs non-justiciability excavated in *Belhaj* remain highly elusive.

In these circumstances, we appear to have come full circle to the conclusion FA Mann reached nearly 80 years ago, 'that it is private international law which provides the solution' here.¹⁸³ In other words, issues arising in civil disputes involving inter-State transactions should be dealt with within the framework of private international law, so that private rights can be given due recognition in international disputes. Indeed, despite its flawed constitutional defence of non-justiciability, *Belhaj* itself ultimately adhered to this vision of private international law's reach: the plaintiffs' claims against the UK government could proceed to trial under private tort laws. *Prince Muffakham Jah* and *Law Debenture*, then, merely built on the instinct implicit in *Belhaj*: it is private international law, not public international law or domestic constitutional law, which supplies the answers to difficult issues arising in civil proceedings involving transactions between sovereign States.

But finally, we must ask: how *should* private international law treat these issues? *Prince Muffakham Jah* and *Law Debenture* leave us with a somewhat unsatisfying conclusion: issues involving inter-State transactions should be tried on their merits because there is no clear reason why they should not be. Does this mean that *Buttes Gas* was incorrect, not just in its reasoning but in its outcome? Or are there still good reasons for judicial restraint on such issues, even within private international law? It is suggested that there are indeed reasons why domestic courts should abstain from adjudicating on certain inter-State transactions, deriving from the inherent limits of private international law's processes. Commentators have suggested that *Belhaj*'s first and second rules may be justified, not on the basis of a need to respect foreign sovereignty, but on grounds that domestic courts are ill-equipped to assess the (constitutional) validity or (administrative) legality of foreign

¹⁸³ FA Mann, 'The Sacrosanctity of the Foreign Act of State' (1943) 59 LQR 42, 54–5.

legislative or executive acts through the choice of law process.¹⁸⁴ One can make a similar argument for *Belhaj*'s third rule—foreign affairs non-justiciability—on the basis of the principled limits imposed by private international law on a court's international jurisdiction.

The argument is as follows: private international law may require courts to abstain from adjudicating over certain disputes involving inter-State transactions, not because they *lack* jurisdiction over such dispute, but because it would be unwise and impractical to *exercise* it.¹⁸⁵ In particular, the values underlying doctrines like *forum non conveniens*, which seek to ensure 'the efficient conduct of litigation in an appropriate forum'¹⁸⁶ given 'the practicalities of litigation' in a given dispute,¹⁸⁷ may justify judicial restraint in certain disputes involving inter-State transactions. After all, it may be inconvenient or impractical for domestic courts to adjudicate upon such transactions, because they involve covert facts and witnesses who are foreign government officials, which likely cannot be disclosed or subpoenaed without the relevant foreign State's consent; and because they may be governed by a law (foreign or international) which the court is unfamiliar with.

The difficulties courts may face here are well illustrated by the Court of Appeal's interlocutory decisions in *Buttes Gas*: although Lord Denning initially insisted that there was nothing objectionable in principle about *Buttes* and *Occidental*'s claims based on inter-State transactions,¹⁸⁸ his enthusiasm disappeared when parties applied for the discovery of documents relevant to the territorial dispute, the disclosure of which would be 'contrary to the comity of nations'.¹⁸⁹ These difficulties were also apparent throughout *Prince Muffakham Jah*, where Smith J found himself inundated by evidential issues arising from a covert decades-old transaction; and will likely arise if *Law Debenture* goes to trial, given the obvious challenges involved in uncovering the facts surrounding Russia's annexation of Crimea.

A clearly more appropriate forum for such disputes involving inter-State transactions, therefore, may be the court of the relevant foreign State or even an international tribunal. In these circumstances, the forum's courts should generally stay proceedings, subject only to concerns of substantial justice. In particular, courts may consider that legal or practical unavailability of a private or public law remedy in the alternative forum justifies adjudicating over a *prima facie* non-justiciable issue—and indeed, these reasons lay at the

¹⁸⁴ M Bogdan, 'Private International Law as Component of the Law of the Forum' (2010) 348 RCADI 15, 114; M Teo, 'Public Law Adjudication, International Uniformity and the Foreign Act of State Doctrine' (2020) 16 JPrivIntL 361.

¹⁸⁵ See J Blom, 'Star Wars Storm Troopers, the Next Episode: Lucasfilm in the United Kingdom Supreme Court' (2011) 24 IPJ 15, 25–6, for a similar reinterpretation of act of state and justiciability arguments involving foreign intellectual property issues.

¹⁸⁶ *Abela v Baadarani* [2013] 1 WLR 2043 (SC) [53].

¹⁸⁷ *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192 (SC) [31].

¹⁸⁸ *Buttes Gas (CA)* (n 132) 573–5, refusing to strike those claims out on the basis of non-justiciability. ¹⁸⁹ *Buttes Gas & Oil Co v Hammer (No. 3)* [1980] 3 WLR 668 (CA) 678–9.

heart of the invocation of the public policy exception in *Belhaj*¹⁹⁰ and *Law Debenture*.¹⁹¹

Thus, though the courts in *Prince Muffakham Jah* and *Law Debenture* were right to be concerned with upholding private rights in the disputes before them, it is questionable whether that alone should have justified their lack of judicial restraint. Instead, private international law, which values efficiency in litigation, may itself require a court to abstain from adjudication on disputes involving certain inter-State transactions, because that court is not the most appropriate forum. One might argue that such an approach effectively reproduces foreign affairs non-justiciability on different theoretical foundations, and this would be entirely accurate. But where the law is uncertain, a sound theoretical foundation becomes crucially important: a version of foreign affairs non-justiciability and its public policy exception founded on these principles and values of private international law may lead to clearer and more defensible conclusions on its precise scope and content. And for a rule that, even after *Belhaj*, still continues to be plagued by tremendous uncertainty, clarity and precision are much-needed virtues.

¹⁹⁰ *Belhaj* (n 3) [30], [102], [262].

¹⁹¹ *Law Debenture* (n 6) [153], [177], [185]–[186].