Torture and the Act of State Doctrine(*)

Prof. Satvinder S. Juss(**)

Professor of Law, Dickson Poon School of Law
Kings College London, UK

Abstract

This paper discussed the origin of the doctrine of judicial self-restraint where a defence of 'Act of State' is raised by a government on grounds of state sovereignty. The older cases raised international boundary and inter-state law issues. These could arise from a dispute over the territorial waters. Lord Wilberforce enunciated the principle as one where, "the courts will not adjudicate upon acts done abroad by virtue of sovereign authority". Lord Wilberforce had explained how, 'the so-called Act of State doctrine … is traditionally limited to governmental action within the territory of the respective state.' He had said that judicial self-restraint 'rather follows from the general notion that national courts should not assume the functions of arbiters of territorial conflicts between third powers even in the context of a dispute between private parties.'

But discomfiture in judicial circles with the foreign act of state doctrine nonetheless remained. Paul Daly has described as the "so-called 'political question' doctrines" but where "[n]o definition has common currency, which makes discussion difficult and increases the risk of attacking a straw man."Writing in 2002, Lawrence Collins has said that: "[t]he idea that some matters are simply not justiciable is not one which comes easily to lawyers and judges. But in the field of foreign affairs it is an idea which has gained much currency ....." It arises because of,"what may be described as sensitivity to foreign policy interests, and certainly not deference to the views or objectives of the executive".

This Paper discussed the question in relation to the case of Belhaj which came before the UK Supreme Court in 2018, because it raised the timely issue whether, outside of the area of inter-state boundary disputes between nations, the 'act of state' doctrine could be invoked for a violation of a fundamental

(*) Paper presented at the kilaw 6th Annual International Conference 1-2 May 2019, Seventh Session: The Sovereignty of States and Emerging Challenges.

(**) The author is indebted to the valuable research assistance provided by Emily Campbell in the preparation of this chapter.

human right – for example an act of state torture. The UK Supreme Court has now given an emphatic and resounding answer to that question. This Paper discusses the implications of this decision, particularly in the context of national security concerns arising from terrorist activities and asks whether the sovereign power of the State to protect its citizens from terrorism has been weakened by this decision.

Key words: Torture, Justiciability, Act of State, Belhaj, Human Rights.

Introduction

In May 2018 the British Government issued, "one of the most shaming, self-abasing apologies ever made in the House of Commons, indeed arguably in any western legislature". This is when "the attorney general read the prime minister's statement saying sorry for Britain's complicity in the abduction of a free man to live through six years of imprisonment and torture at the hands of a dictator, through which we hoped to gain information"(1).

Malcolm Rifkind, a former Home Secretary, immediately called for a parliamentary inquiry into the rendition(2). The man in question was Libyan national, *Abdul Hakim Belhaj,* a member of the Libyan Islamic Fighting Group ('LIFG') set up two decades ago to fight Colonel Gaddafi. *Belhaj* was not alone in his alleged mistreatment. With him also was a man known as "Sami al-Saadi and his family [who] were abducted from the far east to Gaddafi's interrogation and torture cells in Tripoli in 2004". In his case, however, "[t]he British government paid £2.2m to settle a damages claim brought by al-Saadi and his family." *Belhaj* refused to settle "unless he receive[d] an apology"(3).

The British courts, under the watchful eye of the British press which refused to let the story die, piled on the pressure on the executive branch of government. In late 2017, Irwin J. in the High Court, in reviewing the decision not to prosecute state officials, ruled that jurisdiction existed to consider closed material proceedings(4).

In May 2018, just before the apology was issued, the Judge had to deal with the "twenty identified passages"(5), where remarkably, 'privilege' had wrongly not been claimed. He was left to remind everyone how the, "case connects national security, international relations, difficult jurisdictional questions, the use of closed proceedings in a new area(6), and it is this which is the subject-

(1) Will Hutton, *"In the Belhaj case, Britain set aside the rule of law and moral principles",* The Guardian, 13 May 2018.

(2) Nadia Khomani*, "Abdel Hakim Belhaj rendition: ex-minister calls for inquiry"* The Guardian, 12 May 2018.

(3) Nick Hopkins & Richard Norton Taylor, "Blair government›s rendition policy led to rift between UK spy agencies", The Guardian, 31st May 2016 (Available at https://www.theguardian.com/uk-news/2016/may/31/revealed-britain-rendition-policy-rift-between-spy-agencies-mi6-mi5).

(4) *Belhaj & Anor v Director of Public Prosecutions* (DPP) [2017] EWHC 3056 (Admin) (01 December 2017). Irwin J. was mindful that, "[t]he most important problem" with closed material proceedings, "is that, even if justice is being done, it cannot be seen to be being done".

(5) *Belhaj & Anor v Director of Public Prosecutions & Ors* [2018] EWHC 977 (Admin) (03 May 2018) at para 18. He ruled that, "the twenty identified passages of 'underclaimed' privilege were errors" and "were not an attempt at 'cherry picking'", at what should be disclosed.

(6) Ibid. at para 14.

matter of discussion here. It is noteworthy that the alleged torture here was by foreign officials (albeit with British complicity), in a foreign state, at the behest of another foreign government, involving someone who was a foreign national.

For the courts, the question was traditionally a political one because of the sensitivity to foreign policy relations, in circumstances where the legal validity of 'foreign acts of state' could not be judicially assessed in the absence of known judicial or manageable standards, making such a claim in jurisdictional terms, a 'non-justiciable' one.

As against this, torture was internationally proscribed, and if relief were to be refused by a domestic court, there was no international forum with jurisdiction to do so. Added to this, the 'act of state' doctrine itself was of uncertain scope and definition. Its application was often a matter of pure speculation. If the doctrine itself was vague it could scarcely provide a sound basis for legal judgment. To what extent these arguments still held good was the legal question in *Belhaj*.

The macabre tale of *Abdul Hakim Belhaj* is best recounted in the UK Supreme Court's landmark judgment of January 2017(7). In February 2004, whilst living in China, *Mr. Belhaj* and his wife, *Mrs Boudchar*, a Moroccan national, set out to claim asylum in the United Kingdom. They never did. Chinese officials detained them. They put them instead on a flight to Kuala Lumpur. There, after being held for two weeks by the Malaysian authorities, they were in March "allowed to leave for the United Kingdom but were required to go via Bangkok".

Again, they never did. In another bizarre twist, they were in Bangkok, "taken off the aircraft by Thai officials and delivered to agents of the United States". They were then flown to Libya in a US-registered aircraft, "said to have been owned by a CIA front company" and in Libya taken to Tajoura prison. *Mrs Boudchar* was released some three months later but *Mr Belhaj* was not. He was held successively at Tajoura and Abu Salim prisons for six years.

He was then just released in March 2010. In 2013 they both took legal action. Both alleged torture and serious mistreatment by US and Libyan officials in Libya. Both alleged that the British government were complicit in what happened to them. They did not claim that British officials were directly involved in their rendition and torture. What both claimed was that information

(7) see especially, Lord Sumption in *Belhaj & Anor v Straw & Ors* (Rev 1) [2017] UKSC 3 (17 January 2017) at para 33 at para 177.

about their detention in Malaysia, from where they were about to board a flight to London, was passed by the United Kingdom's Security Intelligence Service ('SIS') to the Libyan intelligence services. The SIS then assisted the rendition flight with transit facilities at the British-owned, but American operated base, at Diego Garcia in the Indian Ocean. The defendants included the intelligence services, the departments of state responsible for them, the then Foreign Secretary Mr Straw, and Sir Mark Allen, who was a senior SIS official. If in May 2018, therefore, there was an apology by the UK government to give, it would appear that there was much to apologise for.

The Foreign Act of State Doctrine

The judicial story begins in December 2013. Once legal action was initiated events moved fast. In the High Court(8) Simon J. took strict view. He endorsed the orthodox position. This was a political question and it "has the potential to jeopardise this country's international relations and national security interests," because there will be "the perception that a forensic investigation of what occurred within the territory of a foreign state is an illegitimate interference with that state's internal affairs"(9).

He held that the domestic courts could not get into political questions. This was an Act of State at the behest of the US government in Libya. The claims raised were not justiciable in a court of law. Ultimately, they were for the UK government of the day. The "sensitivity of any investigation into the conduct of those said to be acting on behalf of the United States outside the jurisdiction of the United States"(10) means that with respect to, "the acts alleged to have been carried out by officials of China, Malaysia, Thailand and Libya in those countries, … the act of state doctrine applies and such claims are non-justiciable."

In fact, even if a court of law wished to get into such questions, there were no "'judicial or manageable', or 'clear and identifiable' standards by which such acts may be judged" when considering "the activity of a foreign state on its own territory" with respect "to the legal validity of those acts"(11).

In short, the claims were "only justiciable in so far as they rely on allegations

(8) *Belhaj & Anor v Straw & Ors [2013] EWHC 4111* (QB) (20 December 2013) (Available at *http://www.bailii.org/ew/cases/EWHC/QB/2013/4111.html*).
(9) Ibid., para 145.
(10) Ibid., para 145.
(11) Ibid., at para 146.

of negligence"[12], but here too Simon J's strict approach rejected them on grounds that, "none of the locations where the Claimants allege they were detained, or from where they allege they were transferred, was under British control". In fact, "[t]he alleged detentions and transfers are said to have involved, or to have resulted from, the actions of agents of foreign states".

Indeed, even the liability of UK officials' for 'misfeasance in public office' and for 'negligence' arose from actions of foreign states. Moreover, the places where the Claimants alleged injuries occurred were also not under United Kingdom control. On top of this, "the Claimants are not, and never have been UK nationals, did not have the right to enter or remain in the United Kingdom and were not resident within the United Kingdom during the relevant period"[13]. Why any of this put the adjudication of these claims beyond the reach of the courts is not clear.

In fact, Samuel Shepson has questioned how, "[i]n this case, the court found that one formulation of the act of state doctrine, which focuses on cases concerning the legislative or executive acts of other states, would compel the court to hold the dispute non-justiciable"[14].

Nevertheless, change was afoot. And in a big way. Some six-months after this decision, as the pages of this journal have previously recounted, the Supreme Court considered the lawful parameters of 'justiciability' in a case involving a foreign religion. In *Shergill*[15], it explained how the concept "refers to a case where an issue is said to be inherently unsuitable for judicial determination by reason only of its subject matter"[16].

Such cases, however, were generally limited and fell into one of two categories. The first was where the issue was "beyond the constitutional competence assigned to the courts under our conception of the separation of powers." Here the "paradigm cases are the non-justiciability of certain transactions of foreign states and of proceedings in Parliament". The second involved "issues of international law which engage no private right of the claimant or reviewable question of public law." The latter were not justiciable in the abstract, but "must nevertheless be resolved if their resolution is necessary in

(12) Ibid at para 145 and 152 (3).

(13) Ibid., at para 133.

(14) Samuel Shepson, "*Jurisdiction in Complicity Cases: Rendition and Refoulement in Domestic and International Courts"*, Columbia Journal of International Law (2015, vol. 53, pp. 701-751) at p. 733.

(15) *Shergill & Ors v Khaira & Ors* [2014] UKSC 33 (11 June 2014) (Available at *http://www.bailii.org/uk/cases/UKSC/2014/33.html*) For a discussion , see Satvinder Juss *"Back to the future: justiciability, religion, and the figment of 'judicial no-man's land*" [2016] Public Law, April , pp. 198-206.

(16) *Shergill & Ors v Khaira & Ors* [2014] UKSC 33 (11 June 2014) at para 44.

order to decide some other issue which is in itself justiciable"[17].

The Supreme Court in *Shergill* eschewed a strict approach. It was clear that, "the boundaries of the category of 'transactions' of states which will engage the doctrine now are a good deal less clear today than they seemed to be forty years ago"[18]. Simon J.'s decision in *Belhaj,* whether a domestic court would ever be allowed to adjudicate upon any sovereign or *jure imperii* act committed by a foreign state anywhere abroad now became less assured and clear-cut.

It accordingly now fell to the Court of Appeal in 2014[19] to acknowledge, in the words of Lloyd Jones LJ, that the courts had nothing to fear because, "a fundamental change has occurred within public international law". There "has emerged a system which includes the regulation of human rights by international law" and which is "reflected in a growing willingness on the part of courts in this jurisdiction to address and investigate the conduct of foreign states and issues of public international law"[20].

The claims by *Mr. Belhaj* and his wife, *Mrs Boudchar*, were of "particularly grave violations of human rights" concerning, "[t]he abhorrent nature of torture"[21]. Moreover, the "proceedings are either [against] current or former officers or officials of state in the United Kingdom or government departments or agencies"[22], such that, "[t]hey are not entitled to any immunity before the courts in this jurisdiction".

In fact, contradicting Simon J's *dictum*, "this is not a case in which there is a lack of judicial or manageable standards" but that, "[o]n the contrary, the applicable principles of international law and English law are clearly established. The court would not be in a judicial no man's land"[23].

Indeed, in a bold pitch for the observance of the rule of law, Lloyd LJ stridently declared that, "the stark reality is that unless the English courts are able to exercise jurisdiction in this case, these very grave allegations against the executive will never be subjected to judicial investigation." Given that, "there is, so far as we are aware, no alternative international forum with

(17) Ibid., at paras 41- 43.
(18) Ibid at para 42.
(19) see Belhaj & Anor v Straw & Ors [2014] EWCA Civ 1394 (30 October 2014). URL: *http://www.bailii.org/ew/cases/EWCA/Civ/2014/1394.html*
(20) Ibid., at para 115.
(21) Ibid., at para 116.
(22) Ibid., at para 117.
(23) Ibid., at para 118.

jurisdiction over these issues" unless the court heard the claims, "these very grave allegations would go uninvestigated and the appellants would be left without any legal recourse or remedy"[24]. This was the reality in the cold light of day. The Court of Appeal had no qualms in recognizing it.

The scene was set for the Supreme Court. In their January 2017 decision[25], their Lordships did not mince their words. All referred to the imprecise and indeterminate nature of the foreign act of state doctrine. Lord Mance described the "'silhouette-like' nature of doctrine"[26], drawing from what the Court of Appeal in *Yukos v Rosneft Oil* had said in 2012, namely, "[t]he important thing is to recognise that increasingly in the modern world the doctrine is being defined, like a silhouette, by its limitations, rather than to regard it as occupying the whole ground save to the extent that an exception can be imposed"[27].

His Lordship also referred to Dr Francis Mann, who in his 1986 book[28] had lamented how, "[p]ublic policy dominates one of the most difficult and most perplexing topics which, in the field of foreign affairs, may face the municipal judge in England: the doctrine of the foreign act of State displays in every respect such uncertainty and confusion and rests on so slippery a basis that its application becomes a matter of speculation".

Lord Neuberger said that the doctrine, "has all the advantages and disadvantages of a principle that has been developed on a case by case basis by judges over the centuries"[29]. Lord Sumption noted how, [t]he English decisions have rarely tried to articulate the policy on which the foreign act of state doctrine is based and have never done so comprehensively"[30]. In an Australian decision, Perram J. described how, "beyond the certainty that the (doctrine) exists there is little clarity as to what constitutes it"[31].

Academics have been no less critical. Matthew Nicholson mused how, "[v]

(24) Ibid., at para 119.
(25) Belhaj & Anor v Straw & Ors (Rev 1) [2017] UKSC 3 (17 January 2017). URL: *http://www.bailii.org/uk/cases/UKSC/2017/3.html*
(26) Ibid., at para 44.
(27) *Yukos v Rosneft Oil Co. (No.2) [2012] EWCA CIV 855; [2014] QB 458 (at para 115).*
(28) F. A. Mann, Foreign Affairs in English Courts, (OUP, 1986) where he uses this description in the introduction to the chapter entitled 'The Foreign Act of State'. This has since been published in the Oxford Scholarship Online in March 2012 and is available at: http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198255642.001.0001/acprof-9780198255642.
(29) Ibid., at para 118.
(30) Lord Sumption at para 225.
(31) Perram J. in *Habib v Commonwealth* [2010] FCAFC 12 at para 38.

ague and undefined legal doctrines that are nevertheless determinative present a paradox; how can doctrines whose content, scope and application are uncertain lead to a legal judgment?"[32] Matthew Alderton observed how, "[c]ommon law judges have historically taken an indifferent, and at times outwardly hostile, view to the examination of issues with 'international significance' in domestic courts.

The reluctance of the judiciary to adjudicate upon such issues is founded on what are considered the axiomatic principles of state sovereignty, the separation of powers and the comity of nations. In sum, it has been the case that the judiciary has traditionally abstained from adjudicating upon issues which may impact upon the relations between states — that being the duty and province of the executive arm of government. Although the foundations of this practice are ostensibly sound, the judicial application of these principles to cases that contain complex factual and legal questions of a transnational nature often creates confusion and leads to inconsistent decision-making"([33])

The concept of Justiciability

It was amidst such pronounced skepticism of the doctrine that the 'justiciability' of the foreign act of state doctrine ultimately fell to be decided. What made the task easier for the UK Supreme Court was the allegation of torture against the UK government. The Courts could not be seen to be turning their backs on something so egregious. Lord Mance explained matters cautiously: "[w]hether an issue is non-justiciable falls to be considered on a case-by-case basis.

Considerations both of separation of powers and of the sovereign nature of foreign state or inter-state activities may lead to a conclusion that an issue is non-justiciable in a domestic court …." In fact, "… in deciding whether an issue is non-justiciable, English law will have regard to the extent to which the fundamental rights of liberty, access to justice and freedom from torture are engaged …"[34] Of course, in Lord Neuberger's words[35], there may be "a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it" so that "the courts of this country will not interpret or question dealings between sovereign states".

(32) Matthew Nicholson, *"The Political Unconscious of the English Foreign Act of State and Non-Justiciability Doctrine(s)*" Int'L & Comp. Law Quarterly (Volume 64, Issue 4, pp. 743-781) at p. 744.
(33) Matthew Alderton, Matthew, *"The Act of State Doctrine: Questions of Validity and Abstention from Underhill to Habib",* [2011] Melbourne Journal of International Law (2011, Vol. 12, Issue 1,) see, Introduction On-line at at http://www5.austlii.edu.au/au/journals/MelbJIL/2011/1.html.
(34) Ibid., at para 11(iv)(c).
(35) Ibid., at para 123.

The "[o]bvious examples are making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory"[36]. The courts of this country also "will not, as a matter of judicial policy, determine the legality of acts of a foreign government in the conduct of foreign affairs." In the same way, "international treaties and conventions, which have not become incorporated into domestic law by the legislature, cannot be the source of domestic rights or duties and will not be interpreted by our courts." The rationale for this is, "that domestic courts should not normally determine issues which are only really appropriate for diplomatic or similar channels"[37]. Such a rule "is based on judicial self-restraint, in that it applies to issues which judges decide that they should abstain from resolving …. It is purely based on common law, and therefore has no international law basis, although … its application (unsurprisingly) can be heavily influenced by international law"[38].

The origin of the doctrine of judicial self-restraint is itself judge-made, as the *Buttes Gas* case shows[39]. The facts there were quite different They raised international boundary and inter-state law issues. These arose from a dispute over the territorial waters of the emirate of Sharjah around the island of Abu Musa in the Persian Gulf. When Lord Wilberforce enunciated the principle that "the courts will not adjudicate upon acts done abroad by virtue of sovereign authority"[40] he drew upon the US Supreme Court's decisions in *Underhill v Hernandez*[41] and *Oetjen v Central Leather Co*[42], which provided the foundation for the act of state doctrine in the United States[43].

In *Buttes Gas*, Lord Wilberforce had, "quoted i*n extenso* from a letter written by the Legal Adviser to the US Department of State," that "issues relating to disputed territorial jurisdiction should be analysed by reference to 'the so-called Act of State doctrine which is traditionally limited to governmental action within the territory of the respective state', and arguing that judicial self-restraint 'rather follows from the general notion that national courts should not assume the functions of arbiters of territorial conflicts between

(36) Here Lord Neuberger referred to Lord Pearson's judgment in *Nissan v Attorney General* [1970] 237, which however concerned a Crown act of state, but where the remark was none the less equally apposite to the foreign act of state doctrine.
(37) Lord Neuberger here referred to *Shergill v Khaira* [2015] AC 359 paras 40 and 42)."
(38) Ibid., at para 151.
(39) *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888
(40) Ibid., at pp 933-934.
(41) *Underhill v Hernandez* 168 US 250 (1897).
(42) *Oetjen v Central Leather Co* 246 US 297 (1918).
(43) per Lord Sumption at para 219 of Belhaj.

third powers even in the context of a dispute between private parties' (p 936B-C). In essence, this was the argument that Lord Wilberforce accepted"[44].

But discomfiture in judicial circles with the foreign act of state doctrine nonetheless remained. Paul Daly has described as the "so-called 'political question' doctrines" but where "[n]o definition has common currency, which makes discussion difficult and increases the risk of attacking a straw man"[45]. Writing in 2002, Lawrence Collins has said that: "[t]he idea that some matters are simply not justiciable is not one which comes easily to lawyers and judges.

But in the field of foreign affairs it is an idea which has gained much currency as a result of constitutional doctrine in the United States, and as a result of its adoption by the House of Lords in the *Buttes Gas* case"[46]. It arises because of, "what may be described as sensitivity to foreign policy interests, and certainly not deference to the views or objectives of the executive"[47]. Yet, as we have seen, learned opinion has up to now been divided as to its proper foundation.

The question raised in *Belhaj* was a timely one because it asked whether outside of the area of inter-state boundary disputes between nations, the 'act of state' doctrine could be invoked for a violation of a fundamental human right such as an act of state torture. The Supreme Court has now given an emphatic and resounding answer to that question.

Tolerating Torture

Torture, said the UK Supreme Court, was different. Lord Sumption recognized a proper role for the foreign Act of State doctrine, just as Lord Mance had done, in that, "[i]f a foreign state deploys force in international space or on the territory of another state, it would be extraordinary for an English court to treat these operations as mere private law torts giving rise to civil liabilities for personal injury, trespass, conversion, and the like"[48]. This is because, "[o]nce the acts alleged are such as to bring the issues into the 'area of international dispute' the act of state doctrine is engaged"[49]. However, this was a far cry

(44) per Lord Mance in *Belhaj* at para 57.
(45) Paul Daly, "*Justiciability and the 'political question' doctrine"* Public Law, (2010, January, pp.160-178) at p. 160.
(46) Lawrence Collins, *"Foreign Relations and the Judiciary"* Int'l & Comp. Law Quarterly (Vol. 51, July 2002, pp. 485-510) at p. 497.
(47) Lawrence Collins, *"Foreign Relations and the Judiciary"* Int'l & Comp. Law Quarterly (Vol. 51, July 2002, pp. 485-510) at p. 510.
(48) Here Lord Sumption referred to Lord Wilberforce in *Buttes Gas* (p 931D-E).
(49) Ibid., at para 234.

from a domestic court tolerating torture by its own state officials because(50), "[t]he purpose of the foreign act of state doctrine is to preclude challenges to the legality or validity of the sovereign acts of foreign states".

But, "[i]t is not to protect English parties from liability for their role in it". Although, this "[i]n itself,…would not prevent them from taking incidental advantage of the foreign act of state doctrine" and indeed this was known to have happened in a case where British officials took advantage of the doctrine when they assisted in military action overseas by a foreign sovereign(51) the stark reality was that, "torture is different". Torture was, "by definition an act of a public official or a person acting in an official capacity"(52).

Moreover, the United Kingdom was required under the Torture Convention, "to criminalise not only torture (as defined) but acts constituting complicity in torture"(53). Against this background, Lord Sumption was able to rule how "it would be contrary to the fundamental requirements of justice administered by an English court to apply the foreign act of state doctrine to an allegation of civil liability for complicity in acts of torture by foreign states" (54). This is because "[r]espect for the autonomy of foreign sovereign states, which is the chief rationale of the foreign act of state doctrine, cannot extend to their involvement in torture, because each of them is bound *erga omnes* and along with the United Kingdom to renounce it as an instrument of national or international policy and to participate in its suppression".

Otherwise, one would have the paradoxical result whereby, "the only point of treating torture by foreign states as an act of state would be to exonerate the

(50) Lord Sumption, at para 266.

(51) Lord Sumption gave the example of *R (Noor Khan) v Secretary of State for Foreign Affairs* [2012] EWHC 3728 (Admin).

(52) Lord Sumption here drew attention to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984* (hereafter the 'Torture Convention)Article 1 of which states: "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".

(53) Lord Sumption here referred to Article 4 of the Torture Convention which states that: "1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature".

(54) Lord Sumption at para 262

defendants from liability for complicity". The plain fact here was that, "[t] he defendants are not foreign states. Nor are they the agents of foreign states. They are or were at the relevant time officials and departments of the British government. They would have no right of their own to claim immunity in English legal proceedings, whether *ratione personae* or *ratione materiae*([55].

A Pyrrhic Victory?

The decision in *Belhaj* follows logically and inexorably from *A(FC)*[56]. However, in that case, evidence had been obtained through torture by a foreign state but *without* the complicity of the British authorities. Lord Hoffman had no doubt that, "[t]he use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it"[57] and that "the rejection of torture by the common law has a special iconic importance as the touchstone of a humane and civilised legal system"[58]. Yet, what was different in *A(FC)* was that the Secretary of State, "does not contend ….that evidence obtained from third parties by torture in the United Kingdom would also be admissible. He accepts that it would not. But he submits that the exclusionary rule is confined to cases in which the torture has been used by or with the connivance of agents of the United Kingdom…"[59], which was not the case there. In *Belhaj*, of course, torture was undertaken allegedly with the 'connivance of agents of the UK'. Indeed, there was an explicit allegation of UK complicity in foreign torture.

Where *Belhaj* goes further than the *A(FC)* case, therefore, is in its unequivocal rejection of Lord Hoffman's *obiter* remark that, "there may be cases in which he [ie the Home Secretary] is required to act urgently and cannot afford to be too nice in judging the methods by which the information has been obtained, although I suspect that such cases are less common in practice than in seminars on moral philosophy[60].

Belhaj suggests that such cases may not after all be less common than had been assumed a decade ago. For this reason, *Belhaj* helps re-emphasise age-old values of constitutionalism, by placing the onus of controlling the Executive firmly on the Judiciary, and reminding us of Lord Griffiths' adage, expressed

(55) Lord Sumption does go onto say that (at para 262) that, "On the other hand, they would be protected by state immunity in any other jurisdiction, with the result that unless answerable here they would be in the unique position of being immune everywhere in the world. Their exoneration under the foreign act of state doctrine would serve no interest which it is the purpose of the doctrine to protect."

(56) *A & Ors v. Secretary of State for the Home Department [2005] UKHL* 71 (8 December 2005)

(57) Ibid., at para 82

(58) Ibid., at para 83

(59) Ibid., at para 89.

(60) Ibid., at para 93.

in more confident times that, "... the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law"(61).

Belhaj could not have come too soon. This is because in the wake of the 9/11 attacks, as the ill-fated 'War on Terror' has spread from beyond the USA(62) to other parts of the world(63), counter-terrorist measures have posed ever new challenges for the rule of law. Stalwart academics have been at the forefront of reminding us, as Loiuse Arbour has done, that, "[t]he entire system of abductions, extra-legal transfers and secret detentions is a complete repudiation of the law and of the justice system. No state resting its very identity on the rule of law should have recourse or even be a passive accomplice to such practices"(64).

Torture is particularly insidious. As John T. Parry explains, "modern torture as a practice is hidden. Sometimes this hidden quality is more official than actual because rarely does torture remain secret from all. Yet it stays hidden, in the sense that it remains outside or at the margins of prevailing political discourse. One reason for the ability of modern torture to be hidden while in plain sight may be its frequently nationalist and colonial character. Torture often happens offstage, overseas, during military and intelligence operations, and the victims are not members of the community; they are others, foreign; they are enemies, not friends"(65). *Belhaj* helps us understand how it is this feature which has led to the state sanctioning of torture, enabled by rational bureaucratic structures, and in which the law has often been thoroughly complicit.

Yet, there remains the tantalizing question of whether *Belhaj* may have come at too high a price. It may makes effective counter-terrorism in the national self-interest more difficult. As a forum, the judicial process is not well-suited for the management of national security issues. Yet, *Belhaj* now requires the courts to engage in it. Eyal Benvenisti was not wrong when he said that, "the political branches have no incentive to bestow legitimacy on the international

(61) *R v Horseferry Road Magistrates Court Ex parte Bennet* [1993] 3 All ER 138 at para 61-62. Quoted with approval in *Jamison, R v [2007] NICC 38* at para 28.
(Available at *http://www.bailii.org/nie/cases/NICC/2007/38.html)*

(62) See, Satvinder S. Juss, Human Rights & America's War on Terror (Routledge, October 2018 (ed.)

(63) See, Satvinder S. Juss, Beyond Human Rights & the War on Terror (Routledge, November 2018 (ed)).

(64) Louise Arbour, *"In our name and on our behalf"* European Human Rights Law Review (2006, Vol. 4, pp. 371-385) at p.377.

(65) John T Parry, 'The Shape of Modern Torture, Extraordinary Rendition and Ghost Detainees,' Melbourne Journal of International Law (2005, Vol. 19, Issue 6 (2),) 516 (see on-line version under 'Modern Torture as Hidden Practice' at http://www5.austlii.edu.au/au/journals/MelbJIL/2005/19.html.

legal system, in which their State is only one actor among numerous actors, many of whom do not face judicial restrictions". He has suggested that, "their only interest is the judicial vindication of their action abroad".

This has not been difficult to find because, "[w]ere a court to decide against the government in a foreign affairs matter, officials may refuse to comply, and the government many even restrict the court's jurisdiction". If that happened, then "such decisions could expose judges to the official and public critique of jeopardizing national interests and assisting enemies and rivals". For this reason, "[j]udges have …readily accepted this dictate" of a restriction on their powers from the political branches of government(66).

All too often what has been expected of the courts is supine judicial acquiesce in illegal state acts. The pressures which governments may impose on judicial authorities are clear from another case, of five other Libyans in *Kamoka*(67).

Like *Belhaj*, they too were associated with the LIFG. They too had all sought asylum in the United Kingdom(68). In an insightful and revealing analysis, Flaux LJ, referred to the shifting allegiances of the UK government when, "[f]ollowing the 9/11 terrorist attacks, the UK government formed an increasingly close relationship with the Qadhafi regime" so that [i]t was only in October 2005, during that period of rapprochement with the regime, that the LIFG was proscribed as a terrorist organisation in the United Kingdom"(69), thus placing the five Libyans seeking asylum in the UK in an invidious position.

Ultimately, what *Belhaj* help us do is confront our understanding of 'terrorism.' Federico Fabbrini characterized it as an "emergency" which he says is "the condition that exists when a democracy affronts a momentary threat to effective sovereignty without however facing any existential danger: a condition, hence, falling somewhere between ordinary conditions and conditions of war or crisis"(70). This author has elsewhere argued(71) that terrorism is not some

(66) Eyal Benvenisti, 'Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on 'The Activities of National Courts and the International Relations of their State,' European Journal of International Law (1994, vol. 5, pp. 423-439) at p 426.

(67) *Kamoka & Ors v Security Service & Ors* [2017] EWCA Civ 1665 (25 October 2017).
URL: *http://www.bailii.org/ew/cases/EWCA/Civ/2017/1665.html.*

(68) *Ibid* at para 3. They had brought a claim damages against the various defendants for the torts of false imprisonment, trespass (to person and property) and misfeasance in public office" (para 1).

(69) Ibid., at para 4.

(70) Federico Fabbrini, *'The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice'* (2009) 28 Yearbook of European Law, (January 2009, Volume 28, Issue 1, pp. 664–697) at p. 664-665.

(71) Satvinder Singh Juss, *"Terrorism and the Exclusion of Refugee Status in the UK*" Journal of Conflict & Security Law (Vo. 17, No. 13, Winter 2012, pp. 465-500) at p. 468.

"fiendish force" but "a narrative of normal historical conflict," which must be understood as in times past when "[g]overnments spoke of insurrections, political assassinations and civil wars that were accepted as epoch-making." *Belhaj*, as it weaved its way through the courts, contains an implicit recognition of this mundane fact.

References

- Eyal Benvenisti, 'Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on 'The Activities of National Courts and the International Relations of their State,' European Journal of International Law (1994, vol. 5).
- F. A. Mann, Foreign Affairs in English Courts, (OUP, 1986) where he uses this description in the introduction to the chapter entitled 'The Foreign Act of State'. This has since been published in the Oxford Scholarship Online in March 2012 and is available at: http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198255642.001.0001/acprof-9780198255642.
- Federico Fabbrini, *'The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice'* (2009) 28 Yearbook of European Law, (January 2009, Volume 28, Issue 1).
- John T Parry, 'The Shape of Modern Torture, Extraordinary Rendition and Ghost Detainees,' Melbourne Journal of International Law (2005, Vol. 19, Issue 6 (2),) 516 (see on-line version under 'Modern Torture as Hidden Practice'. at http://www5.austlii.edu.au/au/journals/MelbJIL/2005/19.html).
- Lawrence Collins, *"Foreign Relations and the Judiciary"* Int'l & Comp. Law Quarterly (Vol. 51, July 2002).
- Louise Arbour, *"In our name and on our behalf"* European Human Rights Law Review (2006, Vol. 4).
- Matthew Alderton, Matthew, *"The Act of State Doctrine: Questions of Validity and Abstention from Underhill to Habib",* [2011] Melbourne Journal of International Law (2011, Vol. 12, Issue 1,) see, Introduction On-line at at http://www5.austlii.edu.au/au/journals/MelbJIL/2011/1.html.
- Matthew Nicholson, *"The Political Unconscious of the English Foreign Act of State and Non-Justiciability Doctrine(s)*" Int'L & Comp. Law Quarterly (Volume 64, Issue 4).
- Nadia Khomani, *"Abdel Hakim Belhaj rendition: ex-minister calls for inquiry"* The Guardian, 12 May 2018.
- Nick Hopkins & Richard Norton Taylor, "Blair government's rendition policy led to rift between UK spy agencies", The Guardian, 31st May 2016 (Available at https://www.theguardian.com/uk-news/2016/may/31/revealed-britain-rendition-policy-rift-between-spy-agencies-mi6-mi5).

- Paul Daly, "*Justiciability and the 'political question' doctrine"* Public Law, (2010, January).
- Samuel Shepson, "*Jurisdiction in Complicity Cases: Rendition and Refoulement in Domestic and International Courts"*, Columbia Journal of International Law (2015, vol. 53).
- Satvinder S. Juss, Human Rights & America's War on Terror (Routledge, October 2018 (ed.)
- Satvinder Singh Juss, *"Terrorism and the Exclusion of Refugee Status in the UK*" Journal of Conflict & Security Law (Vo. 17, No. 13, Winter 2012).
- Will Hutton, *"In the Belhaj case, Britain set aside the rule of law and moral principles",* The Guardian, 13 May 2018.

Table of Contents