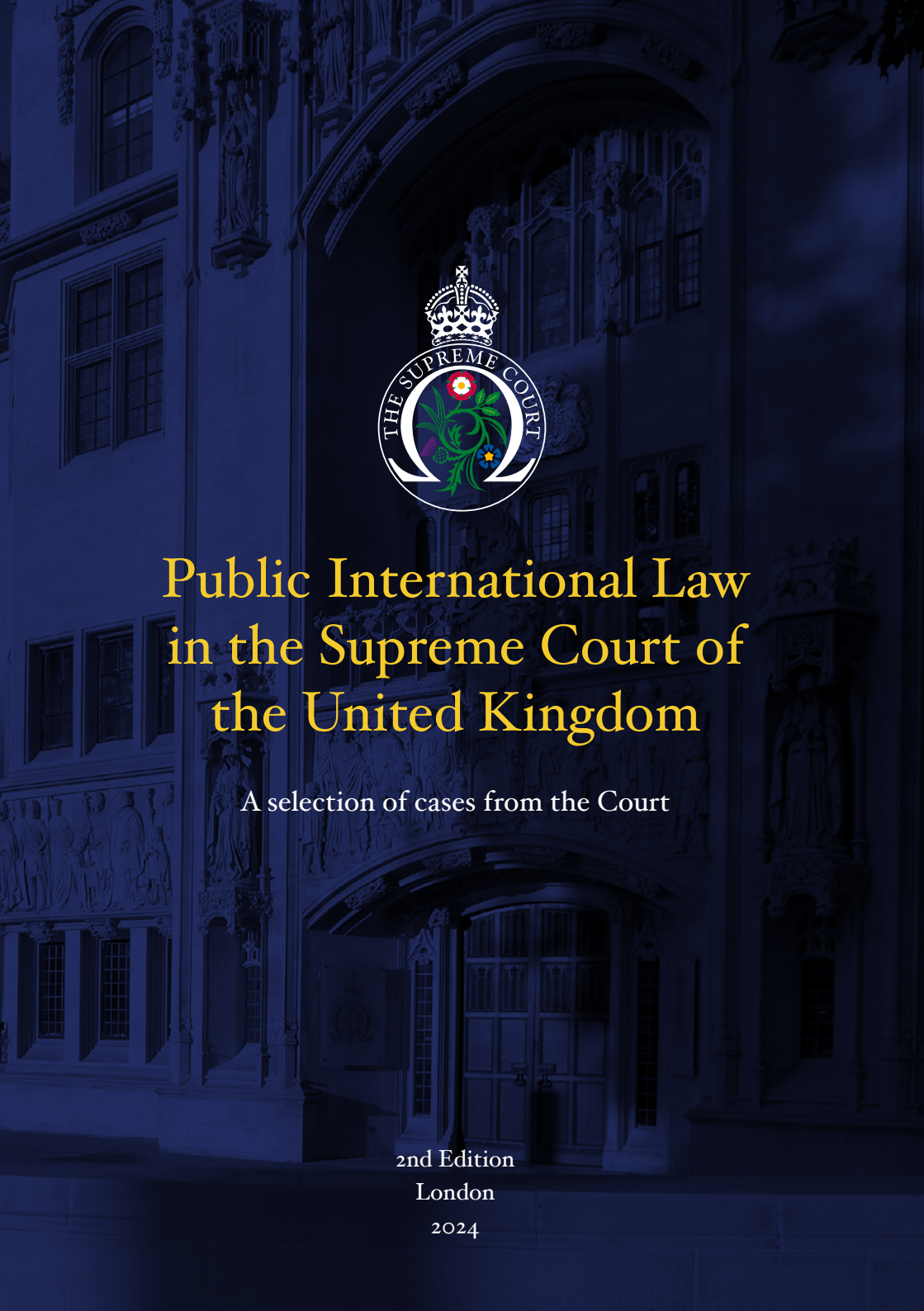

# Public International Law in the Supreme Court of the United Kingdom

A selection of cases from the Court

2nd Edition
London
2024

# Public International Law in the Supreme Court of the United Kingdom: a collection of cases

This booklet was originally produced as part of the 10th anniversary celebrations of the Supreme Court of the United Kingdom, established in 2009. We are delighted to publish the 2nd edition, which has been prepared to coincide with the Supreme Court's 15th anniversary.

The 2nd edition summarises a collection of Supreme Court judgments in the field of public international law, including some 11 new decisions from the last five years. All of these judgments are published in full on the Supreme Court's website (www.supremecourt.uk), where it is also possible to view recordings of the hearings and short oral summaries of the judgments delivered by the Justices.

# The Supreme Court of the United Kingdom's history and role

1 October 2009 was a defining moment in the constitutional history of the United Kingdom. Following the introduction of the Constitutional Reform Act 2005, judicial authority was transferred from the House of Lords to the newly created Supreme Court of the United Kingdom.

Before then, the House of Lords acted as the country's highest appeal court. This evolved over more than six hundred years and came originally from the work of the royal court, the "Curia Regis", which advised the sovereign, passed laws and dispensed justice at the highest level.

In 1876, the Appellate Jurisdiction Act was passed to regulate how appeals were heard. It also provided for the appointment of Lords of Appeal in Ordinary: highly qualified professional judges working full time on the judicial business of the House. These Law Lords were able to vote on legislation as full Members of the House of Lords, but in practice did so increasingly rarely.

In 2009, the then Law Lords became the Supreme Court's first Justices. They remained Members of the House of Lords but were unable to sit and vote in Parliament. All new Justices appointed since October 2009 have been directly appointed to the Supreme Court on the recommendation of an independent selection commission.

The Supreme Court is located in the former Middlesex Guildhall, a Grade II* listed building in Parliament Square, London. Its location – directly opposite the Houses of Parliament and nestled between Westminster Abbey and the Treasury – means that the three branches of government (the legislature, the executive and the judiciary) and the church are now all represented separately in one symbolic location, on a site which has been associated with the administration of justice for more than two hundred years. The Supreme Court building was refurbished and modernised before being officially opened by Her Majesty Queen Elizabeth II on 16 October 2009.

The building provides three beautiful courtrooms, a magnificent library and plenty of office space for the Justices and Court staff. It is an ideal space from which the Court can fulfil its role: to hear arguable points of law of general public importance from across the United Kingdom.

The establishment of the highest court as a separate entity from the legislature has also provided greater accessibility and transparency. Since the Supreme Court opened its doors in 2009, over 1 million people have visited us. There has also been a renewed effort to enable the public to engage with and understand the work of the Court. All hearings and judgment hand-downs are broadcast online, and the Justices take part in extensive outreach and education programmes to improve knowledge and understanding of the Court and its work.

Over the course of its first 15 years, the Supreme Court has heard a range of high-profile cases and given important judgments which have impacted the lives of people across the country. It has grown in the public consciousness and is now fully established as one of the cornerstones of the United Kingdom constitution.

# Preface

## The Rt Hon The Lord Reed of Allermuir, President of the Supreme Court

Questions of public international law arise not infrequently before the Supreme Court of the United Kingdom. That follows, in part, from the significant role which the United Kingdom has long played in international affairs. It is also a consequence of individuals, businesses and governments from around the world choosing English law to govern their contractual agreements, and the jurisdiction of UK courts and arbitral tribunals to resolve their disputes. This is particularly the case in the realm of international trade and financial services. Their choice of English law and UK courts reflects, in the first place, international confidence in our legal system, and in the independence and expertise of our legal profession and judiciary. It also reflects the United Kingdom's commitment to the rule of law and the consequent stability of its institutions.

These factors help to explain why public international law has made such a notable contribution to the work of the Supreme Court in its first 15 years. As this collection demonstrates, we have been called upon to resolve numerous legal disputes arising out of contractual and other arrangements involving foreign States and other international actors, as well as a wide range of other aspects of international law. For example, a recent contractual dispute between a trustee acting on behalf of the Russian Federation and Ukraine required us to grapple with the legal personality of sovereign States, their capacity to enter into and avoid contracts (including for duress exerted by another State) and the authority of those acting on their behalf. In the last five years, we have also determined appeals on conflicting obligations under the ICSID Convention and the EU Treaties, the application of the UN

Convention against Torture to rebels in the Liberian Civil War, the service of proceedings on foreign States, and the recognition of foreign heads of State, among other issues. In addition, the Court has returned to important questions of State immunity and to the issue of diplomatic immunity and human trafficking.

The cases featured in this collection provide an indication of the significance of public international law, both to States and to the daily lives of individuals. My colleagues and I feel privileged to serve the parties who bring their cases before us, and do not take the United Kingdom's international reputation for granted. We look forward to the Court's next 15 years with a renewed commitment to providing litigants with an accessible, impartial and expert forum for the resolution of their disputes, and to championing the rule of law, both domestically and internationally.

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# Foreword

## The Rt Hon Lord Lloyd-Jones, Justice of the Supreme Court

In the foreword to the 1st edition of this booklet, which was published in 2019 to mark the 10th anniversary of the creation of the Supreme Court of the United Kingdom, Lady Arden and I observed that in recent years there had been a considerable increase in the number of cases before courts in the United Kingdom concerning public international law and foreign relations law. I am happy to record that in the five years since the publication of the 1st edition this trend has continued unabated. This 2nd edition includes, in addition to the original decisions from the Court's first decade, some 11 new decisions from the last five years. This confirms that the Court continues to be called upon to decide a wide range of fascinating and challenging cases in this field.

> "The purpose of this 2nd edition is to illustrate the contribution that public international law has made to the work of the Supreme Court."

The foreword to the 1st edition suggested that the increase in the number of such cases before courts in the United Kingdom may be explained by three factors in particular.

First, this development reflects a fundamental change in the nature of international law. The notion of public international law as a system of law merely regulating the

conduct of States among themselves on the international plane has been discarded and in its place has emerged a system which more frequently addresses and governs issues affecting individuals. This includes the regulation of human rights by international law, a system of which individuals are rightly considered to be subjects.

A second development of great importance in this regard, so far as the United Kingdom is concerned, has been the implementation into domestic law of the European Convention on Human Rights by the Human Rights Act 1998. Not only does this mean that judges in this jurisdiction are required to give effect to the treaty obligations of the United Kingdom under the Convention but, as some of the cases in this collection show, giving effect to the Convention often requires national courts to rule on issues of international law. This in turn has had an influence on what may be considered justiciable before national courts.

Thirdly, there has been a growing willingness on the part of judges in the United Kingdom to address the conduct of foreign States and issues of public international law when appropriate. As a result, we are seeing a major reconsideration of concepts such as comity and justiciability, and of the precise relationship between customary international law and the common law. There is also among legal practitioners and among the judiciary an increasing understanding of international law and its potential beneficent effects.

The purpose of this 2nd edition is to illustrate the contribution that public international law has made to the work of the Supreme Court. My colleagues and I hope that you will find the new selection of cases informative. We trust that you will enjoy perusing them and that you will find them as fascinating, both factually and legally, as we have.

I am most grateful to Rebecca Fry, Lydia Kim, Caleb Kirton and Crash Wigley, Judicial Assistants at the Supreme Court, for their patient and skilful input into this publication. I also wish to thank John McManus and India Cocking, the Supreme Court Head and Deputy Head of Communications and Paul Sandles and Rachel Watson, the Supreme Court Librarians, for their invaluable assistance.

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** indicates that a case is included in more than one chapter*


THE SUPREME COURT


THE SUPREME COURT

# 1. Customary International Law

## *Keyu v Secretary of State for Foreign and Commonwealth Affairs* **[2015] UKSC 69; [2016] AC 1355; 182 ILR 555**

In this case, the Supreme Court considered the basis of and extent to which customary international law is received into the common law. The Secretary of State had refused to hold a public inquiry into the deaths of 24 civilians killed by a British Army patrol in 1948 when the United Kingdom was a colonial power in the former Federation of Malaya. The appellants, who were related to the victims, applied for judicial review of this refusal.

The appellants argued, among other things, that customary international law required the UK government to investigate the civilians' deaths, and that the common law would recognise and give effect to this aspect of international law. The Supreme Court rejected this argument unanimously, for two reasons.

First, the duty to investigate suspected unlawful killings did not form part of customary international law at the time of the deaths in 1948, even if there were strong reasons for believing that they constituted a war crime. International law had since developed to recognise a duty on States to carry out formal investigations into certain deaths for which they were responsible and which may have been unlawful. However, it was unlikely that this entailed a retrospective obligation to investigate any suspected war crime or suspicious death which may have occurred within a State's jurisdiction in the past. Even if customary international law did impose such a duty, it had to be subject to a cut-off date. Giving the lead judgment on this issue, Lord Neuberger considered it "inconceivable that any such duty could be treated as retrospective to events which occurred more than 40 years earlier, or could be revived by reference to events which took place more than 20 years before that" (at [116]).

Secondly, even if customary international law required an investigation into historical deaths, that requirement could not be implied into the common law. Parliament had expressly legislated for investigations into deaths, including through the Inquiries Act 2005 and the incorporation of article 2 of the European Convention on Human Rights in the Human Rights

Act 1998. It would, therefore, be inappropriate for the courts to develop the common law to impose a further duty of carrying out a public inquiry, particularly as this would have potentially uncertain and wide ramifications.

Lord Mance (concurring) expanded on the issue of the incorporation of customary international law into the common law. He explained (at [150]) that customary international law can and should shape the common law "whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration". It would, however, be inappropriate for the courts to import a duty to investigate the civilians' deaths into the common law because Parliament had effectively pre-empted the whole area of investigations into historic deaths.

The Court's decision was recently applied in *Law Debenture Trust Corporation plc v Ukraine*, discussed on page 39 below.

# 2. Interpretation and Status of Treaties

## *Al-Sirri v Secretary of State for the Home Department; DD (Afghanistan) v Secretary of State for the Home Department* **[2012] UKSC 54; [2013] 1 AC 745; 159 ILR 616**

This decision evidences the Supreme Court's use of persuasive sources, including the decisions of equivalent domestic courts in other States and the guidance of international organisations, in interpreting international conventions.

In this appeal, the Supreme Court was required to determine the meaning of article 1F(c) of the United Nations Refugee Convention 1951 ("the 1951 Convention"), which excludes from protection "any person with respect to whom there are serious reasons for considering that … [h]e has been guilty of acts contrary to the purposes and principles of the United Nations". The Home Secretary had invoked this exception in refusing to recognise the appellants as refugees.

The General Assembly and Security Council had condemned terrorism as contrary to the purposes and principles of the UN, but neither organ defined terrorism. The Home Secretary argued that States parties to the 1951 Convention were each free to adopt their own definition. The Supreme Court rejected this argument. It held that the phrase "… acts contrary to the purposes and principles of the United Nations" must have an autonomous meaning binding on all parties.

Absent an internationally agreed definition of terrorism or a court or tribunal established to authoritatively interpret the 1951 Convention, the Supreme Court considered decisions from several other jurisdictions and the published guidance of the UN High Commissioner for Refugees ("the UNHCR"). Reviewing these sources, it adopted a cautious approach and endorsed the restrictive meaning of article 1F(c) proposed by the UNHCR. Under this interpretation, crimes had to be capable of seriously affecting international peace and security (such as an attack on an international force created by a Security Council resolution), or represent serious and sustained violations of human rights. Generally, for the exception provided by article 1F(c) to apply, there must be serious reasons for considering that the individual is personally responsible for acts of sufficient gravity.

The Court's decision has, subsequently, been cited by the High Court of Australia (*FTZK v Minister for Immigration* [2014] HCA 26), the Supreme Court of Canada (*Febles v Canada* [2014] SCC 68) and the Supreme Court of Cyprus (*Emam v Director of Central Staff* (2016) Civil App. No. 121/2016).

## *R (on the application of Tag Eldin Ramadan Bashir) v Secretary of State for the Home Department* [2018] UKSC 45; [2019] AC 484

In this appeal, the Supreme Court analysed an international convention's territorial application.

Upon granting independence to Cyprus in 1960, the United Kingdom retained sovereignty over the areas of Akrotiri and Dhekelia as Sovereign Base Areas for military purposes. Throughout its time as a colony, the United Nations Refugee Convention 1951 ("the 1951 Convention"), to which the UK is party, applied to the territory of Cyprus.

Between 1998 and 2001, refugees were brought to safety at the Base Areas, including six whose ship had foundered during transit from Cyprus to Italy. In 2003, Cyprus and the UK concluded a memorandum of understanding on illegal migrants and asylum seekers, but this did not apply to refugees arriving at the Base Areas before 2003.

The six refugees argued that the Secretary of State's November 2014 refusal to admit them into the UK, following their formal request for entry, contradicted the 1951 Convention. Given Cyprus's independence, the Supreme Court was required to determine if the 1951 Convention had, at all material times, continued to apply to the retained Base Areas.

In an interim judgment addressing this issue, the Supreme Court clarified that, while international law provided the relevant rules, the application of those rules depends on each case's facts, including a territory's domestic

constitutional provisions. Analysing whether the political separation of the Base Areas from the remainder of Cyprus affected the 1951 Convention's application to them, the Court concluded that State practice was both too contradictory and too obviously influenced by pragmatic considerations to generate a rule of customary international law that treaties of a particular subject-matter, such as those of a humanitarian character, would continue to apply to individual territories even if a new State succeeds to sovereignty over them. Nevertheless, because the UK retained sovereignty over the Base Areas upon granting Cyprus independence, the UK's treaty obligations continued to apply there, as it had to the whole of Cyprus before 1960. The political act of ceding sovereignty over part of the island's territory did not affect the remainder.

Consequently, the 1951 Convention applied to the Base Areas. The same was true of the 1951 Convention's 1967 Protocol, which, subject to any reservation limiting its operation (which did not exist here), applied to the same territories as the 1951 Convention.

Interpreting the 1951 Convention, however, the Supreme Court concluded that it conferred no right on the six refugees to resettle from the Base Areas to the UK mainland. Rather, on its true construction, the 1951 Convention treated a State's mainland and overseas possessions as separate territories, and applied independently to both. Further, though providing protection against forced removal from the Base Areas, the 1951 Convention provided no inverse right entitling the six refugees to resettle on the UK mainland.

The case settled before the Supreme Court considered outstanding issues, including the 2003 memorandum's applicability to the six refugees. The six refugees were admitted into the UK.

On its true construction, the UN Refugee Convention 1951 treated a State's mainland and overseas possessions as separate territories, and applied independently to both.

## *R v Reeves Taylor* [2019] UKSC 51; [2021] AC 349; 197 ILR 88

Treaty interpretation was also a feature of the *Reeves Taylor* appeal (considered at page 30, below), which concerned a domestic statutory provision (section 134(1) of the Criminal Justice Act 1988) the purpose of which was to give effect to an international convention (the United Nations Convention Against Torture 1984).


## *Micula v Romania* [2020] UKSC 5; [2020] 1 WLR 1033; 196 ILR 629

This appeal concerned an attempt, by the respondent investors, to register and enforce an arbitral award made against the appellant State, Romania, by a tribunal constituted under the auspices of the International Centre for Settlement of Investment Disputes.

In the early 2000s, the respondents had invested in a highly integrated and large food production operation in Romania under a then-applicable domestic investment incentive scheme (which was modified in 1999, after Romania incorporated European Union State aid rules into its domestic law). In 2002, Romania and Sweden concluded a bilateral investment treaty ("the BIT"), which provided protections for the respondents' investment and prescribed investor-State arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention"). After Romania repealed the investment incentive scheme upon its accession to the EU, the respondents successfully instituted arbitral proceedings under the BIT, securing an award ordering Romania to pay compensation of approximately £70,000,000, plus interest, for violating their investment protections ("the award"). Romania

unsuccessfully applied to annul the award.

Romania purported to implement the award by setting off tax debts owed by one of the respondents, but this was injuncted by the European Commission which, after a formal investigation, found that payment of the award by Romania constituted unlawful State aid. The respondents successfully appealed this decision to the General Court of the European Union, which overruled the Commission. The Commission applied to appeal this decision to the Court of Justice of the European Union ("the CJEU").

In 2014, upon the respondents' application, the award was registered for enforcement in England and Wales. In 2017, following applications from both parties, the High Court stayed enforcement of the award, pending the European proceedings, and refused to order Romania to provide security. The Court of Appeal maintained the stay but ordered provision of security.

The Supreme Court unanimously lifted the stay. Although the United Kingdom's duty of sincere cooperation with the EU remained (because the General Court's decision did not affect the underlying State aid investigation and there had been no final judgment from the CJEU), the UK's obligations under the ICSID Convention, which predated its EU obligations, required the UK to facilitate enforcement of the award.

The Arbitration (International Investment Disputes) Act 1966, under which the respondents sought enforcement, had to be interpreted in light of the ICSID Convention, assuming that Parliament intended its provisions to accord with the UK's international obligations. Article 54 of the ICSID Convention requires the UK to recognise ICSID awards as binding and enforce them as if they are final judgments of UK courts. Unlike other arbitral award enforcement regimes (including, for example that under the New York Convention), once authenticated, recognition and enforcement depended on neither merits-based reviews nor national or international public policy. The Court of Appeal's decision to uphold the stay, which forestalled enforcement on substantive (not procedural) grounds, was wrong because it was inconsistent with the UK's duty to enforce the award when, as here, the ICSID Convention's prescribed forms of redress had been exhausted. Additional extraordinary exceptions

to enforcement under UK law – which, based on the ICSID Convention's text and preparatory work, arguably existed – did not assist Romania (and, in any event, the true scope of such exceptions could only be conclusively settled by the International Court of Justice).

Lifting the stay was, moreover, not precluded by EU law. Article 351 of the Treaty on the Functioning of the European Union was intended to establish that the application of the EU treaties did not affect the duty of a Member State to respect the rights of non-Member States under a prior agreement and to perform its obligations thereunder. In the Supreme Court's view, the specific duties in articles 54 and 69 of the ICSID Convention were owed to all other Contracting States, including non-Member States. The duty of sincere co-operation did not require courts in this jurisdiction to decline to decide the issue pending its resolution by the EU courts, and EU case law makes it clear that questions regarding prior treaties in the context of article 351 are not reserved to the EU courts.

Following this decision, the European Commission commenced infraction proceedings against the UK on the basis that the Supreme Court's judgment was inconsistent with EU law. The UK did not defend the proceedings. On 14 March 2024, in *Commission v UK* (Case C-516/22), the CJEU reviewed the Supreme Court's judgment and held that the Court's decision to permit enforcement of the award was inconsistent with EU law.

## *R (on the application of SC) v Secretary of State for Work and Pensions* **[2021] UKSC 26; [2022] AC 223**

This judgment confirmed that unincorporated international treaties do not create rights and obligations in United Kingdom domestic law and cannot be enforced by the domestic courts.

The appellants challenged the two-child limit on the payment of the individual element of child tax credit. They argued, among other things, that the limit breached the UK's obligations under the United Nations Convention on the Rights of the Child 1989 ("the UNCRC") and was, therefore, incompatible with the European Convention on Human Rights ("the ECHR") as given domestic effect by the Human Rights Act 1998 ("the Human Rights Act").

The Supreme Court unanimously rejected this argument for the following reasons. First, although treaties like the UNCRC were agreements intended to be binding on the States parties to them, they were not contracts that domestic courts could enforce. The Court approved (at [76]) Lord Oliver of Aylmerton's statement in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 499 that:

> *"It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law."*

Secondly, it was a fundamental constitutional principle that a treaty did not form part of UK domestic law unless and until it had been incorporated into that law by legislation. The UK's dualist system treated international and domestic systems of law as independent and separate. This was "a necessary corollary of Parliamentary sovereignty": government ministers could exercise the prerogative power to make and unmake treaties, but they could not alter the law of the land (at [78]).

Finally, the only treaty to which the Human Rights Act gave domestic effect was the ECHR. The Act did not give domestic effect to unincorporated treaties such as the UNCRC. There was no basis in the case

law of the European Court of Human Rights, as considered under the Human Rights Act, for any departure from the rule that the domestic courts could not determine whether the UK is in breach of its obligations under unincorporated international treaties.

## *JTI POLSKA Sp. Z o.o. v Jakubowski* [2023] UKSC 19; [2024] AC 621

In this appeal, the Supreme Court was asked to revisit the interpretation given to the United Nations Convention on the Contract for the International Carriage of Goods by Road 1956 ("the CMR") in an earlier House of Lords case. The CMR is a treaty governing international transport by road, which has been transposed into United Kingdom law by statute.

By a CMR-governed contract with the respondents, the appellants undertook to transport a consignment of cigarettes from Poland to England. During transit in England, thieves stole 289 cases of cigarettes with a market value of £72,512. The respondents incurred excise duty of £449,557 because of the theft, as the cigarettes were deemed to have been released for commercial consumption in the UK under a European agreement.

The respondents sought to recover the excise duty from the appellants as "other charges incurred in respect of the carriage of the goods" under article 23.4 of the CMR. States parties had, in their practice under the CMR, interpreted this provision either broadly (to include charges, such as the excise duty here, resulting from how the goods were carried and lost) or narrowly (limiting claims to charges payable if the carriage is performed without incident). In *James Buchanan & Co. Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141 ("*Buchanan*"), by a three-to-two majority, the House of Lords adopted the broad interpretation. The appellants asked the Supreme Court to overrule *Buchanan* and adopt the narrow interpretation.

In assessing whether to apply the Practice Statement (Judicial Precedent) [1966] 1 WLR 1234 to depart from a previous decision on treaty interpretation, the Supreme Court clarified that it may be appropriate to do so if, in the context of an international trade law treaty, that construction produces manifestly unjust results and is demonstrably unsatisfactory in the marketplace. It is, however, insufficient merely to persuade a present panel of Justices that the prior decision is wrong, and there is less scope for reconsideration of a treaty's interpretation because it will rarely be possible to say that one view is demonstrably right or wrong. Instead, if a previous interpretation is tenable, it will be upheld.

The Supreme Court confirmed that it is appropriate to apply the principles and sequential approach expressed in the customary rules of interpretation codified in articles 31 to 32 of the Vienna Convention on the Law of Treaties 1969 to treaties concluded before the VCLT entered into force.

The Supreme Court confirmed that, in construing international conventions, English law now recognises that it is appropriate to apply the principles and sequential approach expressed in the customary rules of interpretation codified in articles 31 to 32 of the United Nations Vienna Convention on the Law of Treaties 1969 ("the VCLT") to treaties concluded before the VCLT entered into force (such as the CMR).

Article 31 lays down the general rule of interpretation and focuses on seeking to ascertain the ordinary meaning of the relevant terms of the treaty, having regard to their context and the object and purpose of the treaty. This is to be done by reference to the text of the treaty and to the material set out in article 31(2) to (4), as a single combined operation.

Article 32 then allows for recourse to be had to supplementary material, including the preparatory work of the treaty and the circumstances of its conclusion, in order to "confirm the meaning" which results from the application of article 31, or in order to "determine the meaning". Such material may only be used to determine the meaning, however, when the interpretation according to article 31 leaves the meaning ambiguous or obscure or leads to a

result which is manifestly absurd or unreasonable, and the preparatory work points clearly and indisputably to a definite legislative intention. The Supreme Court clarified that, in contrast, no such limitations apply to the use of preparatory work to "confirm" a meaning derived from applying article 31.

Applying those rules to the CMR, there was force in the narrow interpretation given the object and purpose of Chapter IV, in which article 23.4 is located, and the structure of the compensation scheme for loss of goods. Nevertheless, the broad interpretation remained tenable, being accepted at all levels in *Buchanan* and by the domestic courts in various States parties. It was also reconcilable with article 23.4's wording, given that the words "in respect of", which are commonly equated to "in connection with", could encompass losses occurring during carriage because they would be connected with that carriage. Accordingly, as *Buchanan* had not been shown to work unsatisfactorily in the market or produce manifestly unjust results, it would be upheld.

# 3. United Nations Security Council Resolutions

## *HM Treasury v Ahmed* [2010] UKSC 2; [2010] 2 AC 534; 149 ILR 641

This was the first appeal to be heard by the new Supreme Court of the United Kingdom. The Court held that aspects of the UK system implementing the United Nations regime for imposing sanctions on suspected terrorists were unlawful because they did not respect fundamental rights embodied in the common law.

In response to various incidents of international terrorism, the UN Security Council passed resolutions requiring Member States to take steps to freeze the assets of designated persons suspected of terrorist activity ("the UNSCRs").

The respondent, HM Treasury, subsequently made orders giving effect to the UNSCRs under section 1 of the United Nations Act 1946 ("the 1946 Act"), including the Terrorism (United Nations Measures) Order 2006 ("the TO") and the Al-Qaida and Taliban (United Nations Measures) Order 2006 ("the AQO") (together, "the Orders").

The appellants in this case were subject to asset freezes made under the TO and article 3(1)(b) of the AQO. The asset freezes were not time limited and imposed severe restrictions on the ability of the appellants to deal with their assets. This, in turn, limited their freedom of movement and affected third parties such as family members.

The seven-Justice Supreme Court unanimously held that the TO was unlawful. They also held, by a six-to-one majority (Lord Brown dissenting), that article 3(1)(b) of the AQO was unlawful. The Court emphasised that, under the principle of legality, ambiguous statutory words should not be interpreted in a manner that infringes fundamental rights, and section 1 of the 1946 Act should be construed accordingly. Orders made under section 1 would, therefore, only be legitimate where their interference with fundamental rights is no greater than required by the underlying UNSCR.

The Supreme Court concluded that the Orders contained provisions that went further than was necessary to effect the UNSCRs. The TO provided that a


person's assets could be frozen based on "reasonable suspicion", which was not required by the UNSCRs. Under the AQO, there were no means by which designated persons could judicially review their designation, with the consequence that their assets would be automatically frozen. Accordingly, the TO and article 3(1)(b) of the AQO were held to be ultra vires section 1 of the 1946 Act.

Lord Hope observed at [6]:

*"Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty".*

The Supreme Court considered whether rights under the European Convention on Human Rights ("the ECHR") could be held to prevail over obligations under the UN Charter, notwithstanding article 103 of the Charter. It concluded that the European Court of Human Rights ("the ECtHR") was best placed to give authoritative guidance on this matter, so that all Contracting States to the ECHR could adopt a uniform position.

By the time the Supreme Court gave its judgment, the Court of Justice of the European Union had issued its decision in *Kadi v Council of the European Union* (joined cases C-402/05P and C-415/05P), in which it decided that persons listed

by the UN under its sanctions regime could seek judicial review of their designation under EU law. In *Kadi v European Commission (No 2)* (case T-85/09), the General Court of the European Union relied on the Supreme Court's judgment in *HM Treasury v Ahmed*. The judgment has also been referred to by the Grand Chamber of the ECtHR in *Nada v Switzerland* (2012) App. No. 10593/08 and *Al-Dulimi and Montana Management Inc. v Switzerland* (2016) App. No. 5809/08.

UK legislation now gives a designated person the right to apply to a minister to revoke or vary his designation under section 23 of the Sanctions and Anti-Money Laundering Act 2018. The decision of the minister may then be challengeable in the courts. The UN has also made changes to its sanctions regime to strengthen individual rights, including by appointing an Ombudsperson to assist with requests for de-listing.

## *Al-Waheed v Ministry of Defence; Serdar Mohammed v Ministry of Defence* [2017] UKSC 2; [2017] AC 821; 178 ILR 414

The Supreme Court also considered the interpretation of UN Security Council resolutions in the joint appeals of *Al-Waheed* and *Serdar Mohammed*. These appeals were concerned with the legal basis of the detention of suspected combatants in non-international armed conflicts in Iraq and Afghanistan. They are discussed at page 29 below.

# 4. Non-international Armed Conflict

## *R v Gul* [2013] UKSC 64; [2014] AC 1260; 185 ILR 428

This appeal concerned whether the definition of "terrorism" in the Terrorism Act 2000 ("the 2000 Act") includes military attacks by non-State armed groups against national or international armed forces in the context of a non-international armed conflict. This definition is adopted in the Terrorism Act 2006 ("the 2006 Act").

The appellant, Mr Gul, was convicted of disseminating terrorist publications under section 2 of the 2006 Act. According to that provision, a publication is a "terrorist publication" if a matter contained in it is likely to be understood as encouraging or inducing the commission, preparation or instigation of "acts of terrorism". "Terrorism" is defined in section 1 of the 2000 Act as the use or threat of certain types of action designed to influence the government or intimidate the public, and made for the purpose of advancing certain defined causes (such as ideological, political or religious causes). The publications disseminated by Mr Gul included videos depicting attacks by non-State groups on military forces in the context of non-international armed conflicts.

Mr Gul argued before the Supreme Court that both domestic and international law required the statutory definition of terrorism to be interpreted narrowly. There were two aspects to Mr Gul's international law argument. First, he submitted that some provisions of the 2000 and 2006 Acts were intended to give effect to the United Kingdom's international treaty obligations, and the concept of terrorism in international law is narrow in scope. Secondly, he argued that, because the 2000 and 2006 Acts criminalised certain "terrorist" actions committed outside the UK, the meaning of terrorism in those statutes should not be wider than what is accepted by international law norms.

The Supreme Court considered that a natural reading of section 1 of the 2000 Act, in accordance with ordinary principles of domestic statutory interpretation, gave rise to a wide definition of terrorism. In addition, the Court held that there was no basis in international law to interpret section 1 of the 2000 Act more narrowly than the plain and natural meaning of its words.

In reaching its decision, the Supreme Court reasoned (at [44]) that both aspects of the appellant's international law argument faced the "insuperable obstacle" that there is no accepted definition of terrorism in international law, as recognised by the Court in *Al-Sirri* (see page 14, above). Notably, a review of United Nations treaties and resolutions on terrorism revealed that the organisation had not adopted a plain or consistent approach to this issue. In addition, it appeared that insurgents in non-international armed conflicts were not afforded combatant immunity under international humanitarian law. Although some provisions of the 2000 and 2006 Acts gave effect to treaties that did not extend to insurgent attacks on military forces in non-international armed conflicts, there was no reason why the UK could not go further in its domestic legislation than the treaties had.

The Court did not consider it necessary to determine the issue raised by the second aspect of Mr Gul's international law argument, because the appellant was a UK citizen being prosecuted for offences allegedly committed in the UK. The Court recognised, however, that the question of whether a State's criminalisation of actions committed abroad is constrained by international law was one of some difficulty and importance, and might be said to represent a "shift in focus in international law" (at [58]).

In parting, the Supreme Court expressed some concern about the breadth of the UK's statutory definition of terrorism. The Court noted at [63] that this resulted in "very broad prosecutorial discretion" being granted by the 2000 and 2006 Acts, as well as substantial and intrusive stop and search powers. While acknowledging that this was ultimately a matter for Parliament, the Court suggested that any legislative narrowing of the definition of terrorism would be a welcome development, provided that it is consistent with the public protection to which the legislation is directed.

## *Al-Waheed v Ministry of Defence; Serdar Mohammed v Ministry of Defence* **[2017] UKSC 2; [2017] AC 821; 178 ILR 414**

These joined appeals concerned two principal issues: (i) whether there was a legal basis on which British armed forces could detain suspected combatants in non-international armed conflicts in Afghanistan and Iraq; and, if so, (ii) what procedural safeguards were required for such detention.

Mr Al-Waheed had been detained by British armed forces in Iraq for about six weeks and then released. Mr Mohammed was detained by the armed forces in Afghanistan for nearly four months before being transferred to the Afghan authorities. British armed forces were in Afghanistan and Iraq pursuant to United Nations Security Council resolutions, which mandated a multinational force to contribute to the maintenance of security and stability in those countries.

By a seven-to-two majority, the Supreme Court held that the relevant Security Council resolutions implicitly authorised the detention of suspected combatants in non-international armed conflicts for imperative reasons of security. Accordingly, it was unnecessary to decide whether customary international law authorised such detention.

The Court then considered the procedural safeguards for detention. Article 5(1) of the European Convention on Human Rights ("the ECHR") provides that no one shall be deprived of their liberty except in accordance with a procedure prescribed by law, save in six specified cases, none of which applies to armed conflict. Article 5(4) provides that detainees are entitled to have the lawfulness of their detention decided "speedily" by a court.

The majority observed that the European Court of Human Rights had interpreted article 5(1) of the ECHR as permitting the non-arbitrary detention of suspected combatants in an international armed conflict. The majority held that the same approach applied to non-international armed conflicts, provided detention is necessary for imperative reasons of security. The procedural provisions of article 5 may fall to be adapted where necessary in the special circumstances of armed conflict,

provided that minimum standards of protection exist to ensure that detention is not imposed arbitrarily.

The procedural safeguards under article 5 were present in the case of Mr Al-Waheed and so his appeal failed, but the procedures in Mr Mohammed's case did not afford him an effective right to challenge his detention and so did not comply with article 5(4). Mr Mohammed's case was remitted to the trial judge for (among other things) determination of the grounds on which he had been detained after the initial period of 96 hours permitted by the multinational force's guidelines.

Dissenting, Lord Reed and Lord Kerr concluded that neither treaty-based nor customary international humanitarian law authorised the detention of suspected combatants in non-international armed conflicts. They held further that detention outside the six cases specified in article 5(1) of the ECHR was not authorised by the Security Council resolutions. They adopted a significantly different approach to interpreting the resolutions, holding that they had to be interpreted harmoniously with the ECHR and on the basis of a presumption that the obligations imposed on Member States by the resolutions were compatible with international human rights law.

## *R v Reeves Taylor* [2019] UKSC 51; [2021] AC 349; 97 ILR 88

This appeal concerned the interpretation of a domestic statutory provision, the purpose of which was to give effect to an international convention.

Section 134(1) of the Criminal Justice Act 1988 ("the CJA") provides (among other things) that a person acting in an official capacity, whatever his nationality, commits the offence of torture if, in the United Kingdom or elsewhere, he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties. The Supreme Court considered whether the term "person acting in an official capacity" only referred to individuals acting on behalf of the *de jure* government of a State, or

could encompass persons acting on behalf of a non-State entity exercising governmental functions over a civilian population in a territory over which it holds *de facto* control.

The appellant, Reeves Taylor, was arrested in the UK in June 2017 and was charged with torture pursuant to section 134 of the CJA. The charges related to events during the first Liberian civil war in 1990 when an armed group, the National Patriotic Front of Liberia ("the NPFL"), sought to take control of the country. According to the prosecution, at the time of the alleged offences, the NPFL was the *de facto* military government with effective control of the area where the relevant conduct occurred.

By a four-to-one majority, the Supreme Court held that the term "person acting in an official capacity" includes a person who acts or purports to act, otherwise than in an individual and private capacity, for or on behalf of an organisation or body that exercises, in the territory controlled by that body or organisation and in which the relevant conduct occurs, functions normally exercised by governments over their civilian populations. It covers any such person whether acting in peace time or in a situation of armed conflict. The exercise of governmental functions, which is a core requirement, must be distinguished from purely military activity: the question will be whether the entity has established a sufficient degree of control, authority and organisation to become an authority exercising official or quasi-official powers.

In reaching its conclusion, the majority reasoned that section 134 of the CJA was intended to give effect to the United Nations Convention Against Torture 1984 ("UNCAT") in domestic law. Thus, the words "person acting in an official capacity" in section 134 must bear the same meaning as in article 1 UNCAT. The majority considered the primary target of UNCAT to be the elimination of acts of torture committed by public officials, as opposed to private persons. This rationale does not exclude conduct by non-State entities from the scope of article 1. As Lord Lloyd-Jones observed at [36]:

*"Official torture is as objectionable and of as much concern to the international community when it is committed by a representative of a de facto governmental authority as when it is committed on behalf of the de jure government".*

Dissenting, Lord Reed concluded that article 1 UNCAT did not refer to individuals acting on behalf of non-State entities, at least as at the time the crimes allegedly committed by the appellant took place. He considered (among other things) that the core idea behind article 1 was that the person in question acts on behalf of the State, as indicated by the way in which States parties have implemented article 1, as well as previous decisions of the UN Committee Against Torture. In addition, Lord Reed was of the view that the principle of legal certainty meant that criminal legislation whose meaning is unclear should be given a restrictive rather than expansive interpretation.

# 5. Mutual Legal Assistance

## *Elgizouli v Secretary of State for the Home Department* **[2020] UKSC 10; [2021] AC 937**

This appeal concerned the lawfulness of a decision by the Secretary of State for the Home Department ("the Home Secretary") to provide evidence to the United States that could facilitate the imposition of the death penalty.

The appellant's son, previously a British citizen, was suspected of having been involved in the murders of US and British citizens while a member of a terrorist group in Syria. In June 2015, the US requested mutual legal assistance from the United Kingdom in connection with an investigation the US was conducting into the activities of the group. The Home Secretary requested an assurance that the information would not be used directly or indirectly in a prosecution that could lead to the imposition of the death penalty, but the US did not provide an assurance in relation to indirect use. Ultimately, in June 2018, the Home Secretary agreed to provide the information to the US without requiring any assurance whatever.

The appeal raised two questions: (i) whether it is unlawful at common law for the government to facilitate the carrying out of the death penalty in a foreign State by providing information that may be used by that State in the trial of a person who is not currently in the UK ("Ground 1"); and (ii) whether it is lawful under the Data Protection Act 2018 ("the DPA") for law enforcement authorities in the UK to transfer personal data to law enforcement authorities abroad for use in capital criminal proceedings.

By a majority, the Supreme Court dismissed the appeal on the first question. It held that, among other things, the power of the courts to develop the common law should be exercised with caution. While it was a clear policy of the UK to oppose the death penalty in all circumstances as a matter of principle, and recent statements of the Supreme Court supported the development of the common law in line with the European Convention on Human Rights, there was as yet no established principle prohibiting the sharing of information with another country merely because it risked facilitating the imposition of the death penalty in that country. Lord Reed observed at [170]-[171] that the development of the common law "builds incrementally on existing principles", and the development of

the law proposed by the appellant was not an "incremental step".

Lord Kerr would, on this question, have allowed the appeal, concluding that a common law principle should be recognised to the effect that it is unlawful to facilitate by provision of material a trial of a person in a foreign country where the person would be at risk of execution. This principle should only be disapplied in exceptional circumstances. Lord Kerr did not accept, however, that the appellant had adduced sufficient evidence to show that there is an emerging norm of customary international law that the death penalty is, as such, a violation of the absolute right against torture and cruel, inhuman and degrading treatment.

Nevertheless, the Supreme Court unanimously allowed the appeal on the second question, holding that that the Home Secretary's decision to provide mutual legal assistance was unlawful under the DPA. The Supreme Court found that, contrary to the DPA, the Home Secretary (as data controller) had not considered whether the criteria for the processing of personal data had been met in this case.

## *R (on the application of KBR, Inc) v Director of the Serious Fraud Office* [2021] UKSC 2; [2022] AC 519

This appeal considered when domestic statutes will dislodge the presumption, rooted in international comity and international law, that they do not have extra-territorial effect.

The Supreme Court confirmed that the investigatory power in section 2(3) of the Criminal Justice Act 1987 ("the 1987 Act") does not have extra-territorial effect and, therefore, cannot be used to compel a foreign company to produce documents held outside the United Kingdom. Section 2(3) empowers the Director of the Serious Fraud Office ("the SFO") to issue a notice requiring persons to produce documents and other information for the purposes of an SFO investigation into complex or serious fraud.

The appellant, KBR, was a company incorporated in the United States with no registered office in the UK. It had never carried on business in the UK but had UK subsidiaries, including Kellogg Brown and Root Ltd ("KBR

UK"). KBR UK was under investigation by the SFO in relation to suspected offences of bribery and corruption. In July 2017, officers of KBR attended a meeting with the SFO in London. During that meeting, the SFO handed the Executive Vice President of KBR a notice under section 2(3) of the 1987 Act requiring the production of material held by KBR outside the UK. KBR applied for judicial review to quash the notice, arguing, among other things, that it was *ultra vires* because section 2(3) did not permit the SFO to require a company incorporated in the US to produce documents held outside the UK.

The Supreme Court held that the notice was invalid. It held that, when construing section 2(3), the starting point was the presumption that UK legislation is not generally intended to have extra-territorial effect. This presumption is rooted in both the requirements of international law and the concept of comity, which is founded on mutual respect between States. The relevant question was, therefore, whether Parliament intended section 2(3) to displace the presumption to give the SFO the power to compel a foreign company to produce documents it holds outside the UK. The answer was dependent on "the wording, purpose and context of the legislation considered in the light of relevant principles of interpretation and principles of international law and comity" (*per* Lord Lloyd-Jones at [27]).

After considering these factors, the Supreme Court concluded that Parliament did not intend section 2(3) to have extra-territorial effect. Section 2(3) did not contain any express wording to displace the presumption, and the other provisions of the 1987 Act did not provide any clear indication either for or against its extra-territorial effect. Significantly, the relevant legislative history indicated that Parliament intended that evidence of fraud should be obtained from abroad by establishing reciprocal arrangements for co-operation with other countries. Since 1987, successive Acts of Parliament had developed the structures in domestic law permitting the UK to participate in international systems of mutual legal assistance to facilitate criminal proceedings and investigations. These systems are subject to protections and safeguards, including provisions regulating how documentary evidence may be used and making provision for its return. Such provisions are

fundamental to the mutual respect between States and comity on which these international systems are founded. It was, accordingly, unlikely that Parliament would have intended them to operate alongside a broad unilateral power that permitted the SFO to compel foreign companies to produce documents held outside the UK, under threat of criminal sanction and without the protection of any safeguards.

The presumption that UK legislation is not generally intended to have extra-territorial effect is rooted in both the requirements of international law and the concept of comity, which is founded on mutual respect between States.

The Court's decision has been considered in several subsequent cases concerning the extra-territorial effect of domestic legislation. These include *R (on the application of Marouf) v Secretary of State for the Home Department* [2023] UKSC 23, in which the Supreme Court held that the public sector equality duty imposed by section 149 of the Equality Act 2010 did not have extra-territorial effect, with the result that public bodies are not subject to the public sector equality duty when exercising their functions, in so far as that exercise affects people living outside the UK.

# 6. Recognition of Foreign Governments

## *Maduro Board of the Central Bank of Venezuela v Guaidó Board of the Central Bank of Venezuela* [2021] UKSC 57; [2023] AC 156; 203 ILR 612

In this appeal, the Supreme Court was required to determine which of two rival claimants to the Venezuelan presidency, Mr Juan Guaidó Márquez or Mr Nicolás Maduro, was entitled to appoint a board of individuals who could issue instructions, on behalf of the Central Bank of Venezuela ("the BCV"), to institutions in England and Wales, including in respect of US $1,950,000,000 in gold reserves held by the Bank of England.

Following an election in May 2018, which Her Majesty's Government in the United Kingdom ("HMG") considered deeply flawed, Mr Maduro claimed to have been re-elected. In January 2019, however, the Venezuelan National Assembly announced that Mr Guaidó was the interim President of Venezuela. HMG recognised Mr Guaidó as the constitutional interim President of Venezuela until credible presidential elections could be held – a position subsequently reaffirmed.

Mr Guaidó and Mr Maduro each appointed boards (referred to as "the Guaidó Board" and "the Maduro Board", respectively) purporting to act on behalf of the BCV, the former doing so under a "transition statute" passed by the Venezuelan National Assembly, which Venezuela's Supreme Tribunal of Justice had held to be null and void.

In English proceedings, the Maduro Board sought a declaration that the Guaidó Board was invalidly appointed and, therefore, lacked authority to issue instructions on behalf of the BCV. Two questions, tried as preliminary issues, arose: first, whom English law recognised as Venezuela's president; and secondly, if the recognised president was Mr Guaidó, whether English courts had jurisdiction to question the validity of the Guaidó Board's appointment. The Court of Appeal, in reversing the High Court, held that HMG had only recognised Mr Guaidó as Venezuela's *de jure* but not, necessarily, *de facto* head of state, and remitted the case to the High Court to determine whether HMG recognised Mr Guaidó for all purposes and if English law recognised the Supreme Tribunal of Justice's decisions.

The Supreme Court unanimously held that, under English law, Mr Guaidó

was the recognised Venezuelan president, and that his appointment of the Guaidó Board was valid.

HMG was, constitutionally, solely empowered to recognise foreign States and their governments. Under the "one-voice principle", English courts accept such recognition as conclusively establishing, for instance, who is a country's head of state. Earlier approaches to this issue, such as the *de facto / de jure* distinction applied by the Court of Appeal, were outdated and should not be used. Here, therefore, because HMG had clearly and unequivocally recognised Mr Guaidó's presidency, the Supreme Court was bound to accept that he was Venezuela's head of state.

The Supreme Court also addressed the act of state doctrine in this case, as summarised at page 61, below.

# 7. Personality and capacity of States – Authority – Duress – Countermeasures

## *The Law Debenture Trust Corporation plc v Ukraine (represented by the Minister of Finance of Ukraine acting upon the instructions of the Cabinet of Ministers of Ukraine)* **[2023] UKSC 11; [2024] AC 411**

This case raised questions as to the legal personality of sovereign States, their capacity to enter into and avoid contracts (including for duress exerted by another State or by relying on the international law doctrine of countermeasures) and the authority of those acting on their behalf. The appeal arose out of a contractual dispute between Ukraine and the Law Debenture Trust Corporation plc ("the Trustee"), acting on behalf of the Russian Federation ("Russia").

In 2013, Ukraine issued Eurobonds ("the Notes") with a nominal value of US $3,000,000,000 and carrying interest at 5 percent per annum to Russia, and Russia paid the subscription money to Ukraine. In substance, this amounted to a loan of the $3, 000,000,000 by Russia to Ukraine, repayable in December 2015. The Trustee was the trustee of the Notes, which were constituted by a trust deed governed by English law and which provided that the courts of England and Wales were to have exclusive jurisdiction to hear any disputes arising out of it. The trust deed and related contractual documents were entered into by Ukraine's Minister of Finance, acting on the instructions of the Cabinet of Ministers of Ukraine.

Ukraine maintained that it undertook the transaction following massive economic and political pressure from Russia to induce Ukraine not to enter into an association agreement with the European Union and to accept Russian financial support instead, in the form of the Notes. Shortly afterwards, Russia invaded Crimea and purported to annex it. Ukraine contended that Russia had since interfered militarily and succeeded in destabilising and causing huge destruction across eastern Ukraine. The Supreme Court heard the appeal before Russia's invasion of Ukraine in February 2022, and was not asked to consider the 2022 invasion or any other events that followed the appeal hearing.

Ukraine initially made some payments under the Notes, but failed to repay them in full when they matured on 21 December 2015. The Trustee, therefore, issued proceedings against Ukraine, claiming the sums due to Russia. After Ukraine entered its defence in the proceedings, the Trustee applied for summary judgment. In this appeal, the Supreme Court was asked to decide whether four matters raised in Ukraine's defence should proceed to trial.

First, Ukraine argued that, as a matter of Ukrainian law, it lacked capacity to enter the transaction by which the Notes were issued. The Supreme Court, however, held that, as a matter of English law, Ukraine was a legal person with full capacity. It was not, therefore, arguable that it lacked the capacity to issue the Notes or to conclude the related contracts. Ukraine's capacity was not limited in English law by the Ukrainian constitution or domestic law because it derived from the recognition of Ukraine as a sovereign State by the United Kingdom government, not from the State's internal law. This reflected Ukraine's independence and sovereignty, and fully accorded with the principle of international comity.

Secondly, Ukraine contended that its Minister of Finance lacked authority to enter the transaction. The Supreme Court rejected this argument, holding that he had apparent authority. If a State represents that a person has authority to act on its behalf, it will be bound by the acts of that person with respect to anyone dealing with him as agent on the faith of that representation.

Thirdly, Ukraine argued that it was entitled to avoid the Notes because of duress exerted by Russia. The majority of the Supreme Court found that Ukraine's allegations in relation to duress concerned two different kinds of pressure that are treated differently in English law. Category one comprised economic pressure, including Russia's alleged imposition and threat of trade restrictions. This did not constitute duress under English law because trade embargoes, protectionism and sanctions are normal aspects of statecraft. As such, they cannot be regarded as contrary to public policy or inherently illegitimate. Category two comprised Russia's alleged threats to use force to destroy Ukraine's security and territorial integrity. These threats could constitute duress of the person because they would almost inevitably

involve the use of violence against Ukrainian armed forces and civilians. The threats could also constitute duress of goods because they were likely to result in the damage to or destruction of property in Ukraine. It was, consequently, necessary to determine at trial whether Russia's threatened use of force imposed what English law regards as illegitimate pressure on Ukraine to enter into the trust deed and related contracts. This question was justiciable because the English courts could answer it without determining the lawfulness or validity of Russia's acts under domestic or international law.

Finally, Ukraine contended that it was entitled to rely on the international law doctrine of countermeasures to decline to make payment under the Notes. The majority of the Supreme Court held that this could not provide Ukraine with a defence because, for two reasons, the principles of international law governing the rights of States to take countermeasures are not generally justiciable before the English courts. First, English law does not recognise a defence reflecting the availability of countermeasures on the international level. Secondly, subject to exceptions founded on public policy, it is not the function of domestic courts to arbitrate inter-State disputes arising on the international level and governed by international law.

Ukraine was, therefore, permitted to defend itself against the Trustee's claim on the ground of duress, but only to the extent that its defence was based on duress of goods or the person resulting from Russia's alleged threatened use of force. Ukraine's defences on the issues of authority, capacity and countermeasures were struck out.

In a judgment dissenting in part, Lord Carnwath agreed with the majority on the issues of capacity and authority but would have allowed the defence of duress to proceed in its entirety. He also considered that the countermeasures defence should be permitted to proceed.

# 8. Diplomatic Immunity and Inviolability

## *Reyes v Al-Malki* [2017] UKSC 61; [2019] AC 735; 180 ILR 535

Like *Benkharbouche* (see page 53, below), this case concerned a claim by an ex-employee against her employer. The judgments in these two cases were handed down on the same day.

This case raised the question of whether diplomatic immunity applied to claims by a former employee, Mrs Reyes, arising out of alleged human trafficking by her former employer, Mr Al-Malki, a diplomatic agent, in circumstances where he had ceased to hold his position prior to the hearing. The Supreme Court rejected Mr Al-Malki's appeal, emphasising that diplomatic immunity was not an immunity from liability, but an immunity from the jurisdiction of United Kingdom courts.

The United Nations Vienna Convention on Diplomatic Relations 1961 ("the VCDR") was implemented into the domestic law of the UK by the Diplomatic Privileges Act 1964. The Supreme Court unanimously held that the immunity conferred on diplomatic agents and their families under that Convention comes to an end when the diplomatic agent leaves his post. From that moment, he is only entitled to immunity for acts performed in exercise of his diplomatic functions during his posting. As Mr Al-Malki had ceased to hold office, and none of the alleged acts were performed in exercise of his diplomatic functions, he and his wife were not entitled to immunity.

The Supreme Court was divided on the question of whether Mr Al-Malki would have been entitled to immunity if he had not left office. This turned on whether the employment of Mrs Reyes at the diplomat's residence would have come within an exception from immunity for "[a]n action relating to any … commercial activity exercised by the diplomatic agent … outside his official functions" within the meaning of article 31(1)(c) of the VCDR. Mrs Reyes argued that the exception should be interpreted in the light of the UN Protocol to Prevent, Suppress and Punish Trafficking 2000, which requires signatory States to recognise a crime and tort of human trafficking, such that the exception from immunity for a "commercial activity" includes human trafficking. Lord Sumption,

with whom Lord Neuberger agreed, did not accept that the VCDR could be interpreted in this way under the UN Vienna Convention on the Law of Treaties 1969, but Lord Wilson, with whom Lord Clarke and Lady Hale agreed, expressed their doubts as to the correctness of Lord Sumption's approach. Both Lord Sumption and Lord Wilson examined judgments of the International Court of Justice, including *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* [1971] ICJ Rep 16, *Democratic Republic of the Congo v Belgium (Arrest Warrant of 11 April 2000)* [2002] ICJ Rep 3, *Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 161 and *Germany v Italy: Greece Intervening (Jurisdictional Immunities of the State)* [2012] ICJ Rep 99.

Mr Al-Malki also argued that service on him by post at his residential address was in breach of the VCDR, which provides that a diplomat's home and person should be inviolable. The Supreme Court rejected that argument, holding that there was no statutory or VCDR requirement that he should be served through diplomatic channels.

The question that divided the Court fell to be decided five years later in the case of *Basfar v Wong* (see page 45, below).

## *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2018] UKSC 3; [2018] 1 WLR 973; 192 ILR 600

This case provides guidance on the use of confidential diplomatic correspondence that has become available to a party to litigation.

The appellant was the chair of the Chagos Refugees Group, representing former residents of the Chagos Archipelago ("Chagos") in the British Indian Overseas Territory ("the BIOT"). Those residents were removed and resettled elsewhere by the British government between 1971 and 1973 and were prevented from returning. Following earlier proceedings, it was prohibited under the BIOT Constitution and Immigration Order 2004 for Chagossians to return to the BIOT. The appellant challenged a decision of the Foreign Secretary in April 2010 to establish a marine protected area

("the MPA") in which there would also be no fishing in the BIOT.

One of the grounds for challenging the decision of the Foreign Secretary was that, as the appellant contended, the Foreign Secretary's decision was motivated by the improper ulterior motive of making future resettlement by the Chagossians impracticable. The appellant wanted to put in evidence a document purporting to be a confidential diplomatic cable, published by WikiLeaks, from the United States embassy in the United Kingdom to the US federal government in Washington. This allegedly set out what was said by US and UK officials at a meeting concerning the creation of the MPA. When the appellant's claim was heard, it was held that the cable was inadmissible in evidence and his claim was dismissed.

The Supreme Court unanimously held that the cable was admissible in evidence. The confidentiality and inviolability of diplomatic correspondence depended not on its subject-matter or contents, but on its status as part of the archives or documents and official correspondence of a diplomatic mission, protected by articles 24 and 27(2) of the United Nations Vienna Convention on Diplomatic Relations 1961. Lord Sumption (at [69]) explained that:

> *"It has been recognised ever since Vattel … that the basis of the rule of international law is that the confidentiality of diplomatic papers and correspondence is necessary to an ambassador's ability to perform his functions of communicating with the sovereign who sent him and reporting on conditions in the country to which he is posted."*

Lord Mance (with whom Lord Neuberger, Lord Clarke and Lord Reed agreed) held that it was not established that the cable had been in the archives of a US mission when it was removed, and so it was not inviolable. Moreover, it had been widely disseminated and was in the public domain. Lord Sumption and Lady Hale considered that the basis of the principle was control and that the documents would enjoy inviolability so long as they remained under the control of the US embassy. That control might be exercised by sending copies of it on terms as to how it was to be used.

The Supreme Court nonetheless dismissed the appeal as, in the judgment of the majority, on the facts, the cable could have made no difference to the outcome of the appellant's challenge.

## *Basfar v Wong* [2022] UKSC 20; [2023] AC 33

The issue in this appeal was whether a domestic worker, who claimed to be a victim of modern slavery, was able to bring a claim against the diplomatic agent who employed her. This question had been raised and discussed by the Supreme Court in *Reyes v Al-Malki* (see page 42, above), where differing views had been expressed, but it had not been necessary to decide the issue on the facts of the case.

Ms Wong was a migrant domestic worker who served in the household of Mr Basfar, a member of the diplomatic staff of the mission of the Kingdom of Saudi Arabia in the United Kingdom. She brought a claim in the Employment Tribunal for wages and breaches of employment rights. Her allegations included that she had been forced to work from 07:00 to around 23:30 each day, with no breaks or days off. She was required to always wear a doorbell, so that she was at the family's beck and call 24 hours a day. She was held virtually incommunicado, being allowed to speak to her family only twice a year using Mr Basfar's telephone. She was confined to Mr Basfar's house, which she could only leave to take out the rubbish. Mr Basfar withheld her pay. She claimed to have endured these abusive conditions for almost two years, until she escaped from the house. Mr Basfar applied to have her claim struck out on the ground that he was immune from suit because of his diplomatic status.

The issue turned on whether Ms Wong could rely on the exception from immunity for civil claims relating to "any … commercial activity exercised by the diplomatic agent in the receiving State outside his official functions" under article 31(1)(c) of the United Nations Vienna Convention on Diplomatic Relations 1961, whose provisions are incorporated into UK domestic law by section 2(1) of the Diplomatic Privileges Act 1964.

The Supreme Court held that the ordinary employment of a domestic worker by a diplomat did not constitute a "commercial activity" within the meaning of the exception from immunity provided by article 31(1)(c). This was because it would be contrary to the purpose of conferring immunity on diplomatic agents to interpret the provision as including activities incidental to the ordinary conduct of daily life of

diplomats and their families in the receiving State, such as purchasing goods and services for personal use.

However, by a three-to-two majority, the Court held that Ms Wong could nevertheless rely on the exception from immunity under article 31(1)(c). The majority held that exploiting a domestic worker by compelling her to work in conditions of modern slavery was not comparable to an ordinary employment relationship that is incidental to the daily life of a diplomat. They concluded that there was a material and qualitative difference between the two kinds of cases: employment is a voluntary relationship, whereas the essence of modern slavery is that work is extracted by coercing and controlling a victim. On the assumed facts, the extent of Mr Basfar's control over Ms Wong was so despotic and extensive as to place her in a position of domestic servitude. In addition, Mr Basfar gained a substantial financial benefit by deliberately and systematically exploiting Ms Wong's labour for almost two years. This conduct was accurately described as a commercial activity practised for profit, falling within the exception from immunity under article 31(1)(c).

The Court held unanimously that international law on modern slavery (an umbrella term including human trafficking, forced labour, servitude and slavery) was not directly relevant to the interpretation of article 31(1)(c) because the fact that an activity is illegal under international law does not make it a "commercial activity". The majority, however, noted that, when drawing the distinction between ordinary domestic service (which attracts civil immunity) and domestic servitude (which does not), it is appropriate to derive the criteria for that distinction from the rules of international law applicable in relations between the States concerned.

# 9. State Immunity

## *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31; [2011] 2 AC 495; 147 ILR 575

This appeal considered the scope of the "commercial transaction" exception in the State Immunity Act 1978 ("the 1978 Act"), and that statute's interaction with the Civil Jurisdiction and Judgments Act 1982 ("the 1982 Act"), providing comprehensive guidance on the applicability of state immunity in respect of actions on foreign judgments.

The appellant, NML, had purchased bonds issued by Argentina at a considerable discount on their face value, and successfully obtained summary judgment in New York for their full value of over US $284,000,000. In attempting to enforce that judgment against Argentinian assets in England at common law, NML was granted permission to serve Argentina abroad. In applying to set aside this permission, Argentina invoked state immunity. NML argued that Argentina was not immune because its claim was a proceeding related to a commercial transaction within section 3(1)(a) of the 1978 Act, and/or because Argentina's immunity was removed by section 31 of the 1982 Act, or waived by it under the terms of the bond agreements.

By a three-to-two majority, the Supreme Court adopted a narrow interpretation of section 3(1)(a), holding that it only captures claims directly concerning a commercial transaction, not subsequent attempts to enforce foreign judgments on such claims. The majority reasoned that Parliament could not have intended section 3(1)(a) to apply to the latter because, at the time of its adoption, rules of court did not permit a defendant to be served abroad in an action on a foreign judgment. Adopting a wider interpretation of section 3(1)(a) would, moreover, sit uncomfortably with other parts of the 1978 Act, which defined "commercial transactions" in the broadest terms (but without addressing actions to enforce foreign judgments concerning such transactions) and carefully addressed the removal of immunity in analogous situations (such as enforcement of arbitral awards, including those with a commercial subject-matter). Ultimately, if Section 3(1)(a) had a wide meaning, it would have been unnecessary for Parliament

to pass section 31 of the 1982 Act, which addressed state immunity concerning attempts to enforce foreign judgments.

Nevertheless, the Court unanimously held that Argentina lacked immunity pursuant to section 31 of the 1982 Act, which the Court found to be an alternative scheme for restricting state immunity in the case of foreign judgments that reflects and, in part, replaces the 1978 Act's exemptions to immunity. Under section 31, foreign judgments can be enforced against foreign States if, in a given case, the normal conditions for recognition and enforcement of judgments are fulfilled and the foreign State would not have been immune if the foreign proceedings were commenced in the United Kingdom. Here, those requirements were met because, by the terms of the bond agreements, Argentina had submitted to the English jurisdiction and waived its immunity.

The Supreme Court's decision has since been applied by the International Court of Justice in its leading decision on state immunity, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] (Merits) ICJ Reports 99. It has also been considered by the High Court of Australia in *PT Garuda Indonesia Ltd v Australian Competition & Consumer Commission* [2012] HCA 33 and *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43.

## *SerVaas Inc v Rafidain Bank* [2012] UKSC 40; [2013] 1 AC 595; 160 ILR 668

In the following year, the Supreme Court clarified the scope of the "commercial purposes" exception to state immunity from execution of a judgment. Under section 13(2)(b) of the State Immunity Act 1978 ("the 1978 Act"), the property of a State "shall not be subject to any process for the enforcement of a judgment or arbitration award". Section 13(4), however, sets out an exception which makes it possible to issue process in respect of "property which is for the time being in use or intended for use for commercial purposes".

The appellant, SerVaas Inc, had obtained a default judgment against the Republic of Iraq, which it sought to enforce in the United Kingdom. The respondent, Rafidain, was an Iraqi State-controlled bank which was in provisional liquidation in England. Under its scheme of arrangement, Rafidain was due to make a distribution to Iraq in respect of claims acquired by Iraq in the restructure of the debts accumulated under the Saddam Hussein regime. Iraq directed that its dividends should be paid directly to the Development Fund for Iraq established by the United Nations Security Council. SerVaas applied for a third-party debt order, arguing that the dividends should, instead, be paid to SerVaas in order to satisfy the judgment against Iraq.

The central question in the appeal was whether the origin of the debts was relevant to whether the property in question was "in use or intended for use for commercial purposes" for the purposes of the exception in section 13(4) of the 1978 Act. SerVaas argued that Iraq bought the debts to make a profit, while Iraq said they were acquired as part of a general restructuring of debts. In a unanimous judgment, the Supreme Court held that the origin of the debts was irrelevant. The phrase "in use for commercial purposes" should be given its natural and ordinary meaning, having regard to its context. It was insufficient that the property was connected with or related to a commercial transaction. What mattered was its current and intended use. (See *Alcom v Republic of Colombia* [1984] AC 580.) To fall within the commercial purpose exception, SerVaas needed to show

that the property was earmarked by Iraq solely to be used to settle liabilities incurred in commercial transactions. SerVaas had no prospect of doing this, since it was common ground that any dividends would be paid to and used by the Development Fund for Iraq. This was manifestly not a commercial purpose.

The test for whether State property was "in use or intended for use for commercial purposes" arose for consideration by the Supreme Court in a different context in *Argentum Exploration Ltd v Republic of South Africa* (see page 56, below).

## *The United States of America v Nolan* [2015] UKSC 63; [2016] AC 463; 180 ILR 477

In *Nolan*, the Supreme Court confirmed that domestic statutory collective redundancy consultation rules applied to dismissals arising from the closure of a United States military base in the United Kingdom. In doing so, the Court rejected the US's contention that, as a matter of international law, dismissals involving redundancies arising from a decision taken by a foreign State in its sovereign capacity were excepted from the statutory consultation requirements.

The case concerned the closure of a US military base in Hampshire in 2006. Mrs Nolan was employed at the base and was made redundant the day before it closed. Mrs Nolan complained that, when proposing to dismiss her and other employees, the US had failed to consult with any employee representative as required by the procedure for handling collective redundancies prescribed by Part IV of Chapter II of the Trade Union and Labour Relations (Consolidation) Act 1992 (as amended) ("TULCRA").

The US could successfully have relied on state immunity when the proceedings began but failed to do so sufficiently early in the proceedings. Before the Supreme Court, therefore, it relied on, among other things, a claimed principle of international law that one State does not legislate to affect the sovereign activities of another. The US submitted that this meant that the relevant provisions of TULCRA should be read as being inapplicable to, or subject to an exception for, a foreign State in

circumstances where the State could assert immunity.

The Supreme Court unanimously rejected this argument. It emphasised that TULCRA is expressly stated to extend to England, Wales and Scotland and regulates redundancy procedures in those territories only. The fact that Mrs Nolan's dismissal may have resulted from a decision taken in the US to close military bases did not mean that the UK was legislating extra-territorially.

The Court could not accept the exception contended for by the US. As Lord Mance pointed out, "carried to its logical conclusion it would mean that all legislation should, however clear in scope, be read as inapplicable to a foreign state in any case where the state could plead state immunity" (at [38]). This would elide immunity with the distinct concept of jurisdiction when, as a matter of logic, it is only necessary for a State to assert immunity once jurisdiction has been established. It would also "make quite largely otiose the procedures and time for a plea of state immunity" (at [36]), at least in respect of any statutory claim.

## *Belhaj v Straw; Rahmatullah (No 1) v Ministry of Defence* **[2017] UKSC 3; [2017] AC 964; 178 ILR 576**

These appeals concerned, among other things, the scope of state immunity in circumstances where proceedings brought in the United Kingdom involved allegations of wrongdoing by foreign States abroad.

Mr Belhaj, Ms Boudchar and Mr Rahmatullah (the respondents), claimed that various UK authorities and officials (the appellants) had been complicit in torts allegedly committed by other States in overseas jurisdictions. Mr Belhaj and Ms Boudchar alleged (among other things) that the UK had assisted in their unlawful rendition to, and detention in, Libya by coordinating with United States and Libyan authorities. Mr Rahmatullah claimed (among other things) that the UK had been complicit in his unlawful detention and mistreatment in Iraq and Afghanistan by US authorities.

The appellants argued that state immunity applied because it was integral to the respondents' claims that foreign States or their officials must be proved to have acted contrary

to their own laws. The appellants relied on article 6 of the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004, which provides that a State shall refrain from exercising jurisdiction in a proceeding before its courts against another State. Under article 6(2)(b), a proceeding shall be considered to have been instituted against another State if (among other things) it seeks to affect the "interests" of that other State.

The seven-Justice Supreme Court rejected this submission. Lord Mance, agreeing with various academic commentators, held that the term "interests" in article 6 should be limited to a claim for which there is some legal foundation and not merely to some political concern of the State in the proceedings. None of the domestic or international cases to which the Court had been referred carried the concept of "interests" so far.

The Supreme Court noted that the appeals did not involve any issues of possessory or proprietary title. All that could be said was that establishing the appellants' liability in tort would involve establishing that various foreign States, through their officials, were the prime actors in respect of the alleged torts. But that would have no second order legal consequences for the relationship between the respondents and the foreign States in question or their officials. As Lord Sumption observed at [197]:

*"No decision in the present cases would affect any rights or liabilities of the four foreign states in whose alleged misdeeds the United Kingdom is said to have been complicit. The foreign states are not parties. Their property is not at risk. The court's decision on the issues raised would not bind them. The relief sought, namely declarations and damages against the United Kingdom, would have no impact on their legal rights, whether in form or substance, and would in no way constrict the exercise of those rights. It follows that the claim to state immunity fails."*

As a result, the appellants' claim to state immunity, which trespassed beyond the outer limits of the concept, failed.

The Supreme Court's consideration of foreign act of state in these appeals is addressed at page 59, below.

## *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* **[2017] UKSC 62; [2019] AC 777; 180 ILR 575**

Article 6 of the European Convention on Human Rights ("the ECHR") and article 47 of the European Union Charter of Fundamental Rights ("the Charter") concerning access to a court have exercised a considerable influence over the law of state immunity. The inter-relationship of these provisions with the State Immunity Act 1978 ("the 1978 Act") has given rise to intriguing issues, most recently in relation to contracts of employment in the case of *Benkharbouche*.

Ms Benkharbouche and Ms Janah, both Moroccan nationals, were employed as domestic workers in London by the Sudanese and Libyan governments, respectively. Both women were dismissed and issued claims against their employers. The Employment Tribunal dismissed the claims on the basis that Libya and Sudan were entitled to state immunity under the 1978 Act. The question at issue in the appeal before the Supreme Court was whether sections 4(2)(b) and 16(1)(a) of the 1978 Act, which afforded this immunity, were consistent with article 6 of the ECHR and article 47 of the Charter. The answer to this question was dependent on whether the immunity conferred by these provisions was required by any rule of customary international law.

The Supreme Court emphasised that this was not a situation in which a court, considering the international law obligations of the United Kingdom, could properly limit itself to asking whether the UK had acted on a tenable view of those obligations. On the contrary, the Supreme Court made clear that, in the present context, the national court had to decide the requirements of international law. As Lord Sumption observed at [35]:

> *"If it is necessary to decide a point of international law in order to resolve a justiciable issue and there is an ascertainable answer, then the court is bound to supply that answer."*

The Supreme Court then embarked on an extensive review of State practice and *opinio juris*, concluding that: (i) there has probably never been a sufficient international consensus in favour of the absolute doctrine of

immunity to warrant treating it as a rule of customary international law; (ii) the only consensus that there has ever been was in favour of the restrictive doctrine of immunity; and (iii) the adoption of the restrictive doctrine has not proceeded by accumulating exceptions to the absolute doctrine.

The Supreme Court emphasised that the true basis of the doctrine was and is the equality of sovereigns, and that basis never did warrant immunity extending beyond what sovereigns did in their capacity as such.

From this starting point, and by reference to the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 (which is not yet in force), the Supreme Court concluded that there is no basis in customary law for the application of state immunity in an employment context to acts of a private law character because, unless constrained by a statutory rule, the general practice of States is to apply the classic distinction between acts *jure imperii* and *jure gestionis*. Given the foregoing, the Supreme Court concluded that sections 4(2)(b) and 16(1)(a) of the 1978 Act, so far as they conferred immunity, were incompatible with article 6 of the ECHR and, in addition, because they were incompatible with article 47 of the Charter, did not apply to claims derived from EU law.

## *General Dynamics United Kingdom Ltd v Libya* [2021] UKSC 22; [2022] AC 318; 201 ILR 535

In this case, the Supreme Court considered how the procedural requirements for serving proceedings on a defendant State apply in the context of enforcing arbitral awards. General Dynamics had been awarded over £16,000,000 plus interest and costs in arbitral proceedings against Libya. It sought to enforce the award in England and Wales, where it believed Libya held relevant assets.

The question for the Court was whether General Dynamics was required to have followed the procedure under section 12(1) of the State Immunity Act 1978 before the award could be enforced. Section 12(1) governs the process for instituting court proceedings against a foreign State. It provides that "any writ or other document required to be served for instituting

proceedings against a State" shall be served by being transmitted through the Foreign, Commonwealth and Development Office ("the FCDO") to the Ministry of Foreign Affairs of the relevant State.

In the arbitration context, the Civil Procedure Rules provide that an application for permission to enforce an arbitral award pursuant to section 101 of the Arbitration Act 1996 may be made without notice, although the court may require the party to serve the arbitration claim form on the defendant. In this case, the court had not required General Dynamics to serve the arbitration claim form on Libya.

In this appeal, the issue of service was of practical significance: the lower courts had found that the security situation in Libya suggested that service through diplomatic channels would be dangerous and, assuming it to be possible at all, likely to take over a year.

By a three-to-two majority, the Supreme Court allowed Libya's appeal, holding that service under section 12(1) was required before the award could be enforced.

The majority held that the language of section 12(1) is wide enough to apply to all documents by which notice of proceedings is given to a defendant State. In the context of the enforcement of arbitral awards against a State, the relevant document will either be the arbitration claim form (where the court requires this to be served) or, otherwise, the order granting permission to enforce the award. The rule in section 12(1) requiring service on a defendant State through the FCDO is exclusive and mandatory, subject only to the possibility of service in accordance with section 12(6), which permits service in a manner agreed by the defendant State. A court has no power to dispense with the statutory requirements for service under section 12, regardless of any exceptional circumstances.

The majority observed that the procedure provided for by section 12 is how a State is given notice of the proceedings against it and a fair opportunity to respond. This rationale applies fully to the service of an order giving permission to enforce an arbitral award, which puts the defendant State on notice so that it may apply to set aside the order for enforcement.

While the majority of the Supreme Court rejected Libya's submission

that there is a rule of customary international law which requires that documents instituting proceedings against a State be served either through diplomatic channels or in a manner agreed by the defendant State, it stated that considerations of comity and international law strongly supported a wider reading of section 12(1). It noted that the circumstances in which section 12 applies are of considerable international sensitivity. There is a clear need to ensure that the process by which one State is subjected to the jurisdiction of the courts of another State does not give rise to any breach of international law. Without clear procedures, there would be a danger that attempts may be made to serve process on a representative of the defendant State or on diplomatic premises in a manner which could give rise to a breach of international law, such as the rule of diplomatic inviolability. The majority concluded that the mandatory service process set out in section 12 was intended to provide a means of commencing proceedings against States which meets the requirements of international law and comity.

## *Argentum Exploration Ltd v Republic of South Africa* **[2024] UKSC 16; [2024] 2 WLR 1259**

This case concerned the interpretation of section 10(4)(a) of the State Immunity Act 1978 ("the 1978 Act"), which applies to claims brought *in rem* against State-owned cargoes.

The *SS TILAWA* was sunk in the Indian Ocean in 1942 by enemy action. On board was a cargo of 2,364 bars of silver being carried from Bombay to Durban. The silver belonged to the Union of South Africa, now the Republic of South Africa, and had been purchased for the predominant purpose of being made into coin by the South African mint.

In 2017, the silver was recovered from the seabed, carried to the United Kingdom and declared to the Receiver of Wreck. Argentum claimed to be the salvor of the silver and brought a claim *in rem* against the silver for voluntary salvage. South Africa argued that it was immune from suit under the 1978 Act.

Overturning the judgments of the High Court and the Court of Appeal, the Supreme Court unanimously held that South Africa was entitled to immunity from the claim *in rem*. Lord Lloyd-Jones and Lord Hamblen gave a joint judgment.

Section 10(4)(a) of the 1978 Act provides that a State is not immune as respects an action *in rem* against a cargo belonging to that State "if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes".

It was common ground that the *SS TILAWA* was in use for commercial purposes when it was carrying the silver, and that the silver was not intended for use for commercial purposes: its predominant intended use was the sovereign purpose of minting coins.

The central issue in the appeal was, therefore, whether the silver was in use for commercial purposes when it was being carried on board the *SS TILAWA* in 1942.

In considering the meaning of the phrase "when the cause of action arose" within section 10(4)(a), the Supreme Court held that the relevant time was when the cause of action in salvage arose, which was 2017. It was, however, appropriate to have regard to the use and intended use of the cargo when it was being carried, and whether there had been any change of use or intended use in the intervening period. In this case, there had been no such change, and so the status of the cargo and vessel at the time of carriage was determinative.

The central issue in the appeal was, therefore, whether the silver was in use for commercial purposes when it was being carried on board the *SS TILAWA* in 1942. The Supreme Court held that it was not. It rejected an argument that the silver was in use for commercial purposes because of the commercial arrangements for its sale and carriage. This did not accord with the natural meaning of the words "in use". It was Parliament's intention that additional threshold conditions should be met before bringing claims *in rem* as opposed to claims *in personam*. Proceedings *in rem* are far more intrusive into the rights of a State over its property than proceedings *in personam*, so there are compelling

reasons justifying more stringent criteria before immunity is denied.

The Supreme Court also noted that section 10 of the 1978 Act was enacted to enable the UK to ratify the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, Brussels, 1926, which supported the conclusion that a distinct approach was intended for immunity from proceedings *in rem*.

The judgment involves some discussion of the relationship between the 1978 Act and the rules of customary international law on state immunity. The Supreme Court noted that while the 1978 Act was intended to be consistent with the rules of customary international law, it did not seek to replicate precisely the distinction between *acta jure imperii* and *acta jure gestionis* (sovereign and non-sovereign activities). Where the 1978 Act uses this distinction as the basis for delimiting the scope of immunity from adjudicative jurisdiction, it is the juridical nature of the activity and not the purpose for which it is was undertaken which is determinative. Different considerations apply to proceedings concerning the property of a State, however, where the scope of immunity has generally been wider and the use and intended use of the property are highly material considerations. As the Supreme Court had explained in *SerVaas* (see page 49, above), the 1978 Act uses a test of use or intended use to determine whether State property is immune from enforcement jurisdiction, and it noted that section 10 was a hybrid provision, covering both adjudicative and enforcement jurisdiction in Admiralty proceedings.

# 10. Foreign Act of State

## *Belhaj v Straw; Rahmatullah (No 1) v Ministry of Defence* **[2017] UKSC 3; [2017] AC 964; 178 ILR 576**

In *Belhaj* and *Rahmatullah* (see page 51, above), the Supreme Court also examined the scope of the foreign act of state doctrine. The Court observed that, unlike state immunity, the foreign act of state doctrine is not based on customary international law: most, if not all of its strands have been developed doctrinally in domestic law. As Lord Sumption observed at [200], "[t]he foreign act of State doctrine is at best permitted by international law. It is not based upon it".

Lord Mance identified three types of foreign act of state rule recognised by current English authority, broadly also reflected in the judgment of Lord Neuberger. The first is a rule of private international law, whereby a foreign State's legislation will normally be recognised and treated as valid so far as it affects property within that State's jurisdiction. The second rule is that a domestic court will not normally question the validity of any sovereign act in respect of property within its jurisdiction, at least in times of civil disorder. Third, a domestic court will treat as non-justiciable – or will refrain from adjudicating on or questioning – certain categories of sovereign act by a foreign State abroad, even if outside the jurisdiction of that State. This third rule is to be examined on a case-by-case basis, having regard to the separation of powers, the sovereign nature of the activities in question, and whether issues of fundamental rights are engaged. Lord Mance and Lord Neuberger expressed differing views as to the existence of a fourth rule, according to which courts in the United Kingdom might be precluded from investigating acts of a foreign State where such investigation would embarrass the UK in its international relations.

Lord Sumption identified in the case law two principles relevant to the foreign act of state doctrine: "municipal law act of state", corresponding generally to the first two rules of Lord Mance's framework; and "international law act of state", corresponding generally to Lord Mance's third rule. Municipal law act of state is confined to acts done within the territory of the relevant foreign State. International law act of state requires the English courts

not to adjudicate on the lawfulness of the extra-territorial acts of foreign States in their dealings with other States or the subjects of other States, since these occur on the plane of international law. Neither doctrine applies simply because the subject-matter of an action may incidentally disclose that a State has acted unlawfully. In addition, the foreign act of state doctrine cannot bar a claimant's claim insofar as it is based on allegations of complicity or participation in torture or in detention or rendition otherwise than by legal authority.

The Court concluded that the appellants had not, on the assumed facts of the case, shown any entitlement to rely on the foreign act of state doctrine to defeat the proceedings brought by the respondents. Given that the appellants' claim to state immunity also failed (see page 51, above), their appeals were dismissed, and the cases were permitted to proceed to trial.

The judgments of Lord Mance, Lord Neuberger and Lord Sumption in *Belhaj* were relied on by the Supreme Court in *Law Debenture Trust Corporation plc v Ukraine* (see page 39, above) for the purposes of determining whether allegations made by Ukraine about Russia in support of Ukraine's defence of duress were justiciable.

The Court concluded that the appellants had not, on the assumed facts of the case, shown any entitlement to rely on the foreign act of state doctrine to defeat the proceedings brought by the respondents.

## *Maduro Board of the Central Bank of Venezuela v Guaidó Board of the Central Bank of Venezuela* [2021] UKSC 57; [2023] AC 156; 203 ILR 612

In this appeal, the facts of which are summarised above (see page 37), the Supreme Court also considered the applicability of the act of state doctrine.

With regard to the aspect of acts of state with which the appeal was concerned, the Supreme Court distinguished between two rules (each of which is subject to exceptions). The first rule is that courts in the United Kingdom will recognise and will not question the effect of a foreign State's legislation or other laws in relation to any acts which take place or take effect within the territory of that State. The second rule is that UK courts will recognise and will not question the effect of an act of a foreign State's executive in relation to any acts that take place or take effect within the territory of that State. Although the second rule had previously been doubted, the Supreme Court held unanimously that, in light of the substantial body of authority in its support, its existence should now be acknowledged. Furthermore, the Court held unanimously that there is no basis for limiting the second rule to cases of unlawful executive acts concerning property, such as expropriation or seizure.

The Supreme Court held that, under the act of state doctrine, English courts will not, as a general rule, question the effect of a foreign State's legislation, such as the transition statute in this case. Furthermore, as a general rule, they will not question the effect of the acts of its executive on things occurring within its own territory, such as Mr Guaidó's appointments to the Guaidó Board. So far as the latter was concerned, the "extra-territorial acts" exception to the general rule did not apply, because the relevant acts of appointment were made within Venezuela and were not in excess of the jurisdiction of Venezuela in international law. The "incidental acts" exception did not apply either, because the proceedings involved a direct attack upon the validity of Mr Guaidó's appointments to the Guaidó Board.

The decisions of the Venezuelan Supreme Tribunal of Justice were, by contrast, not within the scope of the act of state doctrine (being neither executive nor legislative acts), and its decisions might be recognised and given effect by English courts. That question was remitted to the Commercial Court for determination.

Recognition of the Supreme Tribunal's judgments would, however, be prohibited if it would conflict with a rule of UK domestic public policy, including the principle that, in matters relating to the recognition of a foreign government, the executive and the judiciary must speak with one voice.

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