

BRITISH ACTS OF STATE IN ENGLISH COURTS

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Underlying act of state doctrines is the idea that the survival of a community will sometimes depend upon treating foreigners, and perhaps even citizens, in ways that would usually violate legal and moral rules. Acts of state are actions such as these, taken in the name and the interests of the state to further the public good: “when the act accuses, the result excuses.”² This essay offers an account of act of state doctrines as applied by English courts to actions of the British government overseas. It is a study of “domestic” act of state doctrines concerning actions of the British state, as distinct from

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² Machiavelli *Discourses on Livy* Book I Chapter 9.

doctrines concerning the incompetence of English courts to adjudicate on the validity or legality of the acts of foreign states.³ The subject might seem arcane, but the case law sheds light on enduring questions concerning the nature of English public law and its relationship with public international law, as well as on the question of the availability of remedies against the Crown.

Any study which aims to make sense of English act of state doctrines must grapple with two particular problems. Firstly, it must refer to the rules of English constitutional law on prerogative power, “the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers”.⁴ English constitutional lawyers disagree on what these rules are. They disagree on how far, if at all, the monarch’s traditional prerogative powers have been subsumed within a set of legally constrained executive powers of the state. At one extreme, British governmental power is held to be a matter of the prerogative powers and immunities special to the Crown and its agents, accountable politically before Parliament; such powers and immunities are non-justiciable in English courts, whose concern is and should be only with the oversight of administrative action.⁵ At the other extreme, every power used in government is termed executive power, and in the name of either the rule of law or parliamentary sovereignty or both, government is treated as accountable both to Parliament and in English courts for the way it exercises each and every one of its executive powers.⁶

³ The focus is on acts of the British state in *English* courts as historically Scottish courts have taken a “more robust view of the individual’s rights against the Crown than did the law of England” (Lord Jauncey in *BMA v Greater Glasgow Health Board* 1989 SC (HL) 65, 94); elements of that distinctive approach endure in contemporary Scots law. See generally Adam Tomkins “The Crown in Scots Law” in A McHarg and T Mullen (eds) *Public law in Scotland* (Avizandum: Edinburgh, 2006) 262-280.

⁴ A V Dicey *Introduction to the study of the law of the constitution* (10th edn, 1959) at 424.

⁵ Such accounts often cite Locke’s definition of sovereign prerogative power as “the power of doing public good *without a rule*”, suggesting that its only and ultimate check is popular revolt: *Second Treatise* Chapter 14 “Of Prerogative” ss 168, 166.

For Blackstone “[Prerogative] signifies, in its etymology (from *prae* and *rogō*) something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature singular and eccentric; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects; for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer.” Blackstone *Commentaries on the Laws of England* (Clarendon, Oxford 1765-9) Bk I, Chapter 7, at 239. But, like most constitutional lawyers after him, Blackstone was unclear about how far the feudal prerogative powers of the Crown and its agents should be treated as executive powers subject to legal constraint: “Ever since Blackstone wrote his *Commentaries*, British law has been wavering between the discourse of prerogative and the modern language of executive power” (Denis Baranger “Executive power in France” in Paul Craig and Adam Tomkins (eds) *The executive and public law: power and accountability in comparative perspective* (OUP 2005) 217-242, 218).

⁶ Thus Lord Diplock argues in *Town Investments v Department of the Environment* [1978] AC 359 at 380G-381B that it would be preferable “Where ... we are concerned with the legal nature of the exercise of executive powers of government ... instead of speaking of ‘the Crown’ ... to speak of ‘the government’ - a term appropriate to embrace both collectively and individually all of the ministers of the Crown and parliamentary secretaries under whose direction the administrative work of government is carried on by the civil servants employed in the various government

Since this study concerns the applicability of English act of state doctrines to government action overseas, it must also address a second problematic area of constitutional law, that of the status of rules of international law: again, British politicians, jurists and judges have long disagreed on the ways (if any) in which rules of international law form constraints enforceable in English courts on government action.⁷

Given these conflicting accounts of the extent of the government's legal accountability before English courts and the relevance or otherwise of international law in such proceedings, it is unsurprising that accounts of English act of state doctrines vary widely. This essay is structured chronologically; it focuses on rival act of state doctrines at their moments of strongest influence. But although rival doctrines have each enjoyed times of particular influence, a study of English case law on acts of state cannot be presented as the history of the emergence of one rule, any more than an historical study of English constitutional law could establish the final victory of Enlightenment notions of legally accountable government or Republican notions of political accountability over feudal notions of Crown immunity.⁸ Underlying the historical account are three rationales, all of which endure as rival English act of state doctrines.⁹ This essay aims to

departments". See also his reference to "the Crown, which today personifies the executive government of the country" in *BBC v Johns* [1965] Ch 32 at 79.

The debate on control of prerogative powers is an ongoing one: see in particular the House of Commons Public Administration Select Committee's Fourth Report (4 March 2004) championing full-scale law reform in the form of a "Ministers of the Crown (Executive Powers) Bill" as drafted by Professor Rodney Brazier (online at www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/422/42202.htm.) and the current, eviscerated Constitutional Reform (Prerogative Powers and Civil Service etc.) Bill (brought from the House of Lords, 25 July 2006) at http://www.publications.parliament.uk/pa/pabills/200506/constitutional_reform_prerogative_powers_and_civil_service_etc.htm, excluding not only personal prerogative powers (as in Brazier's version, cl 1(3)) but *all* "rights and powers which belong to Her Majesty in right of the Crown ... , and which are necessary to allow Her Majesty to continue to act as The Queen in Council or as Head of State".

⁷ See further Amanda Perreau-Saussine "Foreign views on eating aliens: the roots and implications of recent English decisions on customary international law as a source of common law limits on executive power" in Colin Warbrick and Stephen Tierney (eds) *Towards an international legal community? The sovereignty of states and the sovereignty of international law* (British Institute for International and Comparative Law, London 2006) 75-129.

⁸ For a thought-provoking survey of historical selectivity in twentieth century traditions in English public law see John Allison *The English historical constitution: continuity, change and European effects* (CUP 2007); see also Martin Loughlin *Public law and political theory* (Clarendon, 1992) (especially chapters 5, 7 and 9 on what he calls "Normativism", Oxbridge liberal writing – focussing on the work of A.V Dicey, William Wade, Paul Craig and Trevor Allan) and David Dyzenhaus "The Left and the question of law" (2004) 17 *Canadian Journal of Law and Jurisprudence* 7-30 (on public law traditions linked with the London School of Economics, focussing on John Griffiths and recent followers in his tradition - Martin Loughlin, Keith Ewing and Adam Tomkins). For an attempt to present English constitutional history as a victory for political (Parliamentary) accountability, see Jeffrey Goldsworthy *The sovereignty of Parliament* (Clarendon, 1999) and the critical review essays by Douglas Edlin ("Rule Britannia" (2002) 52 *University of Toronto Law Journal* 313-329) and Mark Walters ("Common law, reason and sovereign will" (2003) 53 *University of Toronto Law Journal* 65-88).

⁹ Holdsworth (*History of English Law* (Methuen London 1964) XIV 28-52) runs together the first two doctrines (31-32) and asserts that one clear "modern basis" for acts of state has been "established"(45). He holds that the Crown can certify conclusively as to matters of state, but

shed light on this area of English constitutional law by using a study of leading cases to trace these three doctrines.

Three rationales for the English act of state doctrine

On one account, in rare circumstances it can be both necessary and just for a sovereign to rob foreigners (and perhaps even his own subjects overseas) or to deprive foreigners (and perhaps even subjects) of basic personal liberties. On this first account, any assessment of the justice of such actions is a political rather than a legal matter. Judicial scrutiny of such unpleasant if necessary actions should be minimised, either because judges lack the capacity or the political legitimacy to assess the political issues at stake, or to avoid a public scrutiny in court that could lead to revulsion among citizens, and to disorder if citizens assumed a licence to follow suit. On this account, the English act of state doctrine is best understood as rendering acts of state non-justiciable: the act of state doctrine identifies acts of state which fall outside the law, actions which are inherently political, and as such are not, or should not be, subject to legal assessment.

On a second account, there is law applicable to acts of state, but (since acts of state are by definition taken on foreign territory) that applicable law is international law rather than English law. This view raises in turn questions about the appropriate forum for application of the relevant rules of international law. As a matter of English law, this means that English courts exercise only a rare and exceptional jurisdiction over overseas acts of the British state: the English act of state doctrine is best understood as a jurisdictional rule.

On a third and final account, acts of state are legally defensible “acts of governance” because and in so far as they are just. The English act of state doctrine is best understood as a legal defence, one that can be invoked by officials to shift sole responsibility for their actions onto the Crown, and so one that recognises the executive’s powers to take actions overseas in the interests of the country that would be unlawful were they private acts of an individual. But on this third account of acts of state, the award of compensation to individuals affected by the Crown’s acts overseas is a justiciable issue. An act of state defence can be raised by the Crown only where just compensation has been offered; where it has not, the Crown’s actions are legally *ultra-vires*.

I begin by elaborating on these three doctrines, and then turn to a more detailed analysis of each one, focusing on the main cases in which the relevant accounts of the act of state doctrine emerges. The cases fall in clusters: the first rationale emerges in a set of

that the courts can decide if the Crown has acted within this power of certification, as more generally whether it has acted within “its power to perform acts of state”(46): if an act alleged to be an act of state is within the Crown’s prerogative powers, “it is a valid act of state and the jurisdiction of the courts is ousted: if it is not within these powers it is not an act of state, and the persons who have done the act are responsible in law to any persons injured thereby, in accordance with the doctrine of ministerial responsibility.”(51) Holdsworth’s account evades the legal issues at stake in act of state cases. Either courts can determine whether an action of the Crown is such an improper use of power that it cannot be characterised as falling within the lawful boundaries of the relevant power (in which case, acts of state are justiciable and the courts can enter into a minimal “merits” review of their justice: the third doctrine, considered in section III below) or courts cannot adjudicate on the use of such powers and then acts of state are better characterised as non-justiciable (*pace* Cane, n 25 below and accompanying text).

decisions concerning legal challenges relating to the establishment and governance of the British Empire; the second rationale emerges in decisions concerning exercises of prerogative powers in the wake of decolonisation; the third rationale emerges sporadically in cases where English courts focus explicitly on the justice or otherwise of the Crown's actions overseas.

(i) The first doctrine: acts of state as non-justiciable because not regulated by law

On one account, it is for the sovereign (and, in modern versions, Parliament) and not the sovereign's courts to judge whether or not the executive has acted in the state's interests. Acts of state should be treated as non-justiciable and withdrawn from the courts: they raise inherently political questions, questions which as a matter of constitutional history courts have not resolved, and which in democratic constitutional theory courts should not resolve. In the blunt terms attributed to Anthony Eden, rejecting the suggestion that the Foreign Office Legal Adviser should be informed of plans relating to Suez, "The lawyers are always against our doing anything. For God's sake keep them out of it. This is a political affair."¹⁰ Acts of state, on this account, are simply not matters subject to legal regulation at all: they are outside the law, "acts by arbitrary power on behalf of the Crown" and acts for which no attempt is made to offer justification "under colour of legal title". The execution of such "a political measure" is not a matter for "the judgment of a legal tribunal".¹¹

This is the account of the overseas powers of the British government articulated in the work of the late William Wade, who has had considerable influence on the development of English constitutional and administrative law:

It is not so much a matter of nationality as of geography – that is to say, the Crown enjoys no dispensation for acts done within the jurisdiction, whether the plaintiff be British or foreign; but foreign parts are beyond the pale (in Kipling's words, "without the law"), and there the Crown has a free hand, whether the plaintiff be foreign or British.¹²

On such accounts, acts of state are actions of high policy which fall outside the law and therefore outside the jurisdiction of any court. They are to be judged only in terms of divine law, or of moral and political rules, or of expediency, and not in terms of English law. And judgments about their justice are to be made in the sovereign's conscience, or by the King and his Council, or by Parliament, or by the electorate.

James Fitzjames Stephen offers an account of acts of state along these lines: "The principle is that the acts of a sovereign State are final, and can be called in question only by war, or by an appeal to the justice of the State itself. They cannot be examined

¹⁰ Sir Anthony Nutting *No end of a lesson: the story of Suez* (Clarkson N Potter, New York 1967) 95, quoted in Geoffrey Marston "Armed Intervention in the 1956 Suez Canal Crisis: the legal advice tendered to the British Government" (1988) 37 *ICLQ* 773, 798.

¹¹ The phrases are those of Lord Kingsdown in *Kamachee* [1859] 13 Moo PC 22 at 77 and 85: see below n59 and accompanying text

¹² Wade *Administrative law* (Clarendon Press, Oxford 1st edn, 1961) at 230; Wade and Forsyth *Administrative law* (OUP) [hereafter "Wade and Forsyth"] 8th edn, 2000 at 824; 9th edn 2004 at 840. In the first edition, this passage concludes with an additional sentence omitted from the second edition (Clarendon Press, Oxford 1967 at 272) and subsequent editions: "British courts maintain the rule of law at home, but there are limits to their jurisdiction." Wade was sole author of the first six editions of the book, joint editor of the seventh and eighth editions with Christopher Forsyth, and died in 2004 shortly before the ninth edition was published.

into by the courts of the State which does them.”¹³ As Stephen notes, “If one British subject puts another to death or destroys his property by the express command of the King, that command is no protection to the person who executes it unless it is in itself lawful, and it is the duty of the proper courts of justice to determine whether it is lawful or not.”¹⁴ But “if such acts are done by public authority, or, having been done, are ratified by public authority, they fall outside the sphere of the criminal law”: “as between British subjects and foreigners, the orders of the Crown justify what they command so far as British courts of justice are concerned”.¹⁵

Stephen’s reference to an “appeal to the justice of the State” raises the question of whether such actions are constrained by international law: accompanying this first act of state doctrine, focussing on non-justiciable matters, is a deep scepticism about the legal character of rules of international law. For Stephen, as “the great mass of mankind are and always will be to a greater or lesser extent the avowed enemies of considerable sections of their fellow creatures”, the only universal principle or *ratio ultima* of kings and “human society in all its shapes” is “the compulsion of war”.¹⁶ War decides “whether nations are to be and what they are to be”, “what men shall believe, how they shall live, in what mould their religion, law, morals, and the whole tone of their lives shall be cast”, and in estimating the character of a war we should take into account not merely who was on the offensive or who struck the first blow “but much more the question, Which of the conflicting theories of life, which of the opposing principles brought into collision, was the noblest, the truest, the best fitted for the development of the powers of human nature, most in harmony with the facts which surround and constitute human life?”¹⁷ Writing in the wake of the 1871 *Alabama* settlement; Stephen argues that since nations have no “common superior”, the authority of international principles of arbitration depends entirely on the will of the parties.¹⁸ All great wars are “wars of principle and sentiment”: the wisdom and nobility of a victor will be an element of his strength, and international law is but a reflection or projection of the principles of the strong, a “branch of State morality”.¹⁹ In Posner’s summary, Stephen’s position is one of “utter willingness to rule other peoples, rooted in supreme confidence in the superiority of one’s own civilization.”²⁰ That confidence extends to the mechanisms of political as opposed to legal accountability.

(ii) *The second doctrine (a re-writing of the first): acts of state as purely matters of international law and so outside the jurisdiction of English courts*

By contrast with the previous account of acts of state, this second account assumes a robust account of the legal character of rules of international law. According to this

¹³ James Fitzjames Stephen *A history of the criminal law Vol II* (Macmillan, London 1883) 64.

¹⁴ *Ibid* at 65.

¹⁵ *Ibid* at 63, 65.

¹⁶ James Fitzjames Stephen *Liberty, equality, fraternity* Richard A Posner (ed) (University of Chicago Press 1991) at 239

¹⁷ Stephen *Liberty, equality, fraternity* at 166 (*ultima ratio regem* is said to have been inscribed around Fredrick the Great’s cannon), 165.

¹⁸ *Ibid* at 164.

¹⁹ Stephen *Liberty, equality, fraternity* at 165, 51 (*Preface to second edition*). For Stephen, to make love for humanity the basis of ones creed is about as silly as declaring: “The human race is an enormous agglomeration of bubbles which are continuously bursting and ceasing to be. No one made it or knows anything worth knowing about it. Love it dearly, O ye bubbles.” (243).

²⁰ Richard A Posner, “Forward” to *Liberty, equality, fraternity* at 8.

second account, one that dominates contemporary writing on acts of state, the government actions at issue are in principle susceptible to legal assessment: it is not that there is no law that applies, nor that judges lack a particular capacity to apply the relevant rules of law. But the applicable law is international law and as such to be applied by states among themselves or by an international tribunal, but rarely (if at all) by English courts.

On this account, as actions taken by the Crown or sovereign overseas, acts of state fall outside the jurisdiction of that same sovereign's own courts of law. Legal assessment of acts of state is normally an exclusively international matter since by definition acts of state involve conflicts between different states' interests. Act of state doctrines are then best understood as jurisdictional rules of English law, ones by which English courts have no jurisdiction over international law disputes unless specifically given it.²¹ The central question then concerns the possible sources of that exceptional jurisdiction.

(iii) The third rationale: acts of state as just and legally defensible as such

On a rival account of responsible rule, one at least as venerable as the Thrasymachean or Machiavellian one, prudent sovereigns have a responsibility to maintain and teach the spirit or reason of the laws, something they should treat as binding upon themselves. Otherwise "the man who tastes a single piece of human flesh ... is fated to become a wolf".²² Such "rule of law" accounts recognise that government requires prerogative powers unavailable to ordinary citizens, but treats these powers as constrained in that acts of state are lawful when and only in so far as they are just:

Judges ought above all to remember the conclusion of the Roman Twelve Tables; *Salus populi suprema lex*: and to know that laws, except they be in order to that end, are but things captious and oracles not well inspired. Therefore it is a happy thing in a State when Kings and States do often consult with judges; and again when judges do often consult with the King and State...²³

On this third account, a governmental plea of act of state operates as a defence. If - but only if - a court can be convinced that an otherwise tortious or criminal action by the executive overseas was likely to be in the British state's interest, this will render lawful what would otherwise be unlawful: "It is, I think, for the courts to determine in any particular case as it comes up whether, as matter of policy - the policy of the law - the defence of act of state should be available."²⁴

Crucial to this third doctrine is the question of compensation of victims of acts of state. On the first account of the act of state doctrine, the defensibility or justice of acts of state (including the question of compensation) are exclusively matters of political rather than legal accountability: acts of state are legally non-justiciable and so in English law the Crown has no legal obligation to rectify the harms it has caused. Instead in law it enjoys the freedom to shift the costs of the defence of the state's interests or concerns overseas onto foreigners and perhaps even British subjects. By contrast, on this third

²¹ See Dapo Akande, "Non-justiciability and the foreign act of state doctrine in English courts" (forthcoming).

²² Plato *Republic* Bk VIII 565e.

²³ Bacon "Essay of Judicature" *Works* VI, 509.

²⁴ Denning LJ in *Buttes Gas and Oil Co v Hammer* [1975] QB. 557 at 573-4 citing *Buron v Denman* (on which see section III.iii, below).

and rival account of the doctrine, acts of state are legally defensible, but raising a defence of act of state does not absolve the Crown from acting justly towards those individuals particularly affected: the defence requires that the Crown act justly towards victims of an act of state. If the Crown's actions cannot be characterised as just under any circumstances, then the Crown cannot assert that they amount to an act of state. To characterise a government action as a genuine act of state is to say that it is one considered necessary for the promotion or protection of the public good, and is not only legally but also morally defensible if just compensation has been paid.

The three sections of this essay below trace the case law from which emerge these three accounts of act of state doctrine. A brief concluding discussion suggests reasons for developing the final one of these three rationales.

I Acts of state as non-justiciable because subject to political rather than legal control

For the first two thirds of the twentieth century, and in the name of democratic constitutionalism, English public lawyers commonly treated the executive as answerable only to Parliament for the way it exercised its prerogative powers (powers for the protection and promotion of the public good): the executive was answerable to English courts only when and in so far as Parliament had given the courts this role through legislation. Without clear statutory principles given to them by Parliament, it was argued that the courts lacked legal rules with which to scrutinise executive action. By default, scrutiny was a task requiring political judgment by elected politicians. And since prerogative powers are residual, non-statutory powers, their exercise was by definition a non-justiciable matter: questions of compensation were questions of justice, politics or humanity - but not of English law.

Articulating this vision of prerogative powers, Peter Cane, writing in 1980, suggested that the obscurity of English law on acts of state could be removed by interpreting every branch of it as based on the non-justiciability of prerogative powers:

The rules about acts of State represent an attempt to set the bounds of judicial control of the Executive in the area of foreign relations. In this light it will be suggested that elaborate attempts to distinguish between prerogative acts and acts of State are misguided because the most important characteristic of both types of act is that they lie beyond the scope of judicial review.

... (i) As a matter of constitutional history, the exercise of certain powers has been left to the discretion of the Crown, subject only to legislative encroachment and the control of the courts in [setting broad limits within which the Crown may operate as it pleases.]

(ii) As a matter of constitutional theory, the courts are not the proper bodies to decide whether decisions on certain matters of "high policy" were proper; they are neither representative nor responsible.

(iii) Certain activities, such as foreign relations and war, are most unsuitably conducted by judicial methods of decision making.²⁵

Cane's general assertion that prerogative acts by definition "lie beyond the scope of judicial review" was questionable as an articulation of a principle of English common

²⁵ Cane "Prerogative acts, acts of state and justiciability" (1980) 29 *ICLQ* 680, 680-681.

law even at the time he wrote. Many constitutional lawyers would have emphasised that the prerogative is a residual category and so not necessarily coherent: they might also have echoed Lord Devlin's insistence in *Chandler* that "The courts will not review the proper exercise of discretionary power but they will intervene to correct excess or abuse."²⁶ And in the *GCHQ* case, decided after Cane wrote, the House of Lords famously insisted on their general common law jurisdiction to review the use of prerogative powers even in the absence of legislation.²⁷

This assertion of a general jurisdiction to review the executive's use of the prerogative was coupled with a list of off-limits powers.²⁸ The Lords pointed to general common law principles of rationality which they held were available for reviewing exercises of prerogative power: an administrative decision flouting these principles would be *ultra-vires* and unlawful. But some exercises of prerogative power remained non-justiciable: "those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers" all lay beyond the reach of judicial review.²⁹ This non-exhaustive list of non-justiciable powers signalled that in some cases involving the exercise of prerogative powers the application of the otherwise relevant legal principles was to be suspended. There remained a set of "legal black holes" within the law of the land, a set of situations where there is no law.³⁰

Some public lawyers would argue that this is a mis-characterisation of the legal position. Building on the venerable argument that "the King hath no prerogative, but that which the law of the land allows him"³¹, it must follow, they insist, that the courts always have jurisdiction to determine whether a particular prerogative exists. And if it does exist, its exercise is by definition lawful: the relevant powers are recognised by law and so lawful, but there is no legal control over their abuse. Thus Cane writes:

provided the power purportedly exercised falls within the limits of the prerogative as recognized by the common law, it is entirely up to the Crown to decide what it will do in pursuance of that power. Any exercise of it will be, in the eyes of the law, valid and legally effective. The position is not that the Crown has legal power to do any act of certain descriptions whether lawful or not – a clearly nonsensical proposition – but that any act of certain descriptions done by the Crown is lawful.³²

²⁶ *Chandler v Director of Public Prosecutions* [1964] AC 763 at 810. See also the influential Divisional Court decision (Lord Parker CJ and Diplock LJ) in *R v Criminal Injuries Compensation Board, ex p. Lain* [1967] 2 QB 864.

²⁷ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398.

²⁸ As such, *GCHQ* adopts the position Cane recommended: "It is more desirable to lay down relatively specific rules as to when the courts may intervene and when they should defer."*(ibid.* at 699)

²⁹ Lord Roskill at 418.

³⁰ The term "legal black hole" is from David Dyzenhaus *The constitution of law: legality in time of emergency* (Cambridge University Press 2006) at 3 and 61, building on Lord Phillips' phrase referring to the position of detainees in Guantanamo Bay: *R v Secretary of State for Foreign and Commonwealth Affairs ex p. Abbasi* [2002] EWCA Civ 1598 para 64.

³¹ Edward Coke in *Case of the Proclamations* (1611) 2 Co Rep 74 at 76.

³² Cane "Prerogative acts, acts of state and justiciability", above n 25, 682.

There are two objections to this popular account of non-justiciable acts as nonetheless “lawful”. At the level of constitutional law, it assimilates non-justiciability with a defence, suggesting that law plays a role where it does not: as such, it is a potentially dangerous constitutional fiction. In Dyzenhaus’s terms, it is to suggest that there are not black but only grey holes in the law: “grey holes are disguised black holes, and if the disguise is left in place governments will claim that they govern in accordance with the rule of law and thus garner the legitimacy that attaches to that claim.”³³ But also, and less controversially (since some would treat constitutional fictions as politically expedient), this account of non-justiciable acts fails to reflect the classic leading cases on acts of state which are analysed below. The most widely cited cases where this first rationale is given to the act of state doctrine are part of a series of decisions in which Crown action overseas is treated as non-justiciable *because* the imperial expansions involved were acts “of arbitrary power” which were not performed “under colour of legal title”. Mann’s summary of the position is to be preferred:

Justiciability ... depends on whether the act in question is performed under colour of legal title. If it is not, if, in other words, it rests on the exercise of power, whether it is being described as arbitrary, sovereign or executive, it is not justiciable ...³⁴

The doctrine that acts of state are non-justiciable is best understood as isolating certain actions of the Crown from legal scrutiny, removing them from the jurisdiction of its courts by insisting that on the justice of these actions the executive is answerable to Parliament alone. This, I will argue below, reflects more accurately both the leading cases and their constitutional consequences.

(i) Conflicting cases on imperial acts of state in India as non-justiciable: the Nabob of Arcot’s debts

In the pair of cases with which the series opens, the Nabob of Arcot (the capital of the Carnatic) sought from the East India Company an account of his revenues.³⁵ The Nabob was the first of the “glittering puppets” in the names of whom Lord Clive conducted his campaigns on behalf of the British East India Company against Dupleix and the rival French company.³⁶ In part to gain for himself public recognition as a legitimate ruler, the

³³ Dyzenhaus *The constitution of law*, above n 30, at 3 and 231-2, arguing that to the extent that “the prerogative can still be invoked as the basis for an official act, a common law legal order has not yet fully taken [..the step] insisting that no official may act unless there is a warrant in a valid law of that order”. See also Adam Tomkins *Our Republican constitution* (Hart Publishing 2005) 103-9.

³⁴ F A Mann *Foreign affairs in English courts* (Oxford, Clarendon Press 1986) at 184. See also Lords Pearson (quoted below, text at n 141) and Wilberforce in *Nissan* at 221-2.

³⁵ *The Nabob of the Carnatic / of Arcot v East India Company* High Court of Chancery 1791: 1 Ves Jun 371; 3 Bro C C 292. Court of Chancery 1793: 2 Ves Jun 56; 4 Bro CC 181.

³⁶ The phrase is Macauley’s in his *Critical and historical essays* (London 1891) Vol I 310-311 (on Lord Clive). Burke writes similarly: “[I]hese miserable Indian princes are continued in their seats for no other purpose than to render them, in the first instance, objects of every species of extortion, and, in the second, to force them to become, for the sake of a momentary shadow of reduced authority, a sort of subordinate tyrants, the ruin and calamity, not the fathers and cherishers, of their people.” Burke’s “Speech on the motion made for papers relative to the directions for charging the Nabob of Arcot’s private debts to Europeans on the revenues of the Carnatic”, February 28th 1785 in *The works of the Right Honourable Edmund Burke* vol III (John Nimmo, London 1887) 1 at 71-72.

Nabob had borrowed large sums of money at high rates of interest (as high as 25%) for projects including the maintenance of troops and the building of a great mosque. The case was in effect between the Nabob's private creditors and the East India Company; in reality, in Edmund Burke's words, it concerned the Nabob and his creditors "combining and confederating, on one side, and the public revenues, and the miserable inhabitants of a ruined country, on the other".³⁷ Many of the Nabob's creditors were themselves working for the Company, and included several of its Directors and fourteen members of Parliament.³⁸

Instead of receiving presents, [the East India Company's servants] made loans. Instead of carrying on wars in their own name, they contrived an authority, at once irresistible and irresponsible, in whose name they might ravage at pleasure; and being thus freed from all restraint, they indulged themselves in the most extravagant speculations of plunder. The cabal of creditors who have been the object of the late bountiful grant from his Majesty's ministers, in order to possess themselves, under the name of creditors and assignees, of every country in India, as fast as it should be conquered, inspired into the mind of the Nabob of Arcot (then a dependant on the Company of the humblest order) a scheme of the most wild and desperate ambition that I believe ever was admitted into the thoughts of a man so situated. First, they persuaded him to consider himself as a principal member in the political system of Europe. In the next place, they held out to him, and he readily imbibed, the idea of the general empire of Hindostan. ... On this scheme of their servants, the Company was to appear in the Carnatic in no other light than as a contractor for the provision of armies, and the hire of mercenaries for his use and under his direction.³⁹

In 1781 the Nabob had reluctantly agreed with Lord Macartney (the newly arrived Governor of Fort St George and subsequently Governor of Madras) to assign the revenues of the Carnatic to the Company on an understanding that that it would account for them, and set those revenues against his debts to the Company. Those debts to the Company (like most of his debts to private creditors) were incurred primarily to pay the troops the Company had recruited to resist attacks by Haidar Ali from the neighbouring Sultanate of Mysore, the main threat to British power in the South. For Burke it was this debt which was "the pretext under which all the other debts lurk and cover themselves. That debt forms the foul, putrid mucus in which are engendered the whole brood of creeping ascarides, all the endless involutions, the eternal knot, added to a knot of those inexpugnable tape-worms which devour the nutriment and eat up the bowels of India."⁴⁰

³⁷ Burke "Arcot's debts": *ibid* at 8. See also C A Bayly *The new Cambridge history of India Vol II.i: Indian society and the making of the British Empire* (Cambridge University Press, Cambridge: 1988) 60, 70: "The Nawab's attempts to husband his remaining resources arose from a pathetic desire to maintain independence and the scarcely concealed Anglophobia of his son Umdat-al-Umara. Yet it was powerfully reinforced by the incessant demands of his European creditors for repayment. Here then the Company's public interest and that of its servants and European associates were directly at odds. ... As late as 1776 European private interests, feeding on the wealth of indigenous magnates through the Nawab's debts, could imprison a governor who acted against them." [referring to the imprisonment of Pigot].

³⁸ C H Philips *The East India Company 1784-1834* (Manchester University Press, Manchester: 1940) 36, 41.

³⁹ Burke "Arcot's debts", above n36 at 47.

⁴⁰ *Ibid*, 46 (ascarides are round-worms). Mill concludes (more kindly towards the Company) that "Hypocrisy was the cause which produced the difficulties resulting to the English from their

The Nabob's private creditors continued to demand "repayment of sums both doubtful in origin and exaggerated in amount": the Nabob deliberately admitted the justice of the creditors' claims to play them off against his large debts to the Company.⁴¹ In 1784, almost as soon as Parliament had decided to institute an inquiry into these debts, the creditors obtained extremely controversial agreements with the Company's Board of Control for full payment of debts accrued up to 1777. It was this decision of the Board of Control (a body created by Pitt's India Act in 1784 to provide ministerial oversight of the Company's activities) to acknowledge the debts as just and to appropriate funds to pay them without inquiry that prompted Burke's celebrated speech on the Nabob's debts:

It is not into secret negotiations for war, peace, or alliance that the House of Commons is forbidden to inquire. It is a matter of account; it is a pecuniary transaction; it is the demand of a suspected steward upon ruined tenants and an embarrassed master that the Commons of Great Britain are commanded not to inspect.⁴²

On Macartney's departure in 1785, and under pressure from the creditors, the revenues of the Carnatic were reassigned to the Nabob, although in a later series of agreements more than four fifths of that revenue was to be paid to the Company to discharge the Nabob's debts.

The Nabob's creditors however claimed that new debts of £30,000,000 remained outstanding (only one-twentieth of which was eventually found to be valid⁴³) and that the sums being paid annually to the company (pursuant to the agreement with Macartney) were "more than sufficient" to satisfy the debts owed to the EIC. They "prayed an account, and that the defendants might pay any balance that might appear thereon to be due to plaintiff".⁴⁴ The matter stated was "a mere account, not relative to matters of state ; and certainly, in matters of trade, the East India Company are amenable to this Court, and if, in that respect, they are amenable, they cannot be considered as a sovereign power"; the Company's empowerment to use military force did not "constitute it a sovereign state ; so far from it, it speedily will not exist without some act of the

connexion with the Nabob. They desired to hold him up to the world, as an independent Prince, their ally, when it was necessary they should act as his lord and master. ... If the defence of the country rested with the English; and if they found that to govern it through the agency of the Nabob deprived them of its resources, and above all inflicted the most grievous oppression upon the inhabitants; results, the whole of which might have been easily foreseen, without waiting for the bitter fruits of a long experience; they ought from the beginning, if the real substance, not the false colours of the case, are taken for the ground of our decision, to have made the Nabob in appearance, what he had always been in reality, a pensioner of the Company. What may be said in defence of the Company is, that parliament scanned their actions with so much ignorance, as to make them often afraid to pursue their own views of utility, and rather take another course, which would save them from the hostile operation of vulgar prejudices." *The history of British india* (4th edn, ed Wilson: London 1848) Vol V Bk VI ch III at 373-4.

⁴¹ Phillips *The East India Company*, above n 38, 37.

⁴² Burke, above n 36, 4. See also Phillips *The East India Company*, above n 38, 40, concluding that Pitt "had received political support from the Arcot interest in the general election".

⁴³ Phillips *The East India Company*, above n 38 at n6 40.

⁴⁴ 3 Bro C C 292 at 292-3.

sovereign power of this country to continue its existence. Therefore, the Company is merely to be considered as a corporation, and, of course, amenable here.”⁴⁵

To protect their funds from these further claims by the creditors, the Company argued that their agreements with the Nabob were treaties between sovereigns and as such outside the jurisdiction of Chancery courts: the Attorney General, acting for the Company, argued that “an account arising from a federal treaty cannot be a proper subject of municipal jurisdiction.”⁴⁶ But such a plea, the Lord Chancellor objected, was “perfectly new”:

It is stated to be a plea to the jurisdiction of the Court; but it differs from a plea to the jurisdiction in all the particulars by which those pleas have been described; because ... it is impossible to plead to the jurisdiction of any particular Court, without giving another remedy to the party in some other court. Now this plea says, expressly, that the *party has no remedy in any court of municipal jurisdiction* whatever. ... The plea, therefore, as I take it, is a plea in bar, not a plea to the jurisdiction of a particular court, but of all courts: and a plea to the jurisdiction of all courts, I take to be absurd, and repugnant in terms.⁴⁷

The plea was overruled as “bad in every view” and Lord Thurlow refused a motion for leave to further amend the plea. The ‘fact’ that treaties were involved in the contraction of the debt was not a fact that barred the plea – in modern terms, rendered the case non-justiciable: no cases had been found to defend the Attorney General’s position as a legal doctrine.⁴⁸

At the subsequent Chancery hearing, counsel for the Nabob argued that this earlier determination should be treated as “a great and grave authority because there have been few cases more argued, and in which more pains were taken by the Court.”⁴⁹ But the Attorney and Solicitor General, for the East India Company, argued first – as before – that the Nabob and the Company were acting as neighbouring sovereigns and that sovereigns could not “sue or be sued in a court of municipal jurisdiction, in matters relative to his sovereignty”,⁵⁰ and secondly, that since the Board of Control was now statutorily empowered to give secret orders to the Company’s servants in India,⁵¹ Parliament had placed the Company in a position whereby it would have to keep secret any grounds it may have for a “reasonable apprehension” that the Nabob’s debts to the Company (for provision of troops) would not be paid, grounds which would otherwise entitle them to retain the balance of the revenues.⁵²

No full judgment was given in the case: the Court hurriedly – but crucially - dismissed the Nabob’s creditors’ bill for an account from the Company on the ground that the Company had now convinced the Court that the relevant treaty was “not mercantile in its nature, but political; and therefore this decision stands wholly clear of

⁴⁵ 3 Bro CC 292 at 296, 298

⁴⁶ 3 Bro CC 292 at 300

⁴⁷ *Nabob of Arcot v East India Company* [1791] 3 Bro C C 292 at 301 [original emphasis]: see also 1 Ves Jun 371 at 388.

⁴⁸ 3 Bro C C 292 at 310; 1 Ves Jun 371 at 393.

⁴⁹ *Nabob of Arcot v East India Company* [1793] 4 Bro C C 181 at 185.

⁵⁰ 4 Bro CC 181 at 190.

⁵¹ In fact the government had been giving secret orders to the Company’s servants in India since the late seventeenth century: see Philips *The East India Company*, above n 38, 9-10.

⁵² 4 Bro CC 181 at 192.

the judgment upon the plea”.⁵³ Despite the disclaimer, the assumption that there are “political” treaties standing above any law was in effect the argument on the plea rejected by Lord Thurlow. The Nabob’s creditors appealed to the House of Lords, but on the day of the hearing “the Directors of the East India Company received an account of the death of the Plaintiff; which put an end to the suit”.⁵⁴

The stage was set: despite the earlier detailed arguments on the plea and the Lord Chancellor’s ruling that a plea to the jurisdiction of all courts was in effect a plea in bar, and one that was “absurd and repugnant in terms”, there was now a precedent for the notion that some acts of state were inherently political and as such not matters for a court of law.⁵⁵

(ii) Elphinstone and matters for military rather than civilian courts

In *Elphinstone v Bedreechund* (1830), in a five line opinion the Privy Council reversed a judgment of the Supreme Court of Bombay which had awarded to the estate of a nobleman (Narroba Outia) nearly two million rupees in damages and costs for the seizure of his treasure by an agent of the East India Company. Although understandably often treated as an act of state decision, in legal terms this opinion is best treated as authority for a rule that actions carried out in the course of hostilities in a foreign country were subject to the exclusive jurisdiction of military and not civilian courts.

The Attorney-General, Scarlett, argued for Monstuart Elphinstone (the East India Company’s representative in Peishwa) that “When the success of a commander of an army enables him to take military occupation of a country, he may either deliver it up

⁵³ 2 Ves Jun 56 at 60. See also 4 Bro CC 189 at 198: “the whole was a political transaction.”

⁵⁴ 2 Ves Jun 56 at 60. Just as the Court was about to deliver its opinion, the Company’s counsel announced that a new treaty with the Nabob had been agreed which rendered the suit unnecessary; the cause was adjourned for the Nabob’s lawyers to confirm this. On the final day of that next term, just before the Court rose, counsel for the Nabob declared that “there was no ground for what had been state by the Defendants concerning a treaty” and prayed judgment. Lord Commissioner Eyre commented that if the Court had been asked even an hour sooner a fully reasoned judgment could have been given. The case was cited in argument in *East India Company v Syed Ally* (1827) 7 Moore Ind App 555; 19 ER 417, in which the Master of the Rolls, Sir John Leach, held that the Supreme Court of Madras had no power to “question an act of Sovereignty exercised on the part of the East India Company” – but also that as sovereignty over the Carnatic was ceded to the Company in 1801, the new terms on which the Company had regranted a ‘Jaghire’ (for life only) prevailed over a prior hereditary grant by the Nabob.

⁵⁵ As the second *Arcot* decision assumes a doctrine of treaty non-justiciability denied by Thurlow, in principle it might have been possible to raise a demurrer in a similar subsequent case. But strikingly, none of the leading Chancery pleading manuals published before the Judicature Rules suggest this as a possibility. The main nineteenth century pleading manuals all state simply that that in a plea to the jurisdiction, “it must be shewn what other court has jurisdiction” (*Mitford’s Chancery Pleadings* first edn, 1785 at 171; third edn 1814 at 182). Smith’s *Chancery Practice* (1844) specifically cites the first *Arcot* case as authority for this point (at 316) as does *Daniell’s Chancery Practice* (3rd edn 1857, ed Headlam, at 515). It is not until the 8th edn (1914) of *Daniell’s* that after the reference to the first *Arcot* decision appears a statement that “A plea to the jurisdiction need not allege the existence of a competent court abroad, when the plea is really a plea in bar, and where the ground of it is a want of jurisdiction in the courts of this country generally”, citing *Companhia de Moçambique v British South Africa Company* (1892) 2 QB 358.

to the ravages of his soldiery, if he is cruelly disposed, or may place commissioners in it to preserve tranquillity”, although he does treat war-time actions of the army as constrained by martial law.⁵⁶ Denman KC (later the Lord Chief Justice) argued for the respondent that a proclamation issued by Elphinstone early in the war of conquest made any land conquered “part and parcel of the dominions of the Crown of England” and as such *did* give the domestic civil courts jurisdiction:

If King William III, at the time of the Revolution, after he had come over to England had refused to abide by the terms of the proclamation he had published in Holland, if he had said, there are two or three forts still holding out in the Highlands; there are forces still in arms against me; my proclamation is no agreement, it is all on one side; there is nothing in it that can oblige me to give a free government to England until the whole realm is subdued; what would have been thought of his argument or his integrity? We are not indeed left entirely to our imaginations to conjecture what opinion would have been formed of them at that time (20th Jan. 1692); for we well know, that when Bishop Burnet maintained in a pastoral letter, that he had gained the throne by right of conquest, and was not bound by his proclamation, the Consequence was, that his letter was ordered by the House of Commons to be publicly consigned to the flames by a not very dignified person.⁵⁷

But in a six line judgment, Lord Tenterton agreed that the seizure was made “if not *flagrante*, yet *nondum cessante bello*” and consequently not only that “the Municipal Court had no jurisdiction to adjudge upon the subject” but also that “if anything was done amiss, recourse could only be had to the Government for redress”.⁵⁸

(iii) The non-justiciability of acts of state emerges: the case of Kamachee

It is only in a series of Privy Council decisions given after the 1857 revolt that explicit arguments are given for treating imperial actions in India as acts of state non-justiciable in *any* court. The first and key decision in this series is *Secretary of State for India v Kamachee Boye Sababa* (1859),⁵⁹ which overturned a decision of Sir Christopher Rawlinson sitting as Chief Justice of the Supreme Court of Madras. Rawlinson CJ had ruled that, although the East India Company did enjoy “certain Sovereign powers delegated to them, such as those of making peace and war, and of making Treaties with certain of the native powers in Asia”,⁶⁰ powers which extended to seizing the Raj of Tanjore on the death of the Rajah (in the absence of male heirs), those powers did not entitle the company to seize and sell the Rajah's private estate and property. (The company had sealed the palace, and had taken even pony carriages, children's carriages, cows, ponies, “numerous female jewels and trinkets”, “all the female apparel, clothes, shawls, silks, laces etc.”⁶¹) Against the Company's argument that the seizure was a non-justiciable act of state, Rawlinson CJ

⁵⁶ *Elphinstone v Bedreechund* [1830] 1 Knapp 316 at 351, 354.

⁵⁷ *Elphinstone* at 343-344.

⁵⁸ *Elphinstone* at 360-361. Knapp adds at 361 that “the Respondent presented a memorial to the King in Council, claiming the treasure seized as his private property and praying that his claim might be heard, either before a Committee of the Privy Council or some other competent tribunal to be appointed by his Majesty for that purpose.” A Committee of the Council was appointed and “Lord Tenterton announced their decision to be ‘That they could not advise his Majesty that the Memorialist had made out his claim.’”

⁵⁹ *Secretary of State v Kamachee Boye Sababa* [1859] 13 Moore PCC 22 (15 ER 9).

⁶⁰ *Kamachee* Rawlinson CJ at 46.

⁶¹ *Kamachee* Rawlinson CJ at 42, citing from East India Company lists of property seized.

held that letters from the Government of India and of Madras showed that the Company's agent was authorized only to seize State property and not to make "an indiscriminate seizure, both of public and private property". Citing *Coke on Littleton*, Rawlinson CJ held that "even in England the Monarch could take real as well as personal property in his own right"; as such, the Rajah's widow could sue for recovery of that property "as a private individual, and as the subject of a country forming part of the British territories".⁶²

Appealing to the Privy Council, the Company reiterated their argument that the Supreme Court of Madras did not have power to "ascertain and declare whether [the authority of the Company's agent, Mr Forbes] in general has been rightly exercised" because Forbes's actions were acts of state and as such not subject to the jurisdiction of that Court.⁶³ The Attorney General, Sir Richard Bethell (instructed as counsel before his appointment), rashly argued for the Rajah's widow not simply (as had Rawlinson CJ) that the Company exercised only *certain* sovereign powers, but that the East India Company "did not stand in the position of a Sovereign power; they were only a corporation endowed, it is true, with considerable franchises and prerogatives, but by legislative enactments made accountable for their acts". The actions of the Company here "were arbitrary acts" and justiciable in that they "were not done in virtue of Treaties or *jure belli*": as such, they were bound to account for their wrongful seizure of the Rajah's private property.⁶⁴

Lord Kingsdown, delivering the judgment of the Privy Council, held that the East India Company had been invested with "Sovereign powers" and that "acts done in execution of these Sovereign powers were not subject to the control of the Municipal Courts, either of India or Great Britain".⁶⁵ Precisely because the Privy Council was unable to find "any ground of legal right" for a seizure described before them by Bethell as "a most violent and unjustifiable measure", the Company's actions had to be understood as non-justiciable acts of state:

It is clear from Mr Forbes's report to the Madras Government of what took place on the occasion, that though no resistance was offered by the family of the Rajah, or the inhabitants of the fort, to the seizure of the Raj, and of the palace

⁶² *Kamachee* Rawlinson CJ at 49, 43 (Co. Lit. 15b n4), 46.

⁶³ The Solicitor General, Sir Hugh Cairns QC at 58 – appointed to conduct the Appellant's case because the Respondent had consulted Sir Richard Bethell, who had subsequently been appointed Attorney-General.

⁶⁴ *Kamachee* Bethell A-G at 63. Bethell became Lord Chancellor and Baron Westbury in 1861. One of his biographers summarises: "He disparaged both the common law and the statute book more than any other modern holder of the post [of Lord Chancellor]. His respect for theory was unrivalled in its intensity, and his political energy could eclipse that of Brougham. His capacity for sarcasm had no parallel in Victorian chancellors, and exceeded even that of Lord Birkenhead in the twentieth century. His occasional lack of judgement in debate, and in the exercise of administrative duties, has been rivalled by some lord chancellors but never exceeded in its dramatic effect. Looking back on his career, late Victorians were surely right in seeing him as someone afflicted with both an overwhelming belief in his own intellectual superiority and an emotional *need to prove this ability at every possible point, often at the cost of others*. What made him so striking was the extent to which the quality of his mind often justified his own view of his talents." R C J Cocks, "Bethell, Richard, first Baron Westbury (1800–1873)", *Oxford Dictionary of National Biography*, Oxford University Press, 2004.

⁶⁵ *Kamachee* Kingsdown at 77.

and property of the Rajah, it was regarded on both sides as a mere act of power not resisted because resistance would have been vain. ‘Much sorrow’, he says, ‘was expressed and much grief shown; but all submitted at once to the authority of the Government, and placed themselves in its hands.’⁶⁶

In effect then, the Privy Council was allowing the very kind of plea in bar (one “to the jurisdiction of all courts”) that Thurlow LC in the *Nabob of Arvat* case had found both absurd and repugnant. In *Kamachee* the Crown was held to have successfully delegated to the East India Company a non-justiciable, “sovereign” power to act illegally. Unsurprisingly, *Kamachee* is one of the two cases cited by James Fitzjames Stephen as authority for his claim that “as between British subjects and foreigners, the orders of the Crown justify what they command so far as British courts of justice are concerned”.⁶⁷

(iv) Later inconsistent Privy Council decisions: colonial acts as constrained by law (Sigcau) or as acts of state outside the law (Cook)

The Privy Council followed its approach in *Kamachee* in subsequent imperial succession cases in India.⁶⁸ But on the Crown’s powers in other colonies, the Privy Council’s approach was less consistent, for example holding in a decision concerning the cession of Lagos that “A mere change in sovereignty is *not* to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly.”⁶⁹

The inconsistency is particularly striking in two Privy Council decisions, both of them concerning Sigcau, the chief of Eastern Pondoland in South Africa. In early 1894, Sigcau ceded his territory to the British Crown. In June 1895, Sigcau was arrested and imprisoned (without a trial or hearing) under a proclamation issued for that purpose – a proclamation which did not even specify his offence. The Governor claimed to issue the proclamation “in virtue of powers vested in me by law” including the Pondoland Annexation Act 1894 and on the grounds that Sigcau had been obstructive and his presence in Pondoland was a public danger.⁷⁰ A commission sitting on Sigcau’s case “agreed that, on the whole, he had been an obstruction; but it hastened to add that, thanks largely to his influence, his people had behaved well and that, on the two trifling occasions of which complaint was made, all that could be said was that he had not

⁶⁶ *Kamachee* at 78-79 and 82.

⁶⁷ Stephen *History of the criminal law*, above n 13, II p 65; *Buron v Denman* is the other case on which Stephen relies, on which section III.iii, below.

⁶⁸ *Rajah Salid Ram v Secretary of State for India in Council* (1872) LR IA Supp 119; *Sirdah Bhagwan Singh v Secretary of State for India in Council* (1874) LR 2 IA 38; *Doss v Secretary of State for India in Council* (1875) LR 19 Eq 509; *Secretary of State v Bai Rajbai* (1914-1915) LR 42 IA 229; *Vajesingji Joravarsingji v Secretary of State* [1924] LR 51 IA 357; *Dattatraya Krishna Rao Kane v Secretary of State for India* (1930) LR 57 I. A. 318; *Secretary of State v Sardar Rustam Khan* [1941] AC 356 (by terms of treaty of cession and Foreign Jurisdiction Act 1890 s1, no requirement to recognise pre-existing titles). For critical comment on these Indian Privy Council decisions– and their use, after independence, in early jurisprudence of the Indian Supreme Court, see Agrawala “The doctrine of act of state and the law of state succession in India” (1963) 12 *ICLQ* 1399.

⁶⁹ *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 407 (my emphasis). See also Lord Denning in *Oyekan v Adele* [1957] 2 All ER 785 at 788.

⁷⁰ “Rhodes, as Minister for Native Affairs, had merely been exercising that ‘oriental despotism’ which he had once prescribed for tribal natives. The experiment failed.”: E A Walker *Lord de Villiers and his times: South Africa 1842-1914* (Constable, London: 1925), 259.

cordially supported the magistrate and had been too intent on maintaining his dignity – the dignity of a great chief, who would remain chief in the eyes of his people till the day of his death”.⁷¹

In the Supreme Court of the Cape of Good Hope, De Villiers CJ held that the relevant legislation did not confer on the Governor the power to make new laws but only to enact laws in force elsewhere in the colony: the proclamation was *ultra vires* and Sigcau’s release was ordered. On appeal to the Privy Council, the appellants argued both that the proclamation was valid and that it was a non-justiciable act of state.

Delivering the judgment of the Privy Council, the Lord Chancellor, Lord Watson, treated the proclamation as “an edict, dealing with matters administrative, judicial, legislative and executive, in terms which are beyond the competency of any authority except an irresponsible sovereign, or a supreme and unfettered legislature, or some person or body to whom their functions have been lawfully delegated”.⁷² But rather than concluding, as in *Kamachee*, that the Governor exercised sovereign powers which *could* be exercised arbitrarily and outside the law, Watson remarked that the action at issue was “hardly an Act of State, but rather an Act of Attainder by virtue of a special Act of Parliament.”⁷³ He continued:

It was satisfactory to find that the appellant's counsel did not, in the argument before this Board, venture to trace the power of the Governor to enact such a proclamation to any authority directly derived from Her Majesty; because autocratic legislation of that kind in a Colony having a settled system of criminal law and criminal tribunals would be little calculated to enhance the repute of British justice.⁷⁴

Focussing on the legislative authority delegated to the Governor in the Annexation Act, the Privy Council concluded there was “not a word in the Act to suggest that it was intended to make the Governor a dictator, or even to clothe him with the full legislative powers of the Cape Parliament”: the proclamation was “a new and exceptional piece of legislation, differing entirely in character from any of the laws, statutes and ordinances which he is authorized to proclaim”.⁷⁵ As such, they held that the Supreme Court of the Colony had been right to refuse to effect the proclamation and liberate Sigcau.⁷⁶

⁷¹ Ibid, 259.

⁷² *Sprigg v Sigcau* [1897] AC 238 at 246.

⁷³ *Sigcau* at 241.

⁷⁴ *Sigcau* at 246-7.

⁷⁵ *Sigcau* at 247, 248.

⁷⁶ General Smuts drew this case to Lord Shaw’s attention when they met at an Imperial Conference in London (“we settled all that long ago in a case in Pondoland”) and Shaw was working on his dissent in *Halliday* [1917] AC 260 (on whether Regulation 14B of the Defence of the Realm (Consolidation) Regulations 1914 (empowering detention without trial by Order in Council) fell within the terms of the Defence of the Realm Consolidation Act 1914 s1(1)). Walker *De Villiers*, above n 70, 260 quoting from Shaw’s *Letters to Isobel* (Cassell, New York 1921) at 202. Dyzenhaus uses this as an example of how “the migration of legal ideas does not always go from centre to periphery in the Commonwealth, and that those that go from periphery to centre can bear good fruit.” (*The constitution of law*, above n 30, 26)

Two years later, in *Cook v Sprigg*, a similarly constituted Judicial Committee of the Privy Council held in effect that the same Governor *was* clothed with dictatorial power.⁷⁷ The appellants in *Cook* sought to enforce rights that they claimed had been granted to them in concessions made by Sigcau prior to British annexation. The Supreme Court of the Cape had held that they had not acquired a good title under the existing local laws: Sigcau might at any time have repudiated the rights he had granted to them, and no remedy for such a repudiation would have been available. De Villiers CJ endorsed US Chief Justice Marshall's position that a new government "takes the place of that which has passed away", but succession could not improve Cook's position: here "the native customs, such as they are, do not recognise such concessions" and "if the chief had revoked the plaintiff's concessions, there would equally have been no remedy for his breach of contract".⁷⁸

But instead of adopting de Villiers' approach, echoing Chief Justice Marshall and addressing the relevant questions of local and Colonial property law, the Lord Chancellor (delivering judgment for the Privy Council) relied on *Kamachee*, holding that the "taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State": as such (quoting Lord Kingsdown in *Kamachee*) the question was not a matter for courts of law, although the Privy Council agreed with de Villiers that the appellants had "strong claims to the favourable consideration of the Government and Parliament of the country".⁷⁹

The decision in *Cook* was subject to sustained academic criticism. In one of the earliest critiques the note-writer of the *Law Quarterly Review* (presumably its editor, Pollock) argues that the earlier Indian cases relied on by the Privy Council in *Cook v Sprigg* were "altogether distinguishable": the Judicial Committee's opinion in *Cook* was "offhand", "uninstructive", "perplexing" and "neither sound nor convenient". The decision puts "all private rights in a newly acquired territory at the mercy of the new executive power": it can be read "only as meant to lay down that on the annexation of territory, even by peaceable cession, there is a total abeyance of justice until the will of the annexing Power is expressly made known; and that, although the will of that Power is commonly to respect existing private rights, there is no rule or presumption to that effect of which any court must or indeed can take notice". This doctrine "is contrary to the law of nations as generally understood, and we know of no warrant for it at common law." "If we are wrong", the writer concludes, "it is in Chief Justice Marshall's company. 'A cession of territory is never understood to be a cession of the property belonging to its inhabitants.'"⁸⁰ William Harrison Moore suggested that the right of property of British

⁷⁷ *Cook v Sprigg* [1899] AC 572. The four most senior of the five judges sitting in *Cook v Sprigg* (Lord Halsbury LC, Lord Watson, Lord Hobhouse, Lord Macnaghten, and Lord Morris) were the same four most senior of the seven sitting in *Sprigg v Sigcau* (the Lord Chancellor, Lord Watson, Lord Hobhouse, Lord Macnaghten, Lord Shand, Lord Davey, and Sir Richard Couch).

⁷⁸ *Cook Bros v The Colonial Government* (1895) 12 SC 86 at 95, 96, 97.

⁷⁹ *Cook v Sprigg* at 578.

⁸⁰ (1900) 16 *LQR* at 1-2. Writing in 1943, Mann similarly points out that questions of state succession are in principle justiciable in domestic courts, like Pollock citing Chief Justice Marshall: "The modern usage of nations which has become law would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relationship with their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed. If this be the

subjects in *Cook* should have been given the same protection by the courts as the right of personal security of British subjects in *Sigcau*:

It is not easy to see why the right of property in this case was not equally with the right of personal security in the other under the protection of the Courts of Law; and it is somewhat startling to find the defence of *act of State* accepted in regard to acts done by a subordinate government in territory incorporated into an old established British colony, after a system of law and government has been provided, and when those acts relate to the property of a British subject.⁸¹

(v) Sekgome and the possibility of a statutory power to act despotically

The spirit of *Cook* (like that of its ancestor, *Kamachee*) prevailed before Indian colonial courts,⁸² and it resurfaced in a particularly unhappy decision of the Court of Appeal, *The King v The Earl of Creve ex parte Sekgome*. In *Sekgome*, with the assistance of the Attorney-General, counsel for the Secretary of State for the Colonies, the Earl of Creve, presented with success the very argument that in *Sigcau* Lord Watson had noted the appellant had not “ventured” to raise: colonial governors were empowered to act and legislate as arbitrary despots, either because their actions were acts of state or because they were statutorily empowered so to act under the Foreign Jurisdiction Act 1890. The High Commissioner for South Africa, the Court of Appeal agreed, was acting within his powers in issuing a proclamation to detain the chief (Sekgome) of a native tribe in the Bechuanaland Protectorate and refusing him habeas corpus.

The original Foreign Jurisdiction Act (FJA) 1843, amended by the FJA 1865, had declared the Crown’s actions in foreign dominions to be “as valid and effectual as though the same had been done according to the local Law then in force within such Country or Place”.⁸³ More generally, the Crown’s powers in protectorates and protected states were to be treated as identical to those it held in conquered and ceded colonies.⁸⁴ And in terms of the latter, the Crown’s powers in colonies, under the Colonial Laws Validity Act 1865⁸⁵ (CLVA) governing the competence of colonial legislatures, colonial powers were constrained *only* by Imperial legislation and not by English common law. The FJA 1890⁸⁶

modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory.” (*United States v Percheman* (1833) 7 Peters 51 at 86). Mann suggests that in the cases at issue here, “the Courts recoiled from the possibility of having to find the Executive guilty of a breach of international law and thus to embarrass its standing in international affairs”: F A Mann “Judiciary and executive in foreign affairs” 29 *Transactions of the Grotius Society* (1944) 143 at 148. On an unduly narrow reading of the dictatorial or ‘autocratic’ line of act of state cases considered in the text (and without reference to the rival if much shorter line of cases discussed below n 99 and n 100 and accompanying text), Mann concluded at 147 that “in the eyes of the common law the King is not subject to international law”; he does address the rival line of cases in his *Foreign affairs in English courts*, cited above n 34, at 81-82.

⁸¹ Moore *Act of state in English law* (John Murray, London 1906) 79-80.

⁸² On which see O’Connell *State succession in municipal law and international law* (Cambridge University Press 1967) vol I 258-262.

⁸³ FJA 1843 section 2. In *Sekgome*, the Court of Appeal cites Hall’s argument (*Foreign jurisdiction of the British Crown* (Clarendon, Oxford 1894) at 221) that the Crown’s extra-territorial jurisdiction is limited to the Crown’s own subjects, concluding that it was “impossible now to adopt” this narrow reading of the FJA given its past application to foreign natives (Vaughan Williams LJ at 596).

⁸⁴ 1843 6 & 7 Vict. c94 s1.

⁸⁵ 1865 28 & 29 Vict c.63.

⁸⁶ 53 & 54 Vict. c37.

further specified that Orders in Council authorising “a British court in a foreign country to order the removal or deportation of any person from that country” rendered the removal or deportation “as lawful as if the order of the court were to have effect wholly within that country” (section 8); such Orders in Council would be void if “repugnant” to the provisions of an Act of Parliament or related order, or regulation, but could not be declared invalid on the basis of incompatibility with the common law (section 12).

Most commentators interpret the CLVA as a “charter of colonial legislative independence”.⁸⁷ The first author of the relevant section of Halsbury, writing shortly before *Sekgome*, presents the “obvious meaning and purpose” of the CLVA as “to preserve the right of the Imperial Legislature to legislate for a colony, although a local legislature has been given, and to make it impossible, when an Imperial statute has been passed expressly for the purpose of governing that colony, for the colonial legislature to enact anything repugnant to the express law applied to that colony by the Imperial Legislature itself.”⁸⁸ Under the CLVA, colonies were empowered to develop their own constitutional jurisprudence, constrained only by relevant Imperial legislation: in addressing the validity of colonial legislation, colonial courts could appeal to the terms of relevant Imperial legislation (section 2), and to the letters patent or other instruments authorizing the colonial governor to assent to colonial legislation (section 4), but they could not circumvent the constitution and jurisprudence of their colony by direct appeal to English common law (section 3).⁸⁹

In line with this general approach, the Lord Chief Justice had held in the Divisional Court that the courts of Bechuanaland Protectorate had jurisdiction to deal with Sekgome’s detention. The Court of Appeal were not convinced that in Bechuanaland there existed a court “having authority to grant and issue a writ of habeas and to ensure the execution thereof in the Protectorate”⁹⁰ – but felt it unnecessary to address this question as they held the proclamation to be valid. Section 12 of the FJA was “the only limitation on [the High Commissioner] power of legislation, and that section must be taken to have superseded the dictum of Lord Mansfield in *Campbell v Hall* as to the inability of the sovereign to make a change in a conquered country which is ‘contrary to fundamental principles’”.⁹¹

⁸⁷ A V Dicey *The law of the constitution* (Macmillan, London: Eighth edition, 1920) at 101.

⁸⁸ Sir Charles Tarring and J S Cotton in the first edition of Halsbury (1909, Vol X, para 915 at 536). The Colonial Laws Validity Bill was introduced in May 1865 in the wake of the Privy Council’s controversial decision in *Re Colenso, Bishop of Natal*, concerning the jurisdiction (or otherwise) of the Bishop of Cape Town over the allegedly heretical Bishop of Natal. The case was argued by luminaries including Fitzjames Stephen and Westlake (for the Bishop of Natal) and Phillimore (for the Bishop of Cape Town); giving judgment, the Lord Chancellor held it “to be clear, on principle, that after the establishment of an independent Legislature in the Settlements of the Cape of Good Hope and Natal” Colonial legislation was needed to “give full effect to a Bishopric”: the Crown could not use prerogative powers to establish a Metropolitan See once a colonial legislature was in place.³ Moore PC NS [1864–64] 115 at 148, 150.

⁸⁹ Boothby J in *Adelaide* had taken to declaring South Australian legislation void on the ground that it was repugnant to English law: section 7 of the CLVA specifically emphasised the relevance of the CLVA for South Australian legislation.

⁹⁰ Vaughan Williams LJ at 593.

⁹¹ [1910] 2 KB 576 at 587.

As all three members of the Court of Appeal recognised with due discomfort, their ruling left the High Commissioner legally unaccountable. Vaughan Williams LJ explained:

It would be more congenial to our love as a nation of liberty and justice to act on the eloquent words of Lord Watson in *Sprigg v Sigcau*, but the country in that case was an annexed country under the Pondo Annexation Act, and our single duty is to construe the Foreign Jurisdiction Act, 1890, the Orders in Council, and proclamations made thereunder. It is made less difficult if one remembers that the Protectorate is over a country in which a few dominant civilized men have to control a great multitude of the semi-barbarous.⁹²

And, he added, if the argument about the statutory powers of the Commissioner was ungrounded, Sekgome's detention "would be justified as an act of State". Kennedy LJ held similarly that the detention was "an act of State, justifying the detention of Sekgome, with which neither this nor any other Court of law in this country is entitled to interfere"⁹³: while (citing Cicero), "legislation directed against a particular person ... commends itself as little to British legislators as it did to the legislators of ancient Rome, in the best days of the republic", here the court had not "the case of a civilized and orderly State, such as modern England or the Rome of Cicero's time, but the administration of a barbarous or, at least, semi-barbarous community".⁹⁴ Farwell LJ added, favouring even more radically the upholding of the heavens over just action, that "if it is necessary for the safety of the State, the freedom and even the life of the individual must be sacrificed".⁹⁵

The two other cases sometimes cited to defend a reading of the FJA or CLVA as conferring unlimited statutory powers of foreign or colonial despotism are the martial law decision in the Jamaican case of *Philips v Eyre*, cited in *Sekgome*, and the Privy Council's much later decision in *Liyange*. *Philips v Eyre* is usually read narrowly, confined to a martial law context.⁹⁶ And although occasionally cited as authority for a complete

⁹² *Sekgome* at 610

⁹³ *Sekgome* at 609, 624-5.

⁹⁴ *Sekgome* at 627-8.

⁹⁵ *Sekgome* at 615.

⁹⁶ Governor Eyre had declared martial law in Jamaica when suppressing an indigenous rebellion with great brutality; through his chairmanship of the Jamaica Committee, John Stuart Mill spearheaded a campaign to have Eyre held legally accountable, losing in the process the friendship of the counsel to the Committee, Fitzjames Stephen. See Michael Taggart "Ruled by law?" (2006) 69 *MLR* 1006-1025 at 1009 and n16, and more generally R W Kostal *A jurisprudence of power: Victorian Empire and the rule of law* (OUP 2005). Narrow readings of *Philips v Eyre* are offered in all but the most recent edition of Halsbury. Tarring and Cotton (First edition, 1909, Vol X) treat the case (para 912 p535 and note t) as authority for a rule that "a confirmed Act of a local legislature lawfully constituted, whether in a settled or a conquered colony, has, as to matters within its competence and within the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by Imperial legislation", adding at para 902 p527 and note h: "A Governor can legally take a benefit under a statute of a colony, e.g. an Act of indemnity, though he is himself a necessary party to it, as in fact he is to all legislation in the colony (*Philips v Eyre*). But he cannot be thus protected from prosecution in England on a criminal charge, such prosecutions being brought under Imperial laws which colonial legislation cannot affect." Stanley de Smith in the third edition (1953, Vol V, para 1247 p582 and note f) cites the case as authority for indemnifying "action performed during a regime of martial law". In the fourth edition, John Finnis invokes a more radical reading of the case (1973, Vol VI para 1074 p512 and n29), citing it along with *Liyange* as ruling that a dependent legislature may make

ousting of review of colonial legislation on the basis of fundamental principles⁹⁷, it should be remembered that in *Liyange* the Privy Council's remarks on the CLVA (as ousting a review jurisdiction for violation of fundamental principles) are a prelude to their review of colonial legislation, legislation which they declare invalid for violating a (fundamental) principle of the separation of powers that they implied into the colonial constitution of Ceylon. *Liyange* is best interpreted as reiterating that the CLVA limits the sources of law for colonial courts to those recognised by the colonial constitution.⁹⁸

(vi) Cases turning to Sigcau rather than Sekgome

In two cases from Lagos the Privy Council moved away from their position in *Cook* and back towards *Sigcau*. In *Amodu Tijani v Secretary, Southern Nigeria* Lord Haldane treated cession to the British Crown as "made on the footing that the rights of property of the inhabitants were to be fully respected", a principle which "is a usual one under British policy and law when such occupations take place".⁹⁹ And in *Eshughayi Eleko v Officer Administering the Government of Nigeria*, Lord Atkin emphasised that "as the executive", the imperial Governor could "only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive." As such, it was "necessary for this Board to decide that it is the duty of the Courts to investigate the whole of the questions raised and come to a judicial decision".¹⁰⁰

Writing in the light of these later decisions, E C S Wade concluded that the "explanation" of such apparently conflicting decisions as *Cook's* case and *Amodu Tijani's* case "may be in the latitude permissible to the Judicial Committee which has enabled it to interpret the exercise of the prerogative powers of the Crown sometimes in the direction of autocratic rule, sometimes in accordance with the spirit of articles of cession embodying a policy of pre-cession rights".¹⁰¹ Wade characterises the first set of decisions as "autocratic" because they treat the Crown as subject neither to international law nor to

laws "which are repugnant ... to any principles or rules of natural justice; in the 1991 reissue, this passage is qualified with references to New Zealand and Australian cases (para 1027 p504 and n29 p507) and in the 2003 reissue the 1991 qualification and references are replaced (para 839) with a statement that "constitutional rights recognised by the common law and judicially enforced in the UK do not apply in the interpretation and application of the power to legislate for the peace, order and good government of a British overseas territory (which may nonetheless be subject to some substantive limitation): *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Bancoult* [2001] QB 1067."

⁹⁷ Finnis in Halsbury (*ibid*); Laws LJ in *Bancoult* at para 43— although invoking *Wednesbury* public law limits to conclude that colonial authority "is not wholly unrestrained... every tapestry has a border." para 55: [2001] QB at 1103.

⁹⁸ As recognised by both Laws LJ and Sedley LJ in their decisions in *Bancoult*, the wider reading of *Liyange* - as applying whether or not a colonial constitutional system (in the sense of a responsible government and independent courts) is in place - turns the CLVA into an absolute ouster clause where colonial constitutional courts are not in existence.

⁹⁹ [1921] 2 AC 404 at 407.

¹⁰⁰ [1931] AC 662 at 670, 672.

¹⁰¹ Wade "Act of state in English law: its relations with international law" (1934) 15 *BYIL* 98 at 107. See also Peter Wesley-Smith, "Acts of state: Lord Diplock's curious inconsistency" (1986) 6 *Legal Studies* 325 at 326-327.

the common law. Understandably if rather too conveniently ignoring the Court of Appeal's judgment in *Sekgome* on the impact of the FJA 1890, Wade adds that cases like *Cook* are difficult to reconcile with Lord Mansfield's ruling in *Campbell v Hall* that undertakings given by the Crown on cession *can* be enforced by domestic courts: articles of capitulation and of peaceful cession must be treated as "sacred and inviolable" and the Crown may not make new laws "contrary to fundamental principles".¹⁰²

(vii) Subsequent reliance on Kamachee, Cook and Sekgome

In a strikingly contrasting decision, *Sobhuza II v Miller*, delivered between those in *Amodu* and *Eshugbaya*, the Privy Council ruled that native agricultural and grazing rights in Swaziland (recognised in relevant treaties between Britain and the Chief of Swaziland in 1894) had been abrogated by later Orders in Council. Viscount Haldane held that

The limitation in the Convention of 1894 on interference with the rights and laws and customs of the natives cannot legally interfere with a subsequent exercise of the sovereign powers of the Crown, or invalidate subsequent Orders in Council. [... The High Commissioner's power] was exercised either under the Foreign Jurisdiction Act, or as an act of State which cannot be questioned in a Court of law. The Crown could not, excepting by statute, deprive itself of freedom to make Orders in Council, even when these were inconsistent with previous Orders.¹⁰³

Haldane relied on *Sekgome* for his interpretation of the impact of the Foreign Jurisdiction Act, and referred to *Amodu* but puzzlingly made no attempt to distinguish it.¹⁰⁴

The decision in *Sobhuza* was in turn relied upon in two of three post-war decisions on acts of state that hinged on arguments made by Lord Diplock. In *Nyali Ld v AG*¹⁰⁵, the Court of Appeal accepted Diplock's arguments as counsel that "The courts rely on the representatives of the Crown to know the limits of its jurisdiction and to keep within it. Once jurisdiction is exercised by the Crown the courts will not permit it to be challenged. Thus, if an Order in Council is made affecting the protectorate, the courts will accept its validity without question."¹⁰⁶ In *Post Office v Estuary Radio Ltd*, a case on the extent of the UK's territorial waters in the context of a licensing offence, Diplock LJ (giving the judgment of the Court of Appeal) held that "The Queen's courts, upon being informed by Order in Council or by the appropriate Minister or Law Officer of the Crown's claim to sovereignty or jurisdiction over any place, must give effect to it and are bound by it."¹⁰⁷ And strikingly, giving a sweeping opinion for the Privy Council in *Winfat Enterprise (HK) v AG*, Lord Diplock dismissed the line of Privy Council decisions running counter to *Cook v Sprigg*, arguing that "Although there are certain obiter dicta to be found in cases which suggest the propriety of the British Government giving effect as *an act of state* to promises of continued recognition of existing private titles of inhabitants of

¹⁰² (1774) 1 Cowp 204; 98 ER 1045.

¹⁰³ [1926] AC 518 at 528-529.

¹⁰⁴ On the argument that the Order in Council, and proclamations made under it, were "unchallengeable" acts of state, Haldane refers to the Privy Council in *Re Southern Rhodesia* [1919] AC 211, although the only reference to acts of state in Lord Sumner's judgment in that case is a denial that a relevant concession could be treated as one.

¹⁰⁵ [1956] 1 QB 1 (The case reached the House of Lords, but not on this issue.)

¹⁰⁶ Denning LJ at 15, citing *Sobhuza*; Morris LJ relies on *Sobhuza* at 23 as does Parker LJ at 33.

¹⁰⁷ [1968] 2 QB 740 at 753-4 (relying on a majority of the Court of Appeal in *The Fagernes* [1927] P 311)

territory obtained by cession, there is clear long-standing authority by decision of this Board that no municipal court has authority to enforce such an obligation.”¹⁰⁸

As one commentator noted, Lord Diplock’s opinion in *Winfat* is inconsistent with his own robust opposition to executive autocracy in other areas of constitutional law, “a curious inconsistency, for high authority might well have justified a different approach, one more in keeping with modern constitutional ideas which Lord Diplock himself has done much to promote”.¹⁰⁹ But Diplock’s position is at least on the surface very close to that of another extremely influential public lawyer, William Wade, who defended a very wide act of state doctrine ostensibly based on the old “autocratic” cases. “There is”, argues Wade, “a certain sphere of activity where the state is outside the law, and where actions against the Crown and its servants will not lie. The rule of law demands that this sphere should be as narrow as possible. In British law the only available examples relate in one way or another to foreign affairs.”¹¹⁰ As noted earlier,¹¹¹ Wade argues that in English law “foreign parts are beyond the pale (in Kipling’s words, ‘without the law’), and there the Crown has a free hand, whether the plaintiff be foreign or British.” According to Wade, the common law offers neither limits on nor redress for the effects of *any* exercises of executive power overseas – although crucial, as we will see, is what Wade counts as “overseas” for this purpose.¹¹² To fit with his narrow definition of “overseas”, Wade cites neither *Kamachee* nor *Cook*, but instead *Buron v Denman*¹¹³ as exemplifying the “fundamental rule that acts of violence in foreign affairs, including acts

¹⁰⁸ [1985] AC 733 at 746 (citing *Cook v Sprigg* and *Vajesingji Joravarsingji v Secretary of State for India in Council* but not *Sobbuza*).

¹⁰⁹ Wesley-Smith, above n 101, 325. Lord Woolf questioned Diplock’s position in *Christian v The Queen (The Pitcairn Islands)* [2006] UKPC 47 (30 October 2006), a case concerning the Crown’s criminal jurisdiction over rape, sexual assault and incest committed on Pitcairn Island, Britain’s smallest colony and a tiny Pacific island roughly midway between New Zealand and Chile:

In my view the evidence that Pitcairn is and was at all relevant times a British possession was overwhelming and so I agree with Lord Hoffmann, that for the purposes of determining these appeals, it is not necessary to explore the limits of the act of state doctrine. Where this is not the position, in my view it would be necessary to carefully re-examine the authorities including those cited by Lord Hoffmann which support the contention that an act of state is to be regarded as conclusive on issues as to the status of alleged British possessions overseas. Recent developments, mainly in relation to judicial review have demonstrated a greater willingness on the part of the courts to scrutinise the use by the Crown of prerogative powers and so far the limits, if any, of the courts’ power of review has not been clearly determined. [33]

Unlike Lord Hoffmann (who at [10] treats an executive statement as non-justiciable), Lord Woolf here accepts that Pitcairn was British on the basis of “overwhelming evidence” – *not* on the basis of an executive statement. Lord Hope similarly relies at [47] on the “evidence” that Pitcairn is a settled colony as a matter of “long standing practice”.

¹¹⁰ Wade and Forsyth *Administrative law* (2004) 9th edn p838.

¹¹¹ Above n 12 and accompanying text.

¹¹² Wade also argues that were rules of customary international law to form part of English law, and so a constraint on extra-territorial executive action, those rules of customary international law would necessarily prevail over English legislation in the way in which he argues European law was revolutionarily held to do in the House of Lords’ decisions in *Factortame*. Wade “Sovereignty – Revolution or Evolution?” (1996) 112 *Law Quarterly Review* 568-75. On Wade’s position on the common law status of customary international law, see my “Foreign views on eating aliens”, cited above n 7.

¹¹³ (1848) 2 Ex 167: see text below at p0.

of war, if committed abroad, cannot be questioned in English courts”, a rule which “also casts a complete immunity over all acts of the Crown done in the course of annexing or administering foreign territory”.¹¹⁴

John Collier similarly argues that the plea of act of state is best characterised as a plea “by which the Crown can cause the court to declare it has no jurisdiction”: “once the courts are satisfied that an act is truly an act of state, they must decline to take jurisdiction over any claim arising out of it”, although the court *does* have jurisdiction to inquire into whether a particular action does constitute an act of state.¹¹⁵ The Crown’s plea will succeed, Collier implies,¹¹⁶ not where the Crown has convinced the courts that it has acted in the public interest nor where the Crown has convinced the courts that it is the proper judge of whether it was acting in the public interest (act of state as a defence) but in *all* cases concerning actions of the executive overseas *because* (consciously echoing Wade): “foreign parts are beyond the pale”.¹¹⁷

The breadth of Wade’s doctrine that “foreign parts are without the law” goes far beyond the cases considered above, some of which as we have seen *did* involve English courts accepting that they had a role in inquiring into the legality of Crown actions overseas. But Wade’s and Collier’s strikingly broad act of state doctrines have equally striking limits in terms of what they are prepared to term “foreign”. There is, continues Wade, a common law rule that the common law extends to constrain exercises of executive power within British territory or *protectorates ruled as if colonies*. He invokes the Master of the Rolls’ judgment in *Mwenya*,¹¹⁸ reading the Habeas Corpus Act 1862 as legislation “merely for the purpose of abrogating the jurisdiction of the courts of Westminster in favour of colonial independence”.¹¹⁹ The issue of a writ of habeas corpus depended solely on whether a detainee was “under the subjection of the Crown”, and not on a territory’s formal status.¹²⁰ Collier similarly argues that “act of state should be a defence against all but citizens of the United Kingdom and Colonies” - despite the fact that some of the “autocratic” cases involve Crown action against British colonial subjects.¹²¹

The early cases (*Nabob of Arcot*, *Elphinstone*, *Kamachee*) concerned Crown actions against natives of formally “foreign” Indian territories¹²²; *Sekgome*, *Sobhuza* and *Nyali*

¹¹⁴ Wade and Forsyth *Administrative law* (2004) 9th edn at 838.

¹¹⁵ Collier “Act of state as a defence against a British subject” (1968) 26 *CLJ* 102 at 117, 119, 118.

¹¹⁶ *Ibid*, 105, 109.

¹¹⁷ *Ibid*, 129, citing Wade *Administrative law* (second edn) at 270-272.

¹¹⁸ [1906] 1 *QB* 241 at 302.

¹¹⁹ In line with the narrow reading of the CLVA and the FJA, see above n **Error! Bookmark not defined.** and n **Error! Bookmark not defined.** and accompanying text.

¹²⁰ [1906] 1 *QB* at 295.

¹²¹ Collier, above n 115, 117, endorsing Lord Reid’s assertion in *Nissan* that the act of state doctrine cannot be invoked against British citizens; in *Nissan*, Lords Morris, Wilberforce and Pearson all countenance the invocation of the act of state doctrine against British citizens overseas. See Stanley de Smith “Civis Britannicus Sum” (1969) 32 *MLR* 427, 480-481 and text below accompanying n144.

¹²² In *Kamachee*, prior to his death the Rajah of Tanjore was treated as a “native independent Sovereign under the protection of the East India Company”; rather than accepting the Company’s argument (invoking Dalhousie’s “Doctrine of Lapse” under which an Indian prince could not appoint an heir, so that in the absence of a direct male heir his property lapsed to the

concerned actions in protectorates; *Cook* concerned claims of British subjects in a Crown Colony. The apparently vast and legally unprecedented discretion Wade accords to the Crown in “foreign parts” seems to be designed to lull readers into a subsequent acknowledgement of the Crown’s *legal* responsibilities to inhabitants of colonies and protectorates, a qualification which undermines all but the earliest of the “autocratic” cases.¹²³

Wade’s quotation of Kipling’s phrase “without the law” is taken from the poem “Recessional”, in which Kipling inveighs against lawless power politics:

If, drunk with sight of power, we loose
Wild tongues that have not Thee in awe,
Such boastings as the Gentiles use,
Or lesser breeds *without the Law* –
Lord God of hosts, be with us yet,
Lest we forget – lest we forget.

For heathen heart that puts her trust
In reeking tube and iron shard,
All valiant dust that builds on dust,
And guarding, calls not Thee to guard,
For frantic boast and foolish word –
Thy mercy on Thy People, Lord!

Commenting on the poem in 1942, George Orwell suggests that the verses of this “good bad poem” show that Kipling “does possess one thing which ‘enlightened’ people seldom or never possess, and that is a sense of responsibility.”¹²⁴ But according to Orwell, the text, like the lines from Psalm 127 to which it adverts, cannot make much impression on “the post-Hitler mind”. Those who pretend otherwise “are either intellectual cowards, or power-worshippers under a thin disguise, or have simply not caught up with the age they are living in”: “We all live by robbing Asiatic coolies, and those of us who are ‘enlightened’ all maintain that those coolies ought to be set free; but our standard of living, and hence our ‘enlightenment’, demands that robbery shall continue.”¹²⁵ So according to Orwell, Kipling’s autocratic but responsible government,

Government on his death), the Court simply held the seizure an act of state: see above n 65 and accompanying text. (The “Doctrine of Lapse” was renounced by Canning in 1858.)

¹²³ See de Smith’s “Civis Britannicus Sum”, cited above n 121, recognising *Cook* “and one or two other awkward cases in which ostensibly unlawful acts in relation to British subjects immediately after the annexation of a territory were held to be defensible as acts of State” (428, n8). Wade presumably relies on William Holdsworth’s interpretation of *Buron v Denman* because *Buron* involved action on straight-forwardly foreign territory against a foreign citizen. But unlike the imperial “autocratic” cases, *Buron* does not support a stark contrast between rule-constrained exercises of executive power (prerogative powers at home) and unfettered exercises of executive power over foreigners (acts of state overseas): text below, p0. The only authorities for this approach are the “autocratic” line of cases considered above.

In his *International law opinions* I 111-117, McNair relies explicitly on Wade’s textbook account, acknowledging in n1 p111 that he is “much indebted to Professor Wade for criticism of this subsection”.

¹²⁴ “A good bad poem is a graceful monument to the obvious.” George Orwell “Rudyard Kipling” in *Collected essays* (Secker and Warburg, London: 1968) Vol II 184 at 195. (First published in *Horizon* February 1942.)

¹²⁵ *Ibid* at 187.

self-constrained by notions of divine law, can evolve only – with a “post Hitler” loss of faith – into the unconstrained exploitation of foreigners overseas. The dilemma Orwell sketches is not simply a “post-Hitler” one: it returns us to the oldest question in political philosophy, that of the nature of a sovereign’s responsibility – and of how far this is a matter of law.

Commonwealth courts have since come to argue that when the Crown acquired already inhabited land, it held that land *not* on a legally unenforceable moral trust for the inhabitants¹²⁶ but on a legally enforceable trust: in Canada and New Zealand, courts have held that the Crown’s dominium over land was and remains qualified by aboriginal titles, that treaties of cession can be relied on by the courts in defining the relevant titles, and that in its management of their assets the Crown owes aboriginal peoples a legally enforceable fiduciary duty.¹²⁷

The “autocratic” cases continue to be invoked by English courts. But, “post Hitler”, they are no longer invoked for their original ratio as traced in this section, the idea that imperial actions were non-justiciable *because* they involved sovereign exercises “of arbitrary power” which were not performed “under colour of legal title”. Dicta from Kingsdown in *Kamachee* and Halsbury in *Cook* are now usually cited to justify a very different rationale for the act of state doctrine, a rule that acts of state are non-justiciable *because* they concern matters of international law which as such usually fall outside the jurisdiction of the English courts.¹²⁸ This new rationale for the act of state doctrine is the subject of the following section.

II Acts of state as outside the jurisdiction of English courts because inherently international

(i) *The rewriting of Cook and Kamachee*

On this second account, acts of state “cannot be challenged, controlled, or interfered with by municipal courts” *because* they are matters of international law and as such for international settlement.¹²⁹ A particularly influential reinterpretation of the old act of state cases along these lines is found in the work of D P O’Connell on state succession:

This doctrine [the “Act of State” doctrine in English law], which was affirmed in several cases arising out of the acquisition of territory in Africa and India, has been misinterpreted to the effect that the substantive rights themselves have not

¹²⁶ *Tito v Waddell (No 2)* [1977] Ch 106.

¹²⁷ The leading Canadian cases are *Guerin v The Queen* (1984) 13 DLR (4th) 321; *R v Sparrow* (1990) 70 DLR (4th) 385; and *Delmaguukw v British Columbia* (1997) 153 DLR (4th) 193. The New Zealand Court of Appeal has adopted the same approach, treating the Treaty of Waitangi as “major support for such a duty”: *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 at 306, building on their earlier decision in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641. Toohey J makes a similar argument on the relationship between Australia and its aboriginal peoples in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 199-205 (the other judges leave the issue open). See generally Paul McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* (Oxford University Press 2005).

¹²⁸ “Obiter dicta” in that none of the claims considered in the “autocratic” cases was *founded* upon a treaty, and in each case the claim was held to be non-justiciable not because it involved questions of international law but because it involved extra-legal acts of state. See also Mann *Foreign affairs in English courts*, above n 34, 74.

¹²⁹ Fletcher Moulton LJ in *Salaman v Secretary of State for India* [1906] 1 KB at 639.

survived the change. In fact English courts have gone out of their way to repudiate the construction, and it is clear that the Act of State doctrine is no more than a procedural bar to municipal law action, and as such is irrelevant to the question whether in international law change of sovereignty affects acquired rights.¹³⁰

The act of state doctrine, argues O’Connell, “has been misinterpreted in both literature and judicial pronouncement” in treating pre-existing legal rights as extinguished by a change of sovereignty. *Cook* was the case “originally responsible for this interpretation”, but it is an interpretation which “would seem to be unfounded and to be beyond the limits established in a long series of cases”.¹³¹ O’Connell’s “long series” includes the second of the *Arrot* cases, *Elphinstone*, and *Kamachee*, but he offers no argument or analysis to explain why he believes these cases support his reading,¹³² focusing instead exclusively on dicta in *Salaman v Secretary of State for India*¹³³ and on *Amodu*. The “long series”, he argues, does not “deny a rule of international law” and it insists that “persons who become British subjects by annexation or cession of territory do not lose their duly acquired rights”: the only point of conflict within the case law “is on the question of the extent to which machinery for enforcement of these rights exists in English municipal law.”¹³⁴

Although inconsistent with the original ratio of cases like *Kamachee*, since decolonisation, this account of the act of state doctrine has become the dominant one in contemporary English law. Subsequent leading cases go beyond O’Connell in rewriting the old case law on acts of the British state. In *AG v Nissan*, Nissan, a naturalized citizen of the United Kingdom and Colonies, claimed compensation for the damage, looting and destruction of his luxury hotel in Cyprus during its occupation by British troops, initially (from December 1963) under an agreement with the Government of Cyprus and from March until May 1964 as part of the United Nations Peace-Keeping Force in Cyprus. The Attorney General argued (invoking *Wade on Administrative Law* and John Collier’s essay on act of state¹³⁵) that the initial occupation was an act of state pursuant to an agreement with an independent sovereign (Cyprus), and the occupation from March to May one for which the United Nations was solely responsible.

All the Law Lords in *Nissan* held that as the United Nations was not a foreign sovereign power, no separate plea relating to acts of a foreign state was available for the March-May occupation. Lord Reid’s judgment is considered in the final section of this essay¹³⁶: he concludes that “both on principle and on the balance of authority this act was not of such a character that the courts have no jurisdiction to entertain the present action”.¹³⁷ The other four Law Lords held that, on the assumed facts of the case, the damage to the hotel could not be characterised as an act of state.¹³⁸ But three of those

¹³⁰ O’Connell, above n 82, 378, citing *Salaman* and *Amodu Tijani*.

¹³¹ *Ibid*, 258-262.

¹³² O’Connell also invokes McNair *Legal effects of war* (3rd edn, 1948) 386 and Moore *Act of state in English law* 157ff): *ibid* 251 n3.

¹³³ [1906] 1 KB 613: Fletcher Moulton LJ was *dissenting* on the point about enduring rights.

¹³⁴ O’Connell, above n 82, 253 (cases at n2 p253), 255.

¹³⁵ [1970] AC 179 at 192F; see further above n 110 and n 115 and accompanying text.

¹³⁶ Below, p0.

¹³⁷ *AG v Nissan* [1970] AC 179 at 213E.

¹³⁸ *Nissan Morris* at 216H; *Cf* Collier and de Smith, above n 121 and accompanying text.

four¹³⁹ each accepts that the act of state doctrine could operate as a procedural bar against British subjects attempting to bring claims based on actions of the Crown overseas, and each of those three associates acts of state with matters of international law for international settlement rather than for domestic courts.

Lord Morris treats acts of state as “the category of transactions which by reason of being a part of or in performance of an agreement between states are withdrawn from the jurisdiction of the municipal courts” and cites *Cook* as authority for this principle.¹⁴⁰ Lord Pearson, reserving the question of whether an act outside the realm against a British subject could be an act of state, treats an act of state as “something not cognisable” by “an ordinary court of law (municipal not international)”. “In such a case”, he expands, “the court does not come to any decision as to the legality or illegality, or the rightness or wrongness, of the act complained of: the decision is that because it was an act of state the court has no jurisdiction to entertain a claim in respect of it.”¹⁴¹ Citing passages from Lord Kingsdown’s judgment in *Kamachee* referring to transactions between sovereign states to illustrate the nature of acts of state, he continues:

No doubt the making of the treaty was an act of state, and the performance of it must to some extent involve acts of state. But I think the things that were done by the United Kingdom Government had to some extent the character of acts of state in themselves, apart from the fact that they were done under a treaty. [...There] was a military operation, involving the use of armed force, so far as might be necessary to keep the peace. It could not be justified under municipal law: it was outside the sphere of municipal law, being in the sphere of international relations.¹⁴²

Lord Wilberforce adheres to the old terminology of “justiciability” (rather than the “jurisdiction” of his peers) but rewrites the substance of the act of state doctrine, treating the relevant rule as “one of justiciability: it prevents British municipal courts from taking cognisance of certain acts. The class of acts so protected has not been accurately defined: one formulation is ‘those acts of the Crown which are done under the prerogative in the sphere of foreign affairs.’”¹⁴³ On this definition, he wonders “why, if the character of the act is what makes it noncognisable, the quality or nationality of the plaintiff should enter into the matter”; surveying case law and jurists’ writings, he concludes that “the preponderance of authority and of practice” allows the plea of act of state to operate as a procedural bar against British subjects, although “the scope of the Crown’s prerogative, and the consequent non-justiciability of its acts, is uncertain – as uncertain as such expressions as ‘the conduct of foreign relations’ or ‘in the performance of treaties.’”¹⁴⁴

¹³⁹ Lord Pearce recognizes that it “has long been one of the liberties of the subject that when a wrong is done to him by the executive he cannot be shut out from justice by the faceless plea of an act of state”, but since the taking of the hotel did not fall within the category of an act of state, he holds it unnecessary to decide whether the plea of act of state could bar British courts from considering interference by the Crown with a subject’s liberties of person or property abroad: *Nissan* at 224F, 227A.

¹⁴⁰ *Nissan* at 217C-D.

¹⁴¹ *Nissan* at 240D, 237F-G.

¹⁴² *Nissan* at 239H-240A.

¹⁴³ *Nissan* at 231E-F, citing *Wade and Phillips’s Constitutional Law* (7th edn, 1956) 263.

¹⁴⁴ *Nissan* at 232C; 235E.

Similarly in *Buttes Gas & Oil Co v Hammer (No.3)*, counsel for *Buttes* treated *Kamachee* and *Cook* as authorities for the rule that “The English courts will decline to try actions which require the courts to interpret the precise nature of obligations or transactions arising between sovereign states.”¹⁴⁵ (*Buttes*’ counsel included Robert Jennings, who in later comments supports a “flexible” jurisdictional account of the act of state doctrine.¹⁴⁶) Endorsing in his judgment this interpretation of the older case law, Lord Wilberforce adopts as the underlying rule Halsbury’s “well-known sentence ‘It is a well-established principle of law that the transactions of independent states between each other are governed by other laws than those which municipal courts administer.’” The cases, Wilberforce concludes, link “the doctrine of non-justiciability” with “a wider area of transactions in the international field.”¹⁴⁷

Again in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry*, counsel for the member states of the International Tin Commission invoked *Cook* as an authority for the rule that “Individuals are not the subjects of international law and thus cannot derive rights from the rules of that law unless such rules have been transformed by some means into domestic law.”¹⁴⁸ Lord Griffiths accepts this approach, citing *Kamachee* and *Cook* as authorities for the rule 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.”¹⁴⁹

(ii) Two dangers of this second act of state doctrine

Although it involves a rewriting of the earlier case law, the appeal of this second act of state doctrine is evident. Treating the doctrine as a jurisdictional rule allows an English court to avoid conflict with the executive without treating the Crown as an autocrat unconstrained by rules of international law. It also accords with a dominant contemporary account of a sovereign’s legal responsibility in international law – and for this reason is a doctrine of acts of state nurtured by international lawyers. But this second doctrine is a constitutionally dangerous one. It returns us to the idea of “grey holes”, “disguised black holes” in the rule of law which allow the executive to claim that it governs according to law while removing all scrutiny of its decisions from English courts;¹⁵⁰ as a result, the doctrine can blind English courts to applicable rules of English law while claiming to be applying the law. The rationale is also less conducive to the maintenance and development of international law than its defenders assume.

¹⁴⁵ [1982] AC 888 at 895-6.

¹⁴⁶ (1990) 39 *ICLQ* 513 at 524-5.

¹⁴⁷ *Buttes* at 933 citing from *Cook* at 578.

¹⁴⁸ [1990] 2 AC 418 at 463.

¹⁴⁹ [1990] 2 AC 418 at 499. For criticism of this approach in the *ITC* case, see Rosalyn Higgins *Problems and Processes* (OUP 1994) 206-213; Lawrence Collins (2002) 51 *ICLQ* 485 at 496-8; Lord Steyn in *In re McKerr* at paras 51 (quoting Collins at 497, and arguing this is “not to say that the actual decision in the *International Tin Council* case was wrong. On the contrary, the critics would accept the principled analysis of Kerr LJ in the Court of Appeal that the issue of liability of member states under international law is justiciable in the national court, and that under international law the member states were not liable for the debts of the international organisation”).

¹⁵⁰ Dyzenhaus, above n 33 and accompanying text.

Since the mid-nineteenth century, in accounting for a sovereign's legal responsibility, most international lawyers have treated international law and domestic constitutional law as operating in separate realms. On this account, whether or not an official's breach of rules of international law gives rise to liability under domestic law is a question for domestic law: international law is applied by domestic courts on domestic law's terms. States are free to decide whether and if so how to deal at the domestic level with the official conduct that constitutes a breach of international law. If the state or its courts decides to hold the officials answerable for their actions in the domestic courts, adopting and enforcing the relevant treaty obligation or rule of customary international law, that adoption will be on the terms of domestic law: as such the relevant rule binds as a rule of domestic rather than international law. If the state or its courts decides to offer only an insufficient remedy, or to offer no remedy, declaring the conduct in question an act of state, this decision is not a threat to international law: domestic rules of law like the act of state doctrine and domestic judicial decisions (or other state practices motivated by domestic constitutional concerns) cannot undermine or affect the relevant rule of international law - unless and until the relevant state believes that it must act in a particular way as a matter of international (as opposed to constitutional) law. If the state or its courts *has* offered only an insufficient remedy, at the international level the state (and, in cases of international crimes, the relevant official) remains responsible for the conduct: doctrines and provisions of domestic law cannot be invoked as a defence. But the international obligation to make reparation does not include a specific obligation to bring its domestic law in line with the relevant international rules.¹⁵¹

The difficulties with this now popular account emerge in reflecting on its consequences. As a matter of international law, a state has a continuing duty to abide by its international obligations: where its officials have acted internationally wrongfully (in breach of an international obligation), the responsible state is under an international obligation to ensure that that act ceases (if it is continuing), to guarantee non-repetition where relevant, and to make full reparation for any injury caused.¹⁵² In practice, these international obligations of cessation, non-repetition and reparation leave the responsible state with two options. The responsible state can decide to adhere to its international obligations, amending its domestic constitutional practices in so far as they would otherwise permit officials to continue to act in an internationally wrongful way. This constitutional change will be taken to reflect an acknowledgement and strengthening of the existing international rule. Alternatively, the responsible state can deny that its officials' actions were internationally wrongful, denying the existence of the rule allegedly breached. It will argue, in other words, that the relevant domestic constitutional practices attest to the correct *international* position, that there is insufficient evidence for the contrary international rule it is supposed to have violated.¹⁵³

¹⁵¹ On accounts along these lines, see Gerald Fitzmaurice "The general principles of international law considered from the standpoint of the rule of law" (1957) 92 *Hague Recueil* 68-94. (At 68-69 Fitzmaurice claims to avoid the monist/dualist debate, but his account of the two "fields" or "separate independent legal orders" of international and domestic law is a dualist one: see Jennings and Watts *Oppenheim's international law* (9th edn, London: Longman 1996) 53 n24 and Patrick Capps "Sovereignty and the identity of legal orders" in Colin Warbrick and Stephen Tierney (eds) *Towards an International Legal Community? The Sovereignty of States and the Sovereignty of International Law* (British Institute of International and Comparative Law, 2006) 19-73 at 31-32.)

¹⁵² Cf International Law Commission Articles on State Responsibility, articles 30 and 31.

¹⁵³ See Michael Lobban "Common law reasoning and the law of nations" in Amanda Perreau-Saussine and James B Murphy (eds) *The nature of customary law: legal, historical and philosophical*

What is really at stake in the “separate realm” account of the act of state doctrine is a resistance to the latter argument: underlying the (re)interpretation of the act of state doctrine as a jurisdictional rule is an idea that the practices of state officials, however constitutional under domestic law, should not be allowed to undermine existing international rules nor to generate new ones without good reason.¹⁵⁴ Without this last condition, it is feared, international law will lose its claim to be anything more than Fitzjames Stephen’s projection of imperial power.¹⁵⁵ On one influential account, the crucial judgments about what counts as a reason sufficiently good to distinguish a rule from a habit are themselves judgments determined by *jurists’* customs.¹⁵⁶ On a rival account, reference to jurists’ customs is made not because those customs constitute the relevant reasons for accepting the existence of a binding rule, but because – and only in so far as – they are evidence of objectively good reasons underpinning the relevant practice.¹⁵⁷ Both accounts insist that customary international law is not entirely made or unmade by the practices of state officials, but that jurists’ reasoning plays a crucial role.

Whatever the “filtering” role of a requirement for *opinio juris*, in practice rules of customary international law are in very significant part a coalescence of the customary constitutional practices of state officials. Those constitutional rules and practices will

perspectives (Cambridge University Press, 2007) 256-278. Lassa Oppenheim went to great lengths to persuade his British contemporaries to adopt a dualist account under which international and British law operated in separate realms. He relied heavily on a decision of the full bench of the Scottish High Court of Justiciary in *Mortensen v Peters* (1906) 14 SLT 227 that “Whatever may be the views of any one as to the propriety or expediency of stopping [otter] trawling [in the Moray Firth – in waters which in international law were the high seas], the enactment shews on the face of it that it contemplates such stopping; and it would be most clearly ineffective to debar trawling by the British subject while the subjects of other nations were allowed so to fish.”(231). But the Lord Justice General went on to argue that it was unclear that international law *did* prohibit legislation for waters “more or less land-locked or land-embraced, though beyond the three-mile limit”: *pace* Oppenheim, the case is not an example of a British court rejecting as binding a rule which they had nonetheless acknowledged as clearly established in international law. (Perreau-Saussine “Three ways of writing a treatise on public international law: nineteenth century British textbooks and the nature of customary international law” in Amanda Perreau-Saussine and James B Murphy (eds.) *The nature of customary law* (Cambridge 2007) 228-255.

Cf James Crawford (1976) *BYIL* 353, commenting on British case law on the status to be granted to rules of international law: “Probably the *dicta* which have been regarded as embodying the ‘doctrine of transformation’ have been attempting to convey two distinct propositions, both qualifying rather than displacing the basic principle that international law is part of the law of England. First, attention is drawn to the need for clear and satisfactory evidence that the customary rule is as contended for, and that it has according to its terms legal effects as part of the municipal law. (The real point in *Thakrar*.) Secondly, emphasis is placed on the status of any such rule, once incorporated, as a distinct and independent rule of English law, subject to the normal rules of *stare decisis*.”

¹⁵⁴ The phrase “*opinio juris*” seems to have entered the discourse of international lawyers under the influence of Savigny and his followers in the German historical school.

¹⁵⁵ See above n 15 and accompanying text.

¹⁵⁶ See eg James Crawford “Public international law in twentieth-century England” in Jack Beatson and Reinhard Zimmermann edd. *Jurists uprooted: German speaking emigré lawyers in twentieth century Britain* (Oxford University Press 2004) 681 at 692, 699, 700-701.

¹⁵⁷ See eg John Tasioulas, “Customary international law and the quest for global justice” in Amanda Perreau-Saussine and James B Murphy (eds) *The nature of customary law* (Cambridge, 2007) 307-335.

themselves change and develop through interpretations offered by domestic courts, interpretations which in turn are influenced by customary rules and practices of international law. And once given, each interpretation and application of a written law itself extends that same set of customs. Official British practices sanctioned by English courts can and do contribute to the development and recreation of rules of international law.¹⁵⁸

In so far as the act of state doctrine operates to persuade English courts to declare themselves an inappropriate tribunal for the application of rules of international law to the exercise of prerogative powers, this will impoverish the development of international law *except* where deliberate blindness to an international rule contributes to reform of that rule. This exception is the concern of the third rationale for the act of state doctrine (addressed in section III, below), according to which acts of state, where morally defensible, are also defensible in English law.

Prior to the danger of sealing up an important source for the development of international law, the primary danger in treating the English act of state doctrine as a jurisdictional rule is that an exclusive focus on rules of international law can create a “grey hole” that blinds English courts to the applicable rules of *English* law. As Stanley de Smith suggests, reflecting on *Nissan*:

it would be undesirable to endorse the proposition put forward in some of the judgments in *Nissan*'s case that direct interference with the liberty or property of such persons might be justified as acts of State if that interference were authorised by treaty or were necessary for the implementation of a treaty. This type of approach would open the door too wide to abuses of power by the executive; the validity of executive action ought to rest on a more impressive basis.¹⁵⁹

Both dangers are exemplified in the House of Lords' recent decision in *Al Jedda*. Although it receives no mention in any of the judgments, a version of the jurisdictional act of state doctrine underlies the decision.

(iii) The dangers exemplified: the grey hole of Al Jedda

Al Jedda has close factual parallels with the leading act of state cases on *habeas corpus* considered above, cases like *Sigcau*, *Sekgome* and *Mwenya*. It concerned the internment of a dual British and Iraqi national, Al Jedda, who was resident in the United Kingdom but arrested during a visit with his children to Baghdad (where he had relatives) and flown to a British prison in Basra, on suspicion of involvement with weapons smuggling, explosive attacks, and terrorist recruitment in Iraq. His detention was subject to periodic review and authorisation by senior officers in the British Army; at the time of the House of Lords judgment, he had been detained without charge or trial for over three years.

One might have expected the House of Lords to begin by noting Al Jedda's position as a British citizen resident in the United Kingdom, detained in Iraq by British military officials, and so to determine the applicable system of law. On the basis of *Sigcau*

¹⁵⁸ *Abbasi* offers a striking recent example on the inter-relation between the developing rule articulated in article 19 of the ILC Draft Articles on Diplomatic Protection and the Court of Appeal's judgment: see Perreau-Saussine “Foreign views on eating aliens”, above n 7.

¹⁵⁹ “*Civis Britannicus Sum*”, above n 121, 431.

and *Sekgome*, one would have expected the House of Lords to ask whether Iraq had a “settled system of criminal law and criminal tribunals”¹⁶⁰ under which Al Jedda could be appropriately charged and tried; or whether the situation was closer to that in *Sekgome* where “a few dominant civilized men have to control a great multitude of the semi-barbarous”; or whether, since Al Jedda was a British citizen resident in the United Kingdom, the stability or otherwise of the Iraqi legal system was irrelevant.¹⁶¹ One would also have expected discussion of the availability of a writ of *habeas corpus* on the basis of Lord Evershed’s judgment in *Mwenya* treating issue of a writ of *habeas corpus* as depending solely on whether a territory was “under the subjection of the Crown”, and not on a territory’s formal status.¹⁶² But the question of applicable law is not addressed in these terms, and the availability of *habeas corpus* is not addressed at all.¹⁶³

The appeal to the House of Lords had asked (echoing *Nissan*) whether Al Jedda’s detention was attributable to the United Nations rather than the United Kingdom and as such not within the jurisdiction of British courts; whether United Nations Security Council Resolutions could “qualify or displace” Mr Al Jedda’s right to freedom from arbitrary detention under the Human Rights Act 1998 and Article 5(1) of the European Convention on Human Rights (ECHR: in effect a jurisdictional act of state argument); and only third and finally whether British or Iraqi law applied.

In addressing the question of attribution to the UN, the House of Lords understood themselves to be “called upon to assess how a claim by the appellant, that his international law rights under article 5(1) of the Convention had been violated by the United Kingdom, would fare before the European Court in Strasbourg”.¹⁶⁴ The argument was that if the European Court of Human Rights were to treat Al Jedda’s detention as attributable to the United Nations Security Council, it would hold itself incompetent to rule on the case: the case would fall outside the Strasbourg Court’s jurisdiction since the UN is not a party to the ECHR.¹⁶⁵ Lord Rodger accepted this argument, treating Al Jedda’s detention by British officials in Basra as attributable solely to the United Nations Security Council: as such, the ECHR did not apply to his detention and “Mr Al Jedda cannot bring proceedings in the English Courts under the HRA, alleging that his detention was unlawful because it was incompatible with his article 5(1) Convention right”.¹⁶⁶ It was for the Security Council, “exerting its ultimate authority and exercising its ultimate right of control”, to ensure that Mr Al Jedda was treated in accord with the law of armed conflict.¹⁶⁷ On this account, the Security Council can authorise the exercise of autocratic acts of state, constrained only by its own

¹⁶⁰ Lord Watson in *Sigan*, above n 74 and accompanying text.

¹⁶¹ Vaughan Williams LJ in *Sekgome*, above n 92 and accompanying text.

¹⁶² [1906] 1 QB at 295: see above n 120 and accompanying text.

¹⁶³ Brooke LJ giving judgment in *Al Jedda* in the Court of Appeal ([2006] EWCA Civ 327, [2007] QB 621, at para 100) explains that it was only on appeal that Al Jedda’s counsel sought permission to introduce an application for *habeas corpus*: “We considered this inappropriate, not only because *habeas corpus* relief is governed by a different procedural code but also, and more importantly, because the claim for judicial review which was before the Divisional Court would enable us to rule that Mr Al-Jedda’s detention was unlawful if we were so persuaded.”

¹⁶⁴ R (*Al Jedda*) v Secretary of State for Defence (*JUSTICE and another intervening*) 2007 UKHL 58, 2008 1 AC 153: Lord Rodger at at 195, para 55.

¹⁶⁵ Lord Rodger at 359, para 64, referring to *Bebrami v France* (2007) 45 EHRR SE 85 at para 71.

¹⁶⁶ *Al Jedda*, para 112.

¹⁶⁷ *Al Jedda*, para 113.

understanding of the laws of war. In effect this treats the United Nations Security Council as a foreign sovereign whose acts of state fall outside the jurisdiction of British courts: Lord Rodger's position is the one unanimously rejected by the House of Lords in *Nissan*¹⁶⁸ (another case not addressed in any of the judgments).

The other four Law Lords reject the argument that Al Jedda's detention by British officials should be attributed to the Security Council, although on very different grounds from *Nissan*.¹⁶⁹ But although they each attribute Al Jedda's detention to the UK, all four treat the UK's obligations as a matter *not* of English law but international law and (notionally) Iraqi law: without acknowledging the point explicitly, they treat the UK's detention of Al Jedda as an act of state outside the jurisdiction of English courts.

Lord Bingham treats Security Council Resolution 1546 (8th June 2004) as creating an obligation on the UK to intern in Iraq without trial "where this was necessary for imperative reasons of security". The Resolution authorises the multinational force to take "all measures necessary" to maintain security and stability in Iraq, and a letter annexed to the Resolution from the US Secretary of State (Colin Powell) expressly includes within a list of measures contemplated "internment where this is necessary for imperative reasons of security". Bingham concludes that, given the priority accorded to UN Charter obligations by Article 103 of the Charter, the obligation to intern "where necessary" prevailed over Article 5(1) of the UN Charter, although the UK "must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention".¹⁷⁰

The qualification is worthy of Kafka: here a right to be free from internment is trumped by an obligation to intern. Lady Hale insists that the right "is qualified only to the extent required or authorised by the resolution" and that there would remain in the subsequent proceedings "room for argument about what precisely is covered by the resolution"¹⁷¹ although it is difficult to see what of the right could remain – other than, as she also notes, the question of whether on the facts of the case internment *was* necessary at all ("given that the problem he presents in Iraq could be solved by repatriating him to this country and dealing with him here"¹⁷²), and so whether the Security Council authorisation was triggered in the first place.

Al Jedda's common law claim was one for damages for false imprisonment, and, as a matter of private international law, this was treated as a tort governed by the law of Iraq rather than English law. For this argument, all five members of the House of

¹⁶⁸ See above n 137ff and accompanying text.

¹⁶⁹ All four accept that in principle actions of British forces on a UN mission could be attributable solely to the UN, but were not in this case: see Bingham at paras 22, 24 ("The multinational force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. There was no delegation of UN power in Iraq."); Hale at para 124 (adopting the arguments of Bingham and Brown); Carswell at para 131 (adopting Bingham's arguments); Brown at para 147 (treating the UN's role in Iraq as "an essentially humanitarian and civil aid mission", although deciding in a "Post Script" written after reading Rodger's judgment to "leave over for another day my final conclusion on this point").

¹⁷⁰ *Al Jedda*, para 34, 39.

¹⁷¹ *Al Jedda*, para 126, 129.

¹⁷² *Al Jedda*, para 128.

Lords invoke Brooke LJ's earlier judgment in the case in the Court of Appeal.¹⁷³ There Al Jedda's counsel had argued that it "would be substantially more appropriate to apply English law" since "it would be strange indeed for the English Court to apply Iraqi law to a claim by a British citizen against the British government in respect of activities on a base operated according to English law (and inviolable from Iraqi process) by British troops governed by English law (and immune from Iraqi law)."¹⁷⁴ But Brooke LJ did "not consider that these considerations are strong enough to displace the normal rule":

The emergency for which the powers of internment were required was in Iraq. The law of Iraq was adapted to include measures deemed necessary to combat the emergency. It was in Iraq that "ambush and mutilation, riots and attacks" were occurring and there was the risk of "chaos and the real possibility of civil war" if international troops were prematurely withdrawn. And it was in Iraq that the Security Council gave the MNF all the authority to take all necessary measures to contribute to the maintenance of security and stability, including internment where this was necessary for imperative reasons of security. Given that the laws of Iraq have been adapted to give the MNF the requisite powers, it would be very odd if the legality of Mr Al-Jedda's detention was to be governed by the law of England and not the law of Iraq.¹⁷⁵

On this surprising finding, every one of the English act of state cases involving torts overseas was wrongly decided as English law should not have been applied.

Brooke LJ considered that "these proceedings have shown that he is able to have [his internment] tested in an English court. He is not being arbitrarily detained in a legal black hole, unlike the detainees in Guantanamo Bay in the autumn of 2002."¹⁷⁶ Yet the grey hole in which the Court of Appeal and House of Lords left Al Jedda is constitutionally worse.¹⁷⁷ In effect, both the Court of Appeal and House of Lords treat acts of state as governed by international law *rather than* English law¹⁷⁸, hence their uncritical focus on UN Security Council authorisation and their complete neglect of the long series of English act of state cases on habeas corpus. Treating British acts of state as falling outside the jurisdiction of English courts, the House of Lords neglects English common law on the validity of executive action and impoverishes the relevant English case law on acts of state. Had they examined the issues at stake in the English act of state cases, they would have become aware by analogy that their judgment also ignores the question of whether there are limits on acts of the Security Council and whether it is

¹⁷³ Lord Bingham at para 43 and Lord Brown (para 154) endorse Brooke LJ's argument in the Court of Appeal; Lord Rodger (para 119) and Lord Carswell (para 131) endorse Lord Bingham on the point; Lady Hale does not address the issue explicitly but states her general agreement with Lords Bingham, Carswell and Brown (para 129).

¹⁷⁴ Brooke LJ's judgment in *Al Jedda* [2006] EWCA Civ 327, [2007] QB 621, at para 100.

¹⁷⁵ *Al Jedda* (Court of Appeal), para 106, internal cross-references omitted.

¹⁷⁶ *Al Jedda* (Court of Appeal), para 108, referring to *R (Abbasi) v Foreign Secretary* [2002] EWCA Civ 1598 at [64].

¹⁷⁷ On grey holes, see Dyzenhaus, above n 33 and accompanying text.

¹⁷⁸ Strictly the Human Rights Act does not require English courts to follow decisions of the Strasbourg court, only to consider Strasbourg decisions: see Keith Ewing "The unbalanced constitution" in Campbell, Ewing and Tomkins (eds) *Sceptical essays on human rights* (Oxford University Press 2001) 103-118; two earlier decisions of the House of Lords had nonetheless held rights under the Human Rights Act to be those under the ECHR: *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14 at para 19 (Lord Bingham) and *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57.

empowered to authorise autocratic acts of state violating fundamental freedoms.¹⁷⁹ In ignoring the question of *ultra-vires* Security Council resolutions, it also lost an opportunity to contribute to development of international law on the topic.

III Acts of state as legally defensible because just

British constitutional lawyers frequently insist that all prerogative power is subject to the common law: the view “that the King could by his prerogative withdraw from the common law courts any matter which he chose to say was a matter of state, and decide it as he pleased, was finally disposed of by the Great Rebellion and the Revolution”.¹⁸⁰ Just as in domestic affairs common lawyers have held themselves judges of whether a statutory provision ousting their jurisdiction can truly apply or of whether the executive can properly invoke a prerogative power, so in foreign affairs English courts have *sometimes* held that they have jurisdiction to decide whether or not an act is something the Crown had the legal power to do and as such is a lawful act of state.

The courts have sometimes insisted, in other words, that they are the final arbiter of the lawfulness of all executive action, and so of whether and of when a substantive common law defence of act of state is available to the Crown. On this account, raising a defence of act of state does not absolve the Crown from acting justly towards those individuals particularly affected: the defence requires that the Crown act justly towards victims of an act of state.¹⁸¹ If, but only if, the executive can offer its courts reasonable grounds for believing that its otherwise unlawful actions were just actions that protected harm to the nation, then those actions should be treated as legally justified.

Such accounts are rare and they raise fundamental questions concerning the nature and extent of English public law remedies: in stark tension with a classical English account of the rule of law, according to which the Crown must be subject to the ordinary private law of the land, on this account acts of state are not treated in the same way as acts of ordinary citizens. On Albert Venn Dicey’s celebrated account, the proper remedy for legal wrongs wrought by British officials, as for *any* legal wrong, was to be sought in private law. The rule of law he contrasted “with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint”, with “almost every continental community” in which “the executive exercises far wider discretionary authority in the matter of arrest, of temporary imprisonment, of expulsion from its territory, and the like, than is either legally claimed

¹⁷⁹ Article 24(2) of the UN Charter limits the powers of the Security Council to those in accord with the purposes and principles of the UN, which include in Article 1(3) “promoting and encouraging respect for human rights and for fundamental freedoms for all”: the argument would be that a Resolution incompatible with Article 1(3) is a nullity and as such not an obligation governed by Article 103. See Judge Morelli in the *Certain Expenses of the United Nations, Advisory Opinion*, ICJ Reports 1962 p 151 at 222; Dapo Akande “International Organisations” in Evans (ed) *International law* (OUP 2nd edition 2006) 277 at 292-3.

¹⁸⁰ Holdsworth “The history of acts of state in English law” (1941) 41 *Columbia Law Review* 1313 at 1314 and Holdsworth *History of English law* (1924) Vol 4 85 et seq.; Vol 5 at 430, 439-40; Vol 6 at 21 et seq.

¹⁸¹ “As Lord Pearce put it very pithily; the prerogative involves ‘a right to take and pay’. Perhaps it would be even more accurate to say that it involves the right to take and the duty to pay.” Mann “Act of state as cause of action” in his *Foreign affairs in English courts*, above n 34, 188-190 at 189. On this account of the act of state doctrine as compatible with *Buron v Denman*, see the discussion of the availability of petitions of right, below at p0.

or in fact exerted by the government in England”.¹⁸² In England, argued Dicey, the rule of law means that “every man, whatever be his rank or condition, is subject to the ordinary law of the realm, and amenable to the jurisdiction of the ordinary tribunals” and that constitutional protections are “with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.”¹⁸³

According to Dicey, a doctrine “pervades English law, that no one can plead the command of a superior, were it the order of the Crown itself, in defence of conduct otherwise not justified by law”.¹⁸⁴ Although “well-informed foreign critics, and perhaps some Englishmen also, often think that there is in reality no remedy against the Crown [for a breach of contract or] a wrong committed by the Crown, or rather its servants”, this idea, insists Dicey, is “in substance erroneous.” This error is based on the “technical impossibility” of bringing an action against the Crown, an impossibility “often said to be based on the principle that the Crown can do no wrong.” But for breaches of contract, a petition of right will generally lie “which though in form a petition, and requiring the sanction of the Attorney-General (which is never refused), is in reality an action”. And although, Dicey states, neither an action nor a petition of right “lies against the Crown for a wrong committed by its servants”, “no injustice results from this” as action can be taken “against the person who has actually done or taken part in doing the wrongful act which has caused damage” and the Crown “usually pays damages awarded against a servant of the State for a wrong done in the course of his service”.¹⁸⁵

The key problem with Dicey’s enthusiastic account of the constitutional rule of English private law is the case of *Buron v Denman*, a case to which he does not refer¹⁸⁶ and in which a plea of act of state succeeded as a defence in a tort action brought (exactly as Dicey would advise) against a wrong-doing Crown servant. This section begins by showing how the act of state defence as established in *Buron* operates as a defence for Crown servants, shifting liability onto the Crown; I then move on to consider how and when a plea of act of state can also operate as a defence for the Crown.

(i) The background to Buron v Denman: naval destruction of slave barracoons

Buron ultimately concerned the legality or otherwise of British actions against foreign slave traders overseas. Under Palmerston and the Whigs, and also under Peel, Aberdeen and the Tories, suppression of the slave trade was official British policy. Britain had long been campaigning for international recognition of a general “right of search” allowing the seizure of ships either carrying slaves or preparing to do so: as Sir James Mackintosh had claimed in Parliamentary debate, “the Right of Search was practical abolition”.¹⁸⁷ But there was a suspicion that the British claim to a right of search was motivated by economic rather than philanthropic interest. The American Ambassador in Paris, General Cass, made those suspicions explicit: “Who can doubt that British cruisers

¹⁸² *Law of the constitution*, above n 87, 184.

¹⁸³ *Ibid*, 189, 191, citing at n2 *Calvin’s Case*, *Campbell v Hall*, *Wilkes v Wood* and *Mostyn v Fabregas*.

¹⁸⁴ *Ibid*, 282, citing Mommsen on “a similar principle in early Roman law” but with no reference to *Buron v Denman*.

¹⁸⁵ *Ibid*, 556-7.

¹⁸⁶ On Dicey’s approach to case law, see Brian Simpson “The common law and legal theory” in Simpson (ed) *Oxford essays on jurisprudence II* (Oxford University Press 1977) 77.

¹⁸⁷ Hansard House of Commons 9th February 1818. The account that follows is particularly indebted to Christopher Lloyd *The navy and the slave trade* (Cass, London: 1968): see 45 and more generally 39-60.

stationed upon that distant coast, with an unlimited Right of Search, and discretionary authority to take possession of all vessels frequenting those seas, will seriously interrupt the trade of all other nations, by sending in their vessels for trial, under very slight pretences?”¹⁸⁸ At neither the Congress of Vienna in 1815 nor the conference at Aix-la-Chapelle were other European states prepared to concede to the leading maritime power a role in policing the “freedom of the seas”, not least since the claimed policing role was closely linked to Britain’s insistence on a war-time right to search neutral ships for enemy supplies and British deserters, an insistence that was a cause of the 1812-1814 war between Britain and the United States.¹⁸⁹

But by an 1835 treaty with Spain,¹⁹⁰ the first of a series of similar bilateral treaties between Britain and other states, a crucial “equipment clause” (omitted in earlier treaties) permitted British ships to stop and search Spanish vessels on the high seas when those ships were suspected of slave trading; the British ships were also permitted to seize the ships if they were found to contain any of the specified items of slaving equipment (extra messing equipment, shackles, bolts of handcuffs, or materials for building an extra deck). In the spring of 1840, Commander Denman had been sent to the north-west coast of Africa with instructions to join the ongoing British naval patrol attempting to suppress the slave trade.

Denman’s patrol was looking for slaving ships at the mouth of the Gallinas river, a major slave trading base established by Pedro Blanco and since sold on to other Spanish slavers who were trading under authorisation from Prince Manna, the eldest son of the bedridden King Siacca of the Gallinas. That autumn the Governor of Sierra Leone asked Denman to liberate (employing “force as far as may be necessary”) two British subjects from Sierra Leone, Fry Norman and her child, who were being held in one of the Spanish island prisons (slave “factories” or “barracoons”¹⁹¹). Denman set sail with three ships; the two captives had apparently been returned the day after Denman entered the river¹⁹², but Denman and his crew continued to chase the slave traders (who tried to carry off their remaining slaves in canoes to the mainland), capturing ninety slaves including two British men. He then set guard over the barracoons, and demanded that King Siacca liberate the Normans and undertake by treaty to ban slave trading in the Gallinas. Under threats of violence from Denman, Prince Manna and the chiefs of the Gallinas undertook to banish resident slave traders within the month and “totally to destroy the factories belonging to these white men without delay”. Two days later,

¹⁸⁸ H G Soulsby *The right of search and the slave trade in Anglo-American relations* (John Hopkins University 1933) 47; Lloyd, *ibid*, 52.

¹⁸⁹ A Declaration annexed to the Final Act of 1815 condemned slave trading but deferred to future negotiations the details of the plan for suppressing it.

¹⁹⁰ 28th June 1835; 6 & 7 Will. 4, c. 6. See Allain in this volume of *BYIL*.

¹⁹¹ Described by Commander Forbes as “sheds made of heavy piles, driven deep into the earth, and lashed together with bamboos, thatched with palm leaves. If the barracoon be a large one, there is a centre row of piles; along each line of piles is a chain, and at intervals of about two feet is a large neck-link, in one of which each slave is padlocked. Should this method be deemed insufficient, two, or sometimes in cases of great strength, three, are shackled together the strong man being placed between two others and heavily ironed, after being beaten half to death beforehand to ensure his being quiet.” E Forbes *Six months service in the African Blockade* (1849) 113; Lloyd, *above* n 187, 29-30.

¹⁹² David Eltis *Economic growth and the ending of the transatlantic slave trade* (Oxford University Press, 1987) at 120.

Denman let loose the slaves. The gunpowder was thrown into the river; the casks of spirits opened and left to drain out on the sand (“it being suggested that they were poisoned”); and the traders’ other goods “were claimed by King Siacca, as forfeited in consequence of the owner having acted in defiance of his law, and were delivered up to him”; and the barracoons were burned down.¹⁹³ Eight hundred and forty one slaves were carried by Denman to Sierra Leone and emancipated. Denman also carried some of the slave traders who, terrified of native exultation over their downfall, begged to be taken to Sierra Leone: one of those rescued and given a free passage was Señor Buron.¹⁹⁴

Reports were sent by the Governor of Sierra Leone to the Admiralty and to Lord John Russell, principal Secretary of State for the Colonial Department. James Stephen, Russell’s Under-Secretary and as venerable a campaigner as Russell and Lord Palmerston in the movement to abolish slavery,¹⁹⁵ forwarded the reports to Lord Palmerston, then Foreign Secretary, explaining Russell’s plans “to represent to the Lords Commissioners of the Admiralty, that her Majesty’s government entertain a high sense of the very spirited and able conduct of Commander Denman, and its important results to the interests of humanity”.¹⁹⁶ Palmerston’s reply reiterated this praise of Denman’s actions, recommending “that similar operations should be executed against all the piratical slave trade establishments which may be met with on parts of the coast not belonging to any civilised power”.¹⁹⁷ James Stephen sent on to the Admiralty the set of letters and reports, which were followed by a letter to the Admiralty from Lord Leveson¹⁹⁸ explaining that if it were not possible in future operations to reach an agreement with “the native chiefs”, “the commanders of her Majesty’s cruisers would be perfectly justified in considering European slave traders established in the territory of the native chiefs as persons engaged in a piratical undertaking”.¹⁹⁹ The correspondence was placed before Parliament, who voted to Denman and his men a bounty of four thousand pounds and another three thousand five hundred pounds towards the suppression of the slave trade on the coast of Africa; the Admiralty promoted Denman to the rank of Captain.

Señor Buron, having reached safety, brought an action in trespass against Commander Denman, claiming damages of one hundred thousand pounds (equivalent in today’s money of nearly five and a half million pounds) for the loss of four thousand slaves and goods including cottons, woollens, gunpowder and spirits that had been stocked for exchange for more slaves. “Alien friends” had been allowed to bring most kinds of personal action in English courts since the end of the sixteenth century; primarily to encourage trade. Buron’s was a test case: other actions by slave traders against members of the British navy were pending in the Court of the Exchequer.

It was not only foreign slave traders who were opposed to the official British policy of active intervention: opposition was also growing among free trade Members of

¹⁹³ *Buron v Denman* (1848) 2 Ex 167 at 176 (154 ER 450 at 454).

¹⁹⁴ Lloyd, above n 187, 94-96.

¹⁹⁵ James Stephen was also author of *The slavery of the British West Indies* in 1824. He had married Sarah Wilberforce (William Wilberforce’s sister); James Fitzjames Stephen was their son.

¹⁹⁶ Downing Street 17th March 1841, part of the plaintiff’s evidence, quoted in the case report at 2 Ex 177-178 (154 ER 455).

¹⁹⁷ Russell’s reply through his Under-Secretary, John Backhouse Foreign Office 6th April.

¹⁹⁸ The second Foreign Office Under Secretary – what would now be termed the Parliamentary Under Secretary.

¹⁹⁹ 28th July 1841 – quoted in case report at 2 Ex 180 (154 ER 456).

Parliament, who were far from enthused at Denman's actions. When other naval officers followed Denman's lead, in particular when one Captain Nurse, in the process of destroying a barracoon north of Sierra Leone on the Pongos river in 1841, destroyed the property of foreigners who claimed they were playing no part in the Slave Trade, the free traders became incensed: "What security had any merchant, British or foreign, that an over-zealous naval officer would not burn his goods on the beaches of Africa?"²⁰⁰

(ii) Le Louis, the Aberdeen letter and Dodson's advice: the destruction violated international law

Lord Aberdeen (newly appointed as Foreign Secretary in place of Palmerston) asked the Queen's Advocate, John Dodson, for advice on Buron's case against Denman. Dodson answered that he could not "take it upon himself to advise" that the actions of Commander Denman "are strictly justifiable, or that the instructions of her Majesty's naval officers ... are such as can with perfect legality be carried into execution":

The Queen's Advocate is of the opinion, that the blockading rivers, landing and destroying buildings, and carrying of persons held in slavery in countries with which Great Britain is not at war, cannot be considered as sanctioned by the law of nations or by the provision of any existing treaties; and that, however desirable it may be to put an end to the slave trade, a good, however eminent, should not be obtained otherwise than by lawful means.²⁰¹

Parliament had passed a series of statutes prohibiting the slave trade: the Acts of 1807 and 1811 were drafted very broadly and seemed to allow British subjects to prevent slave trading by traders whose states still recognised slave trading as lawful.²⁰² But in the Admiralty case of *Le Louis* in 1817, Sir Walter Scott (Lord Stowell) had ruled that since slave trading was permitted by international law, Parliament lacked the power to prohibit slave trading among foreigners. Acts against foreigners designed to further the suppression of foreign slave trading must be expressly sanctioned not by statute but by treaty with the relevant state:

To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; to force the way to the liberation of Africa by trampling on the independence of other states in Europe; in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice.²⁰³

And in *Denman's* case, Dodson advised as Queen's Advocate, the 1835 treaty could not possibly be read to sanction patrolling territorial waters, nor landing and destroying the

²⁰⁰ Lloyd's characterisation of the position taken by the Free Trade group of MPs: above n 187, 97. William Hutt (who for Lloyd is the real villain of the story), Cobden, Bright and the young Gladstone argued that the withdrawal of the squadron would lead to a flourishing of legitimate trade and a rapid satiation of demand for imported slaves. On Hutt's arguments see Lloyd at 104-114. Lloyd concludes, against the Free Traders' arguments, that "All colonial history in every part of the world supports Captain Fishbourne's statement that, without a naval police force, "the coast would become a nest of pirates; the number of slaves exported would be enormous; all legitimate trade would cease, and in a very short time we should have to increase the squadron for the protection of what trade remained." (at 114, quoting Fishbourne's statement to the House of Lords Committee P.P. 1850 vol IX question 4346.)

²⁰¹ Letter from Lord Aberdeen, then Secretary of State for Foreign Affairs, to Lords of the Admiralty, May 20, 1842: quoted in the report of *Buron* at 2 Ex 181 (154 ER 456)

²⁰² 47 Geo.III, c36, 51 Geo. III, c23.

²⁰³ *Le Louis* 2 Dod. 210 at 257.

barracoons, nor carrying off liberated slaves. Palmerston had celebrated Denman's attacking the barracoons (as opposed to waiting for slave trading ships to reach the high sea) as taking the "wasps' nest" rather than chasing after individual wasps.²⁰⁴ But wasp-chasing, advised Dodson, was all the treaty with Spain permitted.

In *Le Louis*, Scott had held that "The Legislature must be understood to have contemplated all that was within its power, and no more."²⁰⁵ Acts of Parliament, he held, could not affect "any right or interest of foreigners, unless they are founded upon principles and impose regulations that are consistent with the law of nations". The Admiralty court must treat Parliament's legislative jurisdiction as circumscribed by international law: it was "the only law" which Britain could apply to foreigners, and so "the generality of any terms employed in an Act of Parliament must be narrowed in construction by a religious adherence thereto".²⁰⁶ The question of the legality or otherwise of slave trading according to the law of nations must be considered "not according to any private moral apprehensions of my own (if I entertained them ever so sincerely), but as *the law* considers it". Firstly as a matter of principle, international law allowed a right to search only the ships of belligerents on the high seas: to allow searches of ships "of states of amity upon the high seas" would violate two fundamental principles of international law, that of the equality and independence of states and that protecting an equal right to uninterrupted use of the high seas. Slave trading could not be assimilated to piracy since slave traders, unlike pirates, are not enemies of every country: they confine "their transactions (reprehensible as they may be) to particular countries, without exciting the slightest apprehension in others" - and in legislating to make slave trading a transportable rather than a capital offence, Britain itself recognised a distinction between slave trading and piracy.²⁰⁷

Secondly, a new rule of customary international law prohibiting slave trading could not be said to have emerged: personal slavery had been protected "with all the sanctions of law, public and municipal, and without any opposition, except the protests of a few private moralists, little heard and less attended to, in every country, till within these very few years in this particular country." Although a considerable change of opinion was now taking place, the "speculative opinions" condemning slave trading at the 1815 Vienna Congress could not "be admitted to have the force of overruling the established course of the general law of nations": the states represented at Vienna continued to permit slave trading by treaty. And even if the principles of the Vienna Declaration had not been undermined by the witness of these contradictory treaties, were an equivalent Congress to declare "that the right of search in time of war, as exercised on neutrals, was contrary to all reason and justice", Britain "I presume would not attribute any such effect to such opinions".²⁰⁸

In places in his judgment, Scott assumes an account of international law that treats its principles as the inherently wise, "publicly just and privately moral" fruits of long practice. But he also insists that certain principles such as the ban for which the USA contended on wartime searches of neutral ships (his judgment does not explicitly

²⁰⁴ See Lloyd, above n 187, 93-99.

²⁰⁵ *Le Louis* at 254

²⁰⁶ *Le Louis* at 239.

²⁰⁷ *Le Louis* at 247.

²⁰⁸ *Le Louis* at 250, 252-3.

refer to the USA) could be excluded from English law on grounds of reason and justice: whether this is because as unjust and unreasonable principles they cannot be principles of international law at all, or whether they can be principles of international but not *English* law is not made clear, although the implication seems to be the latter, making the reason and justice of principles of international law subject to assessment by “this country”. Scott denies that his moral and political opinions play a role in stating what “*the law* considers” yet also insists that arguments of reason and justice (and in effect British policy) would justify a refusal to enforce as a rule of international law the ban for which the USA contended. (Britain eventually accepted such a prohibition during the Crimean War in the Declaration of Paris.)

On Dodson’s report of the decision in *Le Louis*, Scott’s arguments for distinguishing slave trading from piracy were those put to him by Lushington, while his denial of a right of search either under the general law of nations or specific treaties was made by the appellant’s second advocate who “laid it down as a primary and fundamental rule of the law of nations, that the right to visit and search foreign ships on the open sea does not exist in time of peace; and this position he proceeded to establish upon the three grounds of reason, authority, and practice.”²⁰⁹ That second advocate was the reporter himself, the later Queen’s Advocate, John Dodson.

Scott’s decision in *Le Louis* was followed by the common lawyers of the Court of the King’s Bench in *Madraço v Willes* (1820),²¹⁰ who also held themselves bound to construe the then-extant anti-slavery legislation as applying only to *British* subjects involved in the slave trade. They accepted Scott’s argument that neither a “British Act of Parliament, nor any commission founded on it, can affect the rights or interests of foreigners, unless they are founded upon principles and impose regulations that are consistent with the law of nations. That is the only law that Great Britain can apply to them; and the generality of any terms employed in an Act of Parliament must be narrowed in construction by a religious adherence thereto.”²¹¹ The case is cited by one twentieth century writer on English law as the “strongest example of courts restraining the effect of widely expressed statutes” in line with what the court understood to be the relevant rules of international law: the broader reading of the statutes, summarises Sir Carleton Allen, “however morally commendable, would have violated an elementary principle of International Law; and in *Madraço v Willes* the Court of the King’s Bench, with regret but without hesitation, so narrowed the statutes that a Spaniard was enabled to recover very large damages in an English court for interference at Havana with his slave ship and traffic”.²¹² [AP-S: include citation for Carleton Allen]

Countering Scott’s argument (highlighting the divergence between statutory penalties for piracy and for slave trading), with an Act of 1824 Parliament bolstered its anti-slavery legislation by assimilating slave trading to piracy, treating it as punishable by death²¹³; another crucial piece of legislation was the Emancipation Act of 1833.²¹⁴ But

²⁰⁹ *Le Louis* at 225.

²¹⁰ (1820) 3 B & Ald 353.

²¹¹ 2 Dods 239 (ER 1474).

²¹² C K Allen *Law in the making*, seventh edition (Clarendon Press Oxford 1964) 461.

²¹³ An Act for the more effectual suppression of the African Slave Trade 1824 (5 Geo. IV c.17).

²¹⁴ An Act for the abolition of slavery throughout the British colonies, for promoting the industry of the manumitted slaves, and for compensating the persons hitherto entitled to the services of such slaves 1833 (3&4 Will. IV c. 73).

when the papers relating to Denman came before Dodson, he stuck to his guns: he advised the Cabinet that slave trading remained lawful under international law and so that under English law foreign slave traders could be constrained only by treaty.²¹⁵

(iii) Baron Parke's summing-up in *Buron v Denman*: the nature of the defence of act of state

One historian sees Aberdeen's request for legal advice from Dodson as "a serious error on the part of the Whig Government", one that postponed all hope of successful abolition for many years.²¹⁶ Given the position on the suppression of slave trading still shared by the executive and by most members of Parliament, and their endorsement of Denman's actions, the executive was in a difficult position, one which became all the more difficult as free trade Parliamentarians began to argue more directly in the mid 1840s that naval attempts to suppress the slave trade, and the naval patrols in particular, should cease.

Denman's actions might have been defended as lawful because the relevant rule of customary international law on which *Le Louis* and *Madrazo* were based had now changed. It might have been argued that Dodson was out of date and ignored what was now a rule treating slave traders as the enemies of humanity and so outside the protection of the general rule preventing searches on the high seas.²¹⁷ But Dodson was far from alone in arguing as he did: as the campaigners against forcible abolition emphasised, few British international lawyers accepted that such a new rule of customary international law had yet emerged.

Another defence might have been that Denman's actions were lawful because the Court had erred in *Madrazo* in following *Le Louis*: Scott in the Admiralty Court was applying international law rather than national law, but in the eyes of the common law Parliament had legislative jurisdiction even over foreigners overseas and so in English law could empower Denman to do what he did. But to argue this would have required common lawyers not only to ignore the approach of a judge widely regarded as a great civilian, but also to rule in stark rejection of a clearly established rule of international law in a way no English common law court had done.

Only one defence was possible if Denman himself was not to be left liable for the equivalent of five and a half millions pounds in damages for his valiant actions: Denman's actions would have to be attributed exclusively to the state, so that in so far as *Buron* could have a successful claim against the Crown, the state would bear the relevant costs. The Admiralty eventually agreed to have the Attorney General defend Denman

²¹⁵ As a result of Dodson's advice, Aberdeen appointed a Committee presided over by Stephen Lushington (now a judge of the Admiralty Court) to draft instructions to guide naval officers "employed in the suppression of the slave trade"; Denman was involved in the work of the Committee, whose instructions, published in 1844, aim to give Commanders a detailed outline of their legal position – directing, *inter alia*, Commanders stationed on the Coast of Africa to collect detailed information both on the slave trade and on the possibilities for legitimate commerce, and to use force only on the orders of a Senior Officer on the station *or* for rescuing British subjects and if so confining that use of force "to the liberation of the persons so detained." General Instructions Section 2nd paras 2, 6. The Committee's report is in P.P. 1844 1 vol 50.

²¹⁶ Lloyd, above n 187, 97.

²¹⁷ An approach to precedent not endorsed by a common law court until the Court of Appeal's majority judgment in *Trendtex*.

on behalf of the Crown, and the Attorney General argued that in lauding Denman as it had, the Crown had retrospectively adopted Denman's actions as its own, so exempting Denman from all liability.

Furthermore Buron had no right to bring an action against the Crown because as an alien friend he would have a right of action only where a British subject would: here a British subject would not. Those of the Crown's (Denman's) actions falling within the terms of the Spanish treaty could not be questioned: "no subject has a right to bring an action for anything done in pursuance of that treaty, whether sanctioned by the municipal law or not; for his assent is virtually implied to every act of his own government".²¹⁸ Those of the Crown's (Denman's) actions falling outside the terms of the treaty should also be treated as retrospectively adopted acts of state "in respect of which no action can be maintained". To defend this second argument, the Attorney General cited *Elphinstone*.²¹⁹ As seen above, this controversial opinion was at best authority for a rule that actions carried out in the course of a war were subject to the exclusive jurisdiction of military and not civilian courts. If slave trading did amount to piracy, then slave traders could be treated as enemies of mankind and so in effect in a state of constant war, but this could not be argued without challenging Scott's judgment; since Denman's actions should then be treated as carried out in peace time, *Elphinstone* was hardly a relevant precedent. Unsurprisingly, Baron Parke did not refer to the case in summing up in *Buron v Denman*.

But Parke did hesitantly accept the argument that Denman's actions became an act of state when ratified by the Crown – hesitantly because "there appears to me a considerable distinction between the present case and the ordinary case of ratification by subsequent authority between private individuals" since "if the Crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liability the person who commits the trespass." Parke concludes:

Whether the remedy against the Crown is to be pursued by petition of right, or whether the injury is an act of state without remedy, except by appeal to the justice of the state which inflicts it, or by application of the individual suffering to the government of his country, to insist upon compensation from the government of this – in either view, the wrong is no longer actionable.²²⁰

There were then, in Parke's summary, two views of the route now open to Buron.²²¹ On one view, he could pursue a remedy from the Crown by petition of right. On another – in line with the "autocratic" imperial cases considered above - his only remedy was to ask Spain to take up his cause, exercising diplomatic protection on his behalf – in which case under international law any compensation awarded would be the property of the Spanish state (who would be under no legal obligation to recompense Buron). As Buron's case was settled after Parke's ruling (as were the other pending cases), which of the two views was correct was not determined.

²¹⁸ *Buron v Denman* (1848) 2 Ex 167 at 184 (154 ER 457), citing *Conway v Gray* 10 East 536.

²¹⁹ See above n 56 and accompanying text.

²²⁰ *Buron v Denman* at 189-190.

²²¹ Giving judgment in *Nissan*, Lord Morris recognises this possibility ([1970] AC 220A).

If the first view is correct at common law, *Buron* does not give the executive the “free hand” claimed by Stephen and Wade. Their suggestion that it leaves the executive legally unaccountable for acts of state can be defended only if one assumes firstly that Parke, who was celebrated for his knowledge of legal forms and procedures²²², was wrong to suggest that Buron could have sought compensation by petition of right, and secondly that in accepting the plea of act of state the court was not shifting responsibility from Buron to the Crown but was declaring (as in *Elphinstone* and more directly in *Kamachee*) that the case was non-justiciable.

This raises the crucial question of whether or not Buron could have sought compensation from the Crown, that is, whether the plea of act of state operated as a defence *for Denman* shifting liability onto the Crown (through a petition of right), or whether the plea also operated as a defence *for the Crown*. The following and final sections of this article address this question.

(iv) The availability or otherwise of damages for acts of state by petition of right

Over the course of the seventeenth century, an alliance of common lawyers and Parliament had insisted that although in the eyes of his courts the king can do no wrong, a wrong apparently done by the king could be attributed to his servants, and that those servants, however senior, were answerable not solely to the king but also to the courts. Resuscitating and extending the medieval principle of the liability of the king’s servants under ordinary law, the common lawyers had argued that ministers of State could be made personally liable like any private person.²²³ In principle, then, since “a servant of the Crown is responsible in law for a tortious act done to a fellow subject, though done by the authority of the Crown”,²²⁴ the doctrine of ministerial responsibility to the law gave alien friends remedies against the king’s servants. But any claim Buron might have tried to bring against Russell or Palmerston would be more than likely to be met with an act of state defence.

As Parke suggests, it *might* have been possible for Buron to seek compensation directly from the Queen by petition of right.²²⁵ While the monarch cannot issue a writ against herself, she could be petitioned to grant a remedy to a subject who would have had a remedy had his claim been against a fellow subject rather than against the queen herself: “The petition of right, unlike a petition addressed to the grace or favour of the

²²² Parke resigned in 1855 on the abolition of the forms of action: “His fault was an almost superstitious reverence for the dark technicalities of special pleading, and the reforms introduced by the Common Law Procedure Acts of 1854 and 1855 occasioned his resignation.” Sir James Parke, 15 D.N.B. 226.

²²³ For an introductory overview see Holdsworth *A history of English law* Vol VI 101-3, 111, 266-7; Vol IX 98.

²²⁴ Cockburn CJ in *Feather v the Queen* (1865) 6 B&S 257 at 297.

²²⁵ See Holdsworth Vol IX at 30-45 on 18th/19th century developments of the remedy by petition of right. The remedy became increasingly popular over the nineteenth century – Holdsworth attributes this partly to “the fact that the manifold activities of the modern state necessitated some remedy against the crown for breaches of contract and other wrongs committed by its agents; and partly to the fact that the old remedy of suing for a writ of *Liberate*, or petitioning the barons of the Exchequer, had become obsolete with changes in the fiscal machinery of the state.” It was made more generally available in 1860 when the procedure on such a petition was reformed by the Petitions of Right Act (23, 24 Victoria c.34). Vol IX at 39.

sovereign,” explains Cockburn CJ in 1865, “is founded on the violation of some right in respect of which, but for the immunity from all process with which the law surrounds the person of the Sovereign, a suit at law or equity could be maintained”.²²⁶

At the time of *Buron*, the question whether a petition of right might lie for damages in tort had been argued in only one case, *Viscount Canterbury v A-G* (1843), in which the Speaker of the House of Commons sought compensation from the Crown for property destroyed when his home in the old palace of Westminster (containing £10,000 worth of pictures, plate and furniture) was burned down by spectacularly negligent Crown employees who were supposed to have been disposing of old Exchequer tallies in another room of the palace. Lord Lyndhurst LC, dismissing early authorities to the contrary, held that as the Queen herself could not be liable for personal negligence, a petition of right could not lie for compensation from her for the negligence of her employees:

If the master or servant is answerable on the principle *quia facit per alium, facit per se*, this would not apply to the Sovereign, who can be required to answer for his own personal acts. ... If the principle now contended for be correct, the negligence of the seamen in service of the Crown would raise a liability in the Crown to make good the damage, and which might be enforced by petition of right. It would require, I think, some very precise and distinct authority to establish such a liability, and in the absence of any such authority, I cannot venture, for the first time, to lay down a rule which it is obvious would lead to such extensive consequences.²²⁷

Although *Viscount Canterbury* is widely cited as establishing that petitions of right would not lie in tort,²²⁸ Lyndhurst’s justification for Crown immunity in negligence is dubious because so confused. The whole point of petitions of right is that they lay for actions that *if* attributable to a subject (rather than to the Sovereign, who can in law do no wrong) *would* constitute legal wrongs. Lyndhurst’s argument inverts this, suggesting that since the Sovereign can do no wrong, neither can she be said to have done wrong through her servants: on this argument, petitions of right could *never* lie.

It was not until 1864 that the courts were directly confronted with the question that would have been raised by *Buron* had the case not settled: in *Tobin v The Queen*²²⁹ the Tobins, Liverpool ship-owners and merchants, claimed damages from the Crown for the destruction of their boat the *Britannia* off the west coast of Africa by Captain Douglas. Douglas had believed that the spare planks found on the ship (unregistered and flying no national flag) were there to be used to create a second slave deck, and burned the boat as involved in the slave trade (along with the barrels of palm oil being carried on board) on the ground that it was not fit for a voyage to St Helena for adjudication in the Vice Admiralty courts there. The Tobins insisted that they had just bought the boat for carrying out lawful trade in west Africa, that they had no plans to bring the boat to Britain and so no reason to register it, and that the extra planks were being carried

²²⁶ *Feather* at 295.

²²⁷ (1842-1843) 1 Ph 306 at 321-2 (41 ER 648 at 654)

²²⁸ Holdsworth argues that on the basis of medieval precedents a petition of right “ought” to lie for encroachment on property and nuisance, “though whether it would be held to lie in these cases is highly doubtful.” Vol IX at 42-3.

²²⁹ 16 CB (NS) 310. The action was brought by Thomas Tobin’s son on behalf of the estate.

because they were “well adapted for repairing such a vessel” and “not easily procurable”.²³⁰

Presumably fearing an act of state defence were they to sue Captain Douglas, and perhaps also seeking direct recognition of and apology for the Crown’s destruction of their boat, the Tobins sought a petition of right under the newly enacted Petitions of Right Act (1860).²³¹ The Tobins’ lawyers (Sir Hugh Cairns with Kemplay and Archibald) argued that the petition lay as the claim was not one in negligence for unliquidated damages (as in *Viscount Canterbury*), but one for compensation for the seizure of goods which could not be restored in kind. As such it was a claim for which (invoking early authorities) a petition of right *would* lie: the Crown had seized the ship as forfeited because involved in the slave trade, and Douglas, not knowing this was not the case and continuing to act in good faith as the Crown’s servant, had dealt “with the goods in such a manner that they cannot be restored in specie”.²³² The Attorney-General for the Crown demurred, invoking *Viscount Canterbury* and arguing that Parke’s judgment in *Buron* “does not mean to intimate that the subsequent ratification of Captain Denman’s act by the Crown gave a remedy by petition of right”.²³³

Earle CJ, delivering the judgment of the Court of Common Pleas, held that the Tobins had no case against the Queen since Douglas was acting not as an agent of the Queen but as an agent of Parliament (since he was claiming to act under statutory powers); that even if he were an agent of Queen he was acting outside his authority and so the Queen could not be liable for his actions; and finally that even if this were not the case, “a petition of right cannot be maintained to recover unliquidated damages for a trespass” – although it would lie for restitution of chattels “or the value thereof if it had been converted to the King’s use” and probably would also lie for the restitution of money.²³⁴ Compensation from the Crown might, then, be available by petition of right to someone in *Buron*’s position whose property had been seized by a Crown employee purporting to act under prerogative powers.²³⁵ But here the only claim possible was against Douglas – although such claims would usually “have the same effect as a petition of right for damages for the tort, since, in a proper case, the Crown will defend its officer and become responsible for any damages awarded.”²³⁶

Both Dicey and Clode argue that compensation in such a case *should* not be available from the Crown since that compensation “would in such a case be in the nature of damages for conversion, that is for a tort” and so falls within the decision in *Viscount Canterbury*.²³⁷ But in the words of the leading early twentieth century authority on civil

²³⁰ 16 CB (NS) 310 at 313.

²³¹ 23 & 24 Vict., c. 34.

²³² 16 CB (NS) 310 at 331, 334.

²³³ 16 CB (NS) 310 at 330.

²³⁴ 16 CB (NS) 310 at 353, 358, 359.

²³⁵ In the following year in *Feather* at 294, Cockburn CJ echoed these ambiguous dicta, ruling that a petition of right could not be sought for trespass, but suggesting that it *would* lie for damages in lieu of restitution of seized chattels.

²³⁶ George Stuart Robertson *Civil proceedings by and against the Crown* (London 1908) 351.

²³⁷ Clode *The law and practice of Petition of Right* (London 1887) 89; Dicey *Parties to an action* (London 1870) 23-24, reiterating fifty years later (without citations) in an appendix on “Proceedings against the Crown” in his *Law of the constitution* that “Neither an action nor a Petition of Right lies against the Crown for a wrong committed by its servants. The remedy open to a person injured

proceedings against the Crown, the point was “never formally considered” and “may well provide matter for argument on a future occasion”.²³⁸

The prelude to such a future occasion came before the courts in *AG v De Keyser's Royal Hotel*,²³⁹ in which the House of Lords held that a petition of right *would* lie to enforce the Crown's duty to compensate a British hotelier for his wartime losses while his hotel on the Thames Embankment had been the headquarters of the Royal Flying Corps. The Crown argued that it had occupied the hotel as a prerogative right: in a wartime emergency “private convenience must yield to public necessity”, and requisitions made in exercise of this emergency prerogative carried no legal obligation to pay compensation.²⁴⁰ The Crown also argued that it was not covered by a statutory duty to compensate, relying on the Court of Appeal's wartime decision in *In re a Petition of Right* which refused compensation to the owners of a Brighton aerodrome being used as a military base: the Court of Appeal had concluded in 1915 that the Defence Act 1842 did not apply (as it concerned procedures for compulsory purchase rather than occupation) and that the prerogative right “cannot be interfered with or taken away except by plain language or necessary implication”.²⁴¹

In *De Keyser*, the House of Lords held that the Crown was bound by the Defence Act 1842 to pay compensation: accordingly, contemporary administrative lawyers focus on the decision as a leading illustration of statutory provisions (and so the will of Parliament) prevailing over executive claims of unfettered prerogative power. The case is at least as striking for the manner in which a majority of the Court of Appeal evaded their own earlier decision in *In re a petition of right* to reach their decision in favour of the hotelier (a decision with which the House of Lords concurred). The Master of the Rolls argued that the 1842 statute should be read in the light of his requested search of the Public Records, which revealed that “it does not appear that the Crown has ever taken the subject's land for the defence of the country without paying for it”.²⁴² Endorsing his

by a servant of the Crown in the course of his service is an action against the person who has actually done or taken part in doing the wrongful act which has caused damage. But, speaking generally, no injustice results from this, for the Crown, ie the Government, usually pays damages awarded against a servant of the State for a wrong done in the course of his service. ... It would be an amendment of the law to enact that a Petition of Right should lie against the Crown for torts committed by the servants of the Crown in the course of their service. But the technical immunity of the Crown in respect of such torts is not a subject of public complaint, and in practice works little, if any, injustice.”: above n 87, 556-7.

²³⁸ Robertson, above n 236, 336, continuing: “The author inclines to the opinion that the remedy by petition of right should, in strictness, be limited to specific property, though such a limitation would no doubt involve hardship.” (There is “no doubt whatever that a petition of right will lie in respect of money.”)

²³⁹ [1920] AC 508. For a detailed study of compensation offered to owners whose private property had been requisitioned by the state as part of the war effort waged from 1914, see G R Rubin *Private property, government and requisition and the constitution 1914-1927* (Hambleton Press London 1994).

²⁴⁰ [1920] AC 508 at 514.

²⁴¹ [1915] 3 KB 649 at 660 (Lord Cozens-Hardy MR).

²⁴² Lord Dunedin is implicitly critical of the Court of Appeal's decision in *De Keyser* in not only giving the Lords “the benefit of the opinions they had come to on the merits” but also evading their earlier decision by distinguishing their earlier decision on the basis that it had concerned land required “for the conduct of hostilities” while *de Keyser's* case concerned the taking of land “for administrative purposes” (Ld Cozens-Hardy MR at 229; Ld Dunedin at 526).

assessment, the House of Lords held that “it does not appear that the Crown has ever taken for [defence] purposes the land of the subject without paying for it,” that there was “no trace of the Crown having, even in the times of the Stuarts, exercised or asserted the power or right to do so by virtue of the Royal Prerogative”, and that the Crown was bound to pay compensation by the Defence Act 1842 which it was not “free at its pleasure to disregard”.²⁴³

In *De Keyser*, the House of Lords followed a majority of the Court of Appeal in justifying their conclusion by drawing on the resources of a reasonably detailed historical study of the common law and legislation. But what would or could a common law court have done had it faced a claim from a foreigner to compensation for war-time requisitioning under prerogative powers? A majority of the Court of Appeal took this to be the question before them in *Commercial and Estates Company of Egypt v Board of Trade*,²⁴⁴ an appeal from the War Compensation Court (established after *de Keyser* was decided). The Crown had seized timber bought by an Egyptian company which had chartered a British steamer to ship timber from Finland back to Alexandria: as war broke out soon after the steamer had set off, it had been agreed between the company and the steamer’s owners that the wood would stay on board the ship until the end of the war when it would sail on to Alexandria, but in August 1917 the steamer was requisitioned by the British Shipping Controller, and the timber on board was brought (some of it on other requisitioned boats) to England where it was requisitioned by the Controller of Timber Supplies. The Crown argued that “an act of State, whether done in this country or abroad, gives no cause of action against a resident alien”. Alternatively, it argued, the timber had been requisitioned either under the Defence of the Realm Regulations (which meant that under the Indemnity Act 1920 the compensation payable would be limited in accord with those regulations). Or, finally, the Crown argued that if the timber was seized under the internationally recognised right of angary (the right of a belligerent state to seize the property of neutrals found on the territory of or occupied by the belligerent), any obligation to pay the full market value of the timber (at the time of requisition) was recognised only by international law; as such, compensation might be obtained by diplomatic means but not through the English courts.

As section 2(1)(b) of the Indemnity Act 1920 directed that compensation should be in accord with the provisions of any such regulation “purporting to be made under any enactment relating to the defence of the realm”, and here the Crown purported to have seized the timber under defence regulations, Scrutton LJ held that the compensation should be assessed in line with the principles laid down within those regulations.²⁴⁵

By contrast Bankes and Atkin LJ held that the timber owners were entitled not to the limited compensation that would be awarded under the defence regulations but to full compensation. Those defence regulations had been so widely worded (“any goods wherever in the world” could have been included) that “some limitation was necessary”: Atkin LJ argued that “I cannot think it was within the power of the authority making the

²⁴³ *De Keyser* Ld Atkinson at 539.

²⁴⁴ [1925] 1 KB 271.

²⁴⁵ [1925] 1 KB 271 at 289-290, adding that “it will take a great deal of argument to persuade me that, apart from action justified by statute, the defence that an act is an act of State is open to the Sovereign or the executive within the realm.”

regulations under the Defence of the Realm Act to make regulations that affected such neutrals” and considered that the provisions of the Indemnity Act relating to “purported” regulations could not “validate both acts of officials and regulations which would otherwise be *ultra vires*” but “may well have been introduced to cover questions of defect of form or procedure in the making”, although not substantively defective regulations.²⁴⁶ Atkins LJ suggested that he did not need to decide these points, following the conclusion of earlier litigation which had held that the Crown could not justify the seizure under the regulations but only (as it had suggested as an alternative) under the right of angary. Quoting Dicey’s “authoritative” definition of prerogative powers as “the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown”, Atkin LJ held that the right of angary with the accompanying obligation to compensate was one such prerogative power. Were the right of angary not a prerogative right recognised by the common law, the Board of Trade would have been liable for conversion of the timber: the Crown would not have had the right to seize the property in the first place since it is “only in so far as the rules of international law are recognized as included in the rules of municipal law that they are allowed in the municipal Courts to give rise to rights or obligations”. And as it was “well recognized by the conventions of civilized nations, which constitute the body of international law” that the right of angary required its exercisor to make “full compensation for the property he so seizes”, there was “no reason for holding that our municipal law recognizes the right to seize but rejects the obligation to compensate”. To hold that there was no common law obligation to compensate “would be to bring our municipal law into conflict with international usage in a matter where a priori principles of justice seem to support the latter” and to the “remarkable” suggestion, in the light of the decision in *de Keyser*, that “our law granted compensation to subjects who had a direct interest in the defence of the realm and denied it to neutrals whose goods were here against their will”. So a majority of the Court of Appeal held that a petition of right would lie to enforce the company’s claim to compensation.²⁴⁷

While in *de Keyser*, the House of Lords justified making a compensatory award (which following the earlier Court of Appeal decision in *In re a petition of right* would otherwise have been refused) in terms of common law tradition, in *Commercial and Estates* the majority of the Court of Appeal invoked international law and arguments of justice to make a full compensatory award in the face of legislation that came into force after *de Keyser* was decided. Atkin LJ argues that justice required that limitations be placed on the statutory provisions (which he refused to interpret in a way that would effectively render retrospectively lawful substantively *ultra vires* regulations), and that in this case the relevant principles of international law offered a suitably just approach and so could be treated as a consistent part of the common law. The case is a striking example of a common lawyer assuming a natural law understanding of the common law and invoking international law to bolster a common law constraint on legislation.

A petition of right could then have lain against the Crown for a *Buron*-type claim for compensation for seizure of property – so long as that claim was framed in restitutionary terms rather expressly as a tort. The plea of act of state served as a defence for Denman but not (*pace* Stephen, Holdsworth, Wade and Collier) as a defence for the Crown – or at least, not as a defence that freed the Crown from any obligation to

²⁴⁶ *Commercial and Estates* Atkin LJ at 293.

²⁴⁷ *Commercial and Estates* at 295-6, 293, 297.

compensate the victim of the act of state. Accepting the Crown's *post-facto* ratification transformed *Buron's* claim against a private individual (Denman) into a claim against the State. And on the basis of the decision in *Commercial and Estates*, a restitutionary claim against the Crown (made through a petition of right) could have had a chance of success.

(v) The availability of damages for acts of state after the Crown Proceedings Act 1947: possibilities building on *Burmah Oil and Nissan*

In 1947, in order “to prevent the little man from being crushed by the juggernaut of the State”, a right of action was made available in most of the cases where a petition of right would have lain in the past.²⁴⁸ The Crown Proceedings Act 1947 makes the Crown “subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject” in respect of torts by its servants or agents, breaches of its duty as an employer, and breaches of its common law duties attaching “to the ownership, occupation, possession or control of property”. The liability in tort was subject to a proviso: no proceedings in tort would lie against the Crown for “in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate”.²⁴⁹ Glanville Williams comments:

It is thought that this proviso was inserted in order to make it plain that the Crown was to participate in the defence of “act of state” that is open to the servant under the rule in *Buron v Denman*. But if this was the intention, the proviso uses a bludgeon to kill a fly – and the fly was already dead, because where the servant has the defence of “act of state” it cannot be said that he has committed a tort ... and thus there is nothing for which the Crown could in any event be liable.²⁵⁰

Arguably Williams's bludgeon misses the fly. The very cause of Parke's hesitancy in *Buron* was that accepting the Crown's post-facto ratification left the Crown *alone* as the only party responsible for the damage caused, rather than (as would be usual under the law of agency) making Denman and his principal (the Crown) jointly and severally liable. The decision left the Crown not vicariously liable but solely responsible for an action treated by the courts as an exclusively public or state enterprise, an action for which I have argued above *restitutionary* damages could have been available had the case not settled.

The question of the availability or otherwise of compensation for acts of state brings us to two key post-war cases against the Crown, *Burmah Oil* and *Nissan*. Both involved actions against British subjects overseas, and in neither case did the House of Lords accept a defence of act of state that removed the Crown's obligation to compensate.

²⁴⁸ The Crown Proceedings Act has been held to *limit* rights previously enjoyed under Scots law: *Davidson v Scottish Ministers* [2006] SC(HL) 42 (2006 SLT 110), para 33 (Lord Nicholls).

²⁴⁹ Viscount Jowett LC, the promoter of the then Crown Proceedings Bill on its second reading in the House of Lords on 4th March 1947; Crown Proceedings Act 1947 ss 1, 40(2), 2(1)(a).

²⁵⁰ Glanville Williams *Crown Proceedings: an account of civil proceedings by and against the Crown as affected by the Crown Proceedings Act 1947* (London 1948) at 44.

In *Burmah Oil Co v Lord Advocate*, a majority of the House of Lords, recognising the paucity of case law, held as in *Commercial and Estates* that a prerogative power under which the state had acted entitled the Crown only to “take and pay”.²⁵¹ The Burmah Oil Company and other owners of Burmese oil refineries and inventories of crude petroleum and gasoline were seeking compensation for destruction of this property in March 1942 by General Sir Harold Alexander and his British troops during the British evacuation of Rangoon in what was then the British colony of Burma. (Burmah Oil’s refinery continued burning for twenty-three years.) The destruction happened in the face of oncoming Japanese troops: it was part of a “scorched-earth” plan to demolish all property that might be of use to the victorious enemy, a plan approved in advance by the British War Cabinet. The company’s claim was assessed at 17 million pounds by the Carter Committee, a claims commission set up to make non-binding assessments of damage complaints in British far eastern colonies. Before any payments had been made, Burma became independent (in 1948); Burmah Oil was advised by the British Lord Chancellor of the Exchequer to seek compensation from Burma, but the new Burmese government (unlike that in Malaya) was loathe to compensate war claimants. In 1949, the British government recognized their “equitable responsibility” to the Burma claimants, making an *ex gratia* payment of 4.75 million pounds to Burmah Oil; Burmah Oil was not required to sign an “accord and satisfaction” agreement, apparently because the British government did not want to prejudice the company’s ongoing proceedings in the Burmese courts, proceedings finally dismissed in 1960. But when they failed to recover further compensation through the Burmese courts, the company brought an action against the British Crown instead. As a company registered in Edinburgh, the Scots limitation period (of twenty years, as against the English six) could be applied: by just four months, in October 1961 the company was in time to bring an action against the Queen’s Lord Advocate, claiming over 31 million pounds plus interest at 5 per cent for twenty years.²⁵²

The Deputy Treasury Solicitor wrote to warn the company that if, contrary to the Government’s expectations, the company’s claim (wholly unfounded in law) were to succeed, it was not “one which ought to be met by the British taxpayer”: as such retrospective legislation would be introduced to indemnify the Crown against the claim.²⁵³ But the company pursued its claim. The Crown pleaded “irrelevancy”, arguing that claim was legally ungrounded, but in a lucid and scholarly judgment in the Outer House of the Court of Session, Lord Kilbrandon overruled the Crown’s plea. He recognised as inherent in sovereignty a prerogative right to take property for public benefit, a right independent of the tort law defence of necessity, and concluded, crucially, that (outside cases of “battle damage”) such acts of state required compensation. On the relation between necessity in tort and takings under the prerogative, Kilbrandon argues:

I do not have to consider exactly what, under the law of Scotland, a man impelled by necessity may do to protect his own interests although he sacrifice those of his

²⁵¹ [1965] AC 75. The paragraphs below are indebted to the discussion of the case (accompanied by strong criticism) in “The Burmah Oil affair” (1966) 79 *Harvard Law Review* 614-634. (Harvard case notes are published anonymously; the author of this note was Charles Whitman.) See also T C Daintith “The case of the demolitions” (1965) 14 ICLQ 1006.

²⁵² Under the Crown Suits (Scotland) Act 1857 (20 & 21 Vict, c44), suits in Scotland against the Crown must be brought against the Lord Advocate personally, who is indemnified against loss by the Crown.

²⁵³ Letter of 13th June 1962, quoted in Lord Kilbrandon’s judgment at 436.

neighbours. I am sure, however, that in February 1942 an ordinary citizen could not, consistently with the law of Scotland, have destroyed property belonging to someone else valued at £30,000,000 and justified his action on the ground that he, the ordinary citizen, was entitled to act upon his private conviction that what he was doing was in prejudice of His Majesty's enemies. In time of war, when strategical measures against world wide enemies are in question, the sovereign is the judge of necessity. [...] It is the sovereign's right when necessity obliges him, to sacrifice the property of the private citizen to the good of the commonwealth, and that that right of eminent domain is properly called a prerogative right.²⁵⁴

Kilbrandon invoked the one Scottish case quoted to him as reiterating this doctrine of eminent domain, one which he traced as running "through the works on public law".²⁵⁵ Those works were Kames's *Principles of Equity*, Mackenzie's *Jus Regium* (1722), and Jason, Grotius, Vattel, Pufendorf and Burlamaqui, a list that in itself brings out the strikingly different status of civilian writing in Scots law. (Pufendorf offers a particularly clear statement: "since there are times in the life of every state when a great necessity does not allow the collection of strict quotas from everyone, or when something belonging to one or a few citizens is required for the necessary uses of the commonwealth, the supreme sovereignty will be able to seize that thing for the necessities of the state, on condition, however, that whatever exceeds the just share of its owners must be refunded by the other citizens".²⁵⁶)

The obligation to compensate for "denial damage" (deliberate destruction of property to prevent it being of use to the enemy) Kilbrandon traced to the limited Scots case law on the subject but again primarily to Grotius and Vattel:

If Grotius is to be accepted – and I suppose there is no higher authority – the attempt made by the Crown in the first branch of the argument, to distinguish between the nature of an exercise of the prerogative and an exercise of a right arising from necessity seems to fail. Whether you call it by the name of prerogative or whether you do not, compensation is payable when private property is taken for public good.²⁵⁷

The loss occasioned by a prerogative taking or destruction of property, he concluded from the civilians, the sovereign was "bound to cause ... to be shared equally among the beneficiaries, with whom is included the private owner despoiled, so that it falls on the state, and not on an individual."²⁵⁸

²⁵⁴ 1963 SC 410 at 423.

²⁵⁵ Lord Kilbrandon's judgment at 425, referring to *Grieve v Edinburgh and District Water Trustees* 1918 SC 700. On the development of doctrines of expropriation and eminent domain in Anglo-Commonwealth courts, see Michael Taggart "Expropriation, public purpose and the constitution" in C Forsyth and I Hare (eds) *The golden metwand and the crooked cord: essays on public law in honour of Sir William Wade QC* (Clarendon, Oxford: 1998) 91-112, concluding at 112 that the bodies of law from various jurisdictions, contexts and times examined in the essay point "to a constitutional principle that private property should only be taken for public purposes".

²⁵⁶ Pufendorf *De jure naturae et gentium* Book 8, Ch 5, para 7, quoted in Kilbrandon's judgment at p428.

²⁵⁷ Lord Kilbrandon's judgment at 425, referring to *Grieve v Edinburgh and District Water Trustees* 1918 SC 700.

²⁵⁸ Lord Kilbrandon's judgment at 429.

Turning to English law, there was “no authority one way or the other ... on the question of whether land could be taken by the Crown under the prerogative without compensation” (in *De Keyser*, no case had been found of a prerogative taking of land, so no instance of compensation either being paid or refused); the little English case law extant on the use of other prerogatives to take property was “not opposed to the principles of Scots law as I have endeavoured to state them”.²⁵⁹ An apparently contrary majority decision of the United States Supreme Court in *Caltex*²⁶⁰, a similar case, Kilbrandon distinguished as hinging on the terms of the fifth Amendment: the majority treated the requirement “nor shall private property be taken for public use, without just compensation” as *excluding* what had been a prior right under the common law of the United States to compensation for the destruction (as well as the use) of private property.²⁶¹ Importantly, Kilbrandon concluded that on the facts of *Burmah Oil*’s case, any award of compensation would need to examine whether the value of the refineries might well have been nominal at the time of their destruction.

The Crown appealed to the Inner House, which upheld the appeal and dismissed the action. Three of the four Inner House judges (Lords Clyde, Guthrie and Carmont) endorsed Kilbrandon’s conclusion that prerogative takings require compensation subject to an exception for “battle damage”, but, offering alternative tests for “battle damage”, concluded that *Burmah Oil*’s losses fell within this exceptional category. Lord Sorn relied on the necessity argument from private law that had been rejected by Kilbrandon.

Burmah Oil appealed to the House of Lords. Lord Reid’s judgment begins by questioning why Scots law had been treated as applicable, but concludes “it does not appear that as regards [the matters involved in this appeal] there is any material difference between the law of Scotland, the law of England and the law applicable in Burma in 1942 [i.e. Burmese colonial law].”²⁶² Reid examines the sparse English case law on the subject, concluding that “on balance the weight of opinion was against there being any general rule that no compensation can be due for loss caused by an exercise of this prerogative”; in Scots law, “there is virtually no native authority. But none of the learned judges who took part in this case had any doubt about the general rule.”²⁶³ The work of the continental commentators was pertinent because the case concerned the status of the prerogative in the seventeenth and eighteenth centuries, a period when the writings of civilians had great influence in Scots law: “the prerogative, having been virtually dormant or in abeyance, should not, in my view, be regarded as any wider today than it was three centuries ago. If, therefore, I find among these writers a consensus of opinion as to the limits of *dominium eminens* I would regard that as very good evidence of the limits of the prerogative.”²⁶⁴ Reid then follows Kilbrandon’s judgment closely; including his approach to *Caltex*, concluding that the company was entitled to compensation although (as Kilbrandon had emphasised) “it will be necessary to consider whether compensation must not be related to their loss in the sense of what difference it would have made to

²⁵⁹ Lord Kilbrandon’s judgment at 431, 432.

²⁶⁰ *United States v Caltex (Philippines) Inc* 344 US SC 149.

²⁶¹ Lord Kilbrandon’s judgment at 433, 435.

²⁶² 1964 SC (HL) at 120.

²⁶³ 1964 SC (HL) at 126.

²⁶⁴ 1964 SC (HL) at 127.

them if their installations had been allowed to fall into the hands of the enemy instead of being destroyed.”²⁶⁵

Lord Pearce holds that the applicable law is “the common law of England” since Burma was a crown colony, but while “not necessarily similar in all respects on this matter, the laws of England and Scotland have sufficient similarity to make the consideration of Scots law a valuable help in ascertaining what is the law of England.”²⁶⁶ And English law should give weight to the civilian writers “as showing what was the general view of natural justice and the practice and theory of monarchy.”²⁶⁷ He builds on Kilbrandon’s arguments for distinguishing the Crown’s powers from those of a private citizen in case of necessity: “It is not possible that the war prerogative of the warrior king should dwindle to the right and duty of ‘every man in a brown coat’ (as Lord Thurlow expressed it) and should come into effect only when things are so desperate that the citizen may use his own initiative in improvising defences and burning stores. It would, indeed, be an odd state of affairs if the Crown had no power to blow up these oil wells ... unless and until things had reached a pass at which the man in the street was entitled to blow them up.”²⁶⁸ But neither can these broader public powers of the Crown be linked with “a power to take whatever it needs from the subject without payment in the general emergency of war”: such a power “has never been laid down by any authority” and “if it existed, war taxation would be largely unnecessary”:

If justice requires that the sacrifice of one person’s property for the common good be compensated by the rest, which is the principle found in our law of general average (see *Mouse’s Case*) and the other legal systems as early as the *lex Rhodia*, the Crown is better placed than the citizen for collecting contribution from the commonality. The Crown or the state can, but the citizen cannot.²⁶⁹

It is, argues Lord Pearce, “plainly just and equitable that, when the state takes or destroys a subject’s property for the general good of the state, it shall pay him compensation”: after considering the “slender” arguments for the converse position, he concludes that where “both custom from early times and equity alike favour compensation, it would be strange if your Lordships should deny it.”²⁷⁰ Following Kilbrandon closely, he concludes that the destruction of oil wells “like various forms of economic warfare, is quite outside the battle damage”, although any assessment of compensation for the destroyed property should depend on the “chances of its survival and restoration” had it been left to fall into the hands of the enemy.²⁷¹

Lord Upjohn agreed with Lords Reid and Pearce, finding Kilbrandon’s judgment “very compelling”.²⁷² The applicable law was that of England, although it “would be most astonishingly inconvenient” if “the Crown had the right to seize and use the property of its subjects on the suspected approach of the enemy if they landed on the south bank of the Tweed on different terms than if they chose to land on the north bank”. The English authorities “such as they are, permit the conclusion that in general

²⁶⁵ 1964 SC (HL) at 131.

²⁶⁶ 1964 SC (HL) at 159.

²⁶⁷ 1964 SC (HL) at 161.

²⁶⁸ 1964 SC (HL) at 157.

²⁶⁹ 1964 SC (HL) at 158.

²⁷⁰ 1964 SC (HL) at 161.

²⁷¹ 1964 SC (HL) at 173.

²⁷² 1964 SC (HL) at 173.

the prerogative of the Crown to take the property of the subject in times of necessity for the public good is exercisable only upon payment by the state then or thereafter.” And “where authority both of Scotland and of England is so sparse and uncertain ... I find the writings of the civilians of peculiar assistance.” Those writers were “not purporting, as I read them, to propound a general principle of international law but only to lay down the proper judicial concept of the municipal law of any civilised country; accordingly they are of great persuasive force, particularly the views of Vattel. ... In argument before your Lordships it was in the end almost a matter of common consent that the effect of the civilian writers was best set out in the writings of Vattel.”²⁷³

Viscount Radcliffe, dissenting, concludes that whatever system of law was applicable, “it was not Scottish law”. He focuses on English common law “subject to any ordinances or regulations then in force in Burma by which it was controlled or affected”. Although he adds that he has “not seen any reason for supposing that the law of Scotland is in fact in any relevant way different from the law of England on the issue before us”, he rejects the conclusion reached by every Scots judge hearing the case (including Lord Reid) apart from Lord Sorn. Civilian writings, like the American case law before the court, “can, of course, be no more than persuasive in the ascertainment of our common law about the prerogative” and “I am bound to say that I regard the American cases as much the more important.”²⁷⁴ The civilians were writing advice for princes on the principles of “natural right in a civilised polity” but not “describing the actual legal situation in any given country”.²⁷⁵ The common law, he concluded, “never has provided and does not now provide any remedy for these actions of the Crown”: there simply was “no law on the matter to which we can give effect. That there is something which may, by a permissible transfer of language be called a public law which requires the careful attention of the state to damage thus inflicted and calls upon it to make such provision for compensation as the recognised equity in favour of compensation may demand, I would be glad to agree. But that, I think, is not for us.”²⁷⁶

Lord Hodson, also dissenting, begins by analysing English case law while noting that “I do not understand it to be contended that there is a difference between the law of England and the law of Scotland so far as the prerogative of the Crown is concerned. Nor would I expect such a contention to be raised, seeing that the Crown, in and out of Parliament, occupies the same position and performs the same duties in the same realm.”²⁷⁷ Lord Kilbrandon, he argues, was mistaken in presenting “the principles derived from the institutional writers as part of the common law of Scotland”: these writings could be at best of persuasive authority. The principle that the exercise of the prerogative was “lawful, subject to the equitable obligation to make compensation”, “even if sound as a matter of policy, has not been incorporated into our law so as to make it possible for the subject to sue the state for compensation in the courts.” Although the general principle of the law of average or Rhodian law was not “novel” to

²⁷³ 1964 SC (HL) at 173-4, 177.

²⁷⁴ 1964 SC (HL) at 132, 144.

²⁷⁵ 1964 SC (HL) at 144.

²⁷⁶ 1964 SC (HL) at 150.

²⁷⁷ 1964 SC (HL) at 153. Compare Joseph Jacob *The Republican Crown* (Dartmouth, 1996) at 306, invoking Presbyterian notions of Republican government with which he argues the Scottish constitution remains imbued to challenge the “persistent belief that there is only one British constitution so that what goes on in England is taken to apply in Scotland. On the contrary, if there is one British constitution, it is more of Scotland than of England.”

the common law, in this context it was “most desirable that Parliament should, if so advised, lay down not only the extent of compensation but the section of the community which should bear the burden. The common law has not readily available the machinery for this purpose.”²⁷⁸ And even if one accepts with Kilbrandon a general principle that compensation must be payable, the losses here fell within what needed to be a broadly drawn category of “battle damage”.²⁷⁹

Had the majority been more specific about the measure of restitutionary compensation available here (asking whether just compensation had already been awarded to the Company, and developing their remarks that the value of the refineries was that of ones about to be taken by the Japanese, refineries which may well then as Japanese ones have been destroyed as enemy property without compensation being payable), the case would have reconciled a classical common lawyer’s emphasis on rule of law constraints on the exercise of prerogative powers with appropriate recognition of the weakness of the claim to compensation on the facts of this case. But as principles governing the extent of the compensation payable were left undetermined— “as if [the] refineries had been located in the Scottish highlands”²⁸⁰ - the House of Lords left open the possibility of a large judgment against the Crown. And so, despite the riders that were given on the suitable level of compensation in the judgments, the company refused to lower its claims for full compensation at “peacetime” value plus compound interest for twenty years, although they sought a settlement with the Treasury. The Tory government in power began drafting the threatened retrospective legislation, entitling the Crown to apply to a court to have set aside common law proceedings for compensation for war damage; that “War Damage Bill” was introduced by the new Labour government into the Commons in December 1964, becoming law – after extended controversy in both Houses – in 1965.²⁸¹

English courts have since moved far from the position lamented with reason by an American commentator on *Burmah Oil*, who notes that “not one of the judges asked himself whether his authorities were sufficiently impressive to outweigh the disadvantages to the British Treasury of the result the Lords were reaching”.²⁸² Highlighting how the enforcement of written legislation, and indeed even a written constitution, must be a creative task, that commentator concluded that one significant legacy of *Burmah Oil* was “doubt about the ability of the British courts to offer creative analysis of new problems.”²⁸³ English courts have since given ample reasons to quash this doubt in their development of public law over the past forty years. And under the influence both of the HRA and of European law, English courts have developed significant expertise in assessing just compensation in cases of state liability.²⁸⁴

²⁷⁸ 1964 SC (HL) at 154, 155.

²⁷⁹ 1964 SC (HL) at 155-6.

²⁸⁰ “The *Burmah Oil* affair”, above n 251, 632.

²⁸¹ For an account of the relevant proceedings in Parliament, see *ibid*, 624-631 and Paul Jackson “War Damage Act, 1965” (1965) *MLR* 574. Section 1, containing a prospective ban on common law compensation for war damage, was repealed by the Statute Law (Repeals) Act 1995 c44.

²⁸² “The *Burmah Oil* affair” above n 251, 633.

²⁸³ *Ibid*, 634.

²⁸⁴ For an excellent overview, see the Law Commission’s *Remedies against public bodies: a scoping report* (2006) http://www.lawcom.gov.uk/docs/remedies_scoping_report.pdf at paras 2.6-2.18.

But the House of Lords has yet to confront the question at stake here in the light of these developments in English public law. Constitutionally, an appropriate approach for a contemporary English court considering the legal position of an uncompensated victim of an act of state could be to use the flexible remedy of declaratory relief. Relying on *Burmah Oil*, such a declaration could treat the award of just compensation as a condition for the lawful exercise of the relevant prerogative power; the relevant act would be declared *ultra vires* if just compensation had not been paid.²⁸⁵ In so doing, the court would need to draw on its experience in assessing state liability to give clear guidance on the relevant principles and measure of what *would* amount to just compensation in the case before them.²⁸⁶ Decisions also remain sorely needed on the other conditions under which the defence is available for acts of state overseas: on whether the plea can be raised against a British subject²⁸⁷, on the wrongs short of homicide that are covered by the plea²⁸⁸, and on the relation between the plea and Article 1 of the First Protocol of the European Convention on Human Rights.

In leaving any final assessment and award of compensation to the executive, accountable to Parliament, the court would be acknowledging not only the crucial distinction between the exercise of public law powers and that of private rights but also the constitutional role of Parliament in making any final decision on award of compensation in such cases involving the exercise of state power in the public interest. But in offering clear indications of the principles to be taken into account in making such an award, the victim of an uncompensated act of state would not be left in a legal “black” or “grey” hole.

Such an approach would be strengthened by the point that even in the conflicting judgments of the House of Lords in *Nissan*²⁸⁹ there is unanimity on the key issue: the Crown’s actions in Cyprus (occupying the luxury hotel (rented by Nissan) for use as the command headquarters for British troops, causing Nissan substantial and uncompensated losses in income and damage to his property in the hotel) could not be defended as acts of state. No member of the House in *Nissan* was prepared to uphold the

²⁸⁵ For an analogous argument on a “benevolent exercise of power” doctrine, treating the award of appropriate damages as a condition for *intra-vires* action, see Mark Elliott “Legitimate Expectations and Unlawful Representations” [2004] CLJ 261 and his *Beatson, Matthews and Elliott Administrative law: text and materials* (Oxford University Press, Third edition, 2005) at 7.2.6.

²⁸⁶ For a revealing study of the unprincipled approach of the First World War compensation bodies, the Defence of the Realm Losses Commission and the War Compensation Court, see G R Rubin *Private property, government and requisition and the constitution 1914-1927* (Hambledon Press London 1994).

²⁸⁷ See nn 120, 121 above and accompanying text.

²⁸⁸ On deprivation of liberty, cf *Sigcau, Sekgome, Mwenya and Al Jedda* (above pp0,0,0,0). The First World War bodies compensating for interference with property denied compensation for interference with personal liberty – although the trustees of a girls’ school in Gravesend requisitioned by the Admiralty as a hospital for the treatment of venereal diseases *were* compensated for the “direct loss” constituted to the moral stigma attached to the premises after derequisitioning: War Compensation Court, *Second Report* (London 1923), pp35-39 (claim of Trustees of Milton Mount College, Gravesend) and Rubin, above n 286, pp245-6.

²⁸⁹ See text above, p0; also Gilmour “British forces abroad and the responsibility for their actions” [1970] PL 120 at 149: “One of the justifiable grounds for criticism of this decision of the House of Lords is that while it disposes of Mr Nissan’s actual problem it leaves everybody else wondering.”

Wade-Collier suggestion that overseas the Crown operates “without the law”.²⁹⁰ Lord Reid, going further than his peers²⁹¹, dismissed a version of the second act of state doctrine as presented to him, a claim that the occupation of the hotel was done in furtherance of treaty obligations and as such an act of state outside the jurisdiction of the courts: “If the same act would be actionable if done by the executive *ex proprio motu*, how can it matter that the Government had agreed beforehand with some other Government that it would do that act?”²⁹² It would “be a strange result if it were found that those who have struggled and fought through the centuries to establish the rights of the subject to be protected from arbitrary acts of the King’s servants have been completely successful with regard to acts done within the realm, but completely unsuccessful in gaining any legal protection for British subjects who have gone beyond the territorial waters of the King’s dominions.”²⁹³ Lord Reid evacuates *Cook* of its old meaning in treating the case as one where the appellant “only had rights against the former ruler”; *Kamachee* similarly “only deals with the property of the dispossessed sovereign and I cannot accept the view that it affords any justification for the submission that the property of a British subject in conquered territory can be confiscated.” None of this line of cases, argues Lord Reid,

decides that when the Crown annexes territory it is entitled to confiscate the property of British subjects which is in that territory. ... A British subject cannot complain if the new sovereign alters the law of the annexed territory to his detriment, but he can, in my view, complain of a confiscation of his property which is not justified by any law.²⁹⁴

(v) Possible claims for damages for acts of state

An adviser to an uncompensated victim of an act of state seeking compensation in the English courts would need to think carefully about how to frame any claim for damages – as well as how to defeat arguments that the relevant acts were non-justiciable or that the court lacks jurisdiction (the first two act of state doctrines).

One approach, following Dicey, would be to advise that, like any other victims, those harmed by acts of state should rely on ordinary tort actions against the relevant wrong-doing officials. Such proceedings would have to be brought in the hope that the Crown will advise the responsible officials against raising a *Buron* defence, on the assurance that the Crown will pay any damages awarded against those officials. A tort-based action against the responsible officials could also take heart from the fact that, in both leading twentieth century cases in which act of state defences were raised by officials, the plea was rejected. In *Walker v Baird*²⁹⁵, the Privy Council upheld a judgment of the Supreme Court of Newfoundland, ruling that it was not open to the defendant Captain (patrolling the coast of Newfoundland where the French exercised fishing rights under the terms of a treaty with Britain) to claim that his right to close down the British appellant’s lobster factory was either an act of state or a necessary concomitant of a

²⁹⁰ In a brave approach to precedent, Wade and Forsyth have suggested that the House of Lords’ decision in *Nissan* should be overlooked in favour the Privy Council’s decision in *Cook* (which they read as an example of the Crown successfully pleading act of state against British subjects).

²⁹¹ Text above, p0.

²⁹² 1970] AC 179 at 211D.

²⁹³ 1970] AC 179 at 208B.

²⁹⁴ [1970] AC 179 at 210, 211.

²⁹⁵ [1892] AC 491.

peace treaty between France and Britain. Although the Privy Council expressly reserved opinion on whether interference with private rights can be authorised by a peace treaty without incorporating legislation, it held that the suggestion that the defendant's actions "can be justified as acts of State, or that the Court was not competent to inquire into a matter involving the construction of treaties and other acts of State, is wholly untenable."²⁹⁶ And in *Johnstone v Pedlar*²⁹⁷, the House of Lords held that Johnstone, the Chief Commissioner of the Dublin Metropolitan Police, could not plead that his seizure of cash and a cheque from Pedlar (an Irish-American arrested in Ireland – then British territory - for illegal drilling) was an act of state.²⁹⁸ The subject of "a State at peace with His Majesty, while permitted to reside in this country, is under the King's protection and allegiance": "the defence of act of State cannot be made good as to acts in the King's Dominions on a bare averment that the plaintiff is an alien."²⁹⁹

There are three problems with this first approach under which remedies would be sought in tort from the relevant officials. Firstly, in both *Walker* and *Johnstone*, the official's defence of act of state was rejected on the facts at stake in the case: no suggestion is made that a *Buron*-type plea *cannot* be raised by an official in an appropriate case.³⁰⁰ A second set of problems can lie in identifying the relevant officials and establishing English law as the applicable law. And a third and final problem is that casting acts of state as torts can be problematic precisely because the relevant actions involve the exercise of state power overseas, highlighting in their facts alone the contrast between acts of state and ordinary torts: as such, questions of justiciability and jurisdiction will arise of the kinds addressed by the first and second act of state doctrines.

Both the second and third problems with this first approach to damages for acts of state are exemplified in the recent *Chagos Islanders* proceedings in tort for damages to compensate for the effects of the islanders' enforced removal or exclusion from their homeland in the early 1970s to accommodate the United States' request to use Diego Garcia as a military base. Both Ouseley J (striking out the entirety of the claim for damages) and Sedley LJ (refusing permission to appeal) highlight the injustice of the British state's actions towards the Chagos islanders:

²⁹⁶ [1892] AC 491 at 497 (Lord Herschell).

²⁹⁷ [1921] 2 AC 262, Viscount Findlay claiming at 271 that Baron Parke's summing up in *Buron* treated Denman's act as "an act of State of which a municipal Court cannot take cognisance" and Lord Sumner at 290 that *Buron* was "a case rather of the inability of the Court than of the disability of the suitor. ... What the Crown does to foreigners by its agents without the realm is State action also, and is beyond the scope of domestic jurisdiction."

²⁹⁸ Lord Phillimore explains: "[T]he rules of international law and the common law of England and Ireland which agrees with international law are, I think, well established. To begin with the alien takes his character from his State. ... If his State is in amity with ours he is considered an alien ami even though his personal intentions are hostile. His individual hostility does not entitle him to the character of an alien enemy. He can be executed for high treason, and is not entitled to be considered as a prisoner of war. By parity of reason neither does his hostility disentitle him to the rights conferred by law upon an alien ami, once he has entered this realm with permission from the King." [1921] 2 AC 262 at 295-6.

²⁹⁹ [1921] 2 AC 262, 273, 275, Viscount Findlay and Lord Phillimore suggesting that in "another case" a question might arise as to whether act of state *was* available against an alien who "is by overt acts showing that he is in active hostility to the Government" (274, 297-8)

³⁰⁰ An attempt might also be made in this context to re-invigorate the defence of necessity, as envisaged by a small minority of judges in the *Burmah Oil* litigation: above, p0.

The Chagossians alone were made to pay a personal price for the defence establishment on Diego Garcia, which was regarded by the UK and US Governments as necessary for the defence of the West and its values. Many were given nothing for years but a callous separation from their homes, belongings and way of life and a terrible journey to privation and hardship.³⁰¹

A rival approach, focussing on the special nature of acts of state against individuals, would be to claim damages directly against the relevant department for breaching individuals' human rights contrary to section 6 of the Human Rights Act 1998. The HRA "is not a tort statute"³⁰²: as the Law Commission highlights in its scoping report, *Remedies against Public Bodies*, damages are "discretionary and modest, allowing the court to tailor the remedies to fit the particular circumstances of the case"³⁰³. The award of damages under the HRA is a discretionary remedy of "last resort"³⁰⁴, and must take account of the principles applied by the European Court of Human Rights in awarding compensation under Article 41 of the European Convention on Human Rights³⁰⁵: "damages have "to be 'just and appropriate' and 'necessary' to afford 'just satisfaction'. The approach is an equitable one."³⁰⁶ But a key problem with this second approach in the context of acts of state is that the HRA has been held to apply to the exercise of prerogative powers overseas only to the limited extent that the UK's international obligations under the ECHR would so apply.³⁰⁷

A third and final approach, developed in line with the case law considered under the rubric of my third act of state doctrine, would be to treat the payment of just

³⁰¹ *Chagos Islanders v Attorney General and British Indian Ocean Territory Commissioner* [2003] EWHC 2222 (QB) Ouseley J at [154] ; cf also [2004] EWCA Civ 997, Sedley LJ at [6]: "[I]t would be wrong of us to move on to the legal issues without acknowledging ... the shameful treatment to which the islanders were apparently subjected. The deliberate misinterpretation of the Ilois' history and status, designed to deflect any investigation by the United Nations; the use of legal powers designed for the governance of the islands for the illicit purpose of depopulating them; the uprooting of scores of families from the only way of life and means of subsistence that they knew; the want of anything like adequate provision for their resettlement: all of this and more is now part of the historical record. It is difficult to ignore the parallel with the Highland clearances of the second quarter of the nineteenth century. Defence may have replaced agricultural improvement as the reason, but the pauperisation and expulsion of the weak in the interests of the powerful still gives little to be proud of." Sedley LJ did hold that were the proceedings not time barred, he would have granted permission to appeal on two arguable points. The first was whether "in certain exceptional circumstances, for instance where the defendant, by the very making of the deceitful statement or for some other reason, had assumed liability to the claimant, a cause of action [in deceit] could exist." [36] The second was whether the fundamental rights conferred by the Mauritius Constitution were still enjoyed in the Chagos Islands thanks to a standard provision in the relevant Order in Council (creating the British Indian Ocean Territory) continuing in force the laws in force immediately before the making of the Order: "There is in reality no other way of providing continuity of governance, and the process was used in grants of independence throughout the former Empire." [41].

³⁰² Lord Bingham, asserting the secondary nature of damages in human rights contexts in *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL14 at [19].

³⁰³ Above n 284, para 2.13.

³⁰⁴ *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406 at [56].

³⁰⁵ HRA s 8(3).

³⁰⁶ *Anufrijeva* Lord Woolf CJ at [66].

³⁰⁷ *Al Skeini*.

compensation to those affected (usually individuals who are not among the people in the name of whose “public interest” the state has acted) as a prerequisite for the lawful exercise of prerogative powers overseas. Declaratory relief would treat the award of just compensation as a condition for the lawful exercise of the relevant prerogative power; the relevant act would be declared *ultra vires* if just compensation had not been paid. In so doing, the court would need to give clear guidance on the relevant principles and measure of what *would* amount to just compensation in the case before them, while leaving any final assessment to the executive, accountable to Parliament.

Were such an approach to be adopted, English judges would disprove accusations that in the realm of state liability they have been “unduly timorous” out of “terror of being thought to dictate to government”³⁰⁸; they would be moving a step closer to the position of French courts on state liability, and in so doing beginning to compensate for what Lord Woolf recognizes as a major shortcoming of English courts.³⁰⁹ But two generations of English common lawyers had been encouraged to believe with Dicey that public or administrative law was a sinister invention of the French resting on “two leading ideas alien to the conceptions of modern Englishmen.”³¹⁰ The first of these alien ideas was that “the government, and every servant of the government, possesses, as a representative of the nation, a whole body of special rights, privileges, or prerogatives as against private citizens”. The second was that a constitutional separation of powers “means something different from what we mean in England by the ‘independence of the judges,’ or the like expressions”: as “interpreted by French history, by French legislation, and by the decisions of French tribunals, it means neither more nor less than the maintenance of the principle that while the ordinary judges ought to be irremovable and thus independent of the executive, the government and its officials ought (whilst acting officially) to be independent of and to a great extent free from the jurisdiction of the ordinary Courts.”³¹¹ Although the French translators of Dicey’s book challenged this account, Dicey continued to maintain that *droit administratif* was incompatible with the English conception of the rule of law.³¹²

Challenges to this position began eighty years ago, when in 1928 William Robson published his *Justice and administrative law* which he later explained had aimed “to dispel the illusion held by all the leading lawyers, politicians, civil servants and academics who had been brought up on Dicey’s *Law of the constitution* that in Britain there was no administrative law.”³¹³ Direct challenges to Dicey’s work by scholars of English

³⁰⁸ Carol Harlow “Fault liability in French and English public law” (1976) 39 *MLR* 516 at 539-540.

³⁰⁹ H Woolf “Judicial review: have the judges made a mess of it?” *Law Soc. Gazette* 17th Oct 1991, 18. See also Sedley LJ at n336 below, and more generally John Allison *A continental distinction in the common law* (Oxford University Press, revised edn 1999) 170-189 and Duncan Fairgrieve *State liability in tort: a comparative study* (Oxford University Press 2003) esp 102-124.

³¹⁰ Dicey *The law of the constitution* (Macmillan 8th edn 1920) 332.

³¹¹ *Ibid* 332-3.

³¹² “This misunderstanding has been revealed, the true position in France explained and the fear shown to be groundless.” at 4, 22. Dicey responded to his translators in his essay “Droit administratif in Modern French Law” (1901) 18 *LQR* 302, which he transformed into notes x and xi in his appendix added (p xi) to the sixth edition of *The law of the constitution*. For a detailed study of the consequences for English public law of Dicey’s “phantom” theses on *droit administratif*, see Allison *A continental distinction in the common law* (above, n 309).

³¹³ Robson “Justice and administrative law reconsidered” (1979) 32 *Current Legal Problems* 107.

constitutional law began to multiply in the 1930s. Willis's *The parliamentary powers of English government departments* (published in 1933) challenged Hewart's claim that for lack of legislation contemporary government departments were exercising unfettered, 'despotic' power'; Professor Sir Ivor Jennings' *The law and the constitution* (first published in 1933 when Jennings was a Reader at LSE) highlighted the Whig assumptions underpinning Dicey's reasoning³¹⁴; Professor Emlyn Wade, editor of the ninth edition (1939) of Dicey's *Introduction to the Study of the Law of the Constitution*, characterised Dicey's as an account of the constitution which appeared "to one who was a firm adherent to a particular school of political thought then current".³¹⁵ Importantly, Emlyn Wade included as an Appendix to his edition of Dicey's *Law of the constitution* an essay by Professor René David on *droit administratif* in France, championing "the liberal character" of the Conseil d'Etat and "the efficiency with which the rights of citizens are protected by it in France against any possible encroachment of the Administration".³¹⁶ And it would be from among the next generation of constitutional lawyers, those brought up on this edition of Dicey's *Law of the constitution*, that the first textbook writers on English administrative law emerged.

In their 1952 textbook *Principles of Administrative law*, John Griffith and Harry Street dismiss Dicey's misunderstandings of the French system, but maintain the Diceyan orthodoxy that in England statutory grants of arbitrary power are checked by Parliament and public opinion *rather than* the courts: "The courts will not refuse to enforce a statute because it grants wide discretionary or even arbitrary power; or because it dispossesses a subject without compensation."³¹⁷

In so far as it levels a direct challenge to this orthodoxy, Professor S A de Smith is justified in presenting his 1959 book *Judicial review of administrative action* as "the first of its kind to have been written by an English author". He acknowledges how "recent studies of the work of the *Conseil d'Etat* have dispelled the grosser misconceptions about its status and jurisdiction" and that "in some respects" the protection it gives "to the interests of the citizen in his conflicts with the Administration is still more effective than in England" although "imitation is precluded by three centuries of tradition and myth."³¹⁸ De Smith challenges the "widespread impression" that courts will never examine "the conditions precedent" to the exercise of administrative powers.³¹⁹ This impression has been created, he suggests, by a modern practice of judicial restraint behind which "lies a partly concealed policy decision – a decision that ministerial responsibility to Parliament shall be deemed by the courts to be an appropriate safeguard against the erroneous exercise of widely framed statutory powers." De Smith attributes this "excess of caution" to the impact of wartime and emergency cases when "judicial zeal for the protection of the individual by means of restrictive interpretation of executive powers might have proved contrary to the public interest"; to a fear of violating the separation of powers or of being seen to be following the path of the United States Supreme Court in the early 1930s; to a disinclination to consider the scope of judicial review accepted by

³¹⁴ See also Jennings's "In praise of Dicey" (1935) 8 *Public Administration* 2.

³¹⁵ *Introduction to the Study of the Law of the Constitution* (ninth edition, 1939) xv.

³¹⁶ *Law of the constitution* (9th edn, 1949) (MacMillan, London).

³¹⁷ John Griffith and Harry Street *Principles of Administrative law* (1952) 4, 22.

³¹⁸ S A de Smith *Judicial review of administrative action* (1959) 6, citing at n11 David, Hamson, Street, Schwartz and Sieghart.

³¹⁹ *Ibid*, 18-19, referring at 18 to his later discussion of "scattered dicta, to which legal advisers might profitably pay more attention, indicative of [the courts'] willingness to probe more deeply in some contexts".

other jurisdictions; and “possibly” to “a higher degree of judicial confidence in extra-judicial safeguards than is usual in other countries”.³²⁰

Wade’s *Administrative law*, published two years later in 1961 and aiming “to present administrative law in the form of a general discussion rather than in the cut-and-dried form of a textbook”, emphasises in detail how Dicey’s picture of French officials acting as “a law unto themselves” was grossly misled as an image of the judicial functions of the Conseil d’Etat: the Conseil “has achieved a high degree of objectivity” and as a wing of “an administrative college of great power and prestige” could draw on “deep official experience, and can consequently venture much farther into the merits of official conduct than can an English judge, trained in just the opposite *métier*, and administering a narrowly legalistic control.” The English separation or “antagonism” between the executive government and civil servants on one side and the legal profession on the other “exaggerates the cleavage between the legal and administrative worlds, and impedes the great objective – the improvement of administration by transfusion of legal standards of justice”, giving a “stiff and formal character to our law of judicial control”.³²¹ The only advantages of the English system, argued Wade, are that “it helps to preserve the fundamentals of the rule of law in as undefiled a form as the facts of modern life permit”: a judge’s career does not “depend throughout his working life on a minister of justice”; it has produced “a civil service in which much pride is rightly taken”; and “the satisfaction of being able to challenge the legality of the government’s acts in the ordinary courts by ordinary procedure is a real one, not to be decried.”³²² As a French judge’s career depends on the Minister of Justice, so does an English judge’s career on the Lord Chancellor, and the French take as much ambivalent pride in the Napoleonic tradition of an administration staffed by Enarques as do the English in their civil service staffed by fledgling Sir Humphries³²³.

As Wade knew well, the one real difference was the existence or otherwise of a system of administrative courts staffed by judges specialising in public law, and in places Wade implied that this lack was a disadvantage in the English system. In the preface to the second edition of his book (1967), he laments the “extemporisation”, “improvisation”, and ignorance or misunderstanding of general principles of public law which he finds strewn across English appellate court decisions³²⁴. In the eighth edition (2000), he reiterates how compared to judges of the French Conseil and its first instance tribunals, an English judge “trained basically in private law and administering a more legalistic control, may feel less free to break new ground where new problems of public law call for new solutions”³²⁵.

Given the creation of a special Administrative Court within the High Court, and the experience British judges have gained in assessing state liability in claims made under EU law and the Human Rights Act, a refusal to develop a doctrine of just compensation

³²⁰ Ibid, 19, citing at fn 30 Devlin’s *The common law, public policy, and the executive*.

³²¹ Wade 1st edn 8, 18, 37.

³²² Ibid, 37-38.

³²³ See Stephen Sedley “The sound of silence: constitutional law without a constitution” (1994) 110 *LQR* 271 for a particularly ambivalent view of the civil service.

³²⁴ Wade 2nd edn v-vi.

³²⁵ Wade 8th edn 25. On the myth of English private law as the exclusive source of English constitutional law, see Allison *A continental distinction in the common law* (Oxford University Press 1996).

for acts of state seems decreasingly justifiable. Those courts and commentators who shy from “any form of justice as natural”, even with the positive EU and HRA jurisprudence to guide them, may follow de Smith’s suggestion and “take their choice from among ‘substantial justice’, ‘the essence of justice’, ‘fundamental justice’, ‘universal justice’, ‘rational justice’, ‘the principles of British justice’, or simply ‘justice without any epithet,’ as phrases which express the same idea.”³²⁶ In the first edition of *his* book, Wade treats arguments from justice as “a mode not of destroying Acts of Parliament but of fulfilling them”: “The instinct for justice must be allowed to infuse the work of executive government, just as it must infuse the work of Parliament and the work of the courts.”³²⁷

Such notions of restrained judicial oversight of executive action infuse the third account of the act of state doctrine traced above, a doctrine whose spirit is articulated powerfully by Mann in the closing lines of his 1943 lecture to the Grotius Society on “Judiciary and executive in foreign affairs”:

Deference to the foreign policy of the Executive should be a rule of judicial decision “only in clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds”; it should rest “on tangible grounds, not on mere generalisations”. If the Courts have regard to realities as proved by experience, history and facts rather than imaginary possibilities, if they act upon evidence rather than “horrid suspicions to which high-minded men are sometimes prone”, they should find it less perplexing, though by no means easy, to delimitate the boundaries within which the policy of the Executive should be allowed to influence the law. Mere possibility of embarrassment should not be sufficient. It is the empirically proven likelihood of actual harm to the common weal that should be required to impose upon the Court the duty of deciding in conformity with the policy of the Executive.³²⁸

Conclusion

This essay has examined three English act of state doctrines that endure within English case law. Although rival doctrines have enjoyed times of particular influence, this study cannot be presented as the history of the emergence of one rule, any more than an historical study of English constitutional law could establish the final victory of Enlightenment notions of legally accountable government or Republican notions of political accountability over feudal notions of Crown immunity.³²⁹

On the first account, one that emerged with the expansion of the British Empire, acts of state are simply not matters of law at all: in the words of Lord Kingsdown in *Kamachee*, they are outside the law, “acts by arbitrary power on behalf of the Crown” and

³²⁶ Wade *Constitutional fundamentals* at 62, referring to the “refreshing candour” of Lord Denning MR in *Dutton v Bognor Regis UDC* [1977] 1 QB 373 at 391: “In the end, it will be found to be a question of policy, which we, as judges, have to decide.”

³²⁶ Wade 8th edn 114-115 – the phrase “spirit of autocratic dilettantism” Wade attributes to Redlich and Hirst *History of local government* vol I 102 (all phrases from common law decisions).

³²⁷ Wade *Administrative law* 1st edn 129, 7, 37.

³²⁸ F A Mann “Judiciary and executive in foreign affairs” (1944) 29 *Transactions of the Grotius Society* 143 at 163, quoting from Baron Parke in *Egerton v Brownlow* (1853) 4 HLC1, 123 and Lord Atkin in *Fender v Mildmay* [1938] AC1, 12 and 16. Both cases limit the application of public policy arguments in *private* law.

³²⁹ See above n 8 and accompanying text.

acts for which no attempt is made to offer justification “under colour of legal title”. Such political measures are not a matter for the judgment of a legal tribunal: uncompensated victims of such acts are legally in a “black hole” and must pursue any remedy through political channels. Any questions concerning the unjust treatment of such victims are a matter of moral law to be considered, if at all, by Parliament.

Echoes of this first act of state doctrine, that of the old autocratic cases, remain in contemporary English law. Nurtured by the Privy Council in cases like *Kamachee* and *Cook*, it shows signs of enduring life in the House of Lords’ recent decisions in *Jones* and *Gentle* relating to the question of the legality under international law of the UK’s use of force in Iraq. The account the old cases assume of international law was invoked by Lord Hoffmann: offences should not “creep” into English criminal law “as a result of an international consensus to which only the executive of this country is a party.”³³⁰

But this first, frank act of state doctrine is rarely invoked in later case law and scholarly writing.³³¹ Most judges and jurists prefer to reinterpret the old case law in one of two ways, both ostensibly in line with the notion of the rule of law over the sovereign. On one re-writing, acts of state are *within* the law: the Crown has prerogative powers to act in ways unlawful for individuals, and the way it exercises those powers is non-justiciable, not a matter for courts of law. On a second re-writing, one dominant in contemporary English case law (the second doctrine traced above), acts of state are governed by international law rather than English law: the act of state doctrine is a jurisdictional rule, making clear that acts of state are usually a matter for international

³³⁰ *R v Jones (Margaret) et al* [2006] UKHL 16 at para 62, quoting with approval Scalia J in *Sosa v Alvarez-Machain* (2004) 159 L Ed 2d 718 at 765: “American law – the law made by the people’s democratically elected representatives – does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here.”

The decision in *Jones* suggests that, as a matter of English constitutional law, the prerogative to make war has no limits – that it includes a prerogative to make aggressive, internationally unlawful war, the kind of war waged by Hitler and for which the German war criminals were executed. *Jones* is best regarded as decided *per incuriam* for two reasons. Firstly, both Lord Bingham and Lord Hoffmann wrongly invoke the Treason Act 1351 to suggest that it would be high treason to prevent the Crown’s ministers waging an aggressive war. Yet the Statute of Treasons protects only the personal security of the monarch: far from conferring an absolute immunity on government action overseas, there is a (remote but genuine) possibility under the same statute of Parliament (acting judicially with the Lords as judges and the Commons as a grand jury) declaring ministers guilty of high treason in “leading the monarch to misgovern the country” – as Burke led the Commons to attempt to do in impeaching Warren Hastings for his actions in India. (James Fitzjames Stephen *History of the criminal law of England vol II* (1883) 250). Secondly, as the Lords accept, the prohibition on aggression emerged as a rule of customary international law at the latest during the second world war, and long before the English courts’ current self-denying ban on the recognition of previously unrecognised common law offences. (The appellants were eventually acquitted on the basis that they believed they were acting to prevent an unlawfully disproportionate use of force.)

³³¹ Although see Lord Pearson in *Nissan* at 237: “An act of state is something not cognisable by the court: if a claim is made in respect of it the court will have to ascertain the facts, but if it then appears that the act complained of was an act of state the court must refuse to adjudicate upon the claim. In such a case the court does not come to any decision as to the legality or illegality, or the rightness or wrongness, of the act complained of: the decision is that because it was an act of state the court has no jurisdiction in respect of it.”

resolution and only exceptionally are English courts an appropriate forum for the application of the relevant rules of international law to resolve claims to compensation.

On both re-writings, uncompensated victims of acts of state are legally in a “grey hole”³³². The powers used against them are declared lawful without scrutiny of their claims to just compensation, for which no legal remedy is available to them unless an exceptional claim can be made to ground the jurisdiction of English courts: otherwise, again, any redress must be sought through political channels. Although the phrase “act of state” is evaded in recent case law, variants of this second “grey hole” act of state doctrine dominate contemporary English law on overseas acts of the executive. The doctrine, and its dangers, are manifest particularly strikingly in the House of Lords decision in *Al Jeddah*.³³³

On the third account of the doctrine of act of state considered above, true acts of state *are* lawful and within the jurisdiction of English courts: their legality and justice are questions for the courts, on which the executive *is* expected to offer evidence:

The servants of the Crown, like other men animated by the highest motives, are capable of formulating a policy ad hoc so as to prevent the citizen from doing something that the Crown does not want him to do. It is the duty of the courts to be as alert now as they have always been to prevent abuse of the prerogative.³³⁴

On this third account, to characterise a government action as a genuine act of state is to say that it is one considered necessary for the promotion or protection of the public good, and as such is not only legally but also morally defensible as appropriate compensation has been paid.

This third doctrine emerges sporadically in case law, recognising the Crown’s prerogative powers to take actions overseas in the interests of the country that would be unlawful were they acts of a private British citizen. But unlike on the first account, the act of state doctrine operates as a justiciable defence, one that can be raised only where the Crown has offered just compensation; where it has not, the Crown’s actions are neither non-justiciable (the first account) nor lawful (the second account) but unlawful, legally *ultra-vires*. Any final assessment of compensation is properly for the executive and Parliament, but it is for the courts to offer specific guidance on the relevant principles: a ludicrously small award of compensation, falling outside those principles, would render the act of state *ultra vires*. Mann, writing in 1943, points out that there is no reason “why in matters relating to foreign affairs, the Courts should not abide by the rule that nothing they decide will amount to the making of policy and why in matters international they should not guard their independence as jealously as in matters municipal.” Yet, as Mann notes, “it is a fact, and a really fascinating one, that in international affairs Anglo-American Courts have been inclined to surrender a good deal of their independence, to be guided by and even to submit to the Executive and to refrain from that judicial freedom which otherwise is so proud a feature of the English legal system.”³³⁵

³³² Dyzenhaus, above n 33.

³³³ See above n 163 and accompanying text.

³³⁴ Devlin in *Chandler* at 811, see further above n 26 and accompanying text.

³³⁵ Mann continues: “It seems to have been in the early 19th century, i.e. under the shadow of great political turmoil, that the doctrine originated which in 1828 Shadwell J expressed in the following words which, perhaps fortunately for him, Lord Coke did not live to read and which may now make some of us tremble: ‘It appears to me that sound policy requires that the Courts

In the absence of a British *Conseil d'Etat*³³⁶, it is to be hoped that the English courts will have the courage to combine their growing expertise in administrative law and principles of state liability to develop the arguments offered in *Burmah Oil* into a constitutionally healthier account of the doctrine of act of state as a justiciable defence for the Crown. If our courts do not expect our statesmen to act as “sovereign over themselves”, the thickets of the law could be easily torn down and then who “could stand upright in the winds that would blow?”³³⁷

of the King should act in unison with the Government of the King.’” *Judiciary and executive in foreign affairs* at 146.

³³⁶ Cf Sedley LJ in *Chagos islanders v Attorney General* [2004] EWCA Civ 997 (refusing leave to appeal) at para 20: “In a civil law system, the judgment in *Bancoult* would be enough to entitle the claimants, other things being equal, to an award of damages against the state: see the historic decision of the French Conseil d’Etat in *Blanco* (TC 8 Feb. 1873) [...]. The unlawful exclusion and removal of the islanders would be regarded in such a system as *faute lourde* and would be compensable in damages.” Bacon seems to have envisaged the development of a domestic “Court of State” in which the Lord Chancellor would apply legal rules modified by reason of State – and so the creation of an English *jurisdiction administrative* and *contentieux administratif*: (“Essay of Judicature” *Works VI* at 509). See Moore *Act of state in English law* (John Murray, London: 1906) 14-19 and 30-31.

³³⁷ Plato *Republic* Bk IX 580e; Robert Bolt’s paraphrase of Thomas More’s position in *A man for all seasons* (Random, New York: 1962) at 38.