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FOREIGN ACT OF STATE DOCTRINE, ILLEGALITY AND PUBLIC POLICY

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ІНОЗЕМНИЙ АКТ ДЕРЖАВНОЇ ДОКТРИНИ, НЕЗАКОННОСТІ ТА ПУБЛІЧНОЇ ПОЛІТИКИ

АНОТАЦІЇ (ABSTRACTS), КЛЮЧОВІ СЛОВА (KEYWORDS)

Problem statement. If a national state fails to fulfill its obligations, seeking compensation in a foreign state can often be inaccessible through a private lawsuit. In England, the general rule is that courts do not adjudicate on: (i) executive acts of a foreign state carried out abroad; or (ii) legislative acts of a foreign state. This is the "foreign act of state" doctrine, grounded in the concept of "comity" between nations. The foreign act of state doctrine resurfaced in the case of *Law Debenture Trust Corporation plc v. Ukraine*[2], a dispute involving bonds worth several billion dollars issued by Ukraine to Russia. The Supreme Court ruled that this doctrine barred Russia from accessing the debt obligations it had issued, as they were issued under duress. English law followed this trajectory in cases between national states, and its public policy requires analysis to determine whether courts violated the principle of comity between states by allowing cases involving compulsion when the lawsuit is part of an agreement between two states. Therefore, the article **purpose** to examine various legal and international issues related to the act of state doctrine in English law, specifically the application of the State Immunity Act in common law courts, and its context *ratione materiae,* which encompasses financial and economic variables. The following scientific **methods** were employed: analytical – to examine the analysis of texts of laws, international treaties, court decisions, and other sources to determine the precise content of the foreign act of state doctrine and its relation to illegality and public policy; doctrinal – to explore concepts and legal doctrines applied to the foreign act of state doctrine, to elucidate its theoretical foundations, and to justify legal positions. **Results.** It has been demonstrated that the Act of State doctrine originated from considerations of international comity and extraterritorial sovereignty of other states. The judicial body emphasizes that the execution of foreign affairs is within the competence of the executive, and the courts should refrain from intervening in this matter. The principles that rendered decisions of foreign states non-reviewable were present in the early considerations of the doctrine. The 'Act of State' is the transaction process regarding the subject matter, or ratione materiae, and reflects the executive decision of the foreign state. The doctrine of state immunity takes precedence and was affirmed in the court's decision in "Jurisdictional Immunities of the State." The distinction between procedure and substance serves as an argument against the claim that jus cogens overrides state immunity. The International Court of Justice unequivocally states that a violation of such a peremptory norm of international law obliges the state to respond but does not deprive it of its right to sovereign immunity. **Conclusions.** It is determined that the decisions of English courts are influenced by the executive within the framework of public policy, and an agreement by the state or its agency must conform to the doctrine of contract illegality. Courts refrain from expanding the review of acts of state in recent judicial decisions. Recognition of governments, the grounds upon which they act, and their conduct in interstate disputes is noted. Public policy is a key factor for court decisions, considering all circumstances, including the 'one voice' principle.

Keywords: *Act of State; comity between nations; state immunity; international law; public policy; one voice principle*

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Постановка проблеми. Якщо національна держава не виконує зобов'язання, відшкодування в іноземній державі часто може бути недоступним у приватному позові. В Англії загальне правило полягає в тому, що суди не виносять рішень щодо: (i) виконавчих актів іноземної держави, вивезених за кордон; або (ii) законодавчі акти іноземної держави. Це доктрина "іноземного державного акту", і вона ґрунтується на понятті "дружності" між націями. Іноземний акт державної доктрини знову виник у справі Law Debenture Trust Corporation plc проти України, у справі про облігації на суму кілька мільярдів доларів, випущені Україною Росії. Верховний суд постановив, що ця доктрина не дозволяє Росії отримати доступ до боргових зобов'язань, які вона випустила, оскільки вони були випущені під тиском. Англійське право слідувало цій траєкторії, розглядаючи справи між національними державами, і його публічна політика потребує аналізу, щоб визначити, чи не порушили суди принцип ввічливості між державами, дозволивши справи, які включають питання примусу, коли позов є частиною предмета угоди між двома державами. Тому **метою** статті є розгляд різних аспектів правових та міжнародних питань, пов'язаних із державною доктриною в англійському праві, зокрема, застосування Закону про державу в судах загального права, а його контекст є ratione materiae, який містить фінансові та економічні змінні. Використані наступні наукові **методи:** аналітичний – для розгляду аналізу текстів законів, міжнародних договорів, рішень суду та інших джерел для визначення точного змісту іноземного акта державної доктрини та його відношення до незаконності та публічної політики; догматичний – для розгляду понять і правових доктрин, що застосовуються до іноземного акта державної доктрини, для розкриття його теоретичних основ та обґрунтування правових позицій. **Результати.** Показано, що доктрина "Акта держави" виникла з уваги до міжнародного комітету та екстериторіального суверенітету інших держав. Судовий орган відзначає, що виконання закордонних справ є компетенцією виконавчої влади, і судам слід утримуватися від втручання в це питання. Принципи, що робили рішення закордонних держав непереглядними, були присутні в ранніх розглядах доктрини. "Акт держави" – це процес трансакції щодо предмета справи, або ratione materiae, і відображає виконавче рішення закордонної держави. Доктрина державного імунітету має пріоритет і була підтверджена рішенням суду "Юрисдикційні імунітети держави". Розрізнення між процедурою та сутністю слугує аргументом проти твердження, що jus cogens перевертає державний імунітет. Міжнародний суд юстиції однозначно стверджує, що порушення такої категоричної норми міжнародного права зобов'язує державу відповісти, але не позбавляє її права на суверенний імунітет. **Висновки.** Визначено, що рішення англійських судів визначаються виконавчою владою в рамках публічної політики, і угода держави або її агентства повинна відповідати доктрині недійсності контракту через неправомірність. Суди утримуються від розширення перегляду актів держави в останніх судових рішеннях. Зазначено визначення у визнанні урядів, підстави, на яких вони діють, та їхня поведінка у відношенні до міждержавного спору. Публічна політика – ключовий фактор для рішень суду, враховуючи всі обставини, включаючи принцип "одного голосу".

Ключові слова: *державний акт; доброзичливість між націями; державний імунітет; міжнародне право; державна політика; принцип одного голосу*

Problem statement

The concept of the nation state has evolved from customary international law and it proclaims the sovereignty of the state. It emerged from the various strands of nationalism and coalesced into a Westphalian state that exercised territorial integrity along with its sovereign status. The origins of this doctrine are the Peace Treaties of Westphalia and Osnabruck of 1648 which formally terminated the 'Thirty Years War' in Europe led to the beginning of a new international order of states which is the basis for the contemporary modern nation-state system that is premised on sovereignty. This modern nation state system is considered sovereign in which its acts are inviolable because it is an act of an independent state and it is non-justiciable.[3] It provides one of the limitations on national courts in their exercise of their jurisdiction together with the immunity of the foreign state and when there are legal proceedings by one of the states in English law they are liable for determination for legality of contract and the public policy that defers to the executive.[4]

The nation state in its present evolution went through various manifestations including Hegelian's definition of the abstract framework of the state based on the distinction between the nation-state and the nation with the former as a more durable concept. He argued that the state is the "fun-

[3] See Andreas Osiander, 'Sovereignty, International Relations and the Westphalian Myth', International Organization 55 (2) (2001) p. 251; Anothony McGrew, 'Globalization and Global Politics' in: John Baylis, Steve Smith and Patricia Owens (eds), *The Globalization of World Politics: An Introduction to International Relations* (Oxford University Press 2011) p. 23.

[4] Phillipa Webb, "International Law and Restraints on the Exercise of Jurisdiction by National Courts of States." In: *International Law*. 5th ed. Edited by Malcolm D. Evans, Oxford University Press, 2018, 316–348.

damental vehicle of world history", the other concepts such as "humanity at large", a "cosmopolitan world society"' or "all sentient creation" were abstracttions.[5] Human history for Hegel is a progressive succession of spiritual principles, which actualize themselves successively in the political constitution and spiritual culture of nation states.[6] In this formulation "international affairs are only to be understood though the relations between nation states".[7]

The legal sovereignty has been altered by the dwindling down of the Westphalian state because of the organic state has lost its vitality due to international treaties, globalisation and instrumentation of human rights that have become the norm in international law. There needs to be reassertion of state sovereignty and the prevention of litigation in the forum courts for damages against foreign states. Once the state is forced into becoming subservient to foreign courts the state is then accountable to the supra national order and their sovereignty will be diluted.

The Act of State is the functional part of a transaction of the subject matter, or *ratione materiae*, (subject-matter jurisdiction, which refers to the court's authority to decide over the nature of a particular case and the type of relief sought, or the extent to which a court can rule on the conduct of transactions executed by the state) and the act is attributed to the executive of the foreign state.[8] The sovereignty of the nation state has allowed the doctrine of the act of state to come into existence, which implies that its actions cannot be challenged in the courts of another state. This rule is also considered necessary because nation states are expected to follow cordial relations based on the principle of the 'comity of nations' and the "first act of state case was grounded in international comity and respect for the sovereign acts of foreign States".[9] The court judgments that followed also invoked the doctrine as premised on the "highest concentrations of international comity and expediency".[10]

The issue of subject matter can be integrated with the legality of the transaction such as a contract and manner of its execution and if there is any possibility of illegality. This will be an arrangement arrived at under duress or any wrongful influence rendering it void and reflects the possibility that States committing alleged international law wrongs may see an impact upon their activity in foreign domestic courts on related matters. The English courts have the approach that is illegal in its domestic jurisdiction will determine the outcome of any agreement between two state parties who have their hearings in an English tribunal.

This paper considers the application of the Act of State in the common law courts and its context is the *ratione materiae* that comprises the financial and economic variables. The issue of public policy is central to this issue because this will determine whether the court has the perspective that id derived from legality of contract and external issues such as proprietary and freedom from duress. This will enable the court to make its rulings that will offer the relief by means of declaratory judgment or compensation to any of the state parties.

The road map of this paper is as follow: Part A considers the precedence of the Act of state doctrine in English law by setting out the ratio of the judgments and the comity of nations that it is meant to further as integral to customary international law; Part B will consider state immunity and the judgment in the Supreme Court case of *Law Debenture Trust Corporation plc v Ukraine* and the relations to doctrine of illegality in contract law that rendered the judgment in favour of Ukraine and to the detriment of Russia; and Part C will examine the public policy element and the one voice doctrine that enshrines the one voice doctrine by which the judiciary has to defer to the executive in rulings concerning the foreign acts of state and recognition of governments and the legitimacy of their conduct.

Therefore, the article *purpose* to examine various legal and international issues related to the act of state doctrine in English law, specifically the application of the State Immunity Act in common law courts, and its context *ratione materiae,* which encompasses financial and economic variables.

Acts of state and grounds for justiability

The context in which the doctrine of act of state has developed and is invoked needs to be appreciated when there is a challenge to an act of state in the common law courts. This can be by con-

5 Georg Wilhelm Friedrich Hegel, Elements of the Philosophy of Right, edited by Allen W. Wood, translated by H.B Nisbet, (1991) Cambridge University Press, p. 331.

6 Ibid p 344.

7 Andrew Vincent, The Hegelian State in International Politics, Review of International Politics, Vol 9, no 3 (1983) pp. 91-195.

8 See US Legal, 'ratione materiae' (2001), online: http://definitions,USlegal.com/jurisdiction-ratione-materiae>.

9 SM Morrison, Act of State and the Demise of International Comity, Indiana Journal of International and Comparative law, Vol, 1 : 311 (1995) 211-335 at 332.

10 Oetjen v Central London Co. 246 US 297 (1918) at 245-256; Ricaud v American Metal Co. Ltd 246 US 304 (1918) at 303-304.

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trasting the concept that prevails at common law from which the act of state doctrine originates. In English law, the act of state doctrine can be accurately described as being a product of the common law and is based on a denial of private rights in its application and on notions that parallel other methods of jurisdictional control and regulation in cases involving foreign states.

In *Buttes Gas & Oil Co. v. Hammer*[11] Lord Wilberforce stated as follows:

But, the ultimate question what issues are capable, and what are incapable, of judicial determination must be answered in closely similar terms in whatever country they arise, depending, as they must, upon an appreciation of the nature and limits of the judicial function.[12]

His Lordship also considered whether "*it was open to allege that as ultimate question [of] what issues are capable … of judicial determination must be answered in closely similar terms in whatever country they arise … When the judicial approach to an identical problem between the same parties has been spelt out with such articulation in a country, one not only so closely akin to ours in legal approach, the fabric of whose legal doctrine in this area is so closely interwoven with ours … spelt out moreover in convincing language and reasoning, we should be unwise not to take benefit of it*".[13]

This principle has been contextualised within public policy and in *Kuwait Airways Corp. v Iraqi Airways Co. (Nos 4 & 5)*[14] the House of Lords identified three separate issues arising when English courts are called upon to adjudicate what might otherwise be a wrong and are offered foreign legislative or executive. Lord Hope stated: *There is no doubt as to the general effect of the rule which is known as the act of state rule. It applies to the legislative or other governmental acts of a recognised foreign state or government within the limits of its own territory. The English courts will not adjudicate upon, or call into question, any such acts. They may be pleaded and relied upon by way of defence in this jurisdiction without being subjected to that kind of judicial scrutiny*.[15]

Lord Hope stated further that this did "not provide an absolute rule and it was subject to an exception based on public policy". This is effective "if the foreign legislation constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise the legislation as a law at all".[16] The public policy exception was to be "very narrowly construed and that the only exception which the courts accepted was based on human rights".[17]

The principle of non-justiciability has been extended to the standard of proof to be satisfied by a party which asserts that justice has not been done in a foreign jurisdiction. This aspect of the act of state doctrine has been refined by common law and statute in the UK and is increasingly determined by its limitations, rather than by providing the state with a discretion as to when an exception will be allowed. Whereas Buttes involved issues concerning several foreign states, the political question doctrine developed as a reaction to both internal and external circumstances. This is the reasoning that underlies the wider application of the political question doctrine in relation to the concept of non-justiciability.

The acceptance of the doctrine of the act of state rule and the need to ensure that it was not undermined was integral to the public policy argument that has only been engaged in relation to grave infringements of fundamental human rights and in the absence of a breach of international legal norms, and the common feature of which is that conduct is accepted as binding by all states. However, it is necessary to note the very confined nature of the rights concerned and the rule is that an act of state is governmental – as opposed to private or commercial – and depends on 'its juridical character not its purpose or underlying motive or legality'.[18]

In *Yukos Capital Sarl v OJSC Rosneft Oil Company (No 2)*[19] the Court of Appeal ruled that the foreign Acts of State in issue must lie at the heart of the case and must not be 'merely ancillary or collateral aspersion'.[20] LJ Rix ruled 'that the exception where English public policy is concerned … has not as yet recognised expropriation without compensation as having been outlawed by clearly established international norms'.[21] The only example of a case where a court in England has decided otherwise is *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* when an expropriatory decree

11 (No.3) [1982] A.C. 888.
12 P. 937.
13 P. 938.
14 [2002] UKHL 19.
15 At 135.
16 At 137.
17 Ibid.
18 Lord Goff at 1160. Also see *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62; [2019] AC 777 *per* Lord Sumption at para 8.
19 [2012] EWCA Civ 855; [2014] QB 458.
20 Para 109.
21 Para 72.

made by the Iraqi government of Kuwait's assets was not recognised by the UK authorities.[22]

There are exceptions to non-justiciability in common law courts, such as when an action comes within the *Kirkpatrick Exception* that was set out in a case tried in the US when the claim as formulated involved a direct attack on the lawfulness and validity of state's actions in litigation.[23] In England, the doctrine of the 'act of state' is based on judicial restraint rather than constitutional competence of the courts. The case for application of the doctrine is subject to close scrutiny and it has been qualified by decisions in the courts which have recognised that non justiciability is not an absolute principle. It is circumvented by the common law process based on legal precedents developed by the courts. This has narrowed the doctrine of the act of state and much is owed to the judicial review powers of the courts.

In *Belhaj & Anor v Straw & Ors (Belhaj)*[24], the officials of the UK who were complicit in torture of foreign countries jurisdiction and not otherwise entitled to immunity, should have been prosecuted because there was a compelling public interest in the investigation of the grave allegations against them, and the applicable principles of both international law and English law had to be applied.[55] The second ground for precluding jurisdiction had to be overcome was the 'territorial' limitation which might apply in cases that more closely engage questions of judicial competence, for example, in connection with the transactions between states.[57]

The Court of Appeal held that the increasing role of international law in the protection of the individual includes the regulation of human rights by international law, a system of which individuals are rightly considered to be subjects. There has to be a corresponding transfer in international public policy when grave human rights abuses have occurred. This means that

"so far as unlawful rendition is concerned, this in addition to the international prohibition of torture must occupy a position high in the scale of grave violations of human rights and international law, involving as it does arbitrary deprivation of liberty and enforced disappearance".[54]

The Supreme Court affirmed the liability of the UK and held that state immunity was not applicable in this case.[25] The Court set out three rules that were fundamental which were as follows: "*The first rule is that the courts of this country will recognise, and will not question, the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state.*[26] *The second rule is that the courts of this country will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state.*[27] *The third rule has more than one component, but each component involves issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it*".[28]

Lord Sumption affirmed the "territoriality principle" by which the act of state doctrine was to held to apply to the executive actions of foreign states which will be given recognition by the UK in its jurisdiction.[29] The Kirkpatrick test was favoured by Lord Sumption who ruled it as being conceptually narrower than that favoured by Rix LJ in *Yukos v OJSC* and more likely to lead to judicial review.[20]

It is important to note that the Court confirmed that the act of state doctrine is subject to a geographical limitation; it is generally applicable only to the activities of a third state within its own jurisdiction. This meant that the actions of a foreign government could not affect the role of the domestic court in this matter. However, there was a broad policy exception to the rule that operates in claims with its basis in international human rights law.

The ruling distinguished between the narrow class of claims which may prohibit a court's jurisdiction, based on judicial competence (as in *Buttes v Gas & Oil Co. v Hammer (No 3)* Buttes) and the wider rule of law, based on judicial restraint, "*which*

22 Ibid.

23 The doctrine of the Act of State does not apply if the government or its officials carried out actions that was illegal under its national law. In: *Kirkpatrick & Co. v Environmental Tectonics Corp.*, 493 US 400 (1990), the Supreme Court held that the act of state doctrine did not apply to prevent litigation against Nigerian officials who were alleged to have taken bribes in violation of Nigerian law. The doctrine is 'not a rule of abstention which prohibits courts from deciding properly presented cases or controversies simply because the Executive's conduct of foreign relations may be adversely affected; it is a rule of decision which requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions be deemed valid'. Justice Scalia, 404-410.

24 Belhaj & Anor v Straw & Ors [2014] EWCA Civ 1394.

25 [2017] UKSC 19.

26 Lord Neuberger at Para 121.

27 Ibid Para 122.

28 Ibid Para 123.

29 Para 234.

may result in a refusal by the English courts to permit the vindication of rights in certain situations in which the validity or legality of certain acts of foreign states and their agents are directly challenged".[48] However, it is questionable where the location of the activity could not be precisely determined and where different elements of the transactions took place. The allegations in Belhaj concerned the actions of officials of one state towards nationals of other states, which prevented the identification of the exact party that was responsible for the commission of the acts.

In *Khan v Secretary of State for Foreign and Commonwealth Affairs*[30] the applicant had intended to bring judicial review proceedings in respect of the conveyance of intelligence by the UK's Government Communications Headquarters (GCHQ) to the CIA, which was subsequently used in unmanned aerial vehicle (UMAV) strikes in Pakistan which had killed his relative. The applicant for judicial review had sought a declaration that a UK national responsible for the drone strike in Pakistan was not entitled to rely on the defence of combatant's state immunity. The implication was that a GCHQ officer or other Crown servant in the UK might have committed an offence under Subsections 44–46 of the UKSIA when communicating logistical information to an agent of the US government for use in drone attacks in Pakistan.

The Court of Appeal refused his application and stated that if this was accepted then a British national operating an UMAV in Pakistan would be found guilty of murder, the US government would consider the finding as a condemnation of them and their defence policy.[31] That would be contrary to established principles regarding the sovereign acts of foreign states and infringe the act of state doctrine. Moses LJ accepted that if a domestic right or obligation can only be accepted by consideration of the actions of other states under international law, the court may be compelled to undertake that task. However, he identified an 'important caveat', namely that identifying a right should involve consideration of:

"what exercise of the right would entail. Thus, the restraint traditionally shown by the courts in ruling on what has been called high policy – peace and war, the making of treaties, the conduct of foreign relations – does tend to militate against the existence of the right.[32]

The jurisprudential origins of the Act of State doctrine is the notion of comity of nations and respect for the territorial sovereignty of other states. The underlying concern of the judiciary was that it remained the province of the executive to conduct a state's foreign affairs and that the courts should not involve itself or undermine the conduct of such affairs. It was these principles that were also in existence in the early judicial considerations of the doctrine that made decisions of the foreign states non-reviewable. The 'Act of State' is the process of transaction for the subject matter, or *ratione materiae*, and the act is the executive decision of the foreign state.

The courts are precluded from interfering in the performance of these obligations and this has had the effect of an absolute rule. This is a concept that is derived from common law jurisprudence, with no direct parallel in civil law countries, and its scope and the rationale has varied over the duration of its application. The long-standing arguments about the impact of the Act of State doctrine are best understood in context, and although used to preclude the jurisdiction of domestic judges, the doctrine has not been created by statute, nor required by the international legal framework. The doctrine has evolved in parallel and distinct from the law on state immunity.

State Immunity and jurisdictional waiver

The application of State immunity is grounded in a variety of circumstances which could define a constitutional 'rule' or 'standard' of political restraint by the judiciary and in UK constitutional law, 'an act of the Executive is a matter of policy carried out in the course of its transactions with another state, including its relations with the subjects of that state, unless they are temporarily within the allegiance of the Crown.[33]

The UK State Immunity Act 1978 states in Section 1 "*A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act. (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question*".

The essence of state immunity lies behind the more general principle that the domestic courts will not adjudicate upon the transactions of foreign states. The doctrine of state immunity has been recognised principle in customary international law

30 [2014] EWCA Civ 24.
31 At 132.
32 Ibid, [23].
33 ECS Wade, 'Act of State in English Law: Its Relations with International Law' (1934) 15(98) British Yearbook of International Law 103.

and there is an obligation upon states which generally proceeds on the basis that there is a duty binding on the other states to respect and give effect to that immunity. This relates to the immunity that "the foreign state is entitled to assert its jurisdictional immunity in respect of proceedings relating to acts of the foreign state official performed in the service of the foreign state".[34] This concerns the acts proscribed by international norms directed to the conduct of individuals cannot be characterised as acts in the service of the foreign state".[35]

State immunity derives from the Act of State doctrine and is founded on the principle of the sovereign equality of states. Article 2, Paragraph 1 of the Charter of the United Nations signed on 26 June 1945 underpins this formulation as one of the fundamental principles of the international legal order. According to the UK's constitutional conventions an act of the Executive is a matter of policy carried out in the course of its deliberations with another state, including its relations with the subjects of that state, unless they are transitionally within the remit of the Crown. There is a growth of "multilateral organisations and international standards" that began "regulating conduct between states and as state agencies became mutually interdependent", their heightened role in the increasing number of international transactions became more recognised. This has caused more claims being pursued in the courts that brought into sharp focus the "international conduct" and "interstate litigation" which increased, giving courts the opportunity to engage with private causes of action and international conventions and rights under treaty law.[36]

The application of State immunity is grounded in a variety of circumstances which could define a constitutional 'rule' or 'standard' of political restraint by the judiciary and in UK constitutional law, 'an act of the Executive is a matter of policy carried out in the course of its transactions with another state, including its relations with the subjects of that state, unless they are temporarily within the allegiance of the Crown.[37] The exceptions to state immunity are based on considerations such as the breach of *jus cogen* norms. These peremptory norms are from which no derogation is permitted under international law.

The Vienna Convention on the Law of Treaties of 1969, provides in Article 53 that a treaty is void if, at the time of its conclusion, it conflicts with the peremptory norm of general international law. The *jus cogen* norms have been defined as "positive rules of international law".[38] The effects are far reaching partly because of 'the power and potential invested in the *jus cogens* concept, and partly because of the intricate structure typical of legal norms'.[39] This chain of laws that derive from the *jus cogens* concept has the potential to continue indefinitely in the domain of peremptory international laws as a logical aftermath of its important subject matter.[40]

The peremptory norms impose substantial constraints on states for the protection of values deemed important to the international community. As stated by the International Law Commission '[a] feature common to [*jus cogens* norms], or to a great many of them, evidently is that they involve not only legal rules but considerations of morals and of international good order'.[41] Ian Brownlie states that the concept of *jus cogens* is subject to the development of new norms that regulate the conduct between the nation-states.[42] Moreover, he states that 'more authority exists for the category of *jus cogens* than exists for its particular content'.[43]

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34 State Immunity for the Acts of State Officials, British Yearbook of International Law, Vol 82, 1 (2012) pages 281-348.

35 Ibid.

36 This has led to a restrictive theory of state immunity enacted in the State Immunity Act (UKSIA) in 1978, which was followed by Canada and Australia who promulgated their own Foreign State Immunity Acts in 1982 and 1985, respectively.

37 ECS Wade, 'Act of State in English Law: Its Relations with International Law' (1934) 15(98) British Yearbook of International Law 103.

38 See United Nations, Statute of the International Court of Justice, 18 April 1946, online: <http://www.icj-cij.org/documents/?p1=4&p2=2>.

39 Ulf Lindenfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences? (2007) 18(5) European Journal of International Law 853.

40 Some are described in writings. See Lauri Hannikainen, Peremptory Norms (Jus Cogens) in International Law (Finnish Lawyers Publishing Company, 1988); Jean Allain, 'The Jus Cogens Nature of Non-refoulement' (2001) 13(4) International Journal of Refugee Law 533; Robert Araujo, 'Anti-Personnel Mines and Peremptory International Law: Argument and Catalyst' (1997) 30 Vanderbilt Journal of Transnational Law 1; Erika de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law' (2004) 15(1) European Journal of International Law 97.

41 General Documents; A/CN.4/117, Report of the International Law Commission covering the work of its Tenth Session, 28 April–4 July 1958.

42 James Crawford, Brownlie's Principles of International Law (Oxford University Press, 2012) 513.

43 Ibid, 514–515.

The presence of *jus cogens* has also been invoked in proceedings before international judicial tribunals including the International Criminal Tribunals for the Former Yugoslavia and Rwanda,[44] the Special Tribunal for Lebanon,[45] the Special Court for Sierra Leone,[46] the Inter-American and European Courts for Human Rights,[47] the Court of Justice of the European Union,[48] and numerous arbitration tribunals.[49] This has even permeated the rulings of the International Court of Justice, which had not received this concept in its jurisprudence, but has now adopted its reasoning with arguments of *jus cogens*, and has expressly accepted the concept's relevance.[50]

The *jus cogen* norms are rules of "customary law which cannot be set aside by treaty or acquiescence but only by the formulation of a subsequent customary rule of contrary effect.' They are subject to being "formed and reformed by the actual practice of states".[51] As a consequence a principle that is claimed to be *jus cogens* can be found in treaties or scholarly writings of jurists which serve as *opinio juris* of the courts.[52]

In the *Jurisdictional Immunities (Germany v. Italy)*[53] the International Court of Justice (ICJ) ruled that the doctrine of state immunity rested on the jurisdictional immunities of states and their officials under international law, and not on principles governing the legal effect of foreign official acts in the domestic jurisdiction. The jurisdictional immunity of states is not absolute…" and that "…in cases of crimes under international law, the jurisdictional immunity of States should be set aside."[54]

As between Italy and Germany, this right was derived from customary international law in the absence of a treaty to that effect and based on its analysis of State practice and *opinio juris*, the ICJ held that, "…*practice shows that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity*".[55] The Court also defined the relationship between jurisdictional immunity and the

44 For the jurisprudence of the ICTY, see e.g. *Prosecutor v Kupreškić*, Judgment of 14 January 2000, paras 519–20; *Prosecutor v Kunarac* and others, Judgment of 22 February 2001, para 466; *Prosecutor v Furundžija*, Judgment of 10 December 1998, paras 153–54. For the jurisprudence of the ICTR, see e.g. *Prosecutor v Kayishema and Ruzindana*, Judgment of 21 May 1999, para 88.

45 See e.g. *Prosecutor v El Sayed*, Order of 15 April 2009, para 29; *Prosecutor v Ayyash*, Decision of the Defence Appeals, 20 October 2012, para 68.

46 See e.g. *Prosecutor v Gbao*, Appeals Chamber, Decision on Preliminary Motion, 25 May 2004, paras 9–10; *Prosecutor v Morris Kallon and BrimmaBazzy Kamara*, Decision on Challenge to Jurisdiction, 13 March 2004, paras 60, 66–71.

47 For the jurisprudence of the European Court, see e.g. *Al-Adsani v UK*, Judgment of 21 November 2001, paras 60–7; *Othman (Abu Qatada) v UK*, Judgment of 17 January 2012, para 266; *Jones and Others v UK*, Judgment of 14 January 2014, para 198; *Naït-Liman v Switzerland*, Judgment of 15 March 2018, para 129.

48 See e.g. *Kadi and Al-Barakaat International Foundation v Council and Commission of the European Union*, Judgment of 3 September 2008, paras 280, 287.

49 See e.g. *Delimitation of Maritime Boundary between Guinea-Bissau and Senegal*, Award of 31 July 1989, UNRIAA, Vol 20, para 44; *Methanex v United States*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, ILM, Vol 44, Part IV, Ch C, para 24; *EDF v Argentina*, Award of 11 June 2012, available at: https://arbitrationlaw.com/sites/default/files/free_pdfs/edf_international_v._argentina_award_jun_11_2012.pdf para 909.

50 See e.g. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia), Merits, Judgment of 3 February 2015, paras 87–8; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, para 99; *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, Judgment of 3 February 2012, paras 92–7; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, para 81; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment of 26 February 2007, para 161; *Armed Activities on the Territory of the Congo, New Application (Democratic Republic of Congo v Rwanda)*, Jurisdiction and admissibility, Judgment of 3 February 2006, para 64.

51 Lee A Casey and David B Rivkin, International Law and the Nation State at the UN: A Guide for US Policymakers (2006) online: <www.heritage.org/research/reports/2006/08/international-law-and-the-nationstate-at-the-un-a-guide-for-us-policymakers>.

52 Some are described in writings. See Lauri Hannikainen, Peremptory Norms (Jus Cogens) in International Law (Finnish Lawyers Publishing Company, 1988); Jean Allain, 'The Jus Cogens Nature of Non-refoulement' (2001) 13(4) International Journal of Refugee Law 533; Robert Araujo, 'Anti-Personnel Mines and Peremptory International Law: Argument and Catalyst' (1997) 30 Vanderbilt Journal of Transnational Law 1; Erika de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law' (2004) 15(1) European Journal of International Law 97.

53 Ibid 27–29.

54 Ibid.

55 Ibid. at 57.

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territorial sovereignty of the forum State by stating that:

This principle [of State immunity] has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may [also] represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.[56]

The Court made its decision on the basis of the European Convention for the Peaceful Settlement of Disputes 1961. Article 27(a) of the Convention states that the Convention did not apply to *"disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute*". The Court held that the subject matter of the dispute – the crimes for which reparations are sought – occurred during between 1943 and 1945. However, the "…*facts or situations" which have given rise to the (present) dispute before the Court are constituted by Italian judicial decisions that denied Germany the jurisdictional immunity… and by measures of constraint applied to property belonging to Germany*."[57]

The ICJ noted that while the territorial tort exception had "originated in cases concerning road traffic accidents and other 'insurable risks' national legislation codifying the exception was written in more general terms".[58] This implies that the private causes of action are strictly limited and that there has to be specific legislation in the form of an exception under the state immunity acts before an action could be brought for damages for civil injury. This issue is of particular concern when there is a breach of *jus cogen* norms that are by themselves inviolable but in court's judgement the state immunity will apply where there are issues such the territoriality principle in the dispute and that will take precedence.

The courts have not intervened in actions that are necessary when a right is invoked against the state in a private right of action until recently. The impact on the ability of the litigants to override this process and be able to sue in the jurisdiction of the forum court is the main challenge. It should be noted that the decision on state immunity does not exclude the possibility that domestic courts will refer to international law when determining legal obligations of foreign governments under their own rules. The same considerations apply to when the courts are asked to rule on matters of foreign dispute in which concepts deriving from both civil and criminal responsibility are in issue between states under both international and domestic law.

In *Law Debenture Trust Corporation plc v Ukraine*[59], the government of Ukraine represented by its Minister of Finance faced litigation from a Russian party in a dispute related to the latter issuing them Eurobonds with a nominal value of US $3 billion and carrying interest of 5 % per annum. The terms and conditions 'Notes' were constituted by a trust deed governed by English law, to which the parties were the Trustee and Ukraine. The sole subscriber of the Notes was Russia, which has retained the Notes since their issue.

In the period 2014 and 2015, Ukraine made three payments under the Notes in the full amount of interest in each instance, amounting to US $230 million. The Ukraine authorities did not pay the principal amount or the last instalment of interest when the Notes matured in December 2015 and in On 17 February 2016, the Trustee initiated proceedings against Ukraine in the High Court, claiming approximately US $3 billion plus interests and legal costs. The defence for non payment was duress which it alleged made them voidable for duress because Ukraine alleged Russia applied unlawful force during the preliminary stages of the transaction. It also alleged that the Trustee's claim was that it "lacked capacity and to enter into the transaction and it could rely on the doctrine of countermeasures to not to make payment under the contract".[60]

The trustee argued that the act of state prevented the English court was bound by the doctrine of the act of state. The Trustee raised the issue that this was not a breach of *jus cogens* and the "*existence of a clearly established breach of international law can give rise to an exception to that doctrine, but submitted that those cases concern conduct that has been uniformly condemned by the international community and acknowledged by both parties to the proceedings, so as not to be in dispute at all*".[61] In the trustees submission there was no parallel between the present case and see *Oppenheimer v Cattermole* [1976] AC 249 and *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4*

56 Ibid.
57 Ibid at 49.
58 Ibid at 55–56.
59 [2023] UKSC 11.
60 Para 16.
61 Para 127.

and 5) [2002] UKHL 19; [2002] 2 AC 883 ("*Kuwait Airways*").[62]

The Court ruled that that the third principle in the Belhaj ruling applied

in this case, "*to 'issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state* which is of such a nature that a municipal judge cannot or ought not rule on it"(emphasis added). ie "the courts of this country will not, as a matter of judicial policy, determine *the legality of acts of a foreign government* in the conduct of foreign affairs" (emphasis added).[63]

Lord Neuberger stated the third rule in Belhaj as comprising as no "*more than one component, but each component involves issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it*".[64]

Lord Reed stated further "*The act of state doctrine does not apply … simply by reason of the fact that the subject matter may incidentally disclose that a state has acted unlawfully. It applies only once such acts are classified as acts of state, an English court regards them as being done on the plane of international law, and their lawfulness can be judged only by that law. It is not for an English domestic court to apply international law to the relations between states, since it cannot give rise to private rights or obligations. Nor may it subject the sovereign acts of a foreign state to its own rules of municipal law or (by the same token) to the municipal law of a third country"*.[65]

His Lordship held that the act of state doctrine applied to Ukraine, because it was recognised "as a sovereign state" by the UK and that it did not lack "capacity to enter into and perform a contract, irrespective of the provisions of its own domestic constitution and laws". This "capacity derives from the UK government's recognition of the state, not from Ukraine's internal law".[66] This statement was subject to an important qualification, which Lord Sumpton in Belhaj "the general rule "that the English courts will not adjudicate on *the lawfulness of the extraterritorial acts of foreign states in their dealings with other states or the subjects of other states*" (emphasis added). (Para 234).[67]

Their Lordships held that they agreed that the Act of state doctrine precluded the argument that the acts of Russia on which Ukraine relied were "acts of high policy… in the sphere of international relations", within the scope of the third rule, the court held that Ukraine could rely on the "public policy exception", as explained by Lord Neuberger in Belhaj and exemplified by cases such as *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883. (Para 181).[68]

The Supreme Court sidestepped the potentially difficult legal question of whether the alleged unlawfulness of Russia's acts in this regard were justiciable by English domestic courts by reason of this being a question of international law. The Supreme Court concluded it did not need to investigate whether the acts were unlawful under international law; rather, it had to determine whether the facts were such as to constitute duress under English law. Based on that calculation the Court accepted the "*public policy defence of duress applied*" in this case and as "*far as based on the threats of the use of physical violence towards Ukraine's armed forces and civilians, and the threats of damage to, or destruction of, Ukrainian property*" are concerned they were against the public policy of the UK.[69]

Public policy and One Voice principle

The English courts as stated in the *Ukraine v Russia* case have a public policy element in their judgments which is based on considerations of the existing precedence and general conditions. The international legal instruments also point to the existence of public policy and the principles is set in the documentary text.[70] In court rulings the issue of public policy is diffuse and consists of three different but integrated parts which are "*public interest, public morality, and public security. The public interest category views the private arrangement of citizens as equal to public interest and public policy and the court tries to strike a balance between the two*".[71] In this evaluation the "majority of cases

62 Ibid.
63 Para 129.
64 [2017] UKSC 19, Para 123.
65 [2023] UKSC 11, Para 186
66 Para 188.
67 Para 189.
68 Para 213.
69 Ibid.
70 The brief survey of the U.N. Treaty database indicates that the phrase "public policy" has been inserted in more than 1,600 international instruments. Treaty Database Search, UNITED NATIONS, https://treaties.un.org/ (follow "Advance Search" hyperlink; follow link "Full-text Search"; type "public policy" in search bar; change search criteria to "exact").
71 Farshad Ghodoosi, The Concept of Public Policy in

come under the public interest category, which are "for less court engagement and a balancing approach. The public security category aims to protect citizens from outside threats that might endanger their well-being and consequently eliminate the public sphere".[72]

In the cases that come before the common law courts or tribunals the adjudicators opinions on public policy "have oscillated between a moralistic account – e.g., analyzing it based on "basic notions of morality and justice"[73] and a "rigid positivistic interpretation that subjugates the doctrine only to 'laws and precedents'.[74] The emergence of modern contract law has made the doctrine of public policy into a crucial element and it is determined as void for illegality.[75] The element that has most distinguished the contract law is "*centred on the fairness of the bargain. Afterwards the focus shifted to the will theory of contract law and less so on the very fairness of the bargain"*.[76] In its formative stages the doctrine of public policy was set out in the English courts on the principle of declaring the restraint of trade contracts as against the public policy.[77]

The doctrine changed from immorality or illegality but public policy considerations evolved and shared communal values for its justification and substance came to the fore. The legislative bodies were to decide public policy and the view that was "*conceptualised of public policy as only guide for ascertaining the object and purpose of statutes, whenever the opposite side viewed it as an abstract legal standard independent of time and circumstances*".[78] The contracts that are void for illegality have their basis the *dolus malus* of the parties which can be stated to be against the "the public utility.[79] Historically, in the common law illegality was a general category to public policy, contracts and commit crimes and other categories.[80] There were 3 contracts that were deemed to be against public policy "(i) contracts that ousted jurisdiction of the court (ii) contracts that tended to prejudice the status of marriage, and (iii) contracts that restrained trade".[81]

In order to declare the contracts as illegal the decision has to be grounded in public policy, however, it introduces into the judicial process an element of different characteristics than the other grounds. These contracts are regarded as 'Ex turpi causa non oritur action' and academic opinion has held that this doctrine is based on the "principle of judicial legislation or interpretation founded in the current needs of the community".[82] However, in a common law legal system encouraging judicial review the determination of public policy is considered as based on a statutory interpretation and the judge's reasoning is based on "elucidating non-legal materials".[83]

The concept of public policy as elucidated by the Supreme Court judges in the Ukraine v Russia can be interpreted as distinguishing the "Judicial public policy and legislature policies serve inherently distinct functions; the former revolves disputes at micro level, whereas the latter aims to set broader policies".[84] This is because the public policies enacted by legislative branch and enforced by

Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements, 94 Neb. L. Rev. 685 (2015).

72 Ibid.

73 See, e.g., Parsons & Whitemore Overseas v. Societe Generale De L'industrie Du Papier, 508 F.2d 969, 974 (2d Cir. 1974); Waterside Ocean Navigation Co., Inc. v. Int'l Navigation Ltd., 737 F.2d 150, 153 (2d Cir. 1984); Belize Soc. Dev. Ltd. v. Gov't of Belize, 5 F. Supp. 3d 25, 42 (D.D.C. 2013); Yukos Capital S.A.R.L. v. OAO Samaraneftegaz, 963 F. Supp. 2d 289, 297 (S.D.N.Y. 2013).

74 David Adam Friedman, Bringing Order to Contracts Against Public Policy, 39 FLA. ST. U. L. REV. 563, 612 (2012) (showing that the public policy defence is less likely to succeed if it is not linked to a statute or regulation).

75 Patel v Mirza [2016] UKSC 42.

76 Morton J. Hortwitz, The Historical Foundation of Modern Contract Law, 87 HARV. L. REV. 917, 917–19 (1974). 33. Id.; see also THOMAS CUNNINGHAM, THE LAW OF SIMONY 52 (1784) (discussing The Bishop of London v. Fytche, in which the House of Lords held that resignation bonds were illegal under the law of simony); Fletcher v. Lord Sondes [1826] 3 Bing. 501, 590 (U.K.); Rex v. Waddington [1800] 1 East 143 (Eng.) (providing an account of the historical development of contracts held unenforceable due to illegal terms).

77 Lord Macclesfield in Mitchel v. Reynolds 24 Eng. Rep. 347 (Q.B.); invalidated a contract that would result in restraint of trade: "[T]o obtain the sole exercise of any known trade throughout England, is a complete monopoly, and against the policy of law." at 349.

78 W.S.W. Knight, Public Policy in English law, 38 LQR 207 (1922) ; H Percy, Public policy in English common law, 42 Harvard Law Review; Also see James D Hopkins, Public Policy and the Formation of the Rule, 37 Brook Law Review 323, 323 (1970).

79 P. 209.

80 The Cause of Action in Assumpsit, 510 (1987) 510.

81 MD Furmston, Cheshire and Fifefoot, Furmston's Law of Contract 470, 15 ed. (2007).

82 At 92.

83 In Morris R. Cohen & Felix S Cohen, Readings in Jurisprudence and Legal Philosophy. 187 (1951).

84 Daniel A Faber & Philip P. Frickley, In the shadow of the legislature: The Common law in the Age of the New Public Law, 89 Mich L aw Review 875, 899 (1999).

the executive "*conforms to some level of economic rationality and the rational choice theory has become the dominant yardstick against which to assess explanation of the policy process*".[85]

In the case decided by the Supreme Court the decision confirms that once a state is formally recognised by the UK government, that state has unlimited capacity to contract under English law. This ability to contract is not limited by the constitution of the state or its own internal laws and the only issue that of the entity executing a contract on behalf of a state has sufficient authority to execute the agreement. This analysis will inevitably involve questions of fact such as whether the contract was arrived at under duress and was therefore illegal in English law. This involved the consideration of the same factors that are assessed as that of capacity of the parties. In the international law context that is an important consideration and the ruling of the Supreme Court was that the parties did have the capacity but the case turned on the duress which caused the Court to declare that the illegality was in the conduct under which Russia acted to enforce the agreement against the Ukrainian government.

In the English public policy there is another factor which is crucial to the manner the judges will apply their reasoning which is based on the 'one voice principle'. This is based on the judges ruling in matters of foreign states in accordance with the policy of the executive and they will not differ from the government's recognition of foreign states and the legitimacy of conduct. The executive acts will be non justiciable if the court's consider the foreign government as the legal authority of that state with de jure powers at their disposal.

In *Maduro Board of the Central Bank of Venezuela v Guaido Board of Central Bank of Venezuela*[86] the Supreme Court considered the act of state doctrine and identified two issues which are recognition of a foreign government and the grounds for justiciability. On the first question Lord Lloyd-Jones sated that under the "UK's constitutional arrangements the recognition of foreign states, governments and heads of states is a matter for the executive",[87] the courts accept statements made by the executive "as conclusive' about whether an individual is to be regarded as a head of state";[88] and this rule is defined as "the 'one voice' principle which defers to the executive in the recognition of the valid government of the foreign state".[89]

The historical distinction between the government as de jure and de facto was void and "unlikely to have any useful role" in the courts of the UK in determining the validity of the act of state.[90] On the second issue of justiability the UK courts "will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state".[91] This is not limited to the cases of "unlawful executive acts concerning property, such as expropriation or seizures".[92]

His Lordship stated that "judicial rulings of a foreign state are not subject to the act of state doctrine".[93] He affirmed that courts in this jurisdiction "will not validate or implement the foreign judgments such as those of the STJ if it would conflict with domestic public policy. This is manifested by the 'one voice' principle which is a fundamental rule of its constitutional law".[94] This brings into alignment the judiciary and its rulings with the executive and its public policy making at the level of interpreting the act of state doctrine.

The issue of subject matter can be integrated with the legality of the transaction such as a contract and manner of its execution and if there is any duress which shall deem void for illegality. In the English courts the policy argument carries considerable weight and is reflected by the 'one voice principle' and the consideration of the executive's policy formulation will form the guiding principle of its ruling in its own domestic jurisdiction as to the outcome of the dispute between the two state parties.

Conclusions

The jurisprudential origins of the Act of State doctrine is based on the notion of comity of nations and respect for the extra territorial sovereignty of other states. The underlying concern of the judiciary is that it has remained the province of the executive to conduct a state's foreign affairs and that the courts should not involve itself or undermine the conduct of such affairs. It was these principles that were also in existence in the early judicial considerations of the doctrine that made decisions of the foreign states non-reviewable. The 'Act of

85 Steven Griggs, Rational Choice in Policy Analysis , The theory in Critical Respects, in Handbook of Public Policy Analysis: Theory, Politics and Methods 1973 (Jack Reubin, edition 2007).
86 [2021] UKSC 57.
87 Ibid 64.
88 Ibid 63, 69.
89 Ibid 78.
90 Ibid 99.
91 Ibid 113.
92 Ibid 139-142.
93 Ibid 157, 161.
94 Ibid 170.

State' is the process of transaction for the subject matter, or ratione materiae, and the act is the executive decision of the foreign state.

The doctrine of state immunity is overriding and was affirmed in the landmark judgment of Jurisdictional Immunities of the State, where the distinction between procedure and substance was also used as the main argument against the assertion that *jus cogens* overruling the state immunity. The reasoning employed by the ICJ was unambiguous with respect to the principle that a breach of such a peremptory norm of international law entails the responsibility of the state under international law, but does not deprive it from its claim for sovereign immunity.

The decisions made by English courts are influenced by the executive in terms of their public policy framework and the agreement by the state or its agency will have to satisfy the illegality of contract doctrine. The courts will refrain from expanding the review of acts of state in recent case law outside their remit and it has been set out on the recognition of governments, the grounds upon they act and their conduct in relation to the interstate dispute. The public policy is a crucial factor and will govern the decision of the courts whether the party succeeds in its claims and the pleading of all the factors into consideration, including its own 'one voice' principle.

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