**FOREIGN AFFAIRS: FORBIDDEN TERRITORY FOR THE COURTS**

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**Introduction**

1. I take as my starting premise the thesis of Lord Sumption SC in his paper *Foreign Affairs in the English Courts since 9/11* (14 May 2012, SCt website) that there are no hard and fast rules that preclude domestic court scrutiny over questions of foreign affairs or foreign policy; that rather judicial reluctance to get so involved, so often expressed in absolutist maxims like “Act of State” or “non-justiciability” are ultimately premised (or should be so premised) on constitutional considerations, most notably a doctrine of separation of powers and a broad and utilitarian doctrine of international comity, that require the Court to recognise that it is typically *inappropriate* for Courts either: (i) to second-guess the activities of the Executive in this sensitive area; or (ii) to pass comment on the legality of acts of foreign powers. After all, as JF Kennedy observed *“Domestic policy can only defeat us; foreign policy can kill us.”*
2. This is to accept that the oft (nay invariably) cited statement of the Court of Appeal (Philips MR, Waller and Carnwath LJJ) in *Abasssi* that “*justiciability depends, not on general principle, but on the subject-matter and suitability in the particular case*” has become unchallenged orthodoxy. Yet *Abassi* too talks of certain questions – how to conduct diplomatic negotiation being the case in point – as “forbidden areas”.
3. Are there in fact any outright “no go issues” or is everything ultimately a question of presumption, degree and margin of appreciation – a “go slow” area? Is the true position, as Richards J (as he then was) noted in *CND* (considered below):

*“The simple point, as it seems to me, is that the court should steer away from these areas of potential difficulty in relation to other states unless there are compelling reasons to confront them. ….”?*

This language is echoed by Lord Bingham’s observation in *Gentle* that:

*“It must…have been obvious that an inquiry such as the claimant’s claim would be drawn into consideration of issues which judicial tribunals have traditionally been very reluctant to entertain because they recognise their limitations as suitable bodies to resolve them”*

And, as Lord Sumption points out, the approach in the strongly analogous area of national security is, as exemplified by Lord Hoffmann’s speech in *Rehman* one that is essentially pragmatic and constitutional, a flexible test operating with a strong presumption against judicial interference for constitutional and institutional reasons. Indeed, in the recent *Carlile* case (see [61] per Arden LJ) the Secretary of State appears to have expressly assimilated the *Rehman* test with the *Abassi* test, at least in a case where Convention rights were plainly engaged.

1. The soundness of this “strong presumption” analysis, quite apart from its public adoption by Lord Sumption, has, in my view, been effectively confirmed by the Supreme Court’s ruling in the *Rahmatullah* litigation, in its willingness therein to adopt an approach (consistently with and building upon *Abassi*) that sought to “carve out” free-standing issues of domestic legality, even where such were strongly interwoven with international relations. (I refer below to the three tiers of this case as *Rahmatullah DC*, *CA, SC* respectively). As well as helping to delineate the limits on or flaws in absolutist “justiciablity” arguments, *Rahmatullah SC* offers a tantalising glimpse into what looks almost certain to be a key battleground in this most sensitive area – namely how the Courts must set about dealing with arguments that the UK state’s own wrongdoing should not be investigated if it entails collaterally impugning the conduct of another State (invariably the US or some other partner state).
2. On that starting premise the challenging tasks are to identify: (a) competing constitutional values or principles of sufficient strength (that is Richards J’s “compelling reasons”) that they are capable of displacing what is in effect a very strong presumption of judicial non-intervention; and (b) principles by which such a clash of values can be adjudicated; (c) any hidden themes in the case-law.

**The unopposed constitutional principles**

1. It is perhaps instructive to start with the cases where there are no competing domestic constitutional principles – where the Court is invited to enter into the fray of adjudicating on the legality of questions of foreign affairs by Claimants whose foothold for so doing is no more sound than that they want a public proclamation on the issue in question.
2. Three recent cases stand out in this category, illustrating the equal reluctance of the domestic Court to rule upon the legality of domestic foreign policy or the actions of foreign states with which the UK must deal: first, the *CND* case, in which the Court was effectively being asked to rule upon the legality of second Iraq war; secondly, the *Al Haq* case, in which the domestic Court was being invited to opine on the legality of Israeli; the third, is the *Abassi* case, which was concerned with the extent of the UK’s duties to make diplomatic representations designed to secure Mr Abassi’s release from Guantanamo Bay.
3. In the *CND* case the foothold upon which the claimants sought to build was a Prime Ministerial statement that the UK would always act in accordance with international law. From this statement they sought to assert a public interest in ensuring that this was so, sufficient to justify going to Court so that “*the government should have the benefit of judicial guidance as to what the law is”,* in short, so that an advisory declaration could be provided: see [4]-[5], [16] per Simon Brown LJ. The reasoning of the Court is however varied:
   1. Simon Brown LJ refused this invitation for two reasons: first because it invited the Court to opine on the interpretation of unincorporated international treaties, which long-standing case-law showed to be no part of domestic court’s ordinary function (see [36]-[40]); secondly, because it would be contrary to the public interest and national security to embark upon any such inquiry because of its adverse effect of the UK’s freedom of action in the conduct of international relations (see [41][45).
   2. Kay LJ preferred instead the adoption of blanket rule of non-justiciability in relation to questions of foreign policy and armed force deployment: see [50].
   3. Richards J approached the matter on a far less absolutist basis (though reaching no less firm conclusions once principles were applied to facts): in his analysis there were a number of “discretionary considerations”, in which the inhibiting effect in the conduct of international relations was the key factor, which meant that it was inappropate for the Court to opine in these sensitive areas (see [55]-58]). He adopted a pragmatic approach in which he accepted that the very maintenance of shades of legality was necessary for diplomatic negotiation, such that the grant of advisory opinions cut across their effective conduct in the national interest ([59(i)]); whilst still holding to an apparent measure of absolutist “non-justiciability” in relation to decisions as to whether or not to go to war ([59(ii)], yet all the while rejecting an equation of justiciability with jurisdiction ([60]), stating instead:

*“Whilst I adhere to the view that justiciability is not a jurisdictional concept, it seems to me on reflection that it engages rules of law rather than purely discretionary considerations. They are rules that, in this context at least, the courts have imposed upon themselves in recognition of the limits of judicial expertise and of the proper demarcation between the role of the courts and the responsibilities of the executive under our constitutional settlement. The objections on grounds of non−justiciability therefore provide a separate and additional reason for declining to entertain the claim.”*

Richards LJ was also persuaded that the exercise thrust upon the Court was an impermissible invitation to construe unincorporated international Treaties (62]-[62]).

1. The case of *Al Haq* is almost a flipside of *CND*. The purpose of the litigation was to invite the Court (Pill LJ; Cranston J) to opine on the legality of the actions of the state of Israel in Gaza through the device of an application for a declaration that the UK was in breach of its international obligations by having failed to do various things (such as not having suspended various export licences for military equipment, not having requested the suspension of the EU-Israel Association Agreement, not having sought to exercise universal jurisdiction to prosecute those involved in war crimes etc). What is of particular interest in the case (the result hardly constituting a surprise) is the resuscitation of standing as a basis for declining to consider the case’s substantive merits. Permission was refused on the twin basis that the presumption against intervention in foreign policy areas combined with the fact that the Claimant had no domestically recognised rights to enforce justified the conclusion that there no standing to raise the issue.
2. However, the case of *Abassi* itself illustrates that a modulated and somewhat more intrusive approach will be adopted if: (a) the Claimant is the party whose interests are directly affected (here, a Guantanamo detainee); and (b) the toehold for claiming relief, if not as substantial as a statutory jurisdiction (the Court rejected the argument that the dispute fell within the scope of Article 1 ECHR/the HRA at [68]-[79]), amounts to a recognisable potential extension of a public law duty, e.g. the duty of diplomatic representation owed by the UK to its nationals who were receiving treatment breaching international law norms, as fortified by some form of legitimate expectation.
3. The reasoning in *Abassi* is something of a curate’s egg: the contention that impleading of a foreign power’s acts was rejected, all the while the Court stealthily giving precisely the sort of declaratory judgment about the objectionable nature of arbitrary detention in Guantanamo the applicant sought (under the pretext that such was necessary in order to see whether there were the background foundations for the domestic claims to entitlement to representation) and yet, quite inconsistently with that approach, the Court concluded that anything that touched upon or hindered the conduct of foreign policy was “a forbidden area”. (As Lord Sumption notes the approach in *Al Rawi*, a case involving no real UK ‘toehold’, the applicants merely being former residents, is further proof that even in cases with no competing compelling reasons, the domestic courts are nevertheless retreating from an absolutist approach)

**Adjudication upon “forbidden areas” required/authorised by statute**

1. At the other end of the spectrum lies the case where it is clear that domestic law explicitly or necessarily requires the Court to adjudicate upon a matter of foreign relations. The most obvious scenario in which this occurs are the questions of persecution, safety upon return *etc* arising in an asylum context that require the Courts to pass judgment on the conduct and affairs of foreign states. The classic instance is the case of *Adan,* where the House of Lords concluded that the role entrusted to the Courts, when applying the Refugee Convention (as domestically incorporated by the AIA 1996) required it, considerations of comity notwithstanding, to pass judgment upon or take into critical account the way in which France & Germany were applying the Refugee Convention. Other cases raise still more directly whether a foreign state is engaged in or tolerates the persecution of minorities, or the political oppression/torture of rivals. Uncomfortable as such rulings may be for future diplomacy, and impleading directly as they do the conduct of that foreign state, the Court nevertheless grapples with the issues arising.
2. At the risk of stating the obvious, what makes it easier to enter the “forbidden area” in such cases is the obligation imposed by the legislator to do so. This is ultimately a reflection of two higher constitutional principles: Parliamentary sovereignty; and the superior weight attached to fundamental human rights and humanitarian principles.
3. The *Adan* type situation has complicated greatly by the relatively recent passage of various EU Directives, whose effect is to make asylum law part of the corpus of EU law. Given the heightened *Hedley Lomas/Bacardi* comity principles generally operated by the CJEU, in which Member States are precluded from calling into question the compatibility of actions of other Member States with EU law (mutual trust and confidence being the very point of the Common European Asylum System) the starting point is now to assume that the type of inquiry embarked upon in *Adan* is impermissible, at least as regards fellow EU member states forming part of the common regime of treatment of asylum seekers from third countries. The remedy of any disaffected party lies in seeking a reference to the CJEU or a complaint to the Commission.
4. However, in the case of *NS* the CJEU was called upon to look at an *Adan* type situation, against this requirement for heightened mutual trust, but in circumstances in which it was said that the conduct of Greece in handling applications for asylum conflicted not just with its obligations under the various Directives (and thus the underlying Refugee Convention), but also with fundamental rights under the Charter of Fundamental Rights for the European Union (“CFREU”). Significantly, in *MSS v Belgium* the ECtHR had already opined unfavourably upon conditions of Greek immigration detention, holding them to be in breach of Article 3 ECHR. The CJEU concluded that where there was evidence of systemic deficiencies in an asylum procedure of a Member State (Greece) such as to lead to a real risk of inhuman and degrading treatment a Member State may not return an asylum seeker to that state for his or her application to be processed there.
5. *NS* is illustrative of two things:
   1. First, the somewhat counterintuitive effect (in this area at least) of EU Membership and the closer co-operation it entails is, in general, to fortify - indeed to give legal articulation (through the so-called “duty of loyal cooperation”) – to the principles of comity that preclude investigation of foreign Member State’s compliance with their international (here EU) obligations. But in truth this is not fortification of an existing constitutional principle; but rather its substitution with another, namely the primacy of EU law and the predominant role of EU institutions and procedures for enforcing adherence to common standards.
   2. One irony of the recent decision of the Divisional Court in *Bancoult No.2* is that by finding that the duty of loyal co-operation has free-standing direct effect (and it must be horizontal direct effect – that is binding individuals too – since it is a Treaty provision) the Court has, outside the very unusual circumstances of the dispute in that case, more generally fortified the obligations of litigants not to call into question the actions of other Member States.
   3. Secondly, as in other areas (as will be seen) the pre-eminent “compelling reason” to enter the forbidden territory is because the observation of human rights obligations so requires.
6. Of course EU law offers a still clearer recent example of how Parliamentary intervention may upset the presumption against judicial supervision in “forbidden areas”. One classic such area is that of Treaty-making powers.
   1. In the *Rees-Mogg* case the applicant sought to persuade the Court to intervene and find unlawful the FCO’s exercise of powers to ratify the Maastricht Treaty, on the ground, amongst others, that the Treaty conflicted with section 6 of the European Parliamentary Elections Act 1978. The argument failed to establish any such conflict, with the result that the Divisional Court held that the balance of the challenge was ruled to be a free-standing challenge to the exercise of prerogative powers, and as such impermissible, and non-justiciable (much like Mr Blackburn’s challenge to the original EEC Treaty), it raising no question of domestic law.
   2. In the latter case of *Wheeler* it was conceded that were there any conflict with any statutory precondition to ratification (in that case, s.12 o the European Parliamentary Elections Act 2002) that would render the decision to ratify amenable to judicial review.
   3. Having twice failed entry by the backdoor, those favouring control over EU Treaty making powers have instead blow open the front door by passing the European Union Act 2011, the effect of which will be to enable judicial review to be brought against a wide-range of Treaty and decision-making powers on the international/EU plane should requisite popular or Parliamentary approval not first be obtained: see Craig, *The European Union Act 2011: Locks, Limits & Legality* in the 2011 CMLRev.

**The appeal to fundamental rights**

1. As Lord Sumption indicated in his lecture the prime and repeated source of a “compelling reason” to displace the constitutional presumption of non-intrusion into matters of foreign affairs has been the appeal to binding fundamental/human rights obligations.
2. There are very broadly four categories of these arguments.
3. The first dimension is those cases that raise questions of territorial jurisdiction in relation to actions of the UK Government abroad. There has been a recent plethora of such cases, most notably concerned with the territorial scope of the ECHR – the subject of Martin Chamberlain’s paper. EU law, and the CJEU, raises very similar jurisdictional issues as demonstrated by the case of *Zagorski*.
4. In principle, if jurisdiction is established, then conventional human rights analysis should follow (ill-treatment or abuse in an UK-run Iraqi prison being no different to domestic ill-treatment or abuse). But in such cases, even if jurisdiction is established, there is a strong likelihood of ‘second order’ questions of:
   1. foreign affairs, for instance where the action taken abroad is taken in combination, concert or liaison with another foreign power (*Rahmatullah* being precisely such a case);
   2. appropriateness about engagement with the substance of the case advanced through private rights argument (the apogee being the recent “combat immunity” debate about the interface between public policy and the duty of care/breach in the context of soldiers serving abroad in the case of *Smith v MOD*).
5. Then there are the cases about the obligations of the United Kingdom towards individuals in the territorial jurisdiction but who will, if removed, be potentially subject to human rights violations abroad by another State or individual. Here the overlap with the *Adan* type case is obvious, but asylum cases aside, there is a distinct contribution of human rights analysis in the *Soering*, *Chahal*, MoU/DWA type cases. Here the prospect of ill-treatment (death penalty, flagrant breach of Article 6, torture) by a third State is the very basis of the objection to domestic action (explusion/deportation/extradition). Adjudicating such cases necessarily calls for a highly critical review of the conduct of the third state in question. It is the impleading of such conduct on human rights grounds. Legally, if not politically, this much is now uncontroversial.
6. Thirdly, there are the *Carlile* type cases where it is said that to admit a particular person may produce a blend of national security and/or foreign relations consequences, given the offence that would be no doubt taken by the Iranian state (in effect, a variant on the standard *Farrakhan, Moon, Naik* issues). The Parliamentarians had wished to invite a prominent Iranian dissident and POMI member to the UK to address a committee of the House of Commons. Understandably, the Court concluded that profound issues of A.10 protected free speech arose, before concluding that on a *Rehman* type analysis the Secretary of State’s response was fully compliant with the proportionality principle and with the wider obligations of justification.
7. Lastly, there those cases like *Kuwait Airways* or the earlier *Oppenheimer v Catermole* case, where parties seek to impugn the legality of foreign acts, either collaterally (e.g. in litigation with a third party) or where it is possible to sue a foreign state (e.g. in the well-recognised exceptions to state immunity – e.g. trading entities). Here there is obviously no direct reliance upon municipal incorporation (indeed it was not present in *Kuwait*) but there can be little doubt that the process of incorporation provides greater clarity and legitimacy for the development of “non-negotiable” constitutional values against which the objectionability of certain foreign acts can be gauged on public policy grounds.

**Existing domestic rights**

1. Of course, as the House of Lords recognised in *Gentle* (see [8] per Lord Bingham) the resolution of disputes about private rights may require the Court to resolve questions of international law or international affairs, or to grapple with the legality of acts done abroad.
2. Such private rights may arise in a variety of contexts:
   1. In tort claims against the UK Government, notably the form of claims brought by Binyam Mohammed and others in consequence of the UK’s alleged collusion in their torture/CDT by foreign security services; this issue recurs, if anything with even greater potency (given the more acute UK involvement alleged) in the forthcoming Libyan private rights claims brought by Belhadj and others in relation to their rendition to and treatment in Libya. (It should be noted that torture claims raise ‘private rights’ even if the applicable law may that of the place from which rendition occurred or in which torture occurred).
   2. When matters of international law are raised as a defence in criminal proceedings, a possibility recognised in both the case of *R v Jones* and *R v Gul (Mohammed)*. Here, however, an assertion of non-justiciability may lead to the collapse of the prosecution case (a feature that , ironically, in turn may lead to de facto immunity of security service officers from criminal prosecution).
   3. In habeas proceedings, as in *Rahmatullah*, in those cases where control can be established abroad.
   4. In purely private proceedings, for instance when the adequacy of a foreign judicial system is impugned in a *forum conveniens* application; or where the legality of a foreign Act of State (upon which a claim or defence is built) is impugned in one of the recognised exceptional areas.

**Indirect municipal incorporation/assumption of jurisdiction**

1. What may sometimes be missed in the human rights cases, and indeed in the context of habeas corpus (where “control” or “doubtful control” is the proxy for jurisdiction, and gives a very similar scope to the writ to Article 1 ECHR) is the significance of finding jurisdiction. A substantial part in the Court’s relative willingness to enter into the forbidden area to give effective protection to those fundamental rights is the fact that the Human Rights Act 1998, by giving domestic effect to the ECHR – and in particular Article 1 ECHR – acts just like the asylum legislation considered in *Adan* to *confer jurisdiction* in relation to the issues of foreign affairs that necessarily arise thereby. This point is sometimes missed gien understandable concentration upon the importance of the substantive constitutional values at stake as the “compelling reason” for intervention, a feature long-recognised in the Act of State cases.
2. There is a powerful argument that in other areas where Parliament has conferred jurisdiction on the Courts in some of their functions in areas strongly tending (if not necessarily tending) to stray into questions of foreign affairs that absolutist arguments of non-justiciability – and in even more nuanced “multi-factor discretion” arguments – are consequently weakened, or even comprehensively displaced.
3. In one sense the *Adan* type of case is merely the clearest example of such phenomenon, distinguished only by: (a) the corresponding right of the party in the relevant process to raise the issue (e.g. the asylum litigant; the party challenging extradition *etc*); and (b) the regularity of such issues arising and the necessary centrality of issues involving judgment upon the conduct of or state of affairs in foreign states.
4. Such municipal incorporation may take a variety of forms beyond simple conferral of a cause of action/right of claim. The most intriguing, and obviously the most topical, is the effect of domestic criminalisation. Take the various domestic statutes criminalising war crimes under the various Geneva Conventions, or torture under the Convention Against Torture by way of example: s.1 of the Geneva Conventions Act 1957 and s.52 the International Criminal Courts Act 2001 (which implement the criminalisation obligations of the Geneva Conventions); section 134 of the Criminal Justice Act 1988 (implementing the criminalisation obligations under the CAT); section 52 etc of the Serious Crimes Act 2007 (creating extraterritorial jurisdiction if the relevant offence is effectively planned from the UK and would be an offence if committed in the UK).
5. By criminalising such conduct, and by conferring international jurisdiction in relation to the enforcement of such criminal law, Parliament has made an extraordinary statement about the competence or appropriateness of domestic Courts making inquiry into the foreign affairs subject-matter that necessarily goes with such jurisdiction. An identifiable CIA officer, in the jurisdiction of the English court, who has participated in torture abroad is liable to arrest and prosecution. No “Act of State” defence, or any justiciability variant can or should be allowed to be set up to preclude such prosecution – since any such argument would in practice make such prosecution impossible in most circumstances.
6. If there is no such bar when issues arise in a criminal context, it may be asked why, in related civil proceedings – e.g. to obtain compensation for torture, or for habeas corpus – any different approach should prevail where the party selected as a defendant cannot hide behind a claim of state immunity (as in *Jones v Saudi Arabia*), in particular where that party is the UK government or an arm thereof.
7. It is instructive to see how this issue has become progressively more central in three cases:
8. The first case is *Binyam Mohammed* where the Divisional Court confronted a very similar argument, set up by the Special Advocates as an attempted bar to the claim of public interest immunity. The Divisional Court rejected the argument that the conferral of criminal jurisdiction in relation to torture meant that the state was unable, as a rule, to claim PII in material tending to show the UK’s participation in the commission of such a wrong. But what is telling about the reasoning in that case is that it is nowhere suggested in the judgments (either of the Divisional Court or the Court of Appeal) that the subject-matter of the dispute was somehow non-justiciable – the debate was only as to whether the relevant debate about the material occurred in open or in closed.
9. The second case is *Rahmatullah* itself. The justiciability argument mounted by the Secretary of State, successfully in *Rahmatullah DC*, but without joy in *Rahmatullah CA* was engaged with in *SC* on two planes: (a) by the Respodendants and JUSTICE on the basis that the acts forming the focal point of inquiry – de facto doubtful control by the UK over R and its exercise – raised pure questions of domestic legality and called in no way for an opinion on the legality of the US actions; (b) by JUSTICE, on the basis that the very acts forming ultimate complaint – namely transfer and rendition – had been rendered justiciable by the criminalisation of such acts in the ICCA 2001. The former argument was sufficient for Lord Kerr (and Lords Dyson and Wilson who agreed with him). Lord Phillips did advert to the argument at [96] and [106] of his speech, before ducking the matters (and others) as “difficult issues” and (perhaps unfairly) “not addressed on this appeal”.
10. The third case is that of *Noor Khan*. The case being made, stripped to its core, was that by providing targeting information to the CIA for the CIA’s use in drone strikes in Pakistan, a friendly state with which the UK was not at war, the domestic intelligence services were accessories to murder.
    1. The relief sought by the Claimant was effectively seeking what was in truth either a declaration or advisory opinion as to the criminal law (another “restricted” if not “forbidden” area); nor was such relief sought in a relator action – no doubt because the Attorney General would refuse consent (an act itself immune to review so long as *Gouriet* remains good law) - to enforce the criminal law. The case thus involved twin areas of sensitivity.
    2. The evidential foundation for the allegation that targeting information was being provided was thin: it relied upon a Sunday Times article (see [9] per Moses LJ) to which a NCND response was received.
    3. Moses LJ identified an array of objections to the application, first and foremost being the unwieldy and dangerous nature of the advisory opinion on criminal law sought. These are powerful reasons. However, notably, justiciability did not figure in the reasons for the refusal of permission and it is interesting to consider why: it was indisputable that English criminal law *did* have potential reach into North Waziristan. It did so in circumstances were both parties were agreed, however, that there was not practical prospect of a prosecution being brought under such laws in the United Kingdom. However, Moses LJ was motivated by the apparent absurdity that an SIS employee might have a secondary liability for murder when the principal has no liability whatever.
    4. This absurdity is surely more apparent than real: if there is any inability to entertain a charge of murder against the principal in such circumstances it is *jurisdictional* or a function of a species of *immunity*. It may be asked why the situation is any stranger than the fact that a British National may be prosecuted for murder for encouraging an accomplice in a warehouse burglary in Pakistan to let the security guard “have it”. The argument that entertaining such a charge amounts to indirectly impugning the actions of a sovereign state is similarly defective: can it really be the case that the British Security agencies can obtain *de facto* immunity from English extra-territorial laws by the simple expedient of combining with a foreign agency? (Surely this is what the so-called James Bond clause is for?) If ever there were an *Oppenheimer* case for refusing to accept a claim of “Act of State” such is surely it. Were there ever the evidence to sustain a criminal prosecution in a case such as this surely it could not be enough to frustrate the prosecution for the Defendant simply to allege he acted in concert with a foreign agency.

**What conclusions might be drawn?**

1. So in the check list of compelling reasons favouring entry into a forbidden area we have (in probably descending order):
   1. Direct statutory authorisation/necessity to discharge statutory adjudicative function;
   2. The direct or indirect engagement of human rights obligations or other core substantive constitutional values;
   3. Direct or indirect conferral of jurisdiction;
   4. The need to protect private rights.
2. How then does the Court set about reconciling such principles? It is a simple triumph of the higher constitutional principle, mediated perhaps by some proportionality test? What other rules or principles – actively expressed or covert – can be inferred. I think the following very vague rules of thumb or principles might be capable of articulation:
   1. Standing, although only rarely articulated as a factor (*Al Haq* being the exception proving the rule), may well be a substantial consideration in the case law, particularly in those cases presented by judicial review. The more abstract and unconnected to the vindication of concrete personal rights, the more the dispute will be felt to be straying unjustifiably into the territory of advisory declaration, of relator action, of legal busy-bodiness of the kind that the Court will not contemplate in an area as sensitive as foreign affairs. Given that these cases are on the margins of the heavily-mined constitutional border setting the exclusive territory of the Executive, Courts understandably do not want to go for a judicial stroll there unnecessarily.
   2. Where scrutiny is prompted/justified by a compelling reason, the Courts will, as in *Abbasi* and *Rahmatullah* seek to “carve out” areas of purely national executive action to which they will apply purely domestic standards of review, even if such exercise borders on the artificial. (The notion that the judgments in *Abassi* and *Rahmatullah SC* did not impugn or pass comment on the conduct of the US is difficult to sustain. But, on the plane of international diplomatic discourse, it may be an easier thing to brush off from a domestic Court than a categoric statement by a Government).
   3. The degree, nature and aim of domestic statutory engagement with or targeting of the alleged “forbidden area” is critical. The more clear it is that Parliament intended the Court to wrestle with issues, however difficult, the clearer the mandate (from a separation of powers/discharge of function perspective) to do so. In principle it can be a complete answer to any argument of justiciability (as in *Adan* type cases); but in practical terms lesser forms of statutory engagement/conferral of jurisdiction probably operate only to lower to varying degrees the height of the presumption against intervention.
   4. The relevance of domestic criminalisation of conduct that also generates private claims in tort or relator-style proceeding in public law to the approach to justiciability of such claims is likely to be a hot topic in months and years to come, as *Noor Khan* and the forthcoming Libyan tort claims are likely to explore. There is an obvious tension between the constitutional principle against giving advisory declarations and the basic function of the Court acting as a guardian of the rule of law. The criminalisation dicta invariably arise in cases where the criminalisation is of acts of private individuals, or concerns crimes that individuals and state officers alike may commit. Extra-territorial criminality may be a particularly significant factor in those cases where the crime in question is, however, directed at state or state-sponsored action (such as torture, war crimes etc).
   5. The Justice and Security Act 2013 must be seen for what it is in part – a Parliamentary response to and solution for the increased role of the Court in inquiring into matters that were formerly “forbidden areas” of the most sensitive kind – those areas combining considerations of national security and international relations. Such increased intervention has, of course, itself been a product of earlier legislation and Executive action curtailing ordinary liberties. It would be regrettable if the Government sought to have its cake and eat it, by contending that the JSA regime applied only to national security issues, whereas conventional PII and justiciability bars continued to act in tandem. Put another way, given that the predominant concern in many cases is not to cause international embarrassment by domestic Courts publicly labelling the actions of foreign governments unlawful or even criminal, it might be hoped that at least one benefit of closed proceedings might be a greater willingness on the Courts’ part to engage with the illegality of UK action, even where it entails a collateral attack upon the action of friendly states.

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