

# **Foreign Affairs in the English Courts since 9/11**

## **Lord Sumption**

### **Lecture at the Department of Government, London School of Economics**

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“The laws”, wrote the French novelist Honoré de Balzac, “are spiders’ webs, laid out to catch to catch little insects, which the great insects pass through unscathed”. In the law’s bestiary, there are few greater insects than the state. There is a school of thought that holds that the state is not only the greatest insect but also the most poisonous one. For a number of years the conduct of foreign affairs has served as one of the great forensic battlegrounds between those who take that view and successive governments who, understandably, do not.

There are a number of reasons why this should have recently become an issue. In the first place, in the short life of the present century, foreign affairs have generated moral issues of passionate concern to a significant part of our population, far more than any comparable period since the Second World War. Nuclear weapons development, relations with autocracies with poor human rights records, and the use of armed force in Iraq are just three of the more obvious examples. We may not believe, with Machievalli, that no subterfuge is too gross to be deployed in the interest of the state. But the polar opposite is just as problematic. It is exceptionally difficult to operate a morally pure foreign policy. Relations between states necessarily involve a measure of compromise between different and sometimes opposing values, even when one is dealing with countries that are both democracies and allies. The response of western democracies to the threat of international terrorism has at times been characterised, particularly in the United States, by a degree

of ruthlessness that raises major moral issues of its own and is hard to reconcile with either their legal traditions or ours. Secondly, the growing emphasis in English public law on transparency, combined with the wide scope of the English rules of disclosure in litigation and the diminishing role of public interest immunity has exposed the workings of government in an area of human activity which has for centuries depended on the confidentiality of communications and the secrecy of intelligence-gathering operations. In a recent case, a Divisional Court took the view that the press had a distinct interest in the question whether communications about intelligence between the American and British governments, which had been the subject of a PII certificate by the Foreign Secretary should be published. I doubt whether this would have occurred to an earlier generation of judges. Third, and partly because of these factors, the operations of government in the domain of foreign policy and intelligence-gathering, have aroused intense distrust and suspicion in the press, an important section of the public and, it is fair to say, of the judiciary. This distrust is not easy to dispel without compromising the confidentiality of communications with foreign governments and the secrecy that is bound to protect intelligence work if it is to be effective. Fourth, the background to all of these developments, has been the exponential growth of judicial review over the past thirty years, which has led many people to look to the courts to inject a higher morality into public decision-making, untrammelled by the impurities of the political process. Law is animated by a combination of abstract reasoning and moral value-judgment, a heady mixture which seems a great deal more attractive and more honourable than the messy compromises that are in practice required to maintain relations with foreign states. In England, the significance of this factor is greatly increased by the breadth of the English rules about standing in judicial review proceedings. Just about any one can apply for judicial review if he has either a personal or an institutional concern which the outcome. This approach necessarily exposes the courts to a great deal of litigation which is essentially politics by other means. It opens the

government to challenge in the courts by pressure groups, often concerned with a single issue, which have no interest in the process of accommodation between opposing interests and values that is fundamental to the ability of nations to live in peace. Fifth, and arguably the most important single factor, the enactment into English law of the European Convention on Human Rights, has obliged the court to scrutinise foreign policy decisions impacting on domestic human rights, in a way that would not have been required before. I shall say more about this factor later in this lecture.

It is a matter of speculation, but I suspect that if Britain were still a world power, the interests of the state would receive a larger measure of respect from both the public and the courts, as they once did in England and still by and large do in the United States. The projection of national power, whether hard or soft, no longer strikes most people as a major public interest on a par with, say, the protection of human rights at home and abroad. It is not my function to either welcome or regret these changes. I simply note that they have occurred and command broad assent among most of the politically informed population. They are therefore inevitably part of the background against which judges have to decide the growing number of cases relating to English foreign policy which come before them.

Until recently, foreign policy was one area in which government did indeed pass unscathed through Balzac's spider's web. The same was broadly true of the attendant domains of defence and intelligence. Almost every governmental act in the field of foreign relations is an exercise by ministers of the prerogative powers of the Crown. At one time, it was thought that that fact alone made it immune from judicial scrutiny. In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, the House of Lords held that the mere fact that the legal authority for an act of government was the prerogative of the Crown did not make it immune from judicial review, but that the subject matter of some prerogative powers might have that effect. Three out of the five members of the Committee expressed the view that

foreign affairs were not susceptible to judicial review. This, according to Lord Roskill, was because **“their nature and subject-matter is such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner”** (at p. 398). This judicial instinct was not peculiar to England. It is a feature of the law of a number of continental jurisdictions with highly developed systems of public law, including the Netherlands and Italy. It exists in most common law countries, and in particular in the United States, where the rules about standing are much tighter than they are in England, and the relative immunity of the executive’s foreign policy decisions from judicial scrutiny is probably the most robust part of the political questions doctrine. As Justice Jackson said in the Supreme Court in the famous 1950 case of *Johnson v. Eisentrager* 339 US 763, 789, **“it is not the function of the judiciary to entertain private litigation... which challenges the legality, the wisdom or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.”**

The English courts, in keeping with their traditional suspicion of large constitutional theories, have not been very good at explaining why the courts should be any more reticent in dealing with the Foreign Secretary’s decisions than those of, say, the Secretary of State for Work and Pensions. Two approaches can be discerned in the various judicial statements on the matter. One is based on the concept of non-justiciability, and the other on the constitutional division of powers. The theory of non-justiciability is the more ancient of the two, and also the more absolute. To say that an issue is non-justiciable is to say that there is a rule of law that the courts may not decide it. Justiciability is not a matter of discretion. It is tantamount to a limitation on the court’s jurisdiction, albeit one which is self-imposed. The concept is founded upon the proposition that the very nature of the relations between states means that there are no juridical standards by which to determine the lawfulness of sovereign acts done in the conduct of the sovereign’s foreign relations. It follows that even if the court has jurisdiction over the parties, it has no right to pronounce on the subject-matter. In *Blackburn v Attorney-*

*General* [1971] 2 All ER 1380, the Court of Appeal might have dismissed Mr. Blackburn's application for an injunction to restrain the accession of the United Kingdom to the Treaty of Rome on the ground that the Crown had power to accede to the treaty and had not been shown to have acted in breach of any principle of public law. Instead, the proceedings were dismissed on the ground of non-justiciability. An exercise of the prerogative power of the Crown in the making of treaties, said Lord Denning, "cannot be challenged or questioned in these courts." The high water mark of the theory came in the 1970s, in *Buttes Gas* litigation in England and the United States between two oil companies, about the location of the boundary between the sheikhdoms of Umm al Qaywayn and Sharjah in the Persian Gulf. The issue was decided (or rather left undecided) on both sides of the Atlantic, on the ground that it raised questions which were non-justiciable, because no law bound the acts of sovereigns in their dealings with each other. In the United States proceedings, the Fifth Circuit Court of Appeals said:

**"A judicial resolution of the dispute over Abu Musa between Iran and Sharjah is clearly impossible. In their external relations, sovereigns are bound by no law; they are like our ancestors before the recognition or imposition of the social contract. A prerequisite of law is a recognized superior authority whether delegated from below or imposed from above where there is no recognized authority, there is no law. Because no law exists binding these sovereigns and allocating rights and liabilities, no method exists to judicially resolve their disagreements. The ownership of the island, and derivatively its waters, has long been the subject of dispute. Were we to resolve this dispute we would not only usurp the executive power, but also intrude the judicial power beyond its philosophical limits."**

Echoing these sentiments in the English proceedings, Lord Wilberforce, delivering the leading speech in the House of Lords, held:

**"Leaving aside all possibility of embarrassment in our foreign relations (which it can be said not to have been drawn to the attention of the court by the executive) there are ... no judicial or manageable standards by which to judge these issues, or to adopt another phrase, the court would be in a judicial no man's land "<sup>1</sup>.**

Both of these cases were decided on the basis that as between sovereigns, there is no law. This might be thought rather strange, since international law is certainly law. There must, after all, have been an answer to the question

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<sup>1</sup> *Buttes Gas and Oil Co. v Hammer (No. 3)* [1982] AC 888 at [46]

where as a matter of international law the boundary between these two territories lay, however difficult it might be to discover what it was. The more satisfactory analysis of cases like *Buttes Gas* was surely that it turned on that peculiarity of Anglo-American jurisprudence, the “Foreign Act of State” doctrine. The Foreign Act of State doctrine does not depend on the absence of juridical standards by which to assess what are in most cases ordinary torts. It depends on the principle of comity that the courts of one country will not sit in judgment on the sovereign acts of another, even though they would be perfectly competent to do so if it was relevant. There has more recently been a retreat from the more extreme positions adopted in *Buttes Gas*, at any rate in England. In *Kuwait Airways Corporation v. Iraqi Airways Co (Nos 4 & 5)* [2002] 2 AC 883, the House of Lords gave relief on the basis that the Iraqi invasion of Kuwait was a flagrant breach of international law. The non-justiciability principle, said Lord Nicholls, did not mean that “*the judiciary must shut their eyes to a breach of an established principle on international law committed by one state against another where the breach is plain and indeed acknowledged.*”

The truth is that the principle of non-justiciability has never been a very satisfactory explanation of the reluctance of the courts to interfere with the conduct of foreign relations. The Foreign Act of State doctrine is not based on non-justiciability, and has no bearing on acts of the United Kingdom executive. The acts of the executive are by definition justiciable in its own courts. The powers of the Crown in the conduct of foreign relations, save in the few areas which are governed by statute, are discretionary powers. There are principles of public law governing the exercise of discretionary powers which are perfectly capable of being applied to the conduct of foreign policy as they are in any other area of executive action. If in practice the courts intervene very rarely in these matters, it cannot be on the ground that there are no relevant juridical standards or that the issue is incapable of being resolved judicially. It must be on the ground that the constitutional distribution of powers among the organs of the state makes

foreign policy the peculiar province of the executive. But so what? All executive discretions are assigned by the constitution to the executive. Discretions in the conduct of foreign affairs are simply broader than other discretions. It is a question of degree. In *Secretary of State for the Home Department v. Rehman* [2003] 1 AC 153, Lord Hoffmann justified the Court's reticence in the closely related area of national security on grounds which were essentially pragmatic and constitutional, and had nothing to do with justiciability. At paragraph 62, he said:

**“It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.”**

This is a test of appropriateness rather than jurisdiction, and it necessarily operates more flexibly. For however wide the executive's discretion it cannot be unlimited or exercisable perversely or for any purpose whatever.

Very much the same point was made by the Court of Appeal in *Marchiori v Environment Agency* [2002] Eu. L.R. 225. This was ostensibly a case about environmental standards, but in fact was a not very well-concealed challenge to the United Kingdom's defence policy. Ms. Marchiori was an anti-nuclear weapons campaigner. She objected to the fact that the Environment Agency had authorised the discharge of nuclear waste from a military facility where warheads were manufactured for Trident missiles. Her argument was that under the Euratom Treaty such authorisations required a justification by reference to some public benefit, and there was no public benefit associated with the possession of nuclear warheads. Some of us might be rather startled by the idea that the proper organ of the United Kingdom to weigh up the pros and cons of possessing nuclear weapons is an official of the Environment Agency. But of course it was not what Ms. Marchiori really

wanted. This was demonstrative litigation. She wanted a decision of the courts, even if she had to go via the Environment Agency to get it. The judgment of Laws LJ in the Court of Appeal contains a valuable statement of where we currently are on issues that would once have been regarded as non-justiciable:

**“It seems to me, first, to be plain that the law of England will not contemplate what may be called a merits review of any honest decision of government upon matters of national defence policy. Without going into other cases which a full discussion might require, I consider that there is more than one reason for this. The first, and most obvious, is that the court is unequipped to judge such merits or demerits. The second touches more closely the relationship between the elected and unelected arms of government. The graver a matter of State and the more widespread its possible effects, the more respect will be given, within the framework of the constitution, to the democracy to decide its outcome... There is not, and cannot be, any expectation that the unelected judiciary play any role in such questions, remotely comparable to that of government... Secondly, however, this primacy which the common law accords to elected government in matters of defence is by no means the whole story. Democracy itself requires that all public power be lawfully conferred and exercised, and of this the courts are the surety. No matter how grave the policy issues involved, the courts will be alert to see that no use of power exceeds its proper constitutional bounds.” [at 38].**

The last decade has witnessed the progressive retreat of the non-justiciability theory and the advance of the qualified division of powers theory, which as I have suggested is simply a rather grand way of emphasising the breadth of the government’s discretion. The result has been, as one might have predicted, that the boundary of the discretion has been drawn in different places depending on the nature of the particular decision under review. Some aspects of the conduct of the United Kingdom’s foreign relations have proved to be as readily reviewable as any other executive decision.

The extreme case is of course the choice between peace and war. In reviewing the military interventions of the English government, the courts have arrived at a position practically indistinguishable from the old non-justiciability rule, although justified on a different basis. The legality of the Anglo-American invasion of Iraq in 2003 was, to put it mildly, a matter of some controversy everywhere outside the United States. The great majority

of international lawyers of repute considered it to be contrary to international law, in the absence of the United Nations authority and did not accept that any of the relevant resolutions conferred that authority. The United States was inclined to respond to this difficulty in the way that the British had done at the time of the Suez crisis of 1956, by simply ignoring it. In 1956, the Attorney-General, Sir Reginald Manningham-Buller and the Solicitor-General Sir Harry Hilton-Foster, both supported the invasion politically although both believed and told the Prime Minister that it was illegal. The Chief of Imperial General Staff, Sir Gerald Templer, issued the deployment orders without troubling himself with the legal issue. These are attitudes characteristic of an imperial power, and we should not be particularly surprised to find them adopted by the United States. It is a sign of how far the climate of British opinion had changed by 2003 that the Chiefs of Staff required an assurance from the Attorney-General that operations in Iraq were lawful. They famously received one that had been prepared on a basis not wholly consistent with his previously expressed views and supported by reasoning which provoked the resignation of one of the Foreign Office legal advisers and was rejected by every serious authority on international law.

In *Campaign for Nuclear Disarmament v the Prime Minister* [2002] EWHC 2777, [2003] A.C.D. 36 a Divisional Court presided over by Simon Brown LJ dismissed an application for a declaration that United Nations Resolution 1441 did not authorise military action against Iraq to which the British and Americans were fast moving. The Court was well aware of the difficulty about treating Resolution 1441 as authority for war, to which it referred in its judgment. But it declined to rule upon the meaning of an international instrument on two grounds. First, it had no jurisdiction to declare its meaning in circumstances where it was not relevant to any domestic law right or interest of the Applicants. Secondly, as a matter of discretion such a declaration should not in any event be made because it would adversely affect the international relations of the United Kingdom, potentially embarrass the government, and tie its hands in any international

negotiations on the question. The result would presumably have been exactly the same if the application had been made at the point when the deployment orders were being given, although the government would on that footing have made the decision to invade on the basis of an arguably erroneous view about the relevant international law. The reasoning of the court implies that the government's discretion in the conduct of foreign affairs extended to negotiating or conducting military operations even on the wrong legal footing. It must be most unlikely that the court would have held back in the same way, if some less momentous decision was being made on a legally erroneous basis. In his concurring judgment, Kay LJ observed:

**“I readily accept that the ambit of the “forbidden areas” is not immutable and that cases such as *Everett and Bentley* [2001] 1 Cr App 307 CA illustrate how the areas identified by Lord Roskill in the CCSU case have been reduced. However, the authorities provide no hint of retreat in relation to the subject-matter of the present case. This is hardly surprising. Foreign policy and the deployment of the armed forces remain non-justiciable.”**

The *CND* case continues to use the language of non-justiciability, but the reasoning is in reality based on the breadth of the discretion accorded to the executive in certain areas, as Richards LJ points out in the third judgment.

In *R v. Jones* [2007] 1 AC 136, the House of Lords dealt with a number of criminal appeals arising out of the attempt of the Defendants who trespassed on military bases shortly before the invasion of Iraq began in an attempt to obstruct the deployment of tanks, aircraft and other equipment. Ms. Jones' defence was that they were legally entitled to take steps to obstruct a criminal attempt on the part of the government to wage aggressive war. Lord Bingham, who presided over the appeals is now known, from his writings after retirement, to have believed the war to be illegal. But in common with the rest of the Committee, he rejected the Appellants' defence on the ground (among others) that the recognition of an English law offence of waging aggressive war would:

**“call for a decision on the culpability in going to war either of Her Majesty's government or a foreign government, or perhaps both if the states had gone to war as allies. But there are well-established rules that the courts will be very slow to review**

**the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services, and very slow to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law.” [at 30]**

One sees Lord Bingham here expressing the rule not, as Kay LJ had done, as a question of justiciability, but as a principle of judicial caution in cases concerning the conduct of foreign relations. The court was not precluded from reviewing governmental decisions in this area. It should merely be “very slow” to do so.

When one comes to less critical foreign policy issues than the choice between peace and war or the ratification of treaties, the courts are in practice more inclined to intervene.

In *Abbasi v. Secretary of State for Foreign & Commonwealth Affairs* [2002] EWCA Civ 1598, the applicant was a British subject who had been detained by the Americans at Guantanamo Bay. The applicant submitted that his detention was a violation of his fundamental human rights and that the Secretary of State owed a duty to assist him. The Secretary of State submitted that the English court could not examine the legitimacy of action taken by a foreign sovereign state, nor could it adjudicate upon actions taken by the executive in the conduct of foreign relations. The Court of Appeal did not accept either submission in its full breadth. It did consider the lawfulness of the Foreign Secretary’s position. It concluded that international law recognized no general duty to protect a citizen abroad. It then applied to the Foreign Secretary’s decision the ordinary principles of public law relating to substantive legitimate expectations, and found, on the basis of published statements of policy by the Foreign Office, that there was a legitimate expectation that the Foreign Secretary would at least consider making direct representations to foreign governments on behalf of British citizens. Since Mr. Abbasi’s request had in fact been considered, his application failed. The Court held that it would have been inappropriate to order the Secretary of State to make any specific representations to the United States, even in the

face of an apparently clear breach of a fundamental human right, because this have interfered with the conduct of foreign policy and at a particularly delicate time. But in spite of the delicacy of the situation, the Court expressed its own view that Mr. Abbasi was being detained in contravention of fundamental principles recognized in both England and the United States and in contravention of international law. So, having held that it should not require the Foreign Secretary to make the representations that Mr. Abbasi wanted, the court made the representations itself. Perhaps that did the trick. The Secretary of State later announced that Mr. Abbasi was to be returned after "**intensive and complex discussions**" with the US government, and in January 2005, he was flown back to the UK.

*Al Rawi v Secretary of State for Foreign and Commonwealth Affairs* [2008] QB 289 was another case of prisoners at Guantanamo seeking consular support from the British government. Their position was even more difficult than Mr. Abbasi's, because although they had all at one stage resided in the United Kingdom, they were not nationals, so that the United Kingdom had no standing under the Anglo-American consular treaty to make representations on their behalf. Two of them had been arrested in the Gambia and "rendered" to an American base in Afghanistan and the third had been captured by bounty hunters in Pakistan and handed over to the Americans. All ended up in Guantanamo. The main issue in the case was whether there was nevertheless some principle of international law that required the Foreign Secretary to intervene. But for our purposes, the interest of the case lies in the observations of the Court of Appeal contrasting the current approach to the judicial review of foreign policy decisions with the one that would have been adopted on two decades before.

**"The conduct of foreign relations by the executive government of the United Kingdom,"** they observed, **"would have been regarded as beyond the scope of judicial review. A generation or more ago the courts would, we think, have said there was no jurisdiction to conduct such a review. More recently the line would have been—has been—that the conduct of foreign relations is so particularly the responsibility of government that it would be wrong for the courts to tread such**

ground; and aside from the division of constitutional territory, the courts have not the competence to pass objective judgment, hardening into law, in so intricate an area of state practice. However, in this case, on 16 February 2006, Collins J granted permission to seek judicial review of the United Kingdom's response to requests for assistance in securing the release and return of the detainee claimants. The case was heard by the Divisional Court (Latham LJ and Tugendhat J) on 22 and 23 March 2006. No point as to jurisdiction was taken... What has been the engine of so painstaking a review in an area which in recent years was thought barely apt for judicial review at all? The prisoners at Guantanamo Bay, some of them at least, have suffered grave privations. In this appeal we should, in our judgment, proceed on the premise that the detainee claimants have been subjected at least to inhuman and degrading treatment... The case is thus acute on its facts. The force which seeks to press the courts into this area, and within it to exercise a robust independent judgment, is the legal and ethical muscle of human rights and refugee status... To our mind, the centre of the case consists in appeals to the claimants' human rights and, in the case of Mr El Banna and Mr Deghayes, refugee status. We have to decide how far such appeals should rightly press the courts into territory they do not generally occupy or have not so far occupied." [at 2-4].

The shift away from non-justiciability is here overtly acknowledged. So, rather strikingly, is the reason for it, namely the growing emphasis on the protection of human rights and the barely concealed revulsion of English judges against the conduct of the United States. This is the second of the trio of cases in which strong objections to the American treatment of so-called unlawful combatants has been publicly expressed from the bench and has contributed to moving the legal goalposts within the United States principally. The applicants failed. But what matters about the decision is the application to foreign policy decisions of the ordinary public law principles of lawfulness, rationality, and procedural and (where appropriate) substantive fairness. The sensitivity of the subject-matter is reflected only in the recognition of a wider margin of appreciation. At the conclusion of the judgment, the Court of Appeal said:

**"This case has involved issues touching both the Government's conduct of foreign relations, and national security: pre-eminently the former. In those areas the common law assigns the duty of decision upon the merits to the elected arm of government; all the more so if they combine in the same case. This is the law for constitutional as well as pragmatic reasons... The court's role is to see that the Government strictly complies with all formal requirements, and rationally considers the matters it has to confront."** [at 148].

The third of the trio of cases which was clearly strongly influenced by judicial revulsion against American policies and methods, was the decision, initially of a Divisional Court and then of the Court of Appeal, in *Binyam Mohammed v Secretary of State for Foreign and Commonwealth Affairs* [2011] QB 218. The case had a curious history. It began as a private law action on the *Norwich Pharmacal* principle by Mr. Mohamed at a time when he was in Guantanamo awaiting trial before a military tribunal for his alleged activities as an unlawful combatant. The relief sought was an order requiring the Foreign Secretary, as the minister responsible for the Secret Intelligence Service, to disclose communications between the SIS and the American intelligence services which would help him to prove that he had been tortured at the request of the Americans by agents of a third country. The background to the case was therefore extremely unattractive. Mr. Mohamed, however, was released from Guantanamo at an early stage of the proceedings, partly as a result of British government pressure and partly as a result of the intervention of the US military judge charged with the preliminary assessment of the case. The proceedings nevertheless continued mainly on the question whether certain paragraphs of the Divisional Court's judgment, which summarised the contents of some of the relevant communications, should be redacted. The United States strongly objected to their disclosure, because although the basic facts were by now widely known and acknowledged by the US government itself, they attached importance to the principle that material supplied by them under intelligence cooperation arrangements should not be further disclosed. The paragraphs in question added circumstantial detail to the very full account of the facts in the open part of the judgment, but were not necessary in order to understand the court's reasoning. The only purpose of disclosure at that stage was to embarrass the Americans and possibly the British for being too close to them. There was certainly a widespread feeling among commentators that the Americans and the British ought to be embarrassed, but the Foreign Secretary understandably took the view that as party to the Anglo-American

cooperation agreements, the United Kingdom should not disclose the material against the strong objections of those who had provided it, even though he would himself have had no objection to disclosure. Put crudely, the issue was whether the public interest in open justice required publication of the offending paragraphs, and if so whether that should prevail over the obligation of confidence which the United Kingdom owed to the United States when it received the material. The majority of the Court of Appeal, consisting of Lord Neuberger MR and May LJ expressed themselves to be sceptical of the Foreign Secretary's view that Anglo-American intelligence cooperation might be adversely affected by publication. But they did not think it right to overturn the judgment of the Foreign Secretary on that point. They in fact ordered the publication of the redacted paragraphs on a different ground, namely that the argument had been overtaken by events when, after the conclusion of the oral argument, a US District Court itself published an account of Mr. Mohammed's treatment which removed any confidentiality attached to the material. That ground appears to have no wider implications for the judicial review of foreign policy decisions, but what is remarkable about the case is the palpable anger of the courts about the position in which they had been placed by the insistence of the Americans on maintaining a confidentiality to which they were certainly entitled under the Anglo-American intelligence cooperation arrangements, but which the English courts considered to have no purpose other than to suppress embarrassing facts. The Divisional Court actually went so far as to reject a statement made by the US Secretary of State Mrs. Clinton as to what American policy on the disclosure of their intelligence material was. They said that her statement was irrational, and that American policy on the disclosure of intelligence material must have changed since the departure of the Bush administration, notwithstanding her insistence that it had not. The majority of the Court of Appeal declined to follow the Divisional Court in this part of its reasoning. But it is perhaps a sign of the growing self-confidence of judges addressing issues of foreign policy. It is rare for diplomatic exchanges of this kind to be

put before a court, but there cannot be any other English case in which the court has responded by characterising the position of the foreign minister of an allied country party to the exchange as perverse.

None of this means that the Courts will positively direct the Foreign Secretary as to how he should deal with foreign countries. All of it is dependent on his having disregarded some sufficient domestic public interest that the law of the United Kingdom recognises. In *Al-Haq v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin), a Divisional Court rejected an attempt to build on *Kuwait Airways, Abbasi* and *Al Rawi* by requiring the Foreign Secretary to use his best endeavours to secure the observance by Israel of the human rights of Palestinians in Gaza and the West Bank. But it is clear that the critical factor in this decision was the absence of what the court called a “*domestic foothold*”, i.e. of some factor engaging the responsibility of the United Kingdom, because of some connection between the infringement of the victim’s human rights and the United Kingdom, sufficient to engage the United Kingdom government’s responsibility in either domestic or international law.

*Al-Haq* was an extreme case in which there was no connection at all with the United Kingdom, other than the connection implicit in the applicant’s point that the whole world should be concerned about breaches of human rights by Israel. It is, however, clear that the range of relevant connections with the United Kingdom is relatively wide, and becoming wider. This is partly because of the widening ambit of the Human Rights Convention as interpreted by the Strasbourg Court, and partly because the Strasbourg court has no doctrine of its own equivalent to non-justiciability and no concern with the constitutional distribution of powers within a contracting state. The only tools available to Strasbourg for recognising the special competence of the executive and the legislature in domain of foreign affairs are the relatively narrow margin of appreciation allowed to contracting states, and the territorial limits of the Convention’s application.

In *Bankovic v Belgium* (2001) 11 BHRC 435, the Strasbourg Court declined jurisdiction over the bombing by NATO air forces of Belgrade in 1999 on the ground that the Convention was concerned only with the domestic legal order of contracting states within their own territory. The Strasbourg court has since then refused to become involved in the conduct of troops of contracting states operating under NATO and United Nations authority in Kosovo, on the ground that NATO and the United Nations are not party to the Convention. But these decisions leave open the possibility that troops acting under the sole authority of Convention states outside their own territory may nevertheless exercise authority of a sovereign character there, with the result that the Convention may apply to what they do there. The result may be to impose the principles of the Convention on the conduct of foreign policy and military operations by the United Kingdom, without even the more limited degree of deference to the autonomy of the executive in these areas which characterises recent English case law.

As far as the United Kingdom is concerned, the most significant decisions have been *Al-Skeini v United Kingdom Application no. 55721/07* (2011) 53 E.H.R.R. 18 (ECHR (Grand Chamber)) and *Al-Jedda v United Kingdom Application No. 27021/08* (2011) 53 E.H.R.R. 23 (ECHR (Grand Chamber)), both of which concerned the conduct of British troops occupying southern Iraq. *Al-Skeini* concerned the death of civilians in the course of military operations in the immediate aftermath of the invasion of Iraq, and in one case, the death of a civilian in British military custody. *Al-Jedda* concerned the internment without charge or trial of an Iraqi national in a British detention centre in Basrah. In *Al-Skeini*, the House of Lords, by a majority (Lord Bingham dissenting) held that the Convention could have extraterritorial application, but limited it to a narrow category of cases where the United Kingdom was not merely a military occupying power but exercising direct and effective control over the applicant. On that footing, the only admissible complaint was that of the Iraqi who died in British military custody. The Strasbourg court, however, extended the reach of the

Convention beyond those who were directly and effectively controlled by British troops to the whole area for which Britain had responsibility as an occupying power. The decision in *Al-Skeini* effectively decided the outcome of *Al-Jedda* also, subject to an argument (which the United Kingdom ultimately lost) about whether the application of the Convention was displaced by the authority of the United Nations resolutions under which British forces were at the relevant time acting.

*Al-Skeini* and *Al-Jedda* were concerned with the impact of military operations on the particular complainants, although the application of the Convention to all territory where the United Kingdom is an occupying power will inevitably mean that policy decisions about the conduct of the occupation will fall to be reviewed in circumstances where they would not have been before. Neither case concerned the formulation of British foreign policy in the strict sense of the word. That question did, however, arise in *Gentle and Clark v the Prime Minister* [2008] 1 AC 1356. The applicants were relatives of two British soldiers who had been killed in Iraq. They wanted an independent inquiry into the causes of their deaths, which would address the question whether it had been lawful to deploy them to Iraq at all. The argument was based on an analogy with the decision of the Strasbourg Court in *Soering v United Kingdom Application No. 14038/88* 11 E.H.R.R. 439, that the United Kingdom could not extradite to the United States a person who would be subjected to inhuman treatment there. That decision was made not on the basis that the Convention applied to what the Americans did in America. Plainly it did not. The ground was that the Convention applied to the decision of the United Kingdom to extradite Mr. Soering, which was made in the United Kingdom. By parity of reasoning, it was argued, the Convention should apply to the decision made by the United Kingdom government in the United Kingdom to deploy troops to Iraq. Since that decision exposed them to being killed in Iraq, the United Kingdom was bound by Article 2 of the Convention to conduct a full investigation of the circumstances in which that decision was made. There were two short

answers to the applicants' case. The first was that even if the Convention applied on this basis, Article 2 only required the state to conduct an investigation of the circumstances of the deaths, and not of the background issues of policy which had led to the soldiers being in Iraq at all. The second answer was that the rights or wrongs of the invasion had nothing to do with Article 2 of the Convention. There was no obligation under Article 2 not to expose soldiers to risks inherent in their profession, and such an obligation could not be said to arise from the mere fact that in this case the decision to expose them was or might be contrary to the provisions of another treaty, namely the United Nations Charter. The Court of Appeal accepted the first of these points and the House of Lords accepted both of them. But neither court was willing to leave the matter there. The Court of Appeal was mustard keen to deal with the case on the ground that being a question of foreign policy, the matter lay within the special domain of executive discretion, a point which they referred to, not wholly accurately, as a question of justiciability. This had been a source of some embarrassment to me as Counsel for the Government, for although it was a point in my favour, I could see no respectable basis for it. If Article 2 was engaged by the decision to deploy troops to Iraq, that decision was necessarily justiciable because the Human Rights Act said so. If it was not engaged, then since the argument was wholly based on it there was nothing to be decided at all. Nonetheless, the point emerged as the principal ground of their decision. In the House of Lords House of Lords, the appeal was heard by a board of nine. The Committee accepted that the issue was justiciable. But they also observed that the Convention was concerned to regulate the relations between contracting states and individuals affected by their actions or inactions. It was never intended to deal with the legal relations between states, such as the right to conduct military operations, which were dealt with by other international instruments, primarily the United Nations Charter. This at least offers some assurance that the courts do not propose to treat the obligation to give effect to the human rights Convention as a basis for challenging governmental

decisions on major policy choices in foreign affairs. But there is no doubt that they will continue to scrutinise the impact of foreign policy decisions on individuals in a way that would not long ago have been unthinkable. The law's web is spun more finely, and the State may escape it less often than before.