

# International Law in the UK Supreme Court

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13 February 2017

1. The UK takes a fundamentally dualist view of international law. In other words, it sees domestic and international law as operating on different planes. International law has of course inspired the common law. The UK's international commitments are also the basis of much domestic legislation. But the reception of international law into domestic law depends upon its acceptance in one of two ways: either by Parliament through legislation or by the judges through the common law<sup>1</sup>. There have been rare voices advocating a different approach: see e.g. *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16. There Lord Kerr at [235]<sup>2</sup> argued that the executive should be bound at the domestic level by human rights commitments undertaken at the international level. But even Lord Kerr recognises that his view is in conflict with "constitutional orthodoxy".
2. The dualist view was at the heart of the Supreme Court's recent decision in *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5. The Court acknowledged that at the international level:

"the general rule is that the power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the courts - see *Civil Service Unions* case cited above, at pp 397-398."

3. But it went on to explain:

"This principle rests on the so-called dualist theory, which is based on the proposition that international law and domestic law operate in independent spheres. The prerogative power to make treaties depends on two related propositions. The first is that treaties between sovereign states have effect in international law and are not governed by the domestic law of any state. .... The second proposition is that, although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law.

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<sup>1</sup> In France article 5 of the Code Civile was an attempt to enshrine the principle that the legislature makes, while the judges simply apply the law. In the UK, we recognise explicitly judges make law.

<sup>2</sup> Drawing inspiration from an earlier statement by Lord Steyn in *re McKerr* [2004] UKHL 12, [2004] 1 WLR 807, at [49-50].

It is only on the basis of these two propositions that the exercise of the prerogative power to make and unmake treaties is consistent with the rule that ministers cannot alter UK domestic law.”

4. In the *Miller* case, the majority conclusion was that, because the giving of a notice under article 50 TEU would not have purely international effects, but would change domestic law and was not contemplated by the European Communities Act 1972, it required the Parliamentary authorisation by statute. The majority regarded the case as falling within a well-established principle, which was acknowledged by all the Justices. As one dissenting Justice said:

“At the heart of the case is the classic statement of principle by Lord Oliver in the *Tin Council* case (*JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418):

“... as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament ...” (Lord Oliver pp 499E-500D).”

5. The other side of the coin, that is cases where international law operates independently of domestic law, and there is no domestic “foothold” to enable courts to adjudicate, can be illustrated by several cases:

- a. In the *Tin Council* case itself, the House of Lords refused to adjudicate on a purely international agreement. The International Tin Agreement was an agreement between member states to establish the International Tin Council. The Council made contracts in its own name with third parties such as the claimants, and became insolvent, owing the claimants monies. The claimants then sought to hold the member states liable on the basis that, upon the true construction of the International Tin Agreement, the Council was acting as agent for its member states. The claim was summarily rejected as non-justiciable.
- b. *R v Margaret Jones* [2006] UKHL 13, [2007] 1 AC 136, the defendants were variously charged with causing criminal damage or with trespass at military airbases, to which their defence was that they were attempting to prevent the UK from committing the crime of aggression by invading Iraq. The court held that although in the past the common law had imported from international law the criminal offence of piracy, the days had gone by when it should import new criminal offences without Parliamentary

sanction. The crime of aggression at international law was therefore no part of domestic law, and the defences failed.

- c. In *R v Gentle* [2008] UKHL 20, Mrs Gentle sought an order for a public enquiry into the circumstances surrounding the invasion of Iraq by British forces in 2003, including in particular the steps taken by the Government to obtain timely legal advice on its legality. She claimed that article 2 of the European Convention on Human Rights (“the ECHR”) gave her such a right. We held

“The draftsmen of the European Convention cannot have envisaged that it could provide a suitable framework or machinery for resolving questions about the resort to war. They will have been vividly aware of the United Nations Charter, adopted not many years earlier, and will have recognised it as the instrument, operating as between states, which provided the relevant code and means of enforcement in that regard, as compared with an instrument devoted to the protection of individual human rights. .... 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”.

6. In contrast, where the interpretation of an international instrument is relevant at the domestic legal level, domestic courts have to undertake it. Thus, in the English Court of Appeal case of *Occidental Exploration Production Co v Republic of Ecuador* [2005] EWCA Civ 1116, [2006] QB 432, the interpretation of an international treaty was necessary in order to determine the scope of the parties’ agreement to arbitrate in a bilateral investment treaty arbitration.
7. Dualism does not therefore mean that international law issues never come before domestic courts. Increasingly over the last two or so decades, they have done so. In the United Kingdom, this is in part due to the European Convention on Human Rights (the “ECHR”), which only became part of our domestic law in October 2000. I shall return to the ECHR later in this talk, But, even apart from the ECHR, there has been a striking increase in reliance on and the potential relevance of international law in domestic courts.
8. First, international law has received much domestic attention, because of a strong presumption that domestic law, including statute law, can and should be read consistently with international law. And the volume of international law bodies and instruments, in areas as diverse as environmental law or the law relating to children, has accentuated the relevance of this tendency, even if international law can still sometimes be characterised as vague or unsettled. The presumption as recognised in English law is a “strong” one: *Assange v The Swedish Prosecutor*

[2012] UKSC 22, per Lord Dyson at [122]. The validity of the European Arrest Warrant issued in respect of Mr Julian Assange by a Swedish public prosecutor, turned on whether a public prosecutor is a judicial authority? For a Swedish or indeed a French lawyer, a public prosecutor requesting extradition was and is probably not so strange. *Autorité judiciaire* seems to have a wider meaning, and Sweden is not the only country giving prosecuting authorities such a role. My colleagues by a majority of 5 to 2 decided that, despite the natural meaning of the English phrase, and despite the assurances to Parliament, (i) what was perceived as a generally accepted wider international understanding should be taken as prevailing in European law at the international level and (ii) this should consequently also be applied in domestic law to keep the two in parallel.

9. As to second step, I, as one of the dissenting judges, felt that the majority was going too far in aligning domestic and international law, and was giving too little weight to the labours and intentions of Parliament. The important difference between legislative and judicial activity remains. And it should not be thought it is overlooked. To take one example, not long ago, the Supreme Court held recently, by a clear majority, that whether assisting suicide should continue to be a crime in every case (or whether there might be exceptions, e.g. for those with locked-in syndrome or terminal illness) was a matter which Parliament should, at least in the first instance, be given a further opportunity to debate: *R (Nicklinson) v Ministry of Justice* [2014] UKSC 48.
10. As a postscript to *Assange*, in a later case, *Bucnys and Sakalis v Lithuania* [2013] UKSC 71, we held that a European arrest warrant issued by the Lithuanian Ministry of Justice at the request of the prison authority had not been issued by a judicial authority and was not valid. We held that it was both open and incumbent on us as a domestic court to consider whether, in international law terms, the requesting authority was truly judicial. And in this case we held that a Ministry of Justice could not be. Issues of liberty and the rule of law were clearly involved.
11. The extent to which international law can and should influence the exercise by the executive of domestic law discretions is not an entirely easy topic. The technical answer comes in three stages:
  - a. First, domestic decision-makers, such as the executive or courts, are not *bound* when exercising a discretion to take into account the UK's international obligations: *Ex p Brind v SoS* [1991] 1 AC 696 and *R (Hurst) v Commissioner of Police* [2007] UKHL 13. Suggestions by Lord Steyn as well as by Lady Hale and myself in the last case that

the position might be different in the case of fundamental human rights obligations have not met with general approval.

- b. Second, however, domestic decision-makers are *entitled* to take international obligations into account and have done so increasingly. In summer 2015, an alteration was made to the Ministerial Code which, it has been suggested, is significant in this context. The text had stated that there was an “overarching duty on ministers to comply with the law including international law and treaty obligations and to uphold the administration of justice and to protect the integrity of public life”. The new version states simply that there is an “overarching duty on ministers to comply with the law and to protect the integrity of public life”. An attempt judicially to review this change was rejected by the High Court, but the Court of Appeal a month or so ago gave permission to renew the challenge before it.
- c. If a domestic decision-maker *does* decide to take an international obligation into account, he must also identify such obligation correctly, or his/her decision may be open to successful review. We are increasingly faced with claims for such review.

12. Domestic courts normally apply domestic law in respect of transactions affecting property within their own jurisdiction, and normally recognise the application by overseas courts of their own domestic law to property transactions within their own jurisdiction. A transfer of a New York property under New York law or of Saudi Arabian shares under Saudi Arabian law, will be recognised as valid in England. Similarly, status is normally determined by a person’s country of nationality. But respect for international law can in exceptional cases led to a different result. That was first identified as a possibility in a case concerning the Nazi laws of 1941 depriving Jews of their German citizenship: *Oppenheim v Cattermole* [1976] AC 249. More recently, it was applied at the highest level in *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19, [2002] 2 AC 883. Kuwait Airways there sued Iraqi Airways for wrongfully making use for its own purposes of the Kuwait Airways air fleet. Saddam Hussein had by act of war taken this fleet off to Iraq, and he and the State of Iraq had state immunity. But Iraqi Airways, to which Saddam Hussein gave the fleet, had no such immunity, and their only defence was that Saddam Hussein has passed an Iraqi law giving them the fleet. The law was however in flagrant breach of Security Council resolutions under Chapter VII of the United Nations Charter and contrary to international law. The House of Lords held the law could not be recognised as valid, and that Iraqi Airways was liable.

13. A potential problem in the modern legal world is the proliferation of different types and sources of international law, not all of them easily reconcilable. We have the ECHR. In addition, we have (pending Brexit) EU law and the Charter of Fundamental Rights, which, as some recent cases have indicated, may go beyond the ECHR, albeit only within the sphere of EU law. And, on top of that, we have the ultimate source of international law, the United Nations Charter, under Chapter VII of which the Security Council may make binding resolutions or orders. It is increasingly evident that these different layers of international law may not always be in complete harmony.
14. This became evident at an EU level in the famous *Kadi I* and *Kadi II* cases: C-435/05 and C-584/10P. 593/10P and 595/10P. The Security Council had passed Chapter VII resolutions requiring UN members the freezing of assets not only of terrorist organisations such as Al-Qaeda and the Taliban, but also of named individuals. The EU, although not itself a UN member (though its component states are) had introduced corresponding EU measures to give effect in EU states to the Security Council resolutions. The European Court of Justice assessed the EU measures against the fundamental right to effective judicial protection it held to exist under EU law, and invalidated the EU measures. It said that it was not challenging the Security Council resolutions, but only the EU measures, which had in its view to be measured against the standards of EU law as an autonomous legal system. One beneficial effect has been improvement of the processes at the UN level, whereby freezing orders are made and can be discharged. Another, perhaps less beneficial is a certain fragmentation, which occurs when different centres of what may be called international level emerge.
15. The Supreme Court has had to confront particularly difficult problems in this area, as a result of the extended meaning of the concept of “jurisdiction”, which, under the case law of the ECtHR determines the sphere of application of the ECHR. Article 1 of the ECHR says that Council of Europe States “shall secure to everyone within their jurisdiction” the rights and freedoms set out in the ECHR. UK courts took originally a territorial approach to this concept. So too, it seemed, the ECtHR itself when it held that the bombing of Belgrade by NATO states during the Kosovo war in Spring 1999 was outside the jurisdiction of those states: *Bankovich v Belgium* (app no 52207/99 of 21 Dec 2001).
16. But the ECtHR has since then interpreted jurisdiction so that it has a more than merely geographical sense. Drawing on public international law concepts of jurisdiction, it has gradually identified other connections as sufficient to bring a matter within a Member State’s jurisdiction – for example consular or judicial or de facto control: *Al-Skeini v UK* (2011) 53

EHRR 589. The crew of a ship intercepted on the High Seas by French forces were held on this basis to be within France's control: *Medvedyev v France* (app 3394/03). The UK's activities in Iraq and Afghanistan led to a series of cases in which

- a. first, the basis and nature of the UK forces' presence in Iraq under international law was examined, to see if or how far the parts of Iraq where they were was within our jurisdiction;
- b. then, how far prisoners held, or British soldiers, in British camps were within our jurisdiction, then, how far Iraqis encountered by British forces in potentially hostile situations were; and
- c. finally how far any British soldier sent to Iraq or Afghanistan is and remains within UK jurisdiction at all times so far as concerns the training and equipment with which he has been provided. In *Smith v Ministry of Defence* [2013] UKSC 41 the Supreme Court held by a majority of 4:3 that the UK government may be liable for negligence in training or equipping its armed forces, leading to unnecessary death of its own soldiers in armed combat;
- d. at the end of the day, it remains obscure whether there is any and if so what dividing line between a British soldier killing a supposed enemy combatant in Iraq and NATO forces killing civilians in the course of bombing Belgrade, which the ECtHR held to be outside the UK and other participants' jurisdiction in *Bankovich v Belgium*.

17. The result has been a tension between the principles of the ECHR and the general principles of the law governing war, international humanitarian law, governed by the Geneva Conventions, which the UK and other states recognise as governing military operations during armed conflict in places like Iraq and Afghanistan. Can the UK rely on the Geneva Conventions, which provide expressly for the detention of suspected insurgents or terrorists during international armed conflict (i.e. one involving international combatants), without complying with the detailed provisions of article 5 of the ECHR regulating the circumstances in which domestic detention is permissible? The ECtHR initially suggested not, in *Al-Jedda v UK* (2011) 53 EHRR 23 (disagreeing with the House of Lord: [2008] AC 332), but in a later case called *Hassan v UK* (2014) 38 BHRC 358, it relented, and accepted that article 5 needed to be read in the light of international humanitarian law, and that the circumstances listed in article 5 need not be read as exhaustive in that context.

18. In *Al-Waheed and Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, we had to address a parallel problem in the context of the non-international armed conflict (“NIAC”) which existed after things had quietened down (comparatively) in Iraq and Afghanistan and involved purely domestic peace-keeping at the request of the local government as well as with the backing of Security Council resolutions. The Geneva Conventions contemplate that suspected insurgents may be being detained, but do not expressly authorise this. We had to consider whether customary international law (“CIL”) had developed to the point where it nonetheless authorised such detention, or whether the Security Council resolutions did so, and, in either case, whether the principle in *Hassan v UK* could be applied in this context to permit such detention without literal compliance with article 5. We left open the position under CIL, but we held that the Security Council resolutions did authorise detention for imperative reasons of security. By a majority, we held article 5 could and should be adapted or expanded to accept this.
19. We also had to grapple with the problem that the Security Council resolutions relevant to Afghanistan conferred authority on ISAF (the International Security Assistance Force), which had itself adopted a policy of restricting detention to 96 hours before handing over of detainees to the Afghan authorities, save in exceptional cases. The UK had on the other hand publicly disclaimed this policy and adopted its own more relaxed policy. Could the UK claim to be acting under the SC resolutions? A majority held yes, on the basis that the resolutions in fact conferred direct authority on each state participating in ISAF, so that each state could adopt its own policy. I thought that we a recipe for confusion, but arrived at the same result, on the basis that ISAF had in fact approved or accepted the UK’s special policy.
20. During one period, Serdar Mohammed was being detained with intelligence gathering in mind, and we held that detention on this ground alone would be outside the permissible scope of the resolutions. But, by a majority, we concluded that there may have been an underlying imperative of security, and that the issue whether this was so during the relevant period should go to trial. However, we also held that there were two procedural protections, which should have been but were not afforded to Serdar Mohammed in Afghanistan (enabling him to make representations to an independent body), so that he had a potential claim, although it might not lead to any damages at all, because he might not be able to show that they would have made any difference to his detention. Finally, we concluded that, if the detention of Al-Waheed in Iraq and Serdar Mohammed in Afghanistan was authorised by international humanitarian



law, it was unnecessary for the Ministry of Defence to go further and also to justify it under the local law of those countries.

21. This case shows the complexities that can arise from the interplay between domestic law and the ECHR. Without the ECHR and its extended concept of jurisdiction, the domestic law position would be simpler. That is evident from our contemporaneous decision in *Rahmatullah* and (again *Serdar Mohammed v Ministry of Defence* [2017] UKSC 1). We there dismissed common law claims for detention by UK forces, on the simple ground of Crown act of state. That means, as we explained, that the Crown cannot at common law be sued for acts committed abroad against foreign states or their subjects (and it may also be against UK citizens) in the course of exercising of sovereign military power. The area is notable for the uncertainty of the principles and their scope and the antiquated nature of such authority as can be found in case law. Much of our judgments is taken up by analysis of the exotic case of *Buron v Denman* [1848] 2 Exch 167, a claim against Captain Denman for destruction to slaver's property in the Spanish territory of the Galinas in West Africa. Captain Denman's action was wildly popular with the British public and Lord Palmerston's government ratified it with enthusiasm. The action was dismissed. Whatever else we may have achieved in the appeal before us, I think we explained that the principle of Crown act of state is in effect a unitary principle covering the state and its servants or agents alike – as it must do, if it is to be effective – and that the underlying question is one of justiciability or restraint, whichever word you care to use. I.e. is this an area where domestic courts should tread, or should adjudicate? In other words, the theme is the same one that we mentioned in *Miller*. Just as courts cannot and do not adjudicate upon treaties operating purely at the international level, so that do not adjudicate upon acts of war or armed interventions.
22. The third of our recent cases is *Belhaj v Straw* and again *Rahmatullah v Ministry of Defence* and others, where there were two rather different claims. In *Belhaj*, the claim was against various servants, agents or authorities of the UK government or state in respect of complicity in the alleged detention and mistreatment of two Libyan citizens by Malay officials in KL, by Thai authorities in Bangkok and by US agents in Bangkok and their alleged rendition in an aircraft en route (via I believe DG) to Libya where they were imprisoned and tortured. The foreign states allegedly involved would of course have had state immunity here, so were not sued. The issue here was whether the UK courts could in proceedings against UK individuals and authorities properly investigate the acts and the propriety of the acts abroad of foreign states and their agents. There was no plea that they could rely on Crown act of state. This may have

been a recognition that neither illegal detention and rendition of aliens nor torture in a peacetime context would be likely to be seen in the same light as detention of suspected insurgents for imperative reasons of security in the course of armed conflict.

23. In *Rahmatullah*, the claim this time was in respect of a period of imprisonment and alleged mistreatment in Bagram lasting ten years, after the UK had handed him over the US forces. Again, the plea was that the Ministry of Defence could not be sued because it would involve the investigation of acts and the propriety of acts abroad of foreign states. Again, there was no plea of Crown act of state.
24. Again, we held that the underlying principle was one of non-justiciability or restraint, that it was likely to be even more difficult to rely on the acts of a foreign state under the doctrine of foreign act of state than those of your own under the doctrine of Crown act of state and that in the instant case there was no compelling reason why the acts should not be adjudicated upon in a domestic court. On the contrary, if they could not be, then they would be justiciable nowhere, since the UK individuals and authorities sued would be entitled to state immunity, as servants or agents of the UK, in any foreign jurisdiction.
25. We did however examine possible situations in which Crown or foreign act of state might bite. In that connection we discussed (paras 93 on) a case where proceedings were brought against the UK for alleged complicity in supplying information to enable a US drone strike which killed a tribal elder in Yemen: *R (Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872. Some of you may have seen the very powerful film, *An Eye in the Sky*, which reveals the awful power of drones, and some of the dilemmas to which they may give rise. In *Noor Khan*, we noted the Court of Appeal had in substance, seen the issue as

“one of the lawfulness of the use of drones and as non-justiciable, because its resolution would depend upon determining whether there was an armed conflict in Pakistan and/or Afghanistan, whether any such conflict was international or non-international in nature and what rights of action or self-defence existed.”

26. We commented:

“All those are issues on which the policy and judgment of the executive and armed forces might be expected to prevail. .... It is true that the common law develops and responds to changing times and attitudes, and that a sharp division between the domestic and international legal sphere is less visible today than in the past. The case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 is an example of this development. I also note encouragement given by distinguished international lawyers in article 2 of the Institut de Droit international's resolution *The*

Activities of National Judges and the International Relations of their State (Milan, 1993), to the effect that:

"National courts, when called upon to adjudicate a question relating to the exercise of political power, should not decline competence on the basis of the political nature of the question if such exercise of power is subject to a rule of international law."

27. But, we went on:

"Some matters are however better addressed at the international legal level, rather than in domestic courts. In civil as well as common law, it appears unsurprising under present conditions that domestic courts should treat acts of government consisting of an act of war or of alleged self-defence at the international level as non-justiciable and should abstain from adjudicating upon them: see the concurrently issued judgment in the cases of *Rahmatullah* and *Serdar Mohammed* to which reference is made in paras 6 and 8 above; see also para 71 above and the remarks of the majority and of Judge Costa in his concurring judgment in *Markovic v Italy* 44 EHRR 52, paras 113 -116. Whether, at least apart from the special statutory provisions in *Noor Khan*, there might also have been issues of non-justiciability under the principle of Crown act of state does not require further examination here."

28. What is the basis of the concept of non-justiciability? The precursor to our recent decisions was the extraordinary case of *Buttes Gas v Hammer (Nos 2 & 3)* [1982] AC 888. The issue of non-justiciability there arose in the context of a dispute between private parties about an oil concession around Abu Musa Island in the Persian Gulf, in an area which was claimed by Sharjah, Umm al Qaiwain and Iran. Occidental Oil claimed to have been deprived of the oil concession by conspiracy between Buttes Gas and Ruler of Sharjah, involving the backdating of a decree extending territorial waters. Occidental and its principal Dr Arnold for slander. Occidental and Dr Hammer responded by pleading justification and counter-claiming for damages for conspiracy to cheat. Armed conflict was only averted by the intervention of British armed forces as well as by Iran. The House of Lords was being asked in the context of a defence to a defamation claim to opine upon the rights and wrongs of a boundary dispute and its settlement between Gulf States. It declined. The issues were not justiciable: there were "no judicial or manageable standards" by which to judge whether "transactions between four sovereign states, which they had brought to a precarious settlement, after diplomacy and the use of force" had been unlawful under international law. In saying this, the House drew on the US "political act" doctrine.

29. What the Supreme Court's recent decisions emphasises is that the doctrine is not confined to situations in which it can be said that there are no judicial or manageable standards. Courts are, or have become, quite accustomed to adjudicating on issues of international law, where an appropriate domestic threshold exists. Restraint or abstention is based on more general perceptions about the appropriate role of domestic courts. The perception that some matters are better dealt with at the international level, between states representing their citizens, is no doubt one element. The domestic separation of powers between the executive and judiciary is another underlying consideration. The impact on international relations of adjudication of internationally sensitive issues in a domestic court is a yet further potentially relevant factor. The nature of the issues is another very important factor, as the weight placed on the seriousness of the allegations in *Belhaj* and *Rahmatullah* indicates. What the recent cases suggest is that the decision whether an issue is non-justiciability will often involve a multi-factorial judgment, rather than the application of a single or simple rule. This is one lesson of both *Rahmatullah* on Crown act of state and from *Belhaj* and *Rahmatullah* on foreign act of state.
30. In a recent case *Shergill v Khaira* [2014] UKSC 33, we were asked to say that there were no "judicial or manageable standards" in an essentially domestic context. The issue was who was the true successor of an Indian holyman, for the purposes of deciding who owned some UK property. We held that it must be possible to decide who owned properties in Birmingham or Wolverhampton, and noted that the boundaries of the doctrine of restraint were "a good deal less clear than they seemed to be 40 years ago". The recent cases bear that out, and it is worth finally turning a specific eye to one area, mentioned at the outset in connection with the *Miller* case. That is the royal prerogative. Until 1984, it could be argued that this was generally immune from judicial review. But in that year the House of Lords had to decide whether it had power even to consider the fairness of an instruction issued by Mrs Thatcher's government under the royal prerogative, without prior consultation, that employees at GCHQ would no longer be entitled to belong to national trade unions. In *Civil Service Unions v Minister for Civil Service* [1985] 1 AC 374, the House held that executive action was not immune from judicial review for its fairness because it was carried out in pursuance of a power derived from a common law or prerogative, rather than a statutory, source. In the instant case, the claim failed because the interests of national security were held to outweigh the requirements of fairness, which would otherwise have led to a conclusion that there should have been prior consultation.
31. The die was however cast. From henceforth, the reviewability of the royal prerogative would depend on the nature of the prerogative being exercised and the context in which it was being

exercised. Lord Roskill at p.418B-C cautioned that in his view there would still remain no-go areas. He said:

“But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think susceptible to judicial review because their nature and subject matter are 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 or Parliament dissolved on one date rather than another.”

32. A number of subsequent authorities have in this light explored the boundaries or permissible review of the royal prerogative:

- a. In *R (Abbasi) v SoS for FCA* [2003] UKHRR 76 the CA held that, although the Foreign Secretary had a very wide discretion whether to make representations to the US government about the internment in Guantanamo Bay of a British citizen, the courts could intervene to review it if it was exercised irrationally or contrary to legitimate expectations.
- b. In *R (Bancoult) v SoS for Foreign and Commonwealth Affairs* [2008] UKHL 61; [2009] AC 453, we held that it was open to the courts judicially to review prerogative orders in council by which the Crown governed non-self-governing territories like the British Indian Ocean Islands, where the US base of Diego Garcia is situate. Only by a majority of 3 to 2 did we reject a challenge to an order which changed the local constitution to remove any right of abode there and prohibit entry to any of its former inhabitants, who had been effectively obliged to leave some decades previously.
- c. In *R (Sandiford) SoS for FCA* [2014] 1 WLR 2697, we held that we could review the SoS's decision to withhold legal aid for a final appeal by a British citizen convicted of drug smuggling and sentenced to death in Indonesia.
- d. In *Youssef v SoS for F&C Affairs* [2016] UKSC 3, we held that a decision taken in the exercise of the royal prerogative in the Security Council by the Secretary of State for Foreign Affairs to release a hold placed on Mr Youssef, so that he became subject to

a Security Council sanctions order, was capable of judicial review, but that domestic courts must exercise any such review with caution.

33. This brings me back to my starting point. The *Miller* case was not about abuse of the prerogative power. Had it been, then Lord Roskill's dictum that the making (and so presumably unmaking) of treaties remains immune from review would have been relevant. The *Miller* case was about whether the prerogative power existed or survived at all, to enable the executive to alter the processes or sources of law-making, as well as potentially the content of domestic law, in the UK. It concerned a situation which, if not unique, seems unlikely to find a homologue in our lifetimes. But the issues about the exercise of the royal prerogative, where it exists, will surely continue to arise. The courts have an important role in ensuring the legality and propriety of executive action, at home and abroad. They can never be primary decision-makers. It is the function of the executive to decide and to administer, and the executive is in many respects much better placed to judge on the necessity or appropriateness of action at the international level. At the same time, there are limits, and deprivation of liberty or allegations of torture are example of areas where courts may be expected to become involved.