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Tort Law and State Accountability for Overseas Violations of International Human Rights Law and International Humanitarian Law: The UK Perspective

RESEARCH ARTICLE

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ABSTRACT

This article argues that tort law has a role to play in holding the British government to account for overseas violations of international human rights law and international humanitarian law. The context of tortious claims for overseas violations of international human rights law and international humanitarian law brings to the fore, on one hand, issues of attribution and Crown and foreign acts of State and, on the other hand, issues of private international law. This article describes the approach of UK courts to key issues raised by tortious claims for overseas violations of international human rights law and international humanitarian law, namely subject-matter jurisdiction and the law applicable to the merits.

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1. INTRODUCTION

This contribution to the special issue of the Journal dedicated to the *Mothers of Srebrenica* litigation deals with the use in the UK of tort law as a mechanism for holding the British government to account for violations of international human rights law and international humanitarian law that occur in the course of external exercise of British public power. The inclusion in this special issue of an article that deals with the UK approach is justified by the wealth of experience that UK courts have with the use of tort law for achieving the accountability of the United Kingdom for overseas violations of international human rights law and international humanitarian law.

Although the Human Rights Act 1998 ('HRA') is the principal mechanism for holding the British government to account for human rights violations, tort law is also being used for this purpose. Such use of tort law has become prominent in recent cases that concern alleged overseas violations of international human rights law and international humanitarian law committed by British soldiers and security services in Kosovo, Afghanistan, Iraq, and in the context of the 'war on terror', some of which have even reached the UK Supreme Court. Despite its importance, however, such use of tort law has received insufficient attention in legal scholarship.

This article aims to contribute to the filling of this gap by advancing the following argument. Tort law has a role to play in holding the British government to account for overseas violations of international human rights law and international humanitarian law. An account of this role of tort law must take into consideration the context of tortious claims for overseas violations of international human rights law and international humanitarian law. On one hand, overseas violations of international human rights law and international humanitarian law occur in the course of external exercise of British public power, which in this context is frequently exercised in cooperation with other States and international organisations. This brings to the fore issues of attribution and Crown and foreign acts of State, through which tort law is linked with domestic and international public law. On the other hand, the overseas context inevitably raises issues of private international law.

As this special issue is dedicated to the *Mothers of Srebrenica* litigation, the other contributions to this special issue explore in detail the Dutch approach to the use of tort law for achieving governmental accountability for overseas violations of international human rights law and international humanitarian law. As will be seen, UK courts have developed a distinct approach that differs in many respects from the Dutch approach.

This article is divided into four sections. Following this introduction, the second section demonstrates that tort law and the HRA are distinct bodies of law, which justifies the focus of this article on pure tort litigation, and examines the use of tort law as a mechanism for holding the British government to account for overseas violations of international human rights law and international humanitarian law. The third section describes key issues raised by tortious claims for overseas violations of international human rights law and international humanitarian law, namely subject-matter jurisdiction and the law applicable to the merits. Similarities and differences between the UK and Dutch approaches to using tort law as a mechanism for holding the State to account for overseas violations of international human rights law and international humanitarian law are mentioned throughout the article. The fourth section concludes.

2. TORT LAW, STATE ACCOUNTABILITY AND OVERSEAS VIOLATIONS OF INTERNATIONAL LAW

The use of tort law as a mechanism for holding the British government to account for overseas violations of international human rights law and international humanitarian law gives rise to several questions. What do we mean by tort law in this context? Can tort law perform this role? Should tort law perform this role?

2.1. TORT LAW

There are several legal mechanisms through which a victim of an overseas violation of international human rights law or international humanitarian law can challenge the wrongful acts of the British government in UK courts.

The facts of one of the appeals that the Supreme Court heard together in *Al-Waheed v Ministry of Defence*[1] can be used to illustrate this point. British soldiers were deployed to Afghanistan as part of the International Security Assistance Force ('ISAF') under NATO command. The UN Security Council authorised the States participating in ISAF to take all necessary measures to fulfil its mandate of providing security assistance throughout Afghanistan.[2] These measures included the detention of insurgents. The ISAF detention policy permitted detention for a maximum of 96 hours, after which the detainee had to be either released or handed into the custody of Afghan authorities. The British detention policy, however, allowed for a longer period of detention. The claimant was detained for a total of 109 days under the British detention policy.

On these facts, several claims can be brought under English law. First, the lawfulness of the British detention policy can be challenged in judicial review proceedings. Second, habeas corpus proceedings can be used to seek the claimant's release from detention. Third, the claimant can commence proceedings under the HRA for the violation of his right to liberty and security guaranteed

by Article 5 of the ECHR. Fourth, the claimant can seek damages for unlawful imprisonment. Which of these is a tort law proceeding?

One way of answering this question is to look at tort law books.[3] English tort law books do not cover judicial review and habeas corpus and only exceptionally cover proceedings under the HRA. This suggests that the discussion in this article should be limited to generally-recognised tortious actions such as battery, assault, unlawful imprisonment, negligence and misfeasance in public office.

There are accounts of tort law, however, which give proceedings under the HRA a rather prominent place in the system of tort law. Perhaps the best known is Stevens' conception of tort law as a discipline concerned with the secondary obligations generated by the infringement of primary rights.[4] Since this theory focuses on the protection of rights, it regards the HRA not only as a statute which 'creates a new statutory tort in relation to acts by public authorities which are incompatible with Convention rights',[5] but also as 'possibly the most important "tort statute" ever enacted'.[6] Although there are others that conceive of the HRA as a tort statute,[7] the opposite view prevails.[8] The argument advanced in this paper is that the HRA is not a tort statute. Several arguments support this view.

First, the highest court in the UK has on several occasions emphasised the differences between tort law and the HRA. In *R (Greenfield) v Secretary of State for the Home Department*, for example, Lord Bingham stated that:

> the 1998 Act is not a tort statute. Its objects are different and broader. Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted. Damages need not ordinarily be awarded to encourage high standards of compliance by member states, since they are already bound in international law to perform their duties under the Convention in good faith, although it may be different if there is felt to be a need to encourage compliance by individual officials or classes of official.[9]

While this explanation is not hugely convincing because 'remedy cannot be conclusive of the relationship between torts and the HRA',[10] the view of the UK's highest court cannot be easily disregarded.

There are more fundamental reasons for not regarding the HRA as a tort statute. Despite the fact that tort law and the HRA share some core values such as respect for individual freedom, liberty, security, dignity and private property,[11] the two pursue different objectives and are based on different rules and principles.

The starting points of private law (to which tort law belongs) and public law (to which the HRA belongs) are different. As Megarry V-C explained in *Malone v Metropolitan Police Commissioner*, 'England [...] is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden.'[12] Tort law is the field of private law which most clearly expresses the limits on individual freedom. It regulates horizontal relations between juridical equals by balancing their conflicting rights and interests.

This does not mean that tort law does not or should not apply to relations between private persons and public authorities. The principle of equality, i.e. the conception that 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals',[13] is at the core of the English conception of the rule of law.[14] According to Dicey:

> In England the idea of legal equality, or of the universal subjection of all classes, to one law administered by the ordinary Courts, has been pushed to its utmost limits. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts, and made in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person.[15]

This statement did not, and does not, present a complete picture of the law. The Crown, which included the King in his personal and public capacities and the whole of the central executive, used to enjoy immunity from tortious liability and could not be held liable in tort either directly[16] or on the basis of vicarious liability for torts committed by its servants.[17] There was also the Crown act of State doctrine, which in some cases precluded tortious liability of Crown officials.[18] While the Crown act of State doctrine has been given a new lease of life by a recent Supreme Court judgment,[19] the Crown Proceedings Act 1947 ('CPA') largely abolished the tortious immunity of the Crown. The CPA does not recognise a general liability of the State in tort law. Instead, the starting point continues to be that individual Crown officials are personally liable for torts committed in the purported exercise of executive power. But the CPA reformed the law by allowing vicarious

liability as the modern basis on which the State provides compensation for torts committed by its officials.[20] The CPA also provides for the direct tortious liability of the Crown in three circumstances (for breach of employer's duties, occupier's duties and statutory duties under the same conditions as private persons).[21] Otherwise, the Crown continues to enjoy tortious immunity.[22] When tort law applies to relations between private persons and public authorities, its rules are flexible enough to take into consideration the public context of such relations. The best example of this is the inclusion of public policy considerations in assessing the negligence liability of public authorities.[23]

Public law has the opposite starting point. As Laws LJ stated in *R v Somerset County Council, ex parte Fewings*:

> for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose.[24]

Public law defines the powers and duties of public authorities. It also provides mechanisms for holding public authorities to account when they misuse their powers or fail to fulfil their duties. The HRA is a key mechanism of this kind. The UK ratified the ECHR in 1951. But, as a consequence of the UK being a dualist country, UK public authorities were not required as a matter of domestic law to comply with ECHR rights and, generally speaking, there was no means of having compliance with ECHR rights tested in UK courts before the passing of the HRA. The aim of the HRA was to 'bring rights home'.[25] There are four main ways in which the HRA gives effect to 'the Convention rights'.[26] First, a court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights ('ECtHR') whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.[27] Second, so far as it is possible to do so, legislation must be read and given effect in a way which is compatible with the Convention rights.[28] If a court is satisfied that a provision of a statute is incompatible with a Convention right, it may make a declaration of that incompatibility.[29] While a declaration of incompatibility does not affect the validity, continuing operation or enforcement of an incompatible provision and is not binding on the parties to the proceedings in which it is made,[30] a Crown minister may by order amend the offending legislation to remove the incompatibility.[31] Third, the HRA makes it unlawful for a public authority to act in a way which is incompatible with a Convention right.[32] Courts and tribunals are 'public authorities' for the purposes of the HRA,[33] so they must act in accordance with the Convention rights even when they hear and decide private disputes. It is through the courts' duties to interpret legislation in a rights-compliant way and to act in accordance with the Convention rights that those rights have primarily influenced the development of tort law.[34] Fourth, a person who claims that a public authority has acted (or proposes to act) in a way which is incompatible with a Convention right may bring proceedings against the authority under this Act if he is (or would be) a victim of the unlawful act.[35]

The different objectives of tort law and the HRA are reflected in the different content of the rules and principles of the two bodies of law. This can be illustrated by the way the two bodies of law approach the issues of legally relevant harm, limitation, remedies, foreignness, attribution, duty to confer benefits and causation, and by the modes of reasoning in the two bodies of law. Admittedly, some of these differences are based on contingent factors that have changed in the past and can change again in the future. Nevertheless, these differences are consequences of the different objectives of tort law and the HRA and, therefore, support the argument that tort law and the HRA are distinct bodies of law.

Tort law defines legally relevant harm more strictly than the HRA. The actionability of pure economic loss and mental harm, including harm suffered by indirect victims, is relatively limited. In contrast, the right to commence proceedings under the HRA is given to a broad category of 'victims' of unlawful acts of public authorities.[36] The HRA refers to Article 34 of the ECHR and the jurisprudence of the ECtHR for the definition of the concept.[37] 'Victim' refers to not only direct victims suffering consequential harm as a direct consequence of the violation of a Convention right, but also indirect victims who can show that they have suffered as a result of the violation of a Convention right.[38] This is a consequence of the different objectives of tort law and the HRA. The HRA aims to uphold minimum human rights standards and to vindicate those rights when they are violated by a public authority.[39] The objectives of tort law are more diverse and nuanced, which to an extent reflects the fact that both parties in a tort dispute have conflicting rights and interests that need to be balanced.

In English law, the general time limit for bringing a tortious claim is six years from the date on which the cause of action accrued.[40] There are special rules for certain torts. For actions for damages for negligence, nuisance or breach of duty in respect of personal injuries, the time limit is three years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured.[41] In any event, time does not start to run until the claimant reaches adulthood.[42] In contrast, the

time limit for commencing proceedings under the HRA is one year from the date on which the act complained of took place and there is no exception for minors, although the court can extend the time period if it considers it equitable having regard to all the circumstances.[43] A short time limit for commencing proceedings under the HRA reflects its public law nature.[44]

The main, and often the only available, remedy in tort law is an award of damages, which are available as of right. The aim of damages in tort law is typically to compensate the claimant for the harm suffered, although nominal, punitive or exemplary damages may be available in some circumstances. In contrast, the HRA provides for a broader range of remedies in proceedings under the HRA: the court may grant any remedy that it considers just and appropriate.[45] An award of damages is a subsidiary and discretionary remedy: it is not to be made unless, taking account of all the circumstances of the case, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.[46] In determining whether to award damages or the amount of an award, the court must take into account the principles applied by the ECtHR under Article 41 of the ECHR.[47] UK courts have interpreted this instruction as requiring their approach to the award and quantum of damages in proceedings under the HRA to mirror the approach of the ECtHR under Article 41.[48] Damages under the HRA are available in a narrower range of circumstances and generally in lower amounts than in tort law.[49] This is because the objectives of the HRA can often be achieved by other remedies (e.g. order-based remedies, injunctions, declarations or a mere finding of a violation)[50] or a lower amount of damages. Public law, of which the HRA forms part, is largely forward-looking and concerned with improving the machinery of government. Tort law is largely backward-looking and concerned with remedying past wrongs. Consequently, the range of available remedies in public law is wider than in tort law. Although there are calls for a tort-based approach to the quantum of damages under the HRA,[51] Steele has convincingly argued that the difference in the quantum of damages is justified by the fact that tort law remedies rights violations for the benefit of the individual claimant, while the HRA vindicates and protects the Convention rights in a more general sense.[52] An award of damages is the main, and often the only available remedy in tort law and damages are available as of right because 'an obligation to pay for the losses that one wrongfully occasioned (i.e. that one occasioned in breach of obligation) [...] constitutes the best still-available conformity with, or satisfaction of, the reasons why one had that obligation'.[53]

The HRA does not apply where the ECHR does not apply.[54] The courts have followed closely the ECtHR jurisprudence on extraterritoriality[55] and attribution of conduct[56] to decide whether a claimant has a Convention right for the purposes of the HRA. The issues of foreignness and attribution are dealt with in a fundamentally different way in tort law. If there is an international element, the applicable law is determined in accordance with the applicable choice-of-law rules.[57] The issue of attribution is normally decided by the application of the rules on joint tortfeasorship, vicarious liability and agency.

Tort law must take into account the individual freedom of the defendant and balance it with the rights and interests of the claimant. Consequently, a duty to confer benefits on another is seldom imposed in tort law. Such duty exceptionally arises on the basis of considerations such as assumption of responsibility, statutory provisions specifically imposing liability or a particular link with the victim or the perpetrator of the harm.[58] In contrast, the HRA imposes special responsibilities on UK public authorities, which are essentially derived from the relationship between the State and its citizens and from their membership of a politically organised society. This explains why the HRA draws no distinction in principle between 'negative' and 'positive' rights and obligations and why 'negative rights' are given greater protection under the HRA than under tort law.[59]

The approach to causation is stricter under tort law than under the HRA.[60] While the 'but-for causation' and 'material contribution' tests are normally applied in English tort law, a more relaxed test is applied under the HRA: 'it appears sufficient generally to establish merely that [the claimant] lost a substantial chance' of avoiding harm.[61] The more relaxed test under the HRA is consistent with its aim of upholding minimum human rights standards and vindicating those rights.[62]

Tort law regulates horizontal relations between juridical equals by balancing their conflicting rights and interests. In contrast, in proceedings under the HRA the claimant is always the right-holder and the State is always the duty-bearer. Consequently, the legal reasoning in HRA cases is different from the legal reasoning in tort law cases. In HRA cases, the focus is on the infringement of the claimant's right. The focus in many tort law cases, most importantly in negligence claims, is on the defendant's conduct.[63] In HRA cases, the State can justify the infringement of non-absolute rights on the basis that the infringement was for a legitimate aim and proportionate. The defence of justification of this kind[64] is not possible in tort law because the defendant can always invoke rights of its own. Consequently, tort law involves the balancing of competing rights and interests and not the question whether the defendant's act was justified by the proportionate pursuance of a public utility goal.[65]

It is for these reasons that the HRA should not be regarded as a tort statute and is not discussed further in this article. There are two additional reasons for this article's focus on pure tort litigation. Many issues that arise in proceedings under the HRA which concern

overseas violations of international human rights law and international humanitarian law such as extraterritoriality, attribution and norm conflict in international law, have been and are being thoroughly studied. In contrast, the use of tort law as a mechanism for holding the British government to account for overseas violations of international human rights law and international humanitarian law has received insufficient attention in legal scholarship.[66] Furthermore, the Conservative Party pledged in its 2015 manifesto to 'scrap' the HRA and replace it with a British Bill of Rights.[67] Although the Conservative Party has more recently backtracked on this pledge,[68] the possibility of repeal of the HRA has led to a renewed focus on the protective potential of 'common law constitutionalism'.[69] This discussion of the use of tort law as a mechanism for holding the British government to account for overseas violations of international human rights law and international humanitarian law can be regarded as contributing to this debate. The UK has also been mooting the idea of derogating from the ECHR in relation to certain military operations. If the ECHR is derogated from in this way, the importance of tort law as a mechanism for holding the British government to account for overseas violations of international human rights law and international humanitarian law will increase immensely.

2.2. STATE ACCOUNTABILITY FOR OVERSEAS VIOLATIONS OF INTERNATIONAL LAW

This sub-section examines the use of tort law as a mechanism for holding the British government to account for overseas violations of international human rights law and international humanitarian law. The argument advanced here is that tort law has a role to play in achieving the accountability of the State for overseas violations of international human rights law and international humanitarian law.

Tort law has always performed a prominent public law role of protecting the fundamental rights of individuals.[70] In the UK, civil liberties are traditionally protected from the misuse of power by public authorities through 'rights-based' torts[71] that are actionable *per se* such as battery, assault, unlawful imprisonment, trespass to property and defamation. The famous case of *Entick v Carrington*,[72] 'a canonical statement of the common law's commitment to the constitutional principle of the rule of law',[73] was a tort law case. This role of tort law was best expressed by Dicey, who wrote that:

> the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.[74]

Not only can tort law be used as a mechanism of State accountability in general, but also as a mechanism of State accountability for overseas violations of international human rights law and international humanitarian law in particular.

With respect to remedying violations of international human rights law in domestic legal systems, Shelton writes that:

> State liability in most legal systems has been built on the framework of tort law, which addresses the same set of problems everywhere: the foundation of liability, causation, justifications or excuses, and remoteness of damage.[75]

This statement is corroborated by Bagínska's recent comparative study, which concludes that tort law is generally used as a vehicle for awarding damages for violations of human rights in domestic legal systems.[76] Similarly, in a UK context, Wright argues that tort law rules may function as a vehicle to secure the protection of human rights, that they may in fact be shaped to ensure that human rights obligations are accommodated and that it is frequently tort law that provides the best fit in terms of a remedy.[77]

With respect to remedying violations of international humanitarian law in domestic legal systems, Weill's study shows that the courts in some jurisdictions have used civil law to develop international humanitarian law in the name of a moral cause.[78] Similarly, Abraham has recently argued that some of the losses that States inflict during war are private law wrongs that establish a claim of compensation in tort; where the in bello principles are not observed, losses to person and property constitute wrongs, which those who inflict them have duties of corrective justice to repair.[79]

If tort law can lead to a remedy for a violation of international human rights law or international humanitarian law, it can also lead to a remedy for an overseas violation of this kind. Unlike international human rights law treaties, tort law is not of territorial application and there are well-developed rules of private international law which allow courts to assume jurisdiction over, and determine the law applicable to, foreign torts, even if such torts are committed in the course of exercise of public power.[80]

The argument that tort law has a role to play in achieving the accountability of the State for overseas violations of international human rights law and international humanitarian law is also based on actual practice. Tort law has recently been invoked with the aim of remedying alleged overseas violations of international human rights law and international humanitarian law committed by British soldiers and security services in Kosovo,[81] Afghanistan, Iraq,[82] and in the context of the 'war on terror'.[83] The alleged

wrongs consisted of unlawful killing, torture and other cruel, inhuman or degrading treatment, unlawful imprisonment and failure to confer the benefit of security. Tort law has recently also been invoked with the aim of remedying alleged historical wrongs committed in former colonies and overseas territories.[84] In legal terms, these claims have not been hugely successful. Only two claims have resulted in judgments declaring the British government liable.[85] In only one of those two cases has the court found, after a full trial, that British soldiers violated human rights and international humanitarian law overseas.[86] Nevertheless, these claims were successful in a broader sense since they led to increased political pressure on the government, to an increased awareness of the allegations of the government's wrongs, to full public statements, on the record, of alleged wrongs, to settlements and, in one instance, to an apology from the Prime Minister in Parliament.[87] The Dutch experience with cases concerning Srebrenica[88] offers further evidence that tort law indeed has a role to play in achieving the accountability of the State for overseas violations of international human rights law and international humanitarian law.

3. KEY ISSUES

This section focuses on key issues raised by tortious claims brought in UK courts for overseas violations of international human rights law and international humanitarian law, namely subject-matter jurisdiction and choice of law. A court can hear a case if it has personal jurisdiction over the parties and the matter falls within its subject-matter jurisdiction. Personal jurisdiction refers to the court's jurisdiction over the parties to the proceedings that is required in any *in personam* claim, including any tortious claim. Personal jurisdiction is not problematic in tortious claims brought against British officials and the British government. The British government is present or domiciled in the UK for jurisdictional purposes and the courts can always join an absent or non-domiciled official to the proceedings commenced against the government.[89] The problem of jurisdictional immunities does not arise where a tortious claim is commenced against British officials or the British government. Subject-matter jurisdiction refers to the courts' constitutional power to adjudicate upon a matter of a particular nature. If the court has personal and subject-matter jurisdiction, the next issue is the determination of the law applicable to the merits. All substantive issues, including the actionability of the alleged harm, existence of a basis of primary or secondary liability, causation and defences, are decided under the applicable law. The aim is to describe the approach of UK courts with respect to these issues.

3.1. SUBJECT-MATTER JURISDICTION

Subject-matter jurisdiction is often problematic in cases that concern foreign relations. This sub-section presents the relevant issues under four headings: justiciability, Crown act of State, foreign act of State and attribution.

3.1.1. Justiciability

The British government derives its public power from two sources: the prerogative and statute. In the field of foreign relations, the executive typically acts by exercising prerogative powers. In the past, the prerogative was the exclusive domain of the executive. This meant that the courts did not hear and decide matters that fell within the boundaries of the prerogative. In other words, those matters were regarded as non-justiciable. Nowadays, however, the prerogative is in decline in the sense that Parliament has become involved in, and the courts have increasingly been reviewing the manner of, its exercise. In the field of foreign relations, for example, the powers to ratify treaties[90] and to deploy and use the armed forces[91] are now shared with Parliament and the courts are increasingly reviewing the manner in which the foreign relations prerogative is exercised.[92] This has led to the shrinking of the category of non-justiciability and the corresponding expansion of the category of justiciability.[93] Tortious claims brought against British officials and the British government raise prima facie justiciable matters. As the Court of Appeal observed in *Mohammed*, 'determining whether an individual has been unlawfully deprived of his liberty is quintessentially a matter for a court'.[94] Nevertheless, there are some matters raised by tortious claims brought against British officials and the British government which the courts regard as non-justiciable.

The leading case on justiciability is *Shergill v Khaira*.[95] This case did not concern foreign relations, so its facts are immaterial for the present discussion. What is material, however, is the fact that a unanimous Supreme Court, in a judgment given by Lord Neuberger, set out to explain the nature and effects of non-justiciability. According to the court, the term non-justiciability 'refers to a case where an issue is said to be inherently unsuitable for judicial determination by reason only of its subject matter'.[96] There are two bases for non-justiciability. The first is that 'the issue in question is beyond the constitutional competence assigned to the courts under our conception of the separation of powers'.[97] A paradigm case falling into this category is the non-justiciability of certain transactions of foreign States where an issue is beyond 'the constitutional limits of the court's competence as against that of the executive in matters directly affecting the United Kingdom's relations with foreign states'.[98] The court referred here to *Buttes Gas and Oil Co v Hammer (No 3)*[99] as the leading case in this category. In this case, the House of Lords rejected an action for defamation because its real object was to obtain a decision about the boundary

between the territories of three Gulf States. This issue was held to be non-justiciable because it was political. This basis for non-justiciability is far-reaching because:

> once the forbidden area is identified, the court may not adjudicate on the matters within it, even if it is necessary to do so in order to decide some other issue which is itself unquestionably justiciable. Where the non-justiciable issue inhibits the defence of a claim, this may make it necessary to strike out an otherwise justiciable claim on the ground that it cannot fairly be tried.[100]

The second basis for non-justiciability is that a claim or a defence is based 'neither on private legal rights or obligations, nor on reviewable matters of public law'.[101] The paradigm case is where a claim or a defence is based solely on public international law.[102] This basis for non-justiciability is not as far-reaching as the previous one because:

> Some issues might well be non-justiciable in this sense if the court were asked to decide them in the abstract. But they must nevertheless be resolved if their resolution is necessary in order to decide some other issue which is in itself justiciable [...] Thus, when the court declines to adjudicate on the international acts of foreign sovereign states or to review the exercise of the Crown's prerogative in the conduct of foreign affairs, it normally refuses on the ground that no legal right of the citizen is engaged whether in public or private law.[103]

In other words, it is only if an issue is within the courts' constitutional competence and there is a 'domestic foothold'[104] that, according to the Supreme Court, the issue is justiciable. Tortious claims only exceptionally have as their real object a political issue and are rarely not based on a 'domestic foothold'. There are two doctrines, however, that render certain issues raised by tortious claims non-justiciable. These are the Crown act of State and foreign act of State doctrines. The Crown act of State doctrine concerns acts of the British State, whereas the foreign act of State doctrine concerns acts of foreign States. If it is disputed whether an act is a sovereign act, or whether a sovereign act is committed by the British State or a foreign State, the issue of attribution arises. The following three sub-sections discuss the Crown act of State doctrine, the foreign act of State doctrine and the determination of the law governing attribution.

3.1.2. Crown Act of State Doctrine

It has already been mentioned above[105] that the Crown act of State doctrine is an important exception to Dicey's principle of equality because it exempts from liability Crown officials for torts committed abroad in the conduct of foreign relations. It has also been mentioned that the doctrine has been given a new lease of life by a recent Supreme Court judgment. In *Mohammed*[106] the Supreme Court heard joined appeals in several cases that concerned allegedly unlawful detention and mistreatment of detainees in Afghanistan and Iraq. It was undisputed that the adoption by the British government of policies under which people were detained and transferred to the control of the US and local forces in Afghanistan and Iraq were acts of the British State. The difficult question was whether the Crown act of State doctrine barred the claimants' tortious claims.

According to the Supreme Court,[107] the starting point was that in English law there was no general defence of State necessity to a claim of wrongdoing by State officials.[108] The key question was whether there was an exception in the form of a Crown act of State doctrine. In the court's view, it was undisputed that certain acts of high policy, such as the conduct of foreign relations, making treaties, making peace and war, conquering or annexing territories, by their very nature were not subject to judicial review, whereas other actions taken in pursuance of that policy were.[109] But the fact that other actions taken in pursuance of acts of high policy were subject to judicial review did not mean that the courts had to hear all claims of wrongdoing by State officials committed in the conduct of foreign relations. The doctrine that the King could do no wrong prevented victims of such wrongs from suing the Crown before the adoption of the CPA. The courts had to grapple with the circumstances in which the King's prior authority or subsequent ratification might import the doctrine that the King could do no wrong and afford a defence to State officials who were personally sued for carrying out the Crown's policies.[110] The Crown act of State doctrine as a tort defence was the solution to this problem.[111] It is a defence whose existence was not only long established both in the case law and legal scholarship, but also supported by good policy reasons, at least in the context of military operations abroad:

> if act of state is a defence to the use of lethal force in the conduct of military operations abroad, it must also be a defence to the capture and detention of persons on imperative grounds of security in the conduct of such operations. It makes no sense to permit killing but not capture and detention, the military then being left with the invidious choice between killing the enemy or letting him go.[112]

The court outlined the scope of this defence in the following words:

> We are left with a very narrow class of acts: in their nature sovereign acts - the sorts of thing that

> governments properly do; committed abroad; in the conduct of the foreign policy of the state; so closely connected to that policy to be necessary in pursuing it; and at least extending to the conduct of military operations which are themselves lawful in international law (which is not the same as saying that the acts themselves are necessarily authorised in international law).[113]

Since the tort defence excluded the personal liability of State officials, it also excluded the vicarious liability of the Crown under the CPA.[114] Finally, the court held that the defence was clearly a rule of substantive law rather than a procedural bar and, as such, not contrary to Article 6 of the ECHR.[115] In other words, the defence determined the scope and extent of private rights. If it applies, the defence removes private legal rights or obligations that would otherwise arise out of acts committed in the conduct of foreign relations. If there are no private legal rights or obligations on which a tortious claim can be based, no 'domestic foothold', the issue of the defendant's liability is 'inherently unsuitable for judicial determination by reason only of its subject matter'[116] and, therefore, non-justiciable.

The Supreme Court judgment in *Mohammed* only dealt with the Crown act of State doctrine and not with the merits of the joined appeals. The merits of one of the joined appeals in *Mohammed* were heard in *Alseran*,[117] in which the court clarified that the Crown act of State doctrine did not apply where the alleged act of State or the policy decision pursuant to which that act was performed was of a kind that was judicially reviewable[118] and outside the scope of the government's legal powers under domestic English public law. Ultra vires acts and policy decisions have no legal effect and can, therefore, give rise to the executive's liability in tort.[119] Torturing and mistreating prisoners or detainees were given as relevant examples because such practices are contrary to the HRA and international humanitarian law.[120] The court gave another example:

> Likewise, acknowledging that a government decision to engage in a military operation abroad entails the use of lethal force and detention on imperative grounds of security does not require the courts to accept that, for example, such lethal force may be deliberately targeted at civilians or that such detention is permissible when there are no imperative reasons of security capable of justifying it.[121]

The court further rejected the argument that only 'acts which are so beyond the pale–so obviously contrary to fundamental aspects of public policy' fell outside the scope of the act of State doctrine: 'English law does not distinguish between different degrees of illegality or regard some kinds of unlawful governmental act as more unlawful than others. There is only one standard of legality applied by our courts.'[122] Consequently, the court found that the executive did not authorise and could not have authorised acts of detention contrary to the HRA and public international law because these acts would have been unlawful under domestic English public law and, therefore, ultra vires.[123] Since the court found, following a full trial, that British forces violated the claimants' human rights and international humanitarian law, the Crown act of State doctrine did not apply.

The approach of UK courts to Crown acts of State can be contrasted with the approach of Dutch courts. Dutch courts have dealt with civil claims which concerned alleged overseas violations of international human rights law and international humanitarian law in cases concerning the liability of the Netherlands for the conduct of the Dutch battalion (Dutchbat) of the UN Peacekeepers Protection Forces responsible for the safe area in and around Srebrenica in July 1995. Dutch courts have refused to develop exclusionary doctrines. The Dutch Supreme Court has emphatically rejected the exercise of judicial restraint in the following words:

> The exercise of judicial restraint [...] would mean that there would be virtually no scope for the courts to assess the consequences of the conduct of a troop contingent in the context of a peace mission, in this case the conduct of which Dutchbat and hence the State are accused. Such far-reaching restraint is unacceptable. Nor is this altered by the fact that the State expects this to have an adverse effect on the implementation of peace operations by the United Nations, in particular on the willingness of member States to provide troops for such operations.[124]

3.1.3. Foreign Act of State Doctrine

The UK frequently exercises its public power externally in cooperation with other States or international organisations. Sometimes, a British official or the British government is alleged to have caused harm to a claimant by participating in an overseas violation of international human rights law or international humanitarian law directly committed by a foreign State official or a foreign government in the course of that foreign State's military or security operation. In such case, the British official or the British government can only be liable if the court finds that the foreign State official or the foreign government has committed a wrong under foreign law. The difficult question is whether the foreign act of State doctrine prevents the courts from questioning the lawfulness or validity of foreign sovereign acts under foreign law. This

doctrine is a feature of Anglo-Commonwealth domestic laws and is not used by civil law systems.

In the recent case of *Belhaj*[125] the Supreme Court heard joined appeals in two cases in which British officials and emanations of the British government were sued for their involvement in alleged wrongs committed by foreign States and their officials. One case concerned the abduction in Thailand of an opponent of Colonel Gaddafi and his wife, and their extraordinary detention on a CIA flight to Libya, where they were unlawfully imprisoned and tortured. The whole operation, directly conducted by foreign security services, was enabled by British intelligence. The other case concerned the transfer of a person detained by British forces in Iraq into the custody of US forces, which then transferred him to Afghanistan and detained him there for over 10 years without trial. The defendants put forward the defence of foreign act of State.

According to the Supreme Court,[126] the effect of the foreign act of State doctrine, which is purely one of domestic common law, is that the courts will not readily adjudicate upon the lawfulness or validity of sovereign acts of foreign States.[127] The doctrine applies to claims which, while not made against the foreign State concerned, involve an allegation that a foreign State has acted unlawfully.[128] It is a complex doctrine that comprises three different rules.[129] The first rule, which is a general principle of private international law,[130] is that the courts will recognise, and will not question, the effect of a foreign State's legislation or other laws in relation to any acts which take place or take effect within the territory of that State.[131] The second rule, which is 'close to being' a general principle of private international law,[132] is that the courts will recognise, and will not question, the effect of an act of a foreign State's executive in relation to any acts which take place or take effect within the territory of that State and concern property.[133] The third rule has more than one component.[134] Each component involves issues which are inappropriate for the courts to resolve because they involve a challenge to the lawfulness of the act of a foreign State which is of such a nature that a municipal judge cannot or ought not rule on it. Thus, the courts will not interpret or question dealings between sovereign States. Obvious examples are making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory. Similarly, the courts will not, as a matter of judicial policy, determine the legality of acts of a foreign government in the conduct of foreign affairs. It is also part of this third rule that international treaties and conventions, which have not become incorporated into domestic law by the legislature, cannot be a source of domestic rights or duties and will not be interpreted by the courts. The third rule is based on judicial self-restraint[135] and is justified on the ground that domestic courts should not normally determine non-justiciable issues which are only really appropriate for diplomatic or similar channels. The first two rules, and sometimes also the third, are qualified by a public policy exception.[136] The application of the first two rules, and sometimes also the third, is limited to acts within the territory of the State concerned.[137]

The court found, on the assumed facts of *Belhaj*, that none of the rules applied. The first rule 'plainly [did] not apply',[138] presumably because the joined appeals did not concern acts that were lawful under foreign State's legislation or other laws. The second rule was not engaged because in one joined appeal the alleged wrong involved harm to individuals and not property and the public policy exception would apply anyway[139] and in the other joined appeal the alleged wrong occurred outside the jurisdiction of the State concerned and involved harm to an individual.[140] The third rule was not engaged in one joined appeal because there was no suggestion that there was some sort of formal or high-level agreement or treaty between any of the States involved which governed the co-operation between their executives[141] and in the other joined appeal because the existence and terms of the agreement between the States involved did not bear on the allegations.[142] But even if the third rule had been engaged, the public policy exception would have applied because the claimants' treatment amounted to a breach of jus cogens.[143]

In addition, the Supreme Court held in *Belhaj* that the foreign States concerned had not been indirectly impleaded by the tortious claims because their legal positions had not been affected. Consequently, the doctrine of sovereign immunity did not apply.[144]

3.1.4. Attribution

It may be unclear whether the act in question is a sovereign act. Or it may be unclear whether the act in question is attributable to one or the other state, or perhaps to an international organisation. These questions are important. If the act in question is not a sovereign act, neither the Crown nor the foreign act of State doctrine can apply. If the defendant's act is attributable to a foreign state or an international organisation, jurisdictional immunities may bar the claim. If a British official or the British government is sued on the basis of the rules of accessory liability, the foreign act of State doctrine can apply only if the alleged primary wrongdoing is attributable to a foreign State.

The courts dealt with the issue of attribution in the context of a tortious claim for the first time in the 1960s in *AG v Nissan*[145] and also more recently in a string of cases concerning the aftermath of the military operations in Kosovo, Afghanistan and Iraq.[146] These cases disclose two approaches to the issue of attribution.

The first approach is the application of the English law of agency. In *AG v Nissan*[147] the British Army took a hotel in Cyprus, by that time an independent State, for the purpose of accommodating British peacekeeping forces

in this country. British forces were present and operating in this country initially at the invitation of the government of Cyprus and later as part of a UN peacekeeping force. One of the claimant's arguments was that the taking was unlawful and, therefore, amounted to trespass to chattels. A question that had to be addressed by the court was whether, at the relevant times, the British forces were acting on their own responsibility on behalf of the Crown or as agents of either (with regard to the initial period) the government of Cyprus or (with regard to the later period) the UN. Lord Reid said in the beginning of his speech that 'The first question which arises is whether these facts show that the British forces were acting as agents of the Cyprus Government when they took possession of the respondent's hotel, so as to make their action the act of the Cyprus Government.'[148] He added that 'it was not argued that agency here means anything different from its ordinary meaning in English law'.[149] Applying the English law of agency, the House of Lords held that the British soldiers were not acting as agents of the government of Cyprus.[150] As for the attribution of conduct of the British troops to the UN, their Lordships disagreed with the lower courts and unanimously held that the British troops serving with the UN continued to be soldiers of the Crown and that, consequently, their conduct continued to be attributable to the Crown even after the establishment of the UN peacekeeping force.[151] The consequence of this was that jurisdictional immunities did not apply, whereas the Crown act of State doctrine potentially could (although the court then held that the acts in questions were not of the nature that attracted the application of the Crown act of State doctrine).

Britain did not conduct the military operations in Kosovo, Afghanistan and Iraq on its own. British forces were part of international alliances and coalitions. In all the cases that claimants from Kosovo, Afghanistan and Iraq brought in tort against the British government in which the issue of attribution arose, the courts applied public international law. The leading case, *Al-Jedda*,[152] concerned wrongs allegedly committed in the context of counterinsurgency and counterterrorism operations in Iraq. British forces were present and operating in Iraq as part of a multinational force. The question arose whether the conduct of the British soldiers was attributable to the multinational force or the UK. The issue of attribution was raised for the first time before the House of Lords and was prompted by the decision of the ECtHR in *Behrami v France*,[153] which had been decided after the Court of Appeal had given its judgment in *Al-Jedda*. Strictly speaking, the issue of attribution in *Al-Jedda* was only raised with respect to the public law claim brought under the HRA.[154] The House of Lords found that the British forces which formed part of the multi-national force operating in Iraq were not operating under the auspices of, or under the effective command and control of, the UN so as to make the actions of the forces those of the UN.[155] The House of Lords dealt in the same judgment with the law applicable to the tortious claim advanced against the Secretary of State. There is nothing in the House of Lords' judgment to suggest that it would have adopted a different approach to the issue of attribution for the purposes of this claim. This approach was subsequently confirmed in *Mohammed*[156] and *Kontić*.[157]

This approach is in line with the approach to determining whether an act is an act of a foreign state or an international organisation for the purposes of applying jurisdictional immunities.[158] In the same vein, the courts have recently confirmed that they will also apply public international law if it is necessary to determine whether the conduct of the primary wrongdoer is attributable to a foreign State for the purposes of applying the foreign act of State doctrine.[159]

3.2. LAW APPLICABLE TO THE MERITS

If the courts have personal jurisdiction over the defendant and subject-matter jurisdiction over the matter in dispute, the alleged wrong is not an act of State and can, therefore, lead to the personal liability of the alleged wrongdoer. The Crown can also be liable for the personal torts of its officials under the doctrine of vicarious liability. Since the personal liability of Crown officials and the vicarious liability of the Crown for the torts of its officials are matters of private law, the question of the law applicable to the merits inevitably arises where the alleged wrong is committed overseas. This sub-section starts by explaining how the courts determine the applicable law. Issues that are always governed by the *lex fori* are mentioned next. This sub-section finally outlines the approach of the courts to pleading and proof of foreign law.

3.2.1. Determination of the Applicable Law

The English approach to determining the applicable law to tortious claims for overseas violations of international human rights law and international humanitarian law was set out by the Court of Appeal in *Al-Jedda*.[160]

It was undisputed that the choice-of-law rules for torts of Part III of the Private International Law (Miscellaneous Provisions) Act 1995 ('1995 Act') governed the determination of the applicable law. This is because the Rome II Regulation does not apply to *acta iure imperii* and section 15(1) of part III of the 1995 Act ('Crown application') provides that this part of the 1995 Act applies in relation to claims by or against the Crown as it applies in relation to claims to which the Crown is not a party. Part III of the 1995 Act thus inevitably also applies in relation to claims against Crown officials.

The 1995 Act lays down the general rule that the applicable law is the law of the country in which the events constituting the tort in question occur.[161] There are many torts whose constitutive elements are

scattered across different countries. The Act clarifies that, for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the applicable law is the law of the country where the individual was when he sustained the injury.[162] For a cause of action in respect of damage to property, the applicable law is the law of the country where the property was when it was damaged.[163] In any other case concerning transnational torts, the applicable law is the law of the country in which the most significant element or elements of those events occurred.[164] The 1995 Act introduces a degree of flexibility in the determination of the applicable law by laying down an escape clause that provides for the displacement of the general rule if it appears, in all the circumstances, that it is substantially more appropriate for the applicable law to be the law of another country.[165] The law determined as applicable following the application of the escape clause can govern either the entire tort of one or more issues that arise.[166]

Since the alleged wrongs in *Al-Jedda* were committed in Iraq, Iraqi law was prima facie applicable. The claimant nevertheless argued that English law should apply pursuant to the escape clause in section 12 of part III of the 1995 Act. The essence of the claimant's argument on the applicable law was that:

> it would be strange indeed for the English court to apply Iraqi law to a claim by a British citizen against the British Government in respect of activities on a base operated according to British law (and inviolable from Iraqi process) by British troops governed by British law (and immune from Iraqi law).[167]

The Court of Appeal, however, found that Iraqi law governed the tort.[168] The court adopted a narrow interpretation of the escape clause. In adopting this interpretation, the court followed two cases that concerned garden variety torts, namely a tort suffered in the course of employment[169] and a road traffic accident,[170] in which the courts emphasised that the general rule that the applicable law is the law of the country in which the events constituting the tort in question occur is to be departed from in exceptional circumstances. Such circumstances did not exist in *Al-Jedda* according to the Court of Appeal[171] and the House of Lords.[172] This approach to the determination of the applicable law was subsequently followed by the Court of Appeal in *Belhaj*[173] and the High Court in *Rahmatullah*[174] and *Husayn*.[175]

The approach of UK courts to the determination of the applicable law can be contrasted with the approach of Dutch courts. The Dutch Supreme Court initially held that the foreign law of the place of tort applied to determine the liability of the Netherlands for the Srebrenica genocide.[176] But a U-turn was made in two subsequent cases in which Dutch courts decided to subject the liability of the Netherlands for the Srebrenica genocide to Dutch law, i.e. Article 6:162 of the Dutch Civil Code, which sets out the general basis for claims for damages in tort.[177] This was done pursuant to the Dutch common law choice-of-law rules and Article 10:159 of the Dutch Civil Code on the basis that the peacekeeping operation in question was an exercise of governmental authority. The explanation for this approach was the fact that Book 10 of the Dutch Civil Code, which entered into force on 1 January 2012, laid down a choice-of-law rule for *acta iure imperii*. Pursuant to section 10:159, Dutch law applies to obligations resulting from the exercise of Dutch governmental authority. The rationale for this rule is that:

> the exercise of government authority is pre-eminently an area left to the sovereignty of the State concerned. In doing so foreign law should not be applied to the question whether in exercising authority we can speak of there being unlawful acts and if so to what extent this leads to liability.[178]

Although the point is controversial,[179] The Hague District Court found that the choice-of-law rule codified in section 10:159 had existed before 2012 as a matter of 'unwritten private law'[180] and implied that this unwritten rule had continued to exist and applied separately from the 2001 Dutch Wrongful Act (Conflict of Laws) Act.[181] The preceding judgment of the Dutch Supreme Court in which the law of Bosnia and Herzegovina was applied was distinguished on the basis that the applicable law was not in dispute in that case and for that reason 'did not have to be officially determined'.[182]

The fact that Dutch law applies to the liability of the Netherlands for the Srebrenica genocide does not mean that other systems of law are irrelevant. Dutch courts have found that, since the claims related to a UN peacekeeping operation for which purpose the Netherlands sent its troops to Bosnia and Herzegovina, the question of attribution of conduct of those troops to the Netherlands was to be resolved by the application of public international law.[183] Dutch courts have further found that directly effective provisions of treaties and decisions of international organisations were under the Dutch Constitution binding on all within the Dutch legal system. Such provisions set the standard of conduct for the purposes of the Dutch law on State liability regardless of whether the jurisdictional requirements of the particular instrument (e.g. Article 1 of the ECHR and Article 2(2) of the International Covenant on Civil and Political Rights) were satisfied in a particular case.[184] While the provisions of the ECHR and the International Covenant on Civil and Political Rights that concern the protection of the rights to life and physical integrity are directly effective, the duty to prevent genocide

from Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide lacks direct effect, necessary for its application in a dispute between an individual and the State.[185]

3.2.2. The Role of the Lex Fori

The law determined as applicable under the 1995 Act does not apply to all issues that arise in the context of tortious claims for overseas violations of international human rights law and international humanitarian law. It applies to substantive issues such as the actionability of the alleged harm, existence of a basis of primary or secondary liability, causation and defences. Procedural issues, on the other hand, are always governed by the *lex fori*. There are also some substantive issues that are governed by the overriding mandatory rules of the *lex fori*.

The quantification of damages is treated as procedural under the 1995 Act.[186] Even if the existence and extent of liability (i.e. recoverable heads of damage) is governed by the law determined as applicable under the Act, the quantification of damages is always governed by the *lex fori*.

Overriding mandatory rules of the *lex fori* generally come in two shapes: as statutory overriding mandatory rules and, rarely, as common law overriding mandatory rules. There is an important example of each category that is relevant for tortious claims for overseas violations of international human rights law and international humanitarian law.

An important common law overriding rule is the so-called combat immunity doctrine. Under this doctrine, tortious claims brought against the Crown for acts done in the course of actual or imminent armed conflict have to fail.[187]

An important statutory overriding mandatory rule is contained in the War Damage Act 1965. Section 1(1) of the Act provides that no person shall be entitled at common law to receive from the Crown compensation in respect of damage to, or destruction of, property caused by acts lawfully done by, or on the authority of, the Crown during, or in contemplation of the outbreak of, a war in which the Sovereign was, or is, engaged. This Act covers war damage within and outside the UK. This Act reverses a well-known judgment of the House of Lords in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate*.[188] Although the issue of limitation is generally regarded as substantive[189] the Parliament has enacted the Overseas Operations (Service Personnel and Veterans) Act 2021, which affects the issue of limitation in 'overseas armed forces tort actions'. The Act provides, among other things, that an 'overseas armed forces tort action' must be commenced within an absolute maximum of six years.[190]

3.2.3. Pleading and Proof of Foreign Law

An issue that arose in the context of tortious claims for overseas violations of international human rights law and international humanitarian law is who bears the burden of pleading and proving foreign law. This issue was resolved in *Belhaj*, where the Court of Appeal affirmed the trial judge's decision on the applicable law in the following way:

> [T]he judge said it was clear [...] that the key events which formed the basis of the alleged torts took place in China, Malaysia, Thailand, on board a United States registered aircraft and in Libya rather than in England and Wales (which meant that [...] the applicable law for determining the claimants' causes of action was the law of the place in which the unlawful detention was alleged to have occurred or the injury or damage was alleged to have been sustained).[191]
>
> The inevitable result of all this is that the claimants will have to plead their grounds for asserting that the conduct alleged is unlawful in accordance with the judge's order; and if they do not do so, or fail to prove their case on the point, their pleading will be deficient and their claims will fail.[192]

As a result, the courts not only subject tortious claims for overseas violations of international human rights law and international humanitarian law to foreign law, but further 'boost' this approach to the determination of the applicable law by ordering claimants to plead and prove foreign law on pain of having their claims dismissed.

4. CONCLUSION

This article shows that in a case involving an overseas violation of international human rights law or international humanitarian law by British officials or the British government, several kinds of claim can be brought under English law. But only claims based on common law tortious causes of action or their equivalents under foreign applicable law can be regarded as tortious claims. In other words, the HRA is not a tort statute. This article further shows that tort law has a role to play in holding the British government to account for overseas violations of international human rights law and international humanitarian law.

This article also describes key issues raised by tortious claims for overseas violations of international human rights law and international humanitarian law, namely subject-matter jurisdiction and the law applicable to the merits. UK courts have personal jurisdiction over the British government and British officials. But UK courts do not have subject-matter jurisdiction over all matters raised by tortious claims brought against British officials and the British government. Alleged wrongs that arise out of Crown acts of State are non-justiciable. UK courts can

also exercise judicial self-restraint under the foreign act of State doctrine when the claim raises an issue which is only really appropriate for diplomatic or similar channels. If the matters raised by a tortious claim brought against a British official or the British government are justiciable, the next issue is the applicable law. Almost all substantive issues are governed by the law determined as applicable under the choice-of-law rules for torts of Part III of the 1995 Act, including the actionability of the alleged harm, existence of a basis of primary or secondary liability, causation and defences. Since the alleged violations of international human rights law and international humanitarian law occur overseas, foreign law applies. Claimants must plead and prove that foreign law on pain of having their claims dismissed.

This article also contrasts the approaches of UK courts and Dutch courts with respect to tortious claims for overseas violations of international human rights law and international humanitarian law. In comparison to the English approach, the Dutch approach is simple. Dutch courts have not developed exclusionary doctrines. Dutch courts apply Dutch law to such claims. Under Dutch tort law, public bodies are under a duty to respect directly effective provisions of treaties and decisions of international organisations, which includes a duty to respect the ECHR standard. This is a consequence of the monist nature of the Dutch legal system. A violation of the ECHR by the State is, therefore, a tort under Dutch law.

The English approach is much more complicated. A consequence of the UK being a dualist country is that the ECHR is not directly effective within the UK legal system. Parliament has enacted the HRA 'to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights'. Nowadays, the bulk of litigation in the UK concerning overseas violations of international human rights law and international humanitarian law takes place under the HRA. Another consequence of the UK being a dualist country is that a victim of an overseas violation of international human rights law or international humanitarian law cannot obtain a remedy in tort just because he or she is a victim of an international delinquency. That does not mean that human rights law and international humanitarian law are completely out of the picture in tortious claims.

When the Crown act of State doctrine applies, there can be no tortious liability of the Crown and its officials for acts done abroad which would otherwise be torts. But the Crown act of State doctrine does not apply where the act in question is a violation of the HRA and international humanitarian law. Similarly, the foreign act of State doctrine is subject to a public policy exception, which typically applies when the act in question violates important rules of international law. In other words, the applicability of tort law in tortious claims for overseas violations of international human rights law and international humanitarian law is predicated on the existence of conduct which is contrary to human rights law and international humanitarian law. But even if the Crown act of State doctrine does not apply because the act in question is a violation of the HRA and international humanitarian law, there is no automatic tortious liability. The claimant still has to show that the requirements for tortious liability of the law governing the tort are met and none of the defences apply.

The different level of complexity of the English and Dutch approaches is reflected in different litigation outcomes. The *Srebrenica* litigation has, generally speaking, been a success for the victims in that the courts recognised that the Dutch State was partially responsible for the events in Srebrenica in July 1995 and the victims will receive some compensation. The English approach, in contrast, has led to mixed results. On one hand, only two tortious claims have resulted in judgments declaring the British government liable. In only one of those two cases, *Alseran*, has the court found, after a full trial, that British soldiers violated human rights and international humanitarian law overseas. But the tortious claims in *Alseran* succeeded only in part. Having decided that the conduct in question had violated the HRA and international humanitarian law and that, therefore, it could not be protected by the Crown act of state doctrine, the High Court examined the merits of the case. The court eventually found that all elements of tortious liability under the applicable Iraqi law were met, but the tortious claims failed because they were time-barred. The court, however, did not find this problematic despite the seriousness of the wrongful conduct, since the parallel claims under the HRA succeeded, so the claimants obtained a recognition that they were the victims of violations of human rights law and international humanitarian law in Iraq and compensation under the HRA.

On the other hand, tortious claims were successful in a broader sense since they led to increased political pressure on the government, to an increased awareness of the allegations of the government's wrongs, to full public statements, on the record, of alleged wrongs, to settlements and, in one instance, to an apology from the Prime Minister in Parliament. All of this signals that claims under the HRA remain the more promising route for obtaining remedies for overseas violations of international human rights law and international humanitarian law. Nevertheless, tortious claims – despite all their complexity – have a significant, largely untapped potential. This potential might have to be used if the UK derogates from the ECHR in relation to certain military operations or if it takes the more drastic action of repealing the HRA.

NOTES

1 [2017] UKSC 2, [2017] AC 821.

2 See e.g. UNSCR 1386/2001.

3 Tony Weir, *An Introduction to Tort Law* (2nd edn, OUP 2006) ix: 'Tort is what is in the tort books, and the only thing holding it together is their binding.'

4 Robert Stevens, *Torts and Rights* (OUP 2007).

5 ibid 239 (footnote omitted).

6 ibid 289.

7 Brice Dickson, 'Repeal the HRA and Rely on the Common Law?' in Katja Ziegler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart 2015) 115, 124; Michael Jones and others, *Clerk & Lindsell on Torts* (23rd edn, Sweet & Maxwell 2020) para 13–82; Law Commission and Scottish Law Commission, *Damages under the Human Rights Act 1998* (Law Com No 266, 2000; Scottish Law Com No 180, 2000) para 4.20; Anthony Lester and David Pannick, 'The Impact of the Human Rights Act on Private Law: the Knight's Move' (2000) 116 LQR 380, 382; Dawn Oliver, 'The Human Rights Act and Public Law/Private Law Divides' [2000] EHRLR 343, 348; Keith Stanton and others, *Statutory Torts* (Sweet & Maxwell 2003) 144; Jane Wright, *Tort Law and Human Rights* (2nd edn, Hart 2017) 91–92, 94, 310.

8 Andrew Burrows, 'Damages and Rights' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2012) 275, 292–296; Roderick Bagshaw, 'Tort Design and Human Rights Thinking' in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011) 110; Achas. Burin, 'The Positive Duty of Prevention in the Common Law and the Convention' (2020) 40 LS 209; Richard Clayton and Hugh Tomlinson, 'The Human Rights Act and its Impact on the Law of Tort' in Thiruvallore Thattai Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart 2013) 435, 437; François Du Bois, 'Human Rights and the Tort Liability of Public Authorities' (2011) 127 LQR 589, 601; Duncan Fairgrieve, 'The Human Rights Act 1998, Damages and Tort Law' [2001] PL 695, 696; Donal Nolan, 'Negligence and Human Rights Law: The Case for Separate Development' (2013) 76 MLR 286; Jenny Steele, 'Damages in Tort and under the Human Rights Act: Remedial or Functional Separation?' (2008) 67 CLJ 606, 616; Lord Woolf, 'The Human Rights Act 1998 and Remedies' in Mads Andenas and Duncan Fairgrieve (eds), *Judicial Review in International Perspective*, Vol II (Kluwer 2000) 429, 432.

9 [2005] UKHL 14, [2005] 1 WLR 673 [19].

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94 *Mohammed v Ministry of Defence* [2015] EWCA Civ 843, [2016] 2 WLR 247 [323].

95 [2014] UKSC 33, [2015] AC 359.

96 ibid [41].

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99 [1982] AC 888 (HL) 935–937.

100 [2014] UKSC 33, [2015] AC 359 [42].

101 ibid [43].

102 ibid.

103 ibid.

104 ibid.

105 See text accompanying f.n. 13–19.

106 *Mohammed v Ministry of Defence* [2017] UKSC 1, [2017] AC 649.

107 This summary is based on the leading judgment of Lady Hale. Lords Wilson, Hughes and Clarke agreed with Lady Hale. Lords Mance (with whom Lords Hughes and Clarke agreed), Sumption (with whom Lord Clarke agreed) and Neuberger (with whom Lords Hughes and Clarke agreed) gave concurring judgments.

108 [2017] UKSC 1, [2017] AC 649 [4], [5], referring, among others, to *Entick v Carrington* (1765) 19 State Tr 1029, 95 ER 807.

109 [2017] UKSC 1, [2017] AC 649 [15], [31].

110 ibid [16].

111 ibid [19]–[33].

112 ibid [32].

113 ibid [36], [37].

114 ibid [38]–[41].

115 ibid [45].

116 *Shergil v Khaira* [2014] UKSC 33, [2015] AC 359 [41].

117 *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB), [2019] QB 1251.

118 The courts have reviewed government policies applicable to its treatment of foreigners abroad in *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin), [2011] ACD 11; *R (Equality and Human Rights Commission) v Prime Minister* [2011] EWHC 2401 (Admin), [2012] 1 WLR 1389; *R (Hussein) v Secretary of State for Defence* [2014] EWCA Civ 1087.

119 [2017] EWHC 3289 (QB), [2019] QB 1251 [69]–[73].

120 ibid [71].

121 ibid.

122 ibid [74], [75].

123 ibid [316], [324]–[328], [536], [717].

124 *Netherlands v Mustafić and Nuhanović*, ECLI:NL:HR:2013:BZ9225, ECLI:NL:HR:2013:BZ9228, 6 September 2013, Dutch Supreme Court [3.18.3].

125 *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964.

126 This summary is based on the leading judgment of Lord Neuberger. Lords Wilson and Clarke and Lady Hale agreed with Lord Neuberger on the issue of foreign act of State. Lords Mance and Sumption (with whom Lord Hughes agreed) gave concurring judgments.

127 [2017] UKSC 3, [2017] AC 964 [118].

128 ibid.

129 Lord Neuberger also stated a possible fourth rule, namely that the courts will not investigate acts of a foreign State where such an investigation would embarrass the government; but this doctrine only arises as a result of a communication from the Foreign Office. Lord Neuberger, however, doubted the existence of this fourth rule. See ibid [120], [124], [132], [148], [149].

130 ibid [150].

131 ibid [121].

132 ibid [150].

133 ibid [122], [160], [161].

134 ibid [123].

135 ibid [151].

136 ibid [153]–[157].

137 ibid [163]–[165].

138 ibid [169].

139 ibid.

140 ibid [170].

141 ibid [167].

142 ibid [171].

143 ibid [168], [172].

144 Lords Mance and Sumption gave leading judgments on this issue.

145 [1970] AC 179 (HL).

146 *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332; *Mohammed v Ministry of Defence* [2015] EWCA Civ 843, [2016] 2 WLR 247; *Kontić v Ministry of Defence* [2016] EWHC 2034 (QB).

147 [1970] AC 179 (HL).

148 ibid 206.

149 ibid.

150 ibid 206–207 (Lord Reid), 214–215 (Lord Morris), 223–224 (Lord Pearce), 230 (Lord Wilberforce), 237 (Lord Pearson).

151 ibid 214 (Lord Reid), 221–222 (Lord Morris), 223–224 (Lord Pearce), 237 (Lord Wilberforce), 241 (Lord Pearson).

152 *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332.

153 (2007) 45 EHRR SE10.

154 [2007] UKHL 58, [2008] 1 AC 332 [3].

155 See also *Al-Jedda v UK* (2011) 53 EHRR 23.

156 *Mohammed v Ministry of Defence* [2015] EWCA Civ 843, [2016] 2 WLR 247 [9](i).

157 *Kontić v Ministry of Defence* [2016] EWHC 2034 (QB) [6], [130].

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159 *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964 [199].

160 *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, [2007] QB 621.

161 1995 Act, pt III, s 11(1).

162 1995 Act, pt III, s 11(2)(a).

163 1995 Act, pt III, s 11(2)(b).

164 1995 Act, pt III, s 11(2)(c).

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166 ibid.

167 [2006] EWCA Civ 327, [2007] QB 621 [105].

168 Ibid [102]–[107].

169 *Roerig v Valiant Trawlers Ltd* [2002] EWCA Civ 21, [2002] 1 WLR 2304.

170 *Harding v Wealands* [2004] EWCA Civ 1735, [2005] 1 WLR 1539.

171 [2006] EWCA Civ 327, [2007] QB 621 [106].

172 *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332 [40]–[43] (Lord Bingham), [153]–[154] (Lord Brown).

173 *Belhaj v Straw* [2014] EWCA Civ 1394, [2015] 2 WLR 1105 [136]–[148].

174 *Rahmatullah v Ministry of Defence* [2019] EWHC 3172 (QB), [2021] 4 WLR 39 (appeal pending).

175 *Husayn v Foreign and Commonwealth Office* [2021] EWHC 331 (QB).

176 *Netherlands v Nuhanović and Nuhanović*, ECLI:NL:HR:2013:BZ9225, ECLI:NL:HR:2013:BZ9228, 6 September 2013, Dutch Supreme Court [3.15.5].

177 *Mothers of Srebrenica v Netherlands*, ECLI:NL:RBDHA:2014:8748, 16 July 2014, The Hague District Court [4.166]–[4.172], affirmed by the Court of Appeal in The Hague, ECLI:NL:GHDHA:2017:3376, 27 June 2017 [33]. See also the judgment of the Supreme Court, ECLI:NL:HR:2019:1284, 19 July 2019 [4.1].

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182 ibid [4.171].

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185 *Netherlands v Mothers of Srebrenica*, ECLI:NL:HR:2019:1284, 19 July 2019, Dutch Supreme Court [3.7.2], [3.7.3].

186 1995 Act, pt III, s 14(3)(b); *Harding v Wealands* [2004] EWCA Civ 1735, [2005] 1 WLR 1539.

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COMPETING INTERESTS

The author has no competing interests to declare.

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