material deviation from or indifference to the original treaty commitments and scheme. In a separation of powers guise, this translates into questioning in what circumstances absent a specific statutory direction, the English courts will impute to Parliament an intention to observe international obligations. Put more crisply, when will the courts recognise unincorporated treaty commitments as having domestic legal force?

3.3.1 The Separation of Powers: Parliament

In general terms, Parliament has two roles in the treaty-making process. The first is a consultative role in advance of ratification or accession.[30] The second is the legislative role, consistent with the English dualist model, in bringing negotiated and agreed international obligations into the domestic legal system as domestic law.

Prior to 2010, no legal duty existed requiring treaties and international agreements to be submitted to Parliament for approval.[31] However, by convention standing from 1924, the "Ponsonby Rule", certain treaties were laid before Parliament for 21 sitting days before ratification.[32] Those treaties which would require or called for implementation in the domestic legal system, whether by primary legislation (statute) or secondary legislation (regulations, Orders), would come in any event before Parliament. Under the Ponsonby Rule the practice developed, and was confirmed by successive governments, that treaties and similar international instruments would be set before Parliament in some manner or other (or at least handed to various party representatives), as would any explanatory memoranda, and that copies of these materials would be transmitted to the relevant parliamentary committees. Over the course of time, the government did have occasion to announce various adjustments, broadening or limiting application of the Rule, as the case may be.

Under the Constitutional Reform and Governance Act 2010, ss.20 to 25, the core of the Ponsonby Rule has been set upon a statutory footing, for the first time since the practice of informing Parliament began in 1892. Ratification of a treaty may proceed after 21 sitting days only if no negative resolution has been passed. Notwithstanding a negative resolution in the Commons, ratification may proceed 21 days after a Ministerial statement indicating why the treaty ought nonetheless be ratified, has been laid before Parliament. There also exists the possibility of the government bypassing the notification procedure in certain exceptional cases (s.22) and for certain types of treaty (connected with the European Union, and tax matters: s.23). International instruments not having the character of a treaty in

[30] See generally Templeman 1991, and Harrington 2006.

[31] And drawing upon Templeman 1991, p. 465ff; Harrington 2006, p. 127ff, and Foreign and Commonwealth Office, United Kingdom 2001.

[32] The Ponsonby Rule did not apply to treaties in effect upon signing: Foreign and Commonwealth Office, United Kingdom 2001, p. 2.

international law, such as MOUs, are not covered by the Ponsonby Rule or Constitutional Reform and Governance Act 2010.

Parliamentary approval for ratification or accession should not be confused with conferring legal force upon treaties. The former, the consultative role, speaks to Parliament's political role and influence, rather than to legal powers.[33] In effect, the disapproval of Parliament of a prospective treaty will likely lead to the fall of the government. On the other hand, approving a treaty does not confer legal force upon its provisions. For that to occur, specific words of enactment are required. In practice, where the government considers that a treaty will require the passage of legislation, it will put the desired draft legislation before Parliament, together with the treaty, in advance of ratification. Both the legislative and the consultative roles of Parliament would thus be engaged. Again, Parliament may refuse to enact the legislation necessary to implement the treaty provisions domestically, also likely leading to the fall of the government. And of course, Parliament remains in theory supreme and sovereign in its legislative jurisdiction, so that it may pass any law adopting, rejecting, or modifying those treaty commitments.

Recognising this duality to Parliament's role also brings an appreciation of the separation of powers in the English constitutional settlement. The making of a treaty is a political, not law-making, act which attracts political consequences. Treaty making is reserved for the political branches. It is only the legislative act, the intentional conversion of political will into legal rules, which engages the courts, the legal branch. Whatever the status of treaty obligations in international law, they could have on this constitutional view no inherent or presumptive legal force within the domestic legal system (unlike, say, the view taken in the Netherlands).

3.3.2 The Separation of Powers: The Judiciary

As a general rule, the UK courts do not have (nor claim) jurisdiction to adjudicate upon or enforce rights arising from transactions between independent sovereign states on the plane of international law. Treaties represent a prime example of such transactions reduced to writing. They are agreements between sovereigns, acting precisely in that capacity.

> A treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.[34]

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[33] See Templeman 1991, pp. 460, 471.

[34] Lord Templeman in *Rayner (Mincing Lane) Ltd v DTI* [1990] 2 AC 418, 476–477.

The rule found early expression and application in disputes concerning the East India Company. Its particular status, commingling the nature of a commercial enterprise and of a delegate of the Crown for the public administration of the Kingdom's Indian possessions, tended to obscure (so it would seem) the precise capacity in which it acted. Hence money paid to the Company by the Nabob of Arcot under an agreement entitled a "treaty of friendship and alliance" did not create a debtor–creditor relationship, as under an ordinary private contract subject to the jurisdiction of the national courts.[35] The Nabob could not seek an accounting for his payments allegedly in excess of the debt incurred to the Company under that agreement for financing and prosecuting a local war. The Nabob of the Carnatic was in a similarly position, being unable to maintain an action in domestic law for an accounting of money paid to the Company "as an annual peace establishment" under a like agreement.[36] Likewise, the seizure by the Company of the Raj of Tangore and the whole of the personal property of the Raj, upon the latter's death without male heir or will, was viewed by the Court as an act of state over which a domestic court had no jurisdiction.[37] The Company was acting as the delegate of Crown in India, its sovereign capacity, in relation to the public administration of the Raj as well as several the several mutual aid and protection treaties with it. The government ratified and adopted the Company's act.[38] "The general principle of law was not, as indeed it could not, with any colour of reason be disputed. The transaction of independent States between each other is governed by other laws than those which Municipal Courts administer: such Courts have neither the means of deciding what is right, not the power of enforcing any decisions which they may make."[39] The rule was reiterated and confirmed by the Privy Council in *Cook v Sprigg*.[40] Cook and others sought to enforce a grant of certain mineral, forest, rail and other commercial rights obtained from the erstwhile "Paramount Chief of Pondoland" against the British colonial government. The British had annexed the Pondo territory after the concessions were granted. Although "well understood rules of international law" considered that a change of sovereignty was not presumed to affect title to private property, even if underscored by an express bargain between the sovereigns, such obligations could not be enforced by national courts. The annexing sovereign had the power to recognise or not those accrued rights, either continuing them, altering or overriding them.[41]

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[35] *Nabob of Arcot v East India Company* [1793] 29 ER 841.

[36] *Nabob of the Carnatic v East India Company* [1793] 30 ER 521.

[37] *Sect. State for India v Kamachee Boye Sahaba* [1859] 15 ER 28 32 (per Lord Kingsdown).

[38] *Buron v Denman* [1848] 154 ER 450 (the government's adoption and ratification of naval commander's seizure and destruction of a Spanish slave barracoon, the liberation of the slaves held, and other acts, transformed those deeds into an act of state).

[39] *Sect. State India v Sahaba,* 28–29 (per Lord Kingsdown).

[40] *Cook v Sprigg* [1899] AC 572 (PC); *Winfat v AG (Hong Kong)* [1985] AC 733 (PC).

[41] *Cook v Sprigg*, 578–79 (per Halsbury LC).

It is possible to parse out of these statements of the general rule at least three propositions at work. The first is one of sovereign immunity. Domestic courts will not pronounce upon acts of state, the acts of a sovereign, nor determine the rights of a sovereign, foreign or national, acting in that capacity. The second is that treaty-making stands at the core of Crown's prerogative powers, acting in its sovereign capacity. And in making and performing the treaty (at the level of international law) the Crown is in principle beyond the control of national courts and domestic law. The third proposition is that executive acts and agreements on the international plane cannot of themselves create, determine or alter rights and obligations on the national plane unless an Act of Parliament so directs. Parliament, and not the Executive Branch, has full, unfettered, legislative power.

These three propositions, themselves statements of a general nature, of course bear out further nuance and refinement. But the imprint of the British model of the separation of powers is nevertheless clearly visible. The law-making function is entrusted to, reposes in, Parliament (technically, the Crown in Parliament) and not the Executive Branch. Law-making is a positive, intentional and transparent act undertaken in and by Parliament, for which Parliament bears political responsibility. Parliament is supreme and sovereign in the exercise of that power, at least within the limits of its own territory. It is not bound (the practicalities of the Westminster system aside) by what the Crown has agreed or committed itself to on the international plane. Treaty-making is an act of the Crown in the exercise of its executive powers. Treaty-making is neither a legislative act, nor a mere contract between two parties subject to (national) law. While both law-making and treaty-making can be considered as "acts of state", there is an important distinction to be made. On the one side, legislation passed by Parliament is an act of state, an exercise of sovereignty and state power on the domestic plane. On the other, treaties, war, peace, and international agreements are acts of state on the international plane, as an outward manifestation of sovereignty and state power. Regarding both, British courts have no general, inherent power under the constitution to supplant, supervise, or subvert an act of state, whether of the Parliament or of the Crown (government), nor interfere in the equilibrium between the two.

> The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation in order to enforce a treaty.[42]

(i) sovereignty, justiciable standards and international law

"Sovereign immunity", or the rule that courts will not pronounce upon acts of state, has crystallised into a complex doctrine concerning the position of foreign states and functionaries before domestic courts, with the need to recognise

[42] Lord Templeman in *Rayner (Mincing Lane) Ltd v DTI* [1990] 2 AC 418, 476–477.

multiple layers, levels of differentiation. These include whether the state is acting as a private party or as a public body; what the nature of the claim is against the state, and whether the act of state is directly or only indirectly relevant to a judicial resolution. The technical doctrine, however, is not presently at issue; I consider it in the next chapter on customary international law. Rather, sovereign immunity ought here to be understood in its broadest, most general conception, indeed, less as a legal doctrine capable of direct application and more as a constitutional, even political, proposition sitting at the apex of all those considerations and questions (legal and otherwise) pertaining to the structure, organisation, and application of state power—and thus the separation of powers—nationally and internationally. A constitutional analysis thus runs through the immunity of a sovereign from the scrutiny of judicial organs in treaty matters. It goes to the constitutional status and powers of the government to enter into and conduct international relations, and thus commit blood and treasure to ventures reaching beyond its own shores. And so, there is a further distinction to be made, one between "foreign sovereigns" and "own sovereign". Treaty-making and treaty obligations for the latter are clearly an internal constitutional question. For the former, "foreign sovereigns", reciprocity and analogy to the domestic situation, together with a broader catchment of public policy,[43] play decisive roles.

It is the core tenet of the separation of powers that state power be distributed over (at least) the three basic public organs of executive, legislative and judicial, each with a measure of independence from the other, and each with differing degrees of responsibility to the public, to society. Each of the three has its proper place and function within a polity as a whole. A significant and fundamental divisor is the separation of law and legal considerations from (political) policy and political considerations. The nature and function of the courts, the principal legal arena, makes them by consequence ill-equipped in procedure and in their place in political society to adjudicate upon such policy considerations.[44] The myriad of interests, arguments, pressures, their respective, relative weights and prominence, all represent more the building blocks to any sort of settled standard, than the standards themselves from which rights and obligations by be judged. Acts of state—that which both evidences and comprises sovereignty—are quintessentially matters of policy. It is not within the judicial function or capacity to determine what does or ought to constitute a "valid" or "rightful" act of sovereignty, such as

[43] As in *Kuwait Airways v Iraq Airways (Nos 4 & 5)* [2002] 2 AC 883 (refusal to recognise Iraqi legislation attempting to legitimate the seizure and conversion of Kuwaiti commercial aircraft following the 1990 Iraqi invasion of Kuwait).

[44] On the distinction drawn between public policy (applied by the courts) and political policy (not so), see *Egerton v Brownlow* (1853) 10 ER 359 (HL) (per Lord Truro) and approved by Devlin J in *Bank voor Handel en Scheepvaart v Slatford* [1953] 1 QB 248, 263–65. See also *British Airways v Laker Airways* [1985] AC 58, 85 (per Lord Diplock): "The sources of the public policy to which courts of justice give effect in litigation between subject and subject are to be found in judicial decisions and in legislation and not in the views of the executive government except in the relatively narrow field of international relations between sovereign states which is still reserved to the prerogative."

the making of a treaty. Sovereignty, as Wade notes, is question of fact, not law.[45] But whereas the content of sovereignty and its exercise internally and externally may not lead themselves easily or at all to reconfiguration and reconstitution into legal issues, the attribution of responsibility and power for such an act to a particular state organ, and the limits of its power to act, are certainly subject to judicial scrutiny inasmuch as the constitution ascribes powers and prescribes limits on those powers. Hence the internal and external exercise of sovereignty enjoys no immunity from review as to its claim to validity and legitimacy.

The absence of juridical, manageable standards which underscore judicial restraint in pronouncing on acts of state (foreign states in the instant case) formed the basis of the leading decision of *Buttes Oil v Occidental Oil and Hammer*.[46] At the heart of this slander case was a dispute over petroleum exploration rights in an area of the Persian Gulf contested by neighbouring Emirates, Sharjah and UAQ, and Iran. The UAQ had first granted exploration concessions to Occidental (November 1969), and then Sharjah shortly thereafter to Buttes (December 1969). At the time the UK controlled the foreign relations of those Emirates. Occidental publicly accused Buttes and Sharjah of colluding to extend unlawfully and fraudulently Sharjah's boundary claims to cover the contested oil fields, which led to the slander suit and Occidental's counterclaim that Sharjah's backdated territorial decree was of no force and effect. As the House of Lords rightly recognised, the claim, counterclaim, and defences all depended upon the court's determination of whether the Sharjah decree was permissible, valid, and effective in international law. It was not merely a question whether domestic law and public policy prevented the courts from giving it effect. The matter called for judicial restraint, or abstention, not by way of an act of discretion but as "inherent in the very nature of the judicial process."[47] To the degree that Lord Wilberforce may be said to articulate what was inherent to the judicial process, it would appear from the cases cited that he considered what constituted a valid or lawful act of sovereignty not to be amenable to any cognisable, manageable standards.[48] Hence the distinction he makes between giving domestic effect to foreign law or executive acts, and examining the validity under international law or some doctrine of public policy, of an act operating in the area of transactions between states.

Subsequent consideration of this Wilberforce test has concentrated upon locating some set of readily discernible "manageable standards". Quite naturally the focus has been international law, in particular the domains of human rights, UN conventions and resolutions. These, it would appear, offer the needed certainty. At least, it has proven easier for the courts to measure the acts of foreign states against such standards. A similar judicial exercise remains more elusive for the foreign policy ventures of the British government. In *Marchiori v Environmental Agency*

[45] Wade 1955.

[46] *Buttes Oil v Occidental Oil and Hammer* [1982] AC 888.

[47] *Buttes Oil v Occidental Oil*, 931–32, per Lord Wilberforce.

[48] *Buttes Oil v Occidental Oil*, 937–38, per Lord Wilberforce.

the Court of Appeal rejected a challenge to the British "Trident" nuclear programme as contrary to international law (customary international law and the EURATOM treaty).[49] The Court held it

> … to be plain that the law of England will not contemplate what may be called a merits review of any honest decision of government upon matters of national defence policy. Without going into other cases which a full discussion might require, I consider that there is more than one reason for this. The first, and most obvious, is that the court is unequipped to judge such merits or demerits. The second touches more closely the relationship between the elected and unelected arms of government. The graver a matter of State and the more widespread its possible effects, the more respect will be given, within the framework of the constitution, to the democracy to decide its outcome. The defence of the realm, which is the Crown's first duty, is the paradigm of so grave a matter. Potentially such a thing touches the security of everyone; and everyone will look to the government they have elected for wise and effective decisions. Of course they may or may not be satisfied, and their satisfaction or otherwise will sound in the ballot-box. There is not, and cannot be, any expectation that the unelected judiciary play any role in such questions, remotely comparable to that of government.[50]

Nevertheless, the courts "… will be alert to see that no use of power exceeds its proper constitutional bounds. There is no conflict between this and the fact that upon questions of national defence, the courts will recognise that they are in no position to set limits upon the lawful exercise of discretionary power in the name of reasonableness."[51] In granting its authorisation, the Environmental Agency did not overstep its statutory authority nor fail to account for necessary, statutorily prescribed factors in reaching its decision. In particular, even though customary international law was "part of the law of nations, and the law of nations was part of the law of England", it could not thus oblige a statutory agency to take general cognisance of it where not mandated by the statutory scheme. Hence even if customary international law did restrict or declare repugnant nuclear weapons—which it most certainly did not—it created no exception to the nonjusticiability of national defence policy and the boundaries of the statutory schemes and powers under examination.

In the (*Campaign for Nuclear Disarmament*)*v The Prime Minister et al.,* the Divisional Court rejected an attempt to subject the decision to participate in the Iraq invasion and conflict to legal scrutiny, namely whether military action was justifiable based upon a judicial interpretation of the relevant 2002 UN Security Council Resolution 1441.[52] First, the courts had no jurisdiction "to rule on matters of international law unless in some way they are properly related to the court's determination of some domestic law right or interest." The courts "are the surety

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[49] *Marchiori v Environmental Agency* [2002] EWCA Civ 03 (25 Jan 2002); framed as an application for judicial review of permission for working with radioactive substances granted by a statutory agency pursuant to statutory authority (*Radioactive Substances Act*).

[50] *Marchiori v Environmental Agency*, para 38, per Laws LJ.

[51] *Marchiori v Environmental Agency*, para 40, per Laws LJ.

[52] *The Campaign for Nuclear Disarmament v The Prime Minister et al.* [2002] EWHC 2777 (Div. Ct.) (17 Dec. 2002).

for the lawful exercise of public power only with regard to domestic law; they are not charged with policing the United Kingdom's conduct on the international plane."[53] Second, as was amply demonstrated in the government's evidence, it would be extremely damaging to the national interest—national security and foreign policy—to commit the government to some definitive view of the Security Council Resolution. It would unduly restrict the possibilities available to the government in dealing with the present situation, both as against Iraq and in regards other states, as well as in future matters.

The question of the legitimacy (legality) of British military action in Iraq resurfaced in *R (Gentle) v The Prime Minister*.[54] Avoiding the infirmity of no domestic contact point, this case was framed under the *Human Rights Act 1998* and the EConvHR as an enforceable right to an independent public enquiry into the deaths of two servicemen in Iraq.[55] More than simply the usual inquest into the deaths (which had been conducted), the object of the enquiry would have been the (il)legality of the Iraq military action in international law, determining the (il)legitimacy of the government's decision to send forces there (and thus its consequent breach of Articles 1 and 2 of the Act (Article 2 EConvHR) by failing to protect life). The House of Lords rejected the claim. The right to an enquiry under the Act, insofar as it exists, is a procedural right, one which is inextricably dependent upon a valid, extant substantive right concerning the risk of fatalities. In the instant case, that substantive right would have to arise out of the lawfulness of military action, that the government had some duty or other under international law or the UN Charter not to resort to arms in the circumstances. But such a right did not exist in law.[56]

By way of contrast, the House of Lords had found sufficiently clear and certain standards in international law—customary international law, the UN Charter, and Security Council Resolutions—by which to decline recognition of an Iraqi statute affirming Iraqi Airway's possession and control of commercial aircraft seized from Kuwait Airways during Iraq's invasion of Kuwait in 1990.[57] In 1995, the House of Lords had ruled that Iraqi Airways' involvement in removing the aircraft from Kuwait prior to the Iraqi statute and commercial use of the aircraft, was covered by the doctrine of state immunity.[58] The claim against Iraqi Airways and Iraq accordingly fell. The question of justiciability, in terms of the effect of the Iraqi law purporting to dissolve Kuwait Airways and transfer its property to Iraqi Airways, while raised, was left to be argued during the trial on the merits,

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[53] *CND v The Prime Minister*, paras. 35, 36 (Simon Brown LJ).

[54] *R (Gentle) v The Prime Minister et al.* [2008] 1 AC 1356.

[55] Regarding the right to an enquiry into unexpected deaths occurring in public facilities or under government supervision and control, see, e.g., *R (Middleton) v W. Somerset Coroner* [2004] 2 AC 182, and *In re McKerr* [2004] 1 WLR 2135 (HL).

[56] *R (Gentle) v The Prime Minister*, 1367 (Lord Bingham), 1369 (Lord Hoffman), 1372–3 (Lord Hope), 1376–7 (Lord Rodger), and 1380–81 (Baroness Hale).

[57] *Kuwait Airways v Iraq Airways (Nos 4 & 5)* [2002] 2 AC 883.

[58] *Kuwait Airways v Iraq Airways (No. 2)* [1995] 1 WLR 1147 (HL) 1163 (Lord Goff).

ultimately giving rise to the within case. In its 2002 decision, the Law Lords held that the public policy exception to the recognition by UK courts of foreign law—especially as it operated within the foreign state—was not limited to violations of human rights. It extended to "fundamental" and "flagrant" breaches of international law. The Iraqi invasion and occupation of Kuwait was just such a flagrant and serious breach of international law, of the UN Charter, Security Council resolutions, and of customary international law. The immunities articulated in *Buttes Oil v Occidental Oil* could not be read to establish so strict and absolute rule as to mandate complete judicial abstention from pronouncing upon an act done abroad by a foreign sovereign. The entire House of Lords clearly and certainly accepted international law as a basis upon which such public policy considerations could issue.

Likewise, in 2002, the Court of Appeal considered international and national human rights to offer sufficiently manageable standards upon which UK courts may review the legitimacy of acts taken by a foreign state: *R (Abbasi) v Sect State Foreign and Commonwealth Affairs*.[59] Specifically, those actions were the continuing detention of a British national (captured in Afghanistan) in the US military prison at Guantanamo Bay, Cuba without charge and without ability to challenge that detention. Abbasi's mother sought to compel the Foreign Office to intercede actively on his behalf, to ameliorate his position, claiming that a violation of fundamental human rights, in international and domestic law (viz., arbitrary detention) created a duty on the government to respond formally to a request for assistance, and provide the necessary aid to redress that situation. The Court denied her claim. Although the continuing arbitrary detention of Abbasi by the US was objectionable as a likely violation of his human rights, no direct remedy existed as against the US, as a non-party and a sovereign state, nor as against the UK, not being responsible for that detention. No general duty of active diplomatic assistance existed in international law so as to be imported into English law, nor did the Human Rights Act 1998 (and EConvHR) extend cover to nationals outside the territorial control of the state. Domestic administrative law did, however, offer grounds for judicial review of any decision to deny or extend diplomatic assistance. In appropriate circumstances, depending upon suitability and subject matter, prerogative matters impinging upon private rights, even in the context of foreign affairs, could be subject to judicial review. Here, the policies of Foreign Office regarding diplomatic assistance were such as to give rise to a legitimate expectation that the government would intervene in those cases involving a denial of justice and rights in foreign states. That expectation was further conditioned by a necessary discretion in giving full weight to foreign policy considerations. In sum, the legitimate expectation was not one of having representations made to

[59] *R (Abbasi) v Sect. State Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 (6 Nov. 2002). And see also *R (Al Rawi) v Sect. State FCO* [2008] QB 289 (CA) (applying *Abbasi* in like circumstances to non-British nationals legally resident in Britain prior to detention in Guantanamo, on their claim of unlawful discrimination arising from a refusal by the British government to seek their release as had been done for British nationals).

the foreign government, but merely that the request to intervene would be given a full, fair and reasoned consideration.[60] While this result may seem the quintessential Pyrrhic victory, the Court's approach raises a further significant concern. On the one hand, the *Abbasi* case may be read as continuing the orthodox line of authority, as in *CND*, that courts will only review matters of international law and the conduct of foreign states insofar as they rest upon issues of domestic law. *Abbasi* turned upon a question of domestic administrative law. The actions of the US in detaining Abbasi were one relevant aspect in reviewing the reasonability of the government's decision not to intercede extensively on his behalf. Yet on the other hand, the logic of that approach would not require the Court to loosen as it did the links between international law and domestic law. The decision can also be read as suggesting a general principle that the courts need not observe sovereign immunity where a breach of fundamental rights is in play. "[A]lbeit that caution must be exercised by this court when faced with an allegation that a foreign state is in breach of its international obligations, this court does not need the statutory context in order to be free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights."[61] Indeed, that specific reading and position was argued in *CND v The Prime Minister*.[62] As noted above, the Court of Appeal preferred there the first, more orthodox reading, although in the context of questioning acts of the UK, and not a foreign power, on the international plane.

The inverse to all this is also true. The sovereign immunities underlying the general rule that treaties not incorporated by legislation into English law are not justiciable by national courts affords the courts a diplomatic and serviceable way to avoid pronouncing upon the actions of a friendly government. In *British Airways v Laker Airways*, the House of Lords avoided having to pronounce upon whether US commercial actions were in breach of the air services treaty (and agreements made thereunder) between the US and the UK which was not incorporated by statute.[63] BA sought to restrain Laker Air from pursuing its 1982 US action against British Airways and British Caledonian for unlawful restriction of trade. In effect Laker blamed BA and BC for its insolvency and collapse arising from bitter competition for transatlantic air passengers. In the course of litigation, the British government issued regulations designed to assist BA and BC in avoiding or circumventing the US action and which were ostensibly based upon the government's view that the US was acting contrary to the treaty. Hence conduct under the air services treaty stood at the core of the UK case. But since the treaty was not part of domestic law, the courts had no jurisdiction to enter into consideration of its terms: BA's case for an anti-suit injunction therefore failed. At the same time, domestic administrative law

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[60] *R (Abbasi) v Sect. State Foreign and Commonwealth Affairs*, paras 99, 100, 107 (per Phillips MR). Such a broad reading was indeed argued for and rejected.

[61] *R (Abbasi) v Sect. State Foreign and Commonwealth Affairs*, para 57 (per Phillips MR).

[62] *R (CND) v The Prime Minister*, para 36.

[63] *British Airways v Laker Airways* [1985] AC 58.

did not give Laker Air any grounds to challenge the Order made under statutory authority for the benefit of BA and BC, making it unlawful for them to cooperate in the US proceedings without UK consent.

(ii) treaty-making and the Crown prerogative

As a matter of English constitutional law, treaty-making (and the foreign affairs power, more broadly) is a prerogative power of the Crown. Reviewing the government's power to make and enter treaties remains beyond the jurisdiction held by the courts. Whereas the rule may have once been stated as the courts generally having no jurisdiction to supervise an exercise of the prerogative, such a broad brush exemption of the prerogative is no longer completely safe following the shift in justiciability from the source of public power to the nature of its application and effects.[64] Rather, the making of treaties, and other aspects of relations and transactions (in war and peace) between sovereign powers, pertain so directly to the constituent elements of sovereignty and retain such a high degree of political policy and responsibility as to confound any easily discernible and manageable legal test and standards. In that respect, the rule as stated in *Rustomjee v The Queen* remains valid, "[The Queen] acted throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own courts."[65] Following a war between China and Great Britain, an 1842 peace treaty stipulated that China would pay Britain a sum of money on account of Chinese debts owed and owing to British creditors as at the start of the conflict, before the British were expelled. The British government received the funds promised. A British creditor sued the government to recoup out of those funds the debt owing, as yet unpaid. The Court of Appeal rejected the claim. The Crown did not owe its subjects a legally enforceable duty to administer funds received under the treaty according to the terms of the treaty, whatever political or moral duties may otherwise exist.[66] The Crown did not treat on behalf of its subjects as agent or trustee. In the making and performing of a treaty with another sovereign the Crown is not and cannot be a trustee or agent for a private party, whether or not the Crown would also expressly assume those roles (in the context of national law).

It follows from this that when concluding or acting under a treaty, such as receiving funds or property thereunder, the Crown is acting as a sovereign power on both the national and international planes.[67] It does not have the status of a private party, or one subject to private law. Thus the seizure of the Raj and the Rajah's

[64] Originating in *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 375: see above, Chap. 2.

[65] *Rustomjee v The Queen* (1876–77) LR 2 QBD 69 (CA), 74 (per Lord Coleridge).

[66] See also *Phillips Bros. v Sierra Leone* [1995] 1 LLR 289 (or proceedings in international law).

[67] Or indeed even when no treaty is in issue: see, e.g., *Rahimtoola v Nizam of Hyderabad* [1958] AC 379; *USA v Dollfus Mieg* [1952] AC 582.