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Abhandlungen

Enemy at the court: Carl Schmitt's theory of friend-enemy relations and UK courts' (non)use of international law in domestic litigation

Alexander Orakhelashvili

I. Courts, friends and enemies

It is beyond any dispute that judiciary in the UK deals with questions of international law more intensively than any other national judiciary. From time to time, cases involving international law also involve litigants whose identity could raise political concerns, such as foreign States, or they otherwise draw on relations of the forum State with foreign States. In some such cases, applying the ordinarily applicable law could generate significant political cost for the forum State in its relations with other States; in the opposite case, the UK may be put in breach of its international obligations. To some eyes, resolving such political dilemmas arising around relations between the forum State and its friends, allies or partners may well appear to be an undeclared judicial task.

Carl Schmitt has defined the concept of the political as relating to the intensity of an association or dissociation between people or entities for any possible reason, whether religious, national, cultural, or economic, which "can effect at different times different coalitions and separations."[1] The conflict or confrontation itself is, however, inherently political, which is antithetical to all other distinctions such as economic, moral, ethical or aesthetic. Such political confrontation underlying relations between two persons or entities could transform them into enemies, even if that would not have happened for any other reason. As *Schmitt* has explained,

> "The political enemy need not be morally evil or aesthetically ugly; he need not appear as an economic competitor, and it may even be advantageous to engage with him in business transactions. … These can neither be decided by a previously determined general norm nor by the judgment of a disinterested and therefore neutral third party."[2]

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[1] *C. Schmitt*, The Concept of the Political (1996), 38.
[2] *Schmitt* (supra note 1), 27.

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Schmitt further explains that the distinction between friend and enemy relies on “a definition in the sense of a criterion and not as an exhaustive definition or one indicative of substantial content”.[3] Furthermore, “the friend and enemy concepts are to be understood in their concrete and existential sense, not as metaphors or symbols”,[4] which means that this is about concrete relations arising in concrete situational contexts. Enemy needs not be an existential or unavoidable enemy, and Schmitt is clear that “it is by no means as though the political signifies nothing but devastating war and every political deed a military action.”[5]

A wholesale or categorical opposition or conflict between persons or entities is not necessary to consider them as each other’s enemies. A range of more mundane and trivial situations involving conflicts of interest could also do. According to *Schmitt*, relations between enemies could involve “all sorts of tactics and practices, competitions and intrigues; and the most peculiar dealings and manipulations are called politics.”[6] Enemy of a State can be internal or external, and, in either case, the enemy identity is determined through the decision made by a State.[7]

Politics disregarding any non-political consideration is total and unbounded politics. The origin of such unbounded politics is associated with the rise of fascism in Europe in first half of 20th century. It is explained that,

> “as a philosophy that rejected a politics of limits, which identified the essence of the political with violence, conflict, and the casting of Others as enemies, and which sought to inject this logic as broadly as possible in a process of social mobilization, fascism represents the ultimate social expression of an unbounded politics. … The logic of politics becomes merged with patterns of violence and enmity and extended destructively to all aspects of life, becoming the dominant logic of society as a whole and making its foreign policy wholly one of domination and conflict.”[8]

But an extreme ideology such as fascism is not necessarily required for an unbounded politics to be practised or to thrive. Unbounded politics can and does work in a range of other situations. And here we speak of unbounded politics not as a wholesale characteristic of a political or legal system but in a more nuanced and contextual sense, as adopted in dealing with particular classes of litigants in UK courts.

What generates unbounded politics focusing on *Schmitt’s* friend-enemy distinction in the conditions of a democratic constitution? Over past dec-

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[3] *Schmitt* (supra note 1), 26.
[4] *Schmitt* (supra note 1), 27.
[5] *Schmitt* (supra note 1), 33.
[6] *Schmitt* (supra note 1), 30.
[7] *Schmitt* (supra note 1), 38, 46.
[8] *M.G. Williams*, Why Ideas Matter in International Relations: Hans Morgenthau, Classical Realism, and the Moral Construction of Power Politics, 58 International Organization (2004), 633 at 651; *M. Williams*, The Realist Tradition and the Limits of International Relations (2005), 122.

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ades, several major foreign policy decisions adopted by the UK Government with regard to major international crises have not been informed exclusively by British interests. Instead, the dominant perception of the latter interests has been shaped by UK's relations with its ally and partner States. Since the war in Falklands in 1982, UK has never used force solely in the British interest; UK's participation in wars against FRY (1999), Afghanistan (2001) or Iraq (2003) was from the outset treated as a foregone conclusion because it was required by UK's special relationship with the US. Both Cold War and post-Cold War periods have witnessed confrontations between blocs, which could consist in containing the Eastern bloc, fighting "war on terror", or supporting the hegemon in its ability to choose allies and cultivate relations with them to ensure that it has the power advantage over its actual or possible adversaries. Even a liberal hegemon may need illiberal allies or partners to get better of its illiberal adversaries. Hence, a Realpolitik aimed at attaining liberal ideals is by no means a contradiction.

As for the enemy's identity, the forum State's initial relation to it could be entirely neutral. The enemy may not be inherently opposed to the forum State in any sense, and in some cases, it may even be the forum State's national who has situationally ended up being on the wrong side because of its conflict of interest with the State's friend. However, the forum State's national interest calculus has also to do with looking after its friend's interest. As soon as the forum State is a friend with X with whom Y is an enemy, Y becomes forum State's enemy as well and deprived of its underlying rights.

Examples may show that the phenomenon discussed here is not about the substantive value or merit of political decisions adopted by the Government, but about their ability to decide which option would be more suitable or beneficial than its possible alternatives. In 1945, the UK Government has decided to surrender thousands of Russian prisoners and fugitives to the Soviet Government, even at the risk that many of them would thereupon be shot. Foreign Office considered this to be a sacrifice to serve vital diplomatic needs. This contrasted with the American position that resisted the idea of forcible repatriation and did not face any reciprocal action from the Soviet Union for that.[9] It is difficult to evade the conclusion that the UK Government acted on the premise that surrendered persons were enemies of (then) their friend, Soviet Union, and therefore their own enemies.

The net effect of the friend-enemy politics in adjudication, inevitably consisting in decisions made by a State, is that the law of the forum State should accommodate the alteration of legal rights of relevant entities so that a friend is given, at the enemy's expense, a favour that it would not

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[9] *N. Tolstoy*, Victims of Yalta (1977), 425, 428.

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otherwise obtain under the law of the forum State. This entails, correspondingly, denial of otherwise available remedies and protection to the enemy. English law has long operated the doctrine that an enemy alien, being a national of the State which is at war with the UK, is deprived of judicial protection in the UK.[10] But here we are dealing with cases that involve litigants who are not enemies of the UK in any such sense.

If the above vision is given full effect, total and unbounded politics could engulf adjudication before UK courts. The issue is whether, under the UK model of the separation of power, law and the constitution allows or compels courts to defer to policies adopted by political branches of the UK Government; or whether courts end up manipulating the national or international law applicable in the relevant case to make it easier for political branches of the Government to achieve their political aims and deny the enemy legal protection they would otherwise be entitled to. Common law works in an empirical manner and it could hardly ever examine such matters and their analytical foundation in a comprehensive systemic sense, still less be express on political aspects underlying situations in which litigated cases arise. Thus, the answer cannot be found in cases alone.

II. Identity of the State and its relation to an enemy

A particular mind-set, or a peculiar ethical view of the relationship between the State as a collective and individual rights and freedoms, is required on domestic constitutional plane for courts to embrace the above friend-enemy logic. Political philosophy and ethics that the State will and decision, or its individuality, national interest and autonomy, is a value superior to the rights and freedoms of an individual, is advocated by the range of theories. These are *Rousseau's* theory of "general will", *Hegel's* theory of "national spirit", and *Bentham's* utilitarian take on public interest centring on the notion of "greatest happiness of the greatest number". These theories indeed straddle into each other, all of them being about ways and means to secure a public interest of a political community by overriding or disregarding dissent or countervailing considerations.

According to *Hegel* the State is a reality of a moral idea, moral spirit as self-evident and substantial will (der sittliche Geist als der offenbare, sich selbst deutliche, substantielle Wille), which embodies an inherently rational self-consciousness.[11] This endows a State with its individuality

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[10] Janson v Driefontein Consolidated Mines, Ltd. (1902) AC 484 at 491-2; Rodriguez v Speyer (1919) AC 59 at 90; though owing to 2001 ICC Act that gives effect to 1998 ICC Statute, the enemy alien doctrine is now on a questionable footing, because Article 8 ICC Statute considers that to be a war crime.

[11] *G.W.F. Hegel*, Grundlinien der Philosophie des Rechts (1907), 195.

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and enables it to make autonomous decisions, pursuant to a State's own national interest, including on extent to which it wants to shape its relations with its friends and enemies. "Spirit" of a State or nation is here expressed and realised through the ability of constitutionally empowered State organs to make decisions premised on situational choices and to assess whatever national interest requires here and now to deal with this or that particular friend-enemy relation, and to assess ensuing risks or benefits at every turnaround. On this account, the State is an agency whose judgment could not be morally or legally questioned.

Jeremy Bentham's take on public interest relying on the "greatest happiness of the greatest number" could be another factor informing the policy underlying and process of constitutional decision-making through which the *Hegel's* individuality of a State and the actuality of its spirit is manifested. Ostensibly more suitable for describing democratic constitutions, the utilitarian principle of the "greatest happiness of the greatest number" apparently enables to prioritise the democratic will and consensus of the population and society within a State. In that context, utilitarianism is about ways and process to enable the State to decide where and how the dividing line between the "greatest number" and the rest ought to be drawn. A policy thus designed can be used to suppress rights and interests of a particular class of persons (in our case a particular class of litigants) when they are opposed to that "greatest number" or, alternatively, to a friend of that "greatest number", whereby they are deemed to have become, and treated as, enemies of the "greatest number" itself. The national utilitarian calculus of public good would be stretched to encompass forum State's relations with its "friend" to justify taking friend's side in a friend versus enemy confrontation. And utilitarians are conspicuously consistent about the relationship between general will and interest, and its adverse impact upon individual rights and freedoms.

Rousseau's "general will" also sits well with the thesis that the State autonomously determines who its friends and enemies are, to give effect to its own national interest. According to the French revolution thinking, "volonté générale" emerges through "la reunion de toutes ces volontés", "volonté du plus grand nombre" is the law for all and prevails over wills of individuals. Pamphleteers during the French revolution might not have used *Rousseau's* theory with an impeccable accuracy,[12] but any viable perception of "general will" is premised on an agency that can utter, on particular occasions, the specific will which determines what the content of that "general will" is in the relevant case.[13] As explained, "Rousseau had taught

[12] *J. McDonald*, Rousseau and French revolution (1965), 89–90.

[13] And it is also perfectly compatible with the thesis that foreign policy-making is premised on the unity of State will, discussed below, section III below.

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Hegel that morality and freedom existed in and through the State only and that they were identical with the general will. Freedom consisted in voluntary submission to this general will."[14] From the Benthamite utilitarian perspective too, *Austin* has suggested that individual liberty is whatever remains after the sovereign has issued its commands. Government is free to abridge or curtail individual liberty at its pleasure or discretion. Liberty's value is measured by its correspondence with the general good, and it "is not more worthy of eulogy than political or legal restraint".[15] On this view, there is no inherent limit how far the happiness of the "greatest number" could be increased to suppress the minority.

On all three above theories the allocation, under State constitution, of decision-making authority to particular organs of the State is a vehicle or channel carrying the will which gives expression to the autonomy and individuality of the State in specific situations. And choosing ally and making enemy lawless similarly becomes a way in which the State's individuality is expressed and asserted.

The doctrine traditionally dealing with the ability of States and governments to preserve important national interests is called reason of State, which could also be seen as analytical antecedent to *Schmitt's* decisionism. As with above theories, the core idea behind the notion of the reason of State is that the executive action undertaken in the public interest should not be questioned just because it deviates from the law. As explained, in its original version endorsed by the range of writers from *Cicero* to *Grotius*,

> "reason of state crossed the boundary between political theory, defined as the theory of legitimacy and distribution of power within the state, and international theory. In both spheres reason of state acknowledged the compulsions of necessity; its particular theoretical concern was therefore with the contingent, the extraordinary, and the unforeseeable."[16]

The extra-legal nature of reason of State is manifested through the thesis that, "Since necessity has no law (necessitas non habet legem), reason of state could not be codified or legislated."[17] The core essence of reason of State is not informed by any particular conception of vital State interests. Instead, it is a framework concept referring to the ability of constitutionally designated State organs to design and carry out policies that will not be questioned within their political or constitutional system, even if those policies discard any countervailing consideration. In that sense, reason of State is very similar to, indeed an institutionalised expression of, *Schmitt's*

[14] *F.O. Hertz*, Nationality in History and Politics (1951), 347.

[15] *J. Austin*, The Province of Jurisprudence Determined (1954), 268.

[16] *D. Armitage*, Edmund Burke and the Reason of State, 61 Journal of the History of Ideas (2000), 617 at 621.

[17] *Armitage* (supra note 16), 621; As Burke had himself put it, "what Sort of a Protection is this of the general Right, that is maintained by infringing the Rights of Particulars? What sort of Justice is this, which is inforced by Breaches of its own Laws?", cited in *id.*, 623.

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primacy of the "political" to override and displace the relevance of any non-political consideration (whether economic, moral, ethical or humanitarian). The entirely process-focused nature of the idea of the reason of State is explained thus:

> "Reason of state alone could not determine which circumstances were truly cases of extreme necessity and hence which precise occasions could permit the overriding of custom and law. It could only lay down norms from which such exceptions could be derived, and more generally it provided a consequentialist means of applying the norms of natural law. … The compulsion of necessity demanded in reason of state theory was assumed to be universally recognizable but only under particular circumstances by specific, usually sovereign, agents. The conditions which would make necessity both evident and compelling could never be defined with any precision; it therefore demanded princely or consiliar discretion for its application."[18]

Thus, the viability of reason of State is contingent on the constitution of a State placing discretion in the hands of relevant State organs or officials, to act free of some, most or all legal constraints. Otherwise, political necessities underlying the reason of State would not be ones that are recognised under the law of the State. Now obviously, it may well be asked whether those ancient theories reflect the decision-making pattern within modern liberal constitutional democracies. It has indeed been suggested that "The Kantian categorical imperative and Bentham's greatest happiness principle provided competing but equally fatal alternatives to this tradition of reason of state, their anathematization of it opened up that gulf between morality and politics."[19] But again, reason of State does not have one single or inherent (a)moral content in it. It is merely a framework concept referring out to a statesman's discretion to decide what is required for safely navigating the ship of the State. This element does not go away in democracies. Even within a democracy, political morality of a statesman, political elite or broader sectors of the public could be just as likely to endorse the idea and policies of rendering the relevant enemy rightless to preserve good relations with a friend, ally or partner.

III. One path, one brain – the process of decision-making

Frederick the Great has suggested "the interest of the State is the only consideration that should decide the counsel of a Prince." But State interests are rarely self-evident. *Richelieu* thought that a political leader's task was to distil the foreign policy vision from the array of conflicting pressures and form it as a coherent direction. *Palmerston* similarly emphasised the ambiguity of national interest and said it was about doing "what may seem to

[18] *Armitage* (supra note 16), 621.
[19] *Armitage* (supra note 16), 634.

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be best, upon each occasion it arises, making the Interests of Our Country one's guiding principle."[20] Both these examples prioritise decision-making role over the abstract substance; they both deal with the statesman's constitutional role in distilling and formulating the substance of national interest in changing circumstances, including choosing allies and partners. Both political leaders were certainly premised on that being the position endorsed under the constitution they operated under, whether the absolutist one in *Richelieu's* France or the mixed constitution in Victorian Britain.

Empirically, there can be no reason of the State as such (save in extreme cases where a State is genuinely threatened with destruction or annihilation). The State itself is merely a mechanism or tool that could be put at the service to various policies. There are interests of leaders, interest groups, social classes or sectors which then get adopted, through a situational choice, by the State as State interests. Disagreements are always possible, especially in the conditions of a democratic constitution, as to what the genuine reason of State is, and by which means it could be facilitated. To illustrate, there was a wide divergence of opinions as to whether the UK Government should have joined war against Iraq in 2003, and the Government made its decision to do so even if UK's population hardly ever gave unambiguous support to the idea that this was in UK's national interest.

Reason of State focuses, instead, on process and constitutional authority of adopting relevant decisions. As *Meinecke* has explained, "strictly speaking, only one path to the goal (i.e. the best possible one at the moment) has to be considered at any one time."[21] But *Meinecke* has also emphasised the duality of foundation of State aims:

> "Besides the ultimate value represented by the well-being of the State, there are still other outstanding values which lay an equal claim to be considered as unconditional. Of these we are concerned here with the moral law and with the idea of justice. For it is the case that this very well-being of the State is secured not solely through power, but also through ethics and justice; and in the last resort the disruption of these can endanger the maintenance of power itself."

Therefore, "there at once arises the very obscure question of how far [the statesman] is guided in doing so by a utilitarian and how far by an idealistic point of view. Where then is the boundary between the two?"[22] This reasoning goes to the substance of considerations that inform the meaning of the reason of State. While proposing the broadly based understanding of the reason of State, *Meinecke* also sets the stage for insoluble dilemmas when conflict between power and interest on the one hand and ethics and virtue on the other are likely to occur.

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[20] Both cited in *H. Kissinger*, World Order (2014), 23, 29–30.

[21] *F. Meinecke*, Machiavellism: The Doctrine of Raison d'Etat and Its Place in Modern History (1962), 1.

[22] *Meinecke* (supra note 21), 3.

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Different from that is *Schmitt's* decision-oriented approach, asking the principal question "who decides?" As explained, *Schmitt* criticises *Meinecke's* emphasis on the dichotomy between self-interest and ethical law, and distances himself from the substance of the reason of State and focuses on the essence of the agency who determines it.[23] Mutually incompatible as they come across at first sight, *Meinecke* and *Schmitt* models are analytically in a relation of mutual dependence. Whether foreign policy decisions are premised on ethics or self-interest, which may in their turn be premised on some social consensus and interest representation, some agency has to make those decisions, acting on the relevant motive.

Officials who deal with foreign policy decisions are usually envisaged to possess broad discretion of defining and construing national interest in foreign affairs. The proactive sovereign monarch model is upheld in *Frederick the Great's* political testament, to the effect that "a system can be the product of only one brain; it must consequently be that of the sovereign's", as opposed to those of ministers. The Monarch decides, as opposed to acquiescing into the decisions made by ministers.

Sir William Blackstone was not that different in his reasoning, suggesting that "the king is the delegate or representative of his people", without whose role "unanimity must be wanting to their measures, and strength to the execution of their counsels. In the king therefore, as in a center, all the rays of his people are united, and form by that union a consistency, splendor, and power, that make him feared and respected by foreign potentates."[24] *Blackstone* articulates England's domestic constitutional position on terms that would make *Machiavelli* rather happy: constitutional allocation of public authority serves the reason of State.

Hegel's preference also was for foreign affairs being unreviewably concentrated in the hands of the monarch. He suggests that a State engages in relations not with one other State only, but with many States, and the ensuing relations are so complex and delicate that they must be handled by a head of State (Der Staat ist überdies nicht nur mit einem anderen im Verhältnis, sondern mit mehreren; und die Verwickelungen der Verhältnisse werden so delikat, daß sie nur von der Spitze aus behandelt werden können).[25] But *Hegel's* association of reason of State with the central role of monarchs was more probably a reflection of a particular German (namely Prussian) constitutional model. In early 19th century, *Hegel* criticised the British political system as too dependent on public opinion and pointed out that wars undertaken by Prime Minister *Pitt* in late 18th century followed

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[23] *L. Catteeuw*, Reason of State in the European Intellectual Space during the Interwar Period, in V Dini & M D'Auria (eds.), The Space of Crisis – Images and Ideals of Europe in the Age of Crisis: 1914–1945 (2013), 94–95.

[24] *Blackstone*, I, 245.

[25] *Hegel* (supra note 11), 370.

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the public opinion sentiment, and they increased *Pitt's* popularity.[26] *Hegel* was critical of the British system to the effect that the British Government could not wage an unpopular war.[27]

However, in the later 19th century "foreign affairs" was a matter removed from the public attention, "foreign policy was a matter for an *élite*, and they conducted it according to their own view of national interest and world policy."[28] Statesmen acted on that premise. According to *Disraeli*, "Even to utter the phrase 'foreign affairs' made 'an Englishman convinced that I am about to treat of subjects with which he has no concern.'"[29] This further fostered the assumption that the executive branch of the government was in charge of foreign affairs, and that Parliament that represents the public opinion had left foreign policy to the Executive:

> "as long as foreign affairs remained a matter of royal prerogative and only came before Parliament at the discretion of monarchs and ministries, Parliament's role in sustaining Britain's international standing would necessarily be circumscribed and episodic. The conception of Parliament's omnipotence in municipal matters contrasted with its relative impotence in foreign affairs."[30]

The ensuing pattern of foreign policy constitutional dimension is that it is the responsibility of the Crown to assess intricacies of the country's international position, and to find the optimal use for national resources to be put to the benefit of foreign policy goals such as colonial expansion, maintaining the balance (or equilibrium) of power, or access to natural or other resources required for domestic consumption. This involves assessment and prioritisation of options, and of overriding and subordinated policy aims. A complex enterprise of making calculations on these issues, determining policy objectives, advantages or disadvantages ensuing, is not a matter of legal expertise; on this view, foreign affairs require more secrecy and manipulation, less publicity and public control.

But it has also been recognised over centuries that the Crown is not identical with the person of a Monarch, but can also signify administration carried out in his or her name. In 1824, owing to trading and investment as well as strategic interests, Foreign Secretary *Canning* decided to recognise some Spanish provinces in South America as independent States. The King was against this decision because it went against the principle of legitimacy of European monarchs' territorial possessions and made this clear to the Austrian minister. In response *Canning* "told the King that, if he does not consent, there might be an exposure in Parliament and a *coup*

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[26] *Hegel* (supra note 11), 370.

[27] *Hegel* (supra note 11), 370 ("In England kann z.B. kein unpopulärer Krieg geführt werden.").

[28] *Robinson & Gallagher*, Africa and the Victorians (1961), 378.

[29] *J. Charmley*, Splendid Isolation? Britain and the Balance of Power 1874–1914 (1999), 16.

[30] *Armitage* (supra note 16), 139 (footnote omitted).

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d'état. This threat thoroughly frightened the King, who gave the way."[31] This has conveyed an early expression of the democratic governance idea, within which the cabinet or presidential style of governance need not be essentially different but could still be informed by the "one brain" or "one path" thesis, whether it is a minister's or a policy adviser's brain or one of a lobbying organisation.

A further example of this pattern is provided by *Lord Salisbury's* approach to diplomatic games in relation to Africa in late 19th century, to make UK's colonial possessions secure from foreign attack or penetration:

> "Africa for him remained above all an intellectual problem, an elaborate game of bids and counter-bids, of delimitations and compensations. With the consequences for Africa, the development of the new territories and the impact of conquest, he was not greatly concerned: for him the Partition began and ended on the maps of the Foreign Office. He looked on the process with a detached and empty view, in which chances were weighed and puzzles were solved."[32]

This is one of cases of operational necessity of manipulating and navigating through complex and unpredictable processes of power politics. This operational necessity also involves the degree of urgency and secrecy that not all areas of policy-making involve. Hence, *Salisbury* as the statesman in charge would decide whatever would be treated as a priority. The rise of democracy has not abolished reason of State or made it irrelevant, but it has simply extended the range of considerations that could inform its content. It could as well reflect public opinion and public perception of national interest as one of the considerations that enter the mind of those who make policy and executive decisions. This may be one of the ways in which *Hegel's* individuality of the State and actuality of its constitution manifests itself in relation to foreign affairs. When, moreover, popular representation and democratic consensus is invoked, ideological pressure towards justifying deprivation of protection to particular class of litigants could further increase. Even if a State has democratic constitution, the range of its interests from survival to political and economic success or strategic and economic advantage or power preponderance over its adversaries remains the same. The essence of States and competition between them is neither abolished nor altered.

IV. Implications for the legal reasoning

Let us now deal with the "how" question. The viability of "one path" or "one brain" approach suitable to accommodate friend-enemy jurisprudence with the appearance of regular maintenance of rule of law depends

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[31] *H. Temperley*, The Foreign Policy of Canning 1822–1827 (1925), 147.
[32] *Robinson & Gallagher* (supra note 28), 257.

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on a functional legal order – a concrete total and complete legal order to use *Kelsen's* term[33] – through which actual decisions affecting people's rights are made and can yield real-life implications. The outcome is that, in relevant cases, legal order and constitution accommodates primacy of the political will over the existing law. The notion of reason of the State has long projected political and ideological justification of this outcome. It is explained that necessitas, related to reason of the State, "served all European monarchs as an expedient for suspending the rule of law."[34] On another account, reason of the State "also refers to a decision of political *prudentia*, a decision made according to the needs of contingency. Its meaning oscillates between the violation of law and the adaptation of general rules to particular cases – often necessary for the enforcement of the law itself."[35] It consists in an "arbitrary exercise of political power".[36] *Edmund Burke* saw reason of the State as a notion envisaging "to reconcile the use of both a fixed rule and an occasional deviation".[37] All these accounts focus on the maintenance, of the appearance at least, that government is acting within the legal order and doing what legal order empowers it to do. Even if *Schmitt* "draws the reason of State to the outright opposition to the law",[38] that only ostensibly differs from *Kelsen's* thesis that State can only exist and operate through a legal system.[39] Even if deviation from the ordinarily applicable law amounts to the sovereign exception endorsed by *Schmitt*, it can get nowhere unless the legal system accommodates it. If the workings of the legal system let the reason of State take its effect, then total legal order validates deviation from generally applicable law to the benefit of a friend and to the detriment of an enemy. This outcome is further supported by the thesis that, as individual freedom has no transcendent value that those philosophers could see in it, a legal system, generally aimed at serving the general will could not, on their view, be constrained by it either. Even if a person or class of persons is treated lawlessly, they are still treated by the authority of a legal system.[40]

Thus the political or philosophical concept of reason of the State collapses jurisprudentially into the deviation from rule of law by public authority, taking away rights that would otherwise be arising and operable under the relevant national legal system. In every such case it is about

[33] *H. Kelsen*, General Theory of the Law and State (1949), 100.
[34] *A. Pagden*, Lords of All The World (1995), 51.
[35] *L. Catteeuw* (supra note 23), 91.
[36] *Catteeuw*, (supra note 23), 91.
[37] *Armitage* (supra note 16), 625.
[38] *Catteeuw* (supra note 23), 95.
[39] *Kelsen* (supra note 33), 186 ff.
[40] This is one of the reasons why I do not discuss this through the prism of the rule of law thesis. There are minimum and other versions of rule of law, see *H.L.A. Hart*, Positivism and the Separation of Law and Morals. 71 Harvard LR (1958), 593.

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whether public authority is constitutionally empowered to make such decisions with regard to a particular person or on a general basis, and in common law systems this issue is ordinarily up to courts to decide.

Common law in England has traditionally asserted its own position favouring individual liberty as the driving force English law's historical development, in private relations as well as in relations between individuals and government. Government is subjected to the law of the land as anyone else is. Courts are meant to be loyal not to government's policies, but only to constitutional rules that confer decisions to political branches to adopt those policies and make appropriate decisions. If courts modify, relax or manipulate the standards of applicable law then they themselves make a net and distinct contribution to political agenda or decision, because without that it would not be validated on terms of the legal system. This is so for a simple reason that the Executive has no authority to alter the law of the land. In friend-enemy litigation, enemy is rendered rightless through the combined and cumulative operation of executive and judicial branches of the government and is forced to face to what appears, on the outcome, to be a Hobbesian unlimited sovereign. This may even encourage the suggestion made by *d'Entreves* that "the modern doctrine of the separation of powers [is] much more than merely a constitutional theory about the structure of power in the State. It [is] a recommendation about the scope and uses of State-power, a political theory heavily loaded with ideological elements."[41]

V. Cases adjudicated in UK courts and involving the friend-enemy dimension

1. Jones v Saudi Arabia

In 1999, UK House of Lords decided that *Augusto Pinochet*, former president of Chile, did not enjoy immunity from the UK courts' jurisdiction for the acts of torture because these acts were not perpetrated in the exercise of sovereign authority of a State (acta jure imperii).[42] Former Prime Minister *Margaret Thatcher* heavily criticised this decision. On *Thatcher's* account, *Pinochet* and his regime in Chile had been UK's friend and supported it in the Falklands war. Hence, *Pinochet* ought not to have been bothered by UK authorities and torture victims of his regime should get no remedy or justice in UK courts for what that regime did to them.[43] Thatcher's logic is clearly focused on the friend-enemy distinction.

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[41] *A.P. d'Entreves*, The Notion of the State – An Introduction to Political Philosophy (1967), 91.

[42] [2000] 1 AC, 242.

[43] *M. Thatcher*, Statecraft (2002), 267 ff.

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Earlier in the case of Al-Adsani, the Court of Appeal has upheld immunity of Kuwait for torture because the wording of 1978 State Immunity Act did not give them any other choice except granting immunity to Kuwait even if under international law torture could not be a sovereign activity.[44] Almost decade later, the House of Lords in Jones v Saudi Arabia has faced torture claims against both Saudi Arabia as a State and its officials. The latter's position was not covered by 1978 Act, and the House of Lords ended up discussing immunities of foreign officials on the basis of international law as part of English common law. Saudi Arabia as well as its officials were given immunity.[45]

The House of Lords decision is the first one in the UK, perhaps even in the world, in which such broad interpretation is given to the scope of jure imperii acts, namely in the sense that torture is a sovereign or jure imperii act just because a State official has perpetrated it. This has involved a clear manipulation of applicable standards, even as in Jones it was UK citizens as victims who ended up suffering as a consequence of that. If following its previous jurisprudence in Al-Adsani, Pinochet and Propend, the House ought to have rejected immunity claims advanced to a foreign official's benefit, because it does not take being a State official to perpetrate torture. Another problem with Jones v Saudi Arabia is that it asserts that immunities which are not available in criminal proceedings may still be available in civil proceedings. But an act is either sovereign or it is not, regardless of the type of proceedings through which it is dealt with.

Overall, the influence of UK-Saudi relations on adjudication before UK courts has not been a secret. In Corner House, the House of Lords approved deviation from UK law to bar prosecution for corruption alleged to have been perpetrated in relation to Al-Yamama contract between BAE and the authorities of Saudi Arabia regarding the orders of fighter jets for the Saudi air force.[46] This latter case turned on the use of prosecutorial discretion. Likewise, the UK's approach to allow criminal prosecution of foreign State officials who are alleged to have committed core international crimes, but not civil proceedings in which victims could claim damages in relation to the same situation, seems to reflect the political preference that UK's friends should not be bothered in its courts. In criminal proceedings, government could protect its friends through the use of prosecutorial discretion.

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[44] Al-Adsani (High Court), 103 ILR 427–431; Al-Adsani (Court of Appeal), 107 ILR 538–547.

[45] Jones v Saudi Arabia, [2006] UKHL 16, 14 June 2006.

[46] R (On The Application of Corner House Research and Others) v Director of The Serious Fraud Office, [2008] UKHL 60.

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2. Bancoult *and the displacement of Chagossians*

In this case, the House of Lords was requested to assess the legality of the displacement of the population of Chagos archipelago by UK authorities following the detachment of Chagos from the colonial territory of Mauritius when it became independent. In his leading speech, *Lord Hoffmann* clearly reasoned on terms that resemble *Schmitt's* friend-enemy distinction. His Lordship has alluded to "the brutal realities of global politics" which, in the aftermath of the Cuban missile crisis and the early stages of the Vietnam War, arguably left the United States "vulnerable without a land based military presence in the Indian Ocean." Furthermore, Chagos archipelago was strategically located and it was politically undesirable that Maurttius as part of the Non-Aligned Movement should control it.[47] The Government decided to remove the population from the islands

> "because of a fear (which may well have been justified) that the Soviet Union and its non-aligned supporters would use the Chagossians and the United Kingdom's obligations to the people of a non-self-governing territory under article 73 of the United Nations Charter to prevent the construction of a military base in the Indian Ocean."[48]

Even on purely political terms, the above reasoning is questionable. Whether the US would have a military base in the Indian Ocean is not a problem commensurate to those that the US has faced during the Cuban missile crisis or the Vietnam war. Also, negotiating the stationing of the base with the authorities of Mauritius could have been a possibility. But the House of Lords here clearly reasons on terms of decisionism: the Government's decision is affirmed not because it is the preferable or more sound political decision, but because it is a decision that Government has chosen to make.

Thus, a rather extended use of the Government's royal prerogative was judicially approved to enable political branches of the UK government to suppress the rights of Chagossians as enemies because their interests had conflicted with those of US as UK's friend.[49] *Lord Hoffman's* leading speech refuses to examine this decision in the light of international law because, allegedly, international law is not part of English law. *Lord Hoffman's* was rather emphatic that "as for international law, I do not understand how, consistently with the well-established doctrine that it does not form part of domestic law, it can support any argument for the invalidity

[47] Bancoult, House of Lords, [2009] 1 AC, 453 at 476 (per Lord Hoffmann).

[48] Bancoult, 477.

[49] Elliott and Perreau-Saussine point to "the astonishing position constructed in recent House of Lords decisions … that unquestionably innocent British subjects banished by British authorities from the British overseas territory that was their home enjoy neither the protection of the HRA nor … of general international law in English courts." See *M. Elliott & A. Perreau-Saussine*, Pyrrhic public law: Bancoult and the sources, status and content of common law limitations on prerogative power, Public Law (2009), 697 at 714.

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of a purely domestic law such as the Constitution Order."[50] This should be seen merely as a political and ideological reaction against the well-established doctrine, accepted in English law since the 18th century, that international law is part of common law of England. The House of Lords has taken a power political position. It did contemplate and tolerate the risk of putting the UK in breach of its international obligations but, in the absence of any power or mechanism to enforce the rights of Chagossians arising under international law in relation to the UK, the House of Lords decided not to worry about that.

3. Belhaj *and extraordinary rendition*

The case of *Belhaj* with claims of unlawful detention and rendition, torture or cruel and inhuman treatment and assault as part of extraordinary renditions process. Mr *Belhaj*, a Libyan national and opponent of Colonel *Gaddafi*, and his wife, Mrs *Boudchar*, a Moroccan national, were deported by the Chinese authorities to Kuala Lumpur, where they were detained. MI6 was alleged to have become aware of their detention and on 1 March 2004 to have sent the Libyan intelligence services a facsimile reporting their whereabouts. This was said to lead to rendering them against their will to Libya, using a US airplane. They also alleged that the United Kingdom procured this detention in all these places "by common design with the Libyan and US authorities".[51] The Supreme Court determined that, "in the cases of Mr Belhaj and Mrs Boudchar, the allegations of wrongful detention and mistreatment might well be regarded as inseparable."[52]

The friend-enemy dimension was abundantly involved in this case. It could well be said that, as *Belhaj* and his wife were detained and tortured by UK's friends, allies or partners, they have thereupon become UK's enemies and should get no remedy in UK courts. Yet, the UK Supreme Court decided to disallow the use of the act of State doctrine in this case, and the couple were compensated by the UK Government.

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[50] Bancoult, 490 (per Lord Hoffmann). More so, as *Lord Mance* has observed that, "in Croft v Dunphy the Privy Council left open also a possibility that the power conferred in that case by the British North America Act 1867 on the Dominion Parliament might implicitly be limited to the enactment of legislation conforming with international law." Bancoult, 517 (per Lord Mance).

[51] Belhaj v Straw, [2017] UKSC 3, paras 3–4.

[52] Belhaj, para. 10.

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4. Arming Saudi Arabia and Violations of IHL in Yemen

This case concerned the lawfulness of the grant by the UK Government of export licences for the sale or transfer of arms or military equipment to the Kingdom of Saudi Arabia, for possible use in the conflict in Yemen. Ordinary principles of administrative law in England suggest that in policy decisions courts should not easily question decisions of political branches of the UK Government. In the course of foreign policy-making, such decisions will obviously deal with some aspects of friend-enemy relations.

The Court of Appeal has suggested that "in such a case as this, the courts must accord considerable respect to the decision-maker." But even as the Court used this standard, it concluded that "it was irrational and therefore unlawful for the Secretary of State to proceed as he did."[53] This was because the Government did not properly assess whether arms export could lead to violations of IHL in the Yemen conflict in which Saudi Arabia was involved. As the Court determined, "there is no document or documents to which the Secretary of State can turn, setting out the rationale by which it was thought right that no assessments of past violations should be made or even attempted."[54] And, if Government did not query into those issues, it is difficult to claim that it was for any reason other than UK's close economic and strategic partnership with Saudi Arabia. Moreover, there was "at least some evidence indicating that such assessments routinely can be and have been made in similar but different contexts".[55]

The Court has expressly required that UK Government has to examine this matter even if it will impinge on the overall dynamics UK-Saudi relations:

> "In addition to the points already made, perhaps the most important reason for making such assessments is that, without them, how was the Secretary of State to reach a rational conclusion as to the effect of the training, support and other inputs by the UK, or the effect of any high level assurances by the Saudi authorities? If the result of historic assessments was that violations were continuing despite all such efforts, then that would unavoidably become a major consideration in looking at the "real risk" in the future. It would be likely to help determine whether Saudi Arabia had a genuine intent and, importantly, the capacity to live up to the commitments made."[56]

This is a welcome and exemplary decision showing that, through their ordinary adjudicatory authority under common law, courts in the UK are in position to avoid selective application of national or international law even if political interest so requires. Even if the arms industry creates significant number of jobs in the UK and arms sales to foreign States generate

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[53] Campaign against Arms Trade v Secretary of State for International Trade (CA), [2019] EWCA Civ 1020, para. 145.
[54] CAAT (CA), para. 140.
[55] CAAT (CA), para. 143.
[56] CAAT (CA), para. 144.

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significant private profits as well as public income, victims of violations of international humanitarian law in Yemen were not considered to be UK's enemies.

5. Venezuela's billion dollars

In January 2019, the UK Government, in concert with a number of European States, decided to "de-recognise" *Nicholas Maduro* as Venezuela's President and recognise his rival *Juan Guaido* as Venezuela's interim leader. This decision has followed the US lead in this matter and UK's (or in fact any European State's) own relations with Venezuela did not involve antagonism coming anywhere near to that involved in relations between Venezuela and the US. The UK Government then used its prerogative power to determine that Maduro Government would not get access to billion dollars deposited by Venezuela Government in the bank in the UK. The Government has issued Executive Certificate to that effect, even though Executive Certificates in general deal with establishment of facts, rather than determination of rights, and the identity of a foreign country's government is clearly an issue of law.

While the High Court had taken the side of UK Government and their friend *Guaido*, the Court of Appeal has reversed this decision. The Court has reasoned that the HMG position stated in the Certificate did not suggest that *Maduro* was no longer in effective control of Venezuela's territory.[57] Hence, under international law, *Guaido* did not become a de jure head of State of Venezuela and could not claim the relevant funds. But the UK's Judiciary has not so far allowed making those funds available to Maduro Government either.

The overall dynamics of political events in Venezuela, namely the failure of *Guaido* and his supporters to overthrow *Maduro's* Government, also shows that UK courts do not make good bargain if they easily acquiesce into political decisions made by the Executive. To all intents and purposes, in a common law system there could not be a political decision on these matters made by a government department. There is a political decision only when courts let it be.

6. Julian Assange's case

This case dealt with request made by the US Government for the extradition of *Julian Assange* to the US, to try him for crimes that involved the exposure of strategically important and confidential data possessed and operated by the US as part of its national defence and national security.

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[57] CAAT (CA), para. 122.

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Assange is not, or not in the first place, enemy of the UK. He was targeting US government's secret data and UK Government decided to extradite him. However, the High Court has blocked *Assange*'s extradition because it would involve risks that *Assange* would be subjected to special administrative measures which

> "may ordinarily include housing the inmate in administrative detention or limiting certain privileges, including correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to prevent the disclosure of classified information."[58]

The US Government did not provide assurances against this.[59] Then, post-trial detention of *Assange* would possibly be of the kind that would "prevent all physical contact between an inmate and others, and to minimise social interaction between detainees and staff." This could amount to an inhuman or degrading treatment that would breach *Assange*'s rights under Article 3 of the European Convention on Human Rights,[60] also against the background that *Assange*'s mental health problems increased his suicide risks.[61] Therefore, the High Court concluded that "the mental condition of Mr. *Assange* is such that it would be oppressive to extradite him to the United States of America."[62] The Court has ordered *Assange*'s discharge, but the US Government has appealed the decision and Assange now remains in custody.

VI. Conclusion

The problem of total and unbounded politics is not exclusively *Schmitt*'s problem but has, to varying degrees, been endorsed by several other theories, including ones that are deemed to underlie democratic political systems. On closer inspection, *Schmitt*'s friend-enemy theory differs only relatively from the range of older theories (discussed above) which also emphasised the primacy of the political and the situational nature of political decision-making. *Schmitt*'s theory is only a more extreme version put at the service of Third Reich to which he was loyal. But overall, his friend-enemy theory has merely rounded off the antecedent traditions of political thinking and provided the most vivid description of total and confrontational politics.

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[58] Government of USA v Assange (District Judge (Magistrates' Court)), 4 January 2021, para. 287.

[59] Assange, para. 294.

[60] Assange, para. 307.

[61] Assange, paras 345–346.

[62] Assange, para. 363.

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The practice overviewed above has shown that when there is will, UK courts can always find ways to prevent *Schmitt's* friend-enemy thesis to influence the outcome in particular cases. Nevertheless, the friend-enemy politics in UK courts amounts to a discrete and distinct sociological problem, especially as the cases that could be seen to be premised on the friend-enemy distinction could indeed have been decided the other way, and doing so would have been within the authority of the courts.

The statement made by *Blackstone* almost three centuries ago that "absolute despotic power … must in all governments reside somewhere" in every single constitutional framework[63] is a scientific statement, because every legal system, however liberal or democratic, is capable of exerting total, unbounded and despotic power over certain classes of people chosen to be treated that way. All that is required is a political decision. In the UK legal system, this despotic authority seems to be shared between political and judicial branches of the Government, the former enabled to adopt such political decisions and the latter enabled to endow them with conclusive legal force. This process involves nothing less than the courts' own involvement in the political decision-making, whereby they become contributors to a nation's political individuality on terms articulated by *Hegel*. And judicial contribution courts make to the crystallisation of the State's sovereign will enables the entirety of State machinery to operate with regard to relevant classes of litigants as the Hobbesian sovereign unbound by the law and the constitution. Disregard of international law inevitably has constitutional implications on the national plane.

Summary

International law has been viewed part of English law since 18th century, and UK courts regularly deal with complex international legal issues. Hardly any national legal system allows absolutely all international legal rules to have effect at the national level. Nevertheless, a phenomenon encountered in UK courts' jurisprudence at times involves a degree of manipulation of international legal standards (or attempts directed at that) seemingly at least motivated by imperatives of UK Government's relations with governments of some of its ally or partner States. Many decades ago, and in a rather different context, Carl Schmitt designed a theory of friend-enemy politics meant to expose the pure substance of political process. From the analysis of the relevant practice of UK courts, it is clear that at least a tendency exists that applicable standards of international law are interpreted and applied inconsistently when doing so benefits interests of friendly foreign governments.

[63] *Blackstone*, Commentaries on the Law of England, vol. I, 156.

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