



**British Institute of  
International and  
Comparative Law**



**Melbourne  
Law School**

## **Dialogues between International and Public Law**

A conference organised by BIICL and Melbourne Law School,  
30 June – 1 July 2016, London

### **Report of Proceedings**



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## Introduction

This two-day conference brought together for the first time leading academic and practising lawyers to pool knowledge and share perspectives on the changing relationship between public international law and domestic public law in different jurisdictions.

Organised by the British Institute of International and Comparative Law (BIICL) and the Melbourne Law School (MLS), the aim of the conference was to generate constructive dialogue on how national public law and public international law and practice should, and must, co-exist, combining theory with case studies and the experience of practitioners.

The conference was attended by 97 people, including prominent academics in international law and public law fields from a number of countries, experienced practitioners from private practice and government legal practice, and serving and retired members of the senior British and Australian judiciary. It took place at Woburn House Conference Centre, 20–24 Tavistock Square, London, WC1H 9HQ.

This report summarises the proceedings.<sup>1</sup>

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<sup>1</sup> This report was written by Yvonne Yue Wang and Zoe Hough, Students of Melbourne Law School and Research Interns on the Watts Public International Law Programme, BIICL, under the supervision of Jill Barrett. The authors are grateful to the conference speakers for reviewing the summaries of their remarks in draft.

## Summary Report of Conference Proceedings

### Conference opening remarks: how the Dialogues began



Jill Barrett opening the conference

Jill Barrett, the Arthur Watts Senior Research Fellow in Public International Law at BIICL opened the conference by describing it as the high point of the first five years of collaboration between BIICL and MLS. Developing this relationship has been an important part of the Arthur Watts public international law programme from its inception, so visiting MLS to initiate the programme was one of her first and most enjoyable duties.

Ms Barrett recounted her first meeting with Professor Cheryl Saunders in her Melbourne University office in 2012, during which they discovered a common interest in a range of issues at the interface of their two fields of specialisation – international law and public law. For example, they had both been involved in implementing reforms on parliamentary control of treaties. The idea of a joint conference which brings together people from both public law and international law fields was thus conceived, in the realm of fantasy, or so it then seemed.

Meanwhile, other elements of the Arthur Watts collaborative programme proceeded, and in total ten students from MLS have worked at BIICL as research interns on the Watts programme.

The ninth and tenth are with us today: Zoe Hough and Yvonne Yue Wang, and they are part of the team that has been working hard to prepare for the conference.

In addition, members of MLS staff have come to BIICL to conduct research and collaborate on seminars. By way of example, Dr Jason Varuhas is currently in residence pursuing his research on "Mapping Public Law", as a Visiting Fellow at BIICL.

Ms Barrett stated that gradually her fantasy of working with Professor Saunders to convene a conference on the international law/public law interface became a reality, with the help of a number of people at BIICL and MLS, and in particular the sponsors for the conference: Freshfields Bruckhaus Deringer and Debevoise & Plimpton. She also thanked Essex Court Chambers for sponsoring the refreshments and the speakers' dinner.

Ms Barrett remarked that it brought her enormous pleasure to see Professor Saunders and her colleagues present at the conference, including Professor Michael Crommelin and Dr Jarrod Hepburn who came to London specially for this event. She then introduced Sir Bernard Rix, former Lord Justice of Appeal in the Court of Appeal, and now a practising arbitrator at 20 Essex St, as Chair for the keynote address and panel one discussions.

Sir Bernard Rix remarked that, on a personal note, he had visited Melbourne around Christmas time last year and found it to be a fine city. He then introduced the keynote speaker, Lord Peter Goldsmith, who was the UK's Attorney General from 2001 -2007, and before that, a most distinguished barrister. Lord Goldsmith is now the Co-Managing Partner and Chair of European and Asian Litigation at Debevoise & Plimpton. Lord Goldsmith also founded the Bar of England and Wales's Pro Bono Unit, of which he is now President.



## Keynote address: Dialogues between International and Public Law



Lord Peter Goldsmith QC PC

### Lord Peter Goldsmith QC PC, Debevoise & Plimpton

The “Dialogues between International and Public Law” conference was opened with a keynote address delivered by Lord Peter Goldsmith QC PC, described afterwards by the Chair, Sir Bernard Rix, as an “up to date, topical, comprehensive, informative and challenging address.”

Lord Goldsmith opened by remarking that the Brexit referendum result of the previous week had thrown the importance of dialogues between international and public law into sharp relief. This was demonstrated by the fact that one of the key themes of the referendum debate was the nature and extent of the powers exercised by the European Union and the locus, or place, where decisions on matters related to the public interest across a spectrum of issues should be taken. He stated that for many voters, the delegation of certain public powers from the UK to the EU was a determinative factor.

Lord Goldsmith went on to say that, although the EU was born out of international law, having been established by international treaties, the Member States expressly agreed in those treaties to pool their sovereign powers in the EU in the belief that the common good was better achieved by States working in concert. Thus, the EU institutions exercise many public functions and the relationship between the institutions, and between the institutions and the Member States, is governed by detailed rules which could be described as European



public or administrative law. It is therefore not accurate to describe the EU as an international organisation or a purely international body. It is a *sui generis* union, often described as a supranational organisation.

Thus, although the EU was created by international law, it has developed some governance or constitutional features which replicate those of a domestic body. The existential and often fractious debates that culminated in the vote to leave the EU and which continue to foment in other EU Member States are in large part about the attribution of such public characteristics and powers to what was originally conceived of as an international organisation. The interaction between international and public law is therefore not only a current and contemporary topic, it is critical to our understanding of public governance today.

Focusing on the conference theme, he observed that the word "public" is a term derived from the Latin word for "of the people". However, the use of this common term to denote "public" international law and domestic "public" law disguises a difference, at least in nature, between the two legal regimes. Traditionally, public international law governed the relationship between sovereign States; it operated on a horizontal plane. In contrast, domestic public law operated in a vertical manner, governing the relationship between individuals and government. However, this traditional distinction no longer reflects contemporary practice. Public international law is no longer solely the reserve of sovereign states. National, regional, international and supranational organisations, certain individuals, including investors, NGOs, and even criminal organisations and terrorists can be the subjects of public international law to different extents and in different guises.

The other key idea contained in the title of the conference is that of "dialogues". Lord Goldsmith suggested that the word "dialogues" contains many facets. At one level, a dialogue is a conversation or an exchange of often contrasting views. It also presupposes a conversation or interaction with the aim of resolving a conflict. Other essential facets to the concept of "dialogue" in the context of the interaction between international and public law are illuminated by asking the question: Who are the interlocutors in this dialogue? In his view, the interlocutors include the courts, both national and international, national and international legislators, academics and practitioners.

Lord Goldsmith then set out three main ideas which he considered central to the conference. These were the:

1. upward transmission of legal concepts from domestic public law to public international law;
2. downward transmission of concepts from international law to domestic public law;
3. ever closer boundaries between public international law and public law, which can lead to multiple legal orders applying to the same situation concurrently and potentially irreconcilably.

First, when talking about the upward transmission of legal concepts from domestic public law to international law, Lord Goldsmith commented that it was perhaps trite to say that domestic public law plays a significant role in the development of international norms. It is influential at both the substantive and procedural level. Indeed, the general principles of law of civilised

nations are one of the sources of international law articulated in Article 38(1) of the Statute of the International Court of Justice ("ICJ").

As James Crawford wrote in the 8<sup>th</sup> Edition of *Brownlie's Principles of Public International Law*:

An international tribunal chooses, edits and adapts elements from other developed systems. The result is a body of international law, the content of which has been influenced by domestic law but which is still its own creation.<sup>2</sup>

This is demonstrated by the fact that the principle of good faith, derived from domestic law, is deployed with increasing regularity before the ICJ and before investor-state tribunals. Estoppel, *res judicata* and acquiescence, among other principles derived from domestic legal systems, have also been referred to at the international level.

One of the most significant examples of this interaction is the doctrine of proportionality. It is a doctrine that has its genesis in the German administrative courts of the late eighteenth century and today has entered the lexicon of constitutional, administrative and international tribunals, including the World Trade Organisation and investor-state arbitration tribunals. Indeed, it has gone full circle: having been transmitted from civil law systems to international tribunals, its prevalence in the jurisprudence of the European Court of Human Rights (ECtHR) has led to its diffusion back down to the domestic level and into the practice of common law courts. For example, the courts of England and Wales have incorporated a proportionality test into the general standard for judicial review, irrespective of whether the case has a European Convention on Human Rights (ECHR) dimension. Initially, it only applied the proportionality test when applying rights contained in the ECHR.

Lord Goldsmith then moved to his second point about the downward transmission of concepts from international law to domestic public law. At the most basic level, international law has a direct impact at the domestic level when it is incorporated into domestic law. Perhaps the most common example of this today is the incorporation of international human rights treaties into domestic law, allowing an individual to make a claim for breach of international obligations in a domestic court.

However, there are also more indirect ways in which the norms of public international law can impact upon domestic public law, such as when the interpretation of domestic standards is informed or influenced by international obligations. This was illustrated in a recent landmark climate change case in the Netherlands, *Urgenda Foundation v The Netherlands*. The Hague District Court found the Dutch State liable for failing to take adequate measures to prevent dangerous climate change and ordered it to reduce emissions by 25 per cent by 2020 as compared to 1990.<sup>3</sup> Importantly, the decision was not based on international climate change rules, but on a domestic tort action under the Dutch Civil Code that provides that the State owes a duty of care to its citizens. The court held that when interpreting the scope of

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2 James Crawford, *Brownlie's Principles of International Law* (8<sup>th</sup> edn, OUP 2012) 35.

3 *Urgenda Foundation v the State of the Netherlands (Ministry of Infrastructure and the Environment)* C/09/456689/HA ZA 13-1396 (English translation).

the State's (domestic law) duty of care, it was required to take the State's international law obligations into account,<sup>4</sup> including its climate change commitments and contributions under the Kyoto Protocol.

The third issue that Lord Goldsmith touched upon concerned the identification of the locus of public power, hierarchies and pluralism. It has already been demonstrated that legal principles are transmitted between international and public law and that this transmission goes in both directions. However, it can be seen that there has been an expansion of the areas in which public international law operates. The diminishing boundaries between international and public law give rise to an increasing possibility of multiple legal norms or regimes applying concurrently to the same situation, potentially irreconcilably.

For example, in the investor-State context, there is a growing body of claims in which an investor has challenged a tax assessment in alleged breach of a bilateral tax treaty before an investment treaty tribunal, on the basis that the alleged breach of the tax treaty also amounts to a breach of that State's obligations under an investment treaty. The *Kadi*<sup>5</sup> saga, a series of cases before the Court of Justice of the European Union ("CJEU") arising out of a conflict between sanctions imposed pursuant to UN Security Council measures and human rights norms obligations, is another illustration. A particularly striking example is the case of *Micula v Romania*, where Romania withdrew certain financial incentives in order to comply with the EU State aid requirements only to be challenged by investors claiming that the withdrawal of those incentives amounted to a breach of their protections under the Sweden-Romania bilateral investment treaty. Thus, Romania found itself subject to directly conflicting international obligations.<sup>6</sup> This is just one example of a growing problem. Sometimes these conflicts can be solved by the application of conflict of laws rules and doctrines such as the margin of appreciation. However, Lord Goldsmith predicts that this problem will increasingly occur on both the international and domestic planes.

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4 Ibid, para 4.43.

5 Case C402/05 P and C415/05, P. *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

6 *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania* ICSID Case No. ARB/05/20.

## Panel 1: The relationship between Public International law and Public Law – why is it important in practice and in theory?



Sir Frank Berman speaking on panel 1  
L to R: Professor Cheryl Saunders, Sir Bernard Rix, Sir Frank Berman

### Chair: Sir Bernard Rix QC (formerly Lord Justice Rix), 20 Essex St Chambers

Sir Bernard Rix expressed his pleasure in introducing the speakers on this panel: three international and constitutional lawyers of immense international distinction.

#### Sir Frank Berman KCMG QC, BIICL

*International and Public Law: Perspectives from Government and Private Legal Practice*

Sir Frank Berman opened his remarks by stating, in his role as Chairman of the Board of Trustees at BIICL, that BIICL is very proud of the Arthur Watts Fellowship in Public International Law, which was the generating power behind the "Dialogues between International and Public Law" conference. BIICL is also extremely pleased that a long-running and significant partnership has been established with Melbourne Law School and is delighted and grateful that this has all been made possible by the immense generosity of Allan Myers QC.

Sir Frank remarked that you could hardly have a more pregnant moment than now in a British and Australian context to have a conference on dialogues between international and public

law. The UK is in the midst of an immense constitutional and political crisis, following the vote to leave the EU, which was largely brought about by the tension between international obligations, domestic politics and public expectations. In the Australian context, there also exists a tension between Australia's international obligations in certain areas and the domestic political scene, which has contributed to a bruising period in Australian domestic politics.

In order to set the scene for the following dialogues, Sir Frank offered a reflection on the Foreign Office, as it was called when he joined it in 1965,<sup>7</sup> in order to provide a point of comparison with the current situation. In providing this reflection, Sir Frank dealt with the sources and books that were relied upon by the Foreign Office at the time, the topics of international law that were of interest to the Foreign Office, and the situation of both international and national courts.

In 1965 it was extremely rare, although not unthinkable, for the Foreign Office to be involved in any process in the English domestic courts. However, as Lord Bingham wrote in 2005:

*... to an extent almost unimaginable even thirty years ago, national courts in this and other countries are called upon to consider and resolve issues turning on the correct understanding and application of international law, not on an occasional basis, now and then, but routinely and often in cases of great importance.*<sup>8</sup>

In contrast, Sir Frank could recall only two substantial pieces of litigation in which the Foreign Office was involved during his early career. One was the *Anisminic*<sup>9</sup> case, a judicial review of an ouster clause in the Foreign Compensation Act 1950. The other was the series of *Carl Zeiss* cases,<sup>10</sup> which raised significant issues of recognition and territorial status. There were certain other cases that emerged over the course of the years, such as *Trendtex*<sup>11</sup> and *Philippine Admiral*<sup>12</sup>, both of which laid the basis for the introduction of a restricted, not absolute, doctrine of sovereign immunity in the English common law. They were also the beginning of a new attitude towards the reception of customary international law into the English common law system.

These cases were followed by *I Congreso del Partido*<sup>13</sup> in 1983 and the *Tin Council* cases<sup>14</sup> in 1989, which showed what Sir Frank described as "the extraordinarily obtuse attitude of English law as it then stood towards the status and workings of international organisations".

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7 The Foreign Office merged with the Commonwealth Office in 1968 to become the Foreign & Commonwealth Office (FCO). The FCO is now sometimes called the "Foreign Office" for short.

8 Lord Bingham, 'Foreword' in Shaheed Fatima, *Using International Law in Domestic Courts* (Hart Publishing 2005).

9 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 2 WLR 163.

10 *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd* [1965] 1 All ER 300 (CA); *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd* (1964) RPC 299 (Ch); *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd* (No 2) [1966] 2 All ER 536 (HL).

11 *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 QB 529.

12 *Owners of the Philippine Admiral v Wallem Shipping (Hong Kong) Ltd* [1977] AC 373 (PC).

13 *Playa Larga v I Congreso del Partido* [1983] 1 AC 244 (HL).

14 *Maclaine Watson & Co v International Tin Council* (No.1) [1988] 3 All ER 257 (CA); *Maclaine Watson & Co Ltd v International Tin Council* (No. 2) [1988] 3 All ER 257 (CA); *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 (HL).

It was not until the 1990s that it was settled that what created the legal personality of international organisations was the fact that international law conferred the status of a legal entity on the body concerned. However, Sir Frank recalled that in his time as Foreign and Commonwealth Office Legal Adviser, a role he held from 1981 to 1999, there were only two other cases in which the FCO was directly involved: *ex parte Rees-Mogg* (about the ratification of the Maastricht Treaty)<sup>15</sup> and the *Pergau Dam* case (another case of judicial review, but relating to overseas development assistance).<sup>16</sup> When compared with the current situation, where the FCO is preoccupied with more than 92 live items of litigation, it is clear that the picture has changed totally. The current cases include civil claims for damages, judicial review, employment law, freedom of information, sanctions, privileges and immunities and FCO interventions in cases brought against other government departments.

It is not only the volume of litigation that has changed dramatically. The FCO's involvement with statutes is also remarkably different. Sir Frank recalled only a few statutes with which the Foreign Office was substantially involved in the early stages of his career: the British Nationality Act 1948; the Foreign Compensation Act 1950; and the Foreign Enlistment Act 1870. The Diplomatic Privileges Act had just been enacted in 1964. The International Organisations Act 1968 and State Immunities Act 1978 had not yet been enacted. There was an informal parliamentary convention in relation to the ratification of treaties. This is now governed by the Constitutional Reform and Governance Act 2010, which put on a statutory footing what the FCO had been doing in practice for years – a “half-baked” reform in Sir Frank's view.

The books that were relied upon by the Foreign Office in the 1960s also illuminate the changes that have occurred in this area. According to Sir Frank, 1961 was a vintage year for international law books as that was the year that Hart's *Concept of Law*<sup>17</sup> was published, a book which, for the first time, anchored international law and its place in a broader legal landscape from a jurisprudential viewpoint. It was also the year that Lord McNair's new treatise *The Law of Treaties*<sup>18</sup> was published, which has not been edited since. However, all of the leading books of the time were still wrestling with the question of whether international law was a system as opposed to a series of discrete islands in an unregulated sea, and with the justiciability of international disputes.

One of the books which most clearly illustrates the changed scene is *International Law and the Practitioner* by Sir Francis Vallat,<sup>19</sup> FO Legal Adviser in the mid 1960s, which sought to awaken practitioners to what international law meant for them in practice. There were four substantive chapters, two dealing with international claims, one on FO certificates and one on the reciprocal enforcement of judgments. These chapters would look completely different today. The chapter on reciprocal enforcement of judgments would not exist, as that area of

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15 *R v Secretary of State for Foreign and Commonwealth Affairs Ex p Lord Rees-Mogg* [1993] EWHC Admin 4, [1994] QB 552.

16 *R v Secretary of State for Foreign and Commonwealth Affairs Ex p World Development Movement Ltd* [1994] EWHC Admin 1 [1995] 1 WLR 386.

17 HLA Hart, *The Concept of Law* (OUP 1961).

18 Lord McNair, *The Law of Treaties* (Clarendon Press 1961).

19 Sir Francis Vallat, *International Law and the Practitioner* (Manchester University Press 1966).



law is now covered by other rules. With regard to FO certificates, their use went into decline, although something certificate-like has sprung back into life. Also, international claims are not talked about anymore as they are likely to be dealt with by international arbitration. There is now an entirely new system whereby investors' rights are protected by treaty and there are mechanisms for practical enforcement.

The issues that were of international concern at the time included the following: the 1958 Conventions on the Law of the Sea, immunities, State responsibility, the law of treaties, succession of States and governments, special missions, the relationship between States and international organisations, and the most favoured nation clause. It is interesting to note that many of these areas and ideas went quiet, only to emerge in later years. For example, the principles surrounding State responsibility were not fully fledged until the 1990s and most favoured nation clauses are again being looked at by the International Law Commission.

In concluding, Sir Frank stated that international law today is not a series of discrete items; it is now an international legal system. There are consequences that result from the fact that it is a system that has aims towards completeness. One of these consequences is that there is no natural limit to either international law or domestic law. There is no boundary between them; they flow into one another without there being any arbitrary or useful frontier between them. There may be tension but there is no frontier.

He also made the point that domestic courts are often called upon to resolve issues of international law and apply the answer to a concrete situation. Thus domestic judges have a creative and constructive role to play in the international legal sphere, which demonstrates that the theme of the conference is a valid one. It is not just an intellectual dialogue between international and public law, but a real one, which is created by the realities of the international system.

### **Professor Cheryl Saunders, Melbourne Law School**

*Public Law and Public International Law: a Public Law Perspective on Interdependence*

Professor Cheryl Saunders opened her remarks by expressing her hope that the "Dialogues between International and Public Law" conference will serve to deepen the intellectual engagement between the two institutions. She remarked that the interface between public domestic and international law makes a clear grasp of both essential for a good public lawyer in the twenty-first century. However, it can be difficult to explain this interface in a way that does not simply treat the two bodies of law as silos, lining them up against each other, and moving from one to the other, without fully understanding the whole. Thus there is a need for a deeper understanding between specialists in the two areas of law.

The concept of dialogue is central to this conference as it emphasises the importance of genuine engagement between these two branches of law, leading to a mutual appreciation of their respective functions and concerns. While there is nothing new in the idea that public and international law are increasingly interdependent, experts in the two sub-disciplines sometimes talk past each other without realising that they are doing so. This is not surprising as both are rich and complex bodies of knowledge. Additionally, there are inevitably different



perspectives due to the different interests of the two spheres. One example of these different interests is that domestic and international lawyers place different emphases on the concept and role of the State and its institutions. For domestic public lawyers, the State revolves around its people and the institutions through which State power is exercised are assumed to derive their legitimacy from the people. The institutions are also supposed to be responsive to the needs of the people. Domestic public law provides the framework of law and practice through which these assumptions operate. These frameworks differ between, and sometimes within, States. In contrast, for public international lawyers, States are viewed as the critical building block in the international legal order and the institutions of the State are those with which the international community must deal.

While these two perspectives often complement each other, tensions arise on occasion, often inadvertently. This can be seen most obviously when international assistance is provided in building or rebuilding fragile States. National institutions of a familiar kind may be prioritised even if they prove to be impractical or ineffective on the ground. A further example of occasional tension is that domestic and international lawyers naturally tend to prioritise the body of law in which they primarily work. While international lawyers are entitled to expect domestic compliance once international law is established, domestic public lawyers focus on the intricacies of public law and practice, occasionally treating international law as an optional extra.

These differences in assumptions tend to surface in constitution building exercises, such as in relation to the incorporation of international legal standards into new constitutions. These differences have also been evident in the immediate aftermath of the Brexit referendum. International and EU lawyers have focused on the meaning and operation of Article 50 of the Lisbon Treaty,<sup>20</sup> while domestic public lawyers have debated how Article 50 could and should be invoked as a matter of UK constitutional law and whether the prerogative alone is adequate for the purpose.

In order to provide the necessary background for the rest of the conference, Professor Saunders briefly sketched some of the ways in which the interdependence between international and public law occurs and some of the reactions to this interdependence from within the sub-discipline of domestic public law. She also analysed the extremely fluid position that has been reached in the relationship between domestic and international legal regimes and pointed out some of the ways in which collaboration between the two regimes is more important than ever.

Assuming, for the sake of argument, that public law classically provided the exclusive source of law and practice that constituted the framework of government for the State, Professor Saunders stated that the main change in this position has come from the growth of international law and the reach of international institutions. There are numerous well known features of this development. First, the expansion of the breadth of international law in terms of the matters for which it now provides, such as human rights. Second, the expansion in the depth of international law, which is characterised by the reach of international law to include

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<sup>20</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community 2007/C 306/01 (adopted 13 December 2007, entered into force 1 December 2009).

individuals, groups, and organisations as subjects for some purposes. Third, the adoption of mechanisms to enhance the effectiveness of international law in relation to particular regimes, such as international courts and arbitration tribunals, monitoring and other complaints bodies, and sanctions. Finally, the development of schemes for regional integration of a quasi-constitutional kind, the EU being the paradigm case.

These developments affect the public law of all States, although to varying degrees and in sometimes subtle ways. They mould the substance of domestic law and remove some matters from domestic politics and dispute resolution. They have an additional substantial impact on States which are making, or substantially changing, their constitutions in circumstances that lend themselves to international assistance. In these cases, international norms increasingly affect both the process of constitution-making as well as the constitution which the process creates.

Professor Saunders stated that these effects of internationalisation are augmented by the equally potent, but even more amorphous, forces of globalisation, defined here as including information technology. These forces encourage and facilitate the ready transmission of ideas about public law across jurisdictional lines. They also provide the setting for the widespread borrowing of practices, institutions and norms, both between domestic orders and between domestic orders and the international order, sometimes in ways that pay little regard to established legal tradition.

These examples suggest that the changing scene in domestic public law in this age of internationalisation has been "top-down"; flowing from developments in public international law. However, in some instances, actions by individual States invoke the interface with international public law in novel ways, or should be regarded as doing so. One example is the very recent use of international guarantees to reinforce the peace accords in Colombia. Another recent illustration is the deliberate invocation of a treaty by the Government of Guatemala to assist in fighting corruption. Both of these situations involve unusual and creative uses of international law.

Nevertheless, domestic public law has changed in some respects to acknowledge its growing interdependence with international law. The increasing emphasis on devolution of power within the State is one possible example, although there are additional causes. In addition, it has for a long time been argued that the increasing inaccessibility of decision-making at the supranational and international levels has encouraged a turn to "glocalisation". More obviously, contemporary constitutions are now very likely to make explicit provision for the relationship between domestic and international law; the way in which a State may enter into international commitments, the manner in which sovereignty might be transferred to supranational or international bodies, and the circumstances in which domestic courts are authorised to refer to foreign and international law, either generally or in relation to particular regimes. It has also been suggested that the constituent power has become at least partly internationalised and that domestic constitutions are not purely domestic at all but interlinked in a global constitutional network. Either or both of these claims have significant implications for the nature of a constitution and its role within a State to the point that they raise questions about whether the very concept of a constitution is changing before our eyes.

In a further development, a body of public law literature has engaged with the concept of constitutional and legal pluralism as a way of managing some of the uncertainties about the hierarchies of norms of a constitutional kind that emanate from different sources within a single State, but with a different logic and different claims to legitimacy. Internationalisation has also had implications for comparative public law, strengthening claims about convergence and simplifying the comparative task. Much of this scholarship offers important insights into the changes that have taken place in domestic public law in the face of internationalisation and the corresponding challenges. These challenges include the fact that State sovereignty is no longer absolute; international law is more important from a domestic perspective; and international approval does play some, albeit ambiguous, role in some constitution-making processes. Furthermore, there are fascinating questions about the hierarchy between domestic, supranational and international courts.

While some convergence of systems of State law has undoubtedly occurred, generalisations of that kind tend to oversimplify what is in fact a very complex and somewhat obscure picture from the standpoint of domestic public law. Predictions of the demise of the State are premature. The concept of the State is an imperfect vehicle for governing communities. Indeed, in parts of the world it is a fictitious vehicle sustained by the international order. All too often it exploits rather than sustains the communities it is meant to serve. However, for the moment it is what is there to provide a framework for democracy and limited constitutional government and to give substantive effect to international law.

Professor Saunders also made the point that the degree of internationalisation, and thus the extent of the impact of international law on domestic law, varies dramatically between the States of the world. Internationalisation is at its most profound in States that are part of a deeply integrated regional scheme, such as in Europe, or in States that are fragile or unstable and dependent on international support. Internationalisation is also strong in States that welcome it in order to support a domestic democratisation agenda, as is the case in many parts of Latin America. However, it is much weaker in States that are developed, stable, capable of significant self-reliance and not in a deeply integrated regional arrangement, such as Australia, much of Asia and North America. Furthermore, even where internationalisation seems superficially substantive, there may be a question about its effectiveness in practice. For example, it is much easier to insert elaborate bills of rights complete with proportionality tests into new national constitutions than to ensure that they have substantive effect. Equally, there is nothing in our experience so far to suggest that the internationalisation of authority for national constitutions is working very well in practice; it is depressingly hard to find success stories amongst the quite large number of constitution-building exercises in recent years in which international bodies have played a leadership role.

The claims for the convergence of systems of public law also require a more nuanced approach. It is true that old paradigms are breaking down, such as the dichotomies between common law and civil law and between monism and dualism. Nevertheless, they still retain some explanatory power. While there is convergence, it is largely taking place at a level of generality in principles such as the separation of powers, representative democracy, judicial review, freedom of speech, judicial independence, administrative justice and proportionality. However, within each of these general principles, institutional design and normative requirements vary in ways that are still very significant for State systems of domestic public

law. There is also significant variation in the many ways in which domestic systems manage the relationship with international law and establish its status. Cross-systemic borrowing, which is undoubtedly occurring, merely adds to the diversity by introducing irritants into systems of public law. None of this is to deny that a degree of convergence is occurring, but it is also complemented by divergence. Nevertheless, diversity between the systems of public law in the various States of the world is not necessarily a problem. The world is a very long way from having reached nirvana in systems of domestic public law and the needs and expectations of the communities which public law should serve continue to differ in various ways. Diversity, continuing experimentation, and responsiveness to local circumstances are essential for the adequate performance of systems of public law.

In conclusion, Professor Saunders stated that the impact of international law in collaboration with globalisation has had a profound effect on domestic public law in many exciting and very constructive ways. While this phenomenon is not new from a historical perspective, it has now reached a novel stage in terms of global reach, degree and substantive effect. However, the point that has been reached is ambiguous. The progress is by no means linear.

Indeed, the pace and nature of internationalisation is patchy across the globe and the interface of public and international law has many of the hallmarks of unplanned evolution. There are plenty of theories, but they are not necessarily persuasive on a global scale. Furthermore, there are areas in which the relationship between the two branches is not working satisfactorily from a practical point of view. The way forward is unclear in normative terms, not least because of the diversity of conditions of the 190 or so States with which international law must deal. These considerations suggest that there is a greater need than ever for collaboration between domestic and international public law. The better informed that collaboration is, the more effective it is likely to be. The goals of collaboration might be put very generally in terms of the need to work out an effective *modus vivendi* between the two areas of law based on an appreciation of the credentials, possibilities and contributions of each. From the standpoint of domestic law, Professor Saunders is hopeful that would have the effect of encouraging vibrant institutions that support democracy and the rule of law, terms which also vary between State systems and traditions. Within those parameters any number of individual challenges might be identified. These challenges include the need for collaboration to ensure the domestic legitimacy and effectiveness of new constitutions even in conditions of substantial international assistance, to ensure the domestic accountability of State actors in supranational and international forums, and to deal with the disquiet about the tension between democratic decision-making and local dispute resolution and international law.

### **Professor Gerry Simpson, London School of Economics**

*International Law as Public Law*

The relationship between international law and public law is a complicated one. Indeed, international lawyers have been reluctant to even settle on a name for this other body of law with which they are in a relationship. Various terms have been used over the years, including internal law, domestic law, national law, State law and municipal law. The virtue of public law as a label is its expansiveness; the promise that this is not so much a relationship

between international law and public law, but instead a relationship between, at least two, public laws. Professor Simpson proposed to examine the situation from the perspective of international law, followed by public law, before looking at the idea of “publicness” itself.

Professor Simpson stated that those from the international law side of the picture are used to thinking about the relationship and its implications for the international legal order. Indeed, this relationship is examined from the first year of law school in any public international law course. It is known that international law is concerned with domestic law in numerous places. For example, decisions of local courts can contribute to the formation of international law. Professor Simpson also remarked that he has observed over the years that international lawyers are quite comfortable with referring to the decisions of domestic courts without going through any sort of analysis of Article 38<sup>21</sup> to justify why they are doing so; there is an instinct to use domestic decisions. Additionally, domestic law influences the general principles of law that are articulated in Article 38. While there may be general principles of international law itself, most of the general principles that international lawyers encounter have been derived from domestic law. Furthermore, local decisions can be a material source of customary international law itself. A further illustration of the relationship is the fact that the status of domestic law cannot be used as justification for resisting the application of international law as this is not permitted under Article 27 of the Vienna Convention.<sup>22</sup>

From the viewpoint of the public law side, there has been a longstanding debate as to the status of international law in national legal orders. Brownlie begins one of his editions of *Principles of Public International Law* with a statement that constitutive and declaratory theories of recognition help elaborate the relationship between international law and domestic law.<sup>23</sup>

Professor Simpson believes that from the public law side, there is a complex picture in which constitutional decisions are not always fully reflected in judicial orientation; it is not always clear from simply looking at the constitution how judges will actually approach particular questions involving international law. He also questioned the usefulness of theories of incorporation and transformation as it has always appeared to him that domestic courts take a hybrid approach to questions involving those theories. However, in the context of public law in the United Kingdom, UK courts have recently taken a surprisingly deferential approach to one particular aspect of international law, namely the status of Security Council Resolutions, as seen in *Al-Jedda*.<sup>24</sup>

Lawyers and judges in the UK have become increasingly used to negotiating around competing legal orders. It is hard now to maintain a Diceyan commitment to some Archimedean point of sovereignty in the face of this multiplicity of legal orders. British lawyers might be exposed to international, European, Scots and UK law.

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21 Statute of the International Court of Justice 1945, Art 38(1)(c).

22 Vienna Convention on the Law of Treaties 1969. See also Art 27 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986.

23 *Brownlie's Principles of International Law* (7<sup>th</sup> edn, OUP 2008).

24 *Al-Jedda v Secretary of State for the Home Department* [2014] AC 253 (SC).

In the light of this two-way street, there are a few points to make about international law as a public law order. The first point concerns terminology. International law styles itself as public international law in order to distinguish itself from international commercial law, banking, sale of goods law and private international law. This distinction is very important, but it is also a distinction that readily breaks down under any sort of examination. Indeed, the distinction immediately dissolves when one reads nineteenth century international lawyers like James Lorimer, the Scottish natural lawyer.

Second, if public lawyering is now a practice of working around different legal orders, then international lawyers are public lawyers par excellence. Practitioners in international criminal law, for example, have become very used to thinking of international criminal law as a collaboration, or an amalgam, between international law and domestic law. To discuss international criminal law is to discuss major public law and criminal law cases from domestic jurisdictions, like *Eichmann*<sup>25</sup> and *Pinochet*<sup>26</sup> alongside major international law cases like *Milošević*<sup>27</sup> and *Göring*.<sup>28</sup>

Third, international law is, in a way, a public law of public laws; a law among sovereigns. This is paradoxical because international law is also a quintessentially private law regime organising relations between 190-odd fully sovereign private agents. This is why the system is often described as contractual. Thus, it is possible to encounter two international laws, each with a different sensibility about the public in public law. The first is a pluralistic or neutral or administrative or co-operative international law. It is a less public, public international law. The second is a public international law which is more like a public international law system with designated public aims. The relationship between these two international laws is at the heart of what it means to do international law in recent times.

There has been a push to enhance and embolden this public wing of public international law and to create some substantively public way of doing public international law. It seems to involve a conscious effort to make public international law more public and has come in several different variants. The first of these has been a programme to lift international law into some administrative realm by enacting a series of manoeuvres derived from natural justice or judicial restraint on executive power in the domestic realm, which has been called global administrative law over the last 10–15 years. There has also been a more explicit project of constitutionalism, an effort to derive fundamental norms from existing practices. Additionally, there has been a movement to organise international machinery along public law lines, such as the assumption of institutional hierarchies or the long flagged possibility that the relationship between the UN Security Council (“UNSC”) and the ICJ might be organised using some sort of separation of powers that involves judicial restraint of UNSC activity. While this might be described as fragmentation, in public international law, the vertical is always pushing up against the horizontal.

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25 *AG v Adolf Eichmann Criminal Case No. 40/61* (DC Jerusalem).

26 *R v Bow Street Metropolitan Stipendiary Magistrate Ex p Pinochet Ugarte (No.2)* [2000] 1 AC 119 (HL);  
*R v Bow Street Metropolitan Stipendiary Magistrate Ex p Pinochet Ugarte (No.3)* [2000] 1 AC 147 (HL).

27 *Prosecutor v Milošević* ICTY-02-54.

28 *Judgment of the Nuremberg International Military Tribunal* (1947) 41 AJIL 172.

To circle back, one might say that public international law is a discipline organised around a series of decisions about how public it ought to be or what sort of public it ought to be or pursue. The answer to these questions may come down to temperament or training. A diplomatic lawyer might accentuate the international law of inter-sovereign co-operation, in which the public idea of public international law is attenuated or mediated, by the sheer durability of anarchy, while an academic lawyer steeped in constitutional law or trained as a certain sort of public lawyer will want to map onto international law ideas derived from national public law. Indeed, these different approaches may be why the idea of the two sorts of international law started to develop in the first place.

Professor Simpson concluded by reminding the audience that through all this discussion, whether one thinks of international law as public or not, it's important to keep sight of international law's sheer distinctiveness as a legal project. We don't want to arrive at a position where "every image of international law that is not recognised by public law as one of its own concerns threatens to disappear irretrievably."

### **Questions and Answers**

One question from the floor concerned the public understanding and perception of international law. It was observed that whilst the speakers have presented a picture of gradual evolution of international law norms into a distinct, coherent system of law as informed by domestic legal norms, and which has an ongoing communicative relationship with its domestic counterparts, the public has not caught up with this understanding. This was suggested as the reason for the public perception that the Human Rights Act 1998 diminishes the sovereignty of Parliament. It was also suggested that this type of thinking had affected the outcome of the Brexit referendum.

Professor Cheryl Saunders agreed that public understanding is a difficult and important issue which needs to be addressed. The public, at least in Australia, is often unfamiliar with domestic policies, let alone the country's international law arrangements. It seems that we only have two choices, namely, to educate the public by opening up the treaty-making and parliamentary processes, or to ask the public to trust blindly that the government knows what it is doing. Professor Saunders noted that the latter option is not desirable in the long run.

Sir Frank remarked that he was intrigued to hear the word "evolution" being invoked in a Darwinian sense. He was of the view that the process of making international law is a conscious one led by people inside institutions. What he found extraordinary in the aftermath of the Brexit referendum was that people do not trust these political institutions at all; yet they have voted to return power to those very institutions that they do not trust! Sir Bernard observed that when States are making treaties, they are engaged in a contractual and voluntary process. If one looks at the process of judicial decision-making or the writing of jurists however, evolution may not be a bad word. Sir Bernard remarked humorously that when his judgment fell into the hands of academics, he would sometimes find himself reading an article about it a year later and realising "ah, so this is what I decided!" This is a very evolutionary process.



Professor Simpson observed that there are at least three kinds of international lawyers, namely those:

1. who want States to co-operate and co-exist better;
2. who have a programmatic view and think of international law as a tool to pursue particular ideological or moral aims; and
3. who want to limit the sovereignty of States and who think of sovereignty as the key adversary in the battle over public order in the world.

He said that he too was struck by the rhetoric of “getting the country back” and was surprised to find that a sizable portion of the British public views the EU legal order as overly intrusive. He suggested that many bodies of private international law may in fact restrict States’ sovereignty to a much larger extent than EU law or public international law.

In addition, there were discussions with regard to the characterisation of public international law as a contractual arrangement between States, and related issues of consent and justiciability. Professor Simpson clarified that he did not mean to suggest that public international law can be understood solely as a contractual arrangement between States. Indeed, there are aspects of international law which go beyond the voluntary process; the anti-genocide norm for example, is often viewed as a superior norm.

Sir Frank encouraged us to take a practical view of international law. In so far as there are legal or factual disputes between parties, there is room for peaceful adjudication by an international tribunal. Questions of justiciability ought not to be determined by either party to the dispute, but by the relevant tribunal. Sir Frank expressed the view, however, that the authority of international law rests on the consent of the States to which it applies. Sir Bernard expressed similar sentiments regarding the significance of consent. Professor Simpson added that the interpretation of consent might differ from the point of view of those who want States to get along better in a co-operative manner, or those who have a programmatic view of international law and want to save the world.

## Panel 2: Impacts of public international law on public law



Dr Veronica Fikfak speaking on panel 2  
L to R: Professor Dapo Akande, Professor Robert McCorquodale, Dr Fikfak, Professor Michael Crommelin

### Chair: Professor Robert McCorquodale, BIICL

Professor McCorquodale introduced the second panel as focusing on the impacts of public international law on domestic public law. He referred to the recent EU referendum where a majority of the UK voters effectively rejected part of the international law which currently applies to the UK. He remarked that both public international law and public law strive to deliver order in society and they routinely engage with a number of similar issues, one of which is human rights.

### Dr Veronika Fikfak, Cambridge University

*English Courts' Internalisation of the European Convention on Human Rights? Between Theory and Practice*

Dr Fikfak introduced her theme as exploring the possibility that English common law can be developed by the judiciary to protect individual human rights even if the Human Rights Act 1988 ("the HRA") is repealed. This issue is distinct from Brexit, but remains particularly pertinent given the result of the EU referendum and the ensuing uncertainties with regards to the UK's future relationship with the EU and the human rights law that applies through the EU legal order. Dr Fikfak referred to a speech of the Right Honourable Theresa May earlier in the morning, during which it was indicated that she would not now be seeking for the UK to withdraw from

the European Convention on Human Rights (“ECHR” or “the Convention”). However, Mrs May did not state her intentions with regard to the question of a repeal of the HRA.

Dr Fikfak noted that recent developments in the UK Supreme Court suggest that even if the HRA is repealed, domestic common law can still provide a basis for the protection of human rights. The question is whether the English Courts have internalised the ECHR through the English common law in a way that is independent of the HRA, and which would minimise the effect of a possible repeal of the HRA? If the answer is yes, then this would be a prime example of international law having an impact on domestic constitutional law.

Dr Fikfak referred us to the concept of internalisation or domestication of international law as framed by scholars such as Koh<sup>29</sup> and Slaughter,<sup>30</sup> who argued that the only way for international law to be applied effectively in the domestic legal system is for it to form part of that domestic law. It is not argued however that this process needs to take place through the legislature. Rather, it is proposed that the domestication of international human rights law can occur through transnational actors. One such group of actors is judges sitting in the domestic courts. The process of domestication can take place through judicial creativity. Judges act to preserve and enhance the reputation of the international community in response to peer pressure, and they encourage others to follow suit. It is important to note that what ends up being applied is domestic law adapted to international law norms, rather than international law itself. Most importantly, judges are seen, not only as national actors, but also as international participants in the international legal order who provide the catalysts for the voluntary domestication of international law.

In order to determine whether the view advanced by Koh and Slaughter holds true in English law, Dr Fikfak posed three questions:

1. Can the protection of human rights be achieved independently of the HRA?
2. Does the type of protection provided by English common law mirror the protection afforded by the Convention?
3. Are judges performing the role of an international participant because of the compliance pull, communitarian peer pressure or reputation cost? If so, what is the community they are speaking to?

Turning now to the first question, Dr Fikfak referred us to the cases of *Osborn*,<sup>31</sup> *Kennedy*,<sup>32</sup> and the *Guardian News and Media* case.<sup>33</sup> In all of these cases, judges are encouraging counsel to look at common law as an independent basis for domestic human rights protection. Lord Reed remarked in *Osborn* that “the protection of human rights is not a distinct area of the law, based on the case law of the European Court of Human Rights, but permeates our legal system.”<sup>34</sup> In *Kennedy*, Lord Mance criticised the tendency for counsel to rely exclusively

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29 H Koh, ‘Why do Nations Obey International Law?’ (1997) 106 Yale LJ 2599.

30 A Slaughter, ‘Judicial Globalization’ (2000) 40 Virginia Journal of International Law 1103.

31 *Osborn v Parole Board* [2013] UKSC 61.

32 *Kennedy v Charity Commission* [2014] UKSC 20.

33 *R (Guardian News and Media Ltd) v City of Westminster Magistrates Court* [2012] EWCA Civ 420.

34 *Osborne* (n 31) para 55.

on the Convention rights since the passing of the HRA, noting that “the natural starting point in any dispute is to start with domestic law.”<sup>35</sup> In the *Guardian News and Media* case, Lord Toulson noted that “the development of the common law did not come to an end on the passing of the Human Rights Act 1998. It is in vigorous health and flourishing in many parts of the world which share common legal traditions.”<sup>36</sup>

Dr Fikfak argued that these judicial enunciations suggest that there is a strong emphasis on the capacity of the common law to provide a domestic legal basis for the protection of human rights. The common law protection of human rights has continued to exist and it is being developed in parallel to the Convention rights. It is clear that judges want to encourage counsel to rely on common law rights and in turn develop those rights further. It is suggested that, if the HRA is ever repealed, we may still be able to achieve some of the same human rights protections through the common law. Most importantly, in *HS2*, common law rights have been recognised by the Supreme Court as constitutional rights, the standing of which can be compared to Magna Carta.<sup>37</sup> The constitutional hierarchy of the law is such that it cannot be set aside by the HRA or other statutes. Lord Phillips stated extra-judicially that if Parliament repeals the HRA, the judiciary will be willing to throw “the gauntlet back to Parliament.”<sup>38</sup> This means that common law rights now enjoy a level of constitutional protection and are not as vulnerable to political changes as the HRA.

With respect to the second question, Dr Fikfak first directed us to *Moohan*, a case concerning the prisoners’ right to vote.<sup>39</sup> It was argued by counsel that instead of relying on the Convention, the Court should acknowledge a fundamental or constitutional right of universal and equal suffrage in common law, as informed by the principles of democracy and the rule of law, and international norms. This argument was rejected on the basis that the right to vote is traditionally a right derived from statutes and it is therefore inappropriate for judges to develop a common law basis for the right.<sup>40</sup> Dr Fikfak then noted that the picture is different in relation to the common law right to privacy. It is undeniable that common law has been developed under the HRA. In *Douglas*<sup>41</sup> and *Campbell*<sup>42</sup> the concept of breach of confidence has been developed consistently with the UK’s international obligations. In *A v B*, Lord Woolf CJ remarked that Convention rights have been absorbed into the common law.<sup>43</sup> Furthermore, in *Ash v McKennitt*, Buxton LJ held that Articles 8 and 10 “are the very content of the domestic tort that the English Court has to enforce.”<sup>44</sup> In *Google v Vidal-Hall*, the Court of Appeal held that there are two separate and distinct causes of action: an action for breach of confidence, and one for the misuse of private information.<sup>45</sup>

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35 *Kennedy* (n 32) para 46.

36 *R (Guardian News and Media Ltd)* (n 33), [88] (Toulson LJ).

37 *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3, [207] (Lord Neuberger and Lord Mance).

38 Political and Constitutional Reform Committee, *Constitutional Role of the Judiciary if there were a Codified Constitution* (HC 2013-14, 802) 17 (Sweet & Maxwell 2013) (Lord Phillips).

39 *Moohan v Lord Advocate* [2014] UKSC 67.

40 *Ibid*, para 34 (Lord Hodge), para 56 (Lady Hale).

41 *Douglas v Hello! Ltd (No 6)* [2005] EWCA Civ 595.

42 *Campbell v MGN Ltd* [2004] UKHL 22.

43 *A v B plc* [2003] QB 195, [4] (Lord Woolf CJ).

44 *Ash v McKennitt* [2006] EWCA Civ 1714, [11] (Buxton LJ).

45 *Google Inc v Vidal-Hall* [2015] EWCA Civ 311, para 21.

Separately, Dr Fikfak argued that the recognition of proportionality as a common law ground of review has led to the implicit recognition of new common law rights. In *Pham*,<sup>46</sup> it was held that the Government's decision to deprive a citizen of his or her fundamental status as a British citizen is subject to a higher intensity review,<sup>47</sup> and that if the Government wishes to deprive an individual of his or her citizenship, it must do so in a proportionate manner.<sup>48</sup> Dr Fikfak remarked that if we think of the proportionality test as engaging rights, then its use in *Pham* implies the existence of a right not to be arbitrarily deprived of one's citizenship. Dr Fikfak then referred to Lord Mance's observations in *Kennedy* that "in some areas, the common law may go further than the Convention, and in some areas it may also be inspired by the Convention rights and jurisprudence... And in time, of course, a synthesis may emerge."<sup>49</sup> She considered these observations to be apt.

The third question was whether these common law developments occurred as a result of compliance pull or peer pressure from the international community. A related question was with whom might the English courts have been engaged in dialogue? Dr Fikfak observed that what is apparent from the case law is that even though English judges speak of the absorption of Convention rights into the common law, they in fact make little reference to the Convention jurisprudence. Instead, they rely heavily on case law from common law jurisdictions. For instance, in *Campbell*, the House of Lords adopted the test formulated by the High Court of Australia in *Lenah Game Meats* without detailed analysis, even though it was argued by the applicant that the test differs from the Strasbourg approach in relation to Article 8.<sup>50</sup> Similarly, in the *Guardian News* case, Toulson LJ relied on case law of the Canadian Supreme Court, the South African Constitutional Court, and the United States federal courts.<sup>51</sup> Dr Fikfak opined that this reliance on common law authorities demonstrates that the English Courts are engaging in a dialogue, not with its European audience, but with other courts in the international common law community.

Dr Fikfak concluded that, first, recent developments in English law suggest a re-confirmation and re-invigoration for the common law to act as an alternative basis for human rights protection. Second, the common law provides an adaptability for the developments of rights independently from the HRA. Third, common law rights now enjoy a special constitutional status in English law. There are limits however to the common law approach. Common law rights are not Convention rights. They will not achieve the same things as Convention rights would achieve. Most importantly, noted Dr Fikfak, the impact of international law has spurred judges to develop common law rights and in the words of Lord Phillips, speaking extra-judicially, to throw "the gauntlet back to Parliament" if the HRA is repealed.

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46 *Pham v Secretary of State for the Home Department* [2015] UKSC 19.

47 *Ibid*, para 97.

48 *Ibid*, para 120.

49 *Kennedy* (n 31), para 46.

50 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) HCA 63, [42]; adopted in *Campbell* (above n 42), para 135.

51 *R (Guardian News and Media Ltd)* (n 33).

**Professor Michael Crommelin, Melbourne Law School**

*The Pacific Solution to the Refugee Crisis: A Case Study*

Professor Crommelin began by introducing the architecture of the Australian Constitution. He noted that although Australia has no Bill of Rights, the courts have been able to rely on structural features of the Australian Government to protect human rights, by preventing the concentration of public authority. The first feature is the federal system of government which comprises multiple polities, Commonwealth and state, all of which have limited authority. The second is the principle of separation of powers. While the doctrine of responsible government severely compromises the separation of powers between the legislative and executive branches of the government, the peculiar Australian doctrine of the strict separation of the judicial power of the Commonwealth offers some protection for human rights by limiting the power of both the Commonwealth Parliament and the Commonwealth Executive to infringe those rights.

Professor Crommelin observed that globalisation presents significant challenges to the capacity of the Constitutional model in Australia to offer protection for human rights. In some respects, Australia is a dualist State. The Commonwealth Executive has authority for the conduct of international relations, including international rights and obligations, but these rights and obligations require legislative implementation before they can be incorporated into domestic law. The High Court of Australia has stated that the Commonwealth Parliament has the authority to do that as various aspects of Australia's international relations fall within the Parliament's power to make laws in relation to external affairs. There is a symbiotic relationship between the Commonwealth Executive's authority to conduct international relations and the Commonwealth Legislature's authority to incorporate rights and obligations arising from these relationships into Australian law. It was remarked that there are problems with the symbiotic relationship because the limits on the Commonwealth powers, both legislative and executive, are not yet adequately determined.

Professor Crommelin then discussed the *M68* case as an illustrative example.<sup>52</sup> By way of background, in 2012 Australia adopted a policy of offshore regional processing of asylum seekers who attempt to enter Australia by sea. The amendment to the Migration Act 1958<sup>53</sup> established a regime whereby a non-citizen who enters Australia by sea without a visa must be detained by an officer of the Commonwealth and taken to a regional processing country pending determination of his or her refugee status. This regime requires Australia to make arrangements with other countries for the establishment and operation of offshore processing centres. These arrangements, in effect, amount to the outsourcing of Australia's obligations under the Refugee Convention to other Pacific States and private contractors. On 3 August 2013, Australia and Nauru signed a memorandum of understanding ("the MOU") relating to the establishment and operation of a regional processing centre in Nauru. The preamble to the MOU records that Australia and Nauru are both State parties to the Refugee Convention. Australia undertakes to meet all costs under the MOU, while Nauru undertakes to meet the international obligations for refugee protection. Successful applicants may be allowed to

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<sup>52</sup> *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1.

<sup>53</sup> Migration Act 1958 (Australia).



settle in Nauru. Australia must assist Nauru to settle applicants in Nauru or in a safe third country. For unsuccessful applications, Australia must return them to their home country or to third countries.

In 2014, Australia and Nauru concluded further detailed administrative arrangements dealing with the transfer of asylum seekers from Australia to Nauru, the governance of the Nauru regional processing centre and the operation of the processing centre by Nauru officers, Australian officers and a private service provider engaged under contract by Australia. These arrangements confirmed that the determination of refugee status will be made under Nauru law, with the assistance of the private service provider. Further, on 24 March 2014, the Commonwealth government entered into a contract with Transfield Services Australia Proprietary Ltd ("the Transfield Contract"). The company offers a broad range of services, including all security services at the Nauru processing centre. The Australian Government retains tight control over the provision of all these services under the Transfield Contract, through a "step-in right", namely the Government may, at its complete discretion, give notice to Transfield that it will take over all its responsibilities under the contract.

In the *M68* case<sup>54</sup>, the plaintiff, a Bangladeshi national, was on board a vessel when it was intercepted by Australian officers. She was taken to the Christmas Island migration zone and then to the processing centre on Nauru. She was granted a regional processing visa by an officer of the Nauru Government on the basis of an application made on her behalf, without her consent, by an officer of the Australian Government. The visa stipulates that she must reside at the Nauru regional processing centre. She applied to the Nauru Government for recognition as a refugee under the relevant Nauru legislation. Before her application could be determined, she was brought to Australia for medical review.

While in Australia, the plaintiff initiated proceedings in the original jurisdiction of the High Court, challenging the legality of the MOU between Australia and Nauru, the Transfield Contract and her detention in Nauru. The case was initially framed as a challenge to the legality of the exercise of the Commonwealth executive power in establishing and operating the Nauru regional processing centre by means of the MOU, the Transfield Contract and the administrative arrangements. Shortly before the hearing, however, the Commonwealth Parliament passed another amendment to the Migration Act 1958, inserting a new section, section 198AHA, which authorised the Commonwealth Executive to implement these offshore regional processing arrangements. The plaintiff amended her claim to include a challenge to the Commonwealth legislative power in enacting section 198AHA. The newly enacted provision received royal assent on 30 June 2015; however, it purported to have retrospective effect from 18 August 2012, before the MOU was entered into.

Professor Crommelin first discussed the scope of executive power. Despite the amendment, the High Court was asked whether the conduct of the Commonwealth Executive in signing the MOU, as distinct from giving effect to its provisions, was authorised by section 61 of the Constitution.<sup>55</sup> Section 61 states that the executive power of the Commonwealth extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth.

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<sup>54</sup> *Plaintiff M68/2015* (n 52).

<sup>55</sup> Commonwealth of Australia Constitution Act 1900 ("the Australian Constitution") section 61.



It has long been recognised that the language of the section offers little assistance to the identification of the scope of the power. Nonetheless, the HCA has held in recent cases that section 61 provides at least the starting point for the determination of the scope of Commonwealth executive power by identifying its two essential components, namely statutory and non-statutory executive powers. It is relatively straightforward to determine the scope of statutory executive powers – it involves statutory interpretation constrained by the Constitutional requirement that the statute be a law with respect to a subject within the limited authority of the Commonwealth Parliament.

In contrast, non-statutory executive power is heterogeneous, ambulatory and elusive. It includes the administration of the departments of the states of the Commonwealth. It also encompasses what has become known as “the nationhood power”, which is authority that is appropriate to the position of the Commonwealth Executive under the Constitution and to the spheres of responsibility vested in it by the Constitution. The nationhood power has both national and international dimensions, reflecting Australia’s independent statehood in international law and the role of Commonwealth as the national level of government within the Australian Federal Union. Its scope may be informed, but not determined, by resort to the concept of the royal prerogative. The High Court of Australia has not yet marked out the bounds of the non-statutory executive power, but it has recognised some of its components, and these include aspects of international relations, such as the extradition of an Australian citizen from a foreign State to Australia, the conclusion of treaties and the declaration of war and peace.

Nevertheless, the High Court has confirmed that the non-statutory power of the Commonwealth to enter into domestic contracts and to spend public monies is not unlimited in scope. Professor Crommelin noted that two recent cases are particularly instructive in this regard. Both arose from an attempt by the Commonwealth to establish a school chaplaincy programme in Australian schools. At first, the Commonwealth used non-statutory executive powers involving contracts with private providers and public expenditure to set up the programme. The validity of this approach was challenged successfully by the litigant, Mr Williams, in the first *Williams* case.<sup>56</sup> Undaunted, the Commonwealth resorted to legislative power; but the validity of the legislation itself was again challenged successfully by Mr Williams, in the second *Williams* case.<sup>57</sup> In these cases, the High Court rejected various assertions put to it by the Commonwealth regarding the scope of its non-statutory executive power. The High Court did not outline the limits of the non-statutory power, but it did indicate things which fell outside the limits. First, despite Australia’s English constitutional heritage, there is no reason to assume that the executive power of the Commonwealth to enter into contracts is the same as the power of the British Executive. Second, the Court rejected the proposition that the capacity of the Executive to enter into contracts is equivalent to that of an individual. Third, the Court denied that the non-statutory Executive power includes all of the subject matters of the Commonwealth legislative power. The essential reason why these extensive non-statutory powers were denied was that

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56 *Ronald Williams v the Commonwealth of Australia & Ors* (2012) 248 CLR 156; [2012] HCA 23 (“the first Williams case”).

57 *Ronald Williams v the Commonwealth of Australia & Ors* (2014) 252 CLR 416; [2014] HCA 23 (“the second Williams case”).

they were incompatible with the federal nature of the Australian federal union, and with the relations existing between different branches of the Commonwealth government.

Professor Crommelin noted that regrettably in the *M86* case, the High Court passed up the opportunity to consider the application of those principles to Commonwealth non-statutory power exercised in the field of international relations. The majority of the Court held instead that the Migration Act 1958 authorised the conclusion of the MOU, therefore avoiding the need to consider non-statutory executive power.

Turning to the legislative power in the *M68* case, the Commonwealth relied on three sources of authority for Parliament to enact the retrospectively operating provision, namely the aliens' power, the external affairs power and the power with respect to the Islands of the Pacific. Six members of the Court upheld the constitutional validity of section 198AHA on the basis that the power to make laws in respect of aliens extended to the Commonwealth's participation in the implementation of the offshore regional processing scheme in Nauru. Significantly, one member of the Court, Gageler J, held that section 198AHA was also a law in respect of external affairs, insofar as it authorised the Commonwealth Executive to take actions outside Australia in relation to an agreement between the Executive and another foreign government. In other words, the MOU and the administrative arrangements would apparently operate in the same way as a treaty, giving Parliament the power to determine their terms without any explicit limitations.

Professor Crommelin then moved on to discuss Commonwealth judicial power in light of the High Court's decision in *M68*. It was observed that an essential element of the Australia doctrine of strict separation of power is the prohibition of the exercise of judicial power by anybody other than a properly constituted Court. This doctrine effectively curtails the power of the Commonwealth Parliament and Executive. The Courts control the deprivation of liberty in Australia in relation to both administrative detention and legislative detention. Insofar as administrative detention is concerned, the position is clear. No officer of the Commonwealth Executive may, without a judicial warrant, place any person in custody. If such detention is to occur, it requires legislative authority. The position in relation to legislative detention is much less clear. The doctrine of strict separation of power does limit the legislative authority of the Commonwealth Parliament, subject to two important exceptions: the defence power and the aliens' power. Both of these exceptions are limited by the *Lim* principle.<sup>58</sup> Parliament has the power to make laws for the deportation of aliens, and as such it has the incidental power to detain aliens to the extent necessary to make the deportation effective.

In *M68*, the High Court refused to accept the argument that outside Australia the power to detain aliens is unconstrained by the *Lim* principle. Nevertheless, the Court held that the *Lim* principle was of no avail to the plaintiff. Four members of the Court drew a distinction between the detention of the plaintiff by the Commonwealth and the participation of the Commonwealth in the plaintiff's detention by Nauru. The first required the application of the *Lim* principle, the second did not. According to Professor Crommelin, this distinction is unedifying and has substantial weaknesses. It is difficult to reconcile the justification for the

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<sup>58</sup> *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

distinction with the willingness by the same members of the Court to extend the operation of the aliens' power to Commonwealth activities in Nauru.

Professor Crommelin concluded by saying that one significant impact of international law on Australian public law is the demonstration of inadequacies in the protection of human rights through the reliance on the structural features of the Constitution. A large part of the problem stems from the failure of the High Court to apply the principles, which it has developed to determine the scope of Commonwealth powers in the domestic context, to Australia's involvement in the international arena. The *M68* case is the most recent example of this failure. The mystique surrounding the conduct of foreign relations must surely now be regarded as the product of a bygone era. There is no justification for differential treatment for the exercise of public power by Australian institutions domestically and internationally. For Australia, the most significant issue is undoubtedly the extent of Commonwealth executive power with regard to the conduct of international relations. Unconstrained, this power threatens Australian's constitutional foundations and only the courts can devise the necessary constraints.

### **Professor Dapo Akande, Oxford University**

#### *Non-justiciability and the Foreign Act of State Doctrine*

Professor Akande framed his address as concerning the role played by public international law in domestic proceedings involving the principles of Foreign Act of State and *Buttes* non-justiciability.<sup>59</sup> The Foreign Act of State doctrine is engaged when the court is invited to pronounce on the legality of an act of a foreign government in the course of rendering its judgment. Typically, it is applied when the foreign State is not a party to the proceedings. English Courts and courts in other common law jurisdictions have developed the doctrine of Foreign Act of State, which provides that the court will not adjudicate on the legality of an act of a foreign State when it is committed on the territory of that foreign State. Separately, English Courts have also developed the principle of *Buttes* non-justiciability, according to which, "the Courts will not adjudicate on the transactions of foreign, sovereign States."<sup>60</sup> These are to be distinguished from the principles which might prevent the court from adjudicating on the actions of the domestic executive in the conduct of foreign affairs, commonly referred to as the Crown Act of State doctrine, which originates from the case of *Buron v Denman*.<sup>61</sup> In cases where the executive is alleged to have been complicit in the act of a foreign State, both the Crown Act of State and Foreign Act of State principles may be triggered on the facts.

Professor Akande noted that both of these doctrines are currently under consideration by the United Kingdom Supreme Court in two separate cases, *Belhaj v Straw*<sup>62</sup> and *Serdar Mohammed*.<sup>63</sup> In *Belhaj*, the questions facing the Court are: first, whether the Foreign Act of State doctrine exists as a matter of English law; second, if it does, what is the legal basis for this doctrine; and third, are there any limitations or exceptions to this doctrine? The underlying

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<sup>59</sup> *Buttes Gas & Oil v Hammer* [1982] AC 888 (HL).

<sup>60</sup> *Ibid.*

<sup>61</sup> (1848) 2 Ex 16.

<sup>62</sup> *Belhaj v Straw & Ors* [2013] EWHC 4111 (QB).

<sup>63</sup> *Serdar Mohammed v Secretary of State for Defence* [2015] EWCA Civ 843.

claim in *Belhaj* is that several senior UK officials are liable for the torture of Mr Belhaj and his wife through their alleged involvement in a common design to effect the rendition of Mr Belhaj and his wife back to Libya, together with agents of other States, when it was under the control of Gaddafi. The UK Government argued that the Foreign Act of State principle applied and that the Court should be barred from hearing the substantial claim.

Professor Akande then explained the operation of the Foreign Act of State doctrine and its relationship with *Buttes* non-justiciability. The Foreign Act of State doctrine is concerned with the conduct of a foreign State within its territory, whereas the *Buttes* non-justiciability doctrine applies more generally in that the Court will not adjudicate on the transactions of a foreign sovereign, regardless of where it took place. There are questions raised as to whether these doctrines are merging into one. In the *Tin Council* case,<sup>64</sup> for example, Kerr LJ referred to them compendiously as “act of state non-justiciability”. In a more recent case, *Yuko Capital Sarl*, the Court of Appeal held that the *Buttes* non-justiciability doctrine “has, on the whole, not come through as a doctrine separate from the act of state principle itself, but rather has to a large extent subsumed it as the paradigm restatement of that principle.”<sup>65</sup> In spite of their close relationships, Professor Akande noted that these doctrines are underpinned by different considerations. First, whereas the Foreign Act of State doctrine has a territorial limitation, the *Buttes* justiciability is concerned only about the transactions between States. Second, the Foreign Act of State doctrine operates as a rule of decision, which means that the Court assumes that the relevant act of the foreign State is valid and applies it as the basis for its decision. In contrast, the operation of the *Buttes* non-justiciability principle is such that the Court must decline to decide on whether the relevant acts of the foreign State(s) are lawful or not, as demonstrated in the case of *Shergill v Khaira*.<sup>66</sup> This second difference has potential implications for the right of access to a court enshrined under Article 6 of the European Convention of Human Rights. If the court applies the principle of *Buttes* non-justiciability, that right is implicated in a manner similar to when courts refuse jurisdiction on the basis of State immunity. In contrast, Professor Akande argued, there may not be a violation of the right of access when the court continues to entertain the substantive claim but deems the act of the foreign government valid under the Foreign Act of State doctrine.

Turning to the relevance of international law with regard to the Foreign Act of State doctrine, Professor Akande raised two issues, namely:

1. Whether the Foreign Act of State doctrine is based on deference to the sovereignty of a foreign State and is therefore potentially required by or underpinned by principles of international law?
2. To what extent is there an international law exception to the Foreign Act of State doctrine. In other words, can the courts inquire into the legality of a foreign act of State when it is alleged to be contrary to international law?

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64 *Maclaine Watson v International Tin Council* [1988] 3 All ER 257 (CA), 375.

65 *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2014] QB 458, [66].

66 *Shergill v Khaira & Ors* [2014] UKSC 33.

Professor Akande explained that the Foreign Act of State doctrine may be said to be based on domestic constitutional principles which govern the relationships between the different branches of the UK State, or alternatively, based on the court's deference to the competence of foreign sovereigns. In *Belhaj*, the Court of Appeal considered that the Foreign Act of State doctrine is based on a consideration of sovereign equality. However, it noted that the doctrine is not required by international law. The Supreme Court will be interested in the extent to which the Foreign Act of State doctrine is being applied in other common law legal systems, such as the USA, Australia, South Africa and New Zealand. It is sometimes stated that the doctrine is a peculiarly common law principle. If this is the case, it can hardly be regarded as a principle of international law. However, Professor Akande noted that there is literature which suggests that civil law countries have devised theories with comparable consequences to the doctrine. For instance, in his report to the Institut de Droit International, Professor Conforti remarked that the doctrine of Foreign Act of State is not exclusive to common law countries, but is also applied in continental systems as evidenced by a series of cases from the Italian Court of Cassation.

The question in the UK however is to what extent have the Courts regarded themselves as applying the doctrines of the Foreign Act of State and *Buttes* justiciability on the basis of international law, or alternatively, on the basis of Constitutional law? In *Shergill v Khaira*, the UK Supreme Court seemed to suggest that the *Buttes* principle is based on the constitutional limit of the Court's competence as against the Executive in matters affecting the UK's relations with foreign States. This is an *obiter dictum* statement which the Supreme Court would need to revisit in the *Belhaj* case. Quite separately however, the High Court of Australia indicated in *Potter v Broken Hill* that the basis for the Court's enquiry into the validity of the executive act of a foreign State depends on the application of a well-known principle of international law.<sup>67</sup> The US Supreme Court appeared to have rejected international law as the basis for these doctrines in the 1960s. English Courts have been inconsistent more recently in relation to the basis for these doctrines. On the one hand, the doctrines are grounded with reference to sovereign equality, but on the other, there is a reluctance by the Courts to hold that these principles have been derived from international law.

Turning to the question of whether there are international law exceptions to the Foreign Act of State doctrine, Professor Akande noted that one argument which has been made in the *Belhaj* case is that there ought to be an international law exception or, at least, a human rights exception to the general application of the Foreign Act of State principle. Professor Akande noted that while there is not a coherent, general international law exception, there are certain circumstances where domestic courts would be entitled to, or even required to, enquire into the legality of the act of a foreign State under international law. By way of example, in the context of refugee protection, in order to give effect to the UK's international obligations under the Refugee Convention, it would be necessary to look into the level of protection (or otherwise) which can be afforded by another State. Another example would be criminal prosecutions under the CAT,<sup>68</sup> where the domestic Court is required under the Convention to enquire into the legality of the act of a foreign government. In addition, there are cases

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<sup>67</sup> *Potter v Broken Hill Pty Co Ltd* (1906) 3 CLR 479, 510.

<sup>68</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

where States are obliged not to recognise as lawful a situation which has arisen as a result of a breach of *jus cogens*. Professor Akande also referred to the decision by the House of Lords in the *Kuwait Airways* case to enquire into the legality of the transfer of the assets of Kuwait Airways by Iraq, which was in conformity with UK's international obligations as a State.<sup>69</sup>

## Questions and Answers

One comment from the floor suggested that we should be mindful of the English courts' ability to protect human rights through the use of international law in statutory interpretation. Dr Fikfak emphasised in reply that the reliance on common law rights and the use of international law in statutory interpretation are not mutually exclusive. Professor von Bogdandy expressed his concern that if the UK withdraws from the Convention itself, the courts might be unable or unwilling to sustain the same level of protection for human rights as a matter of political reality. Dr Fikfak shared many of the concerns expressed but noted that she was trying to limit her session to the possibility of a repeal of the HRA, not a UK withdrawal from the Convention itself. Dr Fikfak was also asked to elaborate on areas where common law may provide a greater level of protection than the Convention jurisprudence. Dr Fikfak noted in response that the common law may give greater protection in relation to certain areas, such as the right against torture, but it has failed to provide protection in relation to the right to vote.

A question was asked about the type of international law the House of Lords was referring to in the *Kuwait Airways* case. More specifically, when the Court held that it could adjudicate on the act of a foreign State, was it able to do so because of the existence of an international law rule or because a parallel legal determination has already been made in international law? Professor Akande answered that his reading of the case is that the Court was guided by the Security Council ruling on the same issue. In a sense, the domestic court is merely repeating the judgment given at the international level. If we consider the concepts of sovereign equality as the underlying rationale for having the Foreign Act of State doctrine, then the domestic court's reiteration of an international ruling is unlikely to infringe that doctrine.

Professor McCorquodale asked whether Gageler J's judgment in the *M68* case posed any danger for the application of international law in Australian public law. Professor Crommelin noted that Gageler J's judgment is interesting for two reasons. First, Gageler J provided an extensive account of the scope of Commonwealth executive power both domestically and internationally even though it was not called for in the case. Second, Gageler J took an expansive view of the Commonwealth executive power. It was held that the Commonwealth executive power to conduct external affairs applies not only in relation to international treaties but also any international arrangements, contractually binding or not. When the Court decided in the *Tasmanian Dams* case<sup>70</sup> that the Commonwealth external affairs power includes the implementation of international treaty obligations, there was a huge political backlash. As a result of the symbiotic relationship, an extension in the scope of executive power would have a resounding effect on the legislative authority of the Commonwealth Parliament. Professor Crommelin concluded that if the Court were to adopt Gageler J's approach, there could well be another enormous political backlash.

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<sup>69</sup> *Kuwait Airways Corporation v Iraqi Airways Company and Others* [2002] UKHL 19.

<sup>70</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1.



### Panel 3: Public law influences on public international law



Professor Dan Sarooshi speaking on Panel 3  
L to R: Sir Jeffrey Jowell, Professor Sarooshi, Aimee-Jane Lee

#### **Chair: Professor Dan Sarooshi, Oxford University and Essex Court Chambers**

Professor Sarooshi introduced the panel as concerning the influence of domestic public law on public international law, whether applied in the context of international organisations, such as the EU, or by domestic or international courts and tribunals. Given recent events, he said, the mention of Brexit is compulsory! However, even leaving the Brexit challenges aside, there are serious questions as to how significant public law constraints formulated at the domestic level should be applied to States and international organisations by international courts and arbitral tribunals. Prior to introducing the speakers for panel three, Professor Sarooshi congratulated BIICL for the quality of the speakers present at the conference.

#### **Sir Jeffrey Jowell QC, Blackstone Chambers**

*The Internationalisation of the Right to Administrative Justice*

Sir Jeffrey Jowell began by noting that the process through which entitlements gain international acceptance, perhaps first through soft law and then hard law, is not subject to rigorous measurement. It must be assessed by reference to both principles and to practice. The principle of administrative justice is also known as “just administrative action” or “good administration”. It is to be distinguished from “good governance”, which has different and



more varied connotations. It requires all public officials to act within the law, to act fairly, and to act reasonably. It permits everyone to assert those standards and to challenge decisions that are made about their lives which fall short of those standards. The standards themselves are to protect individuals against decisions which are arbitrary, offensive to human dignity, or unnecessarily oppressive.

Sir Jeffrey noted that we find the emergence internationally of just administration standards from three particular sources: the interstices of established human rights instruments; the principle of the rule of law; and the recognition of just administration in domestic Constitutions and the common law.

First, there are a number of established rights that speak to the notion of administrative justice: the right to a fair trial before an independent and impartial tribunal; no punishment without law; no deprivation of liberty unless prescribed by law; equal treatment; no torture or inhuman or degrading treatment.

Second, the rule of law as a source contains a number of aspects of administrative justice. The rule of law is often said to be excessively vague; for example, Jeremy Waldron regards it as a contested concept or a work in progress. However, looking at a number of different sources, including Tom Bingham's work *The Rule of Law*,<sup>71</sup> in which he lays out eight ingredients for the rule of law, it can be seen that there is nothing vague about them. There is nothing vague about the notion of legality, that everyone should be under the law, that the law should be implemented and, as far as public officials go, they should act within their conferred powers. In addition, legal certainty is important; there ought to be fair warning before the law is changed. There is the notion of equality or equal application of the law. There is also the notion of access to justice, which provides for a fair trial before an independent judiciary or other independent bodies. The access to justice principle implies that individuals should be able to challenge decisions made about them. This is the essence of administrative justice.

Turning now to the international recognition of administrative justice, it is often said that the rule of law and the notion of administrative justice are only available for the Global North or developed nations. It is sometimes claimed by countries such as China or Hungary that they uphold the rule of law, but we see only certain aspects of the rule of law being upheld. For instance, in terms of legality, when the law of the ruling party cannot be challenged, it is in reality a system of rule by law rather than the rule of law.

Sir Jeffrey noted that two recent developments suggest the conception of administrative justice is growing in acceptance globally. The first is the Report on the Rule of Law produced by the Council of Europe's Commission for Democracy through Law ("the Venice Commission") in 2011.<sup>72</sup> By way of background, at the inception of the Commission, there was tremendous scepticism from civil law countries in Europe who said that they did not subscribe to the same notion of the rule of law, which is a common law tradition. When the Bingham ingredients

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71 Lord Bingham, *The Rule of Law* (Allen Lane 2010).

72 European Commission for Democracy Through Law, "Report on the Rule of law" (adopted by the Venice Commission at its 86th Plenary Session, 25-26 March 2011), Study No. 512/2009.

were enunciated in the final report, however, it was realised that all member States of the Council of Europe subscribed to these elements. Since then, the 2011 report has been cited frequently as soft law, and it has brought together 46 nations of the Council, having been endorsed by the Council itself. More recently, it has been decided by the Venice Commission to supplement the 2011 Report with a checklist so that States can check their adherence to the rule of law in a practical way ("the Checklist").<sup>73</sup> The Checklist was adopted on 11 – 12 March 2016 and unanimously endorsed by all members of the Council of Europe.

Amongst the elements which have been accepted are legality, legal certainty, equality, access to justice and fair trial. These are broken down into further aspects. One aspect is the prevention of abuse or misuse of powers. This particular section effectively provides that administrative powers exercised by public officials must be open to challenge. The exercise of power which leads to a substantively unfair or unreasonable, irrational or oppressive decision violates the rule of law. It is contrary to the rule of law for the Executive exercise of discretionary power to be unfettered. Thus, the law should indicate the scope of any such discretion to protect against arbitrariness. Dicey opined that the rule of law required the removal of all discretion. This view was criticised by subsequent scholars and the consensus now seems to be that discretion should be allowed, but it needs to be constrained and controlled. The exercise of discretionary power should be controlled by judicial or other independent review, and remedies for the misuse of power should be clear and easily accessible.

Sir Jeffrey referred us to another development in the international arena through the United Nations. In 2010 UN Secretary-General Ban Ki-moon proposed an initiative for the rule of law, which was endorsed by all States present at the General Assembly.<sup>74</sup> Further, the Secretary-General launched the post-2015 development agenda,<sup>75</sup> which included 17 goals and 169 targets on sustainable development. For example, Goal 16 sets out the promotion of "peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels".<sup>76</sup> Target 16.3 then requires States to "[p]romote the rule of law at the national and international levels and ensure equal access to justice for all."<sup>77</sup> Other targets under Goal 16 also speak to the "thick" notion of the rule of law.

Sir Jeffrey then discussed the extraordinary development of the constitutionalisation of administrative justice. The process began with the Namibian Constitution published in 1994.<sup>78</sup> Some of the people who helped to draft the Namibian Constitution went on to assist with the drafting of the South African Constitution.<sup>79</sup> Article 18 of the Namibian Constitution requires the State to act fairly and reasonably (a formulation taken from the enunciation of Lord Diplock

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73 European Commission for Democracy Through Law, "Rule of Law Checklist" (adopted by the Venice Commission at its 106th Plenary Session, 11-12 March 2016), Study No. 711 / 2013.

74 UNGA Res 65/32 (10 January 2011) UN Doc A/RES/65/32.

75 UNGA Res 70/1 (21 October 2015) UN Doc A/RES/70/1.

76 Ibid, 25.

77 Ibid.

78 The Constitution of the Republic of Namibia ("the Namibian Constitution").

79 Constitution of the Republic of South Africa 1996 ("the South African Constitution").

in the *GCHQ* case<sup>80</sup>).<sup>81</sup> Persons aggrieved should have access to redress. This provision went on to be developed further in both the interim and final version of the South African Constitution. Article 33(1) of the South African Constitution provides that “everyone has the right to administrative action that is lawful, reasonable and procedurally fair.”<sup>82</sup> Article 33(2) further requires written reasons to be given when the individual’s rights have been adversely affected by administrative action of the State.<sup>83</sup> The obligation of administrative justice can be found in the Constitution of Kenya,<sup>84</sup> Malawi,<sup>85</sup> the Cayman Islands,<sup>86</sup> Maldives,<sup>87</sup> Zimbabwe<sup>88</sup> and Fiji.<sup>89</sup> This African export has even been adopted by the European Union, in the Charter of the EU, as the right to “good administration”.

This begs the question of whether these aspirations are being implemented. It is true that laws must be accompanied by a culture of compliance. Sir Jeffrey remarked that nonetheless, we should not underestimate the effect of these constitutional provisions because they legitimate the standards of the rule of law. He referred to the Constitutional Court of South Africa as a case in point. The Constitutional Court has upheld the rule of law in a series of decisions involving the country’s President. The constitutional authority of President Mandela was challenged successfully in Court,<sup>90</sup> a decision he accepted with grace. Mr Mbeki was similarly challenged successfully during his presidency over his failure to roll out anti-viral drugs.<sup>91</sup>

Sir Jeffrey concluded that the acceptance of administrative justice at the international level and the provision of mechanisms for its enforcement legitimate the notion that official power is not unconstrained. He reminded us that administrative justice as an international standard is based on the claim that all public officials should be held accountable for the power they exercise on our behalf and the abuse of those powers must be challengeable.

### **Aimee-Jane Lee, Debevoise & Plimpton**

#### *What is the Role of Public Law Notions of Proportionality in Investment Arbitration and Contemporary Treaty Practice?*

Aimee-Jane Lee introduced her presentation as concerning the public law notion of proportionality in the context of investment arbitrations. She discussed the following questions:

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80 *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6 (“the *GCHQ* case”).

81 The Namibian Constitution (n 77), Art 18.

82 The South African Constitution 1996 (n 78), Art 33(1).

83 *Ibid*, Art 33(2).

84 The Constitution of Kenya, Arts 165(7) and 172.

85 Constitution of the Republic of Malawi 1994, s 43.

86 The Cayman Islands Constitution Order 2009, s 19.

87 Constitution of the Republic of Maldives 2008, Art 43.

88 Zimbabwe’s Constitution of 2013, s 68.

89 Constitution of the Republic of Fiji 2013, s 16.

90 *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC).

91 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC).

1. Where have notions of proportionality arisen, both in domestic and international legal systems?
2. How have arbitral tribunals adopted this concept when resolving international investment disputes?
3. Should proportionality take on an increased role in investment treaty arbitration, and if so, how can its application be made legally and practically workable?

By way of introduction, she noted that proportionality analysis has emerged as a common tool in decision-making at both national and international levels. Conflicts frequently arise between competing rights and in the face of such conflicts and the statutory silence as to how they are to be resolved, proportionality analysis has been used to prioritise competing rights. Ms Lee then identified her focus as the notion of proportionality as it arises in disputes concerning the State's exercise of public power, that is, when an aggrieved party seeks to challenge the State measure allegedly impacting on his or her right or interest. In this context, proportionality can assist in the tribunal's determination of the legitimacy of the State measure. At its most basic, proportionality assessment involves a judgment of the means and the end of the impugned State action; it evolves around the central question of whether the State took sufficient account of the legal position of the impacted parties, given the policy objectives that the measure is designed to achieve.

Ms Lee observed that the notion of proportionality has arisen in various domestic legal systems. The notion of proportionality analysis has its roots in German administrative law, and the principle has had constitutional status in Germany since 1965. It has also been incorporated into other domestic legal systems as can be seen in an analysis of constitutional rights. For instance, the Canadian Supreme Court in considering the Canadian Charter of Rights and Freedoms<sup>92</sup> adopted an approach which involves, *inter alia*, an assessment of the proportionality between the effects of the State measure on the rights and the State objectives. Similarly, the Constitutional Court of South Africa has held that the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and, ultimately, an assessment based on proportionality.

Notions of proportionality can also be found in the international sphere. As a matter of public international law, proportionality is a well-established requirement for States to comply with when taking lawful counter-measures. Article 51 of the International Law Commission Draft Articles stipulates that "countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."<sup>93</sup> As a matter of customary international law, any measure taken in self-defence must be proportionate to the initial armed attack.

The notion of proportionality has been adopted in treaty-based international legal systems. The Court of Justice of the European Union ("the CJEU") utilises proportionality analysis to resolve conflicts between domestic State measures and primary and secondary sources of

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<sup>92</sup> The Constitution Act 1982, Part I Canadian Charter of Rights and Freedoms.

<sup>93</sup> ILC, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts' (adopted at the 53rd session, 2001) UN Doc A/56/10.

EU law, as well as fundamental rights and freedoms. The CJEU adopts a three-step approach: it looks at the suitability of the measure, then its necessity, and finally applying proportionality in a stricter sense, balancing the effects against the policy measure. Proportionality also plays a central role in relation to resolving the disputes between rights granted under the ECHR<sup>94</sup> and the exercise of public power by Member States. The European Court of Human Rights has adopted some form of balancing approach in respect of every right, but in particular in relation to Articles 8, 9, 10, 11 and 14 of the Convention. Broadly speaking, States may interfere or restrict a Convention right provided that such interference is prescribed by law and is necessary in a democratic society, in the interests of national security or public safety, or for the prevention of disorder or crime, or for the protection of health or morals, or for the protection of the rights or freedoms of others. In determining what is necessary, the Court affords the State a degree of discretion. The margin of appreciation shrinks or expands depending on the range of measures adopted by other Member States and the relative practicalities of the rights.

Ms Lee remarked that the use of proportionality is not limited to the human rights context; it has also been adopted in the context of international economic law. Article XX of the General Agreement on Tariffs and Trade ("GATT")<sup>95</sup> provides a list of exceptions to the obligations under the agreement. There is a necessity test incorporated into the various exceptions. The test initially focused on the least restrictive measure required to achieve the policy measure. In the *Korea-Beef* case<sup>96</sup> however, the appellate body introduced a balancing approach in light of the regulatory goal. When considering the exceptions, the panel now weighs the contribution to the policy objective against its trade restrictiveness, taking into account the importance of the underlying policy objectives. Additionally, the availability of alternative measures is examined. A measure would not be considered necessary if there are alternative measures which are less inconsistent with that State's GATT obligations.

From this review of the landscape of proportionality analysis in domestic and international legal systems, some overarching common features emerge. First, the court or tribunal will consider the suitability of the measure as a preliminary step in assessing its relevance. This involves an assessment of whether the policy is suitable for the identified State objective, whether the purpose is a legitimate area for public regulation, and whether the measure would contribute towards the achievement of that objective. Second, the relevant adjudicator will examine the necessity of the State measure, specifically, whether there are less intrusive means to achieve the same objective.

Ms Lee then considered proportionality in the context of international investment treaty arbitration. Here, proportionality concerns the finding of a reasonable balance between the rights of the investors and that of the State. Whilst not yet a settled practice, tribunals have been increasingly willing to apply notions of proportionality, in particular when considering claims of expropriation, fair and equitable treatment and non-precluded measures.

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94 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) ("ECHR").

95 WTO, "The General Agreement on Tariffs and Trade" (adopted 1 Jan 1948).

96 WTO, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef* - Report of the Appellate Body (11 December 2000) WT/DS161/AB/R; WT/DS169/AB/R.

By way of background, investment treaty law almost always requires the State to compensate investors when there has been an expropriation. In assessing whether an expropriation has occurred, some tribunals use an “effects test”. The determinative factor is the effect of the measure on the investor’s investment, in other words, whether the investor has been deprived of the value of his or her investment as a result of the measure. Other tribunals adopt what is called the “police powers doctrine”, which acknowledges the State’s power to restrict private property rights for the purpose of achieving legitimate public purposes. Broadly speaking, it requires the tribunal to determine the effects of the measure and to balance the effects against the objective that the measure was seeking to achieve. The notion of proportionality thus emerges. The *Tecmed* case<sup>97</sup> has often been cited as the case which incorporated proportionality into the rubrics of international investment law. The relevant measure at issue in *Tecmed* was the refusal by the Mexican Government to renew a licence to operate a waste landfill. The tribunal held that there needs to be a reasonable relationship of proportionality between the effects on the investor and the aims sought to be achieved by the expropriatory measure. It went on to find that the State’s measure was not proportionate as *Tecmed*’s minor infringements in the operation of the landfill did not give rise to a sufficiently serious or urgent situation, crisis or social emergency to justify the State’s measure, which deprived *Tecmed* of the value of its investments in the landfill operation. Interestingly, whilst the tribunal made explicit reference to the proportionality jurisprudence of the European Court of Human Rights, it did not apply the proportionality test as formulated by the Strasbourg Court, omitting suitability and necessity analyses.

The *Tecmed* approach has been subsequently used by other arbitral tribunals. In *LG&E v Argentina*, the tribunal held that the assessment of expropriation involves balancing two competing interests, namely the investor’s right to ownership and the power of the State to adopt its own policies.<sup>98</sup> This requires consideration of the measure’s economic impacts (including the duration and severity of such impacts) and the practical impacts on the investor in terms of his or her enjoyment of the right of the ownership. Ultimately in *LG&E*, the investor’s claim failed at the first hurdle, namely that there was no permanent deprivation of investment value. It was therefore unnecessary for the tribunal to consider the proportionality of Argentina’s conduct. The tribunal however did endorse the use of the proportionality test in *Tecmed* to distinguish between non-compensable regulation and compensable expropriation. Subsequently in *El Paso Energy*<sup>99</sup>, also a matter arising from the Argentine financial crisis, the tribunal applied approach adopted in *Tecmed* and *LG&E*, reaffirming the need for a proportionality test to be carried out between the public purpose fostered by the regulation and the measure’s interference with the investor’s property rights.

Turning to the use of proportionality in relation to fair and equitable treatment, Ms Lee stated that unlike expropriation, the phrase “fair and equitable treatment” has always been interpreted by the investment treaty tribunals as an all-encompassing standard, and tribunals frequently engage in some form of weighing when considering alleged breaches. More recently however, this weighing process has been linked explicitly to the concept of

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97 *Técnicas Medioambientales Tecmed SA v Mexico* ICSID Case No. ARB(AF)/00/2.

98 ICSID Case No. ARB/02/1.

99 *El Paso Energy International Company v Argentina* ICSID Case No. ARB/03/15.



proportionality. In *MTD v Chile*<sup>100</sup>, the tribunal observed that fair and equitable treatment is a broad, widely-accepted fundamental standard involving good faith, due process, non-discrimination and proportionality.

More recently, the test of proportionality has been directly adopted in *Occidental v Ecuador*.<sup>101</sup> Occidental entered into a participation contract with Ecuador in relation to the exploration and exploitation of an oil field. It committed a technical breach of the contract by assigning some rights and economic interests of the contract to a third party without obtaining the required ministerial approval. As a result, Ecuador terminated the contract and seized the oil field, along with Occidental's properties and assets. In finding that the State acted in breach of domestic law, customary international law and the investment treaty, the tribunal expressly acknowledged that the obligations for fair and equitable treatment, under both Ecuadorian domestic law and public international law, imported with it the need for the tribunal to consider proportionality and the availability of alternative measures. The tribunal went on to observe that when States seek to impose a severe sanction, such as the termination of a contract and seizure of an oil field, the State needs to demonstrate that there has been sufficiently serious harm, or that there has been a persistent or flagrant breach, or that for reasons of good governance or deterrence it was necessary to impose a severe sanction even when the harm was not serious. Further in applying this test, the tribunal focused on two things: first, whether there was a meaningful alternative short of termination; and second, whether, in any event, the termination was a proportionate response. It found that there were meaningful alternatives and Ecuador's sanction was disproportionate to the type of infringement committed by Occidental. Whilst lesser forms of sanction might be defensible, the tribunal found that in light of the magnitude of the total loss to the investment suffered by Occidental, termination was a disproportionate response to a relatively minor wrongdoing. The tribunal acknowledged that every case would turn on its own facts, quoting Lord Steyn's famous enunciation when giving his imprimatur to the importation into English law of the principle of proportionality that "in law, context is everything."<sup>102</sup>

Ms Lee concluded that there is a place for proportionality to be used more broadly in international investment law. First, proportionality represents best practice for the resolution of normative conflicts in a pluralistic legal environment. Second, proportionality can assist in the development of the rule of law by providing a consistent framework for the assessment of conflicting rights. The uniform adoption of proportionality as an adjudication tool in defined circumstances could increase the coherence and predictability of tribunals' rulings, thereby enhancing the rule of law. One must have also regard to the legal and practical implications of this development. The use of proportionality analyses may concentrate judicial powers in arbitrators by granting them a greater degree of discretion, which may exacerbate existing criticisms of the tribunals' legitimacy and democratic deficit. There are also difficulties arising from the transposition of proportionality as a general public international law concept to

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100 *MTD Equity Sdn Bhd and MTD Chile SA v Chile* ICSID Case No. ARB/01/7.

101 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador* ICSID Case No. ARB/06/11

102 *R v Secretary of State for the Home Department, Ex parte Daly* [2001] 3 All ER 433 (HL) 447, cited in *Occidental Petroleum Corp* (n 101) para 451.



international investment law, due to the variation of formulations and the lack of a constitutional value system at the international law level. Finally, as we have seen from the application of proportionality by different tribunals, there is the potential for proportionality analyses to increase inconsistency. Ultimately, the extent to which the role of proportionality evolves will be determined by future investment treaties, and how, in those treaties, States decide to, or not to, use the concept of proportionality to resolve conflicting rights.

### **Ben Juratowitch, Freshfields Bruckhaus Deringer**

#### *Individual Rights in Disputes between States*

In disputes between States, the rights of individuals are sometimes at stake. Dame Roslyn Higgins observed in 1977 that: "When a state delimits its territorial boundaries, grants nationality under its own rules and asserts territorial and extended jurisdiction over its nationals, individuals are manifestly affected."<sup>103</sup> The effects on individuals of disputes between States has not received sufficient attention.

The primary reason for this is that the rights of individuals were typically governed by domestic law in a vertical relationship with the State, to whose jurisdiction they were subject. However, the rights of States were governed by public international law in a horizontal relationship with other States. These juridical planes were only rarely regarded as intersecting, and if they did it was only ever at right angles.

One way in which the two juridical planes intersected was through diplomatic protection, through which States, for centuries, have protected their nationals from the nefarious treatment of other States. This was based on the well-known fiction that it was the State's right that was being asserted, not the individual's, as though the concept of nationality is a conduit through which the rights of an individual metamorphosise into the rights of a State. These cases concern situations in which a State has made a decision to intervene to protect the interests of an individual. The modern alternatives to diplomatic protection are treaties on human rights and investment, which, Dr Juratowitch said, have bloomed like a thousand flowers, or weeds, depending on one's point of view. These treaties often grant individuals or corporations direct rights against States under international law, leading to the suggestion that there is now a system of "global administrative law".

Dr Juratowitch's topic was how the rights and interests of individuals are considered, or not, when they are affected by international litigation between States, the direct rights and obligations of those States being the subject matter of that dispute. One question in this context is whether, and if so how, public law principles could be drawn upon in inter-State disputes to improve the way international courts and tribunals deal with the rights of individuals who are not subject to their jurisdiction. In order to explore this issue Dr Juratowitch discussed three cases and offered several more general observations.

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<sup>103</sup> Rosalyn Higgins 'Conceptual Thinking about the Individual in International Law' (1978) 24 New York Law School Law Review 11.

The first case mentioned was the 1923 Advisory Opinion on *Certain Questions Relating to Settlers of German Origin*,<sup>104</sup> in which the Permanent Court of International Justice (“PCIJ”) considered that international law required Poland to respect private property rights conferred on German farmers under Prussian law in areas that had been German prior to and during the First World War, but became Polish after the war. The farmers had been German nationals at the beginning of the war, but lost their German nationality at the conclusion of the war and became Polish nationals. Poland sought to oust them from their farms on the basis that the acquisition of sovereignty over the territory by Poland reset the private law rights that had been conferred on them by Germany. The case came to the PCIJ for an advisory opinion, which indicated that Poland had behaved unlawfully under international law. This example from almost a century ago brings to mind what has happened on the Crimean Peninsula since 2014. There is a dispute between the Russian Federation and Ukraine about sovereignty over the peninsula and sovereign rights and jurisdiction over the maritime areas surrounding it. One of the first things that the Russian Federation did upon annexation in 2014 was to eviscerate existing property rights under Ukrainian law over hydrocarbons thought to exist on the continental shelf, and confer private law rights to the same resources on Russian State-owned entities under Russian law. Whatever one thinks on the question of which State is the proper sovereign over Crimea, private law rights do not, under public international law, automatically rise or fall depending on which State is sovereign.

The second example was the 2009 case of *Costa Rica v Nicaragua*.<sup>105</sup> An 1858 treaty between Costa Rica and Nicaragua established Nicaraguan sovereignty over the relevant part of the San Juan river, but also preserved Costa Rica’s navigation rights on that same river. The scope of those rights of Costa Rica formed the subject of the dispute more than a century later. The Court found that the inhabitants of the Costa Rican bank of the San Juan were entitled to use the river to meet “the essential needs of everyday life which require expeditious transportation, such as transport to and from school or for medical care.”<sup>106</sup> Nicaragua was required to respect subsistence fishing by Costa Ricans living along the riverbank as a customary right of the State of Costa Rica. This result was reached both by interpreting the treaty and by focusing on Nicaragua’s failure to object to the river-borne activities of Costa Ricans over a very long period.

The third example was the provisional measures phase of the *Arctic Sunrise* case brought by the Netherlands against Russia before the International Tribunal for the Law of the Sea (“ITLOS”),<sup>107</sup> in which Russia chose not to participate. The *Arctic Sunrise* was a Greenpeace ship flying the Dutch flag and protesting against a Russian oil platform in the Arctic, within the Exclusive Economic Zone of the Russian Federation. Russia arrested the vessel and everyone on board on charges of piracy. The Netherlands then sought a provisional measure from ITLOS requiring the release of the vessel and its crew, although only two of the 30 detained

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<sup>104</sup> *Advisory Opinion on Certain Questions Relating to Settler of German Origin in the Territory Ceded by Germany to Poland* 1923 PCIJ Rep Series B No 6.

<sup>105</sup> *Case concerning the Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, [2009] ICJ Rep 213.

<sup>106</sup> *Ibid*, para 78.

<sup>107</sup> *The Arctic Sunrise Case (Kingdom of the Netherlands v Russian Federation)* (Provisional Measures, Order of 22 November 2013) ITLOS Reports 2013, 22.

crew members had Dutch nationality, and some of them were Russian. ITLOS ordered Russia to release the *Arctic Sunrise* and all of its personnel regardless of their nationality, subject to the Netherlands posting a bond of 3.6 million euros. The ITLOS order contained no discussion of the rights of individuals other than its reference to an argument by the Netherlands that: "The settlement of such disputes between two states should not infringe upon the enjoyment of individual rights and freedoms of the crew of the vessels concerned."<sup>108</sup>

As these cases demonstrate, individual rights and interests are sometimes considered in, and can be determinative of, disputes between States. However, the reasoning in most of these cases is sparse. Public international law lacks coherent conceptual and procedural frameworks for the proper consideration of the rights of individuals in inter-State disputes. Whilst the cases mentioned so far have demonstrated at least some consideration of individual rights, there are many more cases where there was no consideration at all.

The complete absence of respect for the fishing rights of private individuals in the maritime boundary delimitation decision of a Chamber of the International Court of Justice ("ICJ" or "the Court") in the *Gulf of Maine* case between the United States and Canada is one prominent example.<sup>109</sup> Since then, the Court has taken a more sympathetic approach to historic fishing rights as a relevant consideration in maritime boundary delimitation.

The extent to which public law principles could be drawn on by international tribunals making decisions in inter-State disputes which will affect the rights and interests of individuals is worthy of consideration. In the first chapter of *The Changing Constitution*,<sup>110</sup> Sir Jeffrey identified three grounds of judicial review: legality, procedural propriety and reasonableness. Principles of this kind are lurking in the interstices of these decisions, like a tentative mole yet to emerge from its burrow.

In *Costa Rica v Nicaragua* the Court held that in concluding their treaty in 1858, Nicaragua and Costa Rica must be presumed to have intended to preserve "a minimal right of navigation for the purposes of continuing to live a normal life in the villages along the river."<sup>111</sup> This presumption is sensible from the perspective of public law, but it does not come from the rules governing the interpretation of treaties reflected in Articles 31 and 32 of the Vienna Convention,<sup>112</sup> notwithstanding the lip service the Court paid to these rules in finding its presumption.

Perhaps the most robust example is the oldest. In its 1923 Advisory Opinion, albeit on the foundation of the Polish Minorities Treaty rather than any general principle, the Court held that: "It is contrary to the principle of equality that [Poland] subjects the settlers to a discriminating and injurious treatment to which other citizens holding contracts of sale or lease

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<sup>108</sup> Ibid, para 87.

<sup>109</sup> *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* [1984] ICJ Rep 246.

<sup>110</sup> Sir Jeffrey Jowell, *The Changing Constitution* (1st edn, OUP 1985).

<sup>111</sup> *Costa Rica v Nicaragua* (n 105) para 79.

<sup>112</sup> Vienna Convention on the Law of Treaties (concluded 23 May 1969) 1155 UNTS 331, Arts 31 and 32.

are not subject.”<sup>113</sup> While Dr Juratowitch was not proposing that inter-State cases could or should involve judicial review of the treatment of individuals by States, international tribunals and courts could usefully develop, and make more explicit, their reasoning in cases where individual rights are affected.

Pursuing the rule of law on the international and domestic planes may involve different considerations, but the essence of the rule of law is the same on both planes. In furthering the rule of law on the international plane by resolving legal disputes between States, international courts and tribunals should be careful to respect the rule of law as it applies to individuals within those States. Whilst some of them have done so, none of them has really explained the conceptual basis on which it has done so. It may be helpful to refer to the international application of the rule of law.<sup>114</sup> Dr Juratowitch stated that the rule of law on the international plane surely requires that if rights are to be affected, the position of rights-holders must be considered, even if the decision-maker is not directly exercising jurisdiction over that right-holder.

In concluding, Dr Juratowitch reminded the audience that no set of domestic public law rules has yet reached nirvana; it is not a perfectly formed system from which ready-made principles may be plagiarised by international law even if international law wanted to do so. Both sides of the dance floor, public law and international law, are modest and frank about their own inadequacies. The question is, notwithstanding their differences, can they help each other to fill the gaps? Dr Juratowitch ventured a hopeful, albeit tentative, yes.

## Questions and Answers

The Chair, Professor Sarooshi, commented that an emerging theme in these panel discussions is the way in which public law has been treated at the international level. The great paradigm shift is the application of international law in domestic courts. We see the proliferation of cases involving international law across all disciplines of domestic law. This process lends itself to the development of international law from the bottom up.

Speaking from the floor, Professor Colin Warbrick challenged Dr Juratowitch on his characterisation of individuals’ interests as rights under public international law. Dr Juratowitch indicated that the fact that a right was conferred under domestic law, or under an instrument of international law over which an international court or tribunal was not exercising jurisdiction, did not mean that it was not a right. It might not be a right under public international law, or might not be a right under an instrument of public international law over which jurisdiction was being exercised, but it was still a right. Whether they were rights or interests, and in some cases it may indeed only be interests that were relevant, the question remained as to whether, and if so on what conceptual basis, an international court or tribunal should take account of them. In the *Costa Rica* case, the Court took into account individual interests by

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<sup>113</sup> Advisory Opinion of 1923 (n 104), 36–37.

<sup>114</sup> Robert McCorquodale, ‘Defining the International Rule of Law: Defying Gravity?’, 65 ICLQ (2016) 277, 292.

finding that the State had a right under the Treaty for its nationals to perform certain activities; it made up the presumption in favour of the protection of individuals in order to achieve this outcome. There was no legal basis for the Court to interpret the Treaty in this way. The real disagreement seems to lie with the extent to which the architecture of public international law *should* allow individual rights and interests to be taken into account in disputes between States. Another question addressed to Dr Juratowitch was whether the absence of reference to individual rights in rulings was simply the result of the failure of counsel to advance individual rights in arguments. Dr Juratowitch opined that there is a deeper, structural problem with the architecture of public international law which has traditionally been rooted in the relationship between States. It operates on the horizontal plane between State actors, where individual rights are, at best, derivative. Counsel have simply been operating within this structure.

Professor Saunders addressed a question to Ms Lee about the method by which the arbitral tribunals have incorporated the concept of proportionality into investment law, in particular, whether this was through an interpretation of the text of the treaties. Ms Lee responded that the notion of proportionality is not expressly stated in investment treaties, rather it has been developed by the tribunals through the interpretation of broadly-framed treaty provisions. The concept of "fair and equitable treatment", for example, allows a certain latitude for tribunals to develop the contents of that standard. As to the widespread use of proportionality in investment treaty law, Ms Lee stated it would improve the consistency of approach by arbitral tribunals, but with flexibility, one gets inconsistency.

Jill Barrett posed two questions to Sir Jeffrey. Ms Barrett asked if the right to good administration should place a greater emphasis on the institutional requirements for administrators to make good administrative decisions in the first place. It was observed that the right of individuals to good administration as presented seems to focus on the *ex post* effect of a bad administrative decision, such as providing the individual with access to a judicial remedy. Separately, Ms Barrett enquired if the principles of good administration should be applied to international organisations, and if so, who would the right-holders be? Should individuals have rights *vis-à-vis* international organisations or should the holders of the right to good administration be the State members of the organisation? Sir Jeffrey remarked that first, the focus of administrative justice is not just *post hoc*, rather, it provides for a standard which helps to advise decision-makers in formulating better administrative decisions on a general basis. Further, Sir Jeffrey argued that the concept of administrative justice should be applied to organisations exercising public powers at all levels, domestic and international. Individuals affected by the decision of an international organisation should have access to their dossier, the right to be given a reason for the decision and the right to remedies.

Dr Antonios Tzanakopoulos asked whether the grouping of concepts such as legality, legal certainty and the right of access to judicial remedies under the umbrella notion of "the rule of law" adds any value to these distinct rights. Sir Jeffrey noted emphatically that what unites these distinctive rights is that they all seek to move arbitrariness to accountability. While each ingredient moves the law in a different way, the ultimate objective is to provide for legal accountability.

## Panel 4: Concepts of “public” in “public” international and “public” law



Jill Barrett speaking on Panel 4  
L to R: Dr Jason Varuhas, Jill Barrett, Professor Armin von Bogdandy,  
Professor David Feldman

### Chair: Jill Barrett, the Arthur Watts Senior Research Fellow in Public International Law, BIICL

Jill Barrett explained that the aim of this panel was to compare the concept of “public” which is integral to both public international law and public law. She commented that the concept of public power is becoming increasingly confused when viewed against the backdrop of trends such as the privatisation of public services, the greater participation of the public in governmental decision-making, and the ability for individuals all around the world to communicate directly through the internet without their States acting as intermediaries. Public Law and International Law face the same external challenges yet their responses have so far been quite unconnected. She hoped that these discussions would identify commonalities and differences between their responses, which would in turn contribute to the development of thinking in both legal fields.

Ms Barrett suggested that while public lawyers had been actively thinking about the concept of “public” for some time, at least since the major privatisations of the 1980s, international lawyers seem somewhat behind the game. In public law, in the UK and elsewhere, conscious efforts have been made to adapt the law to apply to new forms of governance and changing relationships between public and private sectors. In public international law, some traditional certainties have started to crumble around the edges, for example, the notion that the sole subjects of international law are States and international organisations, and that it impinges



on private actors only through national legal systems. The various developments in human rights, investment treaty arbitrations and international criminal law show that international law is capable of penetrating through the public/private divide in terms of actors, albeit in limited fields. Other developments, such as the increasing influence of soft law instruments, which can be made by anyone, raise the possibility that the traditional distinction between States and non-State actors could fade even further. The question is where would the structures of accountability be in these changing landscapes?

She introduced the speakers whose expertise on this subject spans both common law and civil law systems, as well as public law and international law.

### **Professor David Feldman QC, Cambridge University**

#### *The Varying Meaning of "Public" in Public law and Public International Law*

Professor Feldman began by introducing his work as concerned with boundaries: boundaries between criminal and civil procedures; criminal and civil law; public and private law; international and municipal law; and politics and law. Professor Feldman stated compendiously that "the boundaries are without exception, fluid, contested and permeable." He encouraged the audience to take heed of two sets of dichotomies: first, the important and powerful distinction between rulers and ruled; and second, the distinction between power and authority (or "legitimacy", as some would describe the latter). One of the roles of public lawyers is to try to expose false notions such as "popular sovereignty" which is designed to present the relationship between rulers and ruled as one of co-operation and mutual interests, rather than one of exploitation.

Professor Feldman remarked that one distinctive feature of public international law is that it is a set of rules which operates between rulers, where there is no ruler-ruled relationship at its core. Professor Feldman observed that as international law is concerned only with the public relationships between states, the use of the term "public" before international law is redundant and can serve only to differentiate itself from private international law, or the conflict of laws.

It was suggested by Professor Feldman that the use of the private/public divide in municipal law is objective-directed, or what Dworkin would call policy-based, rather than principle-based. If one looks at the various ways in which domestic law in the UK has tried to distinguish the public from the private, one notices that what used to be extraordinary remedies, such as the prerogative writs of certiorari, prohibition and mandamus, have become "public law remedies", that is to say, the scope of those remedies are now being defined by reference to the type of matters, supposedly public, for which they are particularly appropriate. Another example is the development of the judicial review procedure as a distinctively public procedure, which raises the question of what types of procedures are appropriate for judicial review as supposed to ordinary proceedings. The answer to that question, according to Professor Feldman, does not lie in anything that is innate to the notion of public law or public procedure, but to whom one wishes to advantage or disadvantage through the applicable procedures. The question is whether one wants the public body to have any procedural advantages over individual claimants in judicial review proceedings, when compared to ordinary proceedings.



In this light, the application for judicial review can be seen as a set of procedural rules which gives the public body an advantage over individual claimants. From the point of the view of the public body, in a ruler-ruled scenario, the rulers must consider how much they are willing to concede in order to sustain an appearance of effectiveness and legitimacy, while maintaining as much advantage as possible. Professor Feldman remarked that the rule of law can be seen as a situation where the rulers are willing to submit themselves to the discipline of law, for whatever purposes. If and when the rulers decide not to do that, then the rule of law is on its way out. The tension surrounding the degree to which States submit themselves to the rule of law never settles.

Professor Feldman explained that there are techniques that might assist us in demarcating the various boundaries of public law. By way of example, in determining whether EU law has direct effect on emanations of the State, we are obliged to consider the notion of a State. The shape of the State is itself contested and fluid, and has been reshaped fundamentally in the last 35 years. In working out the boundaries of public law, the Human Rights Act 1998 suggests that we could look at whether a private body is exercising functions of a public nature. Professor Feldman argued that there is no such thing as a “public nature”. He went on to quote Max Weber’s remark that States cannot be identified by reference to their exercise of functions because there is no State that has always exercised every function which might be thought of as a “State function”, and there is no function that will always be exercised by every State. The process of privatisation and public-private partnerships therefore presents particular issues which cannot be simply resolved by appealing to the “public nature” test. He further observed that there is no shared criterion for the notion of publicness across many different sub-fields of public law, such as public procurement law, constitutional law and human rights law (even though it is dubious whether human rights law is part of public law). This is why the House of Lords decision in *YL v Birmingham City Council (Secretary of State for Constitutional Affairs intervening)*<sup>115</sup> is an example of an incoherent decision.

Professor Feldman went on to suggest that we could assess the nature of an institution by looking at whether it exercises any coercive authority. This may mean that we assert a particular type of legal regime over the assertion of coercive authority, or it may mean that it is unconstitutional for the State to privatise its exercise of coercive power. By way of example, the Supreme Court of Israel held in 2009<sup>116</sup> that it was unconstitutional for the government to privatise prisons because human dignity is protected under the Basic Law, and thus, if the State subjects people to coercive loss of liberty, it must retain the legal and political responsibility for the exercise of that coercive power.

Professor Feldman concluded by remarking that the idea of publicness, whether in domestic or international law, is always contested, and is a matter of classification which does not answer any questions. Rather, it provides us with a way of asking the question. In order to answer the question, we must first know where the problem is, what sort of problem it is, and the context (social, economic, military, political) in which the problem arises. He ended by quoting the continuity announcer on the BBC Home Service before John Ebdon’s weekly investigation of the BBC Sound Archives, to the effect that he had once again come to no very serious conclusion.

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115 [2007] UKHL 27, [2008] AC 95, HL.

116 *Academic Center of Law and Business v Minister of Finance* HCJ 2605/05.

**Professor Dr Armin von Bogdandy, Max Planck Institute Heidelberg**

*From Public International to International Public Law: Translating World Public Opinion into International Public Authority*

Professor von Bogdandy introduced his talk as concerning “international public law”, where the publicness element is much stronger. He referred us to a research paper developed by the Max Planck Institute on this topic which will be published this year in the *European Journal of International Law*.<sup>117</sup> Professor von Bogdandy discussed the empirical findings of the Berlin Social Science Centre in a study of world public opinion.<sup>118</sup> There is a significant part of world public opinion that regards international institutions with considerable ambivalence. One key insight from the study is an apparent contradiction in public attitudes. On the one hand, many people perceive that international institutions have become powerful and quite a few of their activities raise serious doubts. Professor von Bogdandy commented that the current of British public opinion that international institutions such as the EU have too much power, as evidenced by the recent Brexit referendum, is not unique to Britain or the EU. Rather, it is a widely-held public opinion across the globe and relates to other institutions such as the World Trade Organisation, the European Court of Human Rights, the OECD and the International Monetary Fund. On the other hand, many people believe that these institutions should act more effectively to further common interests, such as environmental protection, immigration, financial stability and the distribution of wealth.

In response to the legitimacy concerns and regulatory demands outlined, Professor von Bogdandy proposed a theory of “international public law”, the purpose of which is to identify, reconstruct and develop the segment of public international law which governs the exercise of international public authority. He remarked that switching the order of “public” and “international” is not a slip of the pen; rather it expresses the overall thrust of the theory, which is to advance a public law paradigm in international law. The aim is to give an expression to world public opinion in the language of international law. International public law stands for the reconstruction and development of the legal regimes governing the activities of international institutions in light of their publicness. In this way, argued Professor von Bogdandy, legal scholarship may contribute towards the increased legitimacy and effectiveness of the institutions’ activities.

Professor von Bogdandy defined the exercise of international public authority as “the adoption of an act which affects the freedoms of others in pursuance of a common interest.” This understanding helps us to single out activities that require modes of legitimation which go beyond the consent of Member States to the institution’s foundational act. Even though views within public opinion may diverge on many important issues, it seems to be common ground that public authority should advance public interests and that it should do so in a way which merits obedience.<sup>119</sup> These twin requirements, and their uneasy relationship, are the key

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117 Armin von Bogdandy, Matthias Goldman and Ingo Venzke, ‘From Public International to International Public Law: Translating World Public Opinion into International Public Authority’ (2016) *EJIL* (forthcoming). A draft version of this paper dated 18 September 2015 is available on SSRN at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2662391](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662391)>. All subsequent pinpoint references are made on the basis of the working paper.

118 von Bogdandy (n 117) 2.

119 *Ibid*, 4.

characteristics of contemporary public law in most domestic legal orders. Therefore, public law theories, doctrines and experiences may help to keep the development of international public law in sync with world public opinion. Notwithstanding the differences between domestic and international public law (not least because the latter is not supported by an overarching central authority), learning can still occur across different levels of governance.

Professor von Bogdandy's explained the five key elements to his theory of international public law, as:<sup>120</sup>

1. International public law is inspired by, and dependent on, domestic public law, but it is not fused with it. This approach caters for both the autonomy and interdependence of domestic and international legal orders.
2. International public law foresees a specific role for international public institutions, which is to authoritatively advance common interests. The fact that legal systems are pluralistic does not prevent the advancement of a common interest. Rather, international public law provides an institutional framework for such policies to be developed even in the absence of a world authority, or other regional fora such as the European Union.
3. International public authority is exercised through acts which claim to pursue common interests, and this requires a public law framework.
4. Freedom is the main rationale. It has a political and an individual dimension. Its political dimension (which seems to be at the heart of the EU referendum) entitles people to collectively exercise public power. The individual dimension, on the other hand, is reflected in human rights. Freedom provides the guidance for the reconstruction of the international legal framework in that public authorities need to understand freedom from both its political and individual dimensions.
5. International public law aims at doctrinal reconstructions and the translation of complex social relationships into a language of legality. This sets out the framework's methodology. Whilst few lawyers globally have mastered the technique of social research and political theory, they share the technique of interpretation.

He went on to discuss what makes an authority or international law "public."<sup>121</sup> It is undeniable that international institutions such as the United Nations or the World Bank operate under a different legal regime as compared to transnational corporations such as JP Morgan or Blackwater. The public/private divide, with all its problems, provides an important stock of knowledge to elaborate this difference. Granted, there are attempts at building overarching legal regimes,<sup>122</sup> such as in the field of human rights, however, even as some human rights apply to private institutions, many differences remain.

The distinction between public and private responds to a fundamental differentiation in modern societies.<sup>123</sup> Most of us will agree that, whatever the eventual definitions, private actions, in particular private economic activities and public action belong to different social spheres. As

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120 Ibid, 22-3.

121 Ibid, 26.

122 Ibid.

123 Ibid.

such, they respond to different operational forms of logic and justificatory requirements. Public law and private law provide the legal basis for activities which follow different rationales. Private law allows actors to act solely in the pursuit of self-interest, whereas public law requires a higher standard, often coined as the pursuit of the common good.

There have been attempts to overcome the public/private divide, the most notable of which is State socialism, the consequences of which is a highly dysfunctional society.<sup>124</sup> The apparent hybridity of some institutions, which is often advanced as an argument against that distinction, rather reinforces it. Any observation of hybridity requires an understanding of the individual components that render something hybrid. The existence of difficult cases of classification does not undermine the utility of the conceptual differentiation.

Publicness can be defined through the public interest.<sup>125</sup> In order to proceed further, we must reflect on the meaning of a concept. Professor von Bogdandy agreed with Professor Feldman that a concept must be understood with regard to its functions. Concepts enable us to understand and deal with reality by purposefully organising the law according to an overarching idea. The overall aim of Professor von Bogdandy and his colleagues is to provide a legal concept in line with calls in world public opinion for effective and legitimate international institutions that advance the common good. The public character of an act is derived from its relation to the public interest. Thus, whether an act belongs to private law or public law depends on the social sphere from which it originates. If the impugned activity is from a sphere where self-interest is a sufficient justification, the act is private. On the other hand, if the act belongs to a sphere where common interests are pursued, it is public.

An act is considered public, argued Professor von Bogdandy, when its enabling norm requires the actor to pursue the common good.<sup>126</sup> The flip side of the coin is that that actor can claim that the legal basis for the act mandates it to advance the public interest. Thus it turns on an interpretation of the enabling norm. The first step of interpretation is to determine which norm the actor invokes, explicitly or implicitly, as the basis for its legal action. The second step involves a consideration of whether the norm requires the pursuit of a common interest. For the purpose of this interpretative exercise, other conditions of legality that the act must meet are irrelevant; the focus is on whether there is a claim of a mandate to pursue a public interest. As the proposed publicness criterion only defines the legal regime which determines the conditions of the legality of the act, further substantive or procedural principles are not required at this stage of the analysis.

Professor von Bogdandy contended that this complex definition also serves another function, which is to distinguish the public interest from the activities of public interest groups, such as Greenpeace.<sup>127</sup> Whereas such groups claim to act in furtherance of the public interest, they lack a specific and public mandate beyond its own members. In contrast, international organisations are entitled to advance public policies in the pursuance of the common interest. For an act to qualify as public, therefore, it suffices that there is a reasonable presumption that

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124 Ibid, 27.

125 Ibid, 27-8.

126 Ibid, 29.

127 Ibid, 30.

the international institution is acting under a public interest mandate. Whether the mandate does exist or whether it is wide enough to cover the particular activities are, different questions which do not concern the qualification of publicness. From this starting point, one can build international public legal regimes and indeed many have been built over the last ten years.

The next question then is how can one define a common or public interest in a pluralist world society?<sup>128</sup> As Kelsen, critical legal studies, and feminist legal theories have shown, to define something as public is a highly political issue which has important repercussions. In the end, it is only the community itself and its institution which can define public interests. An act can claim to articulate a public interest if it is mandated to act on behalf of a community, or a community of communities. Although there are many deep cleavages in the discussion of what amounts to a community, there is wide consensus that a community requires at least an institutional framework for the articulation of a common interest. The term international community, though vague, is well established in international law and politics.

Professor von Bogdandy summed up by reiterating that publicness is established by reference to the legal basis which the act invokes, explicitly or implicitly; if that basis equips an international institution with the authority to define and pursue a common interest, then that authority should be qualified as public.<sup>129</sup>

### **Dr Jason Varuhas, Melbourne Law School**

#### *Against the Public-Private Law Divide: Pluralism and Public Law*

Dr Jason Varuhas argued that although the idea of a fundamental distinction between the nature of public and private law has an intuitive appeal, it ought to be avoided as an analytical tool and that no legal or normative significance should be placed on such a distinction, nor on the idea of public law. By way of an introduction, he defined the scope of his discussions as relating to domestic law in common law jurisdictions, in particular English law. He presented three reasons as to why his arguments are also relevant to international law:

1. many critiques of the divide levered in the domestic sphere will also apply to the invocation of publicness on the international plane;
2. in order for international lawyers to draw on aspects of the domestic law as guiding models for the development of emerging international law areas, such as the global administrative law, it is important to have a firm grasp of the nature of domestic concepts; and
3. the influence of international law has been a persuasive factor in the domestic order, which has rendered the search of a distinctive idea of public law elusive.

Dr Varuhas noted that his arguments would be developed in three parts, namely:

1. the idea of public law as distinct from private law lacks a theoretical anchor in common law systems;

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<sup>128</sup> Ibid.

<sup>129</sup> Ibid, 31.

2. the idea of public law is bound up in an interminable theoretical disagreement which robs it of any practical utility; and
3. the appeal to a unitary idea of public law is fundamentally out of step with the contemporary nature of public law which is a highly pluralistic and varied field of doctrines.

Turning to the lack of a theoretical anchor in domestic law, it was noted that in order to fashion a distinctive idea of public law, one needs to identify the public sphere to which distinctive norms would apply. The search for this anchor has encountered serious difficulties in common law systems. Claims for a distinctive idea of public law typically rests on the idea of the State and that the State ought to be governed by its own unique set of norms. Yet the common law knows no idea of the State. Further, legal developments in common law have proceeded on the basis of disparate forms of actions and paid little attention to the relationship between the claimant and the defendant. This may be contrasted with legal developments in continental jurisdictions, which proceeded according to categories of juridical relationships such as that between the citizen and the State.

Moreover, in common law systems, the principle that public officials are subject to ordinary private law as citizens have militated against the development of a distinctive field of public law. Dr Varuhas gave the example of a tort claim brought against a public official for a wrong committed during the exercise of public powers. The claim would have been brought against the individual officer and the claim would be governed by the law of tort. This raises an important point that English law has traditionally focused on the law of persons, to the exclusion of an abstract idea of the State. This further impeded the development of public law as against the State.

Dr Varuhas described the growth of the modern administrative State in common law jurisdictions around the middle of the last century, which caused English judges and academics to think more deeply about the idea of the State, and the relationship between public entities and individuals. Just as John Allison discussed,<sup>130</sup> this led to a great irony that just as distinctive ideas of publicness were being explored, the brave new world of privatisation, contracting out, and the marketisation of public services had begun. These processes have only intensified over time, rendering the public realm increasingly indistinct. On the other hand, concepts which are often associated with public side of the divide such as fair dealing, checked power, participation, social responsibility and the public interest increasingly inform, through legal regulations or otherwise, the work of non-governmental entities, reflecting evolving understandings of the nature and role of these non-governmental entities, such as firms and societies.

A further complication are phenomena such as devolution and the ceding of sovereignty to international and super-national entities, which has led to a world of fragmented governance structures with multiple nodes of governmental power. Within this post-national legal order, the search for a unitary, home-grown idea of the State appears to be increasingly anachronistic and elusive. Dr Varuhas then reminded us that many domestic processes which have rendered the public/private divide indistinct have also taken place at the international and global level.

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<sup>130</sup> John WF Allison, *A Continental Distinction in the Common Law* (OUP 1996) 107-8.

Dr Varuhas concluded by saying that to the extent that there was a distinction between public and private law, they have become inextricably intermingled in modern times.

Turning to the second pillar of his arguments, Dr Varuhas contended that even if we could identify a theoretical basis for the distinctive idea of public law, the normative implications of invoking such an idea are far from clear. In fact, there are intense disagreements as to what should follow from a matter being classified as being public. Some theorists consider public law as being concerned with the control of public power and as guarding against the abuse of that power, while others see the main task of public law as facilitating the beneficent exercise of public power for the collective good. For yet others, public law is concerned with the protection of individual fundamental rights. Given these contested views of the concept of public law, it is difficult to see how the invocation of a matter as being “public” can be deployed as an analytical tool to help us answer concrete questions. What often happens is that the concept of public law is being relied on by the court without its nature being elaborated. In this way, the invocation of “public law” becomes a poor substitute for justificatory reasoning while boilerplate appeals to the concept mask the normative commitments underpinning its application. Furthermore, there is insufficient discipline around the use of the concept for it to play a meaningful role in a legal dialogue. If one considers that the goal of a particular body of norms in a particular context ought to be the protection of the individual rights, or, alternatively, the protection of the public good, one should defend that position on its merits with concrete legal arguments. The concept of “public” is otiose and likely to obscure and distort our thinking.

Moving on to the third and final pillar of his arguments, which concerns the plurality of contemporary public law, Dr Varuhas noted that the premise underlying the invocation of the public/private law distinction as an idea to guide legal decision-making is that each of public and private law has a degree of inherent unity. Specifically, there seems to be a perception that public law is unified by a common set of ideas, functions, norms, methods, methodologies, and these are fundamentally different to their counterparts which characterise and unify private law. These unitary ideas can then be used to guide legal developments and resolve legal questions across the terrain of the field classified as public law.

Claims of unity based on the nature of public law as it currently exists are plainly wrong. Public law is a pluralistic and highly varied field that cannot be reduced to one set of functions or ideas, and any attempt to argue otherwise is invariably reductionist. To the extent that claims of unity may be normative, they are unattractive. Different fields of public law perform distinctly valuable functions, and a great deal would be lost if we tried to reduce public law to one set of functions.

Dr Varuhas emphasised that contemporary public law contains a plurality of meaningfully distinct sub-fields, each with its own doctrines, functions and defining characteristics. As Professor Richard Rawlings has said, each of these fields has its own “genetic imprint”.<sup>131</sup>

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<sup>131</sup> Richard Rawlings, ‘Modelling Judicial Review’ (2008) CLP 95, 121.



Dr Varuhas invited us to look at the fields of law often streamed via the judicial review procedure in English law. Claims may be brought based on the common law of judicial review, or the law under the Human Rights Act 1998, or EU law, or as a private action, such as claims of false imprisonment, against public officials. Though these areas of law may be categorised as fields of public law, there are fundamental differences between them. Different fields have different basic functions. The principal function of the common law of judicial review is to ensure public powers are exercised properly and for the public goals for which they are conferred. In contrast, the principal function of the HRA is to protect basic individual rights and interests in the face of public power. Fields of private law such as tort have long performed a similar function. Separately, the principal function of core doctrines of EU law applied in domestic judicial review proceedings, such as direct effect, indirect effect, incidental horizontal effect and *Francovich* liability<sup>132</sup> are underpinned with an integrationist ethos that is concerned to ensure the penetration of supranational norms into the domestic legal order. Then there are also reviews brought in respect of specific directives, such as environmental law directives. These directives are characterised by their particular concerns, such as the environmental protection, with their allied principles, such as the Precautionary Principle and sustainable development. Invariably the conduct of the review is shaped by these background considerations.

In addition, different fields protect different interests. For example, many EU norms are concerned with the protection of economic interests or to facilitate wealth maximisation in a single market. Often economic norms are given priority ahead of dignity norms, as the *Viking*<sup>133</sup> and *Laval*<sup>134</sup> judgments have made clear. Whereas in human rights claims, the principal concern is dignity norms. Traditionally at least, the common law has been concerned with ensuring that public powers are performed for the public interest as Parliament had intended.

Further, different fields derive from different sources of law. The law under the HRA derives from one statute, whereas common law judicial review originates from the common law and takes place in the shadow of multiple parent statutes, which shapes how it is applied in different contexts. EU law and human rights law are influenced by different supranational orders and in different areas there may be further sources of norms. For example, judicial review of refugee status which takes place in the context of the Refugee Convention<sup>135</sup> is an autonomous field of its own, characterised by its own distinctive norms. Where the interest of a child is at stake, the UN Convention on the Rights of a Child<sup>136</sup> is drawn on either as a relevant consideration or as a tool in interpreting statutes. Similarly, under human rights law, when there is an adjudication under Article 3 pursuant to the HRA, the Court will take into

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132 C-6/90 *Francovich v Italy* [1991] ECR I-5357.

133 C-438/05 *International Transport Workers Federation and Finnish Seamens Union* [2007] ECR I-10779.

134 C-341/05 *Laval un Partneri* [2007] ECR I-11767.

135 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

136 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CROC).

account European Court of Human Right's jurisprudence, bringing with it, references to norms in the CAT<sup>137</sup> and the Standard Minimum Rules for the Treatment of Prisoners.<sup>138</sup>

As illustrated by this whistle-stop account of the diverse fields of "public" law, concluded Dr Varuhas, unitary accounts of the public law are wholly out of step with the reality. There are different functions to the sub-fields of public law, just as contract, equity and tort each perform their distinctive function.

## Questions and answers

A member of the audience suggested that we could blend aspects of domestic common law and civil law systems to answer some questions posed on the international plane. Dr Varuhas was sceptical about the idea of distilling values from different domestic legal orders, given that invariably when two sets of ideas conflict, one would necessarily pre-empt the other. The conceptual divide we had just heard between the two common lawyers and the civil lawyer on the panel is suggestive of the potential difficulties we may face. Professor Feldman expressed similar reservations.

Sir Stanley Burnton suggested that the use of the word "public" in the domestic legal context is misleading as what we are really discussing is the exercise of governmental functions. Sir Stanley remarked further that the dichotomy between public law and public international law, whilst valid at the beginning of the last century, no longer serves any useful function as a tool of law. Professor von Bogdandy responded by saying that it is not possible to dissolve the dichotomy between public law and international public law as long as we stay as lawyers. This is because any legal analysis must commence with the question of classification.

In response to Professor von Bogdandy's assertion that dichotomies are always important for legal analysis, Dr Varuhas commented as follows: whilst the categorisation of laws can serve practical purposes, there is a danger of expository categories taking on a normative significance unthinkingly. He was not advocating the disapplication of distinct norms to governmental institutions, but he argued that the introduction into English law, principally by Lord Diplock, of the approach that public law is an organising idea is highly problematic. Dr Varuhas remarked that, quoting Harlow and Rawlings<sup>139</sup> specific situations should call for thoughtful, specific answers, and not the mechanical application of the totemic word "public". There could be certain norms which are particularly appropriate to be applied to governmental bodies, which should not be applied to other institutions. But we should not cut off the idea that they may have application outside of governmental bodies. He referred us to the recent Supreme Court decision in *Braganza*,<sup>140</sup> where the Court read across to

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137 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

138 UN Congress on the Prevention of Crime and the Treatment of Offenders 'Standard Minimum Rules for the Treatment of Prisoners,' approved by the ESC by Res 663 C (XXIV) (31 July 1957) and Res 2076 (LXII) (13 May 1977).

139 C Harlow and R Rawlings, *Law and Administration* (3rd edn, CUP 2009).

140 *Braganza (Appellant) v BP Shipping Limited and another (Respondents)* [2015] UKSC 17.

a private contractual context, doctrines of *Wednesbury* unreasonableness and procedural propriety to govern the exercise of contractual discretion, because they are useful norms. Professor Feldman summed up elegantly by depicting the relationship between public and public international law as one of permeability which carries on through a series of channels with filters which control what norms may enter the system.

Professor Dawn Oliver asked the panel whether, in their view, international institutions lack the necessary democratic accountability, and whether it is then appropriate to use domestic ideas of public law on the international level. Professor von Bogdandy replied by contending that international institutions *are* democratic because they have the consent of democratic States. He agreed that in many respects accountability needs to be improved, however it is equally important for international institutions to learn from the reservoir of knowledge from domestic public legal orders. Professor Feldman agreed with the difficulties of democratic accountability raised by Professor Oliver.

Professor Cheryl Saunders commended Professor von Bogdandy and his team for their effort at trying to identify a framework which applies to international institutions. She remarked that while at a certain level of detail, the concept of "world public opinion" may be inchoate, it is entirely plausible that many people do share a mistrust of international institutions, but at the same time, want them to have more powers in pursuing a global common good. In this light, she invited Professor von Bogdandy to elaborate on how the framework fits in with the practical realities of the international legal system. Professor von Bogdandy noted that in advancing an international public law paradigm, he is not advocating a mechanical, totemic approach. The rationality for the interpretation of law is often local. In organising our ideas, dichotomies are very useful. What many citizens see as disembedded economic activities need to be reconstrued in furtherance of the common good. This process needs to take place through international public institutions.

## Panel 5: Complications of Pluralism



Alistair McGlone speaking on Panel 5 – left: Dr Jarrod Hepburn

### **Chair: Professor Dawn Oliver, University College London**

Professor Dawn Oliver introduced panel five as concerning the various ways in which domestic public law and public international law come into conflict or are in tension with each other. The speakers on panel five examine how such conflicts arise and how they can be dealt with by way of case studies. The first case study focuses on the development of conflicting norms in relation to the Aarhus Convention. The second case study relates to parallel expropriation norms in international and domestic law. Unfortunately, the third speaker, Jansen Calamita from BIICL, was not present due to illness. His presentation on “The disconnect between the approach to remedies in investment treaty law and the approach to remedies under systems of public law” was therefore not delivered.

### **Alistair McGlone, International Environmental Law Consultant**

*Principle 10: Implementation at the Global, Regional, EU and National Levels*

Mr McGlone began by stating that one of the most interesting insights he obtained with regard to Brexit was from his cat. The cat said that he had not seriously engaged with international law but he held strong views about Brexit. The cat explained that we should repeatedly ask to leave, but when the door opens, we should sit there and stare at it.

Turning to the substance of the session, Mr McGlone explained that the Rio Declaration on Environment and Development<sup>141</sup> was the centrepiece of the Earth Summit 1992. It comprises 27 principles that were intended to guide future sustainable development around the world. The Rio Declaration is not legally binding even though it was drafted in treaty-like language. The story of how Principle 10 of the Declaration has been implemented at different levels is one of complexity, with many parallel legal provisions at global, regional and national levels. Where proliferation has created tensions, it has so far been resolved by the intervention of the Aarhus Convention Compliance Committee (“ACCC”), the Court of Justice of the European Union (“CJEU”), and the national courts. What seems to be in prospect however, as a result of the vote for Brexit, is that some or all of the pieces will be swept off the table, and the game will re-start again with uncertain rules.

Principle 10 of the Rio Declaration provides that:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.<sup>142</sup>

Mr McGlone stated that Principle 10 is about environmental democracy and addresses public law from the international level. It has three key components, namely: access to information; public participation in decision-making; and access to justice in environmental matters. At its core, the principle concerns itself with accountability. By allowing the participation of all concerned citizens, the Principle seeks to improve the transparency and quality of environmental decision-making, to promote the effective enforcement of decisions and to legitimise environmental norms.

Principle 10 has been implemented differently at different levels. At the global level, the United Nations Environment Programme (“UNEP”) introduced the Bali Guidelines<sup>143</sup> which attempt to drive the matrix of compliance with Principle 10. In Europe and some of the former USSR, it is implemented at the regional level by the Aarhus Convention,<sup>144</sup> which was negotiated under the auspices of the United Nations Economic Commission for Europe (“UNECE”) and adopted in 1998. In addition, it is implemented by large packages of law at the EU level, which are incorporated into domestic UK law in many different pieces of legislation. The EU and UK became parties to the Aarhus Convention in 2005.

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141 UNGA Rio Declaration on Environment and Development (Rio de Janeiro, 3-14 June 1992) UN Doc A/CONF 151/26 (vol I).

142 Ibid, Principle 10.

143 UNEP ‘Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters’ (adopted by decision SS XI/5, part A of 26 February 2010) (Bali Guidelines).

144 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 28 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention).

The Aarhus Convention, adopted in 1998, has three main pillars which mirror the structure of Principle 10 of the Rio Declaration. This operationalisation of Principle 10 is overseen by the ACCC, of which Mr McGlone is a member. The ACCC was established as an arrangement “of a non-confrontational, non-judicial and consultative nature for reviewing compliance”<sup>145</sup> in order to “promote and improve compliance with the Convention.”<sup>146</sup> It is designed to be a mid-way position between judicial decision-making and intergovernmental negotiations. The members are fully independent vis-à-vis the Convention Parties and they serve in their capacity as “persons of high moral character and recognized competence in the fields to which the Convention relates, including persons having legal experience.”<sup>147</sup> Mr McGlone noted that he is not a UK representative on the ACCC; members are independent.

Mr McGlone observed that while the Committee’s procedures can be triggered in a number of ways, most proceedings are initiated by members of the public. In this sense, the procedure is more akin to a human rights mechanism. Findings of the Committee are sent to the Meeting of the Parties of the Aarhus Convention, which may, and almost always does, endorse them. The ACCC’s findings influence EU law<sup>148</sup> and are also recognised in national courts.<sup>149</sup>

In 2005, the EU became a member of the Aarhus Convention as a regional economic integration organization (“REIO”).<sup>150</sup> It made a declaration as to the extent of its competence pursuant to Article 19, which stipulates that REIOs and Member States have separate obligations arising under the Convention.<sup>151</sup> Article 9(3) of the Convention requires that “members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.”<sup>152</sup>

Client Earth, an environmental NGO, approached the ACCC with a communication concerning the EU’s failure to allow access to justice for members of the public to challenge decisions of EU institutions which are in contravention of EU environmental law.<sup>153</sup> The allegation was supported by reference to a number of EU judicial decisions including the *Greenpeace* case,<sup>154</sup> in which Greenpeace and members of the public sought an annulment of the decision adopted by the European Commission to provide financial assistance from the European Regional Development Fund for the construction of power stations on the Canary Islands, without requiring an Environmental Impact Assessment (EIA) to be conducted. The CJEU held that the claimants had no standing under the *Plaumann* test, as set out below:

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145 Ibid, Art 15.

146 UNESC Decision I/7 Review of Compliance (Lucca, Italy, 21-23 October 2002) UN Doc ECE/MP PP/2/Add.8.

147 Ibid, 2.

148 *Joined Cases C 404/12 P and C 405/12 P Council of the European Union v Stichting Natuur en Milieu* (2015) (Grand Chamber), <<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-404/12%20P>>.

149 *Walton v Scottish Ministers* [2012] UKSC 44, [2013] PTSR 51, per Lord Carnwath.

150 Council Decision 2005/370/EC.

151 Aarhus Convention (n 144), Art 19.

152 Aarhus Convention (n 144), Art 9(3).

153 ACCC/C/2008/32 (Part I).

154 *Case T-585/93 Stichting Greenpeace Council (Greenpeace International) v Commission* (First Chamber) ECJ 1995 II-02205; *Case C-321/95 P Stichting Greenpeace Council and Others v Commission* ECJ 1998 I-01651.



Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.<sup>155</sup>

In Case C32 (Part I),<sup>156</sup> the ACCC found that the public must have access to administrative or judicial review procedures for some acts and omissions by EU institutions, and the existing EU jurisprudence was too strict to meet the requirements of the Aarhus Convention. Importantly, the ACCC noted that if the existing EU jurisprudence continued, the EU would be in breach of Article 9 of the Aarhus Convention. Mr McGlone stated ACCC did not find the EU to be in non-compliance of the Aarhus Convention because it wanted to take into account the outcome of the *Stichting Natuur* case,<sup>157</sup> which was being considered by the CJEU.

After the recent judgment in *Stichting Natuur*, the ACCC resumed its deliberations, and, on 27 June 2016, posted Part II of its draft findings in Case C32 on the Aarhus Convention website.<sup>158</sup> Mr McGlone emphasised that the findings were in draft form only and letters had been written to the Party concerned and the communicant inviting their comments.

In short, the draft findings said that the *Stichting Natuur* case did not resolve the issue with regard to the lack of access. The General Court held in 2012 that as Article 10(1) of the EU Regulation to implement the Aarhus Convention<sup>159</sup> provided an internal review procedure in respect of an “administrative act”, it was incompatible with Article 9(3) of the Aarhus Convention.<sup>160</sup> This ACC agreed with the General Court. However, on appeal in 2015, the Court of Justice (Grand Chamber) held that the General Court had no business considering whether the Article 10(1) of the Aarhus Regulation complied with Article 9(3) of the Aarhus Convention because “it was not sufficiently clear that the former was intended to implement the latter.”<sup>161</sup>

The draft findings for Part II included two sets of recommendations. First, if and to the extent that the Party concerned intends to rely on the Aarhus Regulation or other EU legislation to implement its obligations under Article 9, paragraphs 3 and 4, of the Convention, the Committee recommends to the Party concerned that:

- (a) the Aarhus Regulation is amended in a way, or any new EU legislation is drafted in a way, that would leave it clear to the ECJ that legislation is intended to implement article 9, para 3 of the Convention; and

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155 Case 25/62 *Plaumann v Commission* [1963] ECR 95, 107.

156 ACCC/C/2008/32 (Part I).

157 Case T-338/08 *Stichting Natuur en Milieu and Pesticides Action Network Europe v Commission* (Judgment of the General Court (Seventh Chamber) of 14 June 2012) <[www.curia.europa.eu/juris/liste.jsf?num=T-338/08&language=EN](http://www.curia.europa.eu/juris/liste.jsf?num=T-338/08&language=EN)>; *Joined Cases C-404/12 P and C-405/12 P Council of European Union and European Commission v Stichting Natuur en Milieu and Pesticides Action Network Europe* (Judgment of the Grand Chamber of 13 January 2015) <<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-404/12%20P>>.

158 ACCC/C/2008/32 (Part II).

159 Regulation (EC) No 1367/2006, L 264/13 (6 September 2006) (the Aarhus Regulation).

160 Case T-338/08 *Stichting Natuur en Milieu* (n 157).

161 *Joined Cases C-404/12 P and C-405/12 P* (n 157).

- (b) new or amended legislation implementing the Aarhus Convention uses wording that clearly and fully transposes the Convention; in particular, it would be important to correct failures in implementation that are caused by the use of words or terms that do not fully correspond to the terms of the Convention.

Second, if and to the extent that the Party concerned is going to rely on the jurisprudence of the CJEU to ensure that the obligations arising under Article 9, paragraphs 3 and 4 of the Convention are implemented, the Committee recommends to the Party concerned that the CJEU:

- (a) assesses the legality of the EU's implementing measures in the light of those obligations and acts accordingly; and
- (b) interprets EU law in a way which, to the fullest extent possible, is consistent with the objectives laid down in article 9, paragraphs 3 and 4.

Mr McGlone remarked that in light of Brexit it will be interesting to see whether the UK will remain party to the Aarhus Convention and, if not, what that means for communications lodged with the ACCC with respect to the UK. If the UK leaves the EU but remains party to the Aarhus Convention, then a lot of new UK domestic legislation might need to be enacted to implement obligations currently covered by EU law. If the UK leaves the Aarhus Convention as well as the EU, then we would need to work out what Principle 10 of the Rio Declaration means for us, from scratch.

### **Dr Jarrod Hepburn, Melbourne Law School**

#### *Parallel Expropriation Norms in International and Domestic Law*

In order to shed light on some of the complications of pluralism, Dr Jarrod Hepburn focused on expropriation, one instance in which there are parallel norms in both domestic and international law. He stated that the potential for parallel norms has been generated by the expansion of international law in various directions, both in its scope, range of actors and subjects. The extension of rights to individuals in international law has been the most fertile ground for parallel norms, most notably in human rights and investment protection. His focus today is on parallel norms concerning the protection of property rights in both international investment law and Australian domestic constitutional law.

In the Australian context, the protection of property rights is found in section 51 (xxxi) of the Constitution, which states that:

The Parliament shall ... have power to make laws ... with respect to ... the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.<sup>162</sup>

The focus, therefore, is on the concepts of "acquisition" and "just terms".

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<sup>162</sup> Commonwealth of Australia Constitution Act 1990 ("the Australian Constitution") section 51 (xxxi).

The picture is not as clear in international law as there is effectively no canonical norm. There are thousands of investment treaties and a customary law prohibition on expropriation, although there is no unanimous agreement on the scope of this prohibition. However, a heavily litigated provision on expropriation in international law is Article 1110 of the NAFTA.<sup>163</sup> While a direct comparison with the Australian constitutional provision will not be made, examining the litigation concerning Article 1110 (and cases relating to other investment treaties) provides an insight into international investment tribunals' general approach to expropriation.

In general, this analysis shows that international law provides greater protection for investors than Australian domestic law. This is due to numerous factors including the contrasting focuses on acquisition as opposed to deprivation, a taxation exception in Australian domestic law, forfeiture cases, the narrower width of certain Australian administrative law doctrines compared to equivalents in international law, and the lack of property rights protections in Australian state constitutions.

One of the differences between the Australian and international approach to expropriation is the idea of acquisition. In Australia, the use of the word "acquisition" in section 51 (xxxix) of the Constitution means that the focus is on what the State has gained, not what the investor has lost. This was demonstrated in *JT International*,<sup>164</sup> the case concerning Australia's tobacco plain packaging laws. The High Court of Australia effectively stated in that case that there was a deprivation of the investor's property rights, but that this alone was not sufficient to make out an "acquisition" by the government.<sup>165</sup> However, this position is more nuanced than it may appear at first. In other cases, the High Court has clarified that a "slight or insubstantial" acquisition is enough and there does not need to be an exact correspondence between what has been acquired and what has been lost. In addition, the reasoning of the Court sometimes appears to be formalistic when deciding whether an acquisition has been made out. One example of this is *Newcrest Mining*,<sup>166</sup> in which the Court constructed an acquisition by deciding that, by prohibiting mining on the land in question, the government had acquired the land free from Newcrest Mining's right to mine the minerals. Dr Hepburn viewed this construction as somewhat formalistic. While the meaning of acquisition is thus not entirely clear, Dr Hepburn stated that it is generally more difficult to make out an acquisition under Australian law than a deprivation of property rights under an investment treaty.

Another area in which there are different norms is that of taxation. In the High Court of Australia there has been a wide deference to taxation powers in expropriation cases. Indeed, Justice McHugh stated in *Mutual Pools* that any law "with respect to taxation" is not an acquisition.<sup>167</sup> In contrast, international tribunals do seem to have a tendency to examine whether the measure that the State is presenting as a taxation measure is actually a taxation measure. This can be seen in *Murphy v Ecuador*,<sup>168</sup> where the tribunal found that a payment

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<sup>163</sup>North American Free Trade Agreement (adopted 17 December 1992, entered into force 11 January 1994) 32 ILM 289 (NAFTA) Art 1110.

<sup>164</sup>*JT International SA v Commonwealth* [2012] HCA 43, (2012) 250 CLR 1.

<sup>165</sup>*Ibid*, 42.

<sup>166</sup>*Newcrest Mining Limited v Thornton* [2012] HCA 60; (2012) 248 CLR 555.

<sup>167</sup>*Mutual Pools & Staff Pty Ltd v the Commonwealth of Australia* (1996) 190 CLR 513.

<sup>168</sup>*Murphy Exploration and Production Company International v Republic of Ecuador* ICSID Case No ARB/08/4.

of 99 per cent of profits to the State was not in reality a tax and therefore it breached the bilateral investment treaty in question. While the High Court of Australia may well adopt a “bona fides” test if the situation arose, there is currently a difference in approach between the High Court and international arbitration tribunals.

Forfeiture is the third area in which different norms can be seen in the Australian and international contexts. In Australia, any law relating to the forfeiture of property will not amount to an acquisition, even where an innocent third party has been affected<sup>169</sup> or where the law is disproportionate.<sup>170</sup> However, when the recent bilateral investment treaty case *Ickale*<sup>171</sup> is analysed, it can be seen that proportionality is relevant in the international sphere. In this case, the proportionality of what was seized and the alleged misdeeds was considered. This is further evidence that the Australian approach to expropriation is much more deferential to State measures.

Additionally, outside of the federal constitutional context, other avenues for redress under Australian law are also limited. In administrative law, Australian law would be far less willing to recognise substantive legitimate expectations. Also, there are no property protections in Australian state constitutions, although states may have separate statutory compensation schemes.

There is a curious development in the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA)<sup>172</sup> which means that in certain instances, Australian law appears to grant more protection to foreign investors than international law does. This is because AANZFTA contains a general exceptions clause which applies to both direct and indirect expropriation. Thus direct expropriation is likely to be an “acquisition”, but may not breach AANZFTA.

Thus, it is clear that there is a misalignment between the Australian and international approach to expropriation; Australian law is both under- and over- protective when compared to international law. The key question then becomes, does this misalignment matter? An individual’s answer to this question may depend on whether they accept the grand bargain of investment treaties, which are supposed to be predicated on the idea that foreign investors would not bring their capital to a new environment unless the State grants them the protections of an investment treaty. However, the empirical evidence on this predication is mixed, with some suggesting that investment treaties make no difference at all and that investors are considering other factors when they invest. Nevertheless, if the predication is accepted, then the misalignment is not overly concerning as it provides additional protection for investors.

Another matter for concern is the fact that the existence of two remedies gives rise to the possibility of two claims; proceedings in both domestic and international forums. However, these risks can be managed through tools that force a claimant to choose one particular forum or deal with double recovery. Furthermore, some people may view the difference in norms

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169 *Burton v Honan* (1952) 86 CLR 169 (HCA).

170 *Attorney General for the Northern Territory v Emmerson* [2014] HCA 13, (2014) 253 CLR 393.

171 *Içkale İnşaat Limited Şirketi v Turkmenistan* ICSID Case No ARB/10/24.

172 ASEAN-Australia-New Zealand Free Trade Agreement (signed 27 February 2009) (AANZFTA).

as irrational and discriminatory. Dr Hepburn argued that there seems to be no justification for Australia to offer additional protection to foreign investors, as is the case in AANZFTA, and that it could be seen to be economically unwise for States to grant economic advantages to foreigners against their own interests.

Dr Hepburn remarked that another potential problem is the increased risk of violating international law. If one assumes that domestic officials are more familiar with their own law than international law, which studies suggest is the case, then there may be a risk of officials implementing a measure which complies with domestic law, but is in breach of international obligations. While increasing the education of officials on the relevant international obligations may mitigate this risk, an alignment of the two parallel norms would greatly diminish it. There is also an argument that aligning the two bodies of law would allow for virtuous competition between institutions.

If alignment is seen as preferable, there are two methods by which this alignment could be achieved. First, international law could be aligned with domestic standards. This could be done by arbitrators utilising a "comparative public law" approach, which would involve finding general principles of public law liability and identifying the situations where States are responsible to private citizens. This approach would not necessarily align the bilateral investment treaty ("BIT") provisions with the domestic law of the host State as it involves a "lowest common denominator" approach to identifying common general principles, but it is an approach that is possible. The other way in which international law could be aligned with domestic standards is by the States themselves renegotiating treaties. The USA has effectively done this in recent times by including language in its investment treaties that closely tracks its domestic provisions.

Secondly, domestic law could be aligned with international standards. To do this in the Australian context would require a reinterpretation of the constitutional provision, which could be constrained by the text as the word "acquisition" is present. However, there is an argument that the High Court is prepared to interpret "acquisition more flexibly in certain cases to get to the result it desires, as seen in *Newcrest Mining*.<sup>173</sup> This could lead to proportionality having a greater impact in the interpretation of section 51 (xxxii), which would arguably lead to greater harmonisation between Australian domestic law and international law.

## Questions and answers

Ms Barrett asked Dr Hepburn if the issue lies with the fact that the Australian Constitution may give recognition to certain public interests that sometimes come into conflict with the rights of investors, whereas the investment treaties do not, or do so inadequately. Perhaps that has something to do with the way that Australian constitutional and legislative processes provide for greater public participation than the treaty-making process does. The resulting treaty thus does not always cater adequately for the public interest. Dr Hepburn agreed that although the Australian Constitution is very specific, there are similar issues arising in the US and

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<sup>173</sup> *Newcrest Mining* (n 166).

Canadian context. We have seen a lot of re-orientation of the investment treaties in recent years. In addition, there are longstanding debates as to the role of human rights in investor-State disputes.

Professor von Bogdandy asked Mr McGlone to explain the element of publicness in the ACCC decision-making process and the source of authority for the ACCC. Mr McGlone noted that the public engagement in the ACCC communication process is extensive. The process can be triggered by the public. Members of the public can attend the sessions. Draft findings are published on the ACCC website (and therefore available to the public) at the same time as the Parties are given a chance to comment on them. The real question is one of impact. Empirically, it seems that when the ACCC issues a finding, Parties do comply. This may have something to do with the transparent and public nature of the ACCC communication process.

Professor von Bogdandy also posed a question to Dr Hepburn regarding the current status of development of international investment treaty law. He observed that there is an urgent need at the international law level for investment treaty law to be re-aligned from the perspective of public opinion. He notes that the new treaties being negotiated, namely TTIP<sup>174</sup> and CETA,<sup>175</sup> seem to have cut down on the levels of protection afforded to the public. This seems to be the type of re-alignment that is required for investment treaty law to regain public legitimacy. Dr Hepburn argued that there has been a great deal of re-orientation taking place in the last ten years or so. Generally speaking, many of the changes have the effect of reducing protection for foreign investors. However, none of these changes affect the procedural advantages for foreign investors, as domestic investors do not have access to the treaty arbitration process. The ultimate question is whether we consider there is a place for the institution of arbitration itself.

Sir Stanley Burnton commented that the focus on international arbitration stems from the fact that in many countries, the domestic litigation process cannot be relied upon to provide just results for foreign investors. The process of investment treaty arbitration provides access to justice for foreign investors even though there is no guarantee that the award can be enforced. In this sense, Australia may be an exception because it is a country with the rule of law and adequate judicial resources, so it is less clear that there is a justification for providing foreign investors with a separate mechanism for settling disputes.

Sir Frank noted that the idea of providing just compensation for expropriation is not a creature of modern investment treaties. The protection of the interests of foreigners, traders and merchants goes back to the foundations of international law. The protection of property is not only a matter of investment law but an aspect of human rights law. The only valid question is whether the compensation for unlawful expropriation should be different from the compensation for lawful expropriation.

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174 The Transatlantic Trade and Investment Partnership between the EU and the USA.

175 The Comprehensive Economic and Trade Agreement.



## Panel 6: Future Directions



Tim Eicke speaking on Panel 6 (far left) – L to R: Douglas Wilson, Sir Stanley Burnton, Dr Antonios Tzanakopoulos, Professor Tom Poole

### Chair: Rt Hon Sir Stanley Burnton QC, One Essex Court

Sir Stanley Burnton introduced the speakers for panel six and commended them for undertaking the challenging task of drawing conclusions from the interesting and fruitful discussions that had taken place during the conference. Sir Stanley congratulated Tim Eicke QC for his recent appointment as a judge of the European Court of Human Rights and expressed his sincere hope that as a UK-nominated Judge, Mr Eicke would serve at the Strasbourg Court for a considerable time to come.

### Tim Eicke QC, Essex Court Chambers

*The Future Potential for Human Rights and Public Law Issues to Feature in Investment Treaty Negotiations and Arbitrations*

Tim Eicke QC proposed that the best way to reflect on the earlier sessions of the conference would be to pose some questions in light of the discussions. Mr Eicke echoed Lord Goldsmith's query regarding the locus of where decisions on the public interest should be made and the attribution of public power to private arbitrators. The public's perception of the ceding of sovereignty, raised from the floor in panel one, is an issue that also arises in the area of

investor-State disputes. Mr Eicke was struck by Professor Saunder's observation that there is an increased reach and scope for disputes arising as a result of the privatisation of previously State-controlled activities such as the administration of prisons or the building of nuclear power stations. This also resonated with Sir Frank's comment about the absence of boundaries between public law and international law.

Mr Eicke was curious as to whether the seemingly distinct areas of public and public international law are (or remain) really "discrete islands", adopting the illustrative expression of Sir Frank, or whether there can be a dialogue beyond those disciplines for the public good in the absence of boundaries? In posing this question, he drew from some of the issues identified by Professor von Bogdandy in panel four.

Mr Eicke drew our attention to the obvious comparison between the international protection of human rights and investment treaty arbitrations. Drawing from his wealth of experience as an advocate, he remarked that investment treaty arbitration, like human rights, is an area of law which operates vertically to protect individuals against State conduct by providing them with access to an independent and binding dispute settlement process. There are however some notable differences. First, while human rights protections are universally available to all within the respective State's jurisdiction, the enhanced dispute resolution process under investment treaties is only available to foreign investors pursuant to the treaty. Further, there is usually no requirement for foreign investors to exhaust domestic remedies. This is in contrast with human rights treaties, which almost invariably require exhaustion of domestic remedies. In addition, in the human rights context, a productive dialogue has been developed between the Strasbourg Court and domestic courts over common issues which may affect the public good. If one looks at these features in isolation, it may be understandable that the public appears to find it difficult to accept that foreign investors are entitled to a higher level of access and protection.

Mr Eicke questioned if the differences between the objectives underlying human rights law and investor-State dispute resolution are sufficient to justify the differential treatments and results. While the primary objective of human rights protection is to maintain and further the realisation of fundamental freedoms, the purpose of investment-State dispute resolution pursuant to investment treaties is said to be to create conditions favourable for the fostering of foreign investments. However, they both relate to the protection and enforcement of private rights held by individuals against arbitrary State action. Investment treaties are often drafted in vague and general terms, frequently more so than the language of the European Convention. There is clearly an equal need to communicate to the public why these mechanisms can serve the public good, rather than taking away from it.

It was noted by Mr Eicke that the problem may become more acute as we see an increased need for States to protect their own national security and other public interests. In the context of investor-State dispute resolution, it is for the arbitrators, without the benefit of the views of the domestic courts, to decide the question of necessity under the relevant provisions of the treaty. Is the tribunal entitled to verify or second-guess questions of public interest? By contrast, the Strasbourg Court has the benefit of the domestic English courts, which by now, having spent a considerable period of time working on seeking to achieve the appropriate balance between the need for a fair hearing and the need to protect the interests of national

security, will have considered the competing interests by reference to a much fuller body of evidence than that which could ever be put before arbitral tribunals or, for that matter, any international dispute settlement mechanism.

Mr Eicke was curious as to why there is a reluctance – if not hostility – on the part of States to the introduction of an exhaustion of domestic remedies clause when negotiating new investor-State agreements. In fact, it is noteworthy that even today investment treaties usually contain a “fork in the road” clause which excludes access to domestic remedies in the event of an arbitration. In contrast, the ECHR benefits greatly from the detailed assessments of the domestic courts. The question was why we could not learn from the Strasbourg experience in the investor-State context?

Mr Eicke observed that while both the Strasbourg Court and the proposed investment-State dispute settlement mechanism in the draft Transatlantic Trade and Investment Partnership (“TTIP”) are subject to public criticisms in relation to the perceived loss of sovereignty, one curious feature of these criticisms is that some the most vociferous objectors to investment dispute settlement tend to be among the staunchest supporters of the Strasbourg Court. Mr Eicke wondered if the reverse is also true, and if so, whether the motivation for these criticisms is truly the deficiencies of the dispute settlement system?

Mr Eicke concluded by remarking that the dialogue in the title of the conference could work in multiple ways. It struck him that answers can be found in an increased dialogue between public law, investor-State dispute settlement and human rights law, and those who practice in it. The dialogue between the UK Supreme Court and the Strasbourg Court is now a well-developed one, and it helps both courts to anticipate issues which are of concern to the public. Further dialogues may assist the determination of the same problem by different legal orders. He referred us to a recent application of the *Bosphorus* principle<sup>176</sup> by the European Court of Human Rights in the *Avotiņš v Latvia* decision,<sup>177</sup> another example of a dialogue, in that case between it and the CJEU, seeking to avoid conflicts. By contrast, the European Court of Human Rights’s *Opinion 2/13*<sup>178</sup> was perhaps an example of a missed opportunity of a dialogue in the context of the EU’s efforts, mandated under the Treaty on European Union, to become a party to the ECHR. We see similar issues, described sometimes either as a failure, at least so far, of a dialogue or even as a refusal to engage in a dialogue, in the context of the engagement of both the Strasbourg Court and the Luxemburg Court with the obligations imposed on States in the context of sanctions adopted by the UN Security Council; see most recently the Grand Chamber judgment in *Al-Dulimi* (and the separate opinions attached thereto).<sup>179</sup>

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176 *Bosphorus Hava Yollar Turizm ve Ticaret Anonim irketi v Ireland*, Application No 45036/98, 42 EHRR 1.

177 *Case of Avotiņš v Latvia*, Application No 17502/07, Judgment of 23 May 2016

178 ECJ Opinion 2/13, Opinion of the Court (Full Court) of 18 December 2014, OJ C 260, 7.9.2013.

179 *Al-Dulimi and Montana Management Inc v Switzerland*, Application No 5809/08 Grand Chamber Judgment of 21 June 2016.

## Douglas Wilson, Foreign & Commonwealth Office

### *Issues on the Horizon: International Law Positions as an Act of Foreign Policy?*

Mr Wilson began by providing a supplement to Sir Frank's vivid descriptions of how the Foreign Office used to be, with his personal sense of what the Foreign and Commonwealth Office (FCO) is like today. He reminded us that the FCO today is built on the legacy of eminent legal practitioners like Sir Frank. The FCO recruits legal advisers to Her Majesty's Diplomatic Service and this attracts talented lawyers from private practice and other government departments in equal measure. Mr Wilson noted that when he first joined the FCO in 2001, four years before Lord Bingham's celebrated remarks in 2005,<sup>180</sup> a legal case was still a significant event. Today, there are 96 active cases of all descriptions, and this number does not include the cases that have been dismissed at the pre-action stage or cases which are managed by the FCO as UK agent at the European Court of Human Rights. The lawyers at FCO routinely draw from a much wider range of statutes, such as the Constitutional Reform and Governance Act 2010 (on which Jill Barrett led during her time at the FCO), general statutes which apply across all government departments such as the Freedom of Information Act 2000, the Data Protection Act 1998, the Equalities Act 2010, as well as legislation which is more particular to the conduct of foreign affairs such as the Modern Slavery Act 2015, the Aviation and Maritime Security Act 1990, and for the time being at least, the European Communities Act 1972.

Recalling the keynote speech by Lord Goldsmith, Mr Wilson remarked that he did not realise ten years ago that public law and public international law would be so intricately linked. Years ago, in FCO Legal Advisers there was a default mantra whenever an issue of domestic law came up – "we don't do that here – we're international lawyers", but that approach is not viable now. The FCO's advice on international affairs today covers a broad range of applicable domestic laws. While the FCO's focus remains that of public international law, almost all legal matters require consideration of the fundamentals of domestic public law. All FCO legal advisers need a grounding in public law. In addition, the FCO deals with areas of law such as tort, commercial and criminal law, for which it draws on resources from other government departments and, when necessary, external legal services. Mr Wilson asked us to consider the example of a potential decision to use force. The FCO would not only canvass issues arising from public international law such as *jus ad bellum*, but also the law of judicial review, the European Convention on Human Rights and the Human Rights Act, UK criminal law and international criminal law, as well as parliamentary procedures. There was now a practice of providing a summary of the Government's legal position to Parliament prior to a debate on a proposed use of force.

Mr Wilson agreed with the fundamental premise that there needs to be multiple strands of interactions, communications and cross-fertilisations between public law and public international law. He referred to the three categories of international lawyer defined by Professor Simpson during the panel one discussion, remarking that public international law has made a vast contribution towards a safer and more prosperous world by bringing

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<sup>180</sup> Lord Bingham, 'Foreword' in S Fatima, *Using International Law in Domestic Courts* (Hart Publishing 2005).

about greater co-operation and understanding between States. “Make the law stick” is a fundamental aim of FCO legal advisers, and so a large part of what they do is to act alongside policy officials and ministers to ensure that the legal aspects of the policy are considered from the outset. This means helping them defend their position in public with legal tools, but also providing them with full and frank legal advice on the relevant parameters. The international legal system needs to retain a level of respect and trust in order to induce compliance. For the time being, States remain the primary movers of international law and customary international law is still formed by the practice of States.

Mr Wilson commented that if there is a perception by elected politicians that they cannot change laws as a result of restrictions arising from international legal obligations, tensions will arise. Some view public international law as being insufficiently flexible and agile to accommodate the goals and policies of those that have been democratically elected to effect change. Without endorsing this view or otherwise, it is important to acknowledge that this perception exists.

Sometimes the government has to make political choices as to whether, and if so how, to apply a rule of international law or a particular ruling of an international court or tribunal or other body. Some tribunal rulings are more authoritative than others. In most legal systems, the executive has a certain leeway in making foreign policy. International law is a value and an interest. A decision on how to apply international law may itself be an act of foreign policy.

Mr Wilson posed a question as to the basis on which, as a matter of domestic public law, the government’s position with regard to a particular question of international law should be subject to scrutiny and review by the courts. In other words, is a government decision on a question of international law akin to an act of foreign policy, to which the courts normally show a degree of deference, or is it just like any other legal question? Are there boundaries beyond which public law should not normally go in scrutinising the legal decisions of government in the sphere of foreign affairs? If so, what should be the boundaries? Mr Wilson stressed that he was certainly not arguing that there should be no limits to executive discretion in this field, but that further thought is needed on where the parameters of justiciability should be.

### **Professor Thomas Poole, London School of Economics**

*Future Narratives on State Sovereignty: Where Are We Heading?*

Professor Thomas Poole remarked that he would be providing some brief reflections on the discussions from the perspective of a public lawyer. Professor Poole wanted to focus on three topics, namely the history of common law, the concept of public law and the internationalisation of public law and its institutional dimension. It was noted that the underlying theme is the State centred-ness of our thinking, and the stories we tell ourselves as lawyers and scholars.

Turning first to the history of the common law, Professor Poole recalled Sir Frank’s remark that there were very few cases heard in the English courts involving international law from the 1950s to 1980s. In contrast, we have an incredible number of cases going through the English courts today, as Professor Dapo Akande and Douglas Wilson spoke so knowledgeably about.

Professor Poole stated that we tend to think of law in silos and give ourselves a narrative with origin, growth and development in order to orientate ourselves. It was suggested that we need to go beyond these juristic devices and to think about the relationship between common law on the one hand, and the various bodies of transnational laws on the other. What we have to remember is that common law, as described by Lord Hoffmann in *Bancoult No.2*,<sup>181</sup> has always been amphibious in nature.

Professor Poole raised the point that British institutions, including British courts, have been engaging with transnational matters profoundly throughout British history, and it is largely our State-centred thinking and tendency to parochialism that have obscured this obvious fact. The Privy Council has dealt with a host of matters which we might today categorise under subject headings such as the conflict of laws, transnational law, *jus gentium*, and some of these cases had substantial feedback into domestic public law. One leading case on the doctrine of parliamentary sovereignty and constituent power is *Madzimbamuto v Lardner-Burke*,<sup>182</sup> a Privy Council decision that arose out of the unilateral declaration of independence in Southern Rhodesia. It was proffered that common law may be much more fluid, contested and permeable than our State-centred perspective, and it may be much more amenable to relevant dialogues with international and transnational bodies and institutions than we think.

Professor Poole characterised public law as law which relates to the juridical construction of a particular form of civil association, one which may be described as moral or political association. It concerns the relationship amongst citizens as opposed to the relationship between individuals. Public law assists in the identification of matters which are *res publica*, matters which are official and pertaining to the Commonwealth. Professor Poole argued that without the concept of public law, there is no way for us to understand authority, to conceptualise how we might be obliged to do something or to distinguish between a valid command and the orders of a gunman or bandit. In a sense, the concept of publicness is a legal fiction, something Hobbes would describe as a structure which gives rise to an artificial person. This conception is consistent with Professor Feldman's characterisation of public law as an agent of false consciousness and as a conjurer which transforms the opposition between the ruler and the ruled to a story of co-operation and unity. All public law is self-imposed by rulers on themselves, as Feldman pointed out. It was acknowledged that this conceptual structure can and has been used to shield rulers from oversights or liability. However, it is ultimately the idea of public law and authority that explains the difference between a police officer validly arresting a person for trying to steal a car, and that same police officer conducting an arrest because she or he does not like the look of a person's face.

Professor Poole went on to state that to deny the autonomous sphere of public law, as Dr Jason Varuhas came close to doing in his presentation, would do enormous violence to the deep-seated conceptual structure where social actions take place and render notions of legitimate and illegitimate exercise of authority, and the idea of freedom itself meaningless. We tend to associate, at least since the early modern State theorists such as Bodin, Grotius and Hobbes,

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181 *R (On The Application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61

182 *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645.



the delegation of authority through chains of officials with the particular political form of the State. In one sense, there is no reason for the chain of authority to operate within the State structure, as, after all, as Professor Feldman noted, there is no conceptual reason why the chain of authority can only operate within the State structure.

Moving on the internationalisation of public law, it is a mistake to ignore or overlook the institutional dimension of this process or phenomenon. Those scholars who have observed these international trends seem to agree that they tend to empower the executive and judiciary on the one hand, and to diminish or downgrade the role of parliament on the other. As the American jurist Robert Cover describes in *Nomos and Narrative*,<sup>183</sup> there are patterns of developments within the law. In any legal system or body of law, there is a structure of norms, namely rules, principles, practices and presumptions, and also stories we tell ourselves about the nature and purpose of those norms. Public law cannot be made sense of if we look at the doctrine on its own. We must consider how the norms and narratives fit.

Professor Poole referred us to the idea of cosmopolitanism (which is to an extent reflected in Professor von Bogdandy's paper and Professor Jowell's intervention) and noted that if we identify norms and seek to apply them where public power is exercised, then as much as it concerns itself with narrative at all, it is correspondingly a cosmopolitan one. Public lawyers understand that public law is not just a matter of principle, as Professor Saunders mentioned, but also rules which are specifically rooted to a specific culture, institution and set of morals. This can be exacerbating to a certain kind of cosmopolitan, but parliaments have traditionally exercised mediating functions. In the language of Professor Feldman, Parliament is both the ruler and the ruled. Courts cannot do this very well, not least because they are rightly removed from the ruler and the ruled.

Professor Poole concluded that what we need is, first, more plausible narrative and legal accounts to navigate between domestic and international norms. Second, we need more plausible tellers of those stories. It cannot be just jurists, diplomats and international secretariats, but the political class more generally. Otherwise, valuable international projects would not be understood as a legitimate exercise of collective political authority, but rather as a species of alienation or oppression.

### **Dr Antonios Tzanakopoulos, University of Oxford**

#### *What Can We Take Away From These Dialogues?*

Dr Antonios Tzanakopoulos referred to Lord Goldsmith's keynote address which set the stage for the ensuing panel discussions beautifully. Dr Tzanakopoulos then suggested that the structure of upward and downward transmissions left something to be desired in terms of complexity. Dr Tzanakopoulos wanted us to think more comprehensively about the relationship between domestic and international law and the interaction between international and domestic law as it emerges from the relationship.

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183 Robert Cover 'The Supreme Court, 1982 Term - Foreword: Nomos and Narrative' (1983) 2705 Faculty Scholarship Series <[http://digitalcommons.law.yale.edu/fss\\_papers/2705](http://digitalcommons.law.yale.edu/fss_papers/2705)>.

Dr Tzanakopoulos stated that in reality, it is difficult to distinguish between upward and downward transmissions. International law imposes on States international obligations to act in a particular way towards each other. Nevertheless, most international law instruments which are being made today are made up of inward-looking norms and obligations, that is, States agree at the international level to apply particular rules in their respective domestic legal order. If we look at human rights law, international economic law, international investment law, international criminal law, or even aspects of the law of the sea where States are required to set up search and rescue areas and provide navigation aids in their territorial waters, we find that the rules of international law often relate to the obligations of States to act domestically, ie standard-setting. The water is murkier if we take into account the infinite numbers of ways through which international obligations may be incorporated into the domestic legal order. There is no fully monist or dualist State. The UK is dualist in treaties but monist in customary international law. Neither system operates in its pure form: there are moderating mechanisms such as the doctrine of consistent interpretation and non-justiciability which operate to blunt the sharp edges of both monist and dualist approaches in their pure form.

Dr Tzanakopoulos introduced the concept of consubstantial norms, a term derived from the con-substantiality of the Holy Trinity in eastern orthodox theology. Consubstantial norms are rules stemming from different legal orders (eg the international and the domestic one), but in effect have the same underlying substance. He proposed that we reconsider cases such as *Kadi*<sup>184</sup> in this light, where the European Court of Justice was able to circumvent the need to implement international law by appealing instead to primary EU law for the review of a domestic act against the relevant EU law. And yet the rule that the Court applied was that protecting the right of access to a court and the right to an effective remedy: these rights are protected in by and large the same way both in international and domestic law. They are consubstantial norms. In fact, domestic and international human rights law influence each other constantly, creating a feedback loop. This both confirms the existence of consubstantial norms and underlines the difficulty in discerning upward and downward transmissions: both happen constantly.

Continuing on in this context, Dr Tzanakopoulos made specific reference to the constant feedback between domestic and international law. By way of example, we can trace the history of human rights development from the first Bills of Rights of the eighteenth century to the United Nations era when these were passed into international conventions and transitioned into customary international law. Subsequently, these norms influenced the formation of domestic constitutions in newly independent states such as Namibia and South Africa, as well as many European States emerging from dictatorships. These domestic constitutions had in turn been re-internationalised through the creation of new regional treaties and the interpretation of consubstantial norms at the international level, until certain rights and values reach the stage of *jus cogens*. Therefore, we observe this constant process of feedback effects between different international and domestic legal orders. Concepts such as "good faith" and "proportionality" have triggered a similar series of feedback effects between international and domestic legal orders.

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<sup>184</sup> Case C-402/05 P and C-415/05, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

Dr Tzanakopoulos observed that our natural bias means that we would always tend to think of certain concepts as originating from our areas of specialisation, be it public law or public international law, when in reality it may be from either. Dr Tzanakopoulos encouraged us to acknowledge this fluidity and permeability (to use the words of Professor Feldman) and to embrace the contradictions. It is important to continue a dialogue as to how concepts emerge and develop, and to learn from each other.

### **Concluding Remarks by the Chair**

Sir Stanley Burnton concluded the panel, and the conference, by remarking how far the law has developed with regard to public international law and public law in the last century or so. It was not long ago that the only actors in international law were States; individuals and minority groups had no standing. At the beginning of the last century, according to Dicey, public law was a tool for tyranny and therefore not law at all. If we look at English law from the beginning of this century, all cases with a hint of international law were non-justiciable as judges could not possibly interpret treaties or examine foreign policies. The current debates about the process surrounding if, and how, notice under Article 50 of the Lisbon Treaty can be given illustrates the importance of the interaction between public and public international law.

### **Questions and Answers**

One question from the floor was why there are insufficient efforts by States to regulate globalised non-State sources of power (such as transnational corporations) and globalised sectors (such as the banking and financial services sector). Dr Tzanakopoulos replied that although States possess the power to enter into international agreements with regard to the regulation of transnational private power, they lack the political will to do so.

Separately, Dr Varuhas commented on Professor Poole's view on the concept of public law and the perceived danger to freedom in the absence of the concept of publicness. Dr Varuhas pointed out that even though the idea of public law was lost in English law for some 250 years, freedom continued to reign. Professor Poole responded by drawing a distinction between the public law jurisdiction of the courts and the idea of public law generally. He urged Dr Varuhas to look at the whole picture of public law in its totality, including its institutions, processes and underlying rationale. Professor Poole emphasised that public law has always existed since the birth of the modern State.

Finally, one member of the audience asked the panel why there is such a large volume of public international law matters being litigated in the UK, when compared to other European nations. Sir Stanley replied with poise that "we believe in the rule of law."

This report was written by:

**Yvonne Yue Wang, LLM Candidate, Melbourne Law School; and  
Zoe Hough, JD Candidate, Melbourne Law School;  
Research Interns on the Watts Public International Law Programme, BIICL,**



Zoe Hough



Yvonne Wang

and edited by Jill Barrett, Arthur Watts Senior Research Fellow in Public International Law, BIICL.

August 2016

## Annex 1

### Speaker Biographies

#### Professor Dapo Akande

Dapo Akande is Professor of Public International Law at the University of Oxford, where he is also Yamani Fellow at St Peter's College and Co-Director of the Oxford Institute for Ethics, Law and Armed Conflict & the Oxford Martin Programme on Human Rights for Future Generations. Dapo has held visiting professorships at Yale Law School (where he was also Robinna Foundation International Fellow); the University of Miami School of Law, and Católica Global Law School, Lisbon. He is a member of the Editorial Boards of the *American Journal of International Law* and the *European Journal of International Law*; of the Advisory Council of the British Institute of International and Comparative Law (BIICL); and the International Advisory Panel for the American Law Institute's project on the Restatement Fourth, The Foreign Relations Law of the United States. He is founding editor of the scholarly blog: EJIL:Talk!

Dapo has advised States, international organisations and non-governmental organisations on matters of international law. He has advised and assisted counsel or provided expert opinions in cases before several international tribunals and national courts. He has worked with the United Nations organs, the African Union Commission and the Commonwealth Secretariat on issues relating to international humanitarian law, human rights law, international criminal law and terrorism.

#### Jill Barrett

Jill Barrett is the Arthur Watts Senior Research Fellow in Public International Law at BIICL, where she leads the Watts programme of international law research and events. She specialises in the law of treaties, the polar regions, and law of the sea, and leads the BIICL research project on the Obligations of States in Undelimited Maritime Areas. Her most recent publications include Barrett and Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty*, (BIICL 2016) and "Securing the Polar Regions through international law" in Footer et al (eds) *Security and International Law* (Hart 2016). She was Visiting Professor at Kobe University, Japan, in 2013, where she taught international law to postgraduate students, and is now Visiting Reader in the School of Law at Queen Mary University of London.

Jill was previously Legal Counsellor at the Foreign & Commonwealth Office. During her 20-year FCO career she advised on legal aspects of UK foreign policy, often at the intersection of international law and public law. She led the Government's work on creating a new statutory regime for parliamentary scrutiny of treaties, resulting in the provisions on Ratification of Treaties in the Constitutional Reform and Governance Act 2010: see her article on 'The United Kingdom and Parliamentary Scrutiny of Treaties: Recent Reforms' (ICLQ 2011).

### **Sir Frank Berman KCMG QC**

Sir Frank Berman KCMG QC is a barrister at Essex Court Chambers specialising in international arbitration and advisory work in international law. He is also a Visiting Professor of International Law at Oxford University and the University of Cape Town and has been a member of the Permanent Court of Arbitration since 2010. He is the Chairman of the Board of Trustees at BIICL.

Sir Frank has enjoyed a long and varied career in international law and diplomacy. He joined the HM Diplomatic Service in 1965 and was the Legal Adviser to the Foreign and Commonwealth Office from 1991 - 1999. During his FCO career he served in Berlin, Bonn and at the UN in New York, conducted cases before the ICJ and arbitral tribunals and took part in numerous international negotiations, His research interests include the law of treaties, the use of force, settlement of disputes, international humanitarian law and the law of international organisations.

### **Professor Dr Armin von Bogdandy**

Armin von Bogdandy is the director of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg and Professor for Public Law at the University in Frankfurt/Main. He is one of Germany's most renowned researchers in the field of constitutional, European and public international law. His research concerns the structural changes affecting public law, be they theoretical, doctrinal, or practical.

He has been President of the OECD Nuclear Energy Tribunal as well as a member of the German Science Council (*Wissenschaftsrat*) and the Scientific Committee of the European Union Agency for Fundamental Rights. He has also held visiting positions at the New York University School of Law, the European University Institute, the Xiamen Academy of International Law, and the Universidad Nacional Autónoma de México, amongst others.

### **The Rt Hon Sir Stanley Burnton QC**

Sir Stanley Burnton is currently an arbitrator at One Essex Court. He is also Chair of the Board of Trustees of the British and Irish Legal Information Institute and a trustee of BIICL. He is an Honorary Fellow of St Edmund Hall, Oxford and a Visiting Professor at Queen Mary University of London.

He returned to One Essex Court after retiring as a Judge of the Court of Appeal in October 2012, where he was appointed in 2008. He sat in both the civil and criminal divisions of the Court of Appeal. Previously, he sat as a deputy High Court judge in the Chancery Division from 1994 until he was appointed to the High Court Bench (Queen's Bench Division) in July 2000. He was nominated to the Administrative Court shortly after his appointment. As a judge of the Administrative Court he made a number of the early decisions on the European Convention on Human Rights as incorporated in English Law by the Human Rights Act 1998. He was involved in a number of public international law cases as counsel (such as the International Tin Council litigation) and as a judge.



## **Professor Michael Crommelin**

The Zelman Cowen Professor of Law at Melbourne Law School, Michael Crommelin's areas of expertise include the areas of energy and resources law, comparative law and constitutional law. His recent publications include 'Powers of the Head of State' and 'Reforming Australian Federal Democracy' (University of Melbourne Legal Studies Research Papers). He served as Dean of Melbourne Law School from 1989 to 2007 and has held visiting appointments at a number of universities, including the University of Oslo, the University of British Columbia, the University of Calgary and Georgetown University. In 2009, Michael was made an officer of the Order of Australia for service to the law and to legal education, particularly as a tertiary educator and through the development of mining and petroleum law in Australia.

## **Tim Eicke QC**

Tim Eicke is a barrister at Essex Court chambers and is a leading advocate in the areas of Public and Constitutional Law, European Union Law, International Human Rights Law and Public International Law. Tim has particular expertise in cases involving the inter-relationship and interaction between two or more of these (at times competing) areas of law.

He is the Editor of *European Human Rights Reports* and regularly provides training and gives presentations in relation to his areas of expertise. He is a highly experienced and internationally respected advocate and his extensive litigation practice involves frequent appearances in the highest domestic as well as international courts and tribunals, acting for applicants, respondents and interveners, including the High Court, the Court of Appeal, UK Supreme Court, the Court of Justice of the European Union and the European Court of Human Rights as well as investor-state arbitration. Until his appointment as QC, Tim was a member of the Attorney General's A-Panel of counsel and he continues to be instructed by the UK Government in complex and difficult cases.

In June 2016 the Council of Europe Parliamentary Assembly (PACE) elected Tim Eicke as the next judge in respect of the UK at the European Court of Human Rights (ECtHR). He took up this new office on 7 September 2016.

## **Professor David Feldman QC**

Professor David Feldman is the Rouse Ball Professor of English Law at the University of Cambridge, a Fellow of Downing College and an Academic Associate of 39 Essex Chambers, London. His research covers a wide range of public law fields, including the idea and practice of constitutionalism, ways in which human rights law affects administrative justice and the interplay of principles of national, international and EU law in protecting human rights in administrative processes to combat terrorism, amongst many others. He has authored and edited several books, most recently *The Cambridge Companion to Public Law* (CUP 2015) (with Mark Elliott).

He previously taught at the Universities of Bristol and Birmingham, where he was Dean of Law from 1997–2000. He has held visiting positions at the Australian National University,

the University of Melbourne and the University of Nottingham. He was the first Legal Adviser to the UK Parliament's Joint Select Committee on Human Rights from 2000–2004 and sat as an International Judge of the Constitutional Court of Bosnia and Herzegovina from 2002–2010, taking on the role of a Vice-President from 2006–2009.

### **Dr Veronica Fikfak**

Dr Veronika Fikfak is a Fellow and Lecturer at the University of Cambridge and an ESRC Future Research Leader. She holds a Magister Juris and a DPhil from the University of Oxford. Her research interests are in the fields of public law, human rights and international law. She is particularly interested in the interface between domestic and international law and is currently writing a monograph on the role of national judges in relation to international law for Cambridge University Press. Her first book (co-authored) on the engagement of the UK Parliament on questions of war Parliament's Secret War is forthcoming from Hart Bloomsbury at the end of the year.

Dr Fikfak previously worked at the ICJ, the Law Commission of England and Wales, and at the European Court of Human Rights. She is a Member of the Lauterpacht Centre for International Law and Cambridge's Centre for Public Law. Her research is currently funded by the ESRC and the British Academy.

### **Lord Peter Goldsmith QC PC**

Lord Peter Goldsmith QC PC is the London Co-Managing Partner and Chair of European and Asian Litigation at Debevoise & Plimpton. He acts for a variety of clients, alongside his role as chair of the firm's European and Asian litigation practices, in arbitration and litigation in the UK and other countries. He is a QC and appears regularly in court as well as in arbitration. He conducts arbitrations under all the major institutions including LCIA, ICC and SIAC and in ad hoc arbitrations and has also been appointed or confirmed as an arbitrator by these institutions. Significant areas of work include public law and public international law, including judicial review and human rights law, amongst many others.

Lord Goldsmith served as Attorney General from 2001–2007, acting as chief legal adviser to the government on matters of domestic, European and international law. He represented the government in numerous cases in both UK and international courts. Lord Goldsmith practised from Fountain Court Chambers from 1972–2001, specialising principally in commercial, corporate and international litigation and appellate work. He became Queen's Counsel in 1987 and has judicial experience as a Crown Court Recorder and a Deputy High Court Judge.

Lord Goldsmith was made a Life Peer in 1999 and Privy Counsellor in 2001. In 1996, he founded the Bar of England and Wales' Pro Bono Unit, of which he is now President. He is a Bencher of Gray's Inn. In 2013 Lord Goldsmith was a visiting professor of European Legal Studies at Columbia University, New York.

### **Dr Jarrod Hepburn**

Dr Jarrod Hepburn is a McKenzie Postdoctoral Research Fellow at Melbourne Law School. His research interests lie largely in international economic law, international human rights law and public law. His monograph, examining the role of domestic law in investment treaty arbitration, will be published by Oxford University Press in 2016.

Dr Hepburn has previously been a Lecturer at the University of Exeter, specialising in investment treaty arbitration, contract law and company law. He has also taught in a range of areas of law at the University of Melbourne and St Catherine's College at the University of Oxford and has been a visiting researcher at the Max Planck Institute for Comparative and International Private Law in Hamburg.

### **Sir Jeffrey Jowell KCMG QC**

Professor Sir Jeffrey Jowell is a barrister at Blackstone Chambers and Emeritus Professor of Public Law at University College London, where he was twice Dean of the Law Faculty and a Vice Provost. He was the Founder Director of the Bingham Centre for the Rule of Law since its launch in December 2010 until October 2015. The scope of Jeffrey's work includes judicial review, human rights and planning. He is a leading authority on public, constitutional and administrative law.

He has acted as constitutional advisor to a number of national governments in the Commonwealth, Asia and in the Middle East, including assisting with the constitutions and public law of South Africa, Jersey, Gibraltar, the Cayman Islands and the Maldives. From 2000-2011 Jeffrey served as the UK's member on the Council of Europe's Commission for Democracy through Law (The Venice Commission) where he advised on rule of law issues in a number of European States.

### **Ben Juratowitch**

Ben Juratowitch is the head of Freshfields Bruckhaus Deringer's public international law practice globally and a partner in the international arbitration group. He is based in Paris. He represents clients before the ICJ and international arbitral tribunals, including in cases concerning sovereignty over territory, boundary delimitation, the law of the sea, the application of investment treaties, and a broad range of commercial disputes. He teaches an annual course of seminars on international dispute settlement at the University of Paris Descartes and has been a visiting fellow in the Faculty of Law at the London School of Economics.

### **Aimee-Jane Lee**

Aimee-Jane Lee is an international counsel in Debevoise & Plimpton's International Dispute Resolution Group. Her practice focuses on international commercial arbitration and litigation, and public international law. She advises private clients and states across multiple jurisdictions

and a number of industries, including mining, construction, hospitality, advertising and, especially, energy. Her areas of expertise include the international protection of investments, maritime boundary issues, treaty drafting and interpretation, the interaction between public international law and domestic law, international sanctions and human rights.

Following a six-month secondment to the legal department of Liberty, the human rights organisation, she has continued to work, pro bono, on human rights issues, notably in relation to proceedings before the European Court of Human Rights and submissions to the United Nations.

### **Professor Robert McCorquodale**

Professor Robert McCorquodale has been the Director of BIICL since January 2008. He is Co-General Editor of BIICL's major publication: the *International and Comparative Law Quarterly*. He is also Professor of International Law and Human Rights at the University of Nottingham and a barrister at Brick Court Chambers, London, where he practices in public international law.

Professor McCorquodale's research is also primarily in public international law. This includes matters of international human rights law, the role of non-state actors, the right of self-determination, and on business and human rights issues. He has published widely on these areas, including his *Cases and Materials on International Law* (5th ed, OUP 2011) with Martin Dixon and Sarah Williams), and has assisted governments, corporations, international organisations, non-governmental organisations and peoples concerning international law and human rights issues. Previously he was a Fellow and Lecturer in Law at St. John's College, University of Cambridge and at the Australian National University in Canberra. Before embarking on an academic career, he worked as a solicitor in commercial litigation with King & Wood Mallesons in Sydney and Herbert Smith Freehills in London.

### **Alistair McGlone**

Alistair McGlone is an international environmental law consultant and a director of Alistair McGlone and Associates Limited, a consultancy that focuses on environmental law, training and journalism. Alistair is also a member of the Aarhus Convention Compliance Committee, which administers the Convention's unique Compliance Mechanism. Previously, Alistair was Head of International Environmental Law at the Department of Environment, Food and Rural Affairs. In this role, he was one of the lead EU negotiators on the Rio Declaration. He also led the EU during the negotiations that led to the adoption of the Kyoto Protocol procedures and mechanisms relating to compliance and chaired the group that prepared the text founding the Basel compliance committee.

### **Professor Dawn Oliver**

Dawn Oliver is Emeritus Professor of Constitutional Law at University College London. Her research interests are in the fields of UK and comparative public law, and in particular in UK

constitutional reform and law and politics. She was Chair of the UK Constitutional Law Group 2005–2010, and a member of the Executive Committee of the International Association of Constitutional Law 2007-2010. She has been a member of the Study of Parliament Group since 1991, and was its President from 2010–2013. She was elected a Fellow of the British Academy in 2005. In 2011 she was Treasurer of the Honourable Society of the Middle Temple, the first woman and first career academic to have held that post. She was made Queen’s Counsel, *honoris causa*, in 2013.

### **Professor Thomas Poole**

Thomas Poole is Professor of Law at the London School of Economics. His research interests are in public law, constitutional theory and comparative public law. His recent publications include his monograph *Reason of State: Law, Prerogative and Empire* (CUP 2015) and his co-edited book *Law, liberty and state: Oakeshott, Hayek and Schmitt on the Rule of Law* (CUP 2015). He teaches public law, administrative law, civil liberties and human rights, and law and political thought.

Thomas Poole studied at University College London, Oxford University and Manchester University. Before coming to the LSE in 2006, he taught at Nottingham University. He has held visiting positions at the University of New South Wales (2003–2004 and 2005–2006), the European University Institute (2007), Melbourne University (2008), the University of Toronto (2008), Princeton University (2008) and Université Paris II Panthéon-Assas (2013–2014).

### **Sir Bernard Rix**

Educated at New College Oxford (of which he is an Honorary Fellow) and Harvard Law School, Sir Bernard was called to the Bar by the Inner Temple in 1970 (Bencher 1990, Treasurer 2005) and became Queen’s Counsel in 1981. As a barrister, he specialised in international commercial law and arbitral disputes. From 1993–2000, he was a judge of the High Court of Justice (Queen’s Bench Division) and from 2000–2013, he served as Lord Justice of Appeal in the Court of Appeal. In the Court of Appeal, he gave a wide range of judgments in commercial law, banking, insurance, shipping, energy disputes and private and public international law. They include *R (Al-Skeini) v Secretary of State for Defence* [2007] QB and *Yukos v. Rosneft (No 2)* [2013] 1 All ER (Comm) 327. He now practises as an arbitrator and accredited mediator at 20 Essex Street. He sits on the Court of Appeal of the Cayman Islands, the Singapore International Commercial Court and is a Professor of International Commercial Law at Queen Mary, University of London. He is a member of the Advisory Council and former trustee of BIICL, member and former chairman of the Advisory Council of the Centre for Commercial Law Studies at QMUL, has long been associated with the LPO, and is chairman of Coexist House.

### **Professor Dan Sarooshi**

Dan Sarooshi is Professor of Public International Law at the University of Oxford, where he is also Senior Research Fellow of Queen’s College and co-General Editor of the Oxford

Monographs in International Law Series. His books have been awarded the 2001 American Society of International Law ("ASIL") Certificate of Merit, the 2006 ASIL Certificate of Merit, the 2006 Myres McDougal Prize by the American Society for the Policy Sciences, and the 1999 Guggenheim Prize. He is co-editing with H E Judge Christopher Greenwood the new 10<sup>th</sup> edition of *Oppenheim's International Law* (to be published by OUP).

Professor Sarooshi is also a barrister at Essex Court Chambers. He has been instructed by 9 governments (including the UK and USA), 12 international organisations, and a number of corporations in important cases before the UK Supreme Court, English Court of Appeal, English High Court, International Court of Justice, European Court of Human Rights, Hong Kong Court of Final Appeal, Supreme Court of the Bahamas, World Trade Organization and the UN Special Tribunal for Lebanon; and in international arbitration proceedings conducted pursuant to ICSID (including by operation of the ECT), ICSID AF, ICC, UNCITRAL, IUSCT and LCIA Rules. He has been appointed as a member of the UK Attorney General's Public International Law A-Panel of Counsel to represent the UK in "*the most complex public international law cases in various courts*".

### **Professor Cheryl Saunders**

Cheryl Saunders is Laureate Professor Emeritus at the University of Melbourne and the founding director of its Centre for Comparative Constitutional Studies. She is a President Emeritus of the International Association of Constitutional Law and an editor of the *Public Law Review*. She has specialist interests in constitutional law and comparative public law, including federalism and intergovernmental relations and constitutional design and change, in all of which she has published extensively.

Cheryl has held visiting positions at universities around the world including Oxford, Cambridge, Paris II, Georgetown, Indiana (Bloomington), Hong Kong, Copenhagen, Fribourg, Cape Town and Auckland. She is also a former President of the Administrative Review Council of Australia. She is an officer of the Order of Australia and a Chevalier dans l'Ordre National de la Legion d'Honneur of France.

### **Professor Gerry Simpson**

Gerry Simpson was appointed to a Chair in Public International Law at LSE in January 2016. His current research projects include an ARC-funded project on Cold War International Law (with Matt Craven, SOAS and Sundhya Pahuja, Melbourne) and a counter-history of International Criminal Justice. He is also currently writing about the literary life of international law. He is an editor of *The London Review of International Law*.

He previously taught at the University of Melbourne, where he was the Director of the Asia-Pacific Centre for Military Law from 2010–2014, the Australian National University and the LSE. He is the author of *Great Powers and Outlaw States* (Cambridge 2004) and *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Polity 2007), and co-editor (with Kevin Jon Heller) of *Hidden Histories* (Oxford 2014) and (with Raimond Gaita) of *Whos Afraid of International Law?* (Monash 2016 (forthcoming)).



### **Dr Antonios Tzanakopoulos**

Antonios is Associate Professor of Public International Law at the Faculty of Law and Fellow in Law at St Anne's College, Oxford. Antonios is a general international lawyer and has published in a number of areas reflecting his varied research interests, including the Security Council, international dispute settlement, the law of treaties, the law of the sea, international investment law, and others. He regularly provides advice to States, international organisations and private entities on matters of public international law. He has acted as counsel, advisor, or assistant, and has provided expert opinions, in a number of cases before international and domestic courts and tribunals, including the International Court of Justice, EU courts, the European Court of Human Rights, ad hoc and ICSID arbitral tribunals, and the High Court of England and Wales. He has also provided training on international law to domestic judges, as well as diplomats, military officers, and other government officials.

### **Dr Jason Varuhas**

Dr Jason Varuhas is Associate Professor at the Melbourne Law School and a member of the Centre for Comparative Constitutional Studies. He is also Associate Fellow of the Centre for Public Law, University of Cambridge, and Bye-Fellow of Christ's College, Cambridge. Jason's research and teaching interests cross the public law-private law divide; his specialisms lie in administrative law, the law of torts, and the law of remedies. His current research work includes major projects on "mapping" public law and the "socialisation" of private law. He has several books in press including his sole-authored work, *Damages and Human Rights* (Hart Publishing 2016) He is a founder and co-convenor of the biennial series of Public Law Conferences. He has previously held academic positions at the University of New South Wales and the University of Cambridge, as well as a visiting position at Yale University.

### **Douglas Wilson**

Douglas Wilson is the Legal Director of the Foreign and Commonwealth Office, a role he has held since August 2014. He was previously Head of International and European Law at the Attorney General's Office. Before that, Douglas spent nearly four years at the UK Mission to the UN in New York, as First Secretary (Legal) and then as the Deputy Head of the Political Section. Douglas was also posted to the British Embassy in Baghdad as Legal Adviser and Head of the Human Rights and Justice Section, and has served in various home postings as an Assistant Legal Adviser in the Foreign and Commonwealth Office. He qualified as a barrister in London, having studied law at the Universities of Glasgow and Cambridge, and Copenhagen Business School.

## Annex 2

### Conference Programme

#### THURSDAY 30 JUNE

**10.30 – 11.00**      **Registration and tea/coffee**

**11.00 – 11.30**      **Keynote Address**

**Lord Peter Goldsmith QC PC**, Debevoise & Plimpton and former UK Attorney General  
Chair: Sir Bernard Rix QC (formerly Lord Justice Rix), 20 Essex St Chambers.

**11.30 – 13.00**      **Panel 1**

**The relationship between Public International law and Public Law – why is it important in practice and in theory?**

This panel will examine the importance of the relationship from the perspective of public international law and from the perspective of public law, to set the scene for the whole conference. Speakers will offer an overview of ways in which their area of law has changed under conditions of globalisation to intrude into the other: for example, to extend to non-State actors, in the case of public international law, and to involve increasing levels of extraterritorial action, in the case of public law. They will explore whether these developments are linear or involve a degree of ebb and flow, and the issues they raise for scholars and practitioners in both fields.

#### **Speakers:**

Sir Frank Berman, KCMG QC, BIICL: "International and Public Law: Perspectives from Government and Private Legal Practice"

Professor Cheryl Saunders, Melbourne Law School: "Public law and Public International Law: a Public Law Perspective on Interdependence"

Professor Gerry Simpson, London School of Economics and Melbourne Law School: "International Law as Public Law"

Chair: Sir Bernard Rix QC (formerly Lord Justice Rix), 20 Essex St Chambers

**13.00 – 14.00**      **Lunch (provided for all participants)**

**14.00 – 15.30**      **Panel 2**

**Impacts of public international law on public law**

This panel will examine some of the principal ways in which public international law and practice intrude into domestic public law, placing pressures on the way in which international affairs are conducted. It will range from the impact of international law in domestic public law with particular, but not exclusive, reference to international human rights law, and the evolving scope of non-justiciability doctrines, as an aspect of the response of public law systems to internationalisation and globalisation.

**Speakers:**

Dr Veronica Fikfak, Homerton College, Cambridge University: "English courts' 'internalisation' of the European Convention on Human Rights? – Between theory and practice"

Professor Michael Crommelin, Melbourne Law School: "The Pacific 'Solution' to the Refugee Crisis: A Case Study"

Professor Dapo Akande, Oxford University: "Non-justiciability and the Foreign Act of State Doctrine"

Chair: Professor Robert McCorquodale, BIICL

**15.30 – 16.00      Tea break**

**16.00 – 17.30      Panel 3**

**Public law influences on public international law**

This panel will examine the rationale for the extension of domestic public law principles into the international sphere and the scope for and limits of this development. The principles in question include (but are not limited to) democratic legitimacy; legal and political accountability; subsidiarity; the separation of powers and the rule of law. It will discuss their application to "global administrative law", and the internationalisation of the right to good administration.

**Speakers:**

Sir Jeffrey Jowell QC, Blackstone Chambers: "The Internationalisation of the Right to Administrative Justice"

Aimee-Jane Lee, Debevoise & Plimpton: "The Role of Public Law Notions of Proportionality in Investment Arbitration and in Contemporary Treaty Practice"

Ben Juratowitch, Freshfields Bruckhaus Deringer: "Individual Rights in Disputes Between States"

Chair: Professor Dan Sarooshi, Oxford University and Essex Court Chambers

**17.30 – 18.30      Reception for all conference participants**

**19.00                  Speakers' Dinner (at nearby restaurant)**

After dinner speech by Lord Mance, Justice of the Supreme Court

## FRIDAY 1 JULY

**9.00 – 9.30**                    **Registrations (for new arrivals) and tea/coffee**

**9.30 – 11.00**                **Panel 4**

### Concepts of “public” in “public” international and “public” law

This panel will explore the concept of the “public” aspect of each of the two branches of law: their commonality (if any); differences among domestic public law traditions; the interface between the public and the private in each; the impacts on both areas of law of privatisation; and other shifts in train, such as the increasing ability of corporations and individuals to communicate and transact directly through electronic means, without the mediation of States. The case of the horizontal application of human rights will also be considered to draw additional insights from both.

#### **Speakers:**

Professor Dr Armin von Bogdandy, Max Planck Institute for Comparative Public Law and International Law, Heidelberg; and University of Frankfurt: “From Public International to International Public Law. Translating World Public Opinion into International Public Authority”

Professor David Feldman QC, Cambridge University: “The Varying Meaning of ‘public’ in Public Law and Public International Law”

Dr Jason Varuhas, Melbourne Law School: “Against the Public-Private Law Divide: Pluralism and Public Law”

Chair: Jill Barrett, BIICL

**11.00 – 11.30**                **Coffee break**

**11.30 – 13.00**                **Panel 5**

### Complications of pluralism

This panel will examine the various ways in which domestic public law and public international law come into conflict and are in tension with each other. It will look at cases where the influence or impact is a two- or multi-way street. Examples include the use of international investor-State dispute settlement procedures where there are also implications arising out of the same disputes in domestic public law; the (typical) dependence of international law on State implementation; and the (atypical) dependence of international law on implementation by the EU. The way international law penetrates the domestic public law of the EU, and via EU law into the public law of Member States, will be discussed in the context of the UK’s preparations for Brexit.

**Speakers:**

Alistair McGlone, international environmental law consultant, former Defra lawyer: "Case Study on Compliance by EU Institutions with International Obligations Arising Under the Aarhus Convention"

Jansen Calamita, BIICL: "The Disconnect Between the Approach to Remedies in Investment Treaty Law and the Approach to Remedies Under Systems of Public Law"

Dr Jarrod Hepburn, Melbourne Law School: "Parallel Expropriation Norms in International Law and Australian Law"

Chair: Professor Dawn Oliver, University College London

**13.00 – 14.00            Lunch (provided for all participants)**

**14.00 – 15.30            Panel 6**

**Future directions**

This final session will draw conclusions from the earlier proceedings, highlight key insights and examine possible future directions in terms of: (a) the likely trajectories of the interface between domestic and international law; (b) ways of ameliorating difficulties; and (c) suggestions for a more effective working relationship between domestic public lawyers and public international lawyers. The Chair will facilitate an interactive conversation between the panel members and all participants.

**Speakers:**

Tim Eicke QC, Essex Court Chambers: "The Future Potential for Human Rights and Public Law Issues to Feature in Investment Treaty Negotiations and Arbitrations"

Douglas Wilson, Foreign & Commonwealth Office: "Issues on the Horizon: International Law Positions as an Act of Foreign Policy?"

Professor Thomas Poole, London School of Economics: "Future Narratives on State Sovereignty: Where are we Heading?"

Dr Antonios Tzanakopoulos, Oxford University: "What Can we Take Away From These Dialogues?"

Chair: Rt Hon Sir Stanley Burnton QC, One Essex Court Chambers

**15.30 – 15.45            Chair's concluding remarks**  
by Rt Hon Sir Stanley Burnton QC

## British Institute of International and Comparative Law (BIICL)

As a leading independent legal research organisation with charitable status, unaffiliated to any university, BIICL is the only body of its kind in the UK and one of very few in the world. The Institute is focused on applied legal research and serves as an invaluable focal point for the study of international and comparative law. Established over 50 years ago, it has its headquarters in central London. BIICL works closely with the American Society of International Law (ASIL).

## Melbourne Law School (MLS)

Since 2012 BIICL has been welcoming Visiting Research Fellows and post-graduate law students from Melbourne Law School to participate in BIICL's Arthur Watts Fellowship's programme of public international law research and events on subjects ranging from the Antarctic Treaty System to the Paris Convention on Industrial Property. BIICL extends its gratitude to Allan Myers AO who has helped make this programme possible through his generous funding and ongoing support, and Professor Carolyn Evans, Dean of Melbourne Law School for her active support which has also helped make this partnership such a great success.

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