



**British Institute of
International and
Comparative Law**

Public International Law in the Courts of the United Kingdom

Event Report

- Date:** 28 February 2017
- Venue:** British Institute of International and Comparative Law (BIICL)
- Speakers:** Richard Hermer QC (Matrix Chambers)
Dr Philippa Webb (King's College London and 20 Essex Street)
Maya Lester QC (Brick Court Chambers)
- Chair:** Professor Robert McCorquodale (BIICL)
- Organisers:** Dr Jean-Pierre Gauci (Research Fellow in Public International Law at BIICL)
Lise Smit (Research Fellow in Business and Human Rights at BIICL)

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This event began with the Chair, Professor Robert McCorquodale suggesting a slow but certain shift in the attitude of domestic courts toward the application of international law. Through analysis and reflection on recent cases and ongoing developments, each of the speakers explored how domestic courts in the UK have increasingly engaged with issues of international law.

Richard Hermer QC discussed a handful of cases that have been decided by the UK Supreme Court in the last year that have treated with international law issues and concepts. In *Belhaj and another v Straw and others* and *Rahmatullah (No. 2) v Ministry of Defence and another* the Supreme Court grappled with the concepts of foreign act of state and state immunity. The Court significantly narrowed the scope of application for the foreign act of state doctrine and highlighted not only its complexity but also its constitutional importance. The case of *Ministry of Defence v Iraqi Civilians* also known as the ***Foreign Limitation Case*** involved a notion of private international law called 'transposition' which had immediate implications for the application of foreign law in English Courts.

Serdar Mohammed and others v Ministry of Defence again raised the notion of crown act of state with the Court giving consideration to the impact of two bodies of international law on the Article 5 obligations (on the right to liberty and security) under the UK Human Rights Act.

Mr Hermer then presented four 'take aways' from the case law. These were, first, that the Supreme Court has given a far less human rights oriented analysis than the lower Courts and has reduced the protection provided by Article 5 in the context of military conflicts. Second, though a distinction may be made between the Court's more conservative approach to torture and more liberal treatment of detention, the Court has certainly ensured that core protections remain in effect. Third, Mr Hermer found that at times there is difficulty in reconciling the Court's reasoning with the final result which may lead to the view that it engages in some result-oriented reasoning. The fourth and final take away was that there has been an increasing willingness and ability of UK courts to tackle international law issues. In closing, Mr Hermer suggested that this willingness of UK courts and the Constitutional Court in particular, to engage with international law was deeply encouraging.



Dr Philippa Webb's presentation focused on State and diplomatic immunity and in particular, how the courts have taken a narrow, formal approach rather than a broad and functional one in this area.

Dr Webb began by discussing diplomatic immunity with reference to the cases of *Estrada v Al Juffali* and *Al Attiya v Al Thani*. Within one week of each other, the High Court delivered conflicting decisions in these cases on the question as to whether individuals who claimed to be diplomats were entitled to immunity. The difference was in how far the Court found that it could inquire into whether a person claiming to be a diplomat was in fact a diplomat. In both cases, there was evidence to support the finding that they were 'appointments of convenience' that allowed them to benefit from immunity. Dr Webb distinguished the functional review approach in the High Court *Al Juffali*, whereby the Court considered whether the person had functioned as a diplomat in any real sense or whether the post was an "empty husk", from the formal approach in *Al Thani*, in which the Judge found that the person in question was entitled to diplomatic immunity once he was in fact appointed as a diplomat and that appointment had been accepted by the Foreign and Commonwealth Office (FCO). The Court of Appeal in *Estrada v Al Juffali* ruled in favour of a formal approach to the question of diplomatic immunity, overturning the High Court's decision. It found that the Court is to take the FCO certification of diplomatic status at face value, concluding that there is no support or legal precedent for functional review by a court where diplomatic immunity has been asserted. Undertaking such a functional review would undermine the "one voice" principle of the United Kingdom.

Turning then to the question of sovereign immunity, Dr Webb described the narrow view taken by the Courts with respect to indirect impleading of the State. Presenting another aspect of the *Belhaj* case, Dr Webb first discussed the Supreme Court's finding that in the case of indirect impleading, no domestic or international cases allowed the protection of States to extend so far as to cover any reputational or other damage that could follow from proceedings on the merits. The reference to "Interests or activities" in the 2004 UN Convention on State Immunity must be read as *legal* interests or activities.

She then went on to discuss a case in the Jersey Court of Appeal, *Botas v Tepe* [2016] JCA 135., concerning the claim that assets were immune from enforcement because Turkey had interest or control over the shares of subsidiaries of a state owned entity.

The Court again took a narrow and formal view on the level of interest or control that a State must have in order for its property to be immune from the enforcement jurisdiction of the Court. It held that since Turkey merely had an indirect interest in the shares and had no direct and immediate power to exercise control over them, State immunity did not operate as a bar to the Court's jurisdiction.

Dr Webb posited that in the case of a domestic judgment that would not impact upon the legal rights of a foreign state, the sovereign immunity claim will fail under the formal approach. She suggested that courts are taking a cautious, risk-averse approach that reflects their awareness of their place in the system, particularly in relation to executive power and external relations.



Maya Lester QC discussed how UK domestic courts have treated EU economic sanctions that have been implemented by the UK. First, she provided the international background to sanctions and explained how certain individuals may be directly affected by these measures, as in the case of targeted sanctions. Public international law impacts these measures as it raises questions around the degree to which states that impose these measures may be held responsible and whether, when and where these actions may be justiciable. Ms Lester also distinguished UN and EU sanctions on the basis that there is only a very narrow exception to the general position that no recourse is available against UN sanctions. In contrast, the EU's court system gives standing to any person listed for targeted sanctions through an EU styled form of judicial review.

Next, Ms Lester discussed the position of the UK Courts in EU sanctions cases. As illustrated by *Kadi & Al Barakaat v Council & Commission*, the UK has avoided dealing with cases in which relief is sought for an EU sanctions listing. Ms Lester explained that persons seeking relief may approach the UK courts rather than EU Courts in an effort to receive quicker, more effective remedies. The Courts have been clear that it cannot stop the UK from implementing EU sanctions. Following *Kadi*, hundreds of cases have followed at the EU Court exploring permutations of how basic principles of fairness would be applied in sanctions cases.

In contrast to the approach to EU sanctions measures, UK domestic courts have been willing to accept jurisdiction in cases where there have been challenges to the listing and the lawfulness of Foreign Office decisions on unilateral UK sanctions measures. In considering the implications of Brexit, Ms Lester pointed out that following the UK's exit from the EU, it would be making more decisions on its own with respect to its foreign policy and would make its sanctions decisions unilaterally rather than as part of the EU Bloc. In concluding, Ms Lester predicted that sanctions proceedings in domestic courts will be a growing area in the UK as it would therefore no longer be in a position to make complex arguments about whether the relief should be sought in London or in Luxembourg.

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This Report was prepared by Arianne Griffith, Research Assistant at BIICL.