The United Kingdom of Great Britain and Northern Ireland

Comments and observations on the topic

Subsidiary means for the determination of rules of international law

1 February 2024

1. The United Kingdom of Great Britain and Northern Ireland thanks the International Law Commission for the opportunity to submit information relevant to the topic Subsidiary means for the determination of rules of international law.

(a) Decisions of national courts, legislation and any other relevant practice at the domestic level that draw upon judicial decisions and the teachings of the most highly qualified publicists of the various nations in the process of determination of rules of international law, namely: international conventions, whether general or particular; international custom, as evidence of a general practice accepted as law; and the general principles of law recognized by the community of nations;

2. United Kingdom courts have on many occasions referred to Article 38(1)(d) of the Statute of the International Court of Justice or more generally to judicial decisions and writings of authors when considering rules of international law. United Kingdom courts have referred to decisions of both international and national courts. What follows are some examples and in particular cases in which the courts have not simply referred to judicial decisions or writings but set out an approach as to the significance of those subsidiary means or as to how the courts will approach their use.
3. As regards judicial decisions see, for example, paragraph 45 of the judgment of the English High Court of Justice, Family Division in the case of *Re Al M (Immunities) [2021] EWHC 660 (Fam)*. As regards teachings see, for example, paragraph 171 of the judgment of the English Court of Appeal, Civil Division in the case *Mohammed and others v Secretary of State for Defence; Rahmatullah and another v Ministry of Defence and another; Subnom Re Iraqi Civilian Litigation* [2015] EWCA Civ 843. Extracts from both judgments are noted below.
4. See also the judgment of Lord Phillips of Worth Matravers in the United Kingdom House of Lords case *Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [1999] UKHL (24 March 1999), which considered both judicial decisions and writings of authors in the course of analysing the law on state immunity. We would also refer the Commission to the *obiter dicta* of Lord Mance in the United Kingdom Supreme Court case *Abd Ali Al-Waheed v Ministry of Defence* [2017] UKSC 2 (paragraphs 148-151). Extracts from both judgments are noted below.
5. Each year of its publication (1920-2016), the British Yearbook of International Law contained a chapter on decisions of British courts involving questions of public international law.

6. As regards legislation, section 2 of the Human Rights Act 1998 (extract noted below) is an example of United Kingdom legislation that requires United Kingdom courts to take judicial decisions (and other sources) into account in the determination of rules of law.

(b) Statements made in international organizations, international conferences and other forums, including pleadings before international courts and tribunals, concerning subsidiary means for the determination of rules of international law.

7. The United Kingdom has on occasion referred to judicial decisions and writings of authors in the sense of Article 38(1)(d) in pleadings before international courts and tribunals. For example, see the reference to the writer Ian Brownlie at paragraph 6.1 of the Rejoinder of the United Kingdom in the *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* (August, 2001), extracted below.

Note

***Re Al M (Immunities)* [2021] EWHC 660 (Fam), at paragraph 45**

"45. We start, as Lord Pannick did, with the *Arrest Warrant* case. We have no difficulty with the proposition that judgments of the ICJ are in general an authoritative source of CIL, particularly when they codify or crystallise existing State practice and are subsequently recognised as having done so. It is wrong to search an ICJ judgment for its *ratio.* That concept is an artefact of the common law. But to insist on the importance of reading a judgment in context is hardly to adopt a parochial approach. To understand the context, it is necessary to understand the issue before the court and the arguments advanced on that issue by the parties. Only then is it possible to separate those parts of the judgment which reflect the court's considered view on the question before it from "oblique references" of the kind to which Lloyd-Jones LJ and Jay J felt unable to attach weight: see the Divisional Court's judgment in the *Freedom and Justice Party* case, at [105]."

***Mohammed and others v Secretary of State for Defence; Rahmatullah and another v Ministry of Defence and another; Subnom Re Iraqi Civilian Litigation* [2015] EWCA Civ 843, at paragraph 171**

"171. […] The institutional views of the ICRC also qualify as "the teachings of the most highly qualified publicists of the various nations", so that they qualify as a subsidiary source for the determination of rules of international law: ICJ Statute, Article 38(1)(d)."

***Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [1999] UKHL (24 March 1999)**

“Many rules of public international law are founded upon or reflected in Conventions. This is true of those rules of state immunity which relate to civil suit--see the European Convention on State Immunity 1972. It is not, however, true of state immunity in relation to criminal proceedings. The primary source of international law is custom, that is "a clear and continuous habit of doing certain actions which has grown up under the conviction that these actions are, according to international law, obligatory or right"--*Oppenheim's International Law*, 9th ed. p. 27. Other sources of international law are judicial decisions, the writing of authors and "the general principles of law recognised by all civilised nations"--see Article 38 of the Statute of the International Court of Justice. To what extent can the immunity asserted in this appeal be traced to such sources?

[…]

Judicial decisions

In the light of the considerations to which I have just referred, it is not surprising that Senator Pinochet and the Republic of Chile have been unable to point to any body of judicial precedent which supports the proposition that a former head of state or other government official can establish immunity from criminal process on the ground that the crime was committed in the course of performing official functions. The best that counsel for Chile has been able to do is to draw attention to the following obiter opinion of the Swiss Federal Tribunal in *Marcos and Marcos v. Federal Department of Police* (1989) 102 I.L.R. 198 at pp. 202-3.

> "The privilege of the immunity from criminal jurisdiction of heads of state . . . has not been fully codified in the Vienna Convention [on Diplomatic Relations]. . . . But it cannot be concluded that the texts of conventions drafted under the aegis of the United Nations grant a lesser protection to heads of foreign states than to the diplomatic representatives of the state which those heads of state lead or universally represent. . . . Articles 32 and 39 of the Vienna Convention must therefore apply by analogy to heads of state."

Writings of authors

We have been referred to the writings of a number of learned authors in support of the immunity asserted on behalf of Senator Pinochet. *Oppenheim* comments at para. 456:

> "All privileges mentioned must be granted to a head of state only so long as he holds that position. Therefore, after he has been deposed or has abdicated, he may be sued, at least in respect of obligations of a private character entered

> into while head of state. For his official acts as head of state he will, like any other agent of a state, enjoy continuing immunity.""

***Abd Ali Al-Waheed v Ministry of Defence* [2017] UKSC 2**

"148. My position is closer on this issue to Lord Sumption's than to Lord Reed's. Like Lord Sumption I also regard it as one which is in the event unnecessary to decide. But I add one observation. The role of domestic courts in developing (or in Lord Sumption's case even establishing) a rule of customary international law should not be undervalued. This subject was not the object of detailed examination before us, and would merit this in any future case where the point was significant. But the intermeshing of domestic and international law issues and law has been increasingly evident in recent years. Just as States answer for domestic courts in international law, so it is possible to regard at least some domestic court decisions as elements of the practice of States, or as ways through which States may express their opinio juris regarding the rules of international law. The underlying thinking is that domestic courts have a certain competence and role in identifying, developing and expressing principles of customary international law.

149. The potential relevance of domestic court decisions as a source of international law was recognised and discussed as long ago as 1929 by H Lauterpacht, then an assistant lecturer at the London School of Economics, in his article Decisions of Municipal Courts as a Source of International Law 10 British Yearbook on International Law (1929) 65-95. This drew on insights derived from Lauterpacht's joint editorship with his former LSE doctorate supervisor, the then Arnold McNair, of the Annual Digest and Reports of Public International Law Cases (now the International Law Reports) series also launched in 1929: see The Judiciary, National and International, and the Development of International Law by Sir Robert Jennings QC in vol 102 of the series (1996). There is a further extensive bibliography on the subject annexed at pp 18-19 of the Fourth report on identification of customary international law dated 25 May 2016 submitted by Sir Michael Wood QC as rapporteur to the International Law Commission ("ILC"). Most recently, in the chapter The Interfaces between the National and International Rule of Law: a Framework Paper in The Rule of Law at the National and International Levels (Hart Publishing, 2016) the "classic answer" given by Machiko Kanetake (at p 27) is that "under international law, national rule of law practices are, after all, part of state practices, which contribute to the creation of new customary international law", that they "may also form part of the general principles of international law", and "may also qualify as opinio juris".

150. Sir Michael Wood, as rapporteur to the ILC, recognised in his Second Report dated 22 May 2014 para 58 the potential significance in international law of domestic jurisprudence not only as state practice, but also, with caution, as a means for the determination of rules of customary international law: see also his Third Report dated 27 March 2015 paras 41(e) and 76(b).

151. Yet more significantly, the current draft Annual Report of the International Law Commission to the UN General Assembly for 2015, following upon Sir Michael Wood's Reports, contains the following draft Conclusion 13 (subject to finalisation in 2018):

"Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.""

Human Rights Act 1998

"**2. Interpretation of Convention rights.**

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
  a. judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
  b. opinion of the Commission given in a report adopted under Article 31 of the Convention,
  c. decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
  d. decision of the Committee of Ministers taken under Article 46 of the Convention,

  whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

(2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

(3) In this section "rules" means rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this section—
  a. by the Lord Chancellor or the Secretary of State, in relation to any proceedings outside Scotland;
  b. by the Secretary of State, in relation to proceedings in Scotland; or
  c. by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland—
    i. which deals with transferred matters; and
    ii. for which no rules made under paragraph (a) are in force."

***Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* (August, 2001), paragraph 6.2**

“6.2 First, it is necessary to consider what conduct might constitute a threat to use force. Although the concept of a threat is not defined in international law,[182] Brownlie’s description of it as "an express or implied promise by a government of a resort to force conditional on acceptance or non-acceptance of certain demands of that government" is widely accepted.[183]

[182] The Court's Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* states that whether or not "a signalled intention to use force if certain events occur" constitutes a threat under Article 2(4) of the Charter depends upon various factors, *ICJ Reports 1996*, p. 225 at p. 246, para. 47.

[183] *International Law and the Use of Force by States* (1963), p. 364.”