International Law Summary

State Immunity: The UN Convention and Current Practice

Joanne Foakes
Associate Fellow, International Law Programme, Chatham House

Lorna McGregor
Director, Human Rights Centre, University of Essex

Antonios Tzanakopoulos
University Lecturer in Public International Law, University of Oxford

Chair: Elizabeth Wilmshurst
Associate Fellow, International Law Programme, Chatham House

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INTRODUCTION

This is a summary of an event held at Chatham House on 11 December 2013. The purpose of this meeting was to discuss the 2004 UN Convention on Jurisdictional Immunities of States and Their Property; its lack of entry into force; the implications the convention has had on commercial and human rights cases since its adoption; and any general developments in relation to state immunity in these two fields.

The panel provided general observations on the convention and state immunity with particular reference to a recent Chatham House briefing paper. This was followed by a more detailed discussion of the developments regarding state immunity in relation to commercial transactions; and finally a commentary on the impact the convention has had on human rights cases and how immunity issues may develop in such cases in the future.

The meeting concluded with questions from the audience and was held on the record.

THE DRAFTING OF THE CONVENTION AND DEVELOPMENT OF STATE IMMUNITY

The adoption of the convention in 2004 was a major achievement as there were multiple difficulties throughout the drafting process that had to be overcome. There are numerous reasons why the exercise was so difficult. A principal issue was that the rules of state immunity are mainly developed and formulated by claims brought and decided in national courts; for example, the recent decision of the International Court of Justice (ICJ) in the Germany v Italy case relied more extensively on national court cases as evidence of state practice than any other ICJ decision previously had. However, reliance on judicial decisions as direct evidence of state practice has historically been controversial and identifying the relevant rule from such sources is far from straightforward. This exercise is particularly complex when it comes to matters of state immunity for the following reasons: it is often the case that national court decisions are not based upon a very comprehensive survey of the relevant international law; the views of the national courts are not always the same as those of the government or the legislature; governments seeking to guide their own courts on matters of immunity may adopt a position that is inconsistent with that which they adopt in foreign courts; national decisions can be influenced as much by domestic legal procedures and requirements as by international law; and in many states, state practice on immunity is virtually non-existent. It is also important to note that the rules on state immunity have never been static; they have changed significantly over the years and not always at the same pace in different countries. For example, we now see the restrictive doctrine being applied by a small number of states, while many others continue to apply the absolute doctrine. All these issues have impacted on the content and structure of the convention and on the way in which it has been received and viewed by states and national courts since its adoption in 2004.

In relation to the content and impact of the convention it is important to note that the negotiation process for it was particularly long and there were numerous gaps and hiatuses between periods of negotiation. The longest period was the gap between the final adoption of the ILC draft articles and the adoption of the convention itself; as a result of this extended period many of the provisions of the convention were finalized nearly 13 years before it was adopted. Additionally, as with most international law conventions, the text inevitably contains many compromises; and throughout the process there have been some uncertainties as to the scope of the convention, as well as the precise relationship between the operative provisions and the various understandings that have been annexed to it.

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1 The summary of this meeting was prepared by Emma Beatty.
3 Jurisdictional Immunities of the State (Germany v Italy, Greece intervening) 2012 ICJ 143.
The convention is not yet in force; it requires 30 states parties in order to enter into force and nine years after adoption only has 14, the majority of which are European states. One of the possible reasons for the slow uptake of the convention is that states wanted to see it enter into force and be applied and interpreted before signing or ratifying. In addition, in states that already have a domestic law based on the restrictive doctrine, there has perhaps been an extra incentive to stick with the tried and settled legislation rather than go to the trouble and risk of ratification that may prove fairly complex. Finally there has been reluctance amongst a few states to commit to a convention which, it is feared, could tie them to fixed and rigid rules on state immunity, which has always been a changeable and dynamic area of international law.

In spite of this a significant achievement of the convention is its reflection of a general acceptance amongst states that the restrictive doctrine should be the way forward; in this respect participation of several key states will be crucial to the eventual success of the convention and will probably be a strong factor in encouraging other states to sign and ratify.

**RECENT ACTIVITY ON STATE IMMUNITY AND THE INFLUENCE OF THE CONVENTION**

In recent years there has been considerable activity in the field of state immunity, with many cases in both national and international courts. The fact that the convention is not yet in force does not mean that it can be said to be without influence. While it has not yet achieved its principal objective of consolidating state practice around the restrictive doctrine it would be a mistake to dismiss it as a failure. In practice it has had significant influence, its provisions have frequently been referred to by national courts and commentators, and there are signs that many of its provisions are regarded as customary international law.

In terms of international courts, in *Germany v Italy* the ICJ based its conclusion on the customary status of the rules on state immunity, in part on the ‘comments of states on what became the UN Convention’. Meanwhile the European Court of Human Rights (ECtHR) has gone further and stated, rather broadly, in the *Oleynikov v Russia* case, that the 1991 draft articles as enshrined in the convention apply under customary international law even if the state in question has not ratified the convention, provided it has not opposed it. In fact the ECtHR has made a number of pronouncements on the convention in several cases that have considered whether a particular grant of immunity complies with a rule of international law and thus constitutes a proportionate restriction on the right of access to a court under Article 6(1) of the European Convention on Human Rights (ECHR). Thus ECHR states, even those which are not party to the convention, need to be careful that the provisions of their own laws on state immunity do not impose a broader grant of immunity than that required by the convention or international law.

**COMMERCIAL TRANSACTIONS UNDER THE CONVENTION**

The commercial exception to state immunity is the area where there has been most practice and there are two main issues that arise under the convention in this respect.

The first issue is that the convention is limited to commercial transactions only, which is presumably a narrower exemption than commercial activities, to which most of the relevant cases and domestic legislation refer. As such, much of the existing case law will not necessarily be helpful in consolidating the rule or clarifying the content of the term ‘commercial transaction’ within the convention.

The second issue is with the definition of commercial transaction and commercial activity as such. The convention seeks to define the term ‘commercial transaction’ in Article 2.1(c) and Article 2.2...
but these two provisions are quite unfortunately worded. Article 2.1(c) includes several references to the nature of the act, as well as a circular definition which states that a commercial transaction is a transaction which is commercial in nature. Meanwhile Article 2.2 further complicates the definition as, while it states that the primary test for deciding whether a transaction is commercial is the nature test, it also states that a forum state may take into account the purpose of the act as well, if that has always been practice. Thus the definition of commercial transaction provided for by the convention itself is quite open-ended and is unlikely to harmonize practice; if anything these provisions preserve the existing divergence in state practice in relation to the nature or purpose test.

Ultimately until the convention has entered into force and practice on the interpretation of commercial transaction emerges, there can be little reliance on it to help streamline practice in this regard.

**RECENT DEVELOPMENTS REGARDING COMMERCIAL EXCEPTIONS**

A more interesting development in this area relates to the restrictive doctrine generally rather than commercial exceptions specifically.

While in the *DRC v FG Hemisphere* case the Court of Final Appeal of the Hong Kong Special Administrative Region upheld the absolute immunity of the Democratic Republic of Congo, deferring to the public policy of the Chinese government while failing to consider the commercial nature of the relevant acts; there have been recent developments in Europe that are solidifying the commercial exception in a more advanced way than previously seen.

Traditionally the ECtHR has taken the view that, when it comes to the immunity of states as opposed to the immunity of international organizations, there is a right of access to a court under Article 6(1) ECHR but it is not an unlimited right; any proportionate limitation will be legitimate and allowed within the terms of the ECHR. In line with this, in the past, the ECtHR has found that an obligation to accord immunity under customary international law is a proportionate limitation without querying the specific scope of the obligation to accord immunity under customary international law.

However the decision in the recent *Oleynikov* case marks a considerable change in approach. In that case the Russian courts had applied an absolute doctrine of immunity and dismissed the case; yet the ECtHR did not observe that Russia was complying with an obligation under customary international law, which qualified as a proportionate limitation to the right of access to a court, as one would expect from earlier practice. Instead it stated that Russia no longer has an obligation under customary international law to grant absolute immunity; the minimum obligation under customary international law was to accord restrictive immunity. Thus, while compliance with an obligation under international law is a proportionate limitation on the right of access to a court, Russia had gone further than the international obligation required and so the limitation was no longer a proportionate one.

This is a somewhat radical step by the ECtHR, yet it is also marks a transfer of the position taken in relation to the immunity of international organizations into the state immunity regime. For example in the *Kennedy* jurisprudence the ECtHR stated that the obligation to grant immunity to an international organization is subject to a provision of at least equivalent protection at the level of the international organization. Therefore, unless the international organization has some mechanisms

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7 Article 2.1(c) reads: commercial transactions means: (i) any commercial contract or transaction for the sale of goods or supply of services; (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

8 Article 2.2 reads: In determining whether a contract or transaction is a ‘commercial transaction’ under paragraph 1 (c), reference should be made to primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

9 *DRC v FG Hemisphere Associates LLC* (No 1) 147 ILR 376 (CFA HKSAR 2011).

10 *Oleynikov v Russia*, ECHR, 14 March 2013.

11 *Waite and Kennedy*, 18 Feb 1999 [1999] I ECHR
of equivalent protection, granting immunity is a disproportionate limitation of the right of access to a court.

Thus it would seem that in the future, in relation to both immunity of international organizations and immunity of states, a state must opt for the least restrictive measure to allow for the best possible access to a court.

**IMMUNITY FROM ENFORCEMENT UNDER THE CONVENTION**

As regards immunity from enforcement, again recent developments have not been focused on issues that the Convention can be seen to cover or resolve. What the Convention does in this area is to confirm that immunity from enforcement, at least with respect to post-judgment measures of constraint, is restricted and is separate from immunity from jurisdiction and also to confirm that immunity from enforcement is far more extensive than immunity from jurisdiction.

Under the terms of the Convention, immunity from enforcement is subject to waiver. Most interestingly, immunity from enforcement will not apply to property that is in use, or intended for use, by a government for non-commercial purposes; such requirement means one will never find any property against which to enforce, unless one finds a very creative court. This is the case because the principal test used here is purpose rather than nature and anything a government uses can be argued to have a commercial purpose. This observation has been made by many courts in the context of immunity from jurisdiction and is the reason why purpose has been relegated to a secondary criterion there. Thus, as with commercial transactions, the terms of the Convention are in need of clarification; ratification and entry into force is required to see how practice in this area develops.

**WAIVERS OF IMMUNITY FROM ENFORCEMENT**

Beyond the Convention, several cases have recently looked at waivers and their interpretation. As most private parties are well aware of the fact that it is not easy to find exclusively non-commercial property of a state, they make sure to get a waiver of immunity from enforcement and at times quite general and generous waivers are obtained; for example the one that Argentina had with its bonds or the one that Greece currently has. However in spite of such waivers there are still numerous issues with enforcement and there has been a lot of litigation in this respect, particularly from bondholders following the Argentinian crash. For example there were a number of Argentinian bonds, specifically those of bondholder NML Capital, that included quite a generous waiver of immunity from enforcement; following the economic crash NML Capital started litigation against Argentina, obtained a favourable decision and has since been trying to enforce it in numerous locations including France, Germany, Ghana and several times in the United Kingdom.

The interpretations of the Argentinian waiver have varied considerably; for example the Ghanaian courts accepted the waiver from enforcement of immunity and ordered the attachment of a warship to satisfy the earlier judgement; however the International Tribunal for the Law of the Sea (ITLOS) soon ordered the release of the ship as a provisional measure, without reference to the waiver, simply stating that warships are immune under international law and the decision of the Ghanaian court was subsequently reversed. Meanwhile, the French courts have simply stated that if you want to waive immunity from enforcement over state property the waiver must specifically state this.

It would seem that the type of general waivers in such cases is proving to be fairly ineffective. This development has now led creditors to ask for quite specific waivers of immunity; as an example Greece has explicitly waived immunity from enforcement against assets of the Central Bank- quite an extraordinary development.

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12 See Article 19 of the Convention ‘State immunity from post-judgement measures of constraint’
HUMAN RIGHTS EXCEPTIONS AND THE CONVENTION

There are two main issues that the briefing paper raises in relation to human rights. The first is about human rights exceptions to state immunity and the second is about individuals and the coverage under the Convention of individuals who are alleged to have committed international crimes.

On the first point it should be noted that by the time the Convention was adopted, the state practice considered by the working group of the ILC was quite out-dated, particularly in relation to human rights. At that time, in 1999, the working group stated that the Convention was about codification and the time was not right to include an exception to human rights.

At that stage the laws of state immunity in relation to jus cogens and human rights were in a state of flux and there was a clear divide in jurisprudence. Common law countries with state immunity legislation were adopting the position that there was no exception to state immunity on human rights grounds; however, civil law countries, such as Italy and Greece, which did not have domestic legislation on state immunity, were stating that there was an exception to state immunity on those grounds. It was because of the lack of domestic legislation that the civil law countries were able to perform a freer analysis of the relationship between jus cogens norms and state immunity, whereas the common law countries were being restricted by a literal reading of their own domestic legislation.

A key concern at that stage therefore was that the structure of the Convention mirrored domestic immunity laws by providing for a general rule of state immunity subject to express exceptions and, based on the varying practice described, it was feared that such structure could hamper any progression of the law of state immunity. What added to this concern was the fact that, prior to the adoption of national legislation in several common law countries that had restricted the freedom of the courts, the law on state immunity had been developed by national courts interpreting state immunity and looking at whether there needed to be any new exceptions. It was this process that had caused states to move from absolute to restrictive immunity.

This concern led to several commentators voicing the opinion that a Convention that allowed for state immunity with enumerated exceptions but did not include a human rights exception may result in states parties following the behaviour of several common law countries by taking a literal reading of the Convention and deciding that there was no human rights exception, disregarding any subsequent developments in international law or state practice.

As the Convention has not yet entered into force it is hard to say whether this concern has proved to be valid, but it can be argued that the lack of a human rights exception has had an impact on the way in which the Convention has been used as a definitive source of international law in human rights cases. In the Jones case in the UK courts, Lords Hoffmann and Bingham stated in terms that the Convention is the most current and recent thinking on the subject of state immunity, with Lord Hoffman adding that it codifies customary international law on the topic; the court also concluded in this case that there was no human rights exception to state immunity. A similar position was also adopted in the earlier Al Adsani case. Additionally the Kazemi case, which is currently going through the Canadian courts, is a good illustration of the impact the Convention has had in human rights cases. The case has been brought by Stephen Hashemi, the son of Canadian photo journalist Zahra Kazemi, who was allegedly tortured and killed in Iran in 2003. He has initiated civil proceedings in the Canadian courts against named Iranian officials and the state of Iran itself, on behalf of his mother’s estate. The case is particularly interesting in terms of the interpretation of the Convention because, while the appellants refer to the fact that the Convention is yet to garner the 30 ratifications necessary to enter into force and thus should not be given too much weight, the Attorney General has argued that the House of Lords placed considerable

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16 Kazemi v Iran and Ors 2013 SCC (SCC No. 35034).
17 The Supreme Court of Canada has announced that it will review the decision of the Court of Appeal, with proceedings beginning in March 2014.
emphasis on the Convention in the Jones\(^{18}\) case, despite its embryonic status, highlighting that it is the most authoritative statement available on current international law and state immunity.

It can be seen therefore that the Convention is being used as a source of international law for human rights cases.

THE FUTURE FOR HUMAN RIGHTS CASES AND STATE IMMUNITY

Importantly, the Convention now has a partner in the form of the recent ICJ judgement in the Germany v Italy\(^{19}\) case; which is likely to overtake how significant the Convention will be in future human rights cases. As a result of this decision the idea of a broad jus cogens exception to state immunity will no longer be tenable as the ICJ has very clearly stated that such exception is not supported in international law.

What will perhaps be more relevant to the development of human rights and state immunity is the issue discussed previously on right of access to a court under Article 6(1) of the ECHR. This issue was not addressed in relation to the Convention, nor in earlier debates on the relationship between human rights and state immunity, yet it is one that is highly relevant. Most of the cases that involve human rights issues and state immunity have been brought by either a national or a resident of the foreign state, who have initiated proceedings because they allege that it is not possible to bring a case in the country where the crime allegedly took place or that there is no remedy that is adequate or effective in that state. Looking at the Al Adsani\(^{20}\) case this issue did arise but was not properly addressed, as the court failed to fully complete the proportionality analysis, merely stating that an obligation to provide state immunity under international law is a legitimate limitation on Article 6(1). However, in the international organization case discussed, the ECtHR has looked at whether there is equivalent protection or a reasonable alternative means for the person to get access to a court or access to justice.

While this analysis of Article 6(1) has not yet been applied in human rights cases involving state immunity, if and when cases such as Jones\(^{21}\) come before the ECtHR, the court is either going to have to decide that the state is under an international law obligation to provide immunity since there is no human rights exception, meaning that there is no right of access to justice which is effective in practice; or, it is going to have to depart from the generally held interpretation of international law. The possibility of the ECtHR following through on the proportionality analysis is perhaps the only way in which a new exception on human rights grounds could emerge in the future.

STATE IMMUNITY AND INDIVIDUALS

The second issue discussed by the Chatham House briefing paper relates to individuals. Criminal proceedings are not covered by the Convention at all. The traditional argument is that subject matter immunity is provided to state officials, as states can only act through their agents; to bring a case against an individual state official is effectively to bring a case against the state itself. The Convention extends subject matter immunity to individual state officials so that there cannot be spurious cases against such individuals when it is not possible to bring the case against the state. This general position is well accepted in international law and state practice.

However a question does arise here in relation to international crimes where it is accepted that there is an exception to immunity in criminal proceedings, namely, why should there not also be an exception to the immunity of foreign state officials in civil proceedings? Is the denial of immunity limited to individual criminal responsibility for crimes such as torture; or is there an emerging recognition of individual civil responsibility, which would equally say that there should not be

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19 Jurisdictional Immunities of the State (Germany v Italy, Greece intervening) 2012 ICJ 143.
immunity in those types of cases? This issue has not been considered in any depth by either courts or academics and it does represent something of a gap. A key question in this regard will be: if individual civil responsibility does emerge will the Convention stop the recognition of a denial of subject matter immunity in relation to individuals?

**DISCUSSION**

**Commercial transactions**

It was asked if there are no cases concerning the provisions of the Convention as customary international law in relation to commercial transactions; and if there is no interpretative material which may help with the need for practice in this area.

There are cases, but courts tend to be vague in the identification of customary international law: they either state that a provision clearly reflects customary international law without any justification whatsoever, applying the provision as it stands; or they state that a particular legal position reflects customary international law, applying the same approach as they previously have, though failing to mention the fact that the approach is different from the terms of the Convention.

**Waivers**

On the opinion expressed by the panel that the Convention is of little or no use on waivers, it was noted that it at least provides a clear statement that a waiver can be included in a written contract, even though this is still open to some amount of judicial interpretation. This marks progress on the recent *FG Hemisphere* case where the Hong Kong court stated that in fact it would not recognize a waiver even though it was within a written contract; the court instead applied the very outdated common law approach under which such waiver had to be made in the face of the court.

A point was made on the provision on waivers of immunity from execution in arbitration agreements within the Convention. The French courts have said that inclusion of a waiver within an arbitration agreement effectively includes a waiver from execution; whereas the English courts have not yet gone that far, stating only that an arbitration agreement can include a waiver of immunity from jurisdiction but not an implied waiver of immunity from execution. In response it was stated that it is true that the French courts may have taken that approach in one case in 2000; the Swiss courts have also taken that approach to some extent. However, the French courts have now clearly rolled back from this position and the Swiss courts appear to be doing so as well. There is little current state practice to support that position.

Another question was whether the Convention endorse the approach taken in the one instance by the French courts, where it was stated that if a state waives immunity from jurisdiction it must have waived, in an equal measure, immunity from execution. The Convention does not support this approach; in fact it clearly distinguishes between the two types of immunity. Part III, specifically Article 17, is limited to the effect of an arbitration agreement, whereas immunity from enforcement is covered in an entirely separate section, namely Part IV, Article 19. Thus the Convention covers these issues in two separate articles, within entirely different parts. This structure clearly confirms what the ICJ recently stated in *Germany v Italy* that immunity from jurisdiction is one thing, immunity from enforcement is completely different and the two cannot be connected. This issue seems to be clear now and in spite of what may have happened in earlier practice there is little or no scope for arguing the alternative position. It is unlikely that many Western courts will apply that approach again in the future.

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22 DRC v FG Hemisphere Associates LLC (No 1) 147 ILR 376 (CFA HKSAR 2011).
23 Jurisdictional Immunities of the State (*Germany v Italy, Greece intervening*) 2012 ICJ 143
International courts and state immunity

It was asked what will happen if a case in which a state has been accorded immunity for a human rights abuse by a member state of the ECHR goes to Strasbourg. If the ECtHR follow their approach in the Oleynikov24 case, it considers if there is an obligation in international law to accord immunity. Might they take a decision which is at variance with the ICJ Germany v Italy25 case? One cannot truly speculate on this but what can be said is that there is material in Al Adsani26 to support the view that the ECtHR attach great importance to having an alternative access to justice in cases concerning Article 6(1). In both the parliamentary immunity cases and the international organization immunity cases the court has put considerable weight on whether or not there is a reasonable alternative means; this is because in Article 6(1) jurisprudence limitations are not acceptable where the right of access to a court is rendered illusory, ineffective or theoretical. In the state immunity cases, including Al Adsani,27 the court failed to complete the process of analysis required in relation to Article 6(1); instead it looked at the obligation to comply with international law and not what that would mean in terms of Article 6(1). If this type of analysis were to be followed through to the end the court would essentially have two choices. It would either have to say that the Convention, or its interpretation of state immunity under international law, requires the provision of a general law of state immunity subject to enumerated exceptions, which does not include a human rights exception, meaning there is an obligation to provide immunity that may make the right of access to a court illusory; or it would have to consider the possibility of a human rights exception in order for Article 6(1) to be effective.

The panel further commented that the distinction between the Oleynikov28 case and the Germany v Italy29 case should be noted. The latter case involved an obligation under international law to provide immunity where there was no exception; whereas in the former case what the ECtHR seemed to be saying was that there was not in the circumstances an obligation under international law to provide state immunity. While the earlier analysis regarding Article 6(1) is accurate it must be noted that this is a fluctuating standard. These two cases are quite different on the facts; one involved a state transferring its powers to an international organization, moving the case from a jurisdiction where there was a right of access to a court and a right to sue, to the jurisdiction of an international organization where there was no such right, which essentially meant that one had lost a right that one once had; whereas the other case did not involve an international organization, there was never any right to sue and nothing had been lost because the matter had always been covered by state immunity and the obligation to accord immunity under international law.

UK participation in the Convention

The final comment from the audience concerned the participation of the United Kingdom in the Convention. It was noted that the United Kingdom has signed the Convention, which ordinarily suggests an intention to ratify in due course, but some time has passed since then. It was suggested that the reason for this was that the United Kingdom was waiting for the decision from Strasbourg in the Jones30 case, where it had challenged the relevance of Article 6. In addition, there have been several employment appeals tribunal cases concerning state immunity, which were relevant to the position of the United Kingdom. Two such cases relating to state immunity are currently being decided by the same judge, at the same time as a case concerning diplomatic immunity and a domestic servant of a diplomat (Al-Malki/Reyes31 case). This is interesting because in the state immunity cases the earlier decisions have held that there is no state immunity by virtue of EU law and the Charter of Fundamental Rights, yet in the diplomatic immunity case the decisions have upheld diplomatic immunity. These cases are now due to come before the Court of

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24 Oleynikov v Russia, ECHR, 14 March 2013.
25 Jurisdictional Immunities of the State (Germany v Italy, Greece intervening) 2012 ICJ 143
27 Ibid.
28 Oleynikov v Russia, ECHR, 14 March 2013.
29 Jurisdictional Immunities of the State (Germany v Italy, Greece intervening) 2012 ICJ 143
31 Reyes and Rohaetin v Al-Malki and Al Malki, UKEAT/0403/12/KN (October 2013).
Appeal and will be heard together. Currently the Foreign Office is assessing whether or not the United Kingdom will intervene in these cases. As the appellants are looking for a declaration of incompatibility with the Human Rights Act the United Kingdom can intervene, as of right, but is unlikely to do so on the merits of the case; instead it may do so in order to present to the Court of Appeal the various international obligations that are at stake in these cases.