

The Secret Life of International Law

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Keywords

International Law, Foreign and Commonwealth Office, Legal Adviser, Practice, Sources of Law, Litigation

Let me say at the outset, particularly as this is being recorded, that you will all be disappointed about the ‘secret life’ of international law. It will not be nearly as illuminating as the title suggests. I hope, though, that it will be revealing, not in a classified way, but revealing about some appreciations that I formed over the course of the past five years in the Foreign Office Legal Adviser’s seat. As will become apparent, aspects of what I will be talking about could benefit from greater academic study and consideration.

Let me start off with a number of introductory remarks before I get to the meat of the topic. My opening observation, or question, is what constitutes international law as we know it? I do not here refer to Article 38 of the Statute of the International Court of Justice. We all know what this says. The question is rather an enquiry in practical terms about what it is that constitutes the law or legal obligation.

It seems to me that in fact there is a rather smaller subset of what constitutes the law and legal obligation than Article 38 of the Statute suggests. In practice, this comprises, first, treaties, namely, the text of the treaties. Second, there are principles of customary international law that have been declared by courts or by other authoritative bodies. By courts I mean both international courts and national courts. By other authoritative bodies, I mean, although with a question mark, bodies such as the treaty monitoring bodies in Geneva. Third, there are binding decisions of the UN Security Council. And fourth, perhaps, although a smaller category, there are binding decisions of other international organisations. In reality, everything else does not constitute law; it constitutes

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evidence of law. So, for example, when we look at General Assembly resolutions or the practice of states or the observations of foreign ministers, these go to the possible content of customary international law or to questions of treaty interpretation. In other words, they are evidence of law rather than dispositive statements of what the law actually is.

So, in practice, from the seat in which I was sitting until recently, dispositive law actually has a much smaller profile than one would expect, especially compared to the vast array of practice that there is on questions of the creation, interpretation and application of the law. From the perspective of a foreign ministry legal adviser, this is quite an important appreciation because you only need to open a newspaper or turn on the radio or the television to hear someone saying that this or that is contrary to the law and, unsurprisingly, such comments are often, if not mostly, inaccurate and certainly proceed without any appreciation of the nuance and complexity of the law. And, uniquely in the case of international law, the interpretation and application of the law by states is an important part of the creation and development of the law—through state practice, through *opinio juris*, through the conduct of states in the interpretation and application of treaties—for example, under some of the sub-provisions of Article 31 of the Vienna Convention on the Law of Treaties, such as subsequent practice in the interpretation of treaties—in their conduct relevant to the interpretation and application of Security Council resolutions, and so on.

Given this, if one is concerned to undertake a rigorous, considered exercise of deciding what the law is, you cannot simply look at the text of an instrument. You have to look more widely at a whole range of other things. And some of this is visible and collected, for example, in the British Yearbook, British practice. Most of it, however, is invisible to the world at large because it happens internally within governments and never needs to be, and sometimes would not appropriately be, made public. And that is what I mean by the secret life of international law. It is really the invisible life of international law, that part of international law that is not readily open to the public gaze. And this corpus of law, if I can put it in these terms, is very considerable in volume terms. It is also highly developed in its substantive detail. As you can imagine, for example, when it comes to advising on the drafting or the interpretation of Resolution 1973 in respect of Libya,¹ this is not a matter that will simply have merited a one-line piece of advice from a Foreign Office legal adviser. Further, it is highly relevant practice because it is part of the process of determining what the law is. But, for obvious reasons, it is not practice that gets a great deal of attention

¹ SC Res 1973 (2011), 17 March 2011, S/RES/1973 (2011).

in academic writings.

When I was the Director of the Lauterpacht Centre for International Law, before taking up my Foreign Office post, unsurprisingly, my sense of international law and of international relations was that international lawyers owned international relations. We had a view on everything. Our domain was the law and everything that we saw and did was directed through this prism. When I moved into the Foreign Office, however, having come from a private practice in which I advised many governments, even if not with quite the same proximity, it was immediately clear to me that I was responsible for a team of about 40 lawyers in an organisation of 14,000 who, given that scale, had a very considerable volume of work to do, and that we did not lead on everything, or indeed even on most things.

This said, let me identify a number of features of foreign ministry legal advisory teams, not particular to the Foreign Office but to many other governments as well.

First of all, legal teams are horizontal teams, a rather important consideration because most policy teams in foreign ministries are stove-piped, dealing, for example, with geographic matters (such as the Middle East) or thematic matters (such as international criminal justice). In contrast, Foreign Office or other foreign ministry legal advisers work horizontally across all of these teams. That means that a foreign ministry legal team is often better placed than most to make connections, both legal and policy, across different aspects of foreign policy.

Second, it is a team led at senior levels. Not all policy teams are led at senior levels. My position was a Director-General position, one of three or four just below the Permanent Under-Secretary, and overall, foreign ministry legal teams are generally structured at a higher level of seniority, given the professional training and experience of its members.

Third, the Legal Adviser will have direct access to and engagement with Ministers. In my experience, any time that I wanted or needed to see the Foreign Secretary, I was always able to do so.

Fourth, the law is a powerful tool. There is a clear imperative on the part of the United Kingdom government, and indeed other democratic governments, to act lawfully. So, when one speaks as a legal adviser, one has a very powerful voice around the table.

Fifth, that powerful tool is often not very well understood by others around the table. It can be a bit of a black box, with the result that there are not many around the table who can second guess your assessment. Whereas everyone may have a view on, for example, questions of development in South Sudan, not

everyone will be able to talk about the intricacies of the interpretation of Article 16 of the International Law Commission's Articles on State Responsibility dealing with questions of aiding and assisting.

Sixth, legal issues arise for consideration in virtually everything that is done in the foreign policy field.

Seventh, systemic questions arise frequently on issues of law because an approach that might be taken to the interpretation of legal obligations in respect of, let us say, Kenya and the International Criminal Court (ICC), and whether a Security Council resolution should be adopted pursuant to Article 16 of the Rome Statute of the ICC postponing an investigation, could immediately have implications in the case of Libya, in the case of Sudan, and perhaps elsewhere.

So, unusually, the law is cross-cutting in that way. But there are also equally important challenges facing lawyers and the law.

First, as you can see simply by the bare numbers—40 lawyers and 14,000 others—there are huge capacity issues. You cannot be everywhere at once. You can not know everything. And you may not always be able to get to grips with it in detail.

Second, there is a perception in some quarters that the law is only there to constrain rather than to shape and to facilitate. This is a cultural issue that needs to be addressed.

Third, the law is not well understood. It is highly technical—the flip side of what I was saying a moment ago about the advantages, sometimes, of being the owner of the black box.

Fourth, there are some big and interesting issues about the challenges of being influential in a foreign ministry. You must have access—there are a whole series of considerations relevant to access. You must have the trust of your principal. And you must have expertise.

Within this framework, the law is an integral and fundamental part of the policy decision-making process within foreign offices. Lawyers do not in most instances lead on policy, even if there may be some instances in which we might do so. For example, the drafting of the ICC Statute would be something on which the lawyers would lead, but in most instances lawyers do not lead on policy issues. The lawyers will not, for example, generally hold the pen on the drafting of Security Council resolutions or treaties, even if they play an important part in the process. We just could not do it, simply for reasons of capacity. But the lawyers tend to be consulted on, if not absolutely everything, virtually everything. Law therefore is a feature of, or it should be a feature of, every significant foreign policy decision that is made within an office such as

the Foreign Office.

To give you a number of examples of more contemporary relevance; there are legal issues associated with questions of how to address the Palestinian application for membership to the UN addressed to the Security Council. There are issues around the drafting and the interpretation of Security Council Resolutions 1970² and 1973³ on Libya. There are issues around the provision of capacity and development training to foreign police forces. There are issues around the exploration and exploitation of resources in the waters around the Falkland Islands. There are questions about the legal implications of ICC arrest warrants. There are issues around the implications of judgments of the European Court of Human Rights, for example, the *Al Skeini*⁴ and *Al Jedda*⁵ cases for military operations in Afghanistan. And I could go on. This is a very long list indeed. So, you can assume that virtually every major foreign policy issue that is the subject of a decision coming out of the Foreign Office or the State Department or other foreign ministry will have had legal advice associated with it. And, as this suggests, there is therefore a vast body of practice and advice in foreign ministries on such matters as the interpretation and application of treaties; the content of customary international law, and how one goes about identifying such rules; the legal consequences of particular kinds of conduct; issues of accountability; systemic implications of, for example, persistent objection for the development of the law, etc.

Of some importance, the kind of advice given by foreign ministry legal advisory teams necessarily also addresses a range of other issues. It addresses areas in which the law is uncertain. It addresses areas where the law is evolving. It addresses circumstances in which there may be gaps in the law. And it addresses circumstances in which there may be no law at all.

Let me give you a number of examples in illustration. If you take the question of torture and ill-treatment, for example, very much in the public mind, and you look at the 1978 Judgment of the European Court of Human Rights in *Ireland v UK*, you will see that in respect of the conduct in question—conduct such as hooding, sleep deprivation, and other forms of ill-treatment associated with interrogation—the Court of Human Rights concluded that that conduct amounted to inhuman or degrading treatment.⁶ When you fast forward 27 years, however, to the House of Lords Judgment in

² SC Res 1970 (2011), 26 February 2011.

³ *Supra*, note 1.

⁴ *Al Skeini v United Kingdom*, Decision of 7 July 2011, (2011) 53 EHRR 18.

⁵ *Al Jedda v United Kingdom*, Decision of 7 July 2011, (2011) 53 EHRR 23.

⁶ *Ireland v United Kingdom*, Decision of 18 January 1978, [1978] ECHR (Ser A, No 25).

2005 in *A & Others*, which concerned the use of evidence derived from torture, Lord Bingham, the Presiding Law Lord, indicated in his judgment that the conduct that was described by the European Court of Human Rights in 1978 as inhuman and degrading would be described today as torture falling within Article 1 of the Convention against Torture.⁷ So, here you have an example of how legal appreciation on a bright-line issue has evolved over time.

To take another example, the application of the Geneva Conventions in circumstances in which there is no other state party involved in the conflict; a very big issue in the context of the application of the Geneva Conventions in the context of counter-terrorism military operations. Those of you who are familiar with the Geneva Conventions will know that Common Article 2 of the 1949 Conventions is cast in terms of a conflict involving two or more states parties. In such circumstances, even if one party does not respect the law, the other party remains obligated to do so. What happens, however, if there is not a second state party to the conflict, if it is a conflict between a state and a non-state actor? Do the Geneva Conventions apply? In similar vein, what about the issue of the law relevant to detention in circumstances of non-international armed conflict? Afghanistan is a non-international armed conflict. There is not a whole lot of dispositive law about these issues. So, what law does one advise one's military forces to apply?

There are many other areas in which the law is uncertain, where the law is evolving, where there are larger or smaller gaps in the law, or where there is just no law at all. So, the task of a foreign ministry legal adviser is not simply to advise on the application of the law. It is often to advise by analogy on what the law would say, or, if there is no law, on the consequences of the gap, and, of course, also often on litigation risks. And it is important to observe that while courts may be disinclined to say there is no law, sometimes there is no law!

One of the tasks of a foreign ministry legal advisers team, one of the many tasks, is to be the guardian of the bright lines. This is a nice phrase, amenable to appreciation by those to whom one is speaking. But, in truth, when one begins to look at this idea of bright lines of law, and take by way of example the brightest of those lines, the prohibition on torture, a principle of *ius cogens*, you can see from the example that I gave of the European Court of Human Rights decision in 1978⁸ and the House of Lords decision in 2005⁹ that in fact the bright lines of the law, when you come to bring them into sharper focus,

⁷ *A and others v Secretary of State for the Home Department* [2005] UKHL 71, para. 53.

⁸ *Supra*, note 6.

⁹ *Supra*, note 7.

often have a more pixelated quality. When you look at them from a distance, they are sharp; the contours are clear. When you come to look at them up close, however, and put them under a microscope for purposes of advising on specific issues of conduct, the bright lines often devolve into pixels with the result that you may struggle to identify their edges with great precision. This is one of the big challenges for a foreign ministry legal adviser.

Against that background, let me address a number of rather more tangible topics: first, what is it that is not visible to the world at large. Second, I will say a word or two about something that I will call the challenge of indirect opposability and issues of acquiescence and protection. Third, I will say something about the challenge of precautionary advice. Fourth, I will say a very brief word about the issue of classified conduct, or highly sensitive conduct. Fifth, there is the issue of the challenge of persuading courts. Sixth, I will say something about the question of the supremacy of international law over domestic law. Finally, I will conclude with the question of whether conduct needs to be public in order to inform the law.

Let me start off with the issue of what is it that is not visible. What is it that you here in the room do not see? There may be many categories. I have identified five. The first category is things that happen that are not visible, and there is a good deal that happens that is not visible. I have found it striking over the course of the last number of years picking up a newspaper to find comment on things on which I have been working and seeing quite how wide of the mark the comment is. So, there is a lot that happens that is simply not visible.

Second, and perhaps more interesting, is that there is a great deal that does not happen, and it may not happen because of the law. How, therefore, does one construe the absence of something?

Third, there are the legal appreciations that are not seen that inform decision-making and conduct. For good and proper reasons, including principles of legal professional privilege, this element is seldom visible outside of government.

The fourth aspect that is invisible is the political decision-making process relevant to the legal advice. It is not the case that I would advise and that would be an end of the matter. My advice would be part of a wider array of advice relevant to a particular political decision.

The fifth category is rather broader—the coincidence, or the divergence, of bilateral and multilateral practice and appreciations. It is often the case, for example, that the United Kingdom will be acting alongside or together with others. If you look at the International Security Assistance Forces (ISAF) in

Afghanistan, for example, there are around 130,000 personnel from 50 states. Do we all agree on the interpretation of the ISAF resolutions? If not, what is the consequence of this disagreement? And, if we do agree, what is the consequence of that? Because, if you could collect together the practice of 50 states, or even simply of some of them specially affected, interpreting the ISAF resolutions that could be pretty weighty stuff in terms of state practice, *opinio juris*, practice in the interpretation of a treaty-like text, etc.

All of this practice and these appreciations are simply not visible outside of government, save in the relatively unusual instances in which it becomes visible because it is leaked or because it is disclosed in court proceedings or because it is disclosed in some other manner.

Let me give you a number of real world examples, and in doing so stress for the microphone that I am hypothesising. I am not delving into the practice of the British or the American or any other government.

What about issues, for example, to do with the engagement with governmental authorities in Somaliland or in Puntland on questions of anti-piracy or counter-terrorism? This may be an example of something that happens but is not visible. It would surprise me if this were not going on, given the proximity of Somaliland and Puntland to these issues.

As a separate issue, what about the absence of anything formal, said or done, concerning the status of Somaliland and Puntland? What does one infer, for purposes of the law, from the apparent absence of conduct?

Another example focuses on questions of interpretation of Security Council Resolution 1973 on Libya. Let us consider, for example, operational paragraph 4 of the resolution, the paragraph that addresses the protection of civilians. It is remarkable how ill informed the discussion is on these issues, concerning what the resolution is said to have addressed, or not addressed. It would not surprise you to hear that careful consideration will have been given to such phrases, in operational paragraph 4, as (a) 'all necessary measures', (b) 'to protect civilians and civilian populated areas', (c) 'civilian and civilian populated areas under threat of attack', and (d) 'while excluding a foreign occupation force of any form on any part of Libyan territory'. This last phrase, for example, is very precise legal language that refers implicitly to the Hague Regulations of 1907, the Fourth Geneva Convention of 1949, and other elements of legal appreciation. There is a significant amount of legal advice that goes into these issues.

Another example: what about the political decision to breach or abrogate a treaty? There may be all sorts of reasons why treaties are breached or abrogated. This happens frequently, for example, in the case of the WTO, and members are

subsequently found to be in violation. How is the assessment made, when a state decides that it is going to act in breach of a treaty commitment or to abrogate the treaty? Does it do so with the appreciation sharply in its mind that it is acting unlawfully and will take the consequences, but that there is a good reason for the action that it takes? Or does it do so on the basis of an appreciation that in fact it is acting lawfully, but that there is a degree of uncertainty? Or does it have a much clearer view of the legality of its position?

Another example is that which I gave you a moment ago in respect of the ISAF forces operating in Afghanistan: 50 states, 130,000 personnel; there on a number of possible legal bases for the military action, including the consent of the government of President Karzai, the inherent right of self-defence, and the authorisation of the UN Security Council on the basis of a series of resolutions which authorise 'all necessary measures'. How are these elements to be interpreted? A sense of each of these will be fundamental to our collectively forming a considered appreciation of what the law is and of the legality of conduct. In most instances, however, what we see addressed in the media, and perhaps also in academic articles, turns only on the visible terms of the text of the relevant instrument or legal proposition. When it comes to the interpretation of the legality of ISAF conduct, therefore, the tendency, even amongst those well informed on the issues, is simply to look at the resolution and extrapolate from that; the meaning turning simply on a plain and ordinary construction of the words on the page. There is seldom an appreciation that the exercise of interpretation is more intricate than that.

We come, then, to the topic of what I describe as the challenge of indirect opposability and issues of acquiescence and protection. There is a great deal of binding decision-making out there, and of conduct that is not directly opposable to a particular state, for example, the United Kingdom. Let me give you two examples, but there are multitudes. One is the *Wall* advisory opinion of the International Court of Justice, not binding in respect of the UK both because it is an advisory opinion and because it did not address UK conduct.¹⁰ In paragraph 106 of that advisory opinion, the Court, in a couple of sentences, addressed the inter-relationship between international humanitarian law and human rights law, and did so with the broadest of brushes—there are two bodies of law; this suggests that there are three possible ways of interaction: either one applies or the other applies or they both apply. But when you sit in the kind of seat that I was sitting in until recently, you have to make sense of this, and

¹⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 3.

statements of this kind hardly give any guidance at all for the practical purpose of advising a state.

Take another example, perhaps rather sharper, *Guyana/Suriname*, a maritime boundary delimitation arbitration concerning two states far distant from any UK interest.¹¹ Plugged into the middle of that arbitration award, however, are a couple of paragraphs, almost gratuitously, which make some observations on the application of Article 2(4) of the UN Charter prohibiting the threat or use of force in circumstances in which a coastal protection vessel from one state crossed the maritime boundary of the other.

Let me put the following observation very much in personal terms so that there is no mistaking that I am not talking on behalf of any state. In my view, both of the observations I have just noted are fundamentally flawed as a matter of law. And if you think about the volume of other judicial and arbitral judgments and awards, you can appreciate that there is a tremendous amount of dispositive law out there, in the sense that it is binding upon someone, but that is not opposable directly to the UK, and is not in fact opposable to any state other than those directly concerned.

What does one do if you are the UK or some other indirectly interested state in such circumstances, both to protect your own interests and to ensure that the development of the law stays on a sensible track? These statements or determinations are not directly opposable to you, but they nonetheless form part of a growing body of dispositive legal principles that in many cases is of very variable quality. A state such as the UK could object, but the consequences of objection are very significant. First of all, if you take the *Guyana/Suriname* arbitration, can you just imagine the consequences if the UK or the US or Australia or some other state had said 'we think that this arbitration award is wrong, or is wrong in respect of these paragraphs'? Were we to do so, we would be intruding into a private dispute settlement award between two other states with potentially all sorts of problematic repercussions. Second, it would be utterly impossible for us to be comprehensive in an approach of this kind. The volume of material that is out there is both considerable and not always readily visible. But if we were not comprehensive, the question that would inevitably arise would be whether our silence on some or other issue would be regarded as acquiescence. Third, if a state is going to object, it is not simply a matter for the foreign ministry legal adviser to speak out in some or other forum, without having first discussed and cleared the statement carefully with others, to say that this or that point is problematic. It has to be the state speaking, formally,

¹¹ *Guyana/Suriname Arbitration* (2007) 139 ILR 566.

properly considered, cleared and authorised. The consequence of all of these considerations is that in the vast majority of cases states simply say nothing. But the problem remains that these dispositive appreciations of variable quality ultimately inform the development of the law.

Moving to my next category, the challenge of precautionary advice. When one sits in a foreign ministry legal adviser's seat, you are advising a client; you are advising the state. Legality is paramount; not for reasons of lip service, and not simply for the reason that we are a democratic state whose conduct is based on law, but also because such issues engage wider governmental considerations, including of a reputational character, for both governments and individuals. Governments may stand or fall by reference to considerations of legality.

As a foreign ministry legal adviser, you must advise on what the law is today. But, you should also advise on the uncertainties and the risks that may be associated with your advice, because the law may be unclear. You ought to advise on the consequences of your advice turning out to be wrong. You ought to advise on the potential for the evolution of the legal principle in question away from your interpretation if the matter came before a court, and this against the background of a significant increase in litigation against government. So, if you are a responsible and sensible legal adviser, an element of your advice will be precautionary: 'Secretary of State, there is a significant risk that if you act in this way, and it goes to court, you may be found to be in breach with all the risks, political, reputational, and other that this may bring'.

But a government, as with any other party, is entitled to act on the basis of the law as it is, not required to act on the basis of the law as it might evolve to become at some point in the future. And the challenges of precautionary advice are both that it is speculative and that it speeds up the evolution of the law in unpredictable ways. One person, with a relatively narrow vision, sitting in a bubble in a foreign ministry legal team, speculates on what the law might evolve to be if various uncertain circumstances come to pass.

This is an important challenge for government legal advisers. It is also something that needs to be factored in when considering the question of what the law is for purposes of assessing governmental action. Sometimes a government may act in a precautionary manner, not because it believes that its conduct is required by law but rather because it wishes to avoid political risk.

Perhaps the best example of this is the issue of the interpretation of Article 16 of the International Law Commission's Articles on State Responsibility dealing with aiding and assisting. The language of that text is limited, hinged on knowledge. And if you have a look at the judgment of the International Court

of Justice in the *Bosnian Genocide* case, it talks about actual knowledge in the case of genocide.¹² It is therefore entirely appropriate for a government to take the standard of aiding and assisting as being that of actual knowledge and belief; also because this is the standard that is consistent with domestic criminal law. This notwithstanding, on many issues, the view may be taken that if this or that matter came before a court, the court may frame the issue not in terms of what was actually known but rather in terms of what ought reasonably to have been known, i.e., the concept of constructive knowledge. In such circumstances, how should one properly grapple with the issue of the cascading evolution of international law in consequence of precautionary legal advice?

Let me move briefly to the issue of classified conduct. I do not propose to say a great deal about this for obvious reasons but only to underline a couple of points.

A great deal of what states do, and do properly and legitimately, is highly sensitive, both internally within the government and in their engagement with other governments. And this is not simply in the military or intelligence fields but across the wider panoply of what one might call the national security and international relations space.

This conduct, even more so than the other kinds of conduct that I have been addressing, really is very largely invisible. But it is nonetheless the case, absolutely without question, that, particularly in these fields, a great emphasis is given to considerations of law. So here too there is a whole body of specialist practice that is for the most part utterly invisible to the outside world.

Turning to the challenge of persuading courts. There is an increasing volume of litigation, especially before domestic courts. And there are many cases that go to court in which the state may have an interest but may have no involvement at all in the proceedings and indeed may not even be aware of them. For example, in proceedings before the Family Division of the High Court dealing with issues of child abduction or forced marriages, the litigation may be between two private parties, not involving the state, but it may nonetheless involve not simply questions of the interpretation of a treaty but perhaps also other quite sensitive issues of foreign relations, particularly if the government may be required to take certain action at the direction of the court. By way of example, I recall one instance in which I was in receipt of correspondence that said that the High Court in case X, a case we knew nothing about, had directed that the Ambassador in State Y should provide diplomatic refuge to abducted

¹² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43.

wife Z who had been taken into that jurisdiction against her will. This raised big issues of both law and international relations relating to refuge in diplomatic premises, as well as other issues addressed to us by the court but until that point completely outside of our purview.

There is a whole range of questions that arise from this. First, how does one keep track of these issues? Second, how, if indeed it is appropriate, does one make one's views known? Third, what are the consequences of not making one's views known? Fourth, there is the challenge of addressing international law to a national court, or indeed an international court. And, just to state the obvious, taking the issue of a national court, they tend not to be expert in international law, and may additionally not have any expertise at all in the kind of practical matters that may be in issue. If you take issues of intelligence, for example, there has been a good deal of litigation in this area over recent years. There is a very deeply developed practice in the bilateral/multilateral intelligence field. And, certainly when I first arrived in the Foreign Office, I did not have any real sense of the intricacy of such issues. How is a judge, engaging with such issues at most on an occasional basis, to deal with such matters in a sufficiently well informed manner? Fifth, in a dispute before a court, the court is concerned largely with the dispute between the parties before it and the narrow question with which it is faced. It is not invariably concerned with systemic/strategic issues. How, though, are what may be highly important systemic/strategic issues to be addressed in the proceedings? Sixth, there are also particular challenges associated with addressing a court on highly sensitive and classified matters.

This leads to two brief concluding observations. The first concerns questions of supremacy. As an international lawyer, the proposition is in our DNA that international law prevails over domestic law. That is the notion of supremacy, at least as it applies in the international space, and that is the approach that one would expect the International Court of Justice to take.

In practice, however, the position may be rather different, particularly in areas concerned with national security, because a state is likely to be driven by appreciations of its own law, even if its own law is informed by international law. And we, as international lawyers, in my view, need a much more sophisticated appreciation of how national law and international law interact than we have today. We cannot simply rest on the peg of supremacy. It does not adequately and sufficiently address the issues, and it means that our voice is less weighty when it comes to a discussion of these matters.

Finally, let me conclude with a question. Does conduct need to be public in

order to inform the law?

It clearly must be public, at one level, for reasons of predictability, for reasons of accountability, for reasons of opposability, and for reasons of objection. So, at one level conduct must be public in order to be appreciable for reasons of the law. But this does not detract from the weight of the invisible conduct, which is immensely important and relevant. My concluding observation would therefore simply be that in very many cases one cannot make assumptions about what the law is, or reach considered conclusions on whether conduct is lawful or unlawful, until one has considered the invisible conduct, as well as the visible. The secret life of international law has a tremendous bearing on the visible life of international law. I am not an astronomer or a physicist, but I understand that black holes have the ability to assert gravitational or other effects even though they are invisible. They are there, and are influential, even though they cannot be seen. But their existence can be deduced, and they can be identified, by observing their effects. It is the same with the secret life of international law. It may not be visible, but it is there, it is weighty, it has effects, and it can, with sufficient scholarship and informed enquiry, be deduced and identified.