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# JUDICIAL REVIEW

Principles and Procedure

SECOND EDITION

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OXFORD

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## A. Introduction

5.01 Public international law ('international law'), and foreign relations, feature in claims for judicial review more than ever before.<sup>1</sup> What was once an esoteric area of law limited to regulating the conduct of states on the international plane now reaches into numerous fields of activity which are of direct concern to domestic law,<sup>2</sup> including public law.<sup>3</sup> A sharp division between the domestic and international spheres is much less visible today than in the past.<sup>4</sup> The courts have recognized this to be a 'fundamental change' that is 'reflected in a growing willingness to address and investigate the conduct of foreign states and issues of public international law when appropriate'.<sup>5</sup> Against this background, it has been said that '[t]oday, domestic cases involving the foreign relations of the United Kingdom are part of the staple diet of the High Court, in particular the Administrative Court, and of the appellate courts and many of these cases raise wide-ranging questions of international law including international humanitarian law' and, as a result, '[a] command of international law and domestic foreign relations law has become an indispensable element in the equipment of every public lawyer'.<sup>6</sup> Public law governs both the reception of international law in domestic law and the extent to which the conduct of foreign relations is subject to judicial review.<sup>7</sup>

## B. Sources of International Law

## Introduction

5.02 Whereas foreign law is to be proved before the courts as fact,<sup>8</sup> the content of international law must be pleaded as law.<sup>9</sup> The determination of questions of international law is a matter for the courts, not expert evidence.<sup>10</sup> The courts have regard to the same sources of international law as would an international court. The sources of international law are: (a)

<sup>1</sup> For an introduction to international law, see J Crawford, *Brownlie's Principles of International Law* (9th edn, OUP 2019).

<sup>2</sup> See eg *Al-Waheed v Ministry of Defence* [2017] UKSC 2, [2017] AC 821, para 148 per Lord Mance JSC: 'the intermeshing of domestic and international law issues and law has been increasingly evident in recent years'.

<sup>3</sup> See eg the Supreme Court, *Public International Law in the Supreme Court of the United Kingdom: A selection of cases from the Court's first ten years* (Crown Copyright, 2019), identifying ten cases, five of which were claims for judicial review, to illustrate how frequently international law issues have come before the Court.

<sup>4</sup> *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964, para 95 per Lord Mance JSC.

<sup>5</sup> *Belhaj v Straw* [2014] EWCA Civ 1394, [2017] AC 964, para 115 (affirmed on appeal: [2017] UKSC 3, [2017] AC 964). See also D Lloyd-Jones, 'International Law before United Kingdom Courts—A Quiet Revolution' (2022) 71 ICLQ 503, 518.

<sup>6</sup> D Lloyd-Jones, 'International Law before United Kingdom Courts—A Quiet Revolution' (2022) 71 ICLQ 503, 503, 528–529.

<sup>7</sup> In this chapter, as authority for propositions of international law, reference is made (wherever possible) to judgments of the courts of England and Wales which recognize those propositions, rather than judgments of the ICJ or other international courts and tribunals.

<sup>8</sup> In some public law fields, such as immigration, foreign law is generally pleaded through expert evidence: see eg *KV (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 2483, [2018] 4 WLR 166, para 31 per Leggatt LJ. The general approach in judicial review proceedings, however, is that matters of foreign law fall to be determined in the first instance by the decision-maker, and expert evidence that was not before the decision-maker is inadmissible: *R (GA) v Secretary of State for the Home Department* [2021] EWHC 868 (Admin), paras 107–109 per Chamberlain J.

<sup>9</sup> See eg *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, CA, 569 per Stephenson LJ.

<sup>10</sup> See eg *Heathrow Airport Ltd v Her Majesty's Treasury* [2021] EWCA Civ 783, [2021] STC 1203, paras 102, 216 per Green LJ; *R (Charles) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWHC 1620 (Admin), DC, para 49(i).

treaties, (b) customary international law, (c) general principles of law recognized by states, and (d) as subsidiary means for identifying rules of international law (as opposed to themselves being a source of international law), judicial decisions and 'the teachings of the most highly qualified publicists [ie jurists, including academic writers] of the various nations'.<sup>11</sup>

## Treaties, resolutions, and other international instruments

## Treaties

Treaties are agreements concluded between two states (bilateral treaties), more than two states (multilateral treaties), international organizations, or a combination thereof, that are legally binding under international law. Because a treaty is the only tool available to states which wish to create specifically formulated legal rights and obligations between themselves under international law, treaties are central to all areas of international cooperation. The United Kingdom alone is or has been a party to around 14,000 treaties.<sup>12</sup> The rules governing the conclusion, interpretation, application, and termination of treaties between states are found in the Vienna Convention on the Law of Treaties ('VCLT'), itself a treaty.<sup>13</sup>

A written<sup>14</sup> agreement amounts to a treaty if, properly interpreted, it records an intent to establish legally binding obligations.<sup>15</sup> It follows that a treaty need not be called a 'treaty' as such.<sup>16</sup> Many different titles for treaties are used in international practice, including, for example, 'agreement', 'convention', and 'charter'. Even where a written instrument is not legally binding, depending on the circumstances, the courts may still take it into account.<sup>17</sup>

<sup>11</sup> See the Statute of the International Court of Justice 1945, art 38(1), which is widely accepted to be an authoritative statement of the sources of international law; see eg *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, HL, 282 per Lord Phillips. Unilateral declarations of states which are publicly made and are intended to be binding are capable of giving rise to international legal obligations, but there does not appear to be any reported case in which the domestic courts have considered the status or interpretation of a putative unilateral declaration.

<sup>12</sup> The official record of the United Kingdom's treaty obligations is the Foreign, Commonwealth & Development Office's UK Treaties Online (available on the gov.uk website). With the exception of certain categories of bilateral treaties, treaties registered or filed and recorded are published in the United Nations Treaty Series (UNTS) in their original language, together with a translation in English and French, as necessary. For a comprehensive list of collections of treaties and depository information, see Memorandum by the Secretariat, 'Ways and means for making the evidence of customary international law more readily available', UN Doc A/CN.4/710/Rev.1, 14 February 2019, Annex IV.

<sup>13</sup> The VCLT applies only to treaties entered into by parties to the VCLT after it entered into force, but many of its provisions have been recognized as reflecting customary international law, including the rules of treaty interpretation provided for by arts 31 and 32 VCLT. As to the interpretation of treaties, see paras 5.149–5.175. For the law governing treaties to which international organizations are party, see the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986. See further O Corten and P Klein (eds) *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011).

<sup>14</sup> Article 1(a) VCLT. In principle, states may also enter into oral treaties, but this is highly exceptional in practice.

<sup>15</sup> As to the distinction between treaties and non-binding memoranda of understanding, see *R (Charles) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWHC 3185 (Admin), DC, para 111. See also Foreign, Commonwealth & Development Office, Legal Directorate, 'Treaties and Memoranda of Understanding (MOUs): Guidance on Practice and Procedures', March 2022, 3–4, 17–19 (available on the gov.uk website).

<sup>16</sup> See art 1(a) VCLT. United Nations Member States are under an international obligation to deposit treaties with the UN Secretariat (art 102 United Nations Charter 1945; art 80 VCLT), although a failure to deposit a treaty does not affect its internationally legally binding character.

<sup>17</sup> See eg *Rahmatullah v Secretary of State for Defence* [2012] UKSC 48, [2013] 1 AC 614 (memorandum of understanding between the forces of the United States, the United Kingdom, Ireland and Australia concerning the transfer of prisoners of war, internees and detainees); *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964, para 171 per Lord Neuberger PSC (memorandum of understanding between the United Kingdom and the United States

**5.05** The conclusion of a treaty entails several discrete processes: negotiation and drafting, the adoption of the final text(s),<sup>18</sup> and the authentication of the text(s) as authentic and definitive.<sup>19</sup> For a treaty to establish rights and obligations for a particular state, that state must have expressed its consent to be bound by the treaty,<sup>20</sup> and the treaty must have entered into force;<sup>21</sup> for the particular state, the rights and obligations are established from the date of whichever of these events occurs later in time.<sup>22</sup> However, one or more contracting states may agree to the provisional application of the treaty (in whole or in part) pending its entry into force for that state (eg pending its ratification).<sup>23</sup> The VCLT also imposes an interim obligation to refrain from acts which would defeat the object and purpose of the treaty on a state which has (a) signed a treaty that is subject to ratification, acceptance, or approval or (b) expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.<sup>24</sup>

**5.06** As a matter of international law, each treaty is binding upon the parties to it, and their treaty obligations must be performed by them in good faith.<sup>25</sup> A state party cannot invoke its domestic law, including its constitution, as an excuse or justification for failure to perform a treaty obligation.<sup>26</sup> As a general rule, a treaty binds only the state parties to it.<sup>27</sup> Through treaties, two or more states may 'contract out' of (non-peremptory) rules of customary international law which would otherwise apply to the relations between the treaty parties. In such situations, the customary international law rule subsists and continues to bind the treaty parties in their relations with non-treaty parties.

concerning the transfer of specific detainees). The Universal Declaration of Human Rights 1948 is an example of such a written instrument.

<sup>18</sup> Article 9 VCLT.

<sup>19</sup> Article 10 VCLT.

<sup>20</sup> Article 11 VCLT; see also arts 12–17 VCLT.

<sup>21</sup> Article 24 VCLT.

<sup>22</sup> Article 24(3) VCLT. Unless a contrary intention appears from the treaty or is otherwise established, a treaty does not have retroactive effect: see art 28 VCLT.

<sup>23</sup> Article 25 VCLT. The treaty may provide for provisional application or this may have been otherwise agreed between the negotiating states: see eg *Hulley Enterprises Ltd v Russian Federation* [2021] EWHC 894 (Comm), [2021] 1 WLR 3429, paras 84–98 per Henshaw J. The United Kingdom's policy is to use provisional application on an 'exceptional basis' only, and not as a means of bypassing Parliamentary procedures: see Foreign, Commonwealth & Development Office, Legal Directorate, 'Treaties and Memoranda of Understanding (MOUs): Guidance on Practice and Procedures', March 2022, 8 (available on the gov.uk website).

<sup>24</sup> Article 18 VCLT. Notwithstanding its status as an unincorporated treaty provision, the courts have recognized that this obligation applies to the United Kingdom: see eg *Khurts Bat v Investigating Judge of the Federal Court of Germany* [2013] EWHC 2029 (Admin), [2013] QB 349, DC, para 22 per Moses LJ; *R v O* [2019] EWCA Crim 1389, paras 22, 25.

<sup>25</sup> Article 26 VCLT. See also *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 2 AC 1, para 19 per Lord Bingham. In the international law field, the binding nature of treaties is often encapsulated by the Latin maxim '*pacta sunt servanda*'. Latin terms and phrases are still commonly used in the field of international law: see further A Fellmeth and M Horowitz, *Guide to Latin in International Law* (2nd edn, OUP 2021).

<sup>26</sup> Article 27 VCLT; International Law Commission, 'Articles on the Responsibility of States for Internationally Wrongful Acts', annexed to UNGA resolution 56/83, 12 December 2001, arts 3 and 32. See also *R (Bashir) v Secretary of State for the Home Department* [2018] UKSC 45, [2019] AC 484, paras 67–68 (noting also that it is first necessary to determine whether the state in question is subject to the relevant international obligation); *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52, [2021] 2 All ER 967, para 108 per Lord Hodge and Lord Sales J (noting that the United Kingdom's international treaty obligations 'continue whether or not a particular government remains in office').

<sup>27</sup> Article 34 VCLT, read with art 2(1)(h) VCLT. This rule (referred to by the Latin maxim '*pacta tertiis*') reflects the sovereign independence and equality of states. As to whether the rule applies to non-state territorial entities, see *Western Sahara Campaign UK v Secretary of State for International Trade* [2022] EWHC 3108 (Admin), paras 124, 126 per Cockerill J (obiter).

In principle, a rule set forth in a treaty may codify an existing rule of customary international law or crystallize an emerging rule,<sup>28</sup> even if the treaty does not enter into force.<sup>29</sup> In other cases, the acceptance of a treaty rule may be a form of state practice which may be taken into account for the purposes of identifying customary international law.<sup>30</sup>

### Resolutions of the UNSC and UNGA

Neither the resolutions of the United Nations Security Council ('the UNSC')<sup>31</sup> nor those of the United Nations General Assembly ('the UNGA') are treaties. Rather, such resolutions are instruments adopted by those organs of the UN pursuant to a treaty, ie, the UN Charter. Decisions of the UNSC including (but not limited to) decisions contained in resolutions adopted under Chapter VII of the UN Charter (action with respect to threats to the peace, breaches of the peace, and acts of aggression) are binding on UN Member States, including the United Kingdom, by virtue of their treaty obligations under the Charter.<sup>32</sup> UNSC resolutions that do not contain a decision have the force of recommendations only.<sup>33</sup> Pursuant to art 103 of the UN Charter, in the event of a conflict between obligations under the Charter and any obligations under any other international agreement, the obligations under the Charter prevail.<sup>34</sup> Article 103 specifically refers to other 'international agreements' (ie treaties), but the prevailing view is that it also applies to obligations under customary international law other than peremptory norms.<sup>35</sup>

In principle, the obligation to comply with UNSC resolutions may compel Member States to act in contravention of their obligations under the European Convention on Human Rights, but in this respect there are two important caveats. First, since the UNSC is presumed not to intend to impose obligations on Member States in breach of fundamental human rights, clear and explicit language to the contrary is required before a UNSC resolution is held to impose such an obligation.<sup>36</sup> Secondly, whereas the House of Lords has held that the obligation to comply with UNSC resolutions encompasses *authorization* for Member States

<sup>28</sup> See eg *Mohammed (Serdar) v Ministry of Defence* [2015] EWCA Civ 843, [2016] 2 WLR 247, para 221 (reversed in part on appeal: [2017] UKSC 2, [2018] AC 821). See further International Law Commission, 'Draft conclusions on identification of customary international law, with commentaries' (2018), Yearbook of the International Law Commission, 2018, vol II, Part Two, draft Conclusion 11 and commentary.

<sup>29</sup> See *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719, [2019] QB 1075, para 21; *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] AC 777, para 32 per Lord Sumption JSC.

<sup>30</sup> As to the identification of customary international law, see paras 5.13–5.15.

<sup>31</sup> The UNSC has primary responsibility for international peace and security.

<sup>32</sup> UN Charter, art 25; United Nations Act 1946; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, paras 113–114.

<sup>33</sup> See eg *R (Akarcay) v Chief Constable of the West Yorkshire Police* [2017] EWHC 159 (Admin), DC, para 20 per Burnett LJ.

<sup>34</sup> UN Charter, art 103.

<sup>35</sup> See International Law Commission, Report of the Study Group of 13 April 2006, Report of the International Law Commission, 58th Session, A/CN.4/L.682, 175–177, paras 344–346. Other passages of this report were cited with approval in *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB), [2019] QB 1251, para 112 per Leggatt J. As to peremptory norms of international law, see paras 5.16–5.17.

<sup>36</sup> *Al-Waheed v Ministry of Defence* [2017] UKSC 2, [2017] AC 821, paras 284–286, 314 per Lord Reed JSC (dissenting). The European Court of Human Rights has consistently adopted a strict approach to this requirement: see eg *Al-Jedda v United Kingdom* (2011) 53 EHRR 23 (p 789), ECtHR (GC), paras 102, 105; *Al-Dulimi v Switzerland* (2016) 42 BHRC 163, ECtHR (GC), paras 140, 146. In practice, the UNSC only rarely explicitly identifies the various measures which states may adopt, preferring instead simply to authorize 'all necessary measures'. As to whether this formulation is sufficiently clear and explicit to cover the detention of individuals, see *Al-Waheed v Ministry of Defence* [2017] UKSC 2, [2017] AC 821, paras 27–30 per Lord Sumption JSC, para 299 per Lord Reed JSC (dissenting); *Mohammed (Serdar) v Ministry of Defence* [2015] EWCA Civ 843, [2016] 2 WLR 247, para 148.

to take relevant enforcement measures in contravention of their Convention obligations, the Strasbourg Court has consistently reasoned that, in the absence of a binding obligation under a UNSC resolution, there is no conflict between a Member State's obligations under the UN Charter and its obligations under the Convention.<sup>37</sup>

#### Non-binding international instruments

- 5.10 International multilateral diplomacy frequently makes use of non-binding instruments which may be termed, for example, 'recommendations', 'guidelines', 'standards', 'declarations', 'codes', or 'principles'. Collectively, these instruments are sometimes referred to informally as 'soft law'.<sup>38</sup> In principle, widespread acceptance by states of international standards reflected in 'soft law' as law may evidence an emerging rule of customary international law.

#### The territorial scope of treaties entered into by the United Kingdom

- 5.11 Under international law, a treaty is binding upon each party in respect of its entire territory, unless a different intention appears from the treaty or is otherwise established.<sup>39</sup> Accordingly, treaties entered into by the United Kingdom automatically extend to the entire territory of the United Kingdom, including the devolved nations.<sup>40</sup> The Crown Dependencies<sup>41</sup> and Overseas Territories<sup>42</sup> are neither constitutionally part of the United Kingdom nor sovereign states capable of entering into treaties in their own right.<sup>43</sup> The United Kingdom Government is responsible for their international

<sup>37</sup> *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332, paras 35, 39 per Lord Bingham. Cf *Al-Jedda v United Kingdom* (2011) 53 EHRR 23, ECtHR (GC), paras 109–110; *Al-Dulimi v Switzerland* (2016) 42 BHRC 163, ECtHR (GC), paras 132–136, 139–143, 149. However, in *Hassan v United Kingdom* 38 BHRC 358, the Grand Chamber was willing to modify its interpretation of art 5 ECHR so as to accommodate an international law power of detention (provided by the 1949 Geneva Conventions) which was not among the permissible grounds for detention listed in art 5(1) ECHR. In *Al-Waheed v Ministry of Defence* [2017] UKSC 2, [2017] AC 821, a majority of the Supreme Court applied *Hassan* in the context of a non-international armed conflict in which the international law power to detain was derived from UNSC resolutions: see para 60 per Lord Sumption JSC, paras 134–136 per Lord Wilson JSC, para 164 per Lord Mance JSC, para 224 per Lord Hughes JSC.

<sup>38</sup> See eg *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964, paras 95, 107(ii) per Lord Mance (referring, respectively, to a resolution of the Institut de Droit International, and to a passage from a United Nations Report on the Working Group on Arbitrary Detention as 'a most valuable and important soft law pronouncement'); *KV (Sri Lanka) v Secretary of State for the Home Department* [2019] UKSC 10, [2019] 1 WLR 1849, paras 15, 21–24 per Lord Wilson JSC (referring to and interpreting the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by UNGA Resolution 55/89 (2000)); *R (Adan) v Secretary of State for the Home Department* [2001] 2 AC 477, HL, 519–520 per Lord Steyn (referring to the Handbook on Procedures and Criteria for Determining Refugee Status, 1979, published by the UN High Commission for Refugees as 'high persuasive authority, and much relied on by domestic courts and tribunals'), para 78 per Lord Hutton.

<sup>39</sup> Article 29 VCLT. See also *R (Bashir) v Secretary of State for the Home Department* [2018] UKSC 45, [2019] AC 484, paras 64, 74 ('[i]t follows that treaty obligations will cease to apply to a territory where it secedes from the state which entered into the treaty, or where a formerly dependent territory becomes independent of the parent state which entered into the territory').

<sup>40</sup> The Foreign Secretary has 'overall responsibility for concluding treaties and other international agreements on behalf of the United Kingdom': see Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, October 2013, Concordats on International Relations, D1.3 (Scotland), D2.3 (Wales), D3.3 (Northern Ireland). The conduct of international relations is a reserved matter (Scotland and Wales) or an excepted matter (Northern Ireland), but the observance and implementation of international obligations is not: see the Scotland Act 1998, s 30(1) and Sch 5, para 7(1); the Northern Ireland Act 1998, s 4(1) and Sch 2, para 3; the Government of Wales Act 2006, s 108A and Sch 7A, Part I, para 10.

<sup>41</sup> The three Crown Dependencies are Guernsey, Jersey, and the Isle of Man.

<sup>42</sup> The British Overseas Territories are the 14 territories listed in the British Nationality Act 1981, Sch 6: see the British Overseas Territories Act 2002, s 1. The Crown acts in different capacities ('in right of' or 'in right of the Government of') and as a separate legal entity in relation to different territories, and it is necessary to identify the system of government within which the relevant exercise of power takes place: *BAA v Commissioner of the British Indian Ocean Territory Administration* [2023] EWHC 767 (KB), DC, paras 45–46.

<sup>43</sup> *R (Bashir) v Secretary of State for the Home Department* [2018] UKSC 45, [2019] AC 484, para 68, 70 ('whether the treaty applies to the particular state in respect of the particular territory ... will necessarily depend

relations,<sup>44</sup> and it is a long-standing practice that treaties do not apply to these territories unless the treaty expressly provides otherwise.<sup>45</sup> Certain treaties provide for a mechanism by which a contracting state may by declaration extend the treaty's application to territories for whose international relations that state is responsible.<sup>46</sup>

#### Customary international law

Customary international law is binding on all states.<sup>47</sup> However, where it is established that a state (as a 'persistent objector') has clearly objected to a rule of customary international law while that rule was in the process of formation and thereafter, the rule is not applicable to that state for so long as it maintains its objection.<sup>48</sup>

#### Identification of customary international law

A rule<sup>49</sup> of customary international law arises from two necessary elements: (a) state practice, which is (b) accepted as law (*opinio juris*) by states (ie accepted as being required or permitted by international law<sup>50</sup>).<sup>51</sup> State practice may take a wide range of forms and

on the current constitutional relationship between the state and the territory in question, and official statements of the United Kingdom on the international status of the relevant territories were confirmatory). See further, J Hill, *Aust's Modern Treaty Law and Practice* (4th edn, CUP 2023), 215–216.

<sup>44</sup> See I Hendry and S Dickson, *British Overseas Territories Law* (2nd edn, Hart 2018), 23, 279–280; *BBA v Commissioner of the British Indian Ocean Territory Administration* [2023] EWHC 767 (KB), DC, para 48.

<sup>45</sup> See Foreign, Commonwealth & Development Office, Legal Directorate, 'Treaties and Memoranda of Understanding (MOUs): Guidance on Practice and Procedures', March 2022, 13, 24–25 (available on the gov.uk website).

<sup>46</sup> See eg art 56 ECHR; Convention Related to the Status of Refugees, art 40.1. A treaty previously declared by the United Kingdom to be applicable to a territory for whose international relations it is responsible is not automatically extended once that territory becomes a 'new political entity'; in such a case a fresh declaration is required: *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453, paras 63–64 per Lord Hoffmann (1953 declaration extending application of the ECHR to Mauritius pre-independence did not apply to BIOT, which emerged as a new political entity in 1965); *R (Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWCA Civ 1010, para 139. Cf *R (Bashir) v Secretary of State for the Home Department* [2018] UKSC 45, [2019] AC 484, paras 68–71 (1956 declaration extending the Refugee Convention to the British colony of Cyprus continued to apply to the territories which remained under United Kingdom sovereignty (and excluded from the territory of the Republic of Cyprus) as Sovereign Base Areas when Cyprus obtained independence in 1960).

<sup>47</sup> Customary international law is sometimes referred to as 'custom', 'international custom', 'international customary law', 'general international law', and 'the law of nations'. Confusingly, the phrase 'general principle of international law' is also sometimes used to refer to a rule of customary international law, rather than the distinct source of that name: see eg *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] AC 777, para 60 per Lord Sumption JSC.

<sup>48</sup> See International Law Commission, 'Draft conclusions on identification of customary international law, with commentaries' (2018), Yearbook of the International Law Commission, 2018, vol II, Part Two, draft conclusion 15.

<sup>49</sup> The term 'rule' is used to refer in a general sense to a legal rule, encompassing both obligations that can be formulated with precision and rules of a more general or more fundamental character, which are sometimes referred to as 'principles' of customary international law: see *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment* [1984] ICJ Reports 246, para 79.

<sup>50</sup> Cf the situations in which a state is merely seeking to comply with a treaty obligation as a treaty obligation: *R (Al-Saadoon) v Secretary of State for Defence* [2009] EWCA Civ 7, [2010] QB 486, para 62 per Laws LJ. However, a treaty rule and customary rule may exist in parallel: see eg *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2019] AC 777, para 32 per Lord Sumption JSC; *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719, [2019] QB 1075, para 21. As to the relevance of treaty provisions, see further International Law Commission, 'Draft conclusions on identification of customary international law, with commentaries' (2018), Yearbook of the International Law Commission, 2018, vol II, Part Two, draft conclusion 11 and commentary.

<sup>51</sup> See eg *Al-Waheed v Ministry of Defence* [2017] UKSC 2, [2017] AC 821, para 14 per Lord Sumption JSC, para 275 per Lord Reed JSC. For detailed treatment, see O Sender and M Wood, *Identification of Customary International Law* (OUP 2024).

encompasses written, physical, and verbal acts (and, in certain circumstances, inaction) of government officials and organs, including the decisions of domestic courts.<sup>52</sup> There is no predetermined hierarchy among the various forms of practice.<sup>53</sup> In principle, for example, a state's voting practice and explanatory comments in relation to a UNGA or UNSC resolution may be used as evidence that any statement of law contained in the resolution is accepted as law (*opinio juris*).

**5.14** For a particular practice to be capable of generating a rule of customary international law, it must be evidenced by sufficient examples on the part of a sufficiently representative number of states.<sup>54</sup> Provided that the practice is general, no particular duration is required.<sup>55</sup> Whether there is sufficient state practice and *opinio juris* must be assessed on a case-by-case basis. Compilations of the practice of some states, including the United Kingdom, are published periodically.<sup>56</sup>

**5.15** The party relying on the putative rule of customary international law must prove the existence, at the relevant date,<sup>57</sup> of sufficient state practice (which includes a requirement that the state practice be sufficiently representative) and sufficient *opinio juris*.<sup>58</sup> It can be a significant challenge to meet this 'very demanding' test.<sup>59</sup> If the court finds that it is necessary and appropriate to determine the issue of the existence and content of a putative rule of customary international law, the court does not defer to the executive's view (or merely assess whether that view is reasonably tenable); as a general rule, the courts decide the issue

<sup>52</sup> As to national court decisions as a subsidiary means for the determination of rules of customary international law, see *Al-Waheed v Ministry of Defence* [2017] UKSC 2, [2017] AC 821, paras 147–151 per Lord Mance JSC (*obiter*). Cf *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270, para 63 per Lord Hoffmann. See also International Law Commission, 'Draft conclusions on identification of customary international law, with commentaries' (2018), Yearbook of the International Law Commission, 2018, vol II, Part Two, draft conclusion 13(2) and commentary.

<sup>53</sup> International Law Commission, 'Draft conclusions on identification of customary international law, with commentaries' (2018), Yearbook of the International Law Commission, 2018, vol II, Part Two, draft conclusion 6(3) and commentary.

<sup>54</sup> See eg *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] AC 777, paras 31, 66 per Lord Sumption JSC ('widespread, representative and consistent'); *General Dynamics v State of Libya* [2021] UKSC 22, [2022] AC 318, para 51 per Lord Lloyd-Jones JSC. Cf *Mohammed (Serdar) v Ministry of Defence* [2017] UKSC 1, [2017] AC 649, para 14 per Lord Sumption JSC (requiring 'a uniform, or virtually uniform practice of states conforming to the proposed rule'). When determining whether a practice is 'sufficiently representative', the courts may take into account particular relevant features of the putative rule: see eg *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719, [2019] QB 1075, paras 20, 82–83 (focusing on 'affected states').

<sup>55</sup> *Mohammed (Serdar) v Ministry of Defence* [2014] EWHC 1369 (QB), para 255 per Leggatt J; International Law Commission, 'Draft conclusions on identification of customary international law, with commentaries' (2018), Yearbook of the International Law Commission, 2018, vol II, Part Two, draft Conclusion 8(2).

<sup>56</sup> As to modern British practice, see United Kingdom Materials in International Law, published in British Yearbook of International Law from 1978 onwards. For a comprehensive list of resources published by states and organizations, see Memorandum by the Secretariat, 'Ways and means for making the evidence of customary international law more readily available', UN Doc A/CN.4/710/Rev.1, 14 February 2019, Annexes I to IV.

<sup>57</sup> The identification of customary international law generally falls to be considered as at the date of the claim: see eg *Littrell v United States of America (No 2)* [1995] 1 WLR 82, CA, 98 per Rose LJ. However, depending on the facts of the case, the relevant date may be in the past: see eg *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355, paras 112–113 per Lord Mance JSC.

<sup>58</sup> See eg *Al-Waheed v Ministry of Defence* [2017] UKSC 2, [2017] AC 821, para 14 per Lord Sumption JSC. See further International Law Commission, 'Draft conclusions on identification of customary international law, with commentaries' (2018), Yearbook of the International Law Commission, 2018, vol II, Part Two, referred to in eg *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719, [2019] QB 1075, paras 18, 44, 48–50, 100, Appendix II.

<sup>59</sup> *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719, [2019] QB 1075, para 117; *R (Al-Haq) v Secretary of State for Business and Trade* [2025] EWHC 1615 (Admin), DC, paras 129, 131.

for themselves, save where the challenge is to the rationality of the decision-maker's view of the position under customary international law and the true position is unsettled or disputed.<sup>60</sup> Some rules of customary international law are well established and widely accepted, such as the absolute prohibition of torture.<sup>61</sup> In other cases, following 'exhaustive and careful scrutiny of a wide range of evidence',<sup>62</sup> the domestic courts have accepted<sup>63</sup> or rejected<sup>64</sup> the existence of a rule of customary international law. Even where the existence of a given obligation is accepted or assumed, this does not necessarily mean that the actual content of the obligation is clear, and separate consideration must be given to whether the test is satisfied in this respect also.<sup>65</sup> In the words of Lord Hoffmann, 'it is not for national courts to "develop" international law by adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states'.<sup>66</sup> Since customary international law may evolve, depending on the circumstances, previous judgments on the state of customary international law may need to be revisited in light of more recent state practice and *opinio juris*, applying the principles outlined above.<sup>67</sup>

Peremptory norms ('jus cogens') and obligations owed to the international community as a whole ('erga omnes')

Certain rules of general international law (most commonly custom, but also potentially treaty rules and possibly general principles<sup>68</sup>) have the status of peremptory

<sup>60</sup> *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] AC 777, para 35 per Lord Sumption JSC: '[i]f it is necessary to decide a point of [customary] international law to resolve a justiciable issue and there is an ascertainable answer, then the court is bound to supply that answer'. In relation to 'non-justiciability', see para 5.29 (generally), paras 5.36–5.38 (unincorporated treaties), paras 5.67–5.69 (pure international law issues and conduct purely on international plane), paras 5.70–5.72 (need for a 'domestic foothold'), paras 5.73–5.80, 5.84 (policies and decisions concerning conduct of foreign relations), paras 5.85–5.90 (Crown act of state), paras 5.99–5.115 (foreign act of state). On the 'tenability approach', see paras 5.116–117, 5.124, 5.126, 5.134, 5.137–5.148.

<sup>61</sup> See eg *A v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221, para 34 per Lord Bingham.

<sup>62</sup> *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719, [2019] QB 1075, para 19.

<sup>63</sup> See eg *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, HL, 276 per Lord Millett (under customary international law, every state has jurisdiction to exercise extra-territorial jurisdiction in respect of certain international crimes); *BE (Iran) v Secretary of State for the Home Department* [2008] EWCA Civ 540, para 29 (emerging rule of international law prohibiting the use of anti-personnel mines).

<sup>64</sup> See eg *R (Elgizouli) v Secretary of State for the Home Department* [2019] EWHC 60, DC, [2019] 1 WLR 3463, paras 84–90 (no rule of customary international law prohibiting the death penalty or the provision of mutual legal assistance to states which retain the death penalty) (upheld on appeal on this ground but overturned on another ground: [2020] UKSC 10, [2021] AC 937, para 190 per Lord Carnwath JSC); *R (Bashir) v Secretary of State for the Home Department* [2018] UKSC 45, [2019] AC 484, para 70 (no rule of customary international law treating the creation of new colonial entities as leaving unaffected the application of treaties which previously applied to them); *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] AC 777; *R (Septet) v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 1 WLR 856, para 20 per Lord Bingham (no customary international law right of conscientious objection to military service); *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] UKHRR 76, para 69 (no customary international law duty on governments to provide diplomatic assistance to citizens detained by a foreign state).

<sup>65</sup> *R (Al-Haq) v Secretary of State for Business and Trade* [2025] EWHC 1615 (Admin), DC, paras 131–133.

<sup>66</sup> *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270, para 63 per Lord Hoffmann (see also para 22 per Lord Bingham: 'one swallow does not make a rule of international law'); *Mohammed (Serdar) v Ministry of Defence* [2015] EWCA Civ 843, [2016] 2 WLR 247, para 230: '[f]ive swallows under a single eave are similarly unlikely to make a customary rule of international law in the light of the requirement... that the state practice be "extensive"' (reversed in part on appeal: [2017] UKSC 2, [2018] AC 821).

<sup>67</sup> See eg *BE (Iran) v Secretary of State for the Home Department* [2008] EWCA Civ 540, para 29, accepting the existence of 'an emerging rule of customary international law' prohibiting the use of unmarked anti-personnel mines in armed conflict.

<sup>68</sup> International Law Commission, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries' (2022) vol II, Yearbook of the International Law

norms,<sup>69</sup> meaning that they are accepted and recognized by the international community of states as a whole as norms from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>70</sup> Thus, peremptory norms are hierarchically superior to other rules of international law which do not have the same character. Under the VCLT, where a treaty, at the time of its conclusion, conflicts with a peremptory norm, the entire treaty is rendered void.<sup>71</sup> Similarly, where a treaty subsequently comes into conflict with a peremptory norm that has emerged, the treaty is void subject to the rules on separability.<sup>72</sup> Importantly, only a party to the relevant treaty is entitled to invoke these provisions of the VCLT (if they have not been given effect in domestic law), and jurisdiction to rule on a dispute as to their interpretation or application lies with the International Court of Justice ('the ICJ').<sup>73</sup> All states are under an obligation to cooperate to bring to an end, and not to recognize as lawful, a situation created by a serious breach of a peremptory norm,<sup>74</sup> but the customary law status of this rule is uncertain in some respects.<sup>75</sup>

- 5.17 A party seeking to establish the existence of a peremptory norm must prove both the existence of a norm of general international law (ie a customary rule, a treaty rule, or a general principle), and that the given rule has been accepted and recognized by the international community of states as a whole as having peremptory status.<sup>76</sup> Recognized peremptory norms include the prohibitions against aggression, unlawful use of force, genocide, slavery, racial discrimination and apartheid, crimes against humanity, and torture.<sup>77</sup> However, the category of peremptory norms is notoriously difficult to delimit and, given the evolving nature of customary international law, it may change over time.<sup>78</sup> For example, it does not follow that, simply because they are found in the same treaty as a prohibition having the

Commission, Part II, draft conclusion 5. Cf Comments and Observations of the United Kingdom of Great Britain and Northern Ireland on the Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) adopted by the International Law Commission on first reading (Report of the International Law Commission, 71st session, A/74/10), 30 June 2021, para 7 (available on the [un.org](http://www.un.org) website).

<sup>69</sup> Peremptory norms are often referred to as '*jus cogens*' or '*ius cogens*' norms: see eg *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964, para 107(ii) per Lord Mance JSC, para 271 per Lord Sumption JSC.

<sup>70</sup> Article 53 VCLT. See further International Law Commission, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)', with commentaries (2022) vol II, Yearbook of the International Law Commission, Part II, draft conclusion 2.

<sup>71</sup> Articles 44(5) and 53 VCLT; *Stott v Thomas Cook Tour Operators* [2014] UKSC 15, [2014] AC 1347, para 68 per Baroness Hale DPSC.

<sup>72</sup> Articles 44 and 64 VCLT.

<sup>73</sup> Articles 65 and 66 VCLT.

<sup>74</sup> International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UNGA resolution 56/83, 12 December 2001, arts 40–41.

<sup>75</sup> *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, para 34 per Lord Bingham. Cf *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883, para 29 per Lord Nicholls; International Law Commission, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)', with commentaries (2022) vol II, Yearbook of the International Law Commission, Part II, draft conclusion 19 and commentary.

<sup>76</sup> International Law Commission, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)', with commentaries (2022) vol II, Yearbook of the International Law Commission, Part II, draft conclusions 4 and 6.

<sup>77</sup> See eg *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964, para 107 per Lord Mance JSC, paras 271–272 per Lord Sumption JSC; International Law Commission, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)', with commentaries (2022) vol II, Yearbook of the International Law Commission, Part II, draft conclusion 23 and Annex.

<sup>78</sup> *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964, para 107(ii) per Lord Mance JSC.

status of a peremptory norm, other provisions of the UN Convention Against Torture, the Genocide Convention, or the Geneva Conventions also have the same status.<sup>79</sup>

States also owe certain customary international law obligations to the international community as a whole (obligations '*erga omnes*').<sup>80</sup> Such obligations are conceptually distinct from peremptory norms:<sup>81</sup> all peremptory norms give rise to obligations *erga omnes*, but not all obligations *erga omnes* have peremptory status.<sup>82</sup> Any state is entitled to invoke an obligation *erga omnes*, although there is no duty to do so.<sup>83</sup>

## General principles of law recognized by states

General principles of law recognized by states<sup>84</sup> refers to generic legal concepts and practices common to the major domestic legal systems of the world (including both common law and civil law jurisdictions) which may be transposed to the international legal system, and arguably also to general principles that may be formed within the international legal system.<sup>85</sup> General principles of law perform an important function of filling gaps in treaties and customary international law, although there is no hierarchy between these sources and rules may overlap.<sup>86</sup> The domestic courts have recognized that, in principle, general principles are a source of international law.<sup>87</sup> Whereas the domestic courts frequently have regard to comparative law authorities, there has been little consideration of general principles of law recognized by states.<sup>88</sup> In particular, the courts have held that the general principle of good

<sup>79</sup> *Al-Serani v Ministry of Defence* [2017] EWHC 3289 (QB), [2019] QB 1251, para 112 per Leggatt J.

<sup>80</sup> See eg *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWCA Civ 1010, [2021] 1 WLR 472, paras 107, 124 (concerning the right to self-determination).

<sup>81</sup> See *Western Sahara Campaign UK v Secretary of State for International Trade* [2022] EWHC 3108 (Admin), para 118 per Cockerill J (obiter).

<sup>82</sup> Eg the principle of self-determination is an *erga omnes* obligation, but it has never expressly been found by the domestic courts to be a peremptory norm: see *Western Sahara Campaign UK v Secretary of State for International Trade* [2022] EWHC 3108 (Admin), para 132 per Cockerill J (obiter). Cf eg *Legal consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 July 2024, para 233.

<sup>83</sup> See eg *R (Al-Rawi) v Secretary of State for Commonwealth Affairs and Secretary of State for Home Affairs* [2006] EWCA Civ 1279, [2008] QB 289, paras 102–103, 107 (the United Kingdom was under no duty to exercise diplomatic protection with respect to United Kingdom nationals who were detained at Guantánamo Bay and alleged that they were being tortured).

<sup>84</sup> See the Statute of the International Court of Justice, art 38 para 1(c). See generally B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1st edn, CUP 1953, reissued 2006); I Saunders, *General Principles as a Source of International Law* (Hart 2021); D Lloyd-Jones, 'General Principles of Law in International Law and Common Law', Conseil d'État, Paris, 16 February 2018. The International Law Commission's current work includes the preparation of draft articles on 'General principles of law': see Report of the International Law Commission, Seventy-fourth session (24 April–2 June and 3 July–4 August 2023), UN Doc A/78/10, paras 30–41.

<sup>85</sup> There is a debate as to whether general principles may be formed within the international system as a source of international law distinct from customary international law: see Report of the International Law Commission, Seventy-fourth session (24 April–2 June and 3 July–4 August 2023), UN Doc A/78/10, 15, para (3) of commentary on draft conclusion 3. For support, see eg J Crawford, *Brownlie's Principles of International Law* (9th edn, OUP 2019), 34 referring to 'certain logical propositions underlying judicial reasoning on the basis of existing international law'.

<sup>86</sup> See Report of the International Law Commission, Seventy-fourth session (24 April–2 June and 3 July–4 August 2023), UN Doc A/78/10, 28–35.

<sup>87</sup> See eg *Khurts Bat v Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin), [2013] QB 349, DC, para 69 per Moses LJ.

<sup>88</sup> See eg *Al-Malki v Reyes* [2015] EWCA Civ 32, [2016] 1 WLR 1785, para 56 per Lord Dyson MR; *R (GI) v Secretary of State for the Home Department* [2012] EWCA Civ 867, [2013] QB 1008, para 42 per Laws LJ; *R (Al Skeini) v Secretary of State for Defence* [2004] EWHC 2911 (Admin), [2005] 2 WLR 1401, para 342 per Rix LJ; *R*

faith has 'only marginal value as a source of rights and duties' since it is not in itself a source of obligation where none would otherwise exist.<sup>89</sup>

### Judicial decisions and writings

- 5.20 Judicial decisions of international<sup>90</sup> courts and tribunals and the writings of jurists (ie academics and expert bodies involved in the codification of international law) on public international law are not themselves sources of international law, but they may be used as 'subsidiary sources' to help facilitate the identification of general international law.

- 5.21 Judicial decisions  
Except where legislation requires the courts to have regard to the judgments of a particular international court or tribunal when interpreting and applying a given statute,<sup>91</sup> they are not bound to do so, even where the relevant judgment is binding on the United Kingdom under international law.<sup>92</sup> The weight to be placed on the judgments of international courts and tribunals,<sup>93</sup> as well as those of foreign domestic courts, on questions of international law (including as subsidiary means for the interpretation of treaties and the identification of customary international law) depends on their persuasive value. In principle, there is no hierarchy between the judgments of the various international courts and tribunals and, as a general rule, no doctrine of precedent applies. Although the decisions of the ICJ have no binding force under international law except as between the parties to the particular case,<sup>94</sup> in practice courts place particular weight on the Court's jurisprudence (in both contentious cases and advisory opinions).<sup>95</sup> This special weight reflects the Court's role as the principal

*v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, HL, 282, 284 per Lord Phillips.

<sup>89</sup> *R (ST (Eritrea)) v Secretary of State for the Home Department* [2012] UKSC 12, [2012] 2 AC 135, para 31 per Lord Hope DPSC.

<sup>90</sup> Article 38(1)(d) of the Statute of the International Court of Justice is not expressly limited to the judicial decisions of international courts and tribunals, and the ordinary meaning of 'judicial decisions' is broader, but there is a debate as to whether art 38(1)(d) also encompasses the reasoning on points of international law in judicial decisions of domestic courts: see A Pellet and D Müller, 'Article 38' in A Zimmermann and others, *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019), p 953, para 323. Cf International Law Commission, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries' (2022) vol II, Yearbook of the International Law Commission, Part II, draft conclusion 9, commentary para (5).

<sup>91</sup> See eg Human Rights Act 1998, s 2(1)(a); International Criminal Court Act 2001, ss 50(5), 65(5); Cultural Property Armed (Armed Conflicts) Act 2017, s 5(6).

<sup>92</sup> *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, para 27 per Lord Hoffmann.

<sup>93</sup> For a comprehensive list of resources for researching the decisions of international courts and tribunals, see Memorandum by the Secretariat, 'Ways and means for making the evidence of customary international law more readily available', UN Doc A/CN.4/710/Rev.1, 14 February 2019, Annex V.

<sup>94</sup> See the Statute of the International Court of Justice, art 59. Thus, a judgment of the ICJ in a case to which the United Kingdom was a party is binding on the domestic courts as a matter of international law. Article 59 of the Statute of the International Court of Justice has not been incorporated into domestic law, and the domestic courts are neither bound to give effect to judgments of the Court in cases to which the United Kingdom was a party nor precluded from examining the reasoning, although generally the courts strive to act consistently with the United Kingdom's international obligations under this provision: see eg *Lysongo v Foreign and Commonwealth Office* [2018] EWHC 2955 (QB), paras 27–28 per Farbey J. See, more generally, *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, para 27 per Lord Hoffmann.

<sup>95</sup> As to judgments in contentious cases, see eg *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270, para 24 per Lord Bingham; *Re Al M (Immunities)* [2021] EWHC 660 (Fam), para 45 per Sir Andrew McFarlane P and Chamberlain J. The written and oral submissions in all cases are published on the website of the ICJ.

judicial organ of the UN, its unique position as the only international court with general subject-matter jurisdiction, and the significance of its case law. Although it is wrong to search a judgment of the ICJ for its *ratio*, it is necessary to understand the issue before the Court and the arguments advanced on that issue by the parties.<sup>96</sup>

### Writings, including academic commentary

The courts frequently refer to the writings of jurists on international law,<sup>97</sup> whilst recognizing that even a consensus among academic opinion is no substitute for state practice when seeking to identify a rule of customary international law.<sup>98</sup> Although the quality of the reasoning is the key consideration, weight is more readily be accorded to the views of those who are eminent in the field. The courts also refer to the works of expert bodies engaged in the codification of international law.<sup>99</sup> Particular attention is paid to the work of the International Law Commission of the UN (a subsidiary body of the UNGA, the mandate of which covers both the codification of existing international law and the progressive development of international law) where it reflects an attempt to codify existing international law, although it is always necessary to consider the reaction of states.<sup>100</sup> For example, the courts have frequently referred to the work of the International Law Commission on state responsibility,<sup>101</sup> state immunity,<sup>102</sup> diplomatic immunity,<sup>103</sup> the law of treaties,<sup>104</sup> and the identification of customary international law.<sup>105</sup> The final outcome of the International Law Commission's work on a given topic is generally not expressly classified as either progressive

<sup>96</sup> *Re Al M (Immunities)* [2021] EWHC 660 (Fam), para 45 per Sir Andrew McFarlane P and Chamberlain J. In relation to advisory opinions, see *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWCA Civ 1010, paras 111–113, 139.

<sup>97</sup> See eg *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719, [2019] QB 1075, para 18 (writings which were not controversial between the parties were a valuable source of the principles on the identification of rules of customary international law); *Mohammed (Serdar) v Ministry of Defence* [2015] EWCA Civ 843, [2016] 2 WLR 247, para 171 (reversed in part on appeal: [2017] UKSC 2, [2018] AC 821); *R (Bancoult No 3) v Secretary of State for Foreign and Commonwealth Affairs* [2018] UKSC 3, [2018] 1 WLR 973, paras 11–13 per Lord Mance JSC.

<sup>98</sup> See eg *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 2 AC 1, para 27 per Lord Bingham. See also International Law Commission, 'Draft conclusions on identification of customary international law, with commentaries' (2018), Yearbook of the International Law Commission, 2018, vol II, Part Two, para (3) of the commentary to draft conclusion 14 (expressing a 'need for caution' because writers 'do not always distinguish (or distinguish clearly) between the law as it is and the law as they would like it to be', 'writings may reflect the national or other individual viewpoints of their authors', and 'they differ greatly in quality').

<sup>99</sup> Including the work of bodies created by states and international organizations, such as the International Law Commission, and of private collective international bodies such as the Institut de Droit International and the International Law Association. For a comprehensive list of bodies engaged in the examination, codification, progressive development, or harmonization of international law, see Memorandum by the Secretariat, 'Ways and means for making the evidence of customary international law more readily available', UN Doc A/CN.4/710/Rev.1, 14 February 2019, Annex VI.

<sup>100</sup> Statute of the International Law Commission, arts 1, 16. An analytical guide to the work of the International Law Commission is available on the un.org website. The courts have also referred to the American Law Institute's 'Restatement of the Foreign Relations of the United States', now in part in the Restatement Fourth (2018) and others in the Restatement Third (1987), which reflects the opinion of the Institute as to the rules that an impartial tribunal would apply if charged with deciding a controversy in accordance with international law: see eg *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964, para 269 per Lord Sumption JSC ('authoritative').

<sup>101</sup> See eg *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270, para 12 per Lord Bingham.

<sup>102</sup> See eg *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] AC 777, paras 39–40, 50, 61–62, 72 per Lord Sumption JSC.

<sup>103</sup> See eg *Basfar v Wong* [2022] UKSC 20, [2023] AC 33, paras 59–60, 116 per Lord Briggs and Lord Leggatt JSC.

<sup>104</sup> See eg *R (Bashir) v Secretary of State for the Home Department* [2018] UKSC 45, [2019] AC 484, para 75.

<sup>105</sup> See eg *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719, [2019] QB 1075, para 18.

development or codification; it frequently entails instances of both, with the accompanying commentaries only occasionally explaining the status of a given provision. The work of the International Law Commission is commented upon in writing by states, and is also debated by Member States in the Sixth Committee of the UNGA.

### C. International Law and Foreign Relations in Domestic Law

#### Introduction

**5.23** As a matter of international law, all acts of all state organs are automatically attributable to the state.<sup>106</sup> Thus, on the international plane, the United Kingdom's international obligations are binding on the state as a whole, including the executive, the legislature, and the judiciary.<sup>107</sup> On the international plane, a state must comply with its international obligations and it cannot invoke its domestic law, including its constitution, as an excuse or justification for failing to do so.<sup>108</sup> Compliance with international obligations may require a state to modify its domestic law.<sup>109</sup> However, it is for each state to decide, as a matter of its domestic law and in accordance with its constitutional principles, what effect international law should be given in its domestic law.

**5.24** The United Kingdom is commonly characterized as a 'dualist' system, meaning that international law and domestic law<sup>110</sup> are regarded as separate legal systems operating in different and independent spheres.<sup>111</sup> The reception of international law into domestic law is not automatic; it is subject to and controlled by the United Kingdom's constitutional principles, in particular the principles of Parliamentary sovereignty and the separation of powers. In principle, this is true for all formal sources of international law of general application, that is, treaties, customary international law, and general principles of law recognized by states.

<sup>106</sup> See International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UNGA resolution 56/83, 12 December 2001, art 4 (and note that other bases of attribution of conduct to states are set out in arts 5–11). Particular issues of attribution arise in situations in which a claim alleging violation of rights under the ECHR challenges the acts of British forces operating abroad as part of an international peacekeeping force or military coalition under the auspices of an international organization such as the UN. For a summary of the relevant rules and authorities in this area, and an illustration of their application, see eg *Kontic v Ministry of Defence* [2016] EWHC 2034 (QB), paras 79–135 per Irwin J (acts and omissions of the NATO-led mission in Kosovo were attributable to the UN, not the United Kingdom).

<sup>107</sup> *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, para 40 per Lord Hoffmann (international law 'does not normally take account of the internal distribution of powers within a state'), para 105 per Lord Millett; *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964, para 225 per Lord Sumption JSC ('[i]n the eyes of other states, the United Kingdom is a unitary body').

<sup>108</sup> See eg arts 26–27 VCLT; International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, annexed to UNGA resolution 56/83, 12 December 2001, art 32.

<sup>109</sup> See eg *Exchange of Greek and Turkish Population*, Advisory Opinion [1925] PCIJ (Ser B) No 10, 20.

<sup>110</sup> The constitutional principles governing the relationship between international law and domestic law are materially the same for the constituent parts of the United Kingdom.

<sup>111</sup> See eg *The Law Debenture Trust Corp Plc v Ukraine* [2023] UKSC 11, [2024] AC 411, para 157 per Lord Reed PSC, Lord Lloyd-Jones, and Lord Kitchin JJSC. By contrast, domestic legal systems in which the international law obligations of the relevant state are accepted as automatically forming part of that state's domestic law which may be applied by its domestic courts are referred to as 'monist' in nature. In practice, most states fall somewhere on the spectrum between 'dualist' and 'monist', with some sources or particular rules of international law more readily admitted into the domestic legal order than others, depending on the applicable constitutional principles governing the reception of international law into domestic law, which principles vary between states.

Pursuant to the constitutional principle of the separation of powers in the United Kingdom, 5.25 the domestic law position may be summarized as follows.

- (1) The United Kingdom's international relations (including diplomatic relations, making war and peace,<sup>112</sup> the deployment of armed forces abroad, and making and unmaking treaties<sup>113</sup>) are conducted by the executive in the exercise of prerogative powers.<sup>114</sup> Thus, the executive alone has the power to assume international legal obligations on behalf of the United Kingdom as a state.
- (2) The executive is democratically accountable to Parliament through Parliamentary procedures, and ultimately to the electorate, for its exercise of these prerogative powers, including its actions in international law.<sup>115</sup>
- (3) The executive cannot, through the exercise of its prerogative powers to make and unmake treaties, alter domestic law in any way without the intervention of Parliament.<sup>116</sup> Thus, the executive cannot, by concluding treaties, take away the rights of its citizens<sup>117</sup> or require Parliament to enact new legislation or to amend or repeal existing legislation, or constrain Parliament from doing so, even where such action (or inaction) by Parliament would be necessary for the United Kingdom to comply with its international treaty obligations. For this reason, there is a long-standing practice that the government does not give the United Kingdom's formal consent to be bound by a treaty which can be given effect in domestic law only by way of legislation, unless and until the necessary legislation has been enacted by Parliament.<sup>118</sup>
- (4) It is exclusively for the courts to determine the content of the law,<sup>119</sup> including the existence, scope, and effectiveness of common law prerogative powers with respect to the conduct of foreign relations.<sup>120</sup> Insofar as the issue is justiciable, and the courts consider it appropriate to rule on the matter and necessary in order to decide a reviewable question of public law, this also includes the content of international law.<sup>121</sup>

<sup>112</sup> See eg *Mohammed (Serdar) v Ministry of Defence* [2017] UKSC 1, [2017] AC 649, para 57 per Lord Mance JSC.

<sup>113</sup> See eg *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, paras 54–55 per Lord Neuberger PSC et al.

<sup>114</sup> See eg *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, para 54 per Lord Neuberger PSC et al, noting that this is the most significant area in which ministers exercise prerogative powers.

<sup>115</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, para 92 per Lord Neuberger PSC et al, para 249 per Lord Carnwath JSC (dissenting but not on this point); *Mohammed (Serdar) v Ministry of Defence* [2017] UKSC 1, [2017] AC 649, para 57 per Lord Mance JSC; *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2013] EWCA Civ 199, para 66 per Arden LJ (upheld on appeal: [2014] UKSC 60, [2015] AC 945).

<sup>116</sup> *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, paras 77–78 per Lord Reed PSC; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, paras 50, 56, 81, 86 per Lord Neuberger PSC et al, para 167 per Lord Reed JSC (dissenting), para 244 per Lord Carnwath JSC (dissenting), all endorsing *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, HL, 500 per Lord Oliver.

<sup>117</sup> *Laker Airways Ltd v Department of Trade* [1977] QB 643, CA, 728 per Lawton LJ.

<sup>118</sup> Foreign, Commonwealth & Development Office, Legal Directorate, 'Treaties and Memoranda of Understanding (MOUs): Guidance on Practice and Procedures', March 2022, para 11 (available on the gov.uk website).

<sup>119</sup> See eg *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373, para 36.

<sup>120</sup> See paras 5.73–5.76.

<sup>121</sup> See *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] AC 777, para 35 per Lord Sumption JSC: '[i]f it is necessary to decide a point of [customary] international law to resolve a justiciable issue and there is an ascertainable answer, then the court is bound to supply that answer.' Note also *Campaign for Nuclear Disarmament v Prime Minister* [2002] EWHC 2777 (Admin), DC, para 43 per Simon Brown LJ: '[b]y constitutional convention the government will always comply with the decisions of the court. Whatever the court

5.26 Because the conduct of foreign relations is entrusted to the executive branch of government, subject to any contrary provision in statute, this is an area in which the judiciary tread carefully, recognizing the executive as the only branch of government which is institutionally and constitutionally competent to decide on such matters.<sup>122</sup> A paradigm example of this is the principle that, in relation to the conduct of the United Kingdom's foreign relations, the executive and the judiciary should speak with 'one voice'.<sup>123</sup> As a result, the domestic courts accept, as conclusive, statements made by the executive relating to certain questions of fact in the field of international affairs (sometimes referred to as 'facts of state'). Such questions include, for example, the government's recognition of a foreign state,<sup>124</sup> the government's recognition of a foreign government,<sup>125</sup> whether an individual is to be regarded as a head of state,<sup>126</sup> the territorial boundaries of a foreign state,<sup>127</sup> any fact related to the issue whether a person is entitled to an immunity under international law,<sup>128</sup> and whether a reservation or declaration has been made by the United Kingdom with respect to certain treaties and the terms in which it was made.<sup>129</sup> It has also been suggested that the existence of an armed conflict and its classification under international law are facts which the executive may certify with conclusive effect.<sup>130</sup> However, the legal consequences that flow from the certification of a given fact are a matter for the court.<sup>131</sup> Thus, an alternative view is that it is for the

were to declare the [international] instrument to mean, the government could not ignore that ruling or assert some different meaning in its dealing with other States.'

<sup>122</sup> See eg *R (Elgizouli) v Secretary of State for the Home Department* [2020] UKSC 10, [2021] AC 937, paras 179–180 per Lord Reed PSC. See para 5.66.

<sup>123</sup> See *Maduro Board of the Central Bank of Venezuela v Guaidó Board of the Central Bank of Venezuela* [2021] UKSC 57, [2023] AC 156, paras 69, 78–79 per Lord Lloyd-Jones JSC (referring to *Government of the Republic of Spain v SS 'Arantzazu Mendi'* [1939] AC 256, HL, 264 per Lord Atkin: '[o]ur state cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another'); *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964, paras 11(iv), 90–95 per Lord Mance JSC; *The Law Debenture Trust Corp Plc v Ukraine* [2018] EWCA Civ 2026, [2019] QB 1121, para 179. Cf L Collins, 'Foreign Relations and the Judiciary' (2002) 51 ICLQ 485, 509, suggesting that the 'one voice' principle 'is founded on the idea that to the outside world the internal separation of powers is irrelevant'.

<sup>124</sup> *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964, para 148 per Lord Neuberger PSC.

<sup>125</sup> *Maduro Board of the Central Bank of Venezuela v Guaidó Board of the Central Bank of Venezuela* [2021] UKSC 57, [2023] AC 156, para 68 per Lord Lloyd-Jones JSC. Since 1980, as a matter of policy, the United Kingdom Government generally refrains from according recognition to foreign governments, except where it considers it appropriate to do so in all the circumstances: see the *Maduro* case, paras 65, 91 per Lord Lloyd-Jones JSC. If an express statement of recognition has been issued, any ambiguity in the statement should be resolved by a request for clarification: see the *Maduro* case, para 96 per Lord Lloyd-Jones JSC. Subject to the terms of the statement, the earlier acts of a previously recognized government are viewed as the foreign state's acts at that time; *Deutsche Bank AG (London Branch) v Central Bank of Venezuela* [2023] EWCA Civ 742, para 60 per Falk LJ. In the absence of an express statement, the issue of recognition does not arise and the courts assess whether the relevant entity in fact carries out the functions of a government: see the *Maduro* case, paras 96, 98 per Lord Lloyd-Jones JSC.

<sup>126</sup> See eg *Maduro Board of the Central Bank of Venezuela v Guaidó Board of the Central Bank of Venezuela* [2021] UKSC 57, [2023] AC 156, para 69 per Lord Lloyd-Jones JSC.

<sup>127</sup> *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964, para 148 per Lord Neuberger PSC.

<sup>128</sup> As to diplomatic immunity, see the Diplomatic Privileges Act 1964, s 4. As to international organizations' immunity, see the International Organisations Act 1964, s 8 and *Estrafa Juffali v Juffali* [2016] EWCA Civ 176, [2017] Fam 35, para 41. The courts do not look behind the status of an individual certified as a diplomat by the Foreign, Commonwealth & Development Office: see the *Juffali* case, paras 25–26. As to special missions immunity, see *Khurts Bat v Investigating Judge of the German Federal Court* [2013] EWHC 2029 (Admin), [2013] QB 349, DC, para 40 per Moses LJ. Cf *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719, [2019] QB 1075, para 132 (*obiter*), leaving open the question whether a certificate might be reviewable in wholly egregious scenarios, very unlikely to occur in practice, such as bribery of a minister to issue a certificate.

<sup>129</sup> See eg International Criminal Court Act 2001, s 50(4); Geneva Conventions Act 1957, s 7(3).

<sup>130</sup> *R v Gul (Mohammed)* [2012] EWCA Crim 280, [2012] 1 WLR 3432, paras 20–23 (upheld on appeal without comment on this point: [2014] UKSC 64, [2014] AC 1260). See also *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964, para 95 per Lord Mance JSC (*obiter*), para 148 per Lord Neuberger PSC (*obiter*).

<sup>131</sup> See eg *Owners of the Philippine Admiral v Wallem Shipping (Hong Kong Ltd) ('The Philippine Admiral')* [1977] AC 373, PC, 399 per Lord Cross.

executive to certify the relevant facts, but for the court to determine any justiciable legal question whether those facts entail the existence of an international or non-international armed conflict as a matter of international law, although the executive's view of the proper classification is entitled to respect.<sup>132</sup>

As a corollary of Parliamentary sovereignty, Parliament is empowered to legislate in such a way as to put the United Kingdom in breach of its international law obligations (including treaty obligations)<sup>133</sup> and to impose restrictions on the Crown's exercise of prerogative powers for the conduct of foreign relations, including the power to make and unmake treaties.<sup>134</sup>

The United Kingdom's dualist system 'exists to protect Parliament not ministers'.<sup>135</sup> As a matter of domestic policy, ministers and civil servants are under a duty to comply with the United Kingdom's international obligations, regardless of whether such obligations have been given effect in domestic law.<sup>136</sup> This duty reflects the fact that, as a matter of international law, the official acts of civil servants and ministers are attributable to the United Kingdom and therefore, in principle, capable of placing the United Kingdom in breach of its international obligations.<sup>137</sup> Prior to 2015, the Ministerial Code referred to 'the overarching duty on Ministers to comply with the law including international law and treaty obligations'.<sup>138</sup> In October 2015, the words 'including international law and treaty obligations' were removed, but the government confirmed before Parliament and the courts, and the Court of Appeal found, that no substantive change was intended or effected, because the unqualified duty to 'comply with the law' includes international law.<sup>139</sup> The Ministerial Code neither affects the status of the United Kingdom's international obligations in domestic law nor creates legal obligations; enforcement of the Ministerial Code is a matter for Parliament, not judicial review.<sup>140</sup> There is a strong domestic convention that the government will not decide to act in a way which clearly violates the United Kingdom's international law obligations, but there have been rare exceptions and such a decision is not, of itself, contrary to domestic law.<sup>141</sup>

<sup>132</sup> See, by analogy, *A Local Authority v X* [2018] EWHC 874 (Fam), [2019] Fam 313, paras 43–46 per Gwynneth Knowles J.

<sup>133</sup> See eg *EN (Serbia) v Secretary of State for the Home Department* [2009] EWCA Civ 630, [2010] QB 633, para 60 per Stanley Burton LJ, affirming *Salomon v Customs and Excise Comrs* [1967] 2 QB 116, CA, 143 per Diplock LJ. As to the presumption of compatibility, see paras 5.56–5.60.

<sup>134</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, paras 47, 55 per Lord Neuberger PSC et al. Parliament may by statute authorize the exercise of the prerogative power to make a treaty even if there is a statutory restriction provided for by earlier legislation: *In re Allister* [2023] UKSC 5, [2024] AC 1113, paras 72–77 per Lord Stephens JSC.

<sup>135</sup> See eg *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, para 57 per Lord Neuberger PSC et al.

<sup>136</sup> See Ministerial Code, Cabinet Office, November 2024, para 1.6 (available on the gov.uk website); *The Civil Service Code*, 16 March 2015 (available on the gov.uk website); *Attorney General's Legal Risk Guidance*, 6 November 2024, paras 1, 9, 13 (available on the gov.uk website).

<sup>137</sup> *R (FDA) v Minister for the Cabinet Office* [2024] EWHC 1729 (Admin), [2025] KB 269, para 128 per Chamberlain J. Separate consideration may also need to be given to compliance with international legal rules, such as international criminal law, which directly address the personal conduct of individuals.

<sup>138</sup> *The Cabinet Manual*, 1st edn, October 2011, p 26, para 3.46 (available on the gov.uk website). As regards the Civil Service Code, see *R (FDA) v Minister for the Cabinet Office* [2024] EWHC 1729 (Admin), [2025] KB 269, paras 25–27 per Chamberlain J.

<sup>139</sup> *R (Gulf Centre for Human Rights) v Prime Minister* [2018] EWCA Civ 1855, paras 19–26; *R (FDA) v Minister for the Cabinet Office* [2024] EWHC 1729 (Admin), [2025] KB 269, paras 22–24 per Chamberlain J. As to the corresponding duty in the Civil Service Code, see the *FDA* case, paras 126–131, 141.

<sup>140</sup> See eg *R (FDA) v Prime Minister* [2021] EWHC 3279 (Admin), [2022] 4 WLR 5, DC, paras 39–43 per Lewis LJ, holding that the proper interpretation of part of the Ministerial Code was justiciable.

<sup>141</sup> See *R (FDA) v Minister for the Cabinet Office* [2024] EWHC 1729 (Admin), [2025] KB 269, paras 77–79 per Chamberlain J. The duty to comply with the law under the Civil Service Code requires compliance with any domestically lawful ministerial decision to act in clear breach of the United Kingdom's international obligations: see the *FDA* case, paras 132–137.

5.29 Cases in which the courts are invited to examine or adjudicate on an issue of international law or foreign relations are commonly said to raise the question of 'justiciability'. 'Non-justiciability' has been described by Lord Sumption as a 'treacherous word, partly because of its lack of definition, and partly because it is commonly used as a portmanteau term encompassing a number of different legal principles with different incidents'.<sup>142</sup> The concept of 'non-justiciability' refers to the situations in which an issue is said to be inherently unsuitable for judicial determination by reason only of its subject matter.<sup>143</sup> 'Non-justiciability' has been used to refer to situations in which no issue of domestic law arises (such that the court is being invited to rule on a pure question of international law in the absence of any so-called 'domestic foothold'), situations in which the international law rule relied upon is simply not relevant to a claim that is properly before the court, and situations in which the court refrains from deciding a claim that is properly before the court because to do otherwise would require it to examine an international law or foreign relations issue that falls within the constitutional and institutional competence of the executive. Each of these situations reflects a limitation flowing from the constitutional separation of powers.<sup>144</sup> The extent to which the court is able to adjudicate varies, depending on the nature of the issue in the individual case.

5.30 The legal question of the existence and extent of domestic law powers (statutory or prerogative) relied upon for the executive's conduct of foreign relations is subject to review by the courts<sup>145</sup> but, unless required by statute, the courts refrain from examining pure issues of international law (ie the existence, interpretation, or application of international obligations which have not been given effect in domestic law), including the lawfulness under international law of the United Kingdom's conduct on the international plane (ie in its relations with foreign states).<sup>146</sup> The courts have regard to international law obligations which have not been given effect in domestic law only where it is necessary to do so in order to determine rights and obligations under domestic law (ie where there is a so-called 'domestic foothold'), including a reviewable question of public law.<sup>147</sup> However, even where such a 'domestic foothold' exists, the given international law<sup>148</sup> or foreign relations issue might nevertheless not be justiciable because of the specific subject matter and considerations regarding the constitutional and institutional appropriateness of the court's involvement.<sup>149</sup> Additionally, even where no issue of state immunity arises,<sup>150</sup> the courts generally abstain from examining or adjudicating on the lawfulness or validity of a foreign state's sovereign acts in its own territory and certain sovereign acts on the international plane.<sup>151</sup>

<sup>142</sup> *Mohammed (Serdar) v Ministry of Defence* [2017] UKSC 1, [2017] AC 649, para 79 per Lord Sumption JSC. See also J Mance, 'Justiciability' (2018) 67 ICLQ 739, 742.

<sup>143</sup> *Shergill v Khaira* [2014] UKSC 33, [2015] AC 359, para 42 per Lord Neuberger PSC, Lord Sumption, and Lord Hodge JSC.

<sup>144</sup> *Mohammed (Serdar) v Ministry of Defence* [2017] UKSC 1, [2017] AC 649, para 79 per Lord Sumption JSC. Cf *Shergill v Khaira* [2014] UKSC 33, [2015] AC 359, paras 42–43 per Lord Neuberger PSC, Lord Sumption, and Lord Hodge JSC, drawing a distinction between two categories, ie (a) issues with no domestic law 'foothold' (ie issues of purely international law) and (b) issues upon which a domestic court refrains from adjudicating because they lie beyond the constitutional competence of the courts under the separation of powers. However, the first category can also be described as flowing from the separation of powers, since it is the constitutional role of the judiciary to decide domestic law disputes: see para 5.67.

<sup>145</sup> See paras 5.72–5.75.

<sup>146</sup> See paras 5.67–5.69.

<sup>147</sup> See paras 5.70–5.72.

<sup>148</sup> Eg, in relation to unincorporated treaties, see para 5.38.

<sup>149</sup> As to the conduct of foreign relations, see paras 5.73–5.80, 5.84. As to Crown act of state, see paras 5.85–5.91.

<sup>150</sup> As to the jurisdictional immunities of foreign states and international organizations, see paras 5.92–5.98.

<sup>151</sup> As to foreign act of state, see paras 5.99–5.115.

## Status of treaties and other international instruments in domestic law

On the international plane, the United Kingdom's treaties are negotiated, concluded, amended, and terminated by the executive in the exercise of prerogative power.<sup>152</sup> Treaties which have entered into force are published in the Treaty Series of Command Papers.<sup>153</sup> Treaties create legal rights and obligations in international law only; they are neither governed by the domestic law of any state nor agreements which are enforceable by domestic courts.<sup>154</sup>

However, as a matter of constitutional principle the executive cannot, through the exercise of its prerogative powers to make and unmake treaties, change domestic law in any way without the intervention of Parliament.<sup>155</sup> Thus, as a 'necessary corollary of Parliamentary sovereignty',<sup>156</sup> there is a 'dualist' relationship between domestic law and the United Kingdom's treaty obligations as separate legal frameworks operating on different planes. Since treaty-making is a function exclusively for the executive, a treaty does not become part of domestic law unless it is implemented by Parliament.<sup>157</sup> The United Kingdom's ratification of a treaty creates neither a commitment in domestic law to perform its treaty obligations nor an unequivocal statement of government policy as to how those obligations will be implemented.<sup>158</sup> It is also well established that, subject to statute,<sup>159</sup> the executive's exercise of what is generally referred to as the 'treaty-making' prerogative power (ie signing, ratifying, and withdrawing from treaties) is ordinarily exercisable without legislative authority and is not reviewable by the courts.<sup>160</sup>

### Scrutiny of treaties by Parliament

Where a treaty requires changes to domestic law, it is the long-standing stated policy of the government that it does not give its formal consent to be bound (typically, by ratification) by the treaty until the necessary implementing legislation has been enacted by Parliament.

<sup>152</sup> See eg *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, paras 54–55 per Lord Neuberger PSC et al; *Mohammed (Serdar) v Ministry of Defence* [2017] UKSC 1, [2017] AC 649, para 57 per Lord Mance JSC. This is equally true for other treaty actions under international law, including those concerning reservations and interpretative declarations.

<sup>153</sup> See Foreign, Commonwealth & Development Office, 'Guidance about the work of the Foreign, Commonwealth & Development Office (FCDO) Treaty Section', available on the gov.uk website.

<sup>154</sup> See eg *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223, para 76 per Lord Reed PSC.

<sup>155</sup> See paras 5.24–5.25.

<sup>156</sup> *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223, paras 77–78 per Lord Reed PSC.

<sup>157</sup> See *R (Al Saadoon) v Secretary of State for Defence* [2016] EWCA Civ 811, [2017] QB 1015, para 194 per Lloyd-Jones LJ.

<sup>158</sup> *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52, [2021] 2 All ER 967, para 108 per Lord Hodge and Lord Sales JSC.

<sup>159</sup> See *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, para 51 per Lord Neuberger PSC et al.

<sup>160</sup> See *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, HL, 499–500 per Lord Oliver; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, para 55 per Lord Neuberger PSC et al. For an example of an application of this principle, see *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin), [2008] 2 CMLR 57 (p 1583), DC, paras 37–43 per Richards LJ (refusal to hold a referendum on accession to a European treaty not reviewable).

<sup>161</sup> See further art 11 VCLT (note also arts 12–16 VCLT).

<sup>162</sup> *In re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] AC 1022, para 29(2); Foreign, Commonwealth & Development Office, Legal Directorate, 'Treaties and Memoranda of Understanding (MOUs): Guidance on Practice and Procedures', March 2022, 6 (available on the gov.uk website). Save where there is a specific treaty obligation to enact legislation, a failure to pass necessary

the 'non-justiciability'<sup>186</sup> of unincorporated treaties has also sometimes been articulated by reference to the lack of institutional competence of the domestic courts to adjudicate on the interpretation or application of purely international law agreements.<sup>187</sup> The cases have focused on unincorporated treaties. However, this rationale applies equally to other international law agreements or instruments that have not been given effect in domestic law, regardless of whether the particular agreement or instrument is properly characterized as a treaty under international law.<sup>188</sup>

**5.37** Notwithstanding the general non-justiciability of unincorporated treaties, and the fact that it is 'generally undesirable' for the courts to decide questions as to the United Kingdom's obligations under unincorporated treaties,<sup>189</sup> they may have regard to or interpret a relevant unincorporated treaty in a limited number of circumstances:

- (1) where it is necessary to do so to verify a relevant matter of fact, including whether a treaty has actually been concluded and who the parties to it are;<sup>190</sup>
- (2) where appropriate and relevant for the purpose of statutory interpretation;<sup>191</sup>
- (3) as a guide to the exercise of judicial or executive discretion, where relevant and appropriate;<sup>192</sup>
- (4) as an influence in defining or developing the common law, where relevant and appropriate (ie in accordance with constitutional principles);<sup>193</sup>
- (5) in very rare cases in which the exercise of the Royal Prerogative directly effects an extension or contraction of the territorial jurisdiction of the United Kingdom without the need for legislation;<sup>194</sup> or
- (6) where otherwise necessary in order to determine rights and obligations under domestic law (ie where there is a so-called 'domestic foothold'), including a reviewable question of public law.<sup>195</sup>

<sup>186</sup> See eg *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, HL, 544 per Lord Oliver. Cf *Mohammed (Serdar) v Ministry of Defence* [2017] UKSC 1, [2017] AC 649, para 79 per Lord Sumption JSC. As to the meaning of justiciability, see para 5.29.

<sup>187</sup> See eg *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223, para 26 per Lord Reed PSC (citing *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, HL, 499 per Lord Oliver, and in turn *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 8 Moo PCC 22, 15 ER 9, PC, 75 per Lord Kingsdown); *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964, para 123 per Lord Neuberger PSC (stating that the 'third rule' comprising the doctrine of foreign act of state requires judicial self-restraint in relation to unincorporated treaties because domestic courts 'should not normally determine issues which are only really appropriate for diplomatic or similar channels'). Cf *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, para 55 per Lord Neuberger PSC et al, identifying the rationale in *Kamachee* as a proposition upon which 'the prerogative power to make treaties depends'. As to foreign act of state, see paras 5.99–5.115.

<sup>188</sup> The domestic courts ordinarily lack jurisdiction to determine the correct characterization under international law, not least because this would entail interpreting the unincorporated international agreement or instrument.

<sup>189</sup> *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756, para 65 per Lord Brown (obiter), also stating that '[i]f or a national court to assume the role of determining such a question (with whatever damaging consequences that may have for the state in its own attempts to influence the emerging consensus) would be a remarkable thing, not to be countenanced save for compelling reasons'.

<sup>190</sup> *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, HL, 500–501 per Lord Oliver.

<sup>191</sup> See paras 5.49–5.61.

<sup>192</sup> *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964, para 252 per Lord Sumption JSC. See para 5.65 (judicial discretions) and paras 5.118–5.124 (executive decision-makers).

<sup>193</sup> See paras 5.63–5.64.

<sup>194</sup> See *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, HL, 500–501 per Lord Oliver.

<sup>195</sup> See paras 5.70–5.72.

As regards the last of these circumstances, even where there is a 'domestic foothold', in certain cases a court may nevertheless consider that the issue of the interpretation or application of the unincorporated treaty provision is non-justiciable or that it should refrain from pronouncing conclusively on that issue.<sup>196</sup> The following guidance can be drawn from the case law.

- (1) In cases where the courts are satisfied that issues of high policy in the conduct of foreign relations or defence of the United Kingdom are engaged, the concept of a 'domestic foothold' 'must be interpreted in a way which does not require the court to trespass on matters which are properly the sole responsibility of the executive' as a matter of constitutional principle and, as a result, 'there will generally be very limited and sometimes no further scope for review of the responsible minister's decision'.<sup>197</sup>
- (2) Even outwith such areas of high policy, the courts are likely to 'hesitate before undertaking a task of unilateral interpretation where the contracting parties have embraced an alternative form of resolving differences', regardless of whether the agreed international dispute settlement mechanism would not produce a binding decision.<sup>198</sup> Likewise, the courts consider whether there is a live dispute between the parties (or the treaty parties) as to the interpretation of the relevant unincorporated treaty provision, or an absence of domestic or international judicial authority.<sup>199</sup> There is also a concern that it would be 'unfortunate if decision-makers were to be deterred from seeking to give effect to what they understand to be the international obligations of the United Kingdom by fear that their decisions might be held to be vitiated by an incorrect understanding'.<sup>200</sup>

#### UNSC resolutions

UNSC resolutions are adopted pursuant to the UN Charter and, as a general rule, the courts have no jurisdiction to enforce or interpret them,<sup>201</sup> unless they are given effect by way of Order in Council under the United Nations Act 1946.<sup>202</sup> The United Nations Act 1946 provides that an Order in Council may make such provision as appears 'necessary or expedient for enabling those measures to be effectively applied'.<sup>203</sup> The executive's decision as to what is necessary or expedient is nevertheless amenable to judicial review, with more intense scrutiny being applied the closer the measures at issue come to affecting adversely fundamental

<sup>196</sup> See *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, para 90 per Lord Reed JSC.

<sup>197</sup> *R (Al-Haq) v Secretary of State for Business and Trade* [2025] EWHC 1615 (Admin), DC, para 90.

<sup>198</sup> *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756, para 46 per Lord Bingham (obiter).

<sup>199</sup> See *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, para 90 per Lord Reed JSC, endorsing *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756, para 44 per Lord Bingham (obiter); *R (Al-Haq) v Secretary of State for Business and Trade* [2025] EWHC 1615 (Admin), DC, para 51.

<sup>200</sup> *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, para 90 per Lord Reed JSC, endorsing *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756, para 44 per Lord Bingham (obiter); *R (Friends of the Earth Ltd) v Secretary of State for International Trade* [2023] EWCA Civ 14, [2023] 1 WLR 2011, para 50(iv); *American Musicians v Secretary of State for Science* [2026] EWHC 91 (Admin), DC, para 117 per Males LJ.

<sup>201</sup> *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), DC, paras 23, 47 per Simon Brown LJ, para 61 per Richards J. On the interpretation of UNSC resolutions, see paras 5.176–5.177.

<sup>202</sup> United Nations Act 1946, s 1; *R (Akarcay) v Chief Constable of the West Yorkshire Police* [2017] EWHC 159 (Admin), DC, para 20 per Burnett LJ. This is the mechanism through which various UNSC sanctions are given effect in domestic law.

<sup>203</sup> United Nations Act 1946, s 1.