



# International Law

Principles of Common Law

17 November 2025

Lecture 10

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1. International Law
2. Sources of International Law
3. UK and International Law
  
4. US and International Law

Readings

Evans – pp 393-96



# HSF Competition Law Moot

- New opportunity at UZH for FS 26
- 4 people per team
- ~8 pages and 15 min. of pleading per person
- Final in London
- 12 ECTS
- Completely in English





# HSF Competition Law Moot

## Application

- Motivational letter and CV
- Deadline: 23 December
- Short interview
- Decision: 24 January

## Written Phase

- Independent research & writing
- Meetings with teammates and coaches
- Hand-in in the mid-March

## Oral Phase

- Preparation in April/May
- Trial pleadings
- Final (if qualified) early June

Check the [site of Lst. Heinemann](#)





# Sources of International Law (Article 38 ICJ Statute)

## **Customary International Law (Art. 38(1)(b))**

State practice: consistent behavior of states

Opinio juris: belief that practice is legally required

## **Treaties (Art. 38(1)(a))**

Written agreements between states

Create binding legal obligations

UN Charter: Security Council Obligations

## **General Principle of Law (Art. 38(1)(c))**

Principles common to major legal systems

Fill gaps where treaties/custom do not apply

## **Subsidiary Means (Art. 38(1)(d))**

Judicial decisions of international courts/tribunals

Writings of highly qualified legal scholars

## Domestic sources of international law

- 1. Case law
- 2. Statute
- 3. Transnational law





## Monism and Dualism

- Describes the relationship between national and international law, specifically how international treaties and conventions are incorporated into the internal national legal system
- Monism – international and national systems form a unitary body of law. Once the country has signed and ratified a treaty or convention, it has direct effect in their national legal system = citizens may base any claim against the state directly on the treaty (eg. The Netherlands)
- Dualism – international law must be translated into the national legal system, usually by legislation. Citizens must then base their claim on the national rule which incorporates the international one.
- In the UK, all international treaties and conventions must be “brought home” by act of the UK Parliament.
  - EU Law → European Communities Act 1972. UK Withdrawal Act 2020
  - European Convention on Human Rights → Human Rights Act 1998
  - Usually the Act of Parliament either refers to the treaty or copies it verbatim
  - BUT this system allows the UK to cherry pick which Articles of the conventions they will incorporate and which ones they will ignore



# International Law and Internal Legal Systems

Two general approaches:

- **Monism:** international law and domestic law = same legal system. International law at the top of a hierarchy.
- **Dualism:** international law and domestic law = separate legal systems. Each State has to determine how international rules are applied at the national level.

States can adopt approaches that may include a mix of the two!



# Monist Approach to International Law

Example:

## Switzerland

International instruments become part of Swiss law and are binding on state authorities when ratified. They do not require to be transposed into Swiss law to have effect in the Swiss legal order.

## Germany

General Rules of international law are seen as an integral part of German Federal Law.



# United Kingdom: Dualist Approach to International Law

## Parliament is Sovereign

**Parliament has to apply international law domestically in order to have any domestic effect.**

A treaty ratified by the Government does not alter the laws of the UK **unless and until it is incorporated into national law by legislation.**

International law **still applies to the UK on the international level.** The UK is still bound by obligations because it has accepted them.

**Customary international law and UK courts:** one of the sources of common law, accepted by the courts



# Modern Sources of UK Common Law

## Transnational law

- Public international law and treaties
- Three basic types of EU legislation<sup>1</sup>:
  - Regulations
  - Directives
  - Decisions

## Conflicts between English law and EU law

## EU Treaty free movement principle

<sup>1</sup> [http://ec.europa.eu/legislation/index\\_en.htm](http://ec.europa.eu/legislation/index_en.htm)



# Dualism





## Lord Kerr in *R (S G) v Secretary of State for Work and Pensions (2015)*

“Two dominant principles have traditionally restricted the use of international treaties in British domestic law. The first is that domestic courts have no jurisdiction to construe or apply treaties which have not been incorporated into national law; that they are effectively non-justiciable. The second is that such treaties, unless incorporated into domestic law, are not part of that law and therefore cannot be given direct effect to create rights and obligations under national or municipal law”.



## European Communities Act 1972

- Act that brought the UK into the European Economic Community (EEC) European Atomic Energy Community (Euratom), and the European Coal and Steel Community (ECSC)
- It gave EU law supremacy over UK national law
- It gave legal authority for EU law to have effect as national law in the UK
- In case of doubt, the Act required UK courts to refer judgment to the European Court of Justice.
- Courts were obliged to strike down legislation which is inconsistent with EU law.
- 1993: European Community
- 2009: European Union

Attention! **This Act is repealed by the EU Withdrawal Act 2018!**



European  
Economic  
Community



European Law  
was introduced  
into domestic  
legislation



UK was subject  
to EU law



## European Communities Act 1972 2(1)

### General implementation of Treaties

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly ; and the expression " enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.



## Human Rights law –

### European Convention Human Rights (1950)(ECHR) and European Court of Human Rights (ECtHR)

- ❑ Human Rights Law (Impact on English Legal System)
- ❑ 1948-2000 Judges applied human rights law as it was interpreted by English courts. Parties could appeal to European Court of Human Rights (ECR - Strasbourg)
- ❑ 2000-present – Human Rights Act 1998. Courts must take account of ECR rulings in deciding claims under ECHR. Parties can still appeal to Strasbourg, sec 2 H
- ❑ British government in 2016 proposed to amend Human Rights Act so that British judges are not required to take account of ECHR rulings and instead to apply English common law principles





# Dualist approach and the role of Parliament

**Miller v Secretary of State for Exiting the European Union**, 2017

Overview of the Case:

About constitutional requirements for the UK to give notice of its intention to withdraw from the EU pursuant to Article 50 of the Treaty on European Union.

**Article 50:** voluntary and unilateral withdrawal of a country from the European Union (EU).

- An EU country wishing to withdraw must notify the European Council of its intention to do so.
- The European Council is then required to provide guidelines for the conclusion of an agreement setting out the arrangements for that country's withdrawal.



## Overview of the case

“In December 2015, the UK Parliament passed the European Union Referendum Act, and the ensuing referendum on 23 June 2016 produced a majority in favour of leaving the European Union. UK government ministers (whom we will call “ministers” or “the UK government”) thereafter announced that they would bring UK membership of the European Union to an end. The question before this Court concerns the steps which are required as a matter of UK domestic law before the process of leaving the European Union can be initiated. The particular issue is whether a formal notice of withdrawal can lawfully be given by ministers without prior legislation passed in both Houses of Parliament and assented to by HM The Queen”.

Main issue: the ability of ministers to bring about changes in domestic law by exercising their powers at the international level



## The High Court Judgment

- \* 3 November 2016: the High Court, without parliamentary consent, the UK government did not have the authority to trigger article 50 of the Treaty on European Union.
- The UK government appealed the decision
- On 24 January 2017 the UK Supreme Court upheld the decision of the High Court.

landmark case: for the parameters of the UK government to act without  
**Parliamentary consent**

Importance to have a clear strategy for the negotiations and to obtain  
parliamentary consent



# Judgement

**Miller v Secretary of State for Exiting the European Union**, 2017

UK Supreme Court

“International law and domestic law operate in independent spheres [...] treaties between sovereign states have effect in international law and are not governed by the domestic law of any state”.

“the dualist system is a necessary corollary of Parliamentary sovereignty”



# Judgement

## Miller v Secretary of State for Exiting the European Union, 2017

About the European Communities Act 1972

“EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes. This may sound rather dry or technical to many people, but in constitutional terms the effect of the 1972 Act was unprecedented [...]. Of course, consistently with the principle of Parliamentary sovereignty, this unprecedented state of affairs will only last so long as Parliament wishes: the 1972 Act can be repealed like any other statute. For that reason, we would not accept that the so-called fundamental rule of recognition (i.e. the fundamental rule by reference to which all other rules are validated) underlying UK laws has been varied by the 1972 Act or would be varied by its repeal”.

“EU law enjoys its automatic and overriding effect only by virtue of the 1972 Act, and thus only while it remains in force. That point simply reflects the fact that Parliament was and remains sovereign”.



# The Relationship between International and National Law

- UK
  - The executive may conclude treaties which do not involve changes in domestic law – for example, Treaties of Friendship or Investment Promotion and Protection Agreements.

*„A treaty is a contract between the governments of two or more sovereign States. International law regulates the relations between sovereign States and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty’s Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into or alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.“*

JH Rayner v. Department of Trade and Industry (1988)



# Customary International Law and National Law

Acceptance of customary international law as an integral part of national law

- Customary international law was incorporated into English law so that when its rules changed, English law also changed.

Lord Denning said: *"International law does change, and the courts have applied the changes without the aid of any Act of Parliament. Thus, when the rules of international law were changed (by the force of public opinion) so as to condemn slavery, the English courts were justified in applying the modern rules of international law..."*

**Trendtex Trading Corporation Ltd v. Central Bank of Nigeria (1977)**



# Treaty and Inconsistent National Law

- Aim: to avoid conflict between national rules and international obligations.
- The approach of English courts was set out by Lord Denning in *Saloman v Commissioners of Customs and Excise (1967)*, where he said of a treaty which could not directly be relied on but which formed part of the background to the statutory provisions in issue:

“I think we are entitled to look at it because it is an instrument which is binding in international law and we ought always to interpret our statutes so as to be in conformity with international law.”



# Treaty and National Constitutional Norms

- The French and German Constitutions were each amended to ensure the compatibility of the **Treaty on European Union** signed at Maastricht and succeeding EU Treaties with the national constitutional order.
- By the **European Communities Act 1972** the UK also amended its constitution in order to accept features of the European Community's legal order – in particular direct applicability and direct effect – which were inconsistent with its own general approach to the implementation of international obligations.
- **European Union (Withdrawal) Bill** provides that *'the principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made after exit day.'*



# International Law and National Courts

- Principle of ‘**judicial restraint**’
  - Sometimes, where a question of international law is central to the claim, US or UK courts have held that they are in effect not competent to answer it.
  - In ***Pinochet*** cases Lord Lloyd said assumption of jurisdiction would imperil relations between governments and that:

*”We would be entering a field in which we are simply not competent to adjudicate. We apply customary international law as part of the common law, and we give effect to our international obligations so far as they are incorporated in our statute law; but we are not an international court.”*



# US Constitution

## Article II, Section 2 of the US Constitution (1787)

- The President “shall have Power, by and with Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . .”

### Advice and Consent clause

- Senate can reject or delay approval of treaties
- **Article VI, Section 2** provides that:
- “This constitution, and the laws of the United states which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

International law (1787) accepted as part of State and Federal law. No need for incorporation



## US Law and International Law

- International law subject to the US Constitution
- It can be repealed by later US law (Congress enacting a statute that departs from international law).
- US statutes are ‘construed’ so as not to violate US obligations under international law. See *Al Bihani v. Obama*, (2010) – international laws of war do not constrain US constitutional power to declare and wage war.
- US courts may interpret and enforce international law, including international agreements
- Federal courts can review State laws on grounds of inconsistency with international law



## US Law and International Law

- US Courts are bound to give effect to international law and international agreements, except that 'non-self-executing' agreements will not be given effect as law in absence of necessary implementing legislation.
- Article 36 of Vienna Convention on Consular Relations was self-executing treaty
- 'Procedural default rule' – a procedural rule violation which was not raised by defendant's lawyers at the State court level could not be argued at the federal court level.
- US Supreme Court ruled in *Medellin v Texas* that ICJ rulings do not constitute enforceable US federal law and that the President had no authority to alter this position so as to overrule the 'procedural default rule'.
- Texas executed Medellin in knowledge that it represented a violation of the US obligation under article 36 Vienna Convention.



## US Law and International Law

- International Covenant on Civil and Political rights ratified by Senate in 1992
- US government attached notice that articles 1-27 were 'non-self-executing'
- No implementing legislation passed by Congress.
- US Senate now states in giving 'advice and consent' which provisions are 'self-executing'.
- Where international agreement is given effect in US law, it is the implementing legislation, not the agreement, that is interpreted by the courts.
- Great weight given to US obligations under international law to *amicus curiae* briefs by US government (DOJ or Legal Counsel)
- Some states have adopted 'Save our states' legislation



## International Law and its practice

- 1) Close involvement in the treaty-making process of lawyers with knowledge both of their own legal systems and of international law;
- 2) Close attention to questions of national implementation during the treaty-making process and before ratification;
- 3) Detailed parliamentary scrutiny of important treaties before national ratification;
- 4) Teaching of international law as a compulsory element of a law degree and of professional training; and
- 5) Involvement of specialist international lawyers as counsel and as *amici curiae* whenever difficult questions of international law arise in national courts.