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Principles of international law: a brief guide

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Summary

This paper will provide a brief overview of principles of international law, including how it works, its sources, and what happens when states breach their international obligations. International legal obligations come from a number of different sources, including treaties, international customary law, general principles of law and United Nations resolutions. Individual states take different approaches to their international obligations. Some treat international law as part of their domestic law. Others (including the UK) see international law as separate to domestic law, and require domestic legislation to implement international obligations.

The 1969 Vienna Convention on the Law of Treaties (VCLT) sets out the rules relating to the formation, termination, conclusion, interpretation, and validity of treaties. Most treaties provide their own consequences and dispute settlement procedures for a breach of the rules they set out. There are many examples in international affairs of disputes going unresolved, or allegations of breaches of international law that are never formally adjudicated and decided upon. Some examples are provided in this paper. The paper is not intended to be exhaustive in nature, and there are many institutions and legal systems not covered here.

1. International Law

International law, in general, sets out the rules that apply to the relationships between states. It also sets out rules on many issues that states have agreed are of international importance. International law covers a lot of things. These are just a few examples:

- Human Rights
- International peace and security
- International trade
- International Crimes (Genocide, Crimes Against Humanity, War Crimes)
- The Law of War (also known as International Humanitarian Law)
- Diplomatic relations
- Extradition
- Investment treaties
- Economic development
- Climate change
- International dispute settlement
- International monetary affairs
- Double Taxation Treaties

2. Sources of International Law

International legal obligations come from a number of different sources, as set out below.

Box 1: Sources of International Law / International Obligations

Source	What is it?	Examples
Treaties (aka conventions, charters, covenants, pacts, protocols, and agreements)	Written agreements between States and/or international organisations.	UN Charter EU Treaties Bilateral Investment Treaties
Customary international law	Unwritten source of international law, based on customary practices and an accepted belief that the practice is binding.	The principle of non-intervention. Law of State Responsibility (consequences of wrongful acts, and rights of redress).
General principles of law	General principles of law derived from common legal practices of nations	Legal personality of corporations – widely accepted in national legal systems.
Jus Cogens (Peremptory Norms)	A status of rules which means they cannot be derogated from. Any treaty incompatible with a *jus cogens* rule could be void.	The prohibition of the threat or use of force (also a treaty rule, Article 2(4) of the UN Charter, and a customary rule). Prohibition of Genocide.
United Nations Security Council Resolutions	Decisions of the UN Security Council, adopted in binding Resolutions. Note: The Security Council has also established International Criminal Tribunals, such as the International Criminal Tribunal for the (Former) Yugoslavia (ICTY).	UNSC Res 1718 (2006) On the mandatory sanctions and arms embargo against North Korea.

3. International Law and Internal Legal Systems

How international law applies **within** a state, depends on how that state approaches international obligations. There are two general approaches:

- **Monism** – which sees international law and domestic law as **the same legal system**, with international law at the top of a hierarchy.
- **Dualism** – which sees international law and domestic law as **separate legal systems**. It is for each state to determine how international rules are applied at the national level.

In reality, **states adopt approaches that may include a mix of the two,** so it depends on a case-by-case basis how states apply international law domestically.

Box 2: Approaches to International Law by States – Comparing the United Kingdom and Germany

United Kingdom	Germany
Dualist Approach to International Law	General Rules of international law are seen as an integral part of German Federal Law.
Parliament is Sovereign International law has to be applied by Parliament domestically for it to have any domestic effect.	These international rules take precedence over national laws and directly create rights and duties domestically.
International law **still applies to the UK on the international level** – it is still bound by obligations it has accepted on the international level.	Treaties can have the same effect as legislation when ratified, but only take precedence over laws adopted **prior** to the ratification of a treaty.
NOTE: **Customary international law** has been accepted by UK courts as being one of the sources of the common law – the unwritten law recognised by courts.	Certain treaties **require legislation** before they can have domestic effect.

3.1 International law and parliamentary sovereignty in the UK

In the UK, provisions of an international treaty can only have effect in domestic law if they are written into or incorporated by domestic legislation. Therefore, provisions of treaties that are not made part of UK law (i.e. have not been incorporated) are not usually

recognised by UK courts.[1] This reflects the UK's dualist approach to international law. This has been confirmed in many domestic cases, including the recent *Miller* case.[2]

The position was summarised by Lord Kerr in *R (S G) v Secretary of State for Work and Pensions*:

> 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. [3]

In terms of the common law, Lord Sumption *Belhaj v Straw*[4] addressed previous judicial views that "international law is not part of, but is one of the sources of the common law", when he suggested that:

> international law may none the less affect the interpretation of ambiguous statutory provisions, guide the exercise of judicial or executive discretions and influence the development of the common law. Although the courts are not bound, even in these contexts, to take account of international law, they are entitled to do so if it is appropriate and relevant.[5]

Recent commentary on the UK Internal Market Bill reiterated the fact that Parliament in the UK is sovereign, and can in theory make or unmake any law it wishes, even if the proposed laws would violate international law.[6] This is also the official position of the UK Government, as outlined by the Attorney General in response to the same Bill.[7] This is true for the domestic effect of such an Act of Parliament. But in *international law*, the UK's internal principle of parliamentary sovereignty has no bearing on the *international* legal effect of the UK's international obligations. This is because no rule of a state's internal law can be used to justify a breach of an international obligation according to Article 27 of the Vienna Convention on the Law of Treaties.[8]

Furthermore, in the recent *Miller* case, the Supreme Court discussed the dualist approach to international law and the role of parliamentary sovereignty, stating:

> … international law and domestic law operate in independent spheres. … [T]reaties between sovereign states have effect in international law and are not governed by the domestic law of any state.

So, Parliament can in theory make any law it wishes *domestically*, and the legal effect of its domestic law remains unchanged. But if this breaches an international obligation, it might be lawful in domestic law, but it would remain unlawful in international law.

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[1] See, for example, Anthony Aust, *Modern Treaty Law and Practice*, 3rd edition, pp 168-171

[2] *Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[3] *R (S G) v Secretary of State for Work and Pensions* [2015] UKSC 16, at [235].

[4] Belhaj v Straw [2017] UKSC 3.

[5] Lord Sumption in Belhaj v Straw [2017] UKSC 3, at [252].

[6] John Finnis QC and John Larkin QC, "Introducing the Internal Market Bill isn't unconstitutional", *The Spectator,* 10 September 2020; see also, Martin Howe, "Forget the foaming indignation, this Brexit bill is perfectly justifiable", *The Telegraph,* 10 September 2020.

[7] Letter Dated 10 September 2019 from the Attorney General to Simon Hoare MP, Chair, Northern Ireland Affairs Committee, Annex.

[8] The international law of State Responsibility for Wrongful Acts also provides that the internal law of a State cannot be relied upon to justify a wrongful act in international law.

4. Disputes and Breaches of International Law

4.1 Specific Measures & Dispute Mechanisms

Most treaties provide their own consequences and dispute settlement procedures for a breach of the rules they set out. There are some notable regimes in international law that demonstrate how these may work:

Box 3: Examples of Specific Measures and Dispute Mechanisms

Organisation / Treaty Regime	Mechanism	Parties Involved
International Court of Justice	Contentious cases between States parties to the Statute. Advisory Opinions brought by competent United Nations bodies.	States United Nations Organs
United Nations – International Peace and Security	Any threat to peace, breach of the peace, or act of aggression is determined by the UN Security Council. Disputes can be resolved through a range of peaceful measures. Or, where necessary, the UN Security Council can authorise the use of military force, or a range of other coercive measures, to maintain or restore peace.	UN Member States
European Union	Robust system of enforcement, including requiring that EU rules have direct effect in Member States to be enforced by domestic courts. Disputes also overseen by the Court of Justice of the European Union. The EU also has the power to impose financial penalties for failing to adhere to its obligations under the Treaty regime (see Article 260, Treaty on the Functioning of the European Union).	Member States EU Bodies Individuals
World Trade Organisation	The WTO's dispute settlement body can establish Panels to hear disputes, and an appellate body to hear appeals from these Panels. Also offers: • Good Offices • Conciliation • Mediation	WTO Members
European Convention on Human Rights	The European Court of Human Rights can hear cases directly from complainants against States, or through an inter-State dispute process. In the UK, the ECHR is given domestic effect through the Human Rights Act 1998.	States Individuals
Bilateral Investment Treaties	Determined by the treaty. Most allow disputes to be taken to the International	States Individuals

	Centre for the Settlement of Investment Disputes for arbitration.	Private Organisations / Companies
International Criminal Court	Criminal trials for serious breaches of International Criminal Law, usually focused on the leaders of groups who have committed these crimes.	Individuals

The European Union is a notable example of an international legal mechanism having far-ranging mechanisms for resolving breaches of the relevant treaties and laws. EU Member States consent to have EU law directly apply within their state, subject to some procedural rules. The relationship between EU law and international law is outlined below in Section 4.5.

Most other international agreements are governed in international law, the disputes or consequences of breaching them are also usually decided on by international institutions or arbitration.

4.2 General Legal Consequences in Customary International Law

Under the law of State Responsibility, the general rights and duties of states when it comes to breaches of international obligations have developed according to state practice. These rules are set out by the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, which were adopted by the UN General Assembly.[9] Consequences for an internationally wrongful act (a breach of an international obligation) include:

- An obligation to cease the act;
- An obligation to offer guarantees of non-repetition, if appropriate;
- The following remedies, where appropriate in each situation:
  - **Restitution:** to re-establish the situation that existed before the breach, so long as this is not impossible or disproportionate;
  - **Compensation:** to pay compensation for financially assessable damage;
  - **Satisfaction:** an acknowledgement of the breach, an apology, or another appropriate alternative to the satisfaction of the victim state or party.
- **Countermeasures**: a legal right of the victim state or party to take action that may normally be illegal in order to induce the wrongdoing state to adhere to its obligations. This usually includes the use of sanctions, but comes with a number of **safeguards** to prevent the abuse of this avenue, including:
  - Countermeasures cannot breach important obligations, such as human rights or the prohibition of force;
  - Their use must be **proportionate;**
  - Procedural safeguards, such as notifying the target state, and giving an opportunity to make good on their breach; and
  - terminating countermeasures when the purpose is fulfilled

[9] UNGA Res 56/83, Responsibility of States for Internationally Wrongful Acts (28 January 2002) UN Doc A/RES/56/83, Annex.

There are, however, some situations where a breach of an obligation will not be considered 'wrongful':

- Where the potential victim has consented to the act (but not for important *jus cogens* obligations, see above);
- Where there is an unforeseen event making it materially impossible to fulfil the obligation;
- in situations of extreme distress, and there are no other means available to an official to save their life or the life of others entrusted to them;
- in cases of necessity, but this is interpreted narrowly; and,
- where the breach is a lawful act of self-defence under the United Nations Charter.

4.3 Legal Protections under Treaty Law

The 1969 Vienna Convention on the Law of Treaties (VCLT) sets out the rules relating to the formation, termination, conclusion, interpretation, and validity of treaties. **The convention is also recognised as part of customary international law, so it applies even to states who did not adopt it originally.**

Under the VCLT, a nation may only get out of a treaty in the following circumstances:

- Where **a treaty provision allows it,** or by **mutual consent with the other parties;**
- Where there is an **intended or implied right** to unilateral termination;
- **Where the object and purposes of the treaty have been fulfilled,** or it is clear from its provisions that it is limited in time and the required period has ended;
- **Where there has been a 'material breach' by the other party** of an important provision;
- **Where the agreement cannot be carried out because of the "permanent disappearance or destruction of an object indispensable for the execution of the treaty";**
- **A fundamental change of circumstances**: But this is narrowly interpreted and requires:
  - the existence of those circumstances must have constituted an **essential basis** of the consent of the parties to be bound by the treaty;
  - the change must have been **unforeseen** by the parties; and
  - the effect of the change must be to **transform radically the extent of obligations still to be performed** under the treaty.

4.4 Unresolved Disputes

There are many examples in international affairs of disputes going unresolved, or allegations of breaches of international law that are never formally adjudicated and decided upon. Further still, there are also cases where a court or panel has decided on such issues, but that judgment has not been complied with or enforced.

Examples:

The situation between Russia and Ukraine

Following Russia's annexation of Crimea in 2014, many states have imposed sanctions on Russia as they regard Russia's actions as 'aggression' or an 'illegal use of force'. Because Russia is one of the

Permanent Five Members of the UN Security Council – the body with primary responsibility for maintaining international peace and security – it has the power to veto any robust action the Council considers. There is a case pending at the International Court of Justice, on specific allegations of treaty violations stemming from , but the allegation of 'aggression' will not form part of the case.

For more on the wider conflict in eastern Ukraine see Library Briefing Paper: Eastern Ukraine – dashed hopes?, 25 June 2020.

Israeli settlements

Israel's continuing use of settlements in the Occupied Palestinian Territory, has repeatedly been condemned internationally as a violation of international law, including in an Advisory Opinion of the International Court of Justice declaring that the building of a dividing wall in occupied territory was a violation of international law. Several Resolutions of the United Nations Security Council also recognise the illegality of Israel's activities in UN Security Council Resolutions 446 (1979), 452 (1979) and 465 (1980). Most resolutions addressing the situation have been blocked by the United States using its veto in the Council, but when the US has abstained, the Council has deemed the settlements as having "no legal validity and constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution."[10] Despite this, the settlements continue to be built, with Israel arguing that they are legal under its national law.

For further discussion see Library Briefing Paper: Recent developments in the Occupied Palestinian Territories, 20 March 2017, Section 5.

International Court of Justice Advisory Opinion on the Chagos Islands

Between 1968 and 1973 the British Government cleared the entire Chagos Archipelago of its inhabitants in anticipation of a US military base on the biggest island, Diego Garcia. The Archipelago was made a colony, the British Indian Ocean Territory (BIOT). It subsequently became a British Overseas Territory. In 1965 the UK undertook that it will cede sovereignty to Mauritius once the BIOT is no longer required for defence purposes.

In June 2017, the UN General Assembly referred a legal question on the situation to the International Court of Justice to obtain an Advisory Opinion. Advisory Opinions are not legally binding but can be a good indicator of the legal status of a situation in international law. The ICJ found that the "process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago". It went on to assert that the UK is therefore "under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible."

The UK Government rejected the Advisory Opinion but said it was open to further bilateral talks with Mauritius. On 22 May 2019, the UN General Assembly passed a resolution by 116-6 (with 56 abstentions) which endorsed the Opinion and called on the UK to end its administration of the BIOT within six months. The UK Government did not accept this resolution. The six-month deadline passed on 22 November.

For more details, see Library Briefing Paper Disputes over the British Indian Ocean Territory: December 2019 update, 17 December 2019.

South China Sea

The South China Sea is home to a over 30,000 small islands that are disputed between states in the region. However, the most significant development is the building by China of artificial islands in locations of strategic importance – but also in locations where the territory is disputed. China has already been subject to a ruling of Arbitration proceedings brought by the Philippines, the jurisdiction of which China challenged. Despite this ruling against China, tensions in the region continue as China challenges any state that approaches the islands.

For more details see Library Briefing Paper, The South China Sea dispute: July 2016 update, 12 July 2016, and The South and East China Sea disputes: recent developments, 7 November 2018.

[10] See UN Security Council Resolution 2334 (2016), para 1.

Decisions against the EU and US at the WTO

The United States brought action against the European Union at the World Trade Organisation regarding subsidies that Member States provide to aircraft manufacturers. These subsidies were found to breach WTO rules, and a delay in implementing the decision of the Panel by the EU meant that the US was authorised to take countermeasures against the EU for failing to comply with the original Panel's decision.

In July 2020, the EU announced that Member States had taken action to comply with the WTO ruling and called for US countermeasures to be lifted.

The US was also found in breach of WTO rules for measures supporting competitor manufacturers in the US. The EU was also seeking to impose countermeasures against the US for failing to comply with this decision.

These particular examples highlight how, particularly at the WTO, delays in complying with Panel rulings can lead to retaliatory measures being permitted by the WTO against a Member. These measures are designed to be a last resort, but a legal method of enforcing compliance with WTO agreements in bilateral disputes.

It should be noted that appeals at the WTO are currently in a state of crisis, after the United States blocked the appointment of new members to the appellate body required to keep the WTO able to hear appeals. In response, some states and the EU have agreed an interim arbitration appeal process to essentially replace the appellate body until the crisis is resolved.

Because some international dispute settlement mechanisms rely on the consent of states to participate and be bound by the relevant rulings, some states may decide to withdraw from those mechanisms in order to avoid international rulings against them.

While complainant states may still have remedies available to them under the general law of State Responsibility, it may be difficult for them to enforce alone or unilaterally, especially if they are a smaller state.

4.5 The European Union and International Law

The European Union, an international organisation created by international law through its founding Treaties, is also bound by international legal obligations including any Treaties or Agreements in which the Union enters into, or any general obligation in international law to which international organisations such as the EU may be bound. The Vienna Convention on the Law of Treaties technically applies to treaties between states. However, large parts of the VCLT reflect customary international law on treaties, which means that the EU would also be bound by these principles.

There is also a 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which the UK has ratified but the EU has not, but that Convention is not yet in force.

The EU treaties have created an 'internal' legal system for the EU, akin to an internal domestic legal system. The EU courts have therefore recognised that the Courts do not necessarily apply international law directly, but they have taken such principles into account, such as in the Wightman judgment on 10 December 2018 where the Court of Justice of the EU (CJEU) confirmed that the VCLT could be taken into account for the international law on treaties.

There have, on occasion, been conflicts between the international obligations within the EU system, and the international obligations of the Member States outside of the EU.

For example, in the *Kadi* series of cases before EU courts,[11] obligations imposed on Member States by the United Nations Security Council to adopt sanctions against *Kadi* came into conflict with fundamental rights within the EU's legal system. The CJEU decided that it was up to the EU and the Member States as to *how* the UN resolutions were implemented, and therefore gave precedence to the EU's principles and fundamental rights.

This meant that the EU's internal rules were to be applied by the EU courts – the EU courts do not have the powers or competence to apply the UN Charter over the EU's own rules. This may be seen as the EU taking a dualist approach to international law, just as the UK does.[12] Indeed, it is also worth noting that an earlier judgement in the UK Supreme Court also disapplied UN sanctions domestically in favour of domestic rights.[13]

While this, technically, may have meant the Member States of the EU were in breach of their obligations under the UN Charter, there are a number of more nuanced points discussed by the European Court:

- The Court stressed that Member States were still able to abide by their obligations under the UN Charter, so long as the sanctions were adopted in accordance with the fundamental rights in EU law.
- The Court also suggested that the incompatibility between the obligations could be resolved if the UN adopted greater safeguards in its sanctions regime for protecting the fundamental rights of those subject to them.
- In this regard, the Court indicated that it would give deference to the United Nations should a robust procedure be adopted at the Security Council to enable compatibility with fundamental rights.[14]

Some commentators argue that the UN sanctions were also in violation of the same fundamental rights in *international law*, and so were open to challenge or even lawful countermeasures by domestic or regional actors.[15]

These conflicts between obligations in international law between different institutions and legal systems raise important technical questions about the legal relationships between these institutions. While the United Nations is often seen as the central hub of the international community, there is no formal hierarchy for international institutions and legal regimes, and the relationships between international organisations and states are still relatively unanswered issues of international law. Therefore, specialist regimes such as the European Union provide a useful starting point in examining these relationships and, in rare cases, conflicts of international law.

[11] See, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others v Yassin Abdullah Kadi* [2013] ECR I-0000 (*Kadi II*); and, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECJ I-6351 (*Kadi I*).

[12] See further, for example, Juliane Kokott and Christoph Sobotta, "The *Kadi* Case – Constitutional Core Values and International Law – Finding the Balance?", (2012) 23(4) *European Journal of International Law* 1015.

[13] *Her Majesty's Treasury v Mohammed Jabar Ahmed and Others* (FC) [2010] UKSC 2.

[14] See, Antonios Tzanakopoulos, "*Kadi* Showdown: Substantive Review of (UN) Sanctions by the ECJ", *EJIL: Talk!*, 19 July 2013.

[15] Antonios Tzanakopoulos, "Kadi II: The 1267 Sanctions Regime (Back) Before the General Court of the EU", *EJIL: Talk!*, 16 November 2010.

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