



KFG Working Paper Series • No. 30 • April 2019

---

Campbell McLachlan

**The double-facing Foreign Relations Function of the Executive  
and its self-enforcing Obligation to comply with International  
Law**

Berlin Potsdam Research Group „The International Rule of Law – Rise or Decline?“

A decorative graphic at the bottom of the page features three overlapping diagonal bars. The top bar is dark blue, the middle bar is light green, and the bottom bar is grey. They intersect to form a central white space.

## KFG Working Paper Series

Edited by Heike Krieger, Georg Nolte and Andreas Zimmermann

All KFG Working Papers are available on the KFG website at [www.kfg-intlaw.de](http://www.kfg-intlaw.de).

Copyright remains with the authors.

McLachlan, Campbell, The double-facing Foreign Relations Function of the Executive and its self-enforcing Obligation to comply with International Law, KFG Working Paper Series, No. 30, Berlin Potsdam Research Group “The International Rule of Law – Rise or Decline?”, Berlin, April 2019.

ISSN 2509-3770 (Internet)

ISSN 2509-3762 (Print)

This publication has been funded by the German Research Foundation (DFG)

Product of Humboldt-Universität zu Berlin  
Commercial use is not permitted



Berlin Potsdam Research Group  
International Law – Rise or Decline?

Unter den Linden 9  
10099 Berlin, Germany

[info@kfg-intlaw.de](mailto:info@kfg-intlaw.de)  
+49 (0)30 2093-3322  
[www.kfg-intlaw.de](http://www.kfg-intlaw.de)

**DFG** Deutsche  
Forschungsgemeinschaft

## The double-facing Foreign Relations Function of the Executive and its self-enforcing Obligation to comply with International Law

Campbell McLachlan\*

### Abstract:

*How does the international Rule of Law apply to constrain the conduct of the Executive within a constitutional State that adopts a dualist approach to the reception of international law? This paper argues that, so far from being inconsistent with the concept of the Rule of Law, the Executive within a dualist constitution has a self-enforcing obligation to abide by the obligations of the State under international law. This is not dependent on Parliament's incorporation of treaty obligations into domestic law. It is the correlative consequence of the allocation to the Executive of the power to conduct foreign relations. The paper develops this argument in response to recent debate in the United Kingdom on whether Ministers have an obligation to comply with international law—a reference that the Government removed from the Ministerial Code. It shows that such an obligation is consistent with both four centuries of the practice of the British State and with principle.*

---

\* QC; Professor of Law, Victoria University of Wellington; *Associé, Institut de Droit International*; Senior Research Fellow, KFG 'International Rule of Law: Rise or Decline?' Berlin 2019. The author thanks Helmut Aust, Sir Franklin Berman, Jacco Bomhoff, Eirik Bjorge, David Dyzenhaus, Julian Kulaga, Felix Lange and Rayner Thwaites for their invaluable comments on an earlier draft. Any errors are the author's sole responsibility. This paper will be published as a chapter in: Dyzenhaus, Bomhoff & Poole (eds), *The Double-facing Constitution: Legal Externalities and the Reshaping of the Constitutional Order* (Cambridge UP, 2019, pub. forthcoming).

**Contents:**

- 1. Introduction .....5
- 2. International law in the Ministerial Code .....7
  - a) Development of the Code .....7
  - b) The amendment .....8
  - c) The judicial review proceedings .....9
  - d) The arguments advanced in support of the amendment.....10
- 3. British state practice .....13
  - a) Advice of the Law Officers of the Crown on international law .....13
  - b) Determinacy of international law .....14
  - c) Constitutional significance of international legality.....15
  - d) Exceptional cases.....16
  - e) Accountability to Parliament..... 20
- 4. The obligation in constitutional principle .....22
  - a) Executive compliance with international law in a dualist State.....22
  - b) The executive foreign affairs power and Parliamentary sovereignty .....27
  - c) The Rule of Law and compliance with international obligations .....29
- 5. Conclusion.....33

## 1. Introduction

It has been conventional wisdom that the United Kingdom ‘takes a fundamentally dualist view of international law. In other words, it sees domestic and international law as operating on different planes.’<sup>1</sup> Yet recent events have shone a searchlight onto a neglected question that is central to an understanding of the operation of the ‘double-facing Constitution’ in a dualist state. The Constitution grants sovereign law-making power within the State to Parliament and at the same time allocates the conduct of foreign relations to the Executive. In that context: to what extent and, if so why, is the Executive bound to comply with international law obligations that it has contracted on behalf of the State, but which have not been directly incorporated into domestic law?

This question was exposed directly in the controversy sparked in 2015 by a revision to the Ministerial Code that omitted from its statement of Ministers’ duty to comply with the law the express reference that this includes ‘international law and treaty obligations.’ The amendment provoked public debate and litigation, eventually resulting in a decision of the Court of Appeal in 2018.<sup>2</sup> The impact of international law on the deliberative process of Government has also been exposed to view to an unprecedented extent in that long post-mortem into the 2003 invasion of Iraq, the *Chilcot Inquiry*, which finally reported in 2016.<sup>3</sup> It continues to be controversial. In 2018, Parliament insisted that the Attorney General produce his full legal advice to Ministers on the proposed arrangements regarding Northern Ireland in the draft Withdrawal Agreement for exiting the European Union. The advice was produced but only after Parliament had found Ministers in contempt for their failure to do so.<sup>4</sup>

The central argument advanced here is simply this: the Executive’s prerogative power under the Constitution to conduct the foreign relations of the State carries with it an obligation to do so in conformity with the international law obligations of the State, whether or not such obligations are also directly incorporated into domestic law by statute. Such an obligation is a direct consequence of the application of the doctrine of the separation of powers to the foreign affairs power. It does not conflict with the sovereignty of Parliament to make law domestically.

Nor does it necessarily mean that executive decisions may be subjected to judicial scrutiny before domestic courts for their compliance with international law. Much of the scholarly and the public debate about unincorporated international law obligations has tended to conflate the nature of the duty with the extent to which it is justiciable. The latter question implicates a whole different set of considerations, precisely because it engages the role of the judiciary as a separate organ of government in the review of executive decision.

Rather, the distinctive point about the obligation upon the Executive to comply with the international law obligations of the state is that it is, to a large degree, self-enforcing. This does not mean that it lacks substance or real legal force. On the contrary, as with many of the most

---

<sup>1</sup> Lord Mance, ‘International law in the UK Supreme Court’ (King’s College London, 13 February 2017) available at: <https://www.supremecourt.uk/docs/speech-170213.pdf> (last accessed 21 January 2019).

<sup>2</sup> *R (Gulf Centre for Human Rights) v Prime Minister* [2018] EWCA Civ 1855.

<sup>3</sup> United Kingdom House of Commons ‘Report of the Iraq Inquiry’ (HC 264, 6 July 2016).

<sup>4</sup> *Hansard*, HC, vol 650, col 728 (4 December 2018, div 273); A-G’s letter dated 13 November 2018 available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/761852.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/761852.pdf) (last accessed 11 December 2018).

fundamental aspects of a living constitution, it is the internal recognition of the duty by the constitutional actors that matters most. In a largely unwritten constitution, however, such compliance depends upon a continuity of shared understanding as to the operation of the system and the principles that underpin it.

The debate provoked by this amendment is important because it exposed some fundamental misunderstandings about the import of the obligation upon Ministers to abide by international law and its application in a dualist state. It is incorrect to state, as some have claimed, that ‘Ministers have never been legally bound to obey unincorporated treaty obligations’ or that ‘if any such legal duty were to become part of our law it would have momentous constitutional consequences, undercutting the supremacy of Parliament over the executive and, contrary to the principle of the rule of law itself, confronting Ministers with inconsistent legal obligations.’<sup>5</sup>

These propositions are neither descriptively nor normatively correct. The duty on Ministers to abide by international law is not a recent aberration in constitutional practice. In fact, as this paper will seek to show, this is an obligation that, together with the concomitant duty of the Law Officers of the Crown to advise Ministers on international law, has at least four centuries of state practice behind it. It is fully coherent with the allocation of functions within the constitution and with the primacy of Parliamentary sovereignty, which the concept of dualism seeks to protect. Indeed the dualist approach is justifiable precisely because the Executive’s foreign affairs function within such a constitution carries with it the obligation to abide by the international law obligations that the Executive contracts on behalf of the State.

In any event, by framing the issue as one concerning unincorporated treaty obligations, those that would seek to negate a Ministerial obligation to comply with international law on grounds of dualism, omit to consider that in relation to customary international law, the United Kingdom is not, and never has been, a dualist State. On the contrary, the general law of nations is part of the law of England. This, too, is a necessary consequence of the separation of powers within the constitutional compact, and not in derogation from it. It carries real consequences for the conduct of the Executive, particularly in those cases in which high foreign policy is engaged.

In order to make these points good it will be necessary to examine, as a matter of practice, the constitutional significance of the role of the Legal Advisers to the Crown when they advise Ministers on international law (Part 3). It will then be possible in Part 4 to evaluate, as a matter of principle, how this fits within a constitutional theory of the separation of powers and a dualist constitution. At the outset, however, Part 2 outlines the dispute over the amendment to the Ministerial Code in order to see what is at stake.

---

<sup>5</sup> Richard Ekins and Guglielmo Verdirame, ‘The Ministerial Code and the Rule of Law’ UK Constitutional Law Blog (6 November 2015), available at: <https://ukconstitutionallaw.org/> (last accessed 11 December 2018).

## 2. International law in the Ministerial Code

### a) Development of the Code

The Ministerial Code began its life as an informal and confidential document that was issued as guidance by the Prime Minister to Cabinet at the outset of each new Government as *Questions of Procedure for Ministers*. While it was still possible for the Nolan Committee to describe the code in 1995 as having ‘no particular constitutional status,’<sup>6</sup> the prominence accorded to the code in both the Nolan and the Scott Inquiry<sup>7</sup> and its successive reissue has confirmed its status as ‘the defining constitutional document on Prime Minister and Cabinet.’<sup>8</sup>

By the 1990’s the code had come to include a reference to Ministers’ obligation to comply with the law, including international law.<sup>9</sup> The *Ministerial Code* issued by Tony Blair in 1997 provided in the notes to paragraph 1 that:

The notes should be read against the background of the duty of Ministers to comply with the law, *including international law and treaty obligations*, and to uphold the administration of justice...<sup>10</sup>

The now retitled *Ministerial Code* is also referred to in *The Cabinet Manual* (2011) as the principal source of ‘the principles underpinning the standards of conduct expected of ministers.’<sup>11</sup>

The 2010 edition of the Code provided in paragraph 1.2:

The Ministerial Code should be read alongside the Coalition Agreement and the background of the overarching duty on Ministers to comply with the law *including international law and treaty obligations* and to uphold the administration of justice and to protect the integrity of public life.<sup>12</sup>

The 2011 *Cabinet Manual* is to like effect.<sup>13</sup>

Lord Bingham, writing extra-judicially in his book *The Rule of Law*, described this overarching duty in the Ministerial Code as ‘binding on British ministers.’<sup>14</sup>

---

<sup>6</sup> Lord Nolan, ‘Standards in public life: first report of the Committee on Standards in Public Life’ Cm 2850 (May 1995), vol 1, [9].

<sup>7</sup> Richard Scott, ‘Return to an address of the Honourable the House of Commons dated 15<sup>th</sup> February 1996 for the report of the inquiry into the export of defence equipment and dual-use goods to Iraq and related prosecutions’ HC 115 (15 February 1996).

<sup>8</sup> Peter Madgwick and Diana Woodhouse, *The Law and Politics of the Constitution* (Hertfordshire: Harvester Wheatsheaf, 1995).

<sup>9</sup> United Kingdom, House of Commons Library ‘Questions of Procedure for Ministers’ (Research Paper 96/53, 19 April 1996), 8. See also Frank Berman, ‘International law and the Ministerial Code’ *The Guardian* (25 October 2015).

<sup>10</sup> A Baker, *Prime Ministers and the Rule Book* (London: Politico’s Publishing, 2000), 152.

<sup>11</sup> United Kingdom, *The Cabinet Manual* (1<sup>st</sup> edn, 2011), [3.46].

<sup>12</sup> United Kingdom, Cabinet Office, *Ministerial Code: A Code of Ethics and Procedural Guidance for Ministers* (July 2005), [1.2], emphasis added.

<sup>13</sup> United Kingdom, Cabinet Office, *The Cabinet Manual* (1<sup>st</sup> edition, 2011), [3.46].

<sup>14</sup> Tom Bingham, *The Rule of Law* (London: Penguin Press, 2011), Chapter 10.

## **b) The amendment**

In 2015, the Government amended this paragraph to omit the reference to international law. The revised text stated:

The *Ministerial Code* should be read against the background of the overarching duty on Ministers to comply with the law and to protect the integrity of public life.<sup>15</sup>

When this amendment was published, it provoked a sharp response, including from former senior lawyers in the Civil Service. Sir Franklin Berman QC (Legal Adviser to the Foreign & Commonwealth Office 1991-9) wrote:<sup>16</sup>

It is impossible not to feel a sense of disbelief at what must have been the deliberate suppression of the reference to the international law in the new version of the ministerial code. ...

I claim part of the credit for the previous formula, dating from my time as legal adviser to the Foreign and Commonwealth Office in the 1990s. The clear intention was at the time was to avoid any reverse inferences from the earlier mention simply of “the law of the land” and to ensure that the duty to obey the law was the same for civil servants and for ministers.

Sir Paul Jenkins (Treasury Solicitor and Head of the Government Legal Service 2006-14) added:<sup>17</sup>

It is disingenuous of the Cabinet Office to dismiss the changes to the ministerial code as mere tidying up. As the government’s most senior legal official I saw at close hand from 2010 onwards the intense irritation these words caused the PM as he sought to avoid complying with our international legal obligations, for example in relation to prisoner voting. Whether the new wording alters the legal obligations of ministers or not, there can be no doubt that they will regard the change as bolstering, in a most satisfying way, their contempt for the rule of international law.

Questions were asked in Parliament about the amendment. In the House of Lords, the responsible Minister, Lord Faulks, was asked whether he would give the House a categorical assurance ‘that the amendment to the Ministerial Code will make absolutely no difference to Ministers’ existing duty to comply with international law and treaty obligations.’<sup>18</sup> He said:

My Lords, as the noble Lord will be aware, we have a dualist system rather than a monist system. Neither Parliament nor the courts are bound by international law, but a member of the Executive, including a Minister such as myself, is obliged to follow international law, whether it is reflected in the Ministerial Code or not. All Ministers will be aware of their obligations under the rule of law.

---

<sup>15</sup> United Kingdom, Cabinet Office, *Ministerial Code* (2010), [1.3]. This formulation is unchanged in the January 2018 edition.

<sup>16</sup> Frank Berman, ‘International law and the Ministerial Code’ *The Guardian* (25 October 2015).

<sup>17</sup> P Jenkins, *The Guardian* (25 October 2015).

<sup>18</sup> *Hansard*, HL, vol 765 cols 1170-1 (28 October 2015).



He added later that week:<sup>19</sup>

Our position is that all Ministers are obliged to abide by the law, including, in so far as it is ascertainable, international law in this country.

Lord Brown of Eaton-under-Heywood asked:

Am I right in supposing that this amendment is really a prelude to the introduction of a British Bill of Rights in place of the existing Human Rights Act, and is intended principally to clarify the fact that our own domestic primary legislation trumps unincorporated treaty law?

The Minister replied:

The noble and learned Lord is quite right. He points to the difference between the dualist system, which we have, and the monist system whereby unless law is incorporated in an Act of Parliament, it does not become automatically a part of the law. The question of the amendments to the Bill of Rights, when or if it comes before Parliament, is somewhat separate but he accurately states the necessary constitutional principles.

On being pressed to answer why exactly did the Government change the wording, the Minister said:

I fear that I will be repeating myself but they have changed the wording because it is a simple summary of what is plainly the position, which is that Ministers have an obligation to obey the law. The code does not change the obligation that comes from the law; it is simply a summary for Ministers.

The Cabinet Office also confirmed: ‘“Comply with the law” includes international law.’<sup>20</sup>

Yet the proposition that a change was intended was not without foundation. An important element in the Conservative Party manifesto in 2014 had been to reassert the primacy of the UK Supreme Court and Parliament by introducing a new British Bill of Rights and at the same time to curb what was seen as the excessive role of the European Court of Human Rights.<sup>21</sup> The manifesto added, for good measure:<sup>22</sup>

**We will amend the Ministerial Code to remove any ambiguity in the current rules** about the duty of Ministers to follow the will of Parliament in the UK.

### **c) The judicial review proceedings**

In a bid to clarify whether the Government did indeed intend a change in the legal position, the Gulf Centre for Human Rights launched judicial review proceedings seeking an explanation as to why the change had been made.<sup>23</sup>

<sup>19</sup> *Hansard*, HL, vol 765 cols 1523-4 (3 November 2015).

<sup>20</sup> *The Guardian* (22 October 2015), cited in HC Library Briefing Paper ‘The Ministerial Code and the Independent Adviser on Ministerial Interests’ (No 03750, 17 January 2018), [2.2], 11-12.

<sup>21</sup> UK Conservative Party, ‘Protecting human rights in the UK: the Conservatives’ proposals for changing Britain’s human rights laws.’

<sup>22</sup> *Ibid*, 7. Emphasis in original.

<sup>23</sup> *R (ex p Gulf Centre for Human Rights) v Prime Minister* [2016] EWHC 1323 (Admin).

At first instance, Mitting J rejected the application for judicial review on the grounds that the challenged wording is not part of the operative Ministerial Code. 'It is', thought the learned judge, 'simply a statement of the background against which those obligations should be read.'<sup>24</sup> Since '[t]he challenge to the decision could only be based on its lawfulness. The fact that it might be in breach of an unincorporated provision of international law and that the minister was said to be under a duty to comply with international law would not avail the claimant.'<sup>25</sup>

The claimant appealed against Mitting J's refusal to grant permission for judicial review.<sup>26</sup> Arden LJ granted conditional leave only on the question whether there was a change of substance in the two versions of the Code.<sup>27</sup> The Lord Chief Justice, the Master of the Rolls and Hamblen J heard the appeal. The Court held that no change of substance was made. The overarching duty referred to in the Code was not imposed by it. Rather the Code referenced existing duties outside the Code. The Court held that:<sup>28</sup>

[T]he reference to 'international law and treaty obligations' in the 2010 Code is subsumed within the stated duty 'to comply with the law.' That duty includes those obligations. Whatever the precise meaning of the reference to those obligations, they are not independent obligations but simply part of the 'overarching' duty of compliance with the law.

The Government had confirmed this to Parliament in 2015 and again to the Court.<sup>29</sup> In light of these conclusions, the appeal was dismissed.

#### **d) The arguments advanced in support of the amendment**

Was this, then, nothing more than a peculiarly British storm in a teacup? One might gain that impression from reading the judgments. But the debate in Court was framed, as it had to be, in terms of the scope of judicial review. The outcome of those proceedings (and the earlier Ministerial statements to Parliament) may have usefully confirmed that no change in Ministers' obligations was intended. But the decision of the Court of Appeal neatly side stepped the more fundamental question of exactly what those obligations are, when they arise by virtue of treaties that have not been incorporated into domestic law. The statement that Ministers must obey 'the law,' while compendious, does little to illuminate the source and nature of the obligation to obey international law.

It is at this point that the obligation as originally formulated faced three more fundamental challenges: the first alleging that the concept of the Rule of Law itself is really a concept that is only applicable to the internal operation of the domestic legal system of a State; the second based on alleged incompatibility with the two bedrock principles of the Constitution: Parliamentary sovereignty and the Rule of Law; and the third derived from the separation between the international and the domestic legal spheres. In each case, these arguments proceed from the

---

<sup>24</sup> *Ibid*, [8].

<sup>25</sup> *Ibid*, [9].

<sup>26</sup> *R (ex p Gulf Centre for Human Rights) v Prime Minister* [2018] EWCA Civ 1855.

<sup>27</sup> *Ibid*, [13].

<sup>28</sup> *Ibid*, [20].

<sup>29</sup> *Ibid*, [19]-[24].

same point of departure: that Ministers may be placed in a position of conflicting obligations arising respectively from domestic and international law, which has to be resolved in favour of one source of law or the other.<sup>30</sup> It is necessary to examine precisely the way in which each of these arguments was advanced before considering their tenability.

The first proposition is that we cannot understand the concept of the Rule of Law as applying to international law, which is ‘like it or not, a defective example of law,’ such that ‘[i]f we can speak of the Rule of Law in the international domain...it is only a Rule by imperfect analogy with the law of the land.’<sup>31</sup> Rather, it is claimed that the concept of the Rule of Law is ‘intimately connected to the institution of the state’<sup>32</sup> Its application to the international sphere is questionable, and would require substantial qualification.

The second proposition is that: ‘When international law conflicts with domestic law, the constitutional principle of the rule of law requires British courts and ministers—and other legal subjects—to follow British law.’<sup>33</sup> Finnis goes further and claims that the idea of a legal obligation upon Ministers to abide by international law challenges ‘that most fundamental principle of our constitutional law, and thus also challenges the Rule of Law.’<sup>34</sup> He argues that, if Ministers were under a legal obligation to abide by international law, the consequence would be that Ministers would be entitled to ‘change the legal rights or obligations of anyone in the realm simply by entering into or ratifying an international treaty’ and, further, that they could ‘change the legal rights or duties of present or future Ministers.’<sup>35</sup> In his view, the result is that the obligation on Ministers to abide by international law, and to account to their colleagues and to Parliament for the international obligations that they contract is merely an expression of a ‘morally grounded UK policy.’ This may be ‘an important principle of responsible government of our constitutional form’ but ‘*none of this* imposes on Ministers (or civil servants) anything comparable to their personal obligation as citizens and Ministers to *comply with the law*, that is, with the law of the land.’<sup>36</sup>

The third proposition is that any difficulty that may be posed by any apparent conflict between the UK’s international obligations and domestic law is resolved by the fact that ‘ultimately these two elements of legal doctrine inhabit different—domestic and international—legal dimensions.’<sup>37</sup> From this separation of realms, critics of the prior formulation derive a separation of the persons subject to legal obligation. Only the State, the United Kingdom, is responsible as a matter of international law, not Ministers personally. In turn Ministers’ obligations arise only under domestic law. As a result: ‘Under our constitution, Ministers are incapable of imposing legal obligations on themselves or on their successors by way of the Crown’s prerogative to conduct foreign relations.’<sup>38</sup>

---

<sup>30</sup> Mark Elliot, ‘The Ministerial Code and international law’ (26 October 2015) available at: <https://publiclawforeveryone.com/> (last accessed 10 February 2019).

<sup>31</sup> John Finnis, ‘Ministers, international law, and the rule of law’ Judicial Power Project (2 November 2015) available at: [www.judicialpowerproject.org.uk](http://www.judicialpowerproject.org.uk) (last accessed 10 February 2019).

<sup>32</sup> Ekins and Verdirame, ‘The Ministerial Code and the Rule of Law’.

<sup>33</sup> *Ibid.*

<sup>34</sup> John Finnis, ‘Ministers, international law, and the rule of law’.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.* Emphasis in original.

<sup>37</sup> Mark Elliot, ‘The Ministerial Code and international law’.

<sup>38</sup> Ekins and Verdirame, ‘The Ministerial Code and the Rule of Law’.

These arguments all proceed from a fundamental misunderstanding of the nature and source of the legal obligation upon Ministers to abide by the international law commitments of the State. The obligation on Ministers is a principle of the British Constitution, not of international law. It is an essential correlative of the exercise by Ministers of the Royal prerogative to conduct foreign relations—itsself a legal power conferred upon Ministers by the Constitution. These points of principle will be developed in Part IV. The arguments are not only falsifiable as a matter of principle. They are also contrary to the established constitutional practice of the United Kingdom over (at least) four centuries. Recent events demonstrate that this practice has lost none of its force. In view of the density of this practice, it will be possible only to sketch it in outline, which is the task that Part III will address.

### 3. British state practice

This Part advances five points derived from the practice of the British State that are of more general application to the theme of the present essay. It considers: (a) the constitutional role of the Law Officers of the Crown in advising on international law; (b) the assumption underlying the seeking of advice as to the determinacy of international law; (c) the significance of international legality to the conduct of British foreign policy; (d) even in the exceptional cases where international law was not followed or much disputed; and (e) the accountability of the Executive to Parliament for the consistency of its foreign policy with international law.

#### a) Advice of the Law Officers of the Crown on international law

The Governmental legal adviser on matters of international law has a critically important function in the development of the foreign policy of the State. As Berman puts it:<sup>39</sup>

[T]he main role of the Governmental legal adviser is to ‘make’ his Government comply with international law....It is a truism to say that the question whether or not to comply with what international law requires is always a question of *policy*. But even the meanest definition of the role of the international legal adviser in government cannot treat that policy question as if it were an entirely neutral one. It must be assumed to be a necessary part of the role that the international legal adviser should be expected to use his gifts of exposition and persuasion to bring those with whom the power of decision lies to use this power to the right result.

Within the British State, this function has over centuries taken on a particular constitutional significance. At least since the Sixteenth Century, Law Officers of the Crown have advised the British Government as to its obligations and those of other states with whom it is engaged under international law.<sup>40</sup> This practice originated in the taking of advice from the civilians of Doctors’ Commons.<sup>41</sup> The evidence from the State Papers establishes that even ‘before the period when international law was greatly developed, the English Government was convinced of the necessity of juridical study and advice upon international questions.’<sup>42</sup> From about 1600 until 1872, the Crown’s standing adviser on questions of international law was the King’s Advocate-General. He was appointed by letters patent and was consulted constantly. This practice continued after the establishment of the Foreign Office as a separate Department of State in 1782.<sup>43</sup>

<sup>39</sup> Frank Berman, ‘The role of the international lawyer in the making of foreign policy’ in Chanaka Wickremasinghe (ed.), *The International Lawyer as Practitioner* (London British Institute of International and Comparative Law, 2000) 3. Berman served as Principal Legal Adviser to the UK FCO, 1991-1999.

<sup>40</sup> Arnold McNair, ‘The debt of international law in Britain to the Civil Law and the civilians’ (1953) 39 *Transactions of the Grotius Society* 183, reprinted in Arnold McNair, *International Law Opinions, Selected and Annotated*, 3 vols. (Cambridge: Cambridge University Press, 1956) vol. III, App. II; Clive Parry (1965) VII BDIL 242-281; Clive Parry, *Law Officers’ opinions to the Foreign Office 1793-1860: A reproduction of the manuscript series with index and commentaries* 97 vols. (Westmead, UK: Gregg International Publishers, 1970-1973); Clive Parry, *Great Britain Law Officers’ Opinions* (6 micro-film reels, Trans-Media, 1976).

<sup>41</sup> *Ibid.*

<sup>42</sup> William Holdsworth, *History of English Law* vol. 5 (Methuen, 1924), 44.

<sup>43</sup> McNair, *International Law Opinions*, vol. III, 424-5. The demise of this office may perhaps be partly attributable to the débâcle over delay in advice by the Queen’s Advocate on the *Alabama*, the vessel, whose provision to Confederate forces in the course of the American Civil War gave rise to the *Alabama* arbitration. A full account is given in Parry (1965) VII BDIL 274-281; See: Frank Berman and Michael Wood, Submission in

After 1876, the Foreign Office acquired its own legal adviser, who could provide a ‘reservoir of specialist expertise’<sup>44</sup> and continuous advice on all matters of international law that arise in the daily work of the Office. But this did not lead to the Law Officers abandoning their function of advising the Crown on matters of international law that are engaged in the high level policy decisions of the Government. Following the retirement of the last Advocate-General in 1872, this function passed to the Attorney-General and Solicitor-General as the principal law officers of the Crown.<sup>45</sup> Both of these positions are held by members of the Ministry who also sit in Parliament. As such they are called upon to advise Cabinet on issues of both domestic law and international law that may arise.<sup>46</sup> As a consequence, they assume Ministerial responsibility for their advice.

Parry, discussing the binding force of Law Officers’ Opinions in the *British Digest of International Law*, published in 1965, notes that, while ‘there is not, it would seem, any absolute constitutional duty’<sup>47</sup> on the Government to follow the Law Officers’ advice, the ‘Government has consistently considered itself in practice precluded from ordering “policy” otherwise than as the “law”, or rather the exposition of it the Law Officers have given, dictates.’<sup>48</sup> He concludes on that ‘at least during the period covered by this volume, a Law Officers’ report, if capable of translation into action, was so translated invariably, unquestioningly and automatically.’<sup>49</sup>

Berman and Wood encapsulate the constitutional significance of seeking the advice of the Law Officers of the Crown in the following way:<sup>50</sup>

When high-level policy decisions, including at Cabinet level, involve questions of international law, not only will the Attorney General’s advice as the normal rule be available in advance, but the Attorney will usually be present in person to explain that advice Minister-to-Minister, and subsequently to provide any further advice that may be needed arising out of the discussion.

These arrangements have proved to be very effective in melding together a substantial body of specialised expertise in international law *with the extra weight of the Attorney General’s broader experience, and his or her standing as a Member of the Government. Taken together, they ensure that the importance of complying with international law is fully taken into account, not least under circumstances of intense political pressure.*

### **b) Determinacy of international law**

The second point is that, whatever the difficulty of the question posed, the practice of the Crown in taking legal advice presupposes that questions of critical importance in the conduct of

---

response to consultation on the role of the Attorney General’ Annex, *The Governance of Britain: A Consultation on the Role of the Attorney General*, CM 7192 (30 November 2007). At all events, the last holder of the office was Sir Travers Twiss, who retired in 1872.

<sup>44</sup> Berman and Wood, [7].

<sup>45</sup> John Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964); John Edwards, *The Attorney-General: Politics and the Public Interest* (London: Sweet & Maxwell, 1984).

<sup>46</sup> Clive Parry (1965) VII BDIL 249-252.

<sup>47</sup> *Ibid*, 271.

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid*.

<sup>50</sup> Berman and Wood, [9](g)–[10].

foreign relations are capable of a legal answer according to the rules of international law. Such an answer is arrived at after full consideration and evaluation by way of a reasoned legal opinion of the legal arguments. This has been the way in which international law has been regarded in the United Kingdom, even in a much earlier period when the rules of international law were not at all developed to the same extent as they are today.

So, for example, the Report of the Law Officers of 18 January 1753 on the Silesian Loan,<sup>51</sup> which dealt with a controversy between Great Britain and the King of Prussia, dealt amongst other things with the legality of reprisals for the capture of vessels as prize at sea during times of war. The Law Officers answered:<sup>52</sup>

The Law of Nations, founded upon Justice, Equity, Convenience and the Reason of the Thing, and confirmed by long Usage, don't allow of Reprisals, except in Case of violent Injuries, directed or supported by the State, and Justice, absolutely denied, *in Re minime dubiâ*, by all the Tribunals, and afterwards by the Prince.

When the King of the Two Sicilies refused to observe the Treaty of Commerce of 1667 between Britain and Naples, Lord Halifax sought the advice of Marriott, the King's Advocate. Marriott memorably replied on 30 November 1764 in terms of enduring contemporary relevance:<sup>53</sup>

[A]ll Treaties whatsoever whether of Pacification, Alliance or of Commerce concluded between Sovereigns of respective States are not *Personal* but *National* and therefore like all other national Rights and Obligations, inseparable from each other, *are valid in Succession*....[If] all Treaties between Sovereign and Sovereign are merely *personal* then it follows that Treaties of Pacification would be nothing in Effect but Truces...they would be dependent upon Lives and upon National Revolutions...The Sovereign contracts not for himself as a private Person (for that Idea would be injurious to Sovereignty) but as a public One. In other words, he binds himself, his Successors and his People, as the great Representative of a whole Kingdom, who neither *dies nor changes* in his national Capacity.

### **c) Constitutional significance of international legality**

The third point is that the international legality of the actions of the State produces consequences for the Government domestically as well as internationally. As Bethlehem put it:<sup>54</sup>

Legality is paramount; not for reasons of lip service, and not simply for the reason that we are a democratic state whose conduct is based on law, but also because such issues engage wider governmental considerations...for both governments and individuals. Governments may stand or fall by reference to considerations of legality.

The acute importance of international law to the conduct of a Ministry is vividly illustrated by the research of Isabel Hull into the deliberations of the British War Cabinet in World War I.<sup>55</sup> Hull

<sup>51</sup> Ernest Satow, *The Silesian Loan and Frederick the Great* (Oxford: Clarendon Press, 1915), Ch. IX. The Law Officers included Murray, then Solicitor-General, afterwards Lord Mansfield.

<sup>52</sup> *Ibid*, 82; extract reproduced in McNair *International Law Opinions*, vol. II, 303.

<sup>53</sup> McNair, *International Law Opinions*, vol. I, 4-6.

<sup>54</sup> Daniel Bethlehem, 'The secret life of international law' (2012) 1 *Cambridge Journal of International and Comparative Law* 23, 33. Bethlehem was Principal Legal Adviser to the FCO UK, 2006-2011.

demonstrates the importance of Belgian neutrality, as lynch-pin of the system of European order bounded by international law so painstakingly constructed in the pre-War era, as the basis for Britain entering the War.<sup>56</sup> But the importance of the Great War for present purposes is what it demonstrates about the constraints of international law upon the British Government's own conduct of the war. The British blockade of shipping was constructed with painstaking consideration of the position under international law and '[t]he cabinet returned to the legal dilemmas again and again.'<sup>57</sup>

The resulting Order in Council was tested upon the requisition of a Swedish neutral ship carrying a cargo of copper in Prize Court in *The Zamora*.<sup>58</sup> The case was appealed to the Privy Council and argued for the Crown by the Attorney General and Solicitor General.<sup>59</sup> Lord Parker of Waddington delivered the judgment of the Board. His Lordship begins with a classic exposition of the separation of powers, in holding that: 'The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by the Courts of this country is out of harmony with the principles of our Constitution.'<sup>60</sup> But the Prize Court does not administer domestic law. It administers international law. The Board rejected the suggestion that this affects the ability of the Executive to prescribe the law applicable in such a court. The Prize Court 'must ascertain and give effect to a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilized nations in their relations towards each other or in express international agreement.'<sup>61</sup> This rule is of particular importance in prize cases, so that a neutral aggrieved by the actions of a belligerent power can be assured that he has a right of recourse to a court which administers international law. The rule requiring exhaustion of local remedies would otherwise 'entirely vanish if a Court of Prize, while nominally administering a law of international obligation, were in reality acting under the direction of the Executive of a belligerent Power.'<sup>62</sup> A Committee assembled by the Attorney General after this decision concluded that 'The Government *cannot* by executive act alter international law in its favour.'<sup>63</sup>

Even in time of war when matters of vital national survival were at stake, the British Government recognised that international law operated as a constraint upon its actions for which it could be held to account domestically as well as internationally.

#### **d) Exceptional cases**

The significance within the national constitution of the principle that the Executive is constrained in its exercise of its foreign affairs power by international law, on which it receives advice from the Law Officers of the Crown is underscored by the constitutional significance of two

---

<sup>55</sup> Isabel Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (Ithaca: Cornell University Press, 2014).

<sup>56</sup> *Ibid*, 16.

<sup>57</sup> *Ibid*, 161.

<sup>58</sup> *The Zamora* [1916] P 27.

<sup>59</sup> [1917] 2 AC 77.

<sup>60</sup> *Ibid*, 90.

<sup>61</sup> *Ibid*, 91-92.

<sup>62</sup> *Ibid*, 93.

<sup>63</sup> Report of the 'Zamora' Committee in Malkin Papers, 'Maritime Rights, Prize Orders in Council and Papers relating to Withdrawal of Declaration of London 1914-1917' FO 800/918.



much discussed incidents involving the use of force abroad: the Suez Intervention in 1956 and the invasion of Iraq in 2003.

In the first case, the Executive deliberately decided not to seek a formal opinion from the Law Officers, knowing (as the evidence now establishes) that it would not be favourable to the adventure. As the research of Geoffrey Marston from the Foreign Office archives vividly demonstrates,<sup>64</sup> the Government proceeded on the basis of advice proffered by the Lord Chancellor,<sup>65</sup> which was emphatically rejected by the Law Officers of the Crown. On the eve of the ill-fated Suez intervention, the Attorney General, Sir Reginald Manningham-Buller (later Viscount Dilhorne) wrote to the Foreign Secretary (copied to the Prime Minister and Lord Chancellor):<sup>66</sup>

It is just not true to say that we are entitled under the Charter to take any measures open to us 'to stop the fighting.' Nor would it be true to say that under international law apart from the Charter we are entitled to do so. Further, it is not true to say that under international law we are entitled to take any measures open to us 'to protect our interests which are threatened by hostilities. ....

*I feel compelled to write this letter because as the Law Officers are constitutionally the legal advisers of the Government...it will be generally assumed that we have been approached for advice as to the legality of what has been done. In fact we were not consulted on this matter nor were we upon questions relating to the Suez Canal before Israel's attack.*

Sir Gerald Fitzmaurice, Legal Adviser to the Foreign Office, wrote a memorandum to his colleagues in the Foreign Office to the same effect.<sup>67</sup>

The decision of the British Government to support an armed intervention in Iraq in 2003 also demonstrates the consequences where the constitutional process is not properly followed. As a result of the exhaustive investigation of the Chilcot Inquiry, the process of seeking legal advice in this case has been exposed to public scrutiny.<sup>68</sup> Some elements of this narrative deserve special emphasis for their relevance here.

Following the Security Council's adoption of Resolution 1441 on 8 November 2002, the Government decided to delay calling for formal legal advice from the Attorney General, Lord Goldsmith.<sup>69</sup> Lord Goldsmith provided draft advice to the Prime Minister, Mr Blair, on 14 January 2002, which was not shared with Cabinet or the Foreign Secretary, Mr Straw. Lord Goldsmith stated that a further decision by the Security Council would be needed to revive the authorisation to use force contained in Resolution 678 (1990) and that he saw no grounds for self-defence or

---

<sup>64</sup> Geoffrey Marston, 'Armed intervention in the 1956 Suez Canal Crisis: the legal advice tendered to the British Government' (1988) 37 *International and Comparative Law Quarterly* 773.

<sup>65</sup> Viscount Kilmuir cited *Ibid.* See *Hansard*, HL, vol 199, col 1350 (1 November 1956).

<sup>66</sup> FO 800/749 (1 November 1956) cited in Marston 'Armed Intervention in the 1956 Suez Canal Crisis' 803-4. Emphasis added.

<sup>67</sup> FO 800/748 (1 November 1956) cited in Marston 'Armed Intervention in the 1956 Suez Canal Crisis' 806.

<sup>68</sup> United Kingdom, House of Commons, 'The Report of the Iraq Inquiry' (HC 264, 6 July 2016) 'Chilcot Inquiry Report'; and see generally the Symposium on the Iraq Inquiry in the *British Yearbook of International Law* (advance articles published 22 September 2018) available at: [www.bybil.oxfordjournals.org](http://www.bybil.oxfordjournals.org). See, for an earlier account, Philippe Sands, *Lawless World: Making and Breaking Global Rules* (London: Penguin Publishing, 2006, 2<sup>nd</sup> edition), chapter 12 'This wretched legal advice.'

<sup>69</sup> Chilcot Inquiry Report, vol 5, [903].

humanitarian intervention providing the legal basis for military action in Iraq.<sup>70</sup> Despite this advice, Mr Blair continued to say in public that he would not rule out military action if a further resolution in response to an Iraqi breach was vetoed. These statements were at odds with Lord Goldsmith's advice.<sup>71</sup> The Inquiry concluded that: 'Mr Blair's response suggested a readiness to seek any ground on which Lord Goldsmith would be able to conclude that there was a legal basis for military action.'<sup>72</sup>

The Legal Adviser to the Foreign Office, Michael Wood, had given legal advice to the same effect to the Foreign Secretary, Jack Straw on 22-23 January 2003. Mr Straw wrote to Mr Wood on 29 January 2003 stating: '*I note your advice, but I do not accept it.*'<sup>73</sup> Lord Goldsmith wrote to advise Mr Straw that the proper constitutional course where a Minister challenges legal advice he has received is to seek an opinion from the Law Officers.<sup>74</sup>

On 27 February 2003, after a visit to Washington on 10 February, Lord Goldsmith met officials at Downing Street and advised that 'I am prepared to accept—and I am choosing my words carefully here—that a reasonable case can be made that resolution 1441 is capable of reviving the authorisation in 678 without a further resolution if there are strong factual grounds for concluding that Iraq has failed to take the final opportunity.'<sup>75</sup> He confirmed this advice formally on 7 March 2003.<sup>76</sup> By 13 March 2003, the Chiefs of Staff of the Armed Forces and the Civil Service pressed him to state his opinion on the legality of the proposed intervention more definitively. Admiral Boyce considered this to be essential because the members of the armed forces, who might otherwise incur personal liability under international criminal law if they were deployed, were entitled to receive an unequivocal assurance as to the legality of the use of force.<sup>77</sup>

In response, Lord Goldsmith confirmed that he was 'satisfied that the proposed military action by the UK would be in accordance with national and international law.'<sup>78</sup> Thereafter Lord Goldsmith provided a written answer to Parliament on the legality of the intervention on 17 March 2003, in which he confirmed: 'It is plain that Iraq has failed so to comply and therefore Iraq was at the time of resolution 1441 and continues to be in material breach. Thus the authority to use force under resolution 678 has revived and so continues today.'<sup>79</sup> A Cabinet meeting on the same day endorsed the use of force in Iraq. Cabinet was provided with a copy of that Statement, which set out the Government's legal position. It was not provided with the legal basis for the conclusion that Iraq had failed to take the final opportunity to comply with its disarmament obligations under resolution 1441, nor with a legal opinion that set out the competing arguments.<sup>80</sup> The Inquiry concluded that 'Lord Goldsmith should have been asked to provide written advice which fully

---

<sup>70</sup> *Ibid*, [167]-[170].

<sup>71</sup> *Ibid*, [206]-[208].

<sup>72</sup> *Ibid*, [198].

<sup>73</sup> *Ibid*, [351], emphasis added.

<sup>74</sup> Minute dated 3 February 2003, *Ibid*, [357].

<sup>75</sup> *Ibid*, [461].

<sup>76</sup> Minute Goldsmith to Blair 7 March 2003, *Ibid*, [515]-[559].

<sup>77</sup> *Ibid*, [703].

<sup>78</sup> Letter Brummell (Legal Secretary to the Law Officers) on behalf of Lord Goldsmith to Hemming (MOD Legal Adviser), 'Iraq—Position of the CDS' (14 March 2003) *ibid*, [696].

<sup>79</sup> *Hansard*, HL, vol 646, col 482W (14 March 2003).

<sup>80</sup> *Ibid*, [946].

reflected the position on 17 March, explained the legal basis on which the UK could take military action and set out the risks of legal challenge.<sup>81</sup>

On 18 March 2003, Elizabeth Wilmshurst, FCO Deputy Legal Adviser, resigned stating:<sup>82</sup>

I regret that I cannot agree that it is lawful to use force against Iraq without a second Security Council resolution to revive the authorisation given in SCR 678.... My views accord with the advice that has been given consistently in this Office before and after the adoption of SCR 1441 and with what the Attorney General gave us to understand was his view prior to his letter of 7 March. (The view expressed in that letter has of course changed again into what is now the official line.) I cannot in conscience go along with advice—within the Office or to the public or Parliament—which asserts the legitimacy of military action without such a resolution, particularly since an unlawful use of force on such a scale amounts to the crime of aggression; nor can I agree with such action in circumstances which are so detrimental to the international order and the rule of law.

What are we to make of this *débâcle* for present purposes? This was, after all, a case in which the Attorney's advice was sought and given. Yet the circumstances were such as to give rise to a major concern that that process had been misused by a Government merely intent on finding a legal justification in international law for an action that it was determined to take. Three observations of a rather general character need to be made.

In the first place, the question of international legality was central to the concerns of all the constitutional actors, not just the legal advisers. Secondly, those actors knew the paramount importance of an affirmative opinion of the Law Officers of the Crown. That is precisely why Ministers delayed seeking such an opinion to the eleventh hour. Thirdly, the officers of State that would be responsible for implementation of the Government's decision, namely the members of the armed forces, insisted upon definitive advice on legality under international law as a precondition to action. For them legality under international law is paramount because it is the source of their permission to use lethal force.<sup>83</sup> There was a widespread view both at the time and thereafter that the legal basis cited by the Government for the invasion was unsound and that the Attorney had changed his opinion under intense political pressure to suit the Government policy. Those concerns resulted in reviews of both the role of the Attorney General in general and the conduct of the decision-making in relation to Iraq.<sup>84</sup> These reviews have served to underscore, and not to undermine, the importance of the requirement upon the Executive to undertake foreign policy action in accordance with Britain's international law obligations in accordance with dispassionate advice from the Law Officers of the Crown.

---

<sup>81</sup> *Ibid*, [955].

<sup>82</sup> Letter Wilmshurst to Wood, 18 March 2003, available at: <https://webarchive.nationalarchives.gov.uk/20171123123152/http://www.iraqinquiry.org.uk/media/242786/2003-03-18-minute-wilmshurst-to-wood-untitled.pdf> (last accessed 9 April 2019).

<sup>83</sup> David Howarth and Shona Wilson Stark, 'H.L.A. Hart's secondary rules: what do "officials" really think?' (2018) 14 *International Journal of Law in Context* 61, 73-74 develop this point by reference to subsequent interviews with armed forces personnel.

<sup>84</sup> *Supra* note 43 and 68.

### e) Accountability to Parliament

A final aspect of the constitutional role of the Law Officers of the Crown vis-à-vis international law is the extent of their accountability to Parliament for their advice. A review of the position in 1984 noted the inconsistency of Government practice with regard to the disclosure to Parliament of the Attorney's advice to on international law matters.<sup>85</sup> Sir Harold Wilson maintained in 1963 that:<sup>86</sup>

The Attorney General, whoever he may be, is not only the legal adviser to the Crown and to the Government. He is also a servant of this House. It is, from time to time, his duty to advise the House on legal matters—a duty going beyond his responsibility to the Government and the Crown....

Closer examination of instances involving issues of the compatibility of proposed legislation with the international obligations of the United Kingdom shows some instances where the Attorney's legal advice was disclosed to Parliament<sup>87</sup> and some other instances where disclosure was resisted.<sup>88</sup> Sir Michael Havers AG contended that there was no such duty. He thought this 'would raise conflicts with the primary duty of the Law Officers to advise the Crown on legal questions.'<sup>89</sup>

Erskine May states the principle in terms of a constitutional convention:<sup>90</sup>

By long-standing convention, observed by successive Governments, the fact of, and substance of advice from, the law officers of the Crown is not disclosed outside government. This convention is referred to in paragraph 2.13 of the Ministerial Code. The purpose of this convention is to enable the government to obtain frank and full legal advice in confidence. Therefore, the opinions of the law officers of the Crown, being confidential, are not usually laid before Parliament, cited in debate or provided in evidence before a select committee, and their production has frequently been refused; but if a Minister deems it expedient that such opinions should be made known for the information of the House, the Speaker has ruled that the orders of the House are in no way involved in the proceeding.

Berman and Wood express the balance between accountability to Parliament and the need to maintain confidentiality of legal advice in the following way:<sup>91</sup>

[T]he current arrangements also ensure that there is direct Parliamentary accountability in respect of the legal positions which the Government adopts in this vital area. The accountability is of course of a special kind, not identical with that which applies to policy

---

<sup>85</sup> John Edwards, *The Attorney-General: Politics and the Public Interest* (Sweet & Maxwell, 1984), 210-227.

<sup>86</sup> *Hansard*, HC, vol 678 col 994 (27 May 1968).

<sup>87</sup> E.g. Consistency of the Customs (Import Deposits) Bill 1968 with the UK's obligations under the European Free Trade Agreement (EFTA), where Sir Elwyn Jones A G disclosed his legal opinion: *Hansard*, HC, vol 943, cols 793-831, discussed Edwards 1984, 211-2.

<sup>88</sup> Legality of the Immigration Regulations in light of the European Convention on Human Rights: *Hansard*, HC, vol 975 cols 256-7, discussed Edwards 1984, 213.

<sup>89</sup> Law Officers' Department files, letter dated 29 January 1980, cited in Edwards 1984, 225.

<sup>90</sup> Malcolm Jack (ed.), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usages of Parliament* (24 ed, LexisNexis, 2011), 447 (references omitted). See also: Edwards 1984, 256-261. On the recent practice see: United Kingdom, House of Lords Library Briefing Paper, 'Publishing Government Legal Advice' (6 December 2018).

<sup>91</sup> Berman and Wood, [11].

decisions. It has to reflect, amongst other things, the confidentiality that necessarily attaches to advice given by a lawyer to the client, a factor that may be particularly acute when the issue under consideration is a matter of dispute internationally, or may become the subject of judicial proceedings nationally or internationally. All the same, the fact that the Attorney General is a Minister and sits in Parliament at least enables a direct and authoritative explanation to be given of the Government's legal views, allows for Parliamentary Questions to be posed and answered, and may in appropriate cases also allow for such issues to be knowledgeably debated.

The extent to which Parliament may compel the Attorney to disclose to it his advice to the Government on the legal effect at *international* law of steps that the Government proposes to take has gained prominence in recent years. As has been seen, at the time of the proposed entry into armed conflict in Iraq, the Attorney gave a written statement to the House of Lords on the legal position but did not disclose his written legal advice to the Government. A motion that he should be compelled to do so was defeated in the Commons in 2004,<sup>92</sup> but the Government subsequently decided, in the face of continuing public controversy, to disclose it voluntarily. In 2015, the point arose again in the context of the Government's plan to extend its air strikes against ISIS into Syria. The Prime Minister gave a statement to the House on the legal position, but both he and the Attorney reiterated the convention against disclosure of the written advice.<sup>93</sup>

The matter came to a head very recently, when Parliament sought clarification of the legal effect of the proposed provisions on Ireland and Northern Ireland in the draft Withdrawal Agreement with the European Union. The Attorney disclosed his legal advice<sup>94</sup> only after an unprecedented contempt motion against the Government was passed in the House of Commons.<sup>95</sup>

The point here is that under the British Constitution the Ministry is accountable to Parliament not merely, as Dicey emphasised, for its general conduct of the foreign affairs prerogative.<sup>96</sup> It is also accountable to Parliament for the legality of its exercise of that power under international law. The Law Officers of the Crown are members of Parliament and can be called upon to explain the Government's legal position on its obligations under international law where Parliament so requires. In exceptional cases, they can also be required to produce to Parliament their written legal advice.

In this light, it is now possible in Part IV to return to the arguments of principle raised against the proposition that Ministers are under an obligation to comply with international law and to consider how those arguments are to be answered.

---

<sup>92</sup> *Hansard*, HC, vol 418, cols 1459-60 (9 March 2004).

<sup>93</sup> *Hansard*, HC, vol 602, cols 1467-8, 1489-94 (26 November 2015).

<sup>94</sup> Letter Cox AG to Prime Minister, 13 November 2018.

<sup>95</sup> *Hansard*, HC, vol 650, cols 728-731 (4 December 2018).

<sup>96</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan & Co, 1886. 2<sup>nd</sup> edition) 393-394.

#### 4. The obligation in constitutional principle

The previous Part has sought to demonstrate that the practice of the British State over several centuries supports the proposition that the Executive has a constitutional duty to comply with the international law obligations of the State. The present Part considers the nature of that obligation in light of the principles that underlie the constitutional compact in its application to the field of foreign relations. It will consider first the relation between the obligation and the constitutional precepts of dualism. Section (b) will then examine in particular the relation between the obligation of the Executive and Parliamentary sovereignty. Section (c) then turns to the larger frame: the question whether the recognition of such an obligation is consistent with the concept of the Rule of Law in its application to a particular State.

##### a) Executive compliance with international law in a dualist State

How may the obligation upon Ministers to comply with international law be reconciled with the basic premise of dualism that underlies the approach of the Constitution to foreign relations? This premise has two elements: the separation of the international plane from the domestic and the separation of the power to make law binding domestically, which is reserved to Parliament, from the power to conduct foreign affairs—including the power to enter into treaties—which is exercised by the Executive under the prerogative.

In considering the impact of international law within the domestic polity, it is first necessary to distinguish between customary international law and treaties. So far as custom is concerned, the United Kingdom cannot be described as a dualist State. On the contrary, custom is a direct source of English law. Blackstone explained the reasons for this principle in a manner that directly confronts the dualist argument:<sup>97</sup>

In arbitrary states [international] law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power: but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land.

In other words, it is precisely *because* the Executive cannot change the law of the land by the arbitrary exercise of its own prerogative power that general international law must be directly received into English law. This is not the place to retrace the impact that this principle has had, and continues to have, on the substantive content of English law, which the author has done elsewhere.<sup>98</sup> It suffices for present purposes to observe that, in this context, there can be no separation of realms.<sup>99</sup>

---

<sup>97</sup> William Blackstone, *Commentaries on the Law of England* (Oxford: Strahan, Cadell and Prince, 1783, 9<sup>th</sup> edition reprint), Bk IV, 67.

<sup>98</sup> Campbell McLachlan, *Foreign Relations Law* (Cambridge: Cambridge University Press, 2014) Ch 3; See for a contrary account: Roger O'Keefe, 'The doctrine of incorporation revisited' (2008) 79 *British Yearbook of International Law* 7.

<sup>99</sup> See, e.g. *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147. For further development see: Campbell McLachlan, 'Five conceptions of foreign relations law' in Curtis Bradley (ed.), *Oxford Handbook on Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019, pub. forthcoming) Ch 2.

In the case of treaty obligations, the point of departure is the same, but the consequence is different. In this case, the international law obligation does not arise by virtue of general international law. Rather it arises from the deliberate act of the Executive on the international plane. The principle that the Executive has no power by treaty to change the law of the land is fundamental to the Constitution. In 1892, Lord Herschell held that the proposition that the Executive was entitled to justify an invasion of an individual's private rights at home by reference to a treaty obligation that it had assumed in the exercise its foreign affairs prerogative was 'wholly untenable.'<sup>100</sup> This point was central to the ratio of the *Miller* case on withdrawal from the European Union. The Supreme Court held: 'it is a fundamental principle of the Constitution that, unless primary legislation permits it, the Royal prerogative does not enable Ministers to change statute law or the common law.'<sup>101</sup> The Court explained: 'the dualist system is a necessary corollary of Parliamentary sovereignty, or, to put the point another way, it exists to protect Parliament not ministers.'<sup>102</sup>

Nor will the courts *compel* domestic decision-makers to exercise their powers with reference to international law. As Lord Mance put it in a case concerning the exercise of a common law power by a lower court:<sup>103</sup>

The United Kingdom takes a dualist approach to international law.... The starting point in this connection is that domestic and international law considerations are separate.... [A] domestic decision-maker exercising a general discretion (i) is neither bound to have regard to this country's purely international obligations nor bound to give effect to them, but (ii) may have regard to the United Kingdom's international obligations, if he or she decides this to be appropriate.... Neither by reference to the principle of legality, which refers to rights and obligations recognised at a domestic level, nor on any other basis is it possible to limit the domestic court's general discretion by reference to unincorporated international obligations....

But a proper account of dualism requires not only an explanation of the primary role of Parliament to make domestic law and the limits of the court's powers vis-à-vis unincorporated treaty obligations. It also calls for an account of the legal limits on the exercise of the Executive's prerogative power to conduct foreign relations. Lauterpacht addressed this question directly when he considered whether doctrines in domestic law that limit judicial determination in the field of foreign relations are a limitation on the rule of law. In his view, 'limitations upon the freedom of judicial decision, far from amounting to a suspension of the rule of law, are the expression of a differentiation of functions, which for reasons of obvious expediency is unavoidable in the modern State.'<sup>104</sup>

---

<sup>100</sup> *Walker v Baird* [1892] AC 491, 497.

<sup>101</sup> *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, [50].

<sup>102</sup> *Ibid*, [57], approving Campbell McLachlan, *Foreign Relations Law* (Cambridge: Cambridge University Press, 2014), [5.20].

<sup>103</sup> *R (Yam) v Central Criminal Court* [2015] UKSC 76, [2016] AC 771, [35]-[36]

<sup>104</sup> Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Oxford University Press, 1933, reprinted 2011) 397.

Akande and Bjorge pursue this point in the context of the debate about the Ministerial Code:<sup>105</sup>

The fact that certain obligations of international law are not enforceable in the courts does not in any way detract from the fact that the Crown is bound by them. Much of the discussion of the relationship between international law and domestic law has focused on the extent to which international law may be applied by the courts. The unfortunate side effect of this concentration on judicial application of international law is that one may lose sight of the point that obligations may still be *legal* obligations binding on parties, although they are not enforceable before domestic courts.

The Constitution vouchsafes to the Executive the power of engaging the State through treaty actions on the international plane; ‘the making of a treaty is an executive act.’<sup>106</sup> Furthermore, by its acts or omissions, the Executive may engage the United Kingdom’s international responsibility vis-à-vis other states, since ‘most acts giving rise to implications of responsibility will emerge from the executive government, which provides the most direct manifestation of state power.’<sup>107</sup> But it does not follow from this, as has been contended, that the legal obligation, which undoubtedly rests upon the State at international law, has no reach to Ministers. In order to consider this question, it is necessary to consider first the role of Ministers on the international plane and then, second, to consider the implications of this within the domestic constitution.

Treaties may be concluded by States<sup>108</sup> and bind the States that are parties to them.<sup>109</sup> The State is represented in treaty making by those persons who have full powers to express the consent of the State to be bound. The first such category, specified in Article 7(2)(a) of the Vienna Convention on the Law of Treaties (VCLT) is as follows:

In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs for the purpose of performing all acts relating to the conclusion of a treaty;

Once a treaty has entered into force, ‘it is binding upon the parties to it and must be performed by them in good faith.’<sup>110</sup> ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’<sup>111</sup> If the State’s internal legislation is not in conformity with its treaty obligation, ‘a State which has contracted valid international obligations is

<sup>105</sup> Dapo Akande and Eirik Bjorge, ‘The United Kingdom Ministerial Code and International Law: a Response to Richard Ekins and Guglielmo Verdirame’ UK Constitutional Law Blog (10 December 2016) (available at: <https://ukconstitutionallaw.org>).

<sup>106</sup> *Attorney General for Canada v Attorney General for Ontario* [1937] AC 326, 347 (PC).

<sup>107</sup> James Crawford, *State Responsibility: the General Part* (Cambridge: Cambridge University Press, 2013) 119; art 4, Draft Articles on International Responsibility of States for Internationally Wrongful Acts (‘ARSIWA’) [2001] 2(2) YB ILC 26.

<sup>108</sup> Vienna Convention on the Law of Treaties (VCLT) (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 2(a).

<sup>109</sup> *Ibid*, art 26.

<sup>110</sup> *Ibid*.

<sup>111</sup> *Ibid*, art 27.



bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken.’<sup>112</sup>

International law, then, both (a) recognizes that Heads of Government and Foreign Ministers have the capacity to conclude treaty obligations that bind the State and (b) requires that once such a treaty enters into force the State has the obligation to perform it in good faith, including, where necessary, by bringing its domestic legislation into conformity with the treaty.

How is this responsibility at the international level given effect within the British Constitution? Baroness Chalker of Wallasey stated the position in answer to a written question in the House of Lords in 1994, which enquired whether Ministers and civil servants, in discharging their public functions, have a duty to comply with the European Convention on Human Rights and the International Covenant on Civil and Political Rights. She replied:<sup>113</sup>

International treaties are binding on states and not on individuals. The United Kingdom is party to both treaties and it must comply with its obligations under them. In so far as acts of Ministers and civil servants in the discharge of their public functions constitute acts which engage the responsibility of the United Kingdom, they must comply with the terms of the treaties.

This formulation starts with the general proposition that the international obligations constituted by treaties bind States not individuals. This proposition can be accepted as a general statement. But it is important to keep in mind that there are important contexts in which international law does impose its obligations directly on individuals, notably (though not solely) under international criminal law.<sup>114</sup> As has already been seen,<sup>115</sup> this was a critical consideration in the minds of key constitutional actors in the debate of the legality of the invasion of Iraq in 2003.

The main purpose of Baroness Chalker’s statement was to describe the link between obligations that have been assumed by the State and the position of State ministers and officials in the exercise of their public functions. As she put it: ‘In so far as acts of Ministers and civil servants in the discharge of their public functions constitute acts which engage the responsibility of the United Kingdom, they must comply with the terms of the treaties.’<sup>116</sup> In other words, since the acts of such officials can engage the responsibility of the State, there is a concomitant obligation upon such persons to comply with the obligations that the Executive has itself assumed. As Berman put it, the argument that international law and domestic law are in different spheres *‘fails to take into account that governments are comprised of individuals and act through individuals.... [T]he state is the hinge through which international law is transmuted into the domestic context.’*<sup>117</sup>

<sup>112</sup> *Exchange of Greek and Turkish Populations* (Advisory Opinion) (1925) PCIJ Ser B No 10, 20.

<sup>113</sup> *Hansard*, HL, vol 559, col WA 84 (7 December 1994).

<sup>114</sup> Art 49, Geneva Convention I (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Art 50, Geneva Convention II (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Art 129, Geneva Convention III (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Art 146, Geneva Convention IV (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287; Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

<sup>115</sup> *Ibid*, section III 4.

<sup>116</sup> *Hansard*, HL, vol 559, col WA 84 (7 December 1994).

<sup>117</sup> Bingham Centre for the Rule of Law/All Party Parliamentary Group on the Rule of Law, ‘Meeting Report: The Ministerial Code and International Rule of Law’ (9 November 2015).

This does not turn ministers or officials into agents of international law when acting in relation to the international sphere, as George Scelle famously but erroneously proposed in developing his theory of *déboulement fonctionnel*.<sup>118</sup> On the contrary, they are and remain agents of their State. International law imposes its obligations upon the State as a whole. It is a matter for the internal law of the State to determine how those obligations are to be complied with. So the duty of Ministers and officials to comply with the international law obligations of the State is a *consequence* of the State's duty to give effect to its obligations in good faith, but is given effect through a principle of the British Constitution that allocates this responsibility internally to the Executive. It flows from the fact that where the Executive undertakes an international obligation on behalf of the State, the duty to implement it falls in the first instance on the Executive. In a dualist state, that responsibility may include taking steps to introduce legislation into Parliament. But that does not lessen the duty on the Executive, whether or not legislation is properly required.

It may be objected that Parliament and the judiciary are also organs of the State, who may engage the State's international responsibility, yet this does not translate into a specific duty upon them to comply with the State's international obligations. In the case of Parliament, there is a presumption that it will not legislate in breach of the international obligations of the State, the practical effect of which is to create a powerful incentive for Parliament in the formulation of legislation. But this is not such as to call into question Parliament's law-making sovereignty within the domestic sphere. It may choose to legislate in breach of the international obligations assumed for the State on the place of international law. If it does so, it will risk placing the State in breach of international law, a breach for which legality under national law can provide no excuse.<sup>119</sup> But this it is, as a matter of the domestic Constitution, entitled to do.

So too the fact that the courts may by their decisions engage the responsibility of the State does not entail that they are under an obligation, for that reason, to give effect to unincorporated treaty obligations. This is, as Lord Hoffmann put it, 'a fallacy.'<sup>120</sup> Lord Millett developed the point in this way:<sup>121</sup>

[T]he identification of the judicial and other organs of the state with the state itself is a principle of international law. But it has no place in the domestic jurisprudence of the state. The legal relationships of the different branches of government depend on its internal constitutional arrangements. In the case of the United Kingdom, the governing principles are the separation of powers, the supremacy of Parliament, and the independence of the judiciary.

The duty of the Executive to comply with the international obligations that it has contracted on behalf of the State must be seen as a consequence of the role that the Constitution allocates to it in the field of foreign relations. Since the Constitution, as a matter of the separation of powers, grants the conduct of foreign affairs to the Executive, the correlative of the supremacy of Parliament to make law domestically is that the legal obligations that the Executive enters into

<sup>118</sup> Georges Scelle, 'Règles générales du droit de la paix' (1933) 46 *Recueil des cours* 358; on which see: James Crawford, 'Chance, Order, Change: the Course of International Law' (2013) 365 *Recueil des Cours* 9, Ch VII; Yuval Shany, *Regulating Jurisdictional Relations between National and International Courts* (Oxford: Oxford University Press, 2007).

<sup>119</sup> Art 3 ARSIWA.

<sup>120</sup> *R v Lyons* [2002] UKHL 447, [2003] 1 AC 976, [40] per Lord Hoffmann.

<sup>121</sup> *Ibid*, [105].

on behalf of the State internationally engage a duty upon the members of the Executive to comply with those obligations. Ministers may not be answerable in court for their breach. But that is the result of the limitations on the role of the domestic court in relation to international law. It does not suggest the absence of an obligation *ab initio*.

The existence of such an obligation flows from the fact that the power pursuant to which the Executive conducts foreign affairs is a *legal* power, not a licence for the arbitrary exercise of authority. 'It is a limited source of non-statutory administrative power accorded by the common law to the Crown.'<sup>122</sup> The consequence is that: 'Without these ancient powers, Governments would have to take equivalent authority through primary legislation.'<sup>123</sup>

The nature of this power may now be compared with the powers of Parliament under the principle of Parliamentary sovereignty.

### **b) The executive foreign affairs power and Parliamentary sovereignty**

The sovereignty of Parliament carries the consequence that, where Parliament does choose to legislate in the foreign affairs context and establishes a statutory scheme that is inconsistent with the continued exercise of the prerogative, 'it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance.'<sup>124</sup> In that sense, where Parliament chooses to make specific provision proscribing the powers of Ministers in a particular way, Ministers are bound to comply. Where however Parliament has not asserted its power in such a manner, the result is not to leave the Executive with unlimited discretion in foreign affairs. Rather its powers are legally limited by the international law obligations that it has assumed on behalf of the State.

The British Constitution places the power to make treaties in the hands of the Executive. This power is now qualified by the power of Parliament to prevent, save in exceptional cases, the Executive from ratifying a treaty if the House of Commons has resolved that it should not be ratified.<sup>125</sup> But Parliament's power to object does not alter the legal source of the treaty-making power. 'Ratification of a treaty is, as a matter of domestic law, an executive act within the prerogative power of the Crown.'<sup>126</sup>

It bears emphasising that, on many occasions, the exercise of the foreign affairs power will not directly collide with domestic law since it relates to the external relations of the State in its relations with other States and to acts outside the territory of the State. A particularly important aspect of this is the conduct of armed conflict. This is regulated in the field by the major international humanitarian law conventions that enjoy almost universal adherence.<sup>127</sup> Such conventions apply directly to the conduct of the British armed forces abroad.<sup>128</sup> Grave breaches of

<sup>122</sup> *Khadr v Canada (Prime Minister)* 2010 SCC 3, [2010] 1 SCR 44, [34].

<sup>123</sup> United Kingdom; House of Commons Public Administration Select Committee, 'Taming the prerogative: strengthening ministerial accountability to Parliament' (HC 422, 16 March 2004), [8].

<sup>124</sup> *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508, 539-40 (HL).

<sup>125</sup> ss 20 & 22 Constitutional Reform and Governance Act 2010.

<sup>126</sup> *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (DC), [15].

<sup>127</sup> Geneva Conventions Act, *supra* note 114.

<sup>128</sup> United Kingdom, Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (JSP 383, 2004).

such conventions may, as a result of primary legislation, give rise to domestic criminal liability.<sup>129</sup> But the greater part of international humanitarian law simply applies directly to the exercise of the executive function of the armed forces by virtue of the direct operation of international law.<sup>130</sup>

In this field, the invocation of Parliamentary sovereignty solves nothing, since neither the Executive nor Parliament is competent to change international law. This is the lesson that the Executive learned in World War I as a result of *The Zamora* when it realised that ‘The Government cannot by executive act alter international law.’<sup>131</sup> It also explains the insistence of the Chiefs of Staff on an unequivocal assurance as to the legality of the UK’s intervention in Iraq in 2003.

In this field, the limitation on the power of the Executive equally applies to Parliament. Recently published empirical research considered the views of Chiefs of the Defence Staff (‘CDS’) as to the status of international law vis-à-vis domestic law in the conduct of UK military operations reports as follows:<sup>132</sup>

The military, without exception, saw international law as a superior source of law. One former CDS said that he was ‘bound by international law’ because it was the source of his permission to use lethal force. Another former CDS stated that international law was what ‘define[d] the military. When asked what would happen if parliament passed a statute requiring the government to go to war, contrary to international law, yet another former CDS hesitated—the idea was clearly inconceivable to him—but then he replied: ‘I don’t think it’s possible for parliament to do that. Parliament could pass a Bill, but there would be very serious problems if it was contrary to international law.’ One former Army General was confused as to why parliament appeared to be unable to get to grips with international law, considering that he could ‘get a Private to understand it.’

Nor can the legality of the actions of Ministers in peacetime be determined solely by reference to internal law. In *Belhaj v Straw*,<sup>133</sup> Jack Straw, then British Foreign Minister, is sued, along with MI6 and officials, for his part in the alleged complicity of the British Government in the extraordinary rendition of Mr Belhaj, a prominent Libyan opponent of Gaddafi. The claim is formulated as a civil action in tort for false imprisonment, trespass to the person and misfeasance in public office. The applicable law, determined according to English domestic choice of law rules, is that of the place where the alleged acts took place.<sup>134</sup> But the critical point for present purposes is that the Court was not precluded by the foreign act of state doctrine from scrutinising the acts of the Minister because they were alleged to have been carried out in concert with a foreign State. Such acts are ‘in breach of peremptory norms of international law’<sup>135</sup> to which overriding effect must be given.

<sup>129</sup> Geneva Conventions Act 1957; International Criminal Court Act 2001.

<sup>130</sup> *Armed Activities (DRC v Uganda)* [2005] ICJ Rep 168, 242.

<sup>131</sup> *The Zamora* [1916] P 27.

<sup>132</sup> David Howarth and Shona Wilson Stark, ‘H.L.A. Hart’s secondary rules: what do “officials” really think?’, 73-4.

<sup>133</sup> [2017] UKSC 3, [2017] AC 964.

<sup>134</sup> [2014] EWCA Civ 1394, [2017] AC 964, [134]-[160], affirming EWHC 4111 (QB) on this point.

<sup>135</sup> *Habib v Commonwealth of Australia* [2010] FCAFC 12, (2010) 265 ALR 50, [114], reasoning approved by Lord Mance in *Belhaj* [2017] AC 964, [81]-[82], as to which see C McLachlan, ‘The foreign relations power in the Supreme Court’ (2018) 134 *Law Quarterly Review* 380.

### c) The Rule of Law and compliance with international obligations

It is still necessary to address a larger objection to the central proposition that the Executive is bound by the international legal obligations that it assumes on behalf of the State. That is the argument that this is inconsistent with the concept of the Rule of Law. As has been seen, this argument is advanced in two steps. First it is said that the Rule of Law is intrinsically connected with the law within the State and cannot extend to international law, which is 'a defective example of law.'<sup>136</sup> Second it is submitted that an acceptance of a legal obligation on Ministers to comply with international law would necessarily entail the consequence that they could change the legal rights and duties of 'anyone in the realm' contrary to the Rule of Law.<sup>137</sup> Each of these propositions involves a seriously fallacious reasoning step.

One can accept that there is a serious question about the extent to which conceptions of the Rule of Law that have been developed by reference to their application to national legal systems can be applied in the same way to the international legal system.<sup>138</sup> But this is not the issue that is raised by the present debate, which concerns the application of treaty obligations voluntarily assumed by the State to the conduct of executive government. In this context, an important function of international law is precisely to contribute to government under the Rule of Law.

As Arthur Watts put it in considering the concept of the Rule of Law as applied to international law:<sup>139</sup>

The rule of law is the counterweight to political power; together they establish a balance in which the exercise of power is subject to legal constraints which ensure that power is not abused. The rule of law is thus at the crossroads of law and politics: '[n]o legal system operates, or can operate, in a political vacuum; no political system can provide good government, ensure justice, or preserve freedom except on the basis of respect for law.'

A central aspect of the Rule of Law is the control of the exercise of arbitrary power: 'There is indeed a general sense in which other elements comprised within the general concept of the rule of law serve primarily to establish the conditions in which this central element can be realised.'<sup>140</sup>

In this regard, international law concerns itself not merely with the conduct of States on the international plane, but also with matters internal to the State. As James Crawford put it:<sup>141</sup>

International law is concerned increasingly with matters internal to the state—human rights, the environment, investment protection, criminal law, intellectual property, the conditions of free trade in terms of the WTO, the control of civil conflict and so on. Indeed it is not too much to say that in many of these areas the role of international law is to reinforce, and on occasions to institute, the rule of law internally.

---

<sup>136</sup> John Finnis, 'Ministers, international law, and the rule of law'.

<sup>137</sup> *Ibid.*

<sup>138</sup> Crawford 2013 Chs XI–XV.

<sup>139</sup> A Watts, 'The international rule of law' (1993) 36 *German YBIL* 15, 23, citing W.C. Jenks, *The Prospects of International Adjudication* (London: Stevens & Sons, 1964) 757.

<sup>140</sup> *Ibid.*, 32.

<sup>141</sup> James Crawford, 'International law and the Rule of Law' (2003) 24 *Adelaide L R* 3, 7-8.

The contribution of international law to the securing of the Rule of Law within the domestic setting was recognised in the Advisory Opinion of the Permanent Court of International Justice in *Danzig Decrees*.<sup>142</sup> In that case, the Court was asked by the Council of the League of Nations to give its opinion on the consistency with the Danzig Constitution of certain decrees instituted by the new National Socialist administration that amended the Penal Code that *inter alia* purported to confer upon the judge the power to deprive a person of his liberty or to convict him for the commission of an act which ‘according to sound popular feeling is deserving of penalty.’

The Court decided that it was entitled to render an Opinion since ‘though the interpretation of the Danzig Constitution is primarily an internal question of the Free City, it may involve the guarantee of the League of Nations, as interpreted by the Council and the Court.’<sup>143</sup> That is to say, the conformity of measures adopted at the domestic level with the Rule of Law was a matter which international law could and should address.

At this point, the Court’s conception of the Rule of Law becomes a matter of some importance. It observed:<sup>144</sup>

[T]he Constitution endows the Free City with a form of government under which all organs of the State are bound to keep within the confines of the law (*Rechtsstaat*, State governed by the rule of law).

This comprises two elements. The first is requirement that the Senate must always ‘keep within the bounds of the Constitution and the law.’<sup>145</sup> The second element is that the Constitution contains fundamental rights of the individual that ‘are designed to fix the position of the individual in the community, and to give him the safeguards which are considered necessary for his protection against the State. It is in that sense that the words “fundamental rights” have always been understood.’<sup>146</sup> It is apparent from the Court’s reasoning that neither of these elements can be approached by reference to a purely internal understanding of legality.

The Court rejected the submission of the Senate of the Free City that it sufficed that the new provisions had legal force under the law and therefore met the requirement of the Constitution that allowed restrictions on the liberties of individuals to be imposed by law.<sup>147</sup> It required that ‘the law itself must define the conditions in which such restrictions are to be imposed.’<sup>148</sup> Here the Court takes an external view of what it is to be a ‘State governed by the rule of law.’ The Senate of Danzig was not entitled to determine this question for itself as a purely internal matter, since, by reason of treaty, the question would be judged by reference to a broader international conception of the Rule of Law.

As to the second element, the protection of such rights against the abuse of power by the organs of executive government acting at the domestic level is an important function of

---

<sup>142</sup> *Consistency of Certain Danzig Decrees with the Constitution of the Free City* (Advisory Opinion) PCIJ Ser A/B No 65 (1935).

<sup>143</sup> *Ibid*, 50.

<sup>144</sup> *Ibid*, 54.

<sup>145</sup> *Ibid*.

<sup>146</sup> *Ibid*.

<sup>147</sup> *Ibid*, 55.

<sup>148</sup> *Ibid*, 56.

international law that contributes to the maintenance of the Rule of Law. Its application is not limited to autocratic States, since, as Hersch Lauterpacht put it in 1949: ‘Even in democratic countries, situations may arise where the individual is in danger of being crushed under the impact of reason of State.’<sup>149</sup>

In this context, the control of arbitrary action by the Executive is a central concern of international law, as Arthur Watts rightly recognised. A Chamber of the International Court of Justice (ICJ) expressed this idea in a case in which it was called upon to decide whether the conduct of public officials constituted a breach of treaty. It held:<sup>150</sup>

Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the *Asylum* case, when it spoke of ‘arbitrary action’ being ‘substituted for the rule of law’ (*Asylum Judgment, I.C.J. Reports 1950*, p. 284). It is a wilful disregard of due process of law . . .

There is also a fallacy in the second proposition: that to accept a binding obligation upon the Executive to comply with international law would necessarily entail empowering Ministers to change the legal rights of others within the realm. The problem with this proposition is that reverses the object of the legal duty and, in so doing, distorts the nature of that duty. It is certainly correct that Ministers may not invoke a treaty commitment to change the legal rights of individuals within the State. That is precisely the import of *Walker and Baird*<sup>151</sup> and of *Miller*.<sup>152</sup> The reason that Ministers may not do that is precisely to preserve the sovereignty of Parliament to legislate domestically to determine the rights and duties of citizens and to ensure that those rights cannot be taken away by executive fiat.<sup>153</sup>

This principle is not engaged in the present context, since the obligation to comply with international law rests upon Ministers themselves. Here the point is simply that, in conducting foreign relations, including entering into treaty relations on behalf of the State, Ministers are exercising a legal power—the prerogative foreign relations power—conferred upon them under the Constitution. In so doing they have the capacity to engage the responsibility of the State on the international plane: by their acts and omissions and specifically in the treaty context, by exercise of the power to conclude treaties as representatives of the State. That power to act on behalf of the State carries with it a correlative duty that itself supports the State whom they are appointed to serve: to abide by the international treaty obligations that the Executive has assumed.

It is finally objected that this gives a Minister the power to bind future Ministers. This is precisely the point. The executive power is exercised on behalf of the State as a whole and is enduring. This point was established as long ago as 1764 in the Opinion of Lord Halifax cited above: ‘The Sovereign contracts not for himself as a private Person (for that Idea would be injurious to

<sup>149</sup> Hersch Lauterpacht, ‘The Proposed European Court of Human Rights’ (1949) 35 *Transactions of the Grotius Society* 25, 35.

<sup>150</sup> *Elektronica Sicula SpA (ELSI) (United States of America v Italy)* [1989] ICJ Rep 15, 76, [128].

<sup>151</sup> *Walker v Baird* [1892] AC 491, 497.

<sup>152</sup> *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61.

<sup>153</sup> In the Brexit debate, Finnis argued *a contrario* that Executive was entitled to use the treaty power within the foreign affairs prerogative to alter the rights of citizens on the domestic plane, because Parliament had sanctioned this under the European Communities Act 1972: John Finnis, ‘Brexit and the balance of our Constitution’ (Judicial Power Project, 1 December 2016) 5. For analysis and critique see McLachlan ‘The foreign relations power in the Supreme Court’ (2018) 134 *Law Quarterly Review* 380.

Sovereignty) but as a public One. *In other words, he binds himself, his Successors and his People, as the great Representative of a whole Kingdom, who neither dies nor changes in his national Capacity.*<sup>154</sup>

---

<sup>154</sup> Text above at n 53, emphasis added.



## 5. Conclusion

In conclusion, the import of the present paper has been to demonstrate that, so far from being an aberrant and misplaced instruction, the requirement upon Ministers to comply with ‘the law, including international law and treaty obligations’ is in fact an integral element in the operation of the British Constitution. It is supported by several centuries of consistent practice in which the Law Officers of the Crown take Ministerial responsibility for advice to the Government on its obligations under international law, for which the Government, including its Law Officers are answerable to Parliament. Cases in which this rule has not been followed serve only to highlight its continuing validity and importance.

The omission of the express reference to ‘international law and treaty obligations’ from the Ministerial Code was a retrograde step away from the clarity with which that obligation had been articulated in a document that is designed to provide important advice in a concise form about the conduct of Ministerial government. But the subsequent clarifications provided by Ministers to Parliament, now also memorialised in the judgments in the *Gulf Centre* litigation, place again beyond doubt that the compendious reference to ‘the law’ includes ‘international law and treaty obligations.’

This requirement serves an important function in principle. It is not to be reduced to an expression of a ‘morally grounded UK *policy*.’<sup>155</sup> It is itself a fundamental tenet of the British dualist Constitution, which, by conferring upon the Executive the prerogative power to conduct foreign relations, including by means of the conclusion of treaties, also imposes on the Executive the obligation to comply with the international law obligations, which it has assumed. This requirement does not undermine the Rule of Law; it advances it. Ministers may not thereby change the law of the land or impose obligations upon citizens that interfere with their rights under ordinary domestic law. Rather, the requirement ensures that the State abides by the international law obligations that it has assumed through the persons that contract on its behalf and represent it in its foreign relations.

---

<sup>155</sup> John Finnis, ‘Ministers, international law, and the rule of law’ *op cit*.

## The Author



Campbell McLachlan QC is Professor of Law at Victoria University of Wellington. His principal publications include: *Foreign Relations Law* (Cambridge UP, 2014); *International Investment Arbitration: Substantive Principles* (with Weiniger & Shore, 2nd edition, Oxford UP, 2017) and *Lis Pendens in International Litigation* (Hague Academy of International Law, Nijhoff, 2008). He is a Specialist Editor of *Dicey, Morris & Collins on the Conflict of Laws* (15th edn 2012) and Joint Editor-in-Chief of *ICSID Review–Foreign Investment Law Journal*. In 2015, he was elected to the Institut de Droit International and is Rapporteur of its 18th Commission on Equality of Parties before International Investment Tribunals. He has held visiting fellowships at the Lauterpacht Research Centre for International Law in the University of Cambridge, All Souls College Oxford and New York University Law School. From 2006–9 he was President of the Australian and New Zealand Society of International Law.

His recent publications include: the edited special issue ‘The Dynamic Evolution of International Law’ (2018) 49 VUWLR No 4; ‘The Foreign Relations Power in the Supreme Court’ (2018) 134 LQR 380 and ‘Entre le conflit de lois, le droit international public et l’application internationale du droit public: le droit des relations externes des Etats’ [2018] Rev crit DIP 191. Forthcoming publications this year include: ‘Equality of Parties before International Investment Tribunals’ in *Session of The Hague, Yearbook of the Institute of International Law, Preparatory Works* (2018), vol. 79 (forthcoming 2019); ‘Five conceptions of the function of foreign relations law’ in C Bradley (ed) *Oxford Handbook of Comparative Foreign Relations Law* (Oxford UP, forthcoming 2019) Ch. 2; and ‘The assault on international adjudication and the limits of withdrawal’ (2019) 68 No 3 ICLQ.

Campbell McLachlan also practises international law. He is an Associate Member of *Bankside Chambers* (Auckland & Singapore) & *Essex Court Chambers* (London). He is a member of the ICSID Panel of Arbitrators, serving as President or member of a number of international arbitral tribunals under the auspices of ICSID, the PCA and the ICC. He holds an LL B (Hons) degree from Victoria University of Wellington, a PhD from the University of London and the diploma cum laude of The Hague Academy of International Law.

During his senior research fellowship, Professor McLachlan is working on a new project on the Systemic Integration and Disintegration of International Law. In 2020, he will hold the Arthur Goodhart Visiting Professorship in Legal Science in the University of Cambridge.

---

The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.