

USING
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COURTS

Shaheed Fatima



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Using International Law in Domestic Courts

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For Abu and Ami

Foreword

In his presidential address to the Holdsworth Club of the University of Birmingham in 1972, the late Lord Hailsham observed that international law 'has always been a somewhat sickly patient.' He was no doubt referring to the well-known difficulty of enforcing the rules of international law against states which fail to comply with them, or are said to do so. There was indeed a time when international law was seen as the esoteric preserve of a handful of very distinguished professors and Foreign Office mandarins, but not something which impinged on the professional lives of ordinary practitioners and national courts.

Times have changed. To an extent almost unimaginable even thirty years ago, national courts in this and other countries are called upon to consider and resolve issues turning on the correct understanding and application of international law, not on an occasional basis, now and then, but routinely, and often in cases of great importance. This calls for special, and in many cases new, skills on the part of advocates who present cases and judges who decide them.

This book does not purport to be a textbook of international law. Such works exist, and are indispensable. This book does something different. It identifies the main sources of international law binding on the United Kingdom, and tells the searcher where to find them. It summarises the principles governing the interpretation of treaties. It shows, with a wealth of citations, mostly of recent, mostly of English, authority how our courts have up to now responded to the challenges which have come before them.

Armed with this interesting, timely and well-researched book, both Bar and Bench can move with greater confidence into what, for many, remains unfamiliar territory. Shaheed Fatima deserves the thanks of us all.

Tom Bingham.

Preface

‘[Their Lordships] remember the words of M. Portalis, one of Napoleon’s commissioners, who said: “We have guarded against the dangerous ambition of wishing to regulate and to foresee everything . . . A new question springs up. Then how is it to be decided? To this question it is replied that the office of the law is to fix by enlarged rules, the general maxims of right and wrong, to establish firm principles fruitful in consequences, and not to descend to the detail of all questions which may arise upon each particular topic.” (Quoted by Halsbury LC in Halsbury’s Laws of England, Introduction, p.ccxi)’

(*In Piracy Jure Gentium* [1934] AC 586 (PC), 600C–E (Viscount Sankey LC))

This is primarily a reference book for practitioners, setting out the key ways in which courts in the United Kingdom deal with the role and issues of international law in domestic law. Since the influence of international law is widely, and increasingly, felt, these issues cut across many areas of law. Practitioners are more than ever before likely to encounter questions such as: What is the status of an international treaty in domestic law? How may it form part of domestic law? What is the relevance and effect of its incorporation? How should international treaties be interpreted? What is the role of unincorporated treaties and rules of customary international law in domestic law and how can they be used?

Chapters 2–13 address these, and other, questions. Commentary has been kept to a minimum and the emphasis is on describing the law as it is. I have classified the material, in the hope that this will enable quick and easy reference of the key authorities (and illustrations) on a given point. Chapter 1 identifies, by subject matter, international instruments in diverse areas and provides information on, for example, where they can be found, the number of parties to the treaty and the date on which the United Kingdom ratified the treaty. Thus the presentation and form of the book has been largely driven by its purpose—to enable practitioners to use and apply international law within the framework of domestic law.

I have been fortunate in the support and guidance which I have had from friends and colleagues in preparing this book. In particular, from the inception of this book until its completion, I have had extraordinary encouragement, support, and mentorship from Michael Fordham. His has been the guiding hand and voice of reason at every single stage. Beyond gratitude, I am indebted to him. I am grateful also to Professor Christopher Greenwood QC, John Howell QC and Lord Lester of Herne Hill QC (for their helpful comments on drafts of the book); to Martin Smith, senior

clerk (for supporting the project from the start and facilitating time away from practice); Scott Murphy, Daryl Hughes, James Clarke, Tom Winder and Rob Price, clerks (for their patient and efficient assistance in the collection of materials); Elaine Wintle, librarian and everyone else at Blackstone Chambers. Especial thanks go to my publisher, Richard Hart.

This preface would be entirely incomplete absent the name of Professor Peter Birks, my beloved mentor and friend, who died in July 2004. His remembrance will burn ever bright.

Most of all, to my family: my parents, to whom this book is dedicated with my love, my sisters (Hijab, Irum, Amber and Gulshan) and, especially, my husband, my anchor, Nomi: thank you—for everything.

London
30 June 2005

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