



## A GUIDE TO THE BASICS OF INTERNATIONAL LAW\*

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Traditionally, international law has been defined as “the body of rules and principles of action which are binding upon civilized states in their relations with one another.”<sup>1</sup> As globalization continues to bring the international community together, law students may find that they need to become more familiar with the basics of international law and how to apply it. This handout is meant to help by providing:

- (1) a general introduction to the various sources of international law;
- (2) guidance about conducting international law research; and
- (3) an overview of the role international law plays in the U.S. legal system.

### 1. Sources of International Law

The principle sources of international law are enumerated in Article 38 of the Statute of the International Court of Justice, a treaty that has been ratified by every member of the United Nations. The four sources listed by Article 38 are: (a) international conventions or treaties establishing rules expressly recognized by the contesting states; (b) customary international law, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) and judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>2</sup>

#### A. Treaties

International conventions or treaties are international agreements that govern the way nations deal with one another. The Vienna Convention on the Law of Treaties defines a treaty as an international agreement between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments.<sup>3</sup> Although the United States is not a party to the Vienna Convention, it consistently acts as though the Convention is binding international law.<sup>4</sup>

A treaty can come into force once a certain number of nations ratify the treaty, as specified in the treaty, or upon signature by the parties. In addition, specific provisions in most

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<sup>1</sup> J.L. BRIERLY, *THE LAW OF NATIONS* (6th ed. 1963).

<sup>2</sup> Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

<sup>3</sup> Vienna Convention on the Law of Treaties art. 2, May 23 1969, 1155 U.N.T.S. 331.

<sup>4</sup> “U.S. officials have consistently stated that at least most of the [Vienna] Convention’s provisions represent customary international law, and U.S. courts have frequently relied on its terms.” BARRY E. CARTER, PHILLIP R. TRIMBLE & ALLEN S. WEINER, *INTERNATIONAL LAW* 95 (5th ed. 2007).

treaties will identify when it becomes legally binding, how compliance will be monitored and measured, how other nations may accede to the treaty, how and whether the treaty may be amended or modified, and how and when the treaty will terminate. Treaties are only binding upon states that choose to ratify the treaty. Bilateral treaties between two states are deposited with one of the parties to the treaty, while multilateral treaties between many states are registered with the United Nations and made available to the public.

#### B. Customary International Law

Customary international law (CIL) is to international law much as the common law is to our law in the United States. CIL is developed through “a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>5</sup> This definition has two separate and distinct elements, requiring both (a) a state practice and (b) a sense of legal obligation to adhere to that practice (commonly known as *opinio juris*). Essentially, CIL places binding obligations on nations according to their patterns of behavior. Over time, nations come to depend on the patterns of other nations’ actions, words, and responses. If these patterns become reliable, and the principle is “rendered obligatory by the existence of a rule of law requiring it,” then the norm is crystallized into law.<sup>6</sup> CIL is only binding on those states that follow or adhere to the pattern of behavior; denouncing such a norm will protect a state from being held to the legal obligation.

There are some international norms so fundamental, however, that they apply to all states and permit no derogation.<sup>7</sup> This concept, known as *jus cogens*, encompasses a limited set of rights—such as the prohibitions on genocide and slavery—that the international community as a whole has agreed to follow.<sup>8</sup>

#### C. General Principles of Law Recognized by Civilized Nations

General principles of law recognized by civilized nations constitute the common themes familiar to the various legal systems throughout the world; these general principles encompass implementations of procedure, evidence, and the judicial process.<sup>9</sup> More specifically, the ICJ refers to concepts of estoppel and *res judicata* as examples of this form of international law.<sup>10</sup>

#### D. Judicial Decisions and the Teachings of the Most Highly Qualified Publicists

In instances where these other sources of international law have failed to provide a clear or sufficient answer to an issue, then the ICJ or other entity will refer to domestic judicial decisions of the various states as well as scholarly articles from the international community.

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<sup>5</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) 1987.

<sup>6</sup> North Sea Continental Shelf (Ger./Den.; Ger./Neth.), 1967 I.C.J. 3, ¶ 77 (Feb. 20).

<sup>7</sup> Vienna Convention on the Law of Treaties art. 53, May 23 1969, 1155 U.N.T.S. 331.

<sup>8</sup> ANTHONY AUST, MODERN TREATY LAW AND PRACTICE, 257 (2000).

<sup>9</sup> MALCOLM N. SHAW, INTERNATIONAL LAW, 92-99 (5th ed. 2003).

<sup>10</sup> *Id.*

## 2. Conducting International Law Research

If international law research is important to your legal issue or question, it is important that you know where to find it. As you will see, international law research requires some different techniques than the ones you learned from your legal research and writing professor. This section will point you to some helpful introductory sources for researching the various forms of international law.

### A. Introductory Sources for Learning about International Law

In addition to the specific sources below, consulting periodicals, journals, and certain web-based resources can be an important first step in international law research. Current awareness sources such as loose-leaf services and web sites that collect helpful links can provide up-to-date information about pressing issues in international law. A current awareness source could, for example, direct you to learn more about a recently decided ICJ case or about a treaty that has just entered into force. These web sites can be a good place to start research because their links tend to be current and working, providing an excellent navigational tool. Such sources include:

- ***The International Journal of Legal Information***, which is a particularly good source for bibliographies on a country or a specific topic.<sup>11</sup>
- ***The American Society of International Law's (ASIL) Electronic Resource Guide***, which provides both a brief overview and a list of recommended reading for various fields within international law (such as International Criminal Law or International Human Rights).<sup>12</sup>
- ***ASIL's International Law in Brief***, a report published electronically every other Friday that includes a summary of recent resolutions and declarations; judicial proceedings; and any other important development in international law.<sup>13</sup>

### B. Treaties

Treaties will ordinarily be the easiest source of international law to research. If you need to research multilateral treaties that frequently have many states as a party, then the best place to start would be with the primary intergovernmental treaty databases, such as:

- ***The World Legal Information Institute's International Treaties Collection***, which has complete databases of the major intergovernmental treaty sources such as the United Nations Treaty Series.<sup>14</sup> This would be the most efficient way to get the text of a treaty so long as you have an initial understanding of the underlying subject matter.

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<sup>11</sup> Available electronically through HeinOnline and in print at the Woolf International Library (at K9.N787).

<sup>12</sup> Available at <http://www.asil.org/erg/>.

<sup>13</sup> Available at <http://www.asil.org/ilibmenu.cfm/>.

<sup>14</sup> Available at <http://www.worldlii.org/int/special/treaties/>.

- ***The World Treaty Index***, which allows you to search treaties by general topic, parties to the document, or date signed.<sup>15</sup> The database only contains treaties signed between 1945 and 1999. This would be the best place to go if you are interested in a topic or a geographical area, but are unsure about what treaties deal with that subject.

If you need a bilateral treaty between the U.S. and another state, or any treaty that the U.S. is currently a party to, then these domestic sources will often be the best place to start:

- ***The United States Treaties and Other International Agreements (UST)***, the official collection of U.S. treaties and agreements updated every twelve years.<sup>16</sup>
- ***The Treaties and Other International Acts Series (TIAS)***, which provides official slip reports of every treaty that the U.S. has agreed to join.<sup>17</sup>

### C. *Decisions of the ICJ*

The International Court of Justice publishes all of its judgments, advisory opinions, and orders on its own website as PDF documents.<sup>18</sup>

### D. *Customary International Law*

Researching customary international law is difficult, because so many different types of sources may be used to demonstrate both state practice and *opinio juris*. State practice and *opinio juris* may be shown through official pronouncements of states, treaties, domestic law, and announcements by international organizations and international courts.<sup>19</sup> While there are many ways to research customary international law, two of the best areas to start include:

- ***The Digest of United States Practice in International Law***, an annual report published “to provide the public with a historical record of the views and practice of the Government of the United States in public and private international law.”<sup>20</sup>
- ***The Yearbook of International Organizations***, an annual report covering both international non-governmental and intergovernmental organizations. The yearbook includes “a global view of past and future trends in particular fields of activity.”<sup>21</sup>

## 3. The Role of International Law in the United States Legal System

International treaties that have been signed and ratified by the United States make up an important part of domestic law. Article VI, Clause 2 of the Constitution provides that “this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and

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<sup>15</sup> Available at <http://www.worldtreatyindex.com/>.

<sup>16</sup> Available in print at the Woolf International Library (at KZ235.3).

<sup>17</sup> Available at <http://www.state.gov/s/l/treaty/tias/>.

<sup>18</sup> Available at <http://www.icj-cij.org/>.

<sup>19</sup> Silke Sahl, *Researching Customary International Law, State Practice and the Pronouncements of States regarding International Law*, N.Y.U. L. GLOBAL (Apr. 27, 2012, 10:00 AM), [http://www.nyulawglobal.org/Globalex/Customary\\_International\\_Law.htm#\\_Evidence\\_of\\_Customary/](http://www.nyulawglobal.org/Globalex/Customary_International_Law.htm#_Evidence_of_Customary/).

<sup>20</sup> Available at <http://www.state.gov/s/l/c8183.htm/>.

<sup>21</sup> Available at <http://www.uia.be/yearbook/>.

all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land.”<sup>22</sup> This text essentially requires that the various states adhere to and obey any international treaty that the federal government joins, and may not enact laws that contradict these international agreements. While the Court has used this clause to strike down state statutes that conflict with international treaties<sup>23</sup>, it has also been careful to explain that the Constitution supersedes any conflicting international treaty, even after the Senate ratifies the treaty.<sup>24</sup>

Additionally, there is debate over what role customary international law should play within the U.S. legal system. Federal courts sometimes apply customary international law sources in the absence of controlling federal statutory provisions. In an early important case, for example, the U.S. Supreme Court looked to customary international law to find that an American crew violated international wartime customs when it seized a ship during the Spanish-American war.<sup>25</sup> The court did not use international customs to interpret existing U.S. law, but instead looked to the international customs as establishing “law” that the crew had violated.<sup>26</sup>

U.S. courts are also, according to one influential Second Circuit case, bound to observe international law. In *Filartiga v. Pena-Irala*, the Second Circuit Court of Appeals considered a case brought under the U.S. Alien Tort Statute by a Paraguayan citizen in New York against a Paraguayan police captain for the death of her brother in Paraguay.<sup>27</sup> The suit alleged a murder in violation of the law of nations; after being dismissed by the trial court for lack of jurisdiction, the Second Circuit reversed in an important opinion. The court held that the U.S. is bound to observe international law, a premise supported by previous court decisions but not directly supported by the U.S. Constitution or an act of Congress.<sup>28</sup> The court’s opinion explained that the appropriate sources to consult for understanding international law include jurists, writers, the usage and practice of nations, and judicial decisions recognizing and enforcing international law.<sup>29</sup> These cases support the notion that U.S. courts can and will use international law when deciphering what rights, obligations, and remedies exist under federal law.

Finally, international law may be used to interpret U.S. domestic law. In *Murray v. The Schooner Charming Betsy*<sup>30</sup>, Chief Justice Marshall explained “that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>31</sup> This principle, known as the *Charming Betsy* doctrine, continues to be used as a valid canon of statutory interpretation.<sup>32</sup>

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<sup>22</sup> U.S. CONST. art. XVI.

<sup>23</sup> See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

<sup>24</sup> See *Reid v. Covert*, 354 U.S. 1 (1957).

<sup>25</sup> *The Paquete Habana*, 175 U.S. 677 (1900).

<sup>26</sup> *Id.* at 714.

<sup>27</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>28</sup> *Id.* at 884-85.

<sup>29</sup> *Id.* at 880-81.

<sup>30</sup> 6 U.S. (2 Cranch) 64 (1804).

<sup>31</sup> *Id.* at 118; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”).

<sup>32</sup> See *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993) (Scalia, J., dissenting).