

International Law

Third Edition

Barry E. Carter

Professor of Law

Georgetown University

Phillip R. Trimble

Professor of Law

University of California, Los Angeles



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To Kathleen, Gregory, and Meghan
—*Barry Carter*

To Gardner, Billy, and Valeria
—*Phillip Trimble*

Biographies

Barry E. Carter has an extensive background in law, foreign policy, and international business and trade.

Mr. Carter is presently a professor of law at Georgetown University, teaching primarily international courses and also chairing the International Law Programs Committee. He returned to Georgetown in August 1996 after more than three years as the acting Under Secretary and then Deputy Under Secretary of Commerce for Export Administration. During 1993–1996, Mr. Carter also was the U.S. vice chair to Secretary of Defense William Perry on bilateral defense conversion committees with Russia, Kazakhstan, Ukraine, and Belarus. He was the U.S. chair of the committee with Uzbekistan and served on committees with China. As a result of these responsibilities, he helped implement a variety of U.S. trade law as well as streamline and enforce U.S. export controls, including enforcement with special agents in the field. He helped other countries strengthen their controls over nuclear and other sensitive items, and he assisted those countries in converting some of their defense facilities to civilian production, often in joint ventures with U.S. companies. Mr. Carter also worked to reorganize and downsize the 370-person Bureau, and he helped prepare and manage its \$40+ million budget.

Before entering the government, Mr. Carter had been a Georgetown professor since 1979 and Executive Director of the American Society of International Law during 1992-1993. He was active in the 1992 Clinton-Gore campaign and transition, working on NAFTA and other trade and investment issues. He was a visiting law professor at Stanford in 1990. He served as a senior counsel on the Senate Select Committee on Intelligence Activities in 1974. He was a fellow at Harvard's Kennedy School of Government and an International Affairs Fellow at the Council on Foreign Relations in 1972. A member of Dr. Kissinger's National Security Council staff from 1970 to 1972, he worked on the SALT negotiations, other U.S.-Soviet issues, and NATO. While an Army officer, he was a program analyst in the Office of the Secretary of Defense in 1969-1970. He has been a trial and appellate lawyer in California and Washington, D.C.

Mr. Carter, a native Californian, graduated Phi Beta Kappa from Stanford University in 1964, received a master's degree in economics and pub-

lic policy from Princeton's Woodrow Wilson School of Public and International Affairs in 1966, and graduated in 1969 from Yale Law School, where he was the Projects Editor of the Yale Law Journal.

Mr. Carter's book, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime* (Cambridge Univ. Press 1988), received the 1989 annual award from the American Society of International Law for the outstanding new book on international law subjects. He has also written chapters in others books as well as articles in the California Law Review, Yale Law Journal, Washington Post, Scientific American, and other periodicals.

He is a member of the Council on Foreign Relations. He is on the U.S. roster of individuals eligible to serve on binational panels that review antidumping and countervailing duty matters under Chapter 19 of NAFTA. Until joining the Commerce Department, he had also been the vice president of the Arms Control Association and the chairman of the Advisory Board of the Defense Budget Project.

Phillip R. Trimble is a professor of law at UCLA. During his academic career he has been a member of the executive committees of the UCLA Center for International Affairs and the UC Institute on Global Conflict and Cooperation, was a consultant to the U.S. Arms Control and Disarmament Agency (and counsel to the U.S. Delegation to the Nuclear Test Talks), served on an arbitral panel under the U.S.-Canada Free Trade Agreement, and was a visiting professor of law at the Stanford and Michigan law schools.

In the 1960s, Professor Trimble practiced tax and corporate finance law at Cravath Swaine and Moore. His government career included service on the staff of the Senate Foreign Relations Committee under Senator Fulbright; Assistant Legal Advisor for Economic and Business Affairs in the Department of State during the Nixon, Ford, and Carter administrations; counsel to the mayor and then deputy mayor of New York City under Ed Koch; and American Ambassador to Nepal during the Carter Administration. He has been a member of the Board of Visitors at Ohio University; the Board of Directors of the American Alpine Club; the Board of Editors of the American Journal of International Law; and the Southern California advisory boards of the America-Nepal Friendship Society, the Pacific Asia Museum, the Asia Society, and Human Rights Watch.

In his avocation as a mountaineer, Professor Trimble has climbed on six continents, including several expeditions to the Himalaya and polar regions, and in 1976 led the successful U.S. expedition to Mt. Everest. More recently, he has researched music in eastern and central Africa for Afro Pop Worldwide and was assistant director for two contemporary operas in the Netherlands.

His publications have appeared in the Harvard, Stanford, Columbia, Michigan, Pennsylvania, and UCLA Law Reviews, the Tax Law Review, the American Alpine Journal, the Himalayan Journal, the Linnean Society Newsletter, the American Journal of International Law, Comparative Labor Law, and the Yale, Stanford, Berkeley, and Davis International Law Journals.

Professor Trimble lives in Santa Monica and New York City.

Preface to the Third Edition

This third edition of the casebook is a major rewrite and update of the previous two editions. It maintains the basic structure and educational objectives of the successful first and second editions. This third edition, however, emphasizes current issues and developments by adding many new materials (such as cases, government documents, articles, and new notes and questions). It also eliminates or streamlines materials from the second edition. Moreover, this edition also identifies useful web sites as well as books and articles. Beyond the across-the-board updating, some of the major changes are detailed below.

In Chapter 1, we continued to add new analyses and critiques of international law. We also changed the case study to the international response to the Iraqi invasion of Kuwait. There are considerable materials on the immediate U.N. and U.S. response to the 1990 invasion and items on the continuing struggle with Iraq over enforcing the U.N. cease-fire resolutions, including weapons monitoring and the U.S.-British attacks in December 1998. (Materials from the previous Iran hostage case study now appear at appropriate points in other chapters.)

In Chapter 2, we added materials on the creation of international law by international organizations and by non-governmental organizations—both multinational corporations and nonprofit groups.

In Chapter 5, we expanded the discussion of the International Monetary Fund, including its role in the Asian financial crisis. We also included the changes made in the European Union by the Treaty of Amsterdam, which came into effect in 1999.

In Chapter 6, we added a section on the 1996 exception to the Foreign Sovereign Immunities Act for states designated as supporting terrorism and on the related Flatow amendment, as well as the 1988 amendments. These FSLA amendments have spawned a number of cases against Iran, Cuba, and Libya, with some judgments already for huge damage awards. The attempt

to extradite General Augusto Pinochet from England is addressed in the materials on head-of-state immunity and also in Chapter 8.

Chapter 7 includes new materials on the Helms-Burton Act.

In Chapter 8, we added many new items, including material on human rights in Asia and in the Muslim world. The section on the European Court of Human Rights has been expanded and the *Soering* case has been included.

Chapter 11 has been thoroughly redone with major new materials on non-governmental organizations and on recent treaties, including the Kyoto Protocol to the Convention on Climate Change.

In Chapter 12, we expanded the section on individual responsibility to include the proposed International Criminal Court.

Professors Carter and Trimble continued their same areas of primary responsibility as identified in the Preface to the second edition.

The companion Documentary Supplement has also been thoroughly updated. New documents include the Kyoto Protocol to the Climate Change Convention, the Rome Statute of the International Criminal Court, and recent U.N. resolutions on Iraq. We have added the new parties to the other agreements in the Supplement.

Our efforts on this third edition and the new Documentary Supplement were assisted significantly by the comments received from the many people who have used the earlier books. As with the prior editions, we welcome your comments about this third edition.

Barry E. Carter
Phillip R. Trimble

January 1999

Preface to the Second Edition

This second edition of the casebook maintains the basic structure and educational objectives of the first edition. The second edition, however, has been thoroughly updated to reflect the changes in the world and in international law since 1990. Some chapters have also been expanded to fill gaps in coverage in the first edition. In other parts, the second edition has been streamlined.

In Chapter 1 we have added several critiques of international law from feminist, critical legal studies, and philosophical perspectives. In Chapter 11, law and economics approaches are brought to bear on environmental issues.

Chapter 3 has been expanded to discuss the effect of Senate reservations and declarations with respect to a treaty, using recent human rights treaties as examples. It raises important issues that were not treated in the first edition, notably the legislative power of the President and Senate as treaty-makers, the impact of Senate understandings on self-executing treaties, and states' rights.

Chapter 4 provides an analysis of recent innovations in dispute resolution, including those found in the North American Free Trade Agreement (NAFTA) and in the World Trade Organization (WTO) created from the Uruguay Round agreement.

In Chapter 5 we have expanded the discussion regarding the succession of states (e.g., the newly independent states from the former Soviet Union as well as the disintegration of Yugoslavia). The sections on the United Nations and the European Union have also been thoroughly updated to reflect the changes there.

We have substantially revised Chapters 6 and 7 to take account of recent Supreme Court decisions—the *Weltover*, *Nelson*, *Hartford Life Insurance Company*, *Alvarez-Machain*, and *Sale* (Haitian refugee) cases.

Chapter 8 expands and improves the treatment of human rights by adding new material on different cultural perspectives on human rights.

Chapter 9 is updated to highlight the entry into force of the 1982 U.N.

Convention on the Law of the Sea as well as the related agreement regarding the Convention's implementation, which allowed the United States and other major industrial countries to ratify the Convention. Chapter 10 includes more extensive current material on the commercial uses of space.

Chapter 11 has been substantially expanded. It now brings a sharper theoretical focus on how international law has used a variety of techniques to develop new law, starting with research, information exchange, and consultation, and then leading to substantive norms. The chapter also focuses on techniques to induce states to join treaties and the elaborate enforcement structures now being developed. Finally, Chapter 11 explores how private liability regimes can complement public international law.

Reflecting recent developments, Chapter 12 presents new and expanded materials on collective intervention and U.N. peacekeeping operations.

Professor Trimble has been primarily responsible for the revisions and updates to Chapters 1A–C, 2, 3, 7, 8, 10, and 11. Professor Carter has been primarily responsible for the changes in Chapters 1D, 4, 5, 6, 9, and 12.

The companion Documentary Supplement has also been updated. New documents include U.N. Security Council resolutions on the former Yugoslavia, several recent environmental treaties (including the conventions on air pollution, climate change, biodiversity, and hazardous waste), the Senate resolution on the International Covenant on Civil and Political Rights, and the companion agreement to the Convention on the Law of the Sea.

Our efforts on the second edition and the new Documentary Supplement were helped considerably by the comments received from many people who have used the earlier books—faculty, students, and others. As with the first edition, we welcome your comments about this second edition.

Barry E. Carter
Phillip R. Trimble

January 1995

Preface to the First Edition

This casebook is designed for an introductory course in international law. It builds on the traditional theories and concepts of public international law but also addresses new institutions and other developments, especially the relationship between international and domestic law and the increasingly blurred line between public and private law. It analyzes as well how public international law frequently affects private activity, both individual and business. This casebook, however, does not cover in detail international trade, investment, or other economic transactions.

Background

The United States and its people increasingly are enmeshed in international transactions and are influenced by developments abroad. The governments of the United States and over 150 other nations deal daily with a host of issues between one another, or with international institutions like the United Nations, the International Monetary Fund, the World Bank, and other U.N. specialized agencies (e.g., the International Civil Aviation Organization). The problems range from essential, if mundane, matters (such as postal agreements) to those of great economic significance (such as currency exchange rates and retaliatory tariffs). The issues even extend to matters of life and death (disaster assistance, the control of nuclear weapons, and the use of military force).

Each day public and private entities move across U.S. borders many billions of dollars worth of currency and goods, hundreds of thousands of people, and tens of thousands of ships, planes, and other vehicles.

This international activity usually occurs in carefully structured ways, most often without serious incident. The structure is provided by a complex and evolving mix of international and national law. It is administered and enforced by international and national entities, both public and private.

As a result, U.S. lawyers in all parts of the country are increasingly affected. They need to understand the relevant international law and how it can impact on the activities of their clients—whether the client is a government or a private party. For example, can an individual citizen invoke a treaty in domestic litigation? Does a U.S. law against terrorism or against price-fixing extend to activity outside the territory of the United States? How can individuals resort to international tribunals, such as international arbitration?

Objectives

In introducing students to international law, this casebook has five major objectives:

1. The casebook should make students think about the sources of public international law, its principal theories and concepts, and recent developments in the law.

In analyzing sources, particular attention is paid to treaties and customary international law, which a student probably has not studied before in depth. Traditional theories and concepts, such as the various theories for exercising prescriptive jurisdiction, the act of state doctrine, approaches to foreign sovereign immunity, and justifications for the use of military force, are then addressed in appropriate sections.

Historical materials are often used to help define the scope of a principle and to trace its development. Current materials are then extensively drawn upon to note present status, to stimulate student interest in the issues, and to suggest what the future might hold. Excerpts from the 1986 Restatement of the Foreign Relations Law of the United States (Third), including its comments and reporters' notes, will often be employed because the Restatement is recent and represents a consensus among a wide range of U.S. international lawyers.

2. This casebook also analyzes the supporting institutions that help public international law impact on the burgeoning international activity. The system is addressed as it has actually developed and as it is likely to develop in the future.

The years right after World War II witnessed tremendous creativity and accomplishment in establishing an international system. The United Nations, International Court of Justice (or World Court), World Bank, and International Monetary Fund (IMF) were established. While the International Trade Organization never got off the ground, the General Agreement on Tariffs and Trade (GATT) was signed. This progress stimulated hopes by some observers that a new international order was at hand.

Hopes for a new order were also kindled in the 1960s and 1970s as colonialism neared its end and many new countries appeared—usually less developed economically than Europe or North America but strong in their

convictions. Sweeping changes were proposed under the rubric of the New International Economic Order.

The reality of the world today is not, however, a simple structure, but rather a complex mix of international and national law, administered and enforced by a variety of entities. Some of the post-World War II institutions like the World Bank and the IMF have grown and adapted very effectively, and GATT has worked somewhat creakingly. On the other hand, the United Nations and the International Court of Justice have not lived up to their proponents' expectations, although the end of the Cold War and the initial U.N. response to the Iraqi invasion of Kuwait of 1990 have revived hopes for the U.N.'s future.

At the same time, other formal and informal institutional arrangements have emerged and assumed important roles. These other arrangements include regional organizations like the European Community and the Association of Southeast Asian Nations (ASEAN), frequent use of international arbitration, and a vast array of multilateral and bilateral agreements for various purposes—from protection of diplomatic personnel to enforcement of arbitral awards.

3. The casebook recognizes and studies the interaction between public international law and national agencies and courts. These domestic entities are willing to play an international role, such as the decisions by U.S. courts to hear cases on international human rights and to take account of public international law in other areas as well.

4. Students will also be made aware of how public international law increasingly affects private activity, both individual and business. The public international law questions involved, for example, in the seizure of U.S. hostages by Iran in 1979–1981 had wide-ranging ramifications. The situation raised myriad issues—including what level of protection a host country owes foreign diplomatic personnel, the right of the United States to use military force to respond, and the reach of U.S. laws to foreign assets in U.S. banks in other countries. About \$12 billion in Iranian assets were frozen by executive order in U.S. banks and other entities here and abroad. Such measures affected not only the two governments, but also other nations and thousands of businesses and individuals.

On a less dramatic scale, the question of sovereign immunity of foreign governments is not only of interest to governments and their diplomats, but can also be crucial to an American company dealing with a foreign supplier owned by a government.

As a result, the future lawyer should understand how the rapidly increasing body of international law—including multilateral and bilateral agreements—is made; how it can be changed; and how it can affect his or her client's interests. The student should also understand how governments make decisions and how diplomacy operates.

5. Although this casebook focuses on international law, it also aims at educating U.S. lawyers. Consequently, it often considers international law

from the American perspective, including substantial sections on the U.S. Constitution and U.S. laws that have international impact. At the same time, because American lawyers must appreciate the different principles and possible strategies under foreign legal systems, materials from other legal systems are included to illustrate contrasting approaches.

Overview—The Structure of the Book

This casebook is designed primarily for an introductory course in international law that involves two to five semester hours. However, there are sufficient materials to allow professors, within limits, to select their own emphases and to choose among the materials.

Chapter 1 starts with the standard definition of international law, contrasts it with more familiar forms of domestic law, and introduces the ways in which international law is formed and enforced, mostly through diplomatic negotiation. A section on historical background briefly examines the extent to which international law is a Eurocentric system, the role of multinational corporations, and alternative world order systems. The chapter concludes with a case study—the Iran hostage crisis of 1979–1981—that emphasizes law in action and shows how international law actually works. These Iran hostage materials also illustrate the relationship of international and domestic law that is so important to the practitioner (both government and private).

Against this background, Chapters 2 and 3 introduce the basic building blocks of international law—treaties and custom—in the international and U.S. domestic context. In Chapter 2 the student learns what a “treaty” is and some of the basic roles of treaty law. That chapter also covers the formation of customary international law, including the controversial role of the U.N. General Assembly. It concludes with a brief examination of the law-making role of international organizations. Chapter 3 looks at treaties and customary law from the perspective of U.S. constitutional law. It focuses particularly on the relationship of international and domestic law and the struggle between Congress and the President over the powers to conduct foreign affairs.

Chapter 4 examines the major, distinctive means by which international law disputes are settled. Besides the traditional consideration of the International Court of Justice (ICJ) and the role of domestic courts, the chapter also analyzes the process of international negotiation, the development of regional courts, and the increasingly important role of arbitration.

Chapter 5 defines “state” and introduces some of the fundamental consequences of statehood, including the issue of a state government’s right to recognition by other states and its obligation to be bound by the past agreements of prior governments. This chapter also considers the key international and regional organizations that appear as actors throughout this