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FOREIGN RELATIONS LAW
Cases and Materials

Second Edition

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Second Edition

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FOREIGN RELATIONS LAW

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To Kathy, David, and Liana

—Curtis A. Bradley

To Leslie, Jack, and Will

—Jack L. Goldsmith

Preface

This casebook examines the constitutional and statutory law that regulates the conduct of U.S. foreign relations. The topics covered include the distribution of foreign relations authority between the three federal branches, the relationship between the federal government and the states in regulating foreign relations, and the status of international law in U.S. courts. In addition to including excerpts of the major Supreme Court decisions in this area (and some lower court decisions that we thought would be helpful for teaching purposes), we have included a variety of non-case materials, including historical documents; excerpts of statutes, treaties, and Executive Branch pronouncements; and detailed notes and questions.

One of our goals in the book is to give students a sense of the rich history associated with foreign relations law. History is especially important in this field because much of the content of U.S. foreign relations law has developed in response to, and thus can best be understood in light of, discrete historical events. Historical research also has played a significant role in foreign relations scholarship. As a result, much of the first chapter is devoted to history, and we sketch the historical origins of all of the major foreign relations doctrines as they are presented.

Despite these historical materials, the focus of the book is on contemporary controversies, such as debates over the validity of executive agreements, the nature and limits on the war power, the scope of the treaty power, the legitimacy of international human rights litigation, and the propriety of judicial deference to the Executive Branch. In addition to describing the positions taken on these issues by institutional actors, we have attempted to give students some exposure to the extensive academic debates on these topics. We have avoided, however, including long excerpts of law review articles, which, in our experience, are not the best vehicle for teaching. Instead, we have attempted to weave the relevant academic arguments into the notes and questions that follow each set of cases and materials.

Without advocating any particular approach to constitutional interpretation, we also attempt to get students to focus closely on the text of the Constitution, a practice that we believe will be useful to them as lawyers. In addition, we emphasize issues of constitutional structure, especially federalism and separation of powers. Regardless of one's views about the legal relevance of these structural principles to foreign relations (a matter of some debate), we believe it is important to understand these principles at least for their *political* significance. A related theme of the book concerns "legal process" questions about the relative competence of various institutional actors to conduct U.S. foreign relations, questions that overlap with work that has been done in the political science area.

The casebook also emphasizes continuities and discontinuities between foreign relations law and "mainstream" constitutional law, statutory law, and federal jurisdiction issues. Indeed, we believe that many important constitutional law and federal courts doctrines — such as the political question doctrine, federal common law, and dormant preemption — have some of their most interesting applications in the foreign relations context. As a result, it is our hope that the book will appeal not only to students interested in international studies, but also to students interested in domestic constitutional and jurisdictional issues. We also hope that domestic law scholars will be tempted by this book to teach a course in foreign relations law.

Foreign relations law is a fast-changing field, and this second edition contains a significant amount of new material. Among other things, we have included excerpts of recent Supreme Court decisions relating to foreign relations law such as *Sosa v. Alvarez-Machain* (concerning law of nations claims under the Alien Tort Statute), *Hamdi v. Rumsfeld* (concerning the U.S. military detention of a U.S. citizen as an "enemy combatant" in the war on terrorism), *Republic of Austria v. Altmann* (concerning retroactive application of the Foreign Sovereign Immunities Act), and *American Insurance Association v. Garamendi* (concerning the preemption of state law based on sole executive agreements). As with the first edition, we have included a significant amount of material relating to issues posed by the post-September 11 war on terrorism. These issues are raised and addressed where relevant in each chapter, and we have also created a section in the war powers chapter (Chapter 4) specifically devoted to the war on terrorism. In addition to containing updated material throughout the book, this second edition reflects two substantial changes from the first edition. First, we have eliminated what was Chapter 9, on foreign sovereign immunity, and moved those materials to two places: Chapter 2, which covers the role of courts in foreign relations, and Chapter 7, which covers both customary international law and international human rights litigation. We believe that this change will make it easier to teach the sovereign immunity materials by integrating them better with related topics. Second, we have largely rewritten Chapter 4, on war powers. In part this is a reflection of the many interesting issues and developments that have arisen in the war on terrorism. It is also a reflection of additional work that we have both done in this area since the publication of the first edition, and the lessons that we have learned from teaching these materials in a number of classes.

Although (and indeed because) we have participated as scholars in many of the debates implicated by the cases and materials in this book, we have tried hard to present the issues and questions in a balanced manner. We welcome feedback on this and any other aspect of the casebook.

Curtis A. Bradley
Jack L. Goldsmith
December 2005

Acknowledgments

Many people and institutions have helped us in creating this casebook. In preparing the first edition, we benefited greatly from the assistance of the law librarians at the Universities of Virginia and Chicago and from financial and other support from our deans at those schools. We received similarly helpful support from our current law schools, Duke and Harvard, in preparing the second edition. The following individuals provided us with helpful comments and suggestions on drafts of the first edition: Roger Alford, David Bederman, Joe Dellapenna, Martin Flaherty, Ryan Goodman, Jill Hasday, Caleb Nelson, David Sloss, Peter Spiro, Paul Stephan, Geof Stone, Phillip Trimble, Adrian Vermeule, and Andrew Vollmer. Jide Nzelibe, Eric Posner, Michael Pyle, and Michael Ramsey provided helpful comments on the second edition. In preparing both editions of this casebook, we benefited enormously from our interactions with our students. Many of the changes in the second edition are reflections of lessons learned in the classroom. Finally, we would like to thank our able research assistants for their work on the first edition: Elizabeth Amory, Michael Bell, Jared Berg, Bryan Dayton, Megan Davidson, Colin McNary, Mark Mosier, Cynthia Orchard, David Scott, Kendal Sibley, and David Zetoony.

We also should mention that, since the publication of the first edition, we have both worked in the Executive Branch. Professor Goldsmith served as both Special Counsel to the General Counsel at the Department of Defense and as Assistant Attorney General in the Justice Department's Office of Legal Counsel, and Professor Bradley served as Counselor on International Law in the State Department. We both benefited greatly from these experiences and, to the extent that the information is not confidential, we have attempted to incorporate what we have learned into this casebook.

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Editorial Notice

In editing the cases and other materials in this book, we have used ellipses to indicate deletions and brackets to indicate additions. We have not generally signified the deletion of citations or footnotes, and we have not used ellipses at the end of the excerpted material. We have retained citations within the excerpted material only when we thought the citations served a pedagogical purpose or when the citations were needed to identify the source of a quotation.

Overview of International Law and Institutions

Because U.S. foreign relations law often intersects with international law, students may find it useful to acquaint themselves at the outset of this course with the basic sources of international law and some of the most important international institutions. The following is a brief overview.*

1. Sources of International Law

International law can be divided into two categories: public international law and private international law. Traditionally, public international law regulated the interactions between nations, such as the laws of war and the treatment of diplomats. Since the mid-twentieth century, it also has regulated to some extent the way nations treat their own citizens. Private international law, by contrast, encompasses issues relating to transactions and disputes between private parties, such as international commercial standards, international choice of law rules, and the standards for enforcing foreign judgments. References in this course to international law are primarily references to public international law.

There are two principal sources of public international law: treaties and customary international law. Treaties are, quite simply, binding agreements among nations. All such agreements are referred to as "treaties" under international law, regardless of what they are called under each nation's domestic law. By contrast, under U.S. domestic law, "treaties" refers only to the international agreements concluded by the President with the advice and consent of two-thirds of the Senate and does not include "executive agreements" made by the President alone or with a majority approval of Congress.

There are both "bilateral" treaties (between two nations) and "multilateral" treaties (among multiple nations). Typical bilateral treaties include extradition agreements, Friendship, Commerce, and Navigation treaties, and Bilateral Investment Treaties. Multilateral treaties—some of which resemble international legislation in their scope and detail—cover a wide range of subjects, including international trade, the environment, and human rights.

Customary international law results from the general practices and beliefs of nations. By most accounts, customary international law forms only after nations have consistently followed a particular practice out of a sense of legal obligation. It is also commonly accepted that nations that persistently object to an emerging customary international law rule are not bound by it, as long as they do so before the rule becomes settled. Nations that remain silent, however, may become bound by the rule, even if they did not expressly support it. Silence, in other words, is considered a form of implicit acceptance.

Treaties and customary international law have essentially equal weight under international law. As a result, if there is a conflict between these two sources of international law, the later of the two will be controlling. International and domestic adjudicators will likely attempt to reconcile these two sources, however, if that is

* For more extensive discussions, see, for example, Restatement (Third) of the Foreign Relations Law of the United States §§101-103 (1987); David J. Bederman, *International Law Frameworks* (2001); and Mark W. Janis, *An Introduction to International Law* (4th ed. 2003).

reasonably possible. Although it is not uncommon for treaties to supersede customary international law, there are relatively few examples in which customary international law has superseded a treaty.

Before the twentieth century, customary international law was the principal source of international law. Subjects regulated by customary international law included maritime law, the privileges and immunities of diplomats, and the standards for neutrality during wartime. Although customary international law continues to play an important role today, its importance has been eclipsed to some extent by the rise of multilateral treaties, which now regulate many areas previously regulated by customary international law.

Some customary international law rules are said to constitute "*jus cogens*" or "peremptory" norms. A *jus cogens* norm is, according to one widely accepted definition, "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."* These norms transcend requirements of national consent, such that nations are not allowed to opt out of them, even by treaty. Norms frequently described as *jus cogens* norms are the prohibitions (now contained in treaties) on genocide, slavery, and torture.

2. International Institutions

The United Nations was established at the end of World War II, pursuant to the United Nations Charter, a multilateral treaty. Today, 191 nations — essentially all the nations in the world — are parties to the Charter and thus members of the United Nations. The purposes of the United Nations, according to the Charter, are to maintain international peace and security; develop friendly relations among nations; achieve international cooperation in solving economic, social, cultural, and humanitarian problems, and in promoting respect for human rights and fundamental freedoms; and to be a center for harmonizing the actions of nations in attaining these ends.

The central deliberative organ of the United Nations is the General Assembly, which is made up of representatives of all the member nations. The General Assembly is an important forum for discussion and negotiation, but it does not have the power to make binding international law. Instead, it conducts studies and issues non-binding resolutions and recommendations reflecting the views of its members.

The principal enforcement arm of the United Nations is the Security Council. The Council is made up of representatives from fifteen nations. Five nations (China, France, Russia, the United Kingdom, and the United States) have permanent seats on the Council, as well as a veto power over the Council's decisions. The other ten seats on the Council are filled by representatives of other nations elected by the General Assembly. Under the United Nations Charter, the Council is given "primary responsibility for the maintenance of international peace and security." To address any threat to the peace, breach of the peace, or act of aggression, "the Council may call upon the members of the United Nations to apply" measures not involving the use of armed force, such as economic sanctions. If the Council determines that such non-military measures are inadequate, it may authorize "such action by air, sea, or land forces as may be necessary to maintain or restore

* Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331.

international peace and security." The Charter obligates each member to "accept and carry out the decisions of the Security Council."

Another component of the United Nations system is the International Court of Justice (also sometimes referred to as the "World Court"), which is based in The Hague, in the Netherlands. There are fifteen judges on the Court and they are elected to staggered nine-year terms. The Court has jurisdiction over two types of cases: contentious cases and cases seeking an advisory opinion. In contentious cases, only nations may appear as parties. In cases seeking advisory opinions, certain international organizations may also be parties. To be a party to a contentious case before the International Court of Justice, a nation must ordinarily be a party to the Statute of the International Court of Justice (a multilateral treaty) and have consented to the Court's jurisdiction. Consent to jurisdiction can be given in several ways: a special agreement between the parties to submit their dispute to the Court; a jurisdictional clause in a treaty to which both nations are parties; or a general declaration accepting the compulsory jurisdiction of the Court.

In addition to the United Nations system, there are a variety of international institutions established to administer particular treaty regimes. A prominent example is the World Trade Organization (WTO), which was established in 1995 to administer the General Agreement on Tariffs and Trade and related agreements. The WTO has its own dispute settlement body, which adjudicates trade disputes between member nations. To enforce its decisions, the dispute settlement body can authorize the prevailing party to impose trade sanctions on the losing party. Another example is the International Criminal Court, based in The Hague, which has jurisdiction to try and punish certain international offenses, such as genocide.

Finally, there are regional international institutions, the most prominent of which is the European Union (EU). The EU currently is made up of twenty-five member countries. The EU has a number of constitutive organs, including a European Parliament, which is elected by individuals in the member countries; a Council of the European Union, which has representatives from the member governments; and a European Commission (an executive body). It also has a European Court of Justice, based in Luxembourg, which interprets and applies the treaty commitments of the Union. Although not part of the EU system, there is also a European Court of Human Rights, based in Strasbourg, France, which interprets and applies the European Convention for the Protection of Human Rights and Fundamental Freedoms (which has been ratified by over forty countries). The decisions of both the Court of Justice and the Court of Human Rights are binding on the member countries.

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