



Principles of international law

by Sean D. Murphy.

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**PRINCIPLES
OF
INTERNATIONAL
LAW**

By

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Preface

International law is continually transforming the world we live in. So many of the daily transactions in which we or our society are engaged occur in an environment of transnational rules—such as when we make a transatlantic telephone call, fly to Mexico, export computers to Brazil, watch an Australian-made movie, eat Belgian chocolate confident that it is unadulterated, send troops to Afghanistan or Iraq, call for prosecution of war criminals in The Hague, pursue extradition of a suspected murderer who has fled abroad, condemn genocide in Sudan, organize global reductions in ozone-depleting gases, or extract natural gas for our homes from an undersea continental shelf.

This book is about such transnational rules. It explores the basic foundations of international law: its nature, history, and theoretical underpinnings, and the players that make it all happen (states, international organizations, others). The manner in which international law is created, interpreted, and enforced is addressed, as well as mechanisms for dispute resolution. Several chapters are devoted to discrete subject matter areas, such as human rights, environment, international crimes, and the laws of war. Further, the interrelationship of international law with national law is explored, with particular focus on U.S. foreign relations law.

The objective of this book is not to provide a comprehensive account of these areas, for doing so would require several volumes and even then would be incomplete. Rather, this book seeks to illuminate the central principles that animate the field and to convey basic information of use to students and practitioners alike, with appropriate citations for those interested in further study. So as to “bring the material alive,” relevant and contemporary incidents involving international law are provided throughout. While traditional international law is central to the book, new developments in transnational cooperation are also addressed, such as the tremendous influence of non-governmental organizations.

I wish to express my profound appreciation to Judge Thomas Buergenthal, since our prior collaborations helped inspire this volume. My thanks to Jered Matthysse and José E. Arvelo-Vélez for outstanding research assistance on this project, and for the support

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SEAN D. MURPHY
WASHINGTON, D.C.

February 2006

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1. Source: United Nations (<http://www.un.org/aboutun/chart.html>).

2. Source: International Court of Justice (<http://www.icj-cij.org>).

3. Source: U.S. Constitution.

4. Source: United Nations (<http://www.unhchr.ch/hrostr.htm>).

5. Source: 6 U.S. DEP'T OF STATE DISPATCH 6 (Feb. 1995).

6. Source: Canadian Government (<http://www.climatechange.gc.ca/.../earth.asp>).

7. Source: United Nations (<http://www.un.org/Depts/dpko/dpko/bnote.htm>).

*

List of Abbreviations

AFR. J. INT'L & COMP. L.	African Journal of International and Comparative Law
AM. J. INT'L L.	American Journal of International Law
AM. U. J. INT'L L. & POL'Y	American University Journal of International Law and Policy
ARIZ. J. INT'L & COMP. L.	Arizona Journal of International and Comparative Law
BRIT. & FOREIGN STATE PAPERS	British and Foreign State Papers
BRIT. Y.B. INT'L L.	British Yearbook of International Law
C.F.R.	Code of Federal Regulations
Cal. 2d	California Reports (Second Series)
CARDOZO L. REV.	Cardozo Law Review
CHI. J. INT'L L.	Chicago Journal of International Law
Cl. Ct.	United States Claims Court Reporter 1983-92
Ct. Cl.	Court of Claims Reports 1863-1982
COE Doc.	Council of Europe Document
COLUM. L. REV.	Columbia Law Review
Common Mkt. Rep.	Common Market Reporter
Cong.	United States Congress
CONG. REC.	Congressional Record
Consol. T.S.	Consolidated Treaty Series
Dall.	Dallas Series 1790-1800
DEP'T ST. BULL.	United States Department of State Bulletin
ECOSOC Res.	United Nations Economic and Social Council Resolution
Eur. Ct. H.R.	European Court of Human Rights
Eur. H.R. Rep.	European Human Rights Reports
EUR. J. INT'L L.	European Journal of International Law
EUR. PARL. DOC.	European Parliament Document
Europ. T.S.	European Treaty Series
Exec. Order.	Executive Order
F.2d	Federal Reporter 1932-1992 (Second Series)
F.3d	Federal Reporter 1993-present (Third Series)

F. Supp.	Federal Supplement 1932-1960
F. Supp. 2d	Federal Supplement 1960-present (Second Series)
Fed. Appx.	Federal Appendix
Fed. Reg.	Federal Register
FOREIGN INVESTMENT L.J.	Foreign Investment Law Journal
G.A. Res.	United Nations General Assembly Resolution
G.W. INT'L L. REV.	George Washington International Law Review
GEO. L.J.	Georgetown Law Journal
GEO. J. INT'L L.	Georgetown Journal of International Law
H.R.	House of Representatives Resolution
H.R. Con. Res.	House of Representatives Concurrent Resolution
H.R. REP.	House of Representatives Report
HARV. INT'L L.J.	Harvard International Law Journal
HARV. L. REV.	Harvard Law Review
HUM. RTS. L.J.	Human Rights Law Journal
ICAO Ass. Res.	International Civil Aviation Organization Assembly Resolution
ICAO Doc.	International Civil Aviation Organization Document
ICC Doc.	International Criminal Court Document
I.C.J.	International Court of Justice, Report of Judgments, Advisory Opinions and Orders
ICSID REV.-FOREIGN INVEST- MENT L.J	International Centre for Settlement of Investment Disputes Review- Foreign Investment Law Journal
I.L.M.	International Legal Materials
I.L.R.	International Law Reports
Inter-Am. C.H.R.	Inter-American Commission on Human Rights
Inter-Am. Ct. H.R.	Inter-American Court of Human Rights
INT'L & COMP. L.Q.	International Law and Comparative Law Quarterly
Int'l Arb. Awd.	International Arbitration Awards
INT'L ARB. REP.	International Arbitration Reporter
Int'l Crim. Trib. former Yugo.	International Criminal Tribunal for the former Yugoslavia

Int'l Crim. Trib. Rwanda	International Criminal Tribunal for Rwanda
INT'L HUM. RTS. REP.	International Human Rights Re- ports
INT'L J. MAR. & COASTAL L.	International Journal of Marine and Coastal Law
INT'L LAW.	International Lawyer
INT'L ORG.	International Organization
Int'l Trib. L. of the Sea	International Tribunal for the Law of the Sea
Iran-U.S. Cl. Trib. Rep.	Iran-United States Claims Tribunal Reports
L.N.T.S.	League of Nations Treaty Series
MAX PLANCK Y.B. U.N. L.	Max Planck Yearbook of United Na- tions Law
MICH. L. REV.	Michigan Law Review
N.Y. TIMES	New York Times
NAFTA Ch. 11 Arb. Trib.	North American Free Trade Agree- ment Chapter 11 Arbitration Tribunal
NAT'L REV. ONLINE	National Review Online
NEB. L. REV.	Nebraska Law Review
NETH. Q. HUM. RTS.	Netherlands Quarterly of Human Rights
NETH Y.B. INT'L L.	Netherlands Yearbook of Interna- tional Law
NUCLEAR L. BULL.	Nuclear Law Bulletin
OAS Doc.	Organization of American States Document
OAS G.A. Res.	Organization of American States General Assembly Resolu- tion
OAS Res.	Organization of American States Resolution
OECD Doc.	Organisation for Economic Co-oper- ation and Development Docu- ment
O.J.	Official Journal of the European Union
P.2d	Pacific Reporter (Second Series)
P.C.I.J.	Permanent Court of International Justice Report
Pub. L.	Public Law
R.C.A.D.I	Recueil des Cours de l'Académie de Droit International

R.I.A.A.	United Nations Reports of International Arbitral Awards
REV. BELGE DE DROIT INT'L	Revue Belge de Droit International
S. Con. Res.	Senate Concurrent Resolution
S. Ct.	Supreme Court Reporter
S. EXEC. REP.	Senate Executive Report
S. REP.	Senate Report
S. Res.	Senate Resolution
S. TREATY DOC.	Senate Treaty Document
S.C. Res.	United Nations Security Council Resolution
S.C.R.	Supreme Court Reports (Canada)
So. 2d	Southern Reporter (Second Series)
S.W.3d	Southwestern Reporter (Third Series)
Stat.	United States Statutes at Large
T.I.A.S.	Treaties and Other International Agreements Series
Temp. State Dep't No.	Temporary State Department Treaty Number
TEX. INT'L L.J.	Texas International Law Journal
TEX. L. REV.	Texas Law Review
U. CHI. L. REV.	University of Chicago Law Review
U. PA. L. REV.	University of Pennsylvania Law Review
UCLA L. REV.	University of California, Los Angeles, Law Review
U.N. Doc.	United Nations Document
U.N.T.S.	United Nations Treaty Series
U.S.	United States Supreme Court Reports
U.S. CONST.	United States Constitution
U.S.C.	United States Code
U.S.C. App.	United States Code Appendix
U.S.C.A.	United States Code Annotated
U.S.C.S.	United States Code Service
U.S.T.	United States Treaties and Other International Agreements
VA. J. INT'L L.	Virginia Journal of International Law
VAND. L. REV.	Vanderbilt Law Review
WASH. POST	Washington Post
WEEKLY COMP. PRES. DOC.	Weekly Compilation of Presidential Documents
WTO Doc.	World Trade Organization Document
YALE J. INT'L L.	Yale Journal of International Law

PRINCIPLES OF INTERNATIONAL LAW

*

PART I

SYSTEMIC ELEMENTS OF INTERNATIONAL LAW

*

Chapter 1

FOUNDATIONS OF INTERNATIONAL LAW

The field of international law is principally concerned with legal norms that operate among nations (often referred to as "states"), but it is also concerned with certain legal norms that operate between a nation and persons within its jurisdiction, and with certain legal norms that regulate the transboundary relationships of persons. Unlike national law, international law is largely decentralized; there is no single legislature, judiciary, or executive responsible for the creation, interpretation, and enforcement of international law, but instead a conglomerate of ways international law seeks to perform those functions. As such, the origin and nature of international law are both unusual and exciting; the field allows a lawyer to "think outside the box" as to what law is and how it shapes human behavior. At the same time, fully understanding the field of international law may take years of study, for it encompasses an enormous range of topics, from the grander norms that seek to prevent war to the less dramatic norms that regulate trans-Atlantic telephone calls.

The purpose of this chapter is to introduce the reader to the basic structure of international law, to some of the theories that exist in explaining the nature of international law, and to the basic history of the field from its origins to the present. By understanding these foundations of international law, and the "actors" of international law discussed in Chapter 2, it will be possible to discuss in detail the manner in which international law is created (Chapter 3), interpreted (Chapter 4), and enforced (Chapter 5).

A. Structures of International Law

Basic Horizontal Structure: Interaction of States

In the first instance, international law arises from a horizontal structure that consists of 191 nation states.¹ Each of these nation states is fully sovereign; none of them regards themselves as

1. As of 2005, there are 191 member states of the United Nations. There is a further state, the Vatican State, which is not a member of the United Nations. Other entities, such as Palestine, are recognized by some states as being a "state," but have not been admitted to the United Nations. For a discussion of what constitutes a "state," see Chapter 2(A).

subordinate to any other state nor, as a general matter, subordinate to a supra-national organization. This horizontal structure is very decentralized and means that states can only be exposed to restrictions that they have affirmatively accepted, which occurs when they regard the restrictions as advancing their national interests.

Imagine that you are a member of a group of 191 persons stranded on an island. No one in the group is willing to cede power to any single person or small group of persons for the purpose of making rules that would bind the group as a whole. At the same time, two persons on the island might develop rules as between themselves, such as "whenever you give me two coconuts, I will light a fire for you." Entering into such a bilateral agreement serves the interests of the two persons; they both gain more by cooperating than by not cooperating. This bilateral agreement does not bind other persons; it only binds the two persons who have entered into the agreement.

If one of the persons fails to abide by the rule, then the other person likely would reciprocate by no longer cooperating in the arrangement. This dynamic of reciprocity helps keep such bilateral agreements operating, for the two persons entered into the agreement because it was in their interests to do so and, unless those interests change, there is no reason to deviate from the rule. Moreover, a failure to abide by the rule may have reputational consequences; if it is known that you received two coconuts but then refused to light the fire in exchange, you will be seen as an untrustworthy partner by others on the island. Before long, you will not be able to enter into any agreements with other persons, such that your short-term gain (obtaining two coconuts for free) is at the expense of your long-term survival. Even if you could survive, most persons do not like being outcasts; they instead strive to be regarded by others as community members in good standing. All told, the more rational choice for each person is to abide by her agreements.

Such dynamics are quite common in international law. For example, in the field of trade law, states have agreed under the General Agreement on Tariffs and Trade (GATT)² to the entry of goods and services from each other without restriction, or pursuant to negotiated tariff levels or quotas. A failure to abide by the agreement can lead to retaliation by your trading partner and can have reputational consequences in dealing with other trade part-

2. General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. 1700, 55 U.N.T.S. 187. The agreement was revised as part of the Uruguay Round, so as to create a "GATT 1994." See Marakesh Agreement Establishing the

World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 33 I.L.M. 81 (1994).

ners. In most instances, the rational choice for a state is to abide by its trade agreements.

Agreement to a rule need not be solely bilateral. Every person on the island may realize that it is in their interest for certain general rules to exist, such as a rule that physical attacks by a person against another person are prohibited. Consequently, the members of the group might all agree to a rule prohibiting physical attacks. If so, a rule of non-aggression is created even without a legislature, for the community of persons is small enough that, through consensus of the persons directly affected, a new rule can emerge. Such a rule is similar to Article 2(4) of the United Nations Charter, which prohibits the use of force by one state against the territorial integrity and political independence of another state.³

Issues may arise regarding the enforcement and interpretation of the non-aggression rule. Consequently, everyone on the island (or a sub-group) might further agree that if a person is seen physically attacking someone else, then all the other persons on the island (or the members of the sub-group) will band together to stop the attacker. If so, a means for enforcing the rule through collective security has emerged; so long as the community of persons is truly willing to gang up on an attacker, it is likely that the rule will have "teeth"—violations of the rule either will not occur because they have been deterred or, if they do occur, will be dealt with quickly and effectively. Such a rule is similar to Article 5 of the Charter of the North Atlantic Treaty Organization (NATO), by which member states agree that an armed attack against one NATO member in Europe or North America shall be considered an attack against all NATO members.⁴ Many observers believe that this rule helped prevent armed conflict in Europe throughout the Cold War.

There may, of course, be grey areas in applying the non-aggression rule. What if you think someone on the island is about to attack you; may you preemptively attack them? The island has no judicial court to consider such a matter, so instead you may have to rely upon the manner in which the community as a whole responds to such a preemptive act (either accepting an instance of preemptive self-defense or not accepting it). Indeed, over time the practice of the community may serve to interpret and reinterpret the meaning of the rule. In 2002, the United States issued a national security strategy that claimed, among other things, an evolving right under international law for the United States to use military force preemptively against the threat posed by "rogue states" possessing weapons of mass destruction (WMD).⁵ The reac-

3. U.N. Charter art. 2(4), 59 Stat. 1031, T.S. No. 993.

4. North Atlantic Treaty, art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

5. See WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 13-17 (Sept. 17, 2002).

tion of the international community was largely unfavorable, suggesting that such a right may not exist in international law.

Looking at this simple horizontal structure, jurisprudence scholars have expressed differing views as to the nature of "international law." On one end of the spectrum, the British scholar John Austin in 1832 denied that international law was really "law," since law is best understood as a command issued by a sovereign that was backed by a sanction. Since international society lacked such an overarching sovereign, Austin felt that the field referred to as "international law" was best understood as simply a collection of moral rules.⁶ At the other end of the spectrum, the Austrian scholar Hans Kelsen, writing in 1960, saw international law as primitive in nature, but nevertheless as sitting at the top of a global legal order of which national laws are a subsidiary part.⁷ Somewhere in the middle of the spectrum fell H.L.A. Hart, a British scholar who in 1961 regarded international law as a series of "primary rules" (e.g., a rule to trade coconuts for fire), but as lacking the important "secondary rules" (e.g., rules about how the primary rules can change over time and how they are to be interpreted) which are needed to create a true legal system.⁸ These starkly differing views continue to attract adherents today, but are made vastly more complicated when one introduces the other, more "vertical" aspects of contemporary international law.

Vertical Structure: International Organizations

International law is not limited to a simple horizontal structure. Over time, states have come together to create some supranational organizations capable of creating laws that have a binding effect on their member states. For example, within the European Union, the 25 member states have delegated to the European Community (EC) sweeping powers to regulate broad sectors of their economies, including the movement of goods, services, labor, and transportation. On matters such as completion of the internal market, the environment or consumer protection, E.C. legislation is adopted jointly by the European Council and European Parliament under a "co-decision procedure." Certain provisions of the E.C. treaties and various E.C. legislative measures apply directly within the member states, superseding national law in case of conflict. To that extent, E.C. law has a status within the member states comparable to federal law in the United States. Other international organizations typically have less sweeping powers than that found

6. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 142, 200–201 (H.L.A. Hart ed., 1954) (1832).

7. See HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., 1967) (1960).

8. See H.L.A. HART, *THE CONCEPT OF LAW* (1961) (especially Chapter X).

in the European Union. Nevertheless, as discussed in Chapter 3(E), there are other international organizations and autonomous treaty bodies capable of creating new rules that bind their member states without the consensus of those states.

Likewise, in some instances, states have created and submitted themselves to the compulsory jurisdiction of international courts or tribunals. For example, about 65 states have submitted themselves to the compulsory jurisdiction of the International Court of Justice (the judicial wing of the United Nations) if they are sued by another state that has also accepted the Court's compulsory jurisdiction. Hundreds of treaties concluded by states also provide for the Court's jurisdiction when a dispute arises with respect to one of those treaties. The International Court is also available if states mutually agree to bring a particular dispute before the Court, even if jurisdiction on a compulsory basis does not exist. Each year, the International Court decides cases on matters such as territorial and maritime disputes, diplomatic immunities, or disputes over the use of military force. While the International Court is one of the oldest and most venerated fora for pacific settlement of disputes, there are a wide array of such fora in existence, as discussed in Chapter 4.

Some international organizations are capable of helping enforce international rules. As discussed in Chapter 5, the Security Council stands at the center of such entities, with extensive power to impose sanctions and use military force to address threats to peace and security. However, there are numerous other ways that international organizations help to enforce international law, such as the process for authorizing retaliatory trade sanctions by the World Trade Organization, or the indictment and prosecution by the International Criminal Court of persons for violating the laws of war.

Vertical Structure: Interface with National Law

A different aspect of the vertical structure of international law concerns the interface of international law with national law (also referred to as "domestic law"). National legal systems typically contain rules about whether international law is automatically received into the national legal system. As discussed in Chapter 7, Article VI of the U.S. Constitution provides that treaties concluded by the United States are part of the "supreme law of the land," which has been interpreted to mean that, in some instances, a treaty properly concluded by the United States is immediately capable of creating a rule that binds *within* U.S. national law. Thus, a private individual may be able to sue in U.S. court using a provision of the treaty as a rule of decision in the case. By contrast, in the United Kingdom, treaties never have an immediate effect