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INTERNATIONAL LAW

CASES AND MATERIALS

Fifth Edition

Lori F. Damrosch, Louis Henkin,
Sean D. Murphy, Hans Smit

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INTERNATIONAL LAW

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■ ■ ■

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Mat #40736800

610 Opperman Drive
St. Paul, MN 55123
1–800–313–9378

Printed in the United States of America

ISBN: 978–0–314–19128–1

This book is dedicated to our
predecessors in international law
at Columbia University
Philip C. Jessup
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Oliver J. Lissitzyn
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*

Preface to the Fifth Edition

This edition renews and enriches a "classical" casebook on international law. It reflects our aspiration to enable teaching international law in essential continuity with the great traditions of the discipline, yet with fresh appreciation and even some radical change.

International law in the twenty-first century is being invigorated with ideas and energy from peoples around the world. Grass-roots movements, transnational networks, and non-governmental organizations have focused attention on issues where international law can make notable contributions to solution of problems affecting all humanity. New standards of conduct have been elaborated in fields as diverse as human rights, trade, the environment, and disarmament; and new institutions are emerging to realize ambitious goals through law. While the nation state remains a central player, international law is no longer the specialized preserve of states, governments, or diplomats: it is now put to use by activists around the globe.

The transformations in the hitherto largely state-centered nature of our discipline are a major theme of the present edition. Along with emphasizing the centrality of human rights in contemporary international law, we have given enhanced attention to non-state actors and their influence on the theory, content, and implementation of international law, illustrated by developments since the last edition, such as the responses to the attacks of September 11, 2001 and the establishment of the International Criminal Court.

The electronic revolution continues to work changes in the ways that we teach, research, and practice international law. Informational resources that were formerly the province of experts in international law (with access to specialized research libraries) are now instantly available around the world. In view of the ephemeral nature of many Internet resources and the quickly-changing landscape of electronic addresses and search techniques, we have retained print-based citations to standard sources, such as treaty collections, national digests of practice, and case reports, while also indicating as appropriate the main resources of the World Wide Web for contemporary international law research.The exigencies of print production have imposed a closing date of early 2009 for taking account of recent developments.

The editors have compiled a collection of basic documents published as a supplement to the present volume, which provides a convenient reference to the main primary sources discussed in the casebook. Of course, such instruments are also available in original sources, other collections, or electronic databases.

We welcome to our editorial team another colleague in the Columbia Law School tradition, Professor Sean D. Murphy (Columbia J.D. 1985). The result, we believe, is a casebook fit for a new generation.

L.F.D.
L.H.
S.D.M.
H.S.

ABBREVIATIONS

A.F.D.I. or Ann. Français	Annuaire Français de Droit International
A.J.I.L.	American Journal of International Law
Ann. de l'Institut de Droit Int.	Annuaire de l'Institut de Droit International
Ann. Dig.	Annual Digest
A.S.I.L. Proc.	American Society of International Law Proceedings
Brit. Y.B.I.L. or Brit. Y.B. Int'l Law	British Yearbook of International Law
E.J.I.L.	European Journal of International Law
E.S.C. Res.	Economic and Social Council Resolution
E.S.C.O.R.	United Nations Economic and Social Council Official Records
E.T.S.	European Treaty Series
G.A.O.R.	United Nations General Assembly Official Records
G.A. Res.	United Nations General Assembly Resolution
Gr. Brit. T.S.	Great Britain Treaty Series
Hackworth	Hackworth, Digest of International Law (1940–44)
Hyde	Hyde, International Law Chiefly as Interpreted and Applied by the United States (2d ed. 1945)
Hudson	Hudson, International Legislation
I.C.J.	International Court of Justice Reports
I.C.L.Q.	International and Comparative Law Quarterly
I.C.T.R.	International Criminal Tribunal for Rwanda
I.C.T.Y.	International Criminal Tribunal for the Former Yugoslavia
I.L.C.	International Law Commission
I.L.C.Rep.	International Law Commission Reports
I.L.M. or Int'l Leg. Mat'ls	International Legal Materials
I.L.R.	International Law Reports
L.N.T.S.	League of Nations Treaty Series
Malloy	Malloy, Treaties, Conventions, International Acts, Protocols and Agree-

	ments Between the United States of America and Other Powers (1910–38)
O'Connell	O'Connell, International Law (2nd ed. 1970)
Oppenheim	Oppenheim, International Law, vol. 1 (9th ed. Jennings and Watts 1992), vol. 2 (7th ed. Lauterpacht 1952)
P.C.I.J.	Permanent Court of International Justice Reports
Rec. des Cours	Recueil des Cours, Académie de Droit International
Restatement (Third)	Restatement of the Law (Third), The Foreign Relations Law of the United States (1987)
S.C.O.R.	United Nations Security Council Official Records
S.C. Res.	United Nations Security Council Resolution
State Dept. Bull.	State Department Bulletin
Stat.	Statutes at Large, United States
T.I.A.S.	Treaty and Other International Act Series
U.N.C.I.O.	United Nations Conference on International Organization
U.N.Doc.	United Nations Document
U.N.R.I.A.A. or U.N. Rep. Int'l Arb. Awards	United Nations Reports of International Arbitration Awards
U.N.T.S.	United Nations Treaty Series
U.S.C.A.	United States Code Annotated
U.S.G.A.O.	United States General Accounting Office
U.S.T.	United States Treaties and Other International Agreements
Whiteman	Whiteman, Digest of International Law (1963–73)
Yb.I.L.C.	Yearbook of the International Law Commission

ACKNOWLEDGMENTS

We acknowledge and are indebted to a large number of individuals who generously contributed their time and effort to make the Fifth Edition possible. We naturally include those people who assisted in the previous editions. We are grateful to our present and former colleagues in international law and related fields at Columbia and George Washington Universities, where we benefit from exceptionally stimulating environments for teaching and research. We also thank the users of the previous editions who gave us comments and suggestions for improvement, and many present and former students.

The editors of the Fifth Edition would like to acknowledge in particular their great debt to Richard Crawford Pugh, formerly of the Columbia Law School faculty and in recent years Distinguished Professor of Law at the University of San Diego School of Law. His involvement goes back to the predecessor casebook published in 1969 of which he was a co-editor (together with Wolfgang Friedmann and Oliver Lissitzyn), as well as the previous four editions of the present work. His influence pervades the book and we thank him for his many contributions.

In the preparation of this edition we would like to extend our appreciation to Joie Chowdhury, Columbia LL.M. 2009; Jeffrey Brundage, Erin Creegan of the George Washington University J.D. class of 2010; Kelly Dunn, George Washington University J.D. 2009; Amara Levy–Moore, Columbia M.I.A. 2009; and Neelanjan Maitra of the Columbia J.D. class of 2010. Yahaira Alonzo provided valuable support.

We extend our warm thanks for reference assistance readily and frequently given by the staff of the Arthur W. Diamond Law Library at Columbia University and of the Jacob Burns Law Library at George Washington University.

Finally, we acknowledge our indebtedness to the following authors and publishers who granted us permission to reprint copyrighted material:

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INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW

Traditionally, international law was seen as the law of the international community of states, the basic units in the world political system from the Peace of Westphalia (1648) forward. At least from the mid-twentieth century, however, international law has increasingly dealt also with other entities, notably including the individual as bearer of human rights.

That international law has been understood as the law made by states to govern relations among them implies an important frame for the conception of the subject-matter, and accordingly for the presentation of material in a casebook for a course in the field. Conceptually, if international law is state-to-state in its origin and application, other entities would be governed by international law only to the extent that states have accepted to include them in the functioning of what would remain fundamentally an interstate system. Under this view, intergovernmental or non-governmental organizations come within the framework of international law by virtue of decisions made through interstate processes; multinational corporations or other enterprises would not participate directly in the international legal system; and the rights and obligations of individuals would flow from processes in which states were the fundamental actors.

From some perspectives, no doubt, these distinctions are artificial. A more inclusive view maintains that contemporary international relations consist of much more than official relations between states or their governments; that even these relations cannot be understood in isolation from other relations involving other actors; and that the law of intergovernmental relations cannot be seen independently of other law governing other transnational relations. For these reasons, some prefer a more comprehensive perspective that includes all the law—national, international, or mixed—that applies to all actors whose activities or influences cross state lines. The term "transnational law" was coined to express this more capacious conception—a broader one than we can cover comprehensively in the present casebook.

Certainly, beginning already in the first half of the twentieth century and accelerating in the second half, international law came to govern not only relations between states, but also the status, rights, and duties of individuals and of certain kinds of organizations and corporations. Ever-growing numbers of international organizations have acquired existence, personality, rights and duties, and their competences extend across all spheres of human activity. States have conferred ever more expansive authorities on certain intergovernmental organizations, such as the European Union. The influence of the international human rights movement on the system of international law has been profound, to the point that it is no longer accurate to think of interna-

tional law as strictly an interstate system. International law protects the rights of individuals against their own states and even accords them independent status and standing before some international bodies. International law also imposes duties on individuals and may bring them to international trial and punishment.

For purposes of study and analysis, there are convincing reasons to maintain a focus on interstate relations and institutions, even while recognizing that one must attend to all the other rings in the world circus as well. International law is a conceptually distinct system, independent of the national systems with which it interacts. It deals with relations which individual states do not effectively govern. International law is thus to be distinguished from national law that governs foreign and other transnational transactions and relations: each state has its own constitutional foreign relations law, and various intersecting bodies of law address the different sorts of commercial and economic relationships that cross national boundaries. For example, the treaty-making powers of the President-and-Senate, and limitations on those powers in favor of rights of individuals or states of the United States, are questions of U.S. foreign relations law that may have important international significance and even some international legal relevance, without being (strictly speaking) questions of international law. (The relation of international law to national law is a question with which each state must struggle in different ways. See Chapter 10.)

While international law can profitably be studied without too many excursions into other domains, the study of international law can also benefit from broader perspectives. The governance and the law of the international political order merit study with attention to insights about law more generally. One can, and should, ask the same questions, *mutatis mutandis*, from the same variety of perspectives about international law as about other forms of law, even though the answers might be very different. Feminist analysis, critical theories of law, and law-and-economics are among the approaches offering new ways to think about international law.

International law is not a "course"; it is a curriculum. One can find in it the basic concepts of any legal system—property and tort, injury and remedy, status and contract. It has its own law-making and law-applying procedures. There is law governing "public lands" and common environments, as in outer space and the deep sea. The "public law" of the international legal system is not yet vast, as was true of the national law of even developed states until quite recently; nonetheless, it might well fill several courses in any comprehensive curriculum of international law, including international counterparts of constitutional law, administrative law, legislation, and judicial process.

Philosophers and other scholars of law can also ask questions about the international legal system from the vantage point of their discipline. There is a jurisprudence and a sociology of international law, and the beginnings of a criminology. The student of political science can—and should—consider the character of the international political system, its premises and assumption, and how it is governed; he or she might ask whether there are legislative, executive, and judicial functions, and how they are exercised. One might ask

why and how law is made; whether law is enforced and what mechanisms are used to induce compliance with it; by what institutions is law interpreted, applied, developed; how are disputes settled; what is its system of administrative regulation, law and procedure.

Analogies and nomenclature from domestic law are, of course, deceptive, for there are profound differences between domestic societies and international society (itself a metaphor), and between national and international law. But the concepts, the perspectives, even the terminology and categories of domestic law, when used with caution and with awareness of the differences, can be directed at the international system as well. A comprehensive perspective on international law like that which is commonly applied to domestic law can thus benefit the student of international law.

*

HISTORICAL INTRODUCTION[1]

Human history has long known tribes and peoples, inhabiting defined territories, governed by chiefs or princes, and interacting with each other in a manner requiring primitive forms of diplomatic relations and covenants of peace or alliances for war. These relations between peoples or princes, however, were not governed by any agreed, authoritative principles or rules. At various times, moreover, most of the peoples of the known world were part of large empires; and relations between them were subject to an imperial, "domestic" government and law. Empire, actual or potential, was also sometimes supported by an ideology that claimed universal authority over all peoples, or otherwise rejected the independence and equality of nations or any principles governing relations between them other than imperial law.

Thus, classical Chinese philosophy, as formulated by Confucius in the 6th century B.C.E., regarded the ruler of China as the "Son of Heaven," who governs the universe as a righteous ruler. From this conception—often greatlyat variance with the division of China into many rival kingdoms and factions—developed a notion that frequently shaped Chinese attitudes toward international relations: that Chinese rulers were culturally superior "fathers" or "elder brothers" of other nations or states. This notion served to legitimate conquest and subjugation of others.

Ancient Judaism, ideologically committed to monotheism, did not in principle accept the equality of polytheistic nations. But Judaism has not been the ideology of a politically independent people for 2000 years until our own day, and Judaism did not develop a universalist political ideology comparable to that of Christianity or Islam.

In medieval Christianity, the Holy Roman Empire claimed universal authority for the Pope as the spiritual head, and for the Emperor as the temporal head, of the Christian nations of Europe. Thus, religious and political goals coalesced to legitimatize European efforts to conquer—and then convert—non-Christian peoples around the world. Even among the nations of Europe, as long as the concept of universal authority was ascendant, there was little need to develop rules concerning diplomatic intercourse between sovereign states, principles of territorial sovereignty, jurisdiction, treaty-making, state responsibility, and other aspects of interstate relations that form the bulk of the modern law of nations.

Similarly, Islam, like Christianity in its formative phase, sought to extend the religion's reach and therefore held back from recognizing the equality and respecting the integrity of non-Islamic nations. For Moslem jurists, the world

1. See generally Nussbaum, A Concise History of the Law of Nations (rev. ed. 1954); Verzijl, et al., International Law in Historical Perspective, 11 vols. (1968–1992); History of the Law of Nations, 7 Encyclopedia of Public International Law 126–173 (1984). Compare also Onuma, When Was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilizational Perspective, 2 J. Hist. Int'l L. 1 (2000).