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Fifth Edition

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

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

To Mary, Evan, Joshua, and Katie
—*Allen Weiner*

Biographies

Barry E. Carter has an extensive background in law, foreign policy, and international business and trade. He is presently a professor of law at Georgetown University Law Center, where he also serves as the Director of International and Transnational Programs. In 2006 he received the Law Center's excellence in teaching award. Mr. Carter teaches frequently in developing and transition countries about rule of law issues.

He returned to Georgetown in August 1996 after over three years as the Deputy Under Secretary of Commerce for Export Administration. During 1993-1996, Mr. Carter also served as the U.S. vice chair to Secretary of Defense William Perry on bilateral defense conversion committees with Russia, Kazakhstan, Ukraine, and Belarus; as the U.S. chair of the committee with Uzbekistan; and on committees with China. As a result of these responsibilities, he was involved in implementing and enforcing a variety of nonproliferation laws. Mr. Carter helped other countries strengthen their export controls, and he assisted countries in converting some of their defense facilities to civilian production, often in joint ventures with U.S. companies. He also helped reorganize his 370-person Bureau and manage its \$40+ million budget.

Before entering the government, Mr. Carter had been a Georgetown professor since 1979 and was Executive Director of the American Society of International Law during 1992-1993. 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 1975. He was a Fellow at the Institute of Politics at Harvard's Kennedy School of Government and an International Affairs Fellow at the Council on Foreign Relations in 1972. A member of Dr. Henry Kissinger's National Security Council staff from 1970-1972, he worked on U.S. Soviet issues and Europe. While an Army officer, he was a program analyst in the Office of the Secretary of Defense in 1969-1970. He has also been a trial and appellate lawyer in private practice 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 public 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.

Professor 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 (ASIL) for the outstanding new

book on international law subjects. He has contributed chapters to books and he has published articles in the *California Law Review*, *Yale Law Journal*, *Georgetown Law Journal*, *Daedalus*, *Scientific American*, *Washington Post*, and other periodicals.

He is a member of the Council on Foreign Relations, the American Law Institute, the American Bar Association, and the ASIL. He is on the board of directors of an international trading company and on the advisory council of a political risk insurance company. He has been a member of two binational arbitration panels that reviewed trade matters under the North American Free Trade Agreement. He has also served as Chairman of the Advisory Committee of the Defense Budget Project and as the Vice President of the Arms Control Association.

Phillip R. Trimble was a professor of law at the University of California, Los Angeles from 1981 through 2001. From July 1999 to January 2001 he served as the UCLA Vice-Provost for International Studies and Overseas Programs, based in the College of Letters and Science.

In the 1960s, Professor Trimble practiced tax and corporate finance law at Cravath, Swaine and Moore. His subsequent government career included service on the staff of the Senate Foreign Relations Committee under Senator Fulbright (1971-1972); Assistant Legal Adviser for Economic and Business Affairs in the Department of State in the Nixon, Ford and Carter Administrations (1973-1978); Counsel to the Mayor and then Deputy Mayor of New York City under Ed Koch (1979-1980); and American Ambassador to Nepal at the end of the Carter Administration.

During his academic career he also served as a consultant to the U.S. Arms Control and Disarmament Agency (and Counsel to the U.S. Delegation to the 1990 Nuclear Test Talks), and served on an arbitral panel under the U.S.-Canada Free Trade Agreement (settling a dispute involving the automobile industry). He was a visiting professor of law at the Stanford Law School (1988-1989) and at the University of Michigan Law School (1995-1996).

He has been a member of the Board of Editors of the *American Journal of International Law*; the Board of Visitors at Ohio University; the Board of Directors of the American Alpine Club; and the Southern California advisory boards of the Asia Society, the America-Nepal Friendship Society, the Himalayan Arts Council of the Pacific Asia Museum, and Human Rights Watch.

In his avocation as a mountaineer, Professor Trimble climbed on five continents, including expeditions to New Guinea, India, Pakistan, Bhutan, and both Polar Regions. In 1976 he led the successful American Expedition to Mt. Everest. Before law school he spent a year as a Fulbright scholar in Burma. More recently, he collected contemporary music for Afro Pop Worldwide during a trip to east and central Africa, and was assistant director of two music theater works in the Netherlands.

He is the author of the book, *United States Foreign Relations Law* (Foundation Press: 2002). Other of his publications have appeared in the *Harvard*, *Stanford*, *Columbia*, *Michigan*, *Pennsylvania*, *Northwestern*, *Iowa*, *St. Louis*, and *UCLA Law Reviews*, the *Tax Law Review*, the *American Alpine Journal*, the *Himalayan Journal*, *Birding*, the *American Journal of International Law*, *Comparative Labor Law*, and the *Yale*, *Stanford*, *Chicago*, *Berkeley*, and *U.C. Davis Law Reviews*.

Having departed the academic world in 2001, Professor Trimble now lives full time in New York City and West Barnet, Vermont.

Allen S. Weiner is the inaugural Warren Christopher Professor of the Practice of International Law and Diplomacy, a chair belonging jointly to Stanford Law School and the Freeman Spogli Institute of International Studies at Stanford University. He teaches in the areas of international law, international security, and international conflict resolution.

Before joining the Stanford faculty in 2003, Mr. Weiner served for 11 years as a practicing international lawyer in the Office of the Legal Adviser of the U.S. Department of State. He has extensive experience in such wide-ranging fields as national security law, the law of war, international dispute resolution, and international criminal law. While based in Washington, he worked on international claims and investment disputes, including litigation before international tribunals and negotiation of a \$190 million lump-sum claims settlement agreement with Germany; legal matters arising in the scope of U.S. relations with countries of Latin America and the Caribbean, including the Haitian and Cuban migration crises of 1995 and the interpretation of the Panama Canal Treaties; and the interpretation and application of statutes, treaties, and regimes related to nonproliferation and arms control.

Mr. Weiner later served in the U.S. Embassy in The Hague, first as Legal Attaché and later as Counselor for Legal Affairs, where he was actively engaged in U.S. relations with and litigation before international legal institutions such as the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia. Mr. Weiner also served as the U.S. Agent to the Iran-United States Claims Tribunal and participated in the negotiations leading to the establishment of the Special Scottish Court in the Netherlands before which two Libyans charged with the bombing of Pan Am Flight 103 over Lockerbie, Scotland, were tried.

Professor Weiner's most recent publications have appeared in the *Stanford Law Review*, the *American Journal of International Law*, and as a chapter in an edited volume entitled *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory* (Springer: 2007). He is a member of the American Society of International Law and the Pacific Council on International Policy.

Prior to joining the State Department in 1990, Mr. Weiner clerked for Judge John Steadman on the D.C. Court of Appeals. Mr. Weiner graduated from Stanford Law School as a member of the Order of the Coif in 1989 and magna cum laude from Harvard College in 1985. He was born and raised in Denver, Colorado.

Preface to the Fifth 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 it 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.

This Fifth Edition represents a major updating and revision of the casebook. For example, the Fifth Edition contains:

- a new chapter on International Criminal Law;
- excerpts of important new U.S. Supreme Court cases, including *Hamdan v. Rumsfeld*, *Sanchez-Llamas v. Oregon*, *Sosa v. Alvarez-Machain*, *American Insurance Assoc. v. Garamendi*, and *Republic of Austria v. Altmann*;
- new decisions from international tribunals, such as Case Concerning Israel's Construction of a Wall in the Occupied Palestinian Territories (International Court of Justice) and Prosecutor v. Krstic (International Criminal Tribunal for the Former Yugoslavia);
- an updated case study on the law and policy implications of the September 11 attacks and the U.S. and world response to those attacks and terrorism in general;
- expanded treatment of active areas of litigation, including the Alien Tort Statute and suits against foreign government officials and state agencies;
- an extensive updating of the European Union section; and
- major revisions to the use of force and environmental law chapters.

Every chapter has been updated with new and fascinating issues and materials, and the Notes and Questions have been thoroughly revised throughout the casebook.

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 more than 190 other nations deal daily with a host of issues between one another, with international institutions (like the United Nations, the World Trade Organization, and the International Monetary Fund), and with regional organizations (such as the European Union and the North Atlantic Treaty Organization). The problems range from essential, if mundane, matters (like postal agreements) to those of great economic significance (such as retaliatory tariffs and currency exchange rates). They concern the treatment a state accords its own citizens and prevailing human rights standards. The issues even extend to matters of life and death (e.g., the use of military force and efforts to combat the proliferation of weapons of mass destruction).

Each day public and private entities move across U.S. borders billions of dollars worth of currency and goods, hundreds of thousands of people, and tens of thousands of ships, planes, and other vehicles. They also engage in a tremendous amount of communication to and from the United States, through e-mail messages, telephones, fax machines, and the Internet.

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 affect 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?

In addition, lawyers—like all citizens—benefit from understanding how international legal rules may shape and constrain the foreign policy decisions that the United States and other countries make.

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 students probably have not studied before in depth. Traditional theories and concepts, such as the various principles 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 students' interest in the issues, and to suggest what the future might hold. Excerpts from the 1987 Restatement of the Foreign Relations Law of the United States (Third), including its comments and reporters' notes, are often used because the Restatement generally represents a consensus

among a wide range of U.S. international lawyers. Even when the Restatement's views are contested, they can provide a useful starting point for discussion.

2. This casebook also analyzes the supporting institutions that help public international law facilitate 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 immediately 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. The end of the Cold War in the 1990s then held out possibilities for greater international cooperation. Throughout these post-World War II years, the growing foreign trade and investment, accompanied by sweeping changes in technology and communications, contributed to a world that has become increasingly interconnected.

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 effectively, and a weak GATT has been succeeded by a strong World Trade Organization (WTO). On the other hand, many believe that 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 1990 Iraqi invasion of Kuwait revived hopes for the U.N.'s future, these hopes were since dampened by the legal and diplomatic debate over Iraq in 2002-2003.

At the same time, other formal and informal arrangements have emerged and assumed important roles. These other arrangements include regional organizations like the European Union 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 promotion of foreign investment, to the enforcement of arbitral awards.

3. The casebook recognizes and studies the interaction between public international law and national agencies and courts. It is not uncommon for such entities to look to international law on jurisdictional and interpretive questions, as well as on certain substantive issues such as human rights. The status of international law in the U.S. domestic legal system raises many issues of theoretical and practice importance.

4. Students will also be made aware of how public international law increasingly affects private activity, both individual and business.

For example, a national court might draw in part upon international human rights norms to find multinational corporations or individuals liable for large damage judgments for their activities in foreign countries. Or WTO international trade rules might allow an injured country to impose retaliatory tariffs on imports of hundreds of millions of dollars of goods produced by companies in the country

that was found to be violating the rules. 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. A 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 of the Structure of the Book

This casebook is designed primarily for an introductory course in international law that involves two to five semester hours. 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. A section on historical background briefly examines the development of international law and institutions. The third section considers whether and in what ways international law is really law. The fourth section provides some of the various scholarly approaches to international law, including international relations theory, economic analysis, critical legal studies, and feminist jurisprudence.

The chapter concludes with an updated case study on the terrorist attacks of September 11, 2001, and the U.S. and world reactions to them. This case study illustrates how international law actually works.

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 students learn what a “treaty” is and some of the basic rules of treaty law. The chapter also covers the formation of customary international law, including different views about the role of state practice compared to normative statements. There is then a brief examination of the law-making role of international organizations and of nongovernmental organizations—both multinational corporations and nonprofit groups. Finally, there is a section on the general principles of law of major legal systems as a further source of international law.

Chapter 3 considers the status of treaties and customary international law within the U.S. legal system. It begins by considering the scope of the U.S. treaty power and the circumstances under which treaties are enforceable by private parties in U.S. courts. It then considers the foreign relations powers of the national

government more generally, and the constitutional law that governs interactions between Congress and the President in foreign relations. The chapter next discusses the status of customary international law in U.S. courts, with particular emphasis on the use of such law in international human rights litigation. The chapter concludes by examining the role of the individual U.S. states in foreign relations and the circumstances under which their foreign relations activities will be deemed to be preempted.

Chapter 4 examines the major, distinctive means by which international disputes are settled. It starts with the process of international negotiations, turns to the International Court of Justice (ICJ), and then analyzes the development of regional courts (especially the European Union's Court of Justice) and the increasingly important role of international arbitration. As recent examples of international dispute resolution systems, materials are included on the North American Free Trade Agreement (NAFTA) and the WTO. Finally, there is a section on the role of domestic courts and the enforcement of foreign court judgments.

Chapter 5 defines "state" and introduces some of the consequences of statehood, including the issue of recognition by other countries and a new government's 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 book, ranging from the international institutions (such as the United Nations, IMF, and World Bank) to regional economic or security organizations (such as the European Union and the North Atlantic Treaty Organization).

Chapter 6 considers the immunity that states have from suit in the domestic courts of other states, focusing especially on the immunity provided for in the U.S. Foreign Sovereign Immunities Act. The chapter also considers international and U.S. law relating to the immunity of diplomats and heads of state. Finally, the chapter discusses the "act of state doctrine," a common law doctrine applied by U.S. courts that limits their examination of actions by foreign governments.

Chapter 7 examines the international bases for a state to regulate private conduct within and outside its territory and the evolving international rules limiting extraterritorial application of law. For comparison purposes, the chapter concludes with a section that considers briefly the principles of "private" conflicts of law.

Chapter 8 considers the limitations on the state's treatment of individuals within its territory. It begins with traditional rules protecting aliens and alien property and then explores the expansion of rules that protect the state's own citizens from mistreatment under international human rights law. Among other things, the chapter discusses some of the most important human rights treaties and institutions, looks at the history of U.S. involvement in international human rights law, and examines regional human rights law and institutions.

Chapter 9 deals with the international law of the sea. It briefly considers the centuries-long development of customary international law and the 1958 Geneva Conventions. The focus is then on the Law of the Sea Convention, which came into force in 1994 and has been adopted by almost all the major countries of the world, except for the United States, though the United States has accepted many of the Convention's provisions as customary international law.

Chapter 10 introduces the emerging international regimes covering environmental matters. The recent and limited customary international law principles and

emerging “soft law” norms are being rapidly supplemented by multilateral treaty regimes. The chapter addresses the international legal response to two challenges in particular: first, the relatively successful international effort to deal with ozone depletion through the Montreal Protocol and other measures, and second, the continuing struggle to respond to global warming with the Kyoto Protocol and other approaches.

Chapter 11 explores international law regarding the use of force. After introductory historical materials, the chapter examines the justifications for the use of force that emerged after World War II, especially the legal norms in the U.N. Charter. The chapter considers circumstances in which states may permissibly use force, or claim to be permitted to use force, without external authorization. Among the justifications considered are self-defense (including anticipatory and preemptive or preventive self-defense), the use of force to counter terrorism, and humanitarian intervention. The chapter next addresses peacekeeping and peace enforcement operations authorized by the U.N., including those following Iraq’s invasion of Kuwait in 1990 and the 2003 U.S.-led invasion of Iraq. (Generally, the chapter draws heavily on examples, such as the conflicts in Vietnam, Kosovo, and Sudan.) A major section on international humanitarian law (the law that deals with the conduct of war), has materials on the Geneva Conventions of 1949 and the 1977 Additional Protocols. Finally, there is a brief section on U.S. domestic law (notably the War Powers Resolution) and a concluding section on international efforts to combat the proliferation of weapons of mass destruction, with a focus on the nuclear proliferation challenges presented by North Korea and Iran.

New Chapter 12 on international criminal law begins with a look at international cooperation by states to counter transnational crime, including mutual legal assistance treaties, extradition treaties, and irregular rendition practices. It then explores principles of individual responsibility under international law and substantive international offenses including genocide, crimes against humanity, war crimes (grave breaches of the Geneva Conventions), torture, and certain terrorism-related offenses. The final section explores the institutional arrangement for prosecuting international crimes, including domestic courts, international tribunals (e.g., the International Criminal Court), and mixed or “hybrid” courts. The chapter concludes with a brief examination of some alternatives to prosecuting international crimes such as amnesty and truth commissions.

Each chapter contains a broad range of materials to illustrate issues and principles. As suggested by the detailed table of contents, these materials include background information, treaties and other international agreements, domestic laws, and decisions by courts and arbitral panels.

Each chapter also contains frequent questions and short problems for students, often based on recent events or reasonable hypotheticals. These questions and problems are designed to focus students’ attention on the major issues and rules, and to challenge students to apply the relevant law from the perspectives of different clients and to explore alternative enforcement strategies.

While the materials in each chapter include key excerpts of important documents, the texts or excerpts of many basic documents are provided in a separate Documentary Supplement. Among the documents are the U.N. Charter, the ICJ Statute, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Treaty of the European Community, many other

multilateral treaties (such as important human rights conventions, the Law of the Sea Convention, and the Montreal Protocol on the Protection of the Ozone Layer), the U.S. Constitution, and key U.S. laws (such as the Foreign Sovereign Immunities Act and the International Emergency Economic Powers Act). There are also many supporting documents—e.g., U.N. resolutions and U.S. congressional resolutions—for the substantial case study on the terrorist attacks of September 11, as well as on Iraq.

Also, to help readers keep abreast of current developments in international law, we have listed many sources (including Web sites) in the casebook and the Documentary Supplement. Further, we direct the reader's attention to the various online and hard copy materials of the American Society of International Law. Its Web site is <http://www.asil.org>. In addition, there will be a special Web site containing updates to this casebook, at <http://www.lawinternational.org>.

In short, our approach is a blend of the traditional and the new. It should provide the basis for a rigorous course in the fascinating subject of international law.

For this Fifth Edition, Professor Allen Weiner has joined Professor Carter as an active co-author. Professor Carter was primarily responsible for the revisions and updates in Chapters 1A-B, 1E, 3, 4C-E, 5, 6, 7, and 9. Professor Weiner was primarily responsible for changes in Chapters 1C-D, 2, 4A-B, 8, 10, 11, and 12. This edition has also benefited from frequent communication between the two active co-authors, with each making contributions and comments to the other's chapters.

Our efforts on this Fifth Edition were helped considerably by the comments received from many people who have used the earlier editions—faculty, students, and others. As before, we very much welcome your comments on this edition.

Barry E. Carter
Allen S. Weiner

April 2007

Previous Editions

Professor Phillip Trimble and I originally conceived this casebook and co-authored the first three editions. We worked closely and constructively from the beginning of the First Edition. His contributions on the first three editions were and are much appreciated. After Professor Trimble left the academic world in 2001 for other activities, he chose just to comment on the Fourth Edition and he has not worked on this Fifth Edition.

Professor Curtis Bradley was an active co-author for the Fourth Edition. He was primarily responsible for the revisions to about three and one-half chapters. Professors Carter and Bradley also commented on each other's chapters.

Barry E. Carter

April 2007