

International Law

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

To Mom, Gardner, and Billy
— *Phil Trimble*

Preface

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 book, ranging from the United Nations and its many specialized agencies to the European Community and other regional economic or security organizations.

Against that background the remaining chapters after Chapter 5 can be seen as a study of the authority of the state in the international system and the limitations on that authority. These chapters take up other major rights of statehood conferred by international law — the right of a state to regulate conduct both within and outside its territory, as well as over parts of the oceans, air, and space — and the limitations imposed on those rights. Thus, Chapter 6 looks at the right of states to sovereign immunity from suits in the domestic courts of other states, focusing especially on the U.S. Foreign Sovereign Immunity Act and the complementary U.S. act of state doctrine.

Chapter 7 examines the right of a state to regulate private conduct within and outside its territory and the currently evolving international rules limiting extraterritorial application of law. It contrasts the allocation of “public” law-making authority with that in traditional “private” conflicts of law. Chapter 8 considers the limitations on state activity against aliens and alien property within its territory, and the expansion of these rules to protect the state’s own citizens under the international human rights regime.

Chapter 9 deals with the rules authorizing state regulation of activity on the sea and the international law limitations imposed, principally by the 1958 Geneva treaties and by the pending 1982 Law of the Sea Convention. Chapter 10 analyzes the similar legal regimes in air and space. Chapter 11 introduces the emerging regime covering environmental matters.

Finally, Chapter 12 considers the legal principles for regulating military power. It examines the international law regarding the use of force, the efforts to create a legal framework for arms control, and the relevant U.S. domestic law, especially the War Powers Resolution.

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 the student, often based on recent events or reasonable hypotheticals. These problems and questions are designed to focus the students’ attention on the major issues and rules, and to challenge the students to apply

these 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 text or excerpts of many basic documents are provided in a separate Documentary Supplement. These documents include, among others, the U.N. and ICJ charters, the N.Y. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, sample bilateral agreements (such as the U.S.-Japan Friendship, Commerce, and Navigation Treaty), major multilateral treaties (such as the Human Rights Covenants and the Montreal Protocol on the Protection of the Ozone Layer), the 1990 Charter of Paris for a New Europe, the 1990 U.N. resolutions on the Iraqi invasion and occupation of Kuwait, the U.S. Constitution, and key U.S. laws (such as the Foreign Sovereign Immunity Act, the International Emergency Economic Powers Act, and the War Powers Resolution).

Even with all the materials in the casebook and the Documentary Supplement, we should emphasize that the wide scope and complexity of international law today make it impossible to provide a casebook that is all-encompassing. This casebook is designed for an introductory course. Readers seeking further information about international law should consult the Restatement, the available treatises, or the other sources that are cited throughout this casebook.

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.

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