



A GUIDE TO THE BASICS OF INTERNATIONAL LAW*

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Traditionally, public international law or international law has been defined as “the body of rules and principles of action which are binding upon civilized states in their relations with one another.”¹ International law can generally be categorized into two broad categories: subjects of international law and objects of international law. Also known as international legal persons, the “subjects of international law are the actors, or players, on the international stage.”² In contrast, the “objects of international law are the legitimate topics of international legal resolution”³—such as international human rights law, the law of the sea, international economic law—that continue to develop as states negotiate the boundaries of these legal regimes.⁴ The Charter of the United Nations (UN Charter) is the foundational document for the international legal system.⁵ To help you understand the nature of international law, this handout will provide brief introductions to:

- (I) accepted sources of international law;
- (II) international dispute resolutions;
- (III) the role international law plays in U.S. law; and
- (IV) international law research.
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I. Sources of International Law

The principle sources of international law are enumerated in Article 38 of the Statute of the International Court of Justice, a treaty ratified by all 193 members of the United Nations. The four sources listed by Article 38 are: (a) international conventions or treaties establishing rules

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¹ J.L. BRIERLY, *THE LAW OF NATIONS* (6th ed. 1963). A country is commonly referred to as a “state” under international law. Public international law concerns state-to-state relations and intergovernmental bodies, whereas private international law concerns relationships between private parties across international jurisdictions including commercial affairs and family law.

² DAVID J. BEDERMAN & CHIMENE I. KEITNER, *INTERNATIONAL LAW FRAMEWORKS* 83 (4th ed. 2016). The traditional subjects of international law are states; overtime, other actors generally recognized as subjects include international organizations and even individuals. *Id.*

³ *Id.*

⁴ See LORI FISLER DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 1468 (5th ed. 2014).

⁵ *Id.* at 934.

expressly recognized by the contesting states; (b) customary international law, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) and judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁶ Keep in mind that sources of international law do interact with each other. For example, rules enacted in a treaty and customary international law may converge or clash.⁷

A. International Conventions or Treaties

International conventions, commonly referred to as treaties, are legally binding instruments given various names (charter, protocol, pact, among others) and govern the rights, duties, and obligations of participating states. The Vienna Convention on The Law of Treaties (the authoritative source) defines a treaty as an international agreement between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments.⁸ Articles 31 and 32 of the Convention are important provisions that supply the rules for the interpretation of treaties. Although the United States is not a party to the Vienna Convention, it consistently acts as though the Convention is binding international law.⁹

A treaty can come into force once a certain number of nations ratify the treaty, as specified in the treaty, or upon signature by the parties. However, a treaty cannot bind a non-party or non-participating state. In addition, specific provisions in most treaties will identify when it becomes legally binding, how compliance will be monitored and measured, how other nations may accede to the treaty, how and whether the treaty may be amended or modified, and how and when the treaty will terminate. Treaties are only binding upon states that choose to ratify the treaty. Generally speaking, states may not invoke a conflicting domestic law to avoid an obligation under an international agreement. Bilateral treaties between two states are deposited with one of the parties to the treaty, while multilateral treaties between three or more states are registered with the United Nations and made available to the public.

B. Customary International Law

Customary international law is developed through “a general and consistent practice of states followed by them from a sense of legal obligation.”¹⁰ A rule or principle of customary international law must fulfill two separate elements: (a) be general and widespread among states and (b) be accepted as law or arise out of a sense of legal obligation to follow that practice (known as *opinio juris sive necessitatus*).¹¹ Essentially, customary international law places

⁶ Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

⁷ BEDERMAN & KEITNER, *supra* note 2 at 31.

⁸ Vienna Convention on the Law of Treaties art. 2, May 23 1969, 1155 U.N.T.S. 331. This convention only covers treaties between states.

⁹ “U.S. officials have consistently stated that at least most of the [Vienna] Convention’s provisions represent customary international law, and U.S. courts have frequently relied on its terms.” BARRY E. CARTER, PHILLIP R. TRIMBLE & ALLEN S. WEINER, INTERNATIONAL LAW 95 (5th ed. 2007).

¹⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) 1987.

¹¹ See –BEDERMAN & KEITNER, *supra* note 2 at 18. The first part tends to be a more objective inquiry that focuses on practice and conduct. The second part is a more subjective inquiry and asks “why an international actor has engaged in a particular practice.” *Id.*

binding obligations on states based on their consistent patterns of behavior if the practices arise from legal obligation rather than convenience or courtesy.¹² Customary international law only binds the states that adhere to the pattern of behavior. If a state denounces or dissents from a norm (or becomes a “persistent objector”¹³), it is typically immunized from legal obligation.

There are some international norms so fundamental, however, that they permit no derogation.¹⁴ This concept, known as *jus cogens*, or peremptory norms, encompasses a limited set of rights—such as the prohibitions on genocide, torture, piracy, and slavery—that most members of the international community have agreed to follow.¹⁵

C. General Principles of Law

General principles of law constitute common themes familiar to most of the global legal systems. These rules are essentially domestic laws found in nearly all legal systems (such as civil law, common law, or Islamic law), that have entered into international law because they are manifest in most states around the world.¹⁶ Below are some accepted principles that animate many areas of international law:

- *Pacta sunt servanda* (“agreements must be kept”) (ex: treaty enforcement),
- *Lex specialist derogate generalis* (“the specific prevails over the general”) (ex: conflict of laws); and
- *Sic utere tuo ut alienum non laedas* (“use your own so as not to injure another”) (ex: international environmental law).¹⁷

D. Judicial Decisions & Qualified Publicists

In rare circumstances, when customary international law, treaties, and general principles prove inadequate, a tribunal might refer to state judicial decisions, decisions of international judicial bodies, or scholarly articles from the international community.

¹² To prove a principle of customary international law, an international lawyer might look to diplomatic correspondence, opinions of government legal advisors, international organization reports, and reports of State behavior, among other written evidence. *Id.* at 19. Assuming these patterns become reliable, and the principle is “rendered obligatory by the existence of a rule of law requiring it,” then the norm is crystallized into law. *North Sea Continental Shelf* (Ger./Den.; Ger./Neth.), 1967 I.C.J. 3, ¶ 77 (Feb. 20).

¹³ See BEDERMAN & KEITNER, *supra* note 2, at 25.

¹⁴ Vienna Convention on the Law of Treaties art. 53, May 23 1969, 1155 U.N.T.S. 331.

¹⁵ ANTHONY AUST, MODERN TREATY LAW AND PRACTICE, 257 (2000).

¹⁶ BEDERMAN & KEITNER, *supra* note 2, at 16. These rules encompass implementations of procedural law and evidentiary law, among others. MALCOLM N. SHAW, INTERNATIONAL LAW, 92-99 (5th ed. 2003). More specifically, the ICJ refers to concepts of estoppel and *res judicata* as examples of this form of international law. *Id.* For an example of the ICJ applying general principles of law, see *The Corfu Channel Case* (United Kingdom v. Albania), 1949 I.C.J. 4, 22.

¹⁷ DAMROSCH ET AL., *supra* note 4, at 114-229.

II. International Dispute Resolutions

States have an affirmative obligation to resolve disputes through peaceful means.¹⁸ There are both non-adjudicatory procedures (not legally binding) and adjudicatory procedures (legally binding). Non-adjudicatory procedures (in order of formality) are: negotiation, mediation, and conciliation.¹⁹ Arbitration and judicial settlement are formal adjudicatory procedures based on law. International arbitration may occur between various parties: a state and an international organization; a state and a non-state actor; and a foreign investor and a state.²⁰

There are more than 125 international judicial settlement bodies and approximately 80 are active and functioning as judicial bodies.²¹ Some courts are regional and others operate based on specialized subject matter. The most famous is the International Court of Justice: a judicial organ of the United Nations and a court of general jurisdiction operating with 15 elected and geographically-diverse jurists for renewable 9-year terms. There are many international judicial bodies with jurisdiction over particular subject matters. For example, for criminal law matters, those courts include but are not limited to the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court. For human rights law, specialty courts include but are not limited to the European Court of Human Rights, the African Court of Human and People's Rights, and the Inter-American Court of Human Rights.

III. International Law in National U.S. Law²²

The interface between international law and national law generally devolves into two approaches: monist and dualist. Under the monist approach, "international law automatically passes into the state's national legal system."²³ Under dualism, a state recognizes international law and national law as separate legal systems.²⁴ The United States has taken a largely dualist approach: Article VI, Clause 2 of the Constitution provides that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land."²⁵

Historically, the "law of nations" (referred to in the Constitution but now known as international law), became incorporated into United States law through the law of England. The United States recognizes customary international law and federal courts apply customary

¹⁸ BEDERMAN & KEITNER, *supra* note 2, at 57.

¹⁹ LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 535-51 (5th ed. 2014). Parties engaged in conciliation usually submit written and oral pleadings to a conciliator.

²⁰ *Id.* at 544.

²¹ *Id.* at 552.

²² "International law requires a state to carry out its international obligations, but, in general, how a state accomplishes that result is not of concern to international law." DAMROSCH ET AL., *supra* note 4, at 622.

²³ *Id.* at 621.

²⁴ "States rarely take either a purely monist or purely dualist approach." *Id.* at 622.

²⁵ U.S. CONST. art. XVI. According to the Supremacy Clause, states are bound to any international treaty that the federal government joins, and are immobilized from enacting laws contrary to international agreements. *See* *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

international law.²⁶ “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for determination.”²⁷ What happens when there is a violation of customary international law? Statutory law provides some answers. Under 28 U.S.C. § 1350 (“Alien Tort Statute”), for instance, Congress gave federal district courts “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²⁸ And according to the Supreme Court, limitations on the Treaty Power generally amount to prohibitions in the Bill of Rights.²⁹

IV. Preliminary International Law Research

International law research often requires resorting to creative techniques to locate, collect, and examine authoritative documents across international jurisdictions. A useful way to approach international law research is to first select the most relevant branch of the international law tree and then to trace its roots. Take the issue of climate change as an example. Environmental law would be the branch of the international law tree with climate change as a fruit. The root would be the “foundational” legal instrument. In this case, the governing international agreement for international environmental law is the 1972 Stockholm Declaration of the United States Conference on the Human Environment.³⁰ Essentially, locating the root should present you with the legal framework from which you can center and adapt your research. Georgetown Law’s library offers a rich collection [of international law research guides](#).³¹ Several organizations also provide free resources on the full spectrum of international law. Below is a short list of web-based resources organized by theme.

General Primers

- The International Journal of Legal Information³²
- The American Society of International Law’s Electronic Resource Guide³³
- The American Society of International Law’s International Law in Brief³⁴

²⁶ See *Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018); *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013).

²⁷ *The Paquete Habana*, 175 U.S. 677, 700 (1900). See also *Reid v. Covert*, 354 U.S. 1 (1957). “Hence, determinations of international law by the Supreme Court of the United States, like its interpretation of international agreements, are binding on the States.” DAMAROSCH ET AL., *supra* note 4, at 641.

²⁸ DAMAROSCH ET AL., *supra* note 4, at 641.

²⁹ The Court has also developed canons for treaty interpretation. In *Murray v. The Schooner Charming Betsy*, for example, Chief Justice Marshall explained “that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” 6 U.S. (2 Cranch) 64, 118 (1804); see also Restatement (Third) of Foreign Relations Law of the United States § 114 1987 (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”). This principle is known as the *Charming Betsy* doctrine, and continues to be used as a valid canon of statutory interpretation. See *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993) (Scalia, J., dissenting).

³⁰ See DAMAROSCH ET AL., *supra* note 4, at 1467.

³¹ Available at <http://guides.ll.georgetown.edu/home/foreign-law/>.

³² Available electronically through HeinOnline.

³³ Available at <http://www.asil.org/erg/>.

³⁴ Available at <https://www.asil.org/ilib/>.

Treaties

- The World Legal Information Institute's International Treaties Collection³⁵
- The Treaties and Other International Acts Series (TIAS)³⁶

Customary International Law

- The Digest of United States Practice in International Law³⁷
- The Yearbook of International Organizations³⁸

³⁵ Available at <http://www.worldlii.org/int/special/treaties/>.

³⁶ Available at <http://www.state.gov/s/l/treaty/tias/>.

³⁷ Available at <https://www.state.gov/s/l/c8183.htm/>.

³⁸ Available at <http://www.uia.be/yearbook/>.