
PREFACE TO THE EIGHTH EDITION

This casebook is designed for a comprehensive survey course in international law. We have consciously chosen to gear its contents to the needs of students who will be practicing law in, or interacting with, the U.S. legal system, although it can be used by students across the globe. In doing so, we build on traditional theories and concepts of public international law, while also addressing new institutions and other developments, especially the complex relationship between international and domestic legal orders. Our casebook analyzes how public international law frequently affects the private activity of both individuals and businesses. It considers how various actors and processes contribute to the development and evolution of international law.

This Eighth Edition retains the essential structure of the Seventh Edition, while offering a more inclusive range of sources and examples, as well as substantially revised and updated materials in every chapter of the casebook. For example, it:

- provides updates throughout in light of the significant international law implications of Russia's 2022 invasion of Ukraine;
- includes vignettes in the introductory chapter addressing Russia's 2022 invasion of Ukraine, the global response to the COVID-19 pandemic, and the government of Myanmar's genocidal campaign against the Rohingya;
- highlights the emerging focus on the relationship between international human rights law and international environmental law;
- discusses how technology implicates international law from issues of jurisdiction to the use of force and international humanitarian law;
- contains substantially revised chapters on jurisdiction and immunities that give students a solid grounding in the complexities of multi-jurisdictional practice, including excerpts from foreign cases that grapple with these issues with reference to relevant principles of international law;
- provides extensive updated notes and questions that draw on recent global events to illuminate, and help students interrogate, the legal principles presented in each chapter.

The Eighth Edition also includes new materials on topics such as:

- the prohibition on "intervention" under international law and the legal implications for various forms of malicious transnational cyber operations;
- the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case brought by The Gambia against Myanmar before the International Court of Justice;
- the International Law Commission's project on the identification of customary international law;

- cases brought by Ukraine against Russia in the International Court of Justice and the European Court of Human Rights;
- recent developments in the law and practice of the World Trade Organization, including an important decision on the “security interests” exception to states’ WTO obligation and steps taken by the United State to block the appointment of judges to the Appellate Body;
- international environmental law cases, including the first International Court of Justice case awarding damages for environmental harm and the *Urgenda* case on the international human rights obligation of states to mitigate the environmental harms of climate change;
- major U.S. Supreme Court cases on foreign relations law including *Nestlé USA, Inc. v. Doe* (on the availability of civil redress under the Alien Tort Statute) as well as new materials on international agreements concluded by U.S. states;
- self-determination and the International Court of Justice’s 2019 Advisory Opinion in the case of *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*;
- new developments in the identity, functions, and future of the European Union;
- international law and international relations relating to outer space, including the Artemis Accords;
- developments relating to individual accountability for international crimes before domestic, hybrid, and international courts; and
- critical perspectives on international law and the legacy of colonialism in the international legal order.

Every chapter has been updated with issues and materials to capture the new and fast-paced developments in the field of international law. In addition, the Notes and Questions have been thoroughly revised throughout the casebook.

BACKGROUND

Whether or not we are conscious of it, each of our lives is affected in myriad ways by international law: from receiving a GPS signal on our phones, to buying products made in another country, to being able to travel (or not) across international borders. The governments of more than 190 countries deal daily on a wide range of issues with one another, with international institutions and organizations (like the United Nations, the World Trade Organization, the International Atomic Energy Agency, and the G-20), and with regional organizations (such as the European Union, the Organization of American States, and the North Atlantic Treaty Organization). The problems range from essential, if mundane, matters (like postal agreements) to those of considerable economic and foreign policy significance (such as economic sanctions against Russia in response to its 2022 invasion of Ukraine). They concern the human rights standards that states are required to accord to their citizens and the ongoing international efforts to regulate global commons, like the biosphere. These issues even extend to matters of life and death (e.g., the

the resort to military force and conduct of participants in war, efforts to combat the proliferation of weapons of mass destruction, and criminal accountability for those responsible for mass atrocities). In addition to these interactions among governments, countless civil society organizations, businesses, and individuals all need to deal with the challenges of living together on planet Earth.

Each day public and private entities move across borders many billions of dollars' worth of currency and goods, millions of people, and many thousands of ships, planes, and other vehicles. They also engage in a tremendous amount of international communication, with messages carried via undersea cables, satellite signals, and other types of networks.

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, lawyers in the United States and around the world regularly encounter issues involving international law. They need to understand the relevant international law rules and how they 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 arbitral institutions?

In addition, everyone benefits from understanding how international legal rules may shape and constrain the foreign policy decisions that governments make, which can affect the lives of millions, and even billions, of people.

OBJECTIVES

In introducing students to international law, this casebook has four major objectives:

1. The casebook should provide students with a *solid understanding of substantive international law*. We explore the sources and subjects of public international law, its principal theories and concepts, and recent developments in the law. In analyzing sources, we pay particular attention to treaties and customary international law, which students probably have not studied before in depth. In examining subjects of international law, we of course focus on states, but also international organizations and other subjects, including “peoples.” We then address other general concepts—such as international dispute resolution, the various principles for exercising prescriptive jurisdiction, and approaches to foreign sovereign immunity—before turning to particular substantive international law topics like human rights, the law of the sea, international environmental law, the use of military force and the conduct of warfare, and international criminal law, each of which is addressed in a separate chapter.

2. This casebook also analyzes the *international institutions* that help public international law facilitate dramatically expanding international activity. The years

immediately after World War II witnessed tremendous creativity and accomplishment in establishing an international system, and today the international system boasts a plethora of international organizations (such as the United Nations, the World Trade Organization, and International Monetary Fund); specialized agencies (like the International Atomic Energy Agency and the World Health Organization); regional organizations (such as the African Union and the European Union); information groupings of states (such as the G-20 and the G-77); and international courts and tribunals (such as the International Court of Justice and the International Criminal Court), to which states increasingly turn to resolve disputes. The result is not a simple structure of legal institutions, but rather a complex mix of international and national law, administered and enforced by a variety of entities. These institutions have evolved and adapted—with varying degrees of success—to address matters of international concern, ranging from international trade and investment to protection of the environment to the promotion of human rights to the maintenance of international peace and security.

3. The casebook recognizes and studies the *interaction between public international law and domestic law*, including the way national agencies and courts interact with the international legal system. 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. Since most of the users of this book will be students in law schools in the United States, we examine in depth the incorporation and operation of international law in the U.S. legal system; this includes substantial attention to the U.S. Constitution and U.S. laws that have international impact. At the same time, because American lawyers must appreciate the different principles found in foreign legal systems, materials from other legal systems are included to offer comparative insights.

4. Students will also be made aware of how *international law increasingly affects—and is shaped by—private activity*, both of individuals and businesses. For example, a national court might draw in part upon international human rights norms to find private actors 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 have violated the rules. And the question of sovereign immunity of foreign governments is not only of interest to governments and their diplomats, but can also be crucial to private company dealings with a foreign supplier owned by a government.

As a result, the future lawyer should understand how the rapidly expanding body of international law—including multilateral and bilateral agreements—is made, how it can be changed, and how it can affect a client's interests. A student should also understand how governments make decisions and how diplomacy operates.

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 provide

professors with flexibility to shape a course that reflects their own emphases and to choose among the materials.

Chapter 1 starts with definitional questions about what international law “is,” 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, with attention to expanding the histories by which students may understand international law today, including developing world perspectives. The third section considers the nature of international law and examines various theories for understanding what it is and how it works. The chapter concludes with three vignettes on international law in action with respect to Russia’s 2014 and 2022 invasion of Ukraine, the role(s) of international law in responding to the COVID-19 pandemic, and the government of Myanmar’s genocidal campaign against the Rohingya.

Against this background, Chapter 2 introduces the basic building blocks— or sources— of international law. Students first learn what a “treaty” is and examine important issues of treaty law governing the formation, interpretation, invalidity, and termination of treaties. The chapter also describes customary international law, including different views about the role of state practice compared to normative statements by states. We then consider other sources of international law, including general principles of law and, as a subsidiary matter, judicial decisions and the teaching of publicists. The chapter explores the changing ways in which international law is being made today, including the expanding role played by international organizations, transnational networks of government regulators, and nonstate actors— both multinational corporations and nonprofit groups. Finally, there is a section on soft law, or nonbinding rules, that nevertheless seek to establish international norms.

Chapter 3 considers the relationship between international and domestic legal systems, with a particular focus on the U.S. legal system. It begins by considering the general question of how international law can relate to— and be incorporated into— a domestic legal system. It then turns to the United States and explores the scope of the U.S. treaty power and the circumstances under which treaties are enforceable by private parties in U.S. courts. It 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. This includes consideration of modes of making international agreements other than Article II treaties and issues related to the exercise of presidential powers in the context of the post–September 11 response to terrorism. The chapter discusses the status of customary international law in U.S. courts, with particular emphasis on the rise (and fall) of international human rights litigation under the Alien Tort Statute. 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 negotiation, turns to the International Court of Justice (ICJ), and then analyzes the growing role of regional and specialized courts (focusing on the Court of Justice of the European Union as an example of the former and the Dispute Settlement Body of the World Trade

Organization as an example of the latter). We also address the increasingly important role of international arbitration, especially investor-state arbitration. The chapter also addresses the role of domestic courts in enforcing both foreign arbitral awards and foreign court judgments.

Chapter 5 defines the “state” and introduces some of the consequences of statehood, including the law of state responsibility. We examine the role of recognition by other countries on the question of statehood as well as the separate questions of recognition of governments and state succession. This chapter also considers international organizations as subjects of international law, including issues related to the capacities and responsibilities of such organizations. It addresses the structure and functions of a number of key illustrative international organizations, including the United Nations (the most significant global international organization), the World Trade Organization (an important functional organization), and the European Union (the most developed regional organization).

Chapter 6 examines the various international bases for a state to make its law applicable to persons and conduct within and outside its territory (jurisdiction to prescribe), including techniques for addressing concurrent jurisdiction and jurisdictional conflicts. We also investigate the rules governing jurisdiction to adjudicate and to enforce.

Chapter 7 considers the immunities that states have in the domestic courts of other states under the restrictive theory of foreign sovereign immunity, as codified in the U.S. Foreign Sovereign Immunities Act and other countries’ state immunity acts. The chapter additionally considers international law relating to the immunities of current and former foreign officials. Finally, the chapter discusses the “act of state doctrine,” a common law doctrine applied by U.S. courts that limits courts’ ability to invalidate actions by foreign governments.

Chapter 8 considers international law limitations on a state’s treatment of individuals. It begins with traditional rules protecting non-citizens and their property, a discussion that invites consideration of principles of attribution under the law of state responsibility. The chapter then turns to contemporary international human rights law. Among other things, the chapter discusses some of the most important human rights treaties and institutions, considers customary international human rights law, and examines the burgeoning system of regional human rights laws and institutions.

Chapter 9 deals with the international law of the sea. It focuses primarily on the key principles and rules in 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). It outlines key issues like the nationality and status of vessels, the delimitation and breadth of the territorial sea, and the breadth and legal rights and duties associated with the contiguous zone, the continental shelf, and the exclusive economic zone. The chapter also examines the decision of an arbitral tribunal established under the Law of the Sea Convention addressing China’s maritime claims to waters in the South China Sea enclosed by its so-called “nine-dash line,” and the status of certain objects in the South China Sea claimed by China as giving rise to its maritime zone claims. New sections on international law’s role in governing Antarctica and Outer Space conclude the chapter.

Chapter 10 introduces the international legal regimes covering environmental matters. It begins with customary international law principles and “soft law” norms in this field and then describes how these rules are being rapidly supplemented by detailed multilateral treaty regimes. The chapter addresses the international legal response to two major environmental challenges in particular: first, the relatively successful international effort to deal with ozone depletion through the Montreal Protocol and related agreements, and second, the continuing struggle to respond to climate change via the U.N. Framework Convention on Climate Change and subsequent treaties, including the Paris Agreement adopted in 2015. The chapter also addresses the relationship of international environmental law to other fields of international law, and in particular international human rights law and the expansion of lawsuits grounded in claims to a human right to a healthy environment.

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. After setting out the international law prohibition on “intervention,” the chapter turns to the question of when states may permissibly use force without external authorization. Among the circumstances considered are self-defense (including anticipatory self-defense), the use of force in conflicts with nonstate/“terrorist” groups, and humanitarian intervention. The chapter includes subsections dedicated to the application of the legal regime on the use of force to hostile cyber operations and a detailed look at legal issues arising from Russia’s February 2022 invasion of Ukraine. Next, the chapter addresses the use of force pursuant to the collective security powers of the U.N. Security Council, including peacekeeping and peace enforcement operations such as those following Iraq’s 1990 invasion of Kuwait and the 2011 military intervention in Libya. The chapter also examines the contested 2003 U.S.-led invasion of Iraq. A section on international humanitarian law (IHL)—the law that deals with the conduct of war—includes materials on the Geneva Conventions of 1949 and the 1977 Additional Protocols and a subsection on modern technologies and IHL. There are also brief sections on international efforts to control the use and proliferation of weapons of mass destruction and on domestic U.S. law governing the allocation of powers between the Executive Branch and the Congress regarding the conduct of war (notably the War Powers Resolution).

Chapter 12 on international criminal law begins with a discussion of international cooperation by states to counter transnational crime. It then explores principles of individual responsibility under international law and defines the main substantive international crimes including genocide, crimes against humanity, and war crimes, in addition to considering modes of liability for those crimes. The final section explores the institutional arrangements for prosecuting international crimes, including domestic courts, international tribunals, and mixed or “hybrid” courts. This section includes a detailed look at the International Criminal Court and its challenges. The chapter concludes with a brief examination of some alternatives to criminal prosecution.

While the materials in each chapter include key excerpts of important documents, the texts or excerpts of many basic documents—including major international treaties, excerpts from the U.S. Constitution and key U.S. statutes, and

important United Nations resolutions—are provided in a separate Documentary Supplement.

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

For this Eighth Edition, Professor Weiner was primarily responsible for the revisions and updates in Chapters 2B-F, 4, 10, and 11. Professor Hollis was primarily responsible for changes in Chapter 1, 2A, 3, 5, and 9. Professor Keitner was primarily responsible for changes to Chapters 6, 7, 8, and 12. This work has benefited greatly from frequent communication among the three active co-authors, with each making contributions and comments on the other's chapters.

Our efforts on this Eighth 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.

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PREVIOUS EDITIONS

Barry Carter and Phillip Trimble originally conceived this casebook and co-authored the first three editions. After Mr. Trimble left academia in 2001, he chose just to comment on the Fourth Edition and did not work on any subsequent editions. Curtis Bradley was an active co-author for the Fourth Edition.

I joined the project and was Mr. Carter's active co-author for the Fifth and Sixth Editions. He and I worked closely and collaboratively on those two editions before his untimely passing. Mr. Hollis joined me as co-author of the Seventh Edition, and Chimène Keitner joined Mr. Hollis and me for the current Eighth Edition.

Allen S. Weiner

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