

# INTRODUCTION TO PUBLIC INTERNATIONAL LAW

## I. OBJECTIVES

- A. Understand the foundation of the international legal system.
- B. Understand the primary sources of international law, how they are created and how they relate to each other.

## II. INTRODUCTION

- A. Military operations involve complex questions related to international law. International law provides the framework for informed operational decisions, establishes certain limitations on the scope and nature of command options, and imposes affirmative obligations related to the conduct of U.S. forces. Commanders rely on Judge Advocates to understand fundamental principles of international law, translate those principles into an operational product, and articulate the essence of the principles when required.
- B. This body of law has a broader and independent significance in the context of U.S. law and jurisprudence because international law—among the cornerstones of our own Constitution<sup>1</sup>—“is part of our law.”<sup>2</sup>

## III. FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW

- A. Definition. International law is defined as “rules and principles of general application dealing with the conduct of States and of international organizations and with their relations *inter se*, as well as some of their relations with persons, whether natural or juridical.”<sup>3</sup> Regulating those relations is generally viewed through two different lenses: public and private. Public international law is that portion of international law that deals mainly with intergovernmental relations. Private international law is primarily concerned with the “foreign transactions of individuals and corporations.”<sup>4</sup>

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<sup>1</sup> See U.S. CONST. art I, §8 (giving Congress the power to “define and punish . . . Offences against the Law of Nations”); art. II, §2 (giving the President authority, with the advice and consent of the Senate, to appoint ambassadors and make treaties); art. III (providing that the judicial power extends to all cases involving treaties, ambassadors, and maritime cases); and art. VI (listing treaties as among three sources noted as the “supreme Law of the Land”).

<sup>2</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900).

<sup>3</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 101 (1987) [hereinafter RESTATEMENT].

<sup>4</sup> MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 2 (1997).

- B. States. International law developed to regulate relations between States, and States are the focus of the international legal system. International law establishes four criteria that must be met for an entity to be regarded as a State under the law:
1. Defined territory (which can be established even if one of the boundaries is in dispute or some of the territory is claimed by another State);
  2. Permanent population (the population must be significant and permanent even if a substantial portion is nomadic);
  3. Government (note that temporary occupation by enemy forces during war or pursuant to an armistice does not serve to extinguish statehood even if the legal control of the territory shifts temporarily); and,
  4. Capacity to conduct international relations.<sup>5</sup>
- C. Consequences of statehood. Under international law, a State has:
1. Sovereignty over its territory and general authority over its nationals;
  2. Status as a legal person, with capacity to own, acquire, and transfer property, to make contracts and enter into international agreements, to become a member of international organizations, and to pursue, and be subject to, legal remedies; and
  3. Capacity to join with other States to make international law, as customary law or by international agreement.<sup>6</sup>
- D. Inherent tension. Under international law, sovereignty is the ultimate benefit of statehood. Inherent to sovereignty is the notion that a State should be free from outside interference. International law, however, seeks to regulate State conduct. States “trade” aspects of sovereignty in order to reap the benefits of the international legal system. While this may seem natural in cases of warfare between states (or international armed conflict), it becomes more contentious in cases of internal or non-international armed conflict.

#### IV. SOURCES OF INTERNATIONAL LAW

- A. Article 38 of the Charter of the International Court of Justice (ICJ)<sup>7</sup> lists the following sources of international law:

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<sup>5</sup> See RESTATEMENT, *supra* note 3 at § 201.

<sup>6</sup> *Id.* at § 206.

1. International agreements (i.e., **treaties**).
  - a. Treaties are written international agreements concluded between two or more States. They are also referred to as conventions, protocols, covenants, and attached regulations. They only bind those States that are parties.
  - b. In the U.S., treaties include those international agreements concluded by the Executive branch which receive the consent of at least two-thirds of the Senate. Once ratified by the President, they become the “supreme law of the land” pursuant to the Supremacy Clause of the U.S. Constitution (Article VI, Clause 2).
  - c. Reservations and Understandings. A reservation is essentially a unilateral modification of the basic obligations established by a treaty. Under international law, a reservation is permitted if it is compatible with the object and purpose of the treaty. It is treated as a “counter-offer,” and is only binding upon other States that agree to it, though agreement is assumed. Unlike a reservation, an understanding does not modify basic treaty obligations; rather, it guides future interpretation of those obligations.<sup>8</sup>
  - d. Treaties and domestic statutes. U.S. laws fall under the umbrella of the Supremacy Clause. Accordingly, a “later in time” analysis determines the supremacy of a treaty in conflict with a statute. Courts always attempt to reconcile apparent inconsistent provisions before resorting to the later in time rule. Because U.S. courts generally seek to avoid such conflicts by interpreting statutes “in ways consistent with the United States’ international obligations,”<sup>9</sup> any conflict must be explicit for a court to find a statutory intent to contradict a treaty.<sup>10</sup>
2. International **custom** (i.e., customary international law).

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<sup>7</sup> The ICJ was created by operation of the UN Charter.

<sup>8</sup> See Vienna Convention on the Law of Treaties, arts. 19–23, Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter VCLT]. The United States is not a party to the VCLT, but regards most of its provisions as customary international law. Note too that the Commentaries to the 1949 Geneva Conventions and the Additional Protocols of 1977 are useful sources to determine the intent of the drafters.

<sup>9</sup> See JANIS & NOYES, *supra* note 4, at 216.

<sup>10</sup> Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (“an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”).

- a. That law resulting from the general and *consistent* practice of States followed from a sense of legal obligation (*opinio juris*).<sup>11</sup>
- b. Best understood as the “unwritten” rules that bind all members of the community of States. Note, however, that customary international law can emerge from rules established in treaties and, as a consequence, bind all States that do not consistently object to the application of that rule. Also, customary international law can be codified in subsequent treaties.
- c. A practice does not require acceptance by 100% of States to amount to customary international law. However, the argument that a norm exists is enhanced proportionally in relation to the number of States that recognize and adhere to the norm. There is also a correlation between the length of time a practice is followed and the persuasiveness that the practice amounts to customary international law. While this factor is not dispositive, developing law is more suspect than established custom.<sup>12</sup>
- d. Persistent objector. It is possible for a State not to be bound by a rule of customary international law if that State persistently and openly objects to the rule as it develops, and continues to declare that it is not bound by the rule. The U.S. may act in accordance with principles that other States assert amount to customary international law, but expressly state it does not consider itself legally obligated to do so. This is motivated by a concern that our conduct not be considered evidence of a customary norm.
- e. *Jus Cogens*. Some principles of international law are considered peremptory norms and cannot be derogated, even by treaty. Examples cited by the ICJ include prohibitions against inter-state aggression, slavery, genocide, racial discrimination, and torture.<sup>13</sup>
- f. Unlike international law established by treaty, customary international law is not mentioned in the Constitution’s Supremacy Clause. It is, however, considered part of U.S. law.<sup>14</sup>

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<sup>11</sup> See RESTATEMENT, *supra* note 3, § 102(2) cmt c. (1987) (from the Latin *opinio juris sive necessitates*, a practice undertaken by a State out of a sense of legal obligation).

<sup>12</sup> In 1996 the ICRC initiated a study of current state practice in order to identify customary international humanitarian law. That study, which has been criticized by the United States on several grounds, has resulted in 161 “Rules” of customary international humanitarian law and a summary of the underlying practice for those rules. See Customary International Law Database (last visited February 20, 2013) available at <http://www.icrc.org/customary-ihl/eng/docs/home>.

<sup>13</sup> Barcelona Traction, Light and Power Company, Limited, Judgment, 1970 I.C.J. 3, ¶ 34 (Feb. 5).

<sup>14</sup> See *The Paquete Habana*, *supra* note 2.

- g. Customary international law and treaty law are equal in stature, with the later in time controlling.<sup>15</sup>
3. General principles of law recognized by civilized nations. These “general principles,” as reflected primarily in the judicial opinions of domestic courts, can serve as “gap fillers” in international law.<sup>16</sup> The prevailing view is “that general principles of law are to be found in municipal law through the comparative law process. Under this approach, if some proposition of law is to be found in virtually every legal system, it will constitute a general principle of law.”<sup>17</sup> This provides flexibility to resolve issues that are not squarely resolved by existing treaty or customary international law.
4. Judicial Decisions and Writings.
- a. Judicial decisions and the teaching of the most highly qualified publicists can be subsidiary means for the determination of rules of law. These are not really “sources” of law in that they are “not ways in which law is made or accepted, but opinion-evidence as to whether some rule has in fact become or been accepted as international law.”<sup>18</sup>
  - b. Note too that judicial decisions, while persuasive, are not dispositive. They only bind the parties before the tribunal. Also, there is some caution in using *stare decisis* with international courts, since there is no hierarchical structure for international courts.

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<sup>15</sup> See VCLT, *supra* note 8, art. 64 (the emergence of a new *jus cogens* peremptory norm which conflicts with existing treaty obligations voids the conflicting treaty provisions).

<sup>16</sup> John F. Murphy, THE EVOLVING DIMENSIONS OF INTERNATIONAL LAW: HARD CHOICES FOR THE WORLD COMMUNITY 25 (2010).

<sup>17</sup> *Id.*

<sup>18</sup> See RESTATEMENT, *supra* note 3, at § 102, reporters’ notes.

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