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I. International Law Primer

“International law is a 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 their determination.” So wrote the Supreme Court more than a century ago in a maritime action, *Paquete Habana*, 175 U.S. 677, 700 (1900). The oft-cited sentence prompts questions: What is international law? What is an international treaty? International custom? What is the relation of international law to U.S. law? When is the United States obligated to follow a treaty provision or customary norm? When, and to what extent, is either enforceable in the courts of the United States? This *Benchbook on International Law* answers such questions – questions that courts are likely to confront in cases with a cross-border component.

The *Benchbook* uses the term “international law” in a broad sense. It thus treats not only the body of legal obligations that countries assume in order to regulate their own interactions, but also numerous laws, norms, and judgments with intercountry elements relevant to cases in U.S. courts. The instant chapter first elaborates on terms, such as “transnational law,” related to this broad meaning. The chapter then offers, as a foundation for the chapters that follow, a primer on pertinent international law sources, doctrines, and institutions.

A. International Law Defined

In its narrowest sense, “international law” refers to laws applicable between “states” – a word that in international law writings typically refers to a country, or sovereign nation-state, and not to a country’s constituent elements.² International law thus comprises legal obligations to which states have consented in order to regulate the interactions between them. This formulation traditionally concentrated on actions by states; at times, however, it also took into account the behavior of nonstate actors. Examples included the:

- International prohibition against piracy – that is, the prohibition against the commission, typically by a natural person or human being, of robbery or similar crimes on the high seas. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004) (citing 4 William Blackstone, *Commentaries on the Laws of England* 68 (1769)); *United States v. Smith*, 18 U.S. 153, 159-62 (1820) (Story, J.) (construing the federal crime of piracy by reference to the law of nations).

¹ For what this section contains, see the Detailed Table of Contents, <http://www.asil.org/benchbook/detailtoc.pdf>.

² This *Benchbook* follows that usage, so that “state” means country, and individual states within the United States are designated as such.

- Rights and responsibilities of artificial/juridical/nonnatural persons other than states. *See Advisory Opinion on Reparations for Injuries Suffered in Service of United Nations*, 1949 I.C.J. 174 (Apr. 11) (outlining, in an early decision of the International Court of Justice, described *infra* § I.B.3.a.i, the status in international law of the then-four-year-old United Nations Organization); *see also United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y.1988) (applying 1947 U.N.-U.S. agreement, and dismissing suit brought by the United States against the defendant organization’s U.N. observer mission).

International law of this sort is obligatory, binding, “hard law.” That trait distinguishes classical international law from “comity,” a concept defined *infra* § II.B.7, and from “soft law,” discussed *infra* §§ I.B.4, I.C.3.d.

Indicative of this traditional meaning is the definition of “international law” in Section 101 of the *Restatement (Third) of Foreign Relations Law of the United States* (1987):³

[R]ules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.

In the decades since the publication of the *Restatement*, nonstate actors have come to play a greater role in international law and litigation. What is more, areas of law not fully within the above definition have surfaced in federal litigation. Labels for these interrelated and often overlapping areas include:

- Private international law
- Foreign relations law
- Foreign law
- Comparative law
- Transnational law
- Global law

This *Benchbook* covers all these areas, to the extent they are relevant to the dockets of federal courts. Accordingly, each term listed above is defined in the glossary immediately below. *See infra* §§ I.A.1-I.A.6.

After presenting that glossary, the chapter then proceeds to describe what constitutes international law and how such law is determined. *See infra* § I.B. The chapter concludes by discussing uses of international law in the courts of the United States. *See infra* § I.C. As will be seen, at times the law or norm at issue may supply a binding rule for the court; in other cases, a litigant may point to it as potentially persuasive authority.

³ Designated subsequently as *Restatement*, this 1987 American Law Institute treatise compiles many of the doctrines discussed in this chapter. Its provisions must be consulted with due caution, however, particularly given that it was published decades before the Supreme Court’s most recent interpretations of the Alien Tort Statute. On use of this *Restatement* and the 2012 launch of a project to draft a fourth *Restatement* in this field, *see infra* § IV.B.1.

1. Private International Law

The term “private international law” comprehends laws regulating private interactions across national frontiers. An example would be law relating to a contract dispute between private citizens of different countries. It is sometimes referred to as international conflict of laws, although the field encompasses more than just conflicts rules.

By tradition, the opposite number of private international law is “public international law,” which comprehends laws relating to states and interstate organizations. Developments in the last several decades have blurred this distinction, however. For instance, family issues once considered matters of private law – indeed, private domestic law – now may be susceptible to regulation in accordance with instruments of public international law. *See infra* § III.B.

2. Foreign Relations Law

The term “foreign relations law” encompasses U.S. as well as international laws with substantial significance to U.S. foreign relations. Legal texts thus cover domestic laws pertinent to foreign relations – such as the treaty powers allotted to the President and Congress in Articles I and II – as well as treaty- and custom-based international law applicable in U.S. legal systems. *See generally, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Foreign Relations Law* (4th ed., 2011); Thomas M. Franck, Michael J. Glennon, Sean D. Murphy & Edward T. Swaine, *Foreign Relations and National Security Law* (4th ed., 2011).

The term operates as a frame for the *Restatement* series that is described *infra* § IV.B.1 and cited throughout this *Benchbook*.

3. Foreign Law

“Foreign law” comprehends the laws of countries other than the United States. *See* Morris L. Cohen & Robert C. Berring, *How to Find the Law* 610 (8th ed., 1983). Variouslly described as “national,” “internal,” “domestic” – or even, among international lawyers, “municipal” – foreign law may include other countries’ constitutions, statutes, regulations, and judicial decisions.

Resources for locating foreign law are detailed, as a general matter, *infra* § IV.B; as to specific areas of law, in separate subsections of this *Benchbook*.

4. Comparative Law

A concise description of comparative law follows:

Comparative law can be defined as the study of the similarities and differences between the laws of two or more countries, or between two or more legal systems. As such, comparative law is not itself a system or law or body of rules, but rather a method or approach to legal inquiry. It is both an academic discipline and a practical tool for understanding the operation of legal systems or

particular laws by comparing two or more different systems or the laws of different countries.

Morris L. Cohen & Robert C. Berring, *How to Find the Law* 610 (8th ed., 1983); see Ugo A. Mattei, Teemu Ruskola & Antonio Gidi, *Schlesinger's Comparative Law* 7 (7th ed., 2009) (defining comparative law, in a casebook that emphasizes the role of the discipline in an era of globalization, as “an approach to legal institutions or to entire legal systems that study them in comparison with other institutions or legal systems as they exist elsewhere”).

Among other things, comparative law provides tools for contrasting common law systems, like those in the United States and other English-speaking countries, from civil law systems, like those in continental European and other jurisdictions. These tools may assist:

- Understanding of foreign law, defined *supra* § I.A.3, and thus of the general principles of law common to the world's major legal systems, the secondary international law source discussed *supra* § I.B, I.B.2. See Mattei, Ruskola & Gidi, *supra*, at 8 n.4.
- Interpretation of certain international agreements to which the United States belongs; for example, a treaty that deals with child abduction, detailed *infra* § III.B, and another that deals with the international sales of goods, detailed *infra* § III.C.

5. Transnational Law

At its most basic, the term “transnational” means “across countries,” or “going beyond national boundaries.” More than a half-century ago, an international law scholar and former State Department lawyer, who would go on to serve as a judge on the International Court of Justice,⁴ promoted the term “transnational law” to include all law which regulates actions or events that transcend national frontiers.” Philip C. Jessup, *Transnational Law* 2 (1956). The term “transnational law” comprehends not only traditional, public international law, which is concerned primarily with relations between states, but also private international law and, the author wrote, “other rules which do not wholly fit into such standard categories.” Jessup, *supra*, at 2; see *supra* § I.A.1. He elaborated:

Transnational situations, then, may involve individuals, corporations, states, organizations of states, or other groups. A private American citizen, or a stateless person for that matter, whose passport or other travel document is challenged at a European frontier confronts a transnational situation. So does an American oil company doing business in Venezuela; or the New York lawyer who retains French counsel to advise on the settlement of his client's estate in France; or the United States Government when negotiating with the Soviet Union regarding the unification of Germany. So does the United Nations when shipping milk for UNICEF or sending a mediator to Palestine. Equally one could mention the

⁴ The body, also known as the World Court, is discussed *infra* § I.B.3.a.i.

International Chamber of Commerce exercising its privilege of taking part in a conference called by the Economic and Social Council of the United Nations.⁵

Jessup, *supra*, at 3-4.

In contemporary discourse, the term “transnational law” sometimes is used to convey this broad sweep; at other times, it may be intended in the narrower sense of a legal matter that involves just two countries. The term also may be used as a synonym for private international law, described *supra* § I.A.1.

6. Global Law

“Global law” represents not so much a term of art as an effort to capture the operation of various bodies of law at various levels; that is, to allude to the broader meanings of international law and transnational law. *See supra* §§ I.A, I.A.5. In the United States, the phrase often is used in a colloquial sense, as in “global law firm” or “global law school.”

Academics and policymakers also speak of “global governance.” One source offers this succinct definition:

Global governance refers to the way in which global affairs are managed. As there is no global government, global governance typically involves a range of actors including states, as well as regional and international organizations. However, a single organization may nominally be given the lead role on an issue, for example the World Trade Organization in world trade affairs. Thus global governance is thought to be an international process of consensus-forming which generates guidelines and agreements that affect national governments and international corporations.

World Health Org., *Global Governance*, <http://www.who.int/trade/glossary/story038/en/> (last visited Feb. 23, 2014).⁶

⁵ On the two mentioned international organizations that are part of the U.N. system, see UNICEF, *About UNICEF*, <http://www.unicef.org/about/> (last visited Feb. 23, 2014); U.N. Econ. & Soc. Council, *About ECOSOC*, <http://www.un.org/en/ecosoc/about/index.shtml> (last visited Feb. 23, 2014). On the international nongovernmental organization mentioned, see Int’l Chamber Commerce, *A Word from our Secretary-General*, <http://www.iccwbo.org/about-icc/> (last visited Feb. 23, 2014).

⁶ On the intergovernmental organization mentioned in this passage, see World Trade Org., *What is the WTO?*, http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Feb. 23, 2014).