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I.B. Sources and Evidence of International Law

International lawyers speak of “sources” when describing what constitutes international law, and of “evidence” when describing how international law is determined. The descriptions tend to overlap, and this section considers them together.

The *Restatement* defines “[a] rule of international law” as “one that has been accepted as such by the international community of states,” with respect to one of three “sources”; that is, “the ways in which a rule or principle becomes international law.” *Id.* §§ 102, 103 cmt. *a.* These appear:

- (a) in the form of customary law;
- (b) by international agreement; or
- (c) by derivation from general principles common to the major legal systems of the world.

Id. § 102. As discussed in Reporters Note 1 to this section of the *Restatement*, the three sources listed above correspond with those set forth in Article 38 of the Statute of the International Court of Justice,² which states in relevant part:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;

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

² Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179 [hereinafter ICJ Statute]), available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&> (last visited Feb. 13, 2014). Adopted at a diplomatic conference in San Francisco on June 26, 1945, the Charter and the annexed Statute entered into force on Oct. 24, 1945. U.N. Treaty Collection, *Charter of the United Nations and Statute of the International Court of Justice*, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=I-1&chapter=1&lang=en (last visited Feb. 23, 2014). The United States, which ratified on Aug. 8, 1945, is a founding member; in total, there are 193 member states. *Id.*

c. the general principles of law recognized by civilized nations;

At the top of the list in both documents are international agreements, or treaties, and international custom, also known as customary international law. These constitute the two primary sources of international law. Considered a “secondary source” is the third-listed item, general principles. *Restatement* § 102 cmt. 1.

The Statute of the International Court of Justice additionally lists, “as subsidiary means for the determination of rules of law,” the following:

d. ... judicial decisions and the teachings of the most highly qualified publicists of the various nations.³

All of the above, along with evidentiary and other interpretive issues, are discussed below. This chapter thus now moves to an explanation of overall, black-letter rules. Treated first are the two primary sources of international law:

- Treaties/international agreements
- Customary international law

Then follows a discussion of the secondary source:

- General principles

Examined finally are subsidiary means of determining international law rules; specifically:

- Judicial decisions
- Teachings of publicists, also known as scholarly writings

After presenting this overview of sources and evidence, the chapter turns, *infra* § I.C, to uses of international law in U.S. courts.

1. Two Primary Sources of International Law

The two primary sources of international law – treaties and custom – are defined in turn below.

a. Treaties or International Agreements

After positing international agreements as a primary source of international law, the *Restatement* explains that such “agreements create law for the states parties thereto” *Id.*

³ Omitted by way of ellipsis are the words “subject to the provisions of Article 59,” a provision that makes explicit the fact that this court, like some others outside the United States, is not bound by *stare decisis*. The provision states in full: “The decision of the Court has no binding force except between the parties and in respect of that particular case.” ICJ Statute, art. 59.

§ 102(3); *see supra* § I.B (quoting *Restatement* § 102(b)). This binding, or obligatory, characteristic is established once states consent to be bound to the agreement. Thereafter, states parties must discharge the obligations they have assumed in good faith – an international law principle known as *pacta sunt servanda* (Latin for “pacts are to be kept”).

International agreements go by several names, such as “charter,” “convention,” “covenant,” “pact,” “protocol,” “statute,” and “treaty.” “Convention” typically refers to an agreement among many countries, while “charter” or “statute” often is used for the founding document of an institution, and “protocol” for an agreement supplemental to a principal treaty.

In international law, “treaty” refers to an international agreement governed by international law. Treaties may be bilateral, multilateral, or universal, as follows:

- Bilateral treaties involve just two states. An example is the Mutual Legal Assistance Agreement between the United States and Russia, mentioned *infra* §§ II.C.2.v.1, II.C.2.v.3.a.
- Multilateral treaties have multiple states parties. This *Benchbook* discusses many such treaties, covering a range of matters, for example: diplomatic immunities, *infra* § II.B.1.b; arbitration, *infra* § III.A; family and child law, *infra* § III.B; sale of goods, *infra* § III.C; air transportation, *infra* § III.D; human rights, *infra* § III.E; and the environment, *infra* § III.G.
- Universal treaties are those to which all states have consented. Among the very few universal treaties are the four Geneva Conventions of 1949 for the Protection of Victims of War. *See* Int’l Comm. Red Cross, *South Sudan: world’s newest country signs up to the Geneva Conventions*, July 17, 2012, <http://www.icrc.org/eng/resources/documents/news-release/2012/south-sudan-news-2012-07-09.htm>.

Caveat: Speaking precisely, the domestic law of the United States reserves the word “treaty” exclusively for those international agreements that come into being according to procedures set forth in the Constitution. These constitutional requirements, as well as uses of treaties in U.S. courts, are described *infra* § I.C.1. But first, the sections immediately following discuss how an international treaty is made.

i. Treaty-Making Steps

The steps by which a treaty comes into being include:

- Negotiation
- Adoption
- Signature
- Ratification or accession
- Entry into force

International law regarding each step is codified in the 1969 Vienna Convention on the Law of Treaties.⁴ The various steps, along with corollary concerns such as reservations and the precise meaning of “signatory,” are discussed below.

i.1. Negotiation

Each state has the capacity to negotiate a treaty. *See* Vienna Convention on Treaties, art. 6. Leading the negotiations for the United States are officials from the Executive Branch; to be specific, the U.S. Department of State, along with other agencies, like Defense or Commerce, as warranted by the subject of the treaty. Negotiation may occur over the course of years, in private talks or in public diplomatic conferences. *See* Mark Weston Janis, *International Law* 18-19 (6th ed., 2012).

i.2. Adoption

Once negotiation is completed, states adopt a treaty by an agreed-upon voting process. *See* Vienna Convention on Treaties, art. 9. Adoption fixes the text of the treaty, which then will be opened for signature and, eventually, for full joinder by way of ratification or accession. *See infra* §§ I.B.1.a.i.3, I.B.1.a.i.4.

i.3. Signature

After the adoption of a final text, treaties typically are opened for signature; that is, states are invited to sign the treaty within a specified time period, as a preliminary step toward full membership in the treaty. A state that has attached its signature has not consented to be bound to the terms of the treaty, and thus cannot be sanctioned for violating the treaty’s terms. *See infra* § I.B.1.a.i.7 (underscoring the distinctly different meanings of “signatory” and “state party”).

But signature is not entirely devoid of meaning. Article 18 of the Vienna Convention on Treaties provides:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;

⁴ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, *available at* <http://www1.umn.edu/humanrts/instree/viennaconvention.html> [hereinafter Vienna Convention on Treaties]. This treaty, which entered into force on Jan. 27, 1980, has 113 states parties. U.N. Treaty Collection, *Vienna Convention on the Law of Treaties*, http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (last visited Feb. 23, 2014). The United States is not among them. *Id.* Nevertheless, as discussed *infra* § IV.A, U.S. officials have recognized many provisions of the treaty to constitute customary international law.

Accord Ian Brownlie, *Public International Law* 610 (7th ed., 2008) (writing that “signature does not establish consent to be bound,” but rather “qualifies the signatory state to proceed to ratification, acceptance, or approval and creates an obligation of good faith to refrain from acts calculated to frustrate the objects of the treaty”).

i.4. Consent to Be Bound, by Ratification or Accession

A state typically consents to be bound to the terms of a treaty by depositing a certain document – known as the instrument of ratification or accession – with a designated entity. *See* Vienna Convention on Treaties, arts. 1(b), 11, 14-15. Depositories include:

- United States, particularly for bilateral treaties to which it is a party.
- United Nations, for multilateral treaties negotiated under U.S. auspices.
- Organization of American States or other regional, intergovernmental organization. *See, e.g., infra* § III.A (discussing an arbitration treaty negotiated under the auspices of the Organization of American States).
- Hague Conference on Private International Law, based in the Netherlands and described *infra* § III.B.1.
- International Civil Aviation Organization, based in Montreal, Canada, and described *infra* § III.D.1.
- International Committee of the Red Cross, <http://www.icrc.org/eng/>, under whose auspices many international humanitarian law treaties were negotiated.

A state’s act of consent to be bound is called “ratification” when it follows the state’s earlier signing of the treaty, a step discussed *supra* § I.B.1.a.i.4. It is called “accession” when the state never signed the treaty.

On how to determine if the United States or any other country has ratified or acceded a treaty, see *infra* § I.B.1.a.i.8.

i.5. Reservations, Understandings, and Declarations

Each state follows its own domestic law to determine whether it will consent to be bound to a treaty. *See infra* § I.C.1.a (describing the internal process in the United States).

A state may condition or qualify its joinder of a treaty by the attachment of a “reservation,” as long as the treaty itself does not forbid such attachments and the reservation is not “incompatible with the object and purpose of the treaty.” Vienna Convention on Treaties, art. 19. A reservation is defined as

a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State; ...

Id., art. 1(d). States may withdraw previously filed reservations at any time. *See id.*, art. 22.

In addition to reservations, states also may choose to include in their instrument of ratification two other types of qualification:

- “Understandings,” statements of how the state interprets specified provisions; or
- “Declarations” respecting the treaty.

In labeling a qualification an “understanding” or “declaration,” the state effectively maintains that the qualification is not a reservation; nevertheless, as pointed out in *Restatement* § 313 cmt. g, regardless of the label that a state may give it, a qualification “constitutes a reservation in fact if it purports to exclude, limit, or modify the state’s legal obligation.”

The United States frequently attaches a package of such qualifications – sometimes called “RUDs,” for “Reservations, Understandings, and Declarations” – when it deposits its instrument of ratification or accession to a treaty. The package often includes a statement on whether the treaty provisions are understood to be self-executing, and thus immediately enforceable in U.S. courts, or not. An example is the first declaration, available at https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en#EndDec (last visited Feb. 23, 2014), that the United States attached to its 1992 instrument ratifying the 1966 International Covenant on Civil and Political Rights. On self-executing and non-self-executing treaties, see *infra* §§ I.C.1.d.i, I.C.1.d.i.1.

On how to determine if the United States or any other country has filed such qualifications with respect to a treaty, see *infra* § I.B.1.a.i.8.

i.6. Entry into Force

Treaty texts typically make explicit the number of states that must consent to be bound in order for the treaty to take effect – that is, to enter into force. Even after this entry into force, states may continue to join the treaty; typically, a treaty provision specifies that the treaty will enter into force for such a state a few months after that state deposits its instrument of ratification or accession.

On how to determine whether a treaty has entered into force for the United States or any other country, see *infra* § I.B.1.a.i.8.

i.7. Precise Meanings of “Signatory” and “State Party”

The term “signatory” means only that a state has signed a treaty, as described *supra* §§ I.B.1.a.i.3. “Signatory” does not indicate that the state has ratified or acceded to the treaty. Once a state has taken the further step of ratification or accession, described *infra* § I.B.1.a.i.4, and thus has obligated itself fully to the treaty, the state properly may be called a “state party,” a “member state,” or a “contracting party,” and may be held to answer at the international level if it breaches treaty obligations. The state is not any longer just a “signatory.”

Occasionally, even writings of the Supreme Court have erred on this point. *See, e.g., Abbott v. Abbott*, 560 U.S. 1, 16 (2013), *quoted infra* § III.B.3.d.i.3.a. Courts should take care to use the terms “signatory” and “state party” precisely, in order to preserve the important distinction regarding degrees of state obligation.

On how to determine if the United States or any other country is a signatory or, alternatively, a state party to a treaty, see *infra* § I.B.1a.i.8.

i.8. Finding Data on Treaty-Making Steps Taken by the United States or Other Countries

The entity designated as the depository of a particular treaty, see *supra* § I.B.1.a.i.4, compiles information on whether and when the United States or any other country fulfilled specific treaty-making steps, such as signature, ratification or accession, entry into force, and the filing or withdrawal of reservations. Such information is included in this *Benchbook* with respect to every treaty cited.

Treaty depositories that maintain online databases of such information include the:

- United States, often a depository for its bilateral treaties. *See generally* U.S. Dep’t of State, *Treaty Affairs*, <http://www.state.gov/s/l/treaty/> (last visited Feb. 23, 2014).
- United Nations, which serves as the depository for many multilateral treaties and maintains an online database at U.N. Treaty Collection, <https://treaties.un.org/> (last visited Feb. 23, 2014). *Research tip:* To access information from this database, it may prove quickest simply to enter into a web browser like Google the name of the treaty – for example, “International Covenant on Civil and Political Rights” – along with the words “UN Treaty Collection.”
- Hague Conference on Private International Law, based in the Netherlands and described *infra* § III.B.1. To access information for treaties it oversees, go to the list at http://www.hcch.net/index_en.php?act=conventions.listing (last visited Feb. 23, 2014), click on the particular treaty, and when it appears, click on the “Status table” link, in the righthand column of the webpage for that treaty.

- International Civil Aviation Organization, based in Montreal, Canada, and described *infra* § III.D.1. It maintains a chart with treaty information at *Current lists of parties to multilateral air law treaties*, <http://www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllItems.aspx> (last visited Feb. 23, 2014).

b. Customary International Law

The other primary source of international law, besides international treaties, is international custom. *See supra* § I.B (quoting *Restatement* § 102(a); ICJ Statute, art. 38(1)(b)). Section 102(2) of the *Restatement* offers a definition of this source:

Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

No code or other authoritative compilation of customary international law exists; rather, a norm of customary international law is determined by proof of two elements:

- 1) General and consistent state practice; and
- 2) State behavior on account of a sense of legal obligation, an element also known as *opinio juris*.⁵

Each element is described in turn below. Then follows, *infra* § I.B.1.c, a discussion of a norm related to customary international law, the *jus cogens* or peremptory norm.

On the uses of customary international law in U.S. courts, see *infra* § I.C.3.a.

i. First Customary International Law Element: General and Consistent State Practice

State practice establishing a norm of customary international law may include *inter alia* national legislation, executive orders and official statements, and authoritative judicial decisions. *See* Mark Weston Janis, *International Law* 50-52 (6th ed., 2012) (quoting State Department publication); *Restatement* § 102(3). Such practice need not be universal among all states; rather, it must be “general and consistent,” indicating “wide acceptance among the states particularly involved in the relevant activity.” *Restatement* § 102 cmt. *b*.

⁵ This two-part formulation parallels the description of international custom in Article 38(1)(b) of the Statute of the International Court of Justice, quoted in full *supra* § I.B. Specifically, the *Restatement*’s requirement of “general and consistent state practice” corresponds with the Statute’s reference to “general practice,” and the *opinio juris* requirement in the *Restatement* corresponds with the Statute’s requirement that the practice is “accepted as law.”

i.1. Persistent State Objection and Absence of State Objection

A state that demonstrated its rejection of a customary international law norm, by objecting persistently while the norm was forming, is not bound to that norm. *See Restatement* § 102 cmts. *b, d*. Conversely, a state that remained silent during the period of formation is deemed to have implicitly accepted the rule. *See Curtis A. Bradley & Jack L. Goldsmith, Foreign Relations Law* xxv (4th ed., 2011).

ii. Second Customary International Law Element: Sense of Legal Obligation/ *Opinio Juris*

General and consistent state practice amounts to customary international law only if states adhere to the practice out of a sense of legal obligation – an element often called *opinio juris*, shorthand for the Latin phrase *opinion juris sive necessitatis* (“opinion of law but of necessity”). *Restatement* § 102 cmt. *c* (stating further that “a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law”). *See supra* § I.B. The presence of this element may be determined not only by states’ overt statements, but also by inference drawn from states’ action or inaction. *See Restatement* § 102 cmt. *c*.

On “comity” – state practice followed out of a sense not of legal obligation but rather of international friendship – see *infra* § II.B.7.

c. *Jus Cogens* or Peremptory Norms

What is sometimes described as a higher-order norm of customary law emerged in the last half-century or so.⁶ This source of law is referred to either as a peremptory norm or as *jus cogens* (Latin for “compelling law”). The principal instrument pertaining to treaties, the Vienna Convention on Treaties discussed *supra* § I.B.1.a.i, refers to this kind of norm in two separate articles. Article 53 states:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 64 of the same treaty provides:

⁶ The *Restatement* explained:

The concept of *jus cogens* is of relatively recent origin. It is now widely accepted, however, as a principle of customary law (albeit of higher status).

Id. § 102, rptr. n.6 (citing Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 Am. J. Int’l L. 946 (1967)).

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

In other words, if a treaty provision or customary international law norm conflicts with a norm recognized as peremptory, the latter will prevail regardless of when the former arose. Moreover, states may not derogate from, or opt out of, the constraints of peremptory norms. *See Restatement* § 102 rptr. n.6 (interpreting the Article 53 reference to “accept[ance] and recogni[tion] by the international community of States” to mean “‘a very large majority’ of states, even if over dissent by ‘a very small number’ of states”). Peremptory norms thus operate as an exception both to the general rule of state consent and to the later-in-time rule discussed *infra* § I.B.1.d.

Few rules are said to constitute *jus cogens* or peremptory norms; they include:

- Prohibitions on the use of armed force, set out in the Charter of the United Nations.
- International prohibitions against genocide, torture, and slave trafficking.

See Restatement § 102 cmts. *h, k*.

On the use of *jus cogens* in U.S. courts, see *infra* § I.C.3.b.

d. Conflict between Treaty and Custom: Later-in-Time Rule

Treaties and norms of customary international law are considered of equal status under international law. To the extent that a treaty and custom conflict, therefore, whichever arose later in time prevails. *See Restatement* § 102 cmt. *j* & rptr. n.4. As explained *supra* § I.B.1.c, an exception is made in the case of *jus cogens* or peremptory norms, which can be displaced only by a new peremptory norm.

Because of the difficulty in pinpointing when a customary norm came into effect, as a practical matter the later-in-time rule applies most frequently to displacement by a subsequent treaty. In any event, courts likely will try to reconcile an asserted conflict rather than apply the rule. *See* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Relations Law* xxv-xxvi (4th ed., 2011).

2. Secondary Source of International Law

Posited as a “secondary source” of international law – after the primary sources of treaties and customs – are “general principles common to the major legal systems of the world.” *Restatement* § 102 & cmt. *l*. *See* ICJ Statute, art. 38(1)(c) (authorizing International Court of Justice to apply “general principles of law recognized by civilized nations”); *supra* § I.B. This source is discussed below.

a. General Principles

After setting forth general principles as a source of international law in Section 102(1)(c), quoted *supra* § I.B, the *Restatement* offers a more specific definition. Section 102(4) states:

General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.

This source thus operates as a gap-filler – a residual source of law that comes into play when the two primary sources of international law, treaties and custom, fail to provide an applicable rule. *See id.* § 102 cmt. *l.*

Principles that have been invoked in this manner include:

- *Res judicata*
- Equity
- Good faith

See id.; Ian Brownlie, *Public International Law* 19 (7th ed., 2008).

On the use of general principles in U.S. courts, see *infra* § I.C.3.c.

3. Subsidiary Means of Determining International Law Rules

After describing the above sources of international law, the Statute of the International Court of Justice lists, as “subsidiary means of determining international law rules,” the following:

- “[J]udicial decisions”; and
- “[T]eachings of the most highly qualified publicists of the various nations.”

ICJ Statute, art. 38(1)(d), *quoted supra* § I.B. Each of these – discussed in turn below – also may be said to constitute “evidence” of international law. *See Restatement* §§ 102 rptr. n.1, 103.

On the use of such evidence in U.S. courts, see *infra* § I.C.3.a.

a. Judicial Decisions

Judgments or opinions providing evidence of international law may be issued by national courts; indeed, the decisions of a state’s courts may be deemed indicative of state practice for purposes of determining customary international law. *See supra* § I.B. Also relevant may be judgments or opinions issued by arbitral tribunals or international courts. *See Restatement* § 103.

This *Benchbook* discusses many decisions of national and international courts, including some issued by the International Court of Justice, the six-decades-old institution described in the section immediately following. For comprehensive accounts of numerous regional and international forums, see the essays collected in *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Chiara Giorgetti ed., 2012).

i. International Court of Justice

The International Court of Justice – sometimes called the World Court – is “the principal judicial organ of the United Nations.” U.N. Charter, art. 92. It succeeded the Permanent Court of International Justice, a similar body that had operated within the framework of the post-World War I League of Nations. See Joan E. Donoghue, *The Role of the World Court Today*, 47 Ga. L. Rev. 181, 183-84 (2012); Sean D. Murphy, “The International Court of Justice,” in *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* 11, 12 (Chiara Giorgetti ed., 2012).

The court’s founding document, the Statute of the International Court of Justice, described *supra* § I.B, “is annexed to,” and “forms an integral part,” of the 1945 Charter of the United Nations. Int’l Ct. Justice, *Statute of the Court*, <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&> (last visited Feb. 23, 2014).

Serving nine-year, renewable terms on the court are fifteen judges, each from a different U.N. member state. ICJ Statute, arts. 3-4, 13. Judges are nominated by states and elected by the United Nations’ General Assembly and Security Council; thereafter, the judges serve “independent of their governments.” Donoghue, *supra*, at 184 (citing ICJ Statute, arts. 16, 20). At this writing, the American judge on the court is Joan E. Donoghue, formerly a high-ranking attorney at the U.S. Department of State. See Int’l Ct. Justice, *Current Members*, <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1> (last visited Feb. 23, 2014).

The court is authorized to issue:

- Decisions in “contentious,” or adversary, disputes between U.N. member states, provided that the states have consented to the exercise of jurisdiction. See ICJ Statute, art. 34(1).
- Advisory opinions, upon proper request by another U.N. entity. See *id.*, art. 65(1).

The court’s current docket and its prior opinions and judgments (all of which are issued simultaneously in English and French) may be found at Int’l Ct. Justice, *Cases*, <http://www.icj-cij.org/docket/index.php?p1=3> (last visited Feb. 23, 2014).

This court, like many outside the United States, is not bound to a rule of *stare decisis*. See ICJ Statute, art. 59, *quoted supra* § I.B. Nevertheless, as one scholar has written,

The International Court of Justice is a highly respected and authoritative judicial tribunal, lying at the center of the U.N. system, with an influence that extends well beyond the legal relations of the Parties that appear before it.

Murphy, *supra*, at 11. This *Benchbook* cites a number of International Court of Justice judgments. *See infra* §§ II.B.1.a.i.1, II.B.1.b.i, II.B.6.

The U.S. Supreme Court occasionally has cited decisions of the International Court of Justice. *E.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 736 n.27 (2004) (concluding, in decision discussed *infra* § III.E.1, that respondent's citation to a 1980 International Court of Justice judgment and other authorities did not show the conduct at issue to be an international tort); *United States v. Maine*, 475 U.S. 89, 99 (1986) (citing a 1951 International Court of Justice judgment in the course of deciding a maritime boundary dispute between constituent U.S. states); *United States v. Louisiana*, 470 U.S. 93, 107 n.10 (1985) (same); *United States v. California*, 381 U.S. 139, (1965) (citing a 1949 International Court of Justice judgment in determining the extent of a constituent state's title to submerged lands). A recent series of decisions considered the applicability in the United States of a 2004 International Court of Justice judgment concerning the treatment of foreign nationals arrested in the United States. *E.g.*, *Medellín v. Texas*, 552 U.S. 491 (2008); *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), discussed *infra* § I.C.1.a.i.

b. Teachings of Publicists, or Scholarly Writings

In contemporary language, what the ICJ Statute, art. 38(1)(d), calls “the teaching of publicists” is perhaps better referred to as scholarly writings. *See Restatement* § 103(2)(c). Assuming that the writing is sufficiently authoritative, it may aid a court's determination of the existence and content of an international law norm.

4. “Soft Law”

The term “soft law” sometimes is applied to international documents and norms that do not impose a specific, binding obligation on a state. *See* Mark Weston Janis, *International Law* 55-56 (6th ed., 2012). Subsumed within this label may be, for example:

- Documents promulgated under the auspices of an intergovernmental organization, such as the United Nations' Standard Minimum Rules for the Treatment of Prisoners. *See* E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977), *available at* http://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.
- International declarations, such as the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948), *available at* <http://www.un.org/en/documents/udhr/>.

- Rules, guidelines, and standards promulgated by nongovernmental organizations. *E.g.*, *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, available at http://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx (last visited Feb. 23, 2013). Adopted by the London-based International Bar Association in 2010, these rules are discussed *infra* § III.A.6.b.

On the use of soft law in U.S. courts, see *infra* § I.C.3.d.