

UNDERSTANDING INTERNATIONAL LAW

Second Edition

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UNDERSTANDING INTERNATIONAL LAW

Second Edition

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MATTHEW  BENDER

The Author

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Preface

As with the first edition, this book is intended for the newcomer to international law — whether law student, lawyer or judge, layperson or undergraduate — not the specialist. It attempts to explain in plain English what international law is, why it exists, and the basic subjects it covers. In this sense the title of the book is, I hope, appropriate.

The book deals with the law governing the relations between the countries of the world. This body of law has developed over the centuries through the practice of states, as countries are called in the parlance of international law. States treat this law as having binding force. They benefit from it, and expect other states to follow it. This is even true when the benefit of a rule is indirect, or enjoyed by the international community as a whole, as in the case of the rule prohibiting genocide and other rules protecting human rights.

As I tell my students, international law is similar to domestic law in the broad scope of its coverage: there are international-law counterparts to most of the domestic-law subjects studied in law school. It is thus difficult to do the subject justice within the compass of a three-hour course or a small volume such as this one. I have attempted to address this issue by focusing in the present volume on how law is made and functions in the international community, and on the basic subjects of international law. An understanding of these matters should equip the reader to delve into other areas of interest in the field.

While emphasizing these basic issues and subjects, the book attempts to at least touch upon topics of current relevance, such as terrorism, international criminal law, the use and applicability of international law in United States courts, and the law governing the use of military force. This coverage is intended as an introduction only; the interested reader is encouraged to pursue sources discussing these issues in greater depth.

The Law of Treaties is given particular attention, chiefly because of the increasing importance of the treaty in international life. The number of treaties has mushroomed since the Second World War and many of these agreements include over 100 states as parties. Because of their number and the breadth of their coverage, treaties are thus the main form of international legislation. But since they are also contractual in character, and since many multilateral treaties allow states to place conditions on their acceptance of them, the law governing treaties is necessarily more complex than if they were the exact equivalent of national legislation.

This second edition comprehensively updates all of the book's chapters and adds new text where appropriate.

I hope the book will prove helpful in understanding international law, and I welcome readers' comments on it.

Stephen C. McCaffrey
July, 2014

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I have been helped greatly in preparing this book by many people. First, I have received valuable assistance with this edition from two doctoral students, Idowu Adetogun and Maria Milanes-Murcia. A number of research assistants, including Mirwais Haider (Pacific McGeorge '15), have worked cheerfully and tirelessly on both editions in finding sources, chasing down citations, proofreading text and footnotes, preparing tables and making valuable suggestions for the improvement of the work. Second, the Reference Librarians at Pacific McGeorge's Gordon D. Schaber Law Library, particularly Paul Howard, have also been of great assistance, especially in locating obscure and hard-to-find sources. Third, the University of the Pacific, McGeorge School of Law has provided summer research grants throughout the duration of the project. And finally, I could never have completed the work without the unstinting support of my wife, Susan, who is a constant source of inspiration. For all of this help, I am deeply grateful.

Glossary

The following are explanations of certain terms that one often encounters in international law. They are offered for the assistance of the reader and are not intended to be precise definitions or translations.

erga omnes — toward all; obligations *erga omnes* are those owed to all.

jus ad bellum — the rules of international law concerning the right to go to war or to use force.

jus cogens — a peremptory norm of general, or customary, international law.

lex ferenda (or *de lege ferenda*) — law as it ought to be; law in the process of formation.

jus in bello — the law applicable during armed conflict.

lex specialis (or *generalia specialibus non derogant*) — a principle of interpretation according to which a specific law or provision prevails over a general one.

lex lata — law as it is; positive law.

pacta sunt servanda — treaties are binding on the parties and must be performed in good faith.

municipal law — national or domestic law.

pacta tertiis nec nocent nec prosunt or simply *pacta tertiis* — a treaty creates neither rights nor obligations for a third state (i.e., a state that is not a party to the treaty) without its consent.

travaux préparatoires — preparatory work; “legislative history” relating to a treaty.

uti possidetis iuris — the principle that colonial boundaries will not be disturbed after former colonies achieve independence.

*Table of Treaties and Other
International Instruments*

Name of Instrument	Section Location
Abolition of Forced Labor Convention	9.02
African Charter on Human and People's Rights	9.03
Agreement Between the United States and the United Nations Regarding the Headquarters of the United Nations	2.03, 4.07[F], 10.01
American Declaration of the rights and Duties of Man	9.01 [A], 9.03
Antarctic Treaty of 1959	4.05 [B][2][e]
Charter of Economic Rights and Duties of States	3.03 [B][1], 9.01[B]
Charter of the United Nations	1.01, 2.01[A][1], 3.01, 3.03, 3.03[A], 3.03[B][1], 3.03[D], 4.02, 4.05[A], 4.05[C][3], 4.05[C][4][a], 4.05[D], 4.05[E], 4.07[F], 5.02[B][2], 5.02[D], 5.03[B], 5.03[C][1][a][iii], 7.01, 8.01[A], 8.02, 8.03, 8.04, 9.01[A], 9.02, 10.02, 10.04
Comprehensive Nuclear-Test-Ban Treaty	4.05[C][4][a]
Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment	9.01[C], 9.02
Convention Between the Government of the United States of America and the Government of the United Kingdom for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains	6.03[C]
Convention Between the United States and Great Britain (for Canada) for the Protection of Migratory Birds	4.07[C][1]
Convention Concerning the Protection of the World Cultural and Natural Heritage	7.05
Convention on International Trade in Endangered Species	4.05[D]
Convention on the Elimination of All Forms of Discrimination Against Women	9.02
Convention on the Prevention and Punishment of the Crime of Genocide	4.05[B][2][a], 4.05[B][2][c], 9.01[A]
Convention on the Privileges and Immunities of the Specialized Agencies	5.03[B]
Convention on the Privileges and Immunities of the United Nations	5.03[B]
Convention on the Settlement of Investment Disputes between States and Nationals of Other States	5.03[C][2]

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Name of Instrument	Section Location
Convention on the Suppression and Punishment of the Crime of Apartheid	6.03[E]
Convention Relating to the Status of Refugees	9.02
Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance	6.03[E]
Covenant of the League of Nations	1.04, 4.05[C][4], 5.02[D], 8.01[A]
Draft Code of Offences against the Peace and Security of Mankind (1954)	5.03[C][1][a][ii]
Draft Code of Crimes against the Peace and Security of Mankind (1996)	5.03[C][1][a][ii]
Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations	3.03[B][1], 5.02[D], 10.02
Declaration on the Granting of Independence to Colonial Countries and Peoples	5.02[D]
Eurocontrol Convention	4.05[C][4][c]
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	4.05[B][2][d]
European Convention for the Protection of Human Rights and Fundamental Freedoms	4.05[B][2][d], 9.01[A], 9.03
European Convention on State Immunity	6.04[B]
European Union Treaty	4.05[B][2][e]
“Friendship, Commerce and Navigation” (FCN) Treaty Between the United States and Japan	2.05
G.A. Res. 1803, Permanent Sovereignty Over Natural Resources	9.01[B]
General Agreement on Tariffs and Trade	4.02, 4.05[C][3]
Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864)	9.01[C]
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949)	9.01[C]
Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949)	9.01[C]
Geneva Convention on the Continental Shelf	4.04
Geneva Convention Relative to the Treatment of Civilian Persons in Time of War (1949)	5.03 [C][1][b], 9.01[C]

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Name of Instrument	Section Location
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Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1977)	7.04, 9.01[C]
Geneva Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (1977)	9.01[C]
Hague Convention for the Pacific Settlement of International Disputes (1899)	10.03
Hague Convention (I) for the Pacific Settlement of International Disputes (1907)	4.05[C][5], 10.03
Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes	4.05[B][1][c]
Hull-Lothian Agreement	4.02, 4.03
Hungary-Slovakia Treaty (1977)	4.05 [E][2], 5.02[C]
ILA Montreal Draft Convention on State Immunity	6.04[B]
ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts	4.06, 7.01, 7.02[A], 7.02[B], 7.03[A], 7.03[B], 7.04, 7.05, 9.01[B]
International Covenant on Civil and Political Rights	2.05, 5.02[D], 5.03[C][1][a][iii], 9.02, 9.02[A][2]
International Covenant on Economic, Social and Cultural Rights	5.02[D], 5.03[C][1][a][iii], 9.01[B], 9.02, 9.02[A][3]
International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels	6.04[B]
International Convention on the Elimination of All Forms of Racial Discrimination	9.02
International Convention on the Suppression of Acts of Nuclear Terrorism	6.03[E]
Kellogg-Briand Pact	4.02, 8.01[A]
Montevideo Convention	5.02[B][1]
Montreal Protocol on Substances that Deplete the Ozone Layer	7.05
North American Free Trade Agreement (NAFTA)	4.05[B][2][e]
North American Agreement on Environmental Cooperation	7.05
Peace of Westphalia Rome Statute of the International Criminal Court	4.02, 4.05[B][2][d], 4.05[C][4][a], 5.03[C][1][a][ii], 5.03[C][2], 7.01
Roosevelt-Litvinov agreement	4.07[C][2][c]
Statute of the International Court of Justice	2.01[B], 3.01, 3.03, 3.03[C], 3.03[D][1], 3.03[E][2], 10.04

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Statute of the International Tribunal for Rwanda	5.03[C][1][a][ii], 5.03[C][2], 7.01
Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991	5.03[C][1][a][ii], 5.03[C][2], 7.01
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery	9.02
The Cession of Alaska	4.02, 4.03
Treaty between the Jews and the Romans	4.02
Treaty of Peace between Israel and Jordan	4.05[C][4][c]
Treaty on the Reduction and Limitation of Strategic Offensive Arms	4.05[C][4][a]
UK-US Supplementary Extradition Treaty	4.05[B][2][c]
United Nations Convention on Biological Diversity	3.03[A], 7.05
United Nations Convention on Jurisdictional Immunities of States and Their Property	6.04[B], 6.04[C][2], 6.04[C][3]
United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses	3.03[B][2], 4.05[B][1][c]
United Nations Convention on the Law of the Sea (1982)	4.05[B][2][d], 6.03[C]
United Nations Convention on the Rights of the Child	4.05[B][2][d], 9.02
United Nations Framework Convention on Climate Change	7.05
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Universal Declaration of Human Rights	5.03[C][1][a][iii], 9.01[A], 9.01[B], 9.02[A][1]
Vienna Convention on Consular Relations	1.02[C], 2.01[A][1], 2.05, 6.04[A]
Vienna Convention on Diplomatic Relations	3.03[A], 4.02, 6.03[B][1], 6.04[A], 7.02[A]
Vienna Convention on the Law of Treaties	2.02, 3.03[A], 3.03[B][2], 3.03[C], 3.03[E][1], 4.04, 4.05, 4.06, 4.07[A], 4.07[B], 5.03[B], 8.04[B], 9.03
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