

International Legal Research in a Global Community

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International Legal Research in a Global Community

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Series Note

Most lawyers and law students would benefit from a deeper understanding of international law and how to research it. International law is part of the law of the United States and, indeed, every other legal system in the world. Many cases depend upon rules of international law, even when lawyers do not initially realize that a treaty or a rule of customary international law controls their case. Outside of special seminar courses, the legal research and writing courses in most law schools devote little, if any, time to explaining how researchers should find and use international or comparative law. Bar associations, for the most part, offer few continuing legal education courses on how to research and use international or foreign law. Judges and their law clerks often do not have the resources or training to research international and foreign law, confronting international legal issues for the first time in briefs submitted by the parties. Scholars writing law review articles may lack the confidence to research how international or foreign law impact the subjects of their scholarship. And lawyers working in legislatures or administrative agencies may not realize that many problems confronting them have already been dealt with in foreign or international contexts. Although foreign statutes or international resolutions may not dictate a result in another country, it is at least useful to researchers and policymakers to know what other countries and international bodies have done.

This new book, *International Legal Research in a Global Community*, provides both substantive context and practical tips for legal researchers. The authors are Professors Heidi Frostestad Kuehl (Associate Professor of Law and Director of the David C. Shapiro Memorial Law Library at Northern Illinois University School of Law, and previously the Associate Director for Research and Reference Services and Foreign, Comparative, and International Law at Northwestern University School of Law's Pritzker Legal Research Center in Chicago) and Megan A. O'Brien (the Foreign, Comparative, and International Law Librarian and Adjunct Professor of Law at Marquette University School of Law, and a founding member of the International Legal Research Interest Group of the American Society of International Law). These professors have taught international legal research for many years and worked closely with in-

dividual researchers on issues of public and private international law. They have helped students competing in the Philip C. Jessup International Law Moot Court Competition and other international law competitions. And they have assisted lawyers whose cases involve some aspect of international law. Readers of this book are thus the direct beneficiaries of years of experience in researching international, foreign, and comparative law.

International Legal Research in a Global Community is a welcome addition to the International Legal Research Series published by Carolina Academic Press. Books in this series are intended to help attorneys, students, and policymakers find the source materials they need for specific research issues in international, foreign, and comparative law. This book serves that need by providing researchers with the substantive knowledge and practical tips that will enable them to research treaties, customary international law, and other sources of international law.

Mark E. Wojcik
Professor of Law
The John Marshall Law School—Chicago
Series Editor, International Legal Practice Series
Series Editor, International Legal Research Series

Preface—International Legal Research in a Global Community

We embarked on this project to build on existing international legal research texts. We have both taught international legal research over the years and have found students need a foundation in the law to understand why and how to carry out the research. This book offers that foundation as well as a revised approach to handling some of the sources of international law based on the development of the law as explained in the Restatement of the Law (Fourth) Foreign Relations Law of the United States (tentative drafts)¹ and in the 2016 Annual Report of the International Law Commission.² We hope the ideas and strategies offered within will prove useful to law students taking an advanced legal research course in international law, or other seminar courses that require writing a paper on issues related to public international law. As well, we trust that those law students involved with the Philip C. Jessup Moot Court Competition will find this book helpful. In addition, we hope that this book will be useful to lawyers practicing in the United States when confronted with an issue that implicates public international law. We have deliberately offered a U.S.-centric approach and recognize the difficulties of gaining true cultural competency in another jurisdiction.

As with any book that attempts to tackle a topic of this breadth, we struggled with the choice of what to include and what to forego. We decided to follow the structure of Article 38 of the Statute of the International Court of Justice

1. TENTATIVE DRAFT RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, TREATIES, §101 *et seq.* (Mar. 2016).

2. Int'l Law Comm'n, Annual Rep., Sixty-Eighth Session, U.N. Doc. A/71/10, at 99 (2016).

(ICJ)³ and have provided a chapter for each of its enumerated sources. These sources include: international conventions, international custom, the general principles of law recognized by civilized nations, and as a subsidiary means judicial decisions and the teachings of the most highly qualified publicists.⁴ Although this book is ordered according to the sources listed in Article 38 of the Statute of the ICJ, we acknowledge that this is not always the best order in which to tackle a research project. Often, it is more productive to consult secondary sources at the outset. For this reason, we invite researchers to consult the chapters in the order that is most useful for their particular research project.

Chapter 1 provides an overview of public international legal research. It includes a definition of public international law; and an introduction to the Article 38 sources as well as *jus cogens* norms; the impact of U.N. General Assembly resolutions on the development of international law; and, an introduction to the concept of soft law. Chapter 2 provides in-depth coverage of treaty sources and research strategies for finding them. The U.S. treaty implementation process is explained in detail for the legal researcher. Chapter 2 also includes select research examples to highlight the research strategies in action. These examples illustrate the nuances related to the implementation of public international law at a national level. The third chapter goes further and delves into the difficult concept of researching and locating *travaux préparatoires*. The *travaux* are valuable for resolving any ambiguity in the text of a treaty and also for discerning *opinio juris* when dealing with a customary international law issue.

Chapters 4, 5, and 6 are meant to be read together. Chapter 4 covers customary international law concepts by providing a foundation at a level that is suitable for carrying out legal research. We recognize that there are multivolume sets that provide thorough coverage of customary international law. Admittedly, we have sanded down the rough edges of the substantive law. This was done so that researchers could focus on the legal research strategies. Chapter 4 furthers the existing body of literature on the legal research process because it incorporates strategies consistent with the development of the law articulated by the International Law Commission in its 2016 Annual Report. Chapter 5 covers General Principles of Law and highlights the difference between general principles of law used as a gap filler and general principles of law that serve as overarching principles governing public international law. Chapters 6 and 7 cover the subsidiary sources of law: the writings of highly

3. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, ARTICLE 38, http://www.icj-cij.org/documents/?p1=4&p2=2#CHAPTER_II [<https://perma.cc/FH86-NAXG>].

4. *Id.*

qualified publicists and judicial decisions. The use of subsidiary sources as evidence of the law is generally a research approach that is unfamiliar to the U.S. legal researcher. These chapters work together and offer ways to help the researcher understand the unique manner in which these sources are used.

Chapters 8 through 10 comprehensively cover secondary sources, search strategies, and essential research planning. These chapters might easily be consulted first for those approaching an international legal research project for the first time.

Finally, we included a chapter on cultural competencies to help the legal researcher truly appreciate the challenges faced when tackling public international legal research projects. Chapter 11 might well have appeared at the front of the book as it is necessary for researchers to acknowledge the need to continually evolve their understanding of other cultures, or remain at a disadvantage. Placing it last was a way for us to bookend our effort to stress to the U.S. legal researcher the importance of situating oneself in the international community. By closing our book with a chapter that underscores that we live and work in a global community, we hope to encourage researchers to remain humble and appreciate the challenges of researching and working in worldwide legal systems.

Readers will find that we have included many research tips, strategies, charts, and checklists throughout the chapters. These are meant to help by providing a useful means for remembering complex concepts and sophisticated research strategies. Although international legal research may initially be overwhelming to researchers, we have attempted to distill the main international legal principles and the accompanying strategies for handling the sources of law into manageable portions.

We would like to thank our families, friends, and colleagues who have had great patience and provided support throughout the duration of this project. We would like to also thank the great international legal scholars in the U.S. and abroad who tremendously informed our work. Most especially, we would like to thank Mary Rumsey and Marci Hoffman, whose work and friendship have served as inspiration for this book. We would also like to thank Susan Goard, law librarian at the United Nations, who arranged for us to visit the Dag Hammarskjöld Library and attend various training sessions. Special thanks to Susan Trimble at Carolina Academic Press, and Professor Mark Wojcik, of John Marshall Law School, the series editor for Carolina Academic Press' *International Legal Research Series*. Your support and attention to detail have been invaluable.

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