

# Research Guide to Customs, General Principles & the Teachings of Highly Qualified Publicists

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## **International Custom**

Defining and finding the customs of international law are some of the most difficult tasks for the international legal researcher. Modern international legal custom is technically defined by Article 38 of the Statute of the International Court of Justice as “evidence of a general practice accepted as law.” The principle of customary law outdates international law, is difficult to define, and yet is a crucial philosophic basis of the entire edifice of international law.<sup>1</sup> An example of the elusiveness of custom is *Pacta Sunt Servanda*, the principle that promises should be kept, is the foundation of the law of treaties but there is no fundamental legal source for this concept besides customary law.<sup>2</sup>

### Definition

One must look to scholars for help deciphering Article 38’s technical definition of customary law. According to Ian Brownlie the traditional definition of custom has three elements: first, general state practice; second, uniform state practice; and, third, such general and uniform state practice as accompanied by a sense of legal obligation, referred to as *opinio juris*.<sup>3</sup> Identifying custom has an objective element: identifying a general and uniform state practice, and a subjective element: identifying when states are acting out of a sense of legal obligation or *opinio juris*.<sup>4</sup>

### ***Opinio Juris***

The actions of a state demonstrate *opinio juris* when the state follows a legal custom because it believes it is bound to do so by international law. This element of international custom is particularly difficult to research because states rarely reveal why they behave a certain way. International law scholar Ian Brownlie argues that the International Court of Justice has taken two divergent approaches to *opinio juris*. Under the first approach, called no scrutiny, the court simply assumes *opinio juris* exists if there is uniform state practice. Under the second approach, called strict scrutiny, the court demands positive evidence that *opinio juris* exists.<sup>5</sup>

### **Caveats**

#### **Persistent Objector Rule**

If a general and uniform state practice exists and it is accompanied by *opinio juris* then a legal custom exists. The only exception to this is when a state consistently opposes the rule without

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[http://www.okcu.edu/law/lawlib/library\\_researchguides.html](http://www.okcu.edu/law/lawlib/library_researchguides.html)

interruption. The opposing state can escape the otherwise binding nature of an international legal custom by invoking the persistent objector rule.<sup>6</sup>

### ***Jus Cogens***

*Jus cogens* is a peremptory norm of international law accepted and recognized by the international community as a norm from which no derogation is permitted. *Jus cogens* rejects state consent as the foundation of its existence, thus *jus cogens* trumps persistent objection in relation to an international legal custom.<sup>7</sup>

**Sources of International Custom-** International customary law is rarely if ever explicitly written down in one place. International custom is found in a myriad of sources discussed below. Judicial decisions as and the writings of publicists often refer to established customs of international law and may save the researcher considerable time. Indexes, digests, restatements, and yearbooks may also contain references to established customs.

### **Other Research Guides & Exercises**

International Legal Research Tutorial (a joint project of Duke University School of Law and University of California, Berkeley, School of Law) covers custom, general principles and the teachings of highly qualified publicists in detail: [http://www.law.duke.edu/ilrt/cust\\_law\\_1.htm](http://www.law.duke.edu/ilrt/cust_law_1.htm)

Researching Customary International Law, State Practice and the Pronouncements of States regarding International Law by Silke Sahl

[http://www.nyulawglobal.org/globalex/Customary\\_International\\_Law.htm](http://www.nyulawglobal.org/globalex/Customary_International_Law.htm)

Lee Peoples, Customary International Law (CALI Lesson)

<http://www2.cali.org/index.php?fuseaction=lessons.lessondetail&lid=1069>

### **Research Strategy for Locating Customary International Law**

In determining if a particular activity has risen to the level of customary international law it may be useful to first consult the writings of scholars and judicial decisions to discover pre-defined customs. These sources will often tell the researcher if particular conduct has already risen to the level of custom. “Jurists and judges, rather than states, are often the more helpful sources of expressions of opinions that international practice has at some stage become customary international law.”<sup>8</sup> This strategy is adapted from Marci Hoffman’s “Researching Customary International Law and Generally Recognized Principles” accessible at:

<http://www.law.berkeley.edu/library/classes/iflr/customary.html>

### **Pre-Defined Custom - Decisions of National and International Courts**

The decisions of national courts may provide evidence of international legal custom when the decision applies international law as incorporated into municipal law.<sup>9</sup>

### **Pre-Defined Custom - Decisions of National Courts (non U.S.)**

*Annual Digest of International Law Cases, 1919 – 1945* now *International Law Reports* (1946 - ) OCU Call # JX 68.A65 (3<sup>rd</sup> Floor N) Provides decisions from a wide range of national and international tribunals. Includes a table of cases arranged alphabetically by party, court and

country, and a digest. Look under the single or multi-volume indices under the term “Customary International Law.”

For information on locating the decisions of national courts on issues of international law consult the Research Guide “Researching International Case Law” at:

[http://www.okcu.edu/law/library/guide\\_caselaw.pdf](http://www.okcu.edu/law/library/guide_caselaw.pdf)

### **Pre-Defined Custom - Decisions of National Courts (U.S.)**

*American International Law Cases* (1st - 3rd Series) reprints the decisions of United States Courts dealing with international law. (OCU Call # JX 238) 3rd Floor N.

The Westlaw database (FINT-\_\_) contains U.S. cases dealing with international law. Use CS for all, SCT for US Supreme Court, CTA for Circuit Court of Appeals, DCT for District Court, CIT for Customs and International Trade. Another method of locating U.S. cases discussing customary international law is to search the custom digest under the topic “International Law” including the terms custom or customary.

The Lexis library (CASES; HIER-LOC) as U.S. cases dealing with international law.

Cases are also found in the digests discussed *infra*.

### **Pre-Defined Custom - Decisions of International Courts**

The concept of *stare decisis* does not apply to decisions of the International Court of Justice which are binding only upon the parties to the particular dispute according to Article 38 (1)(d) of the Statute of the International Court of Justice. The decisions are at best indirect evidence that state practice has become customary law and are not direct evidence of custom.<sup>10</sup> It is still important to examine the decisions of international courts when looking for evidence of custom because while they are not binding they may provide persuasive evidence of custom. Decisions of international courts often contain a discussion of whether a particular principle has risen to the level of custom. For example see the decision of the International Court of Justice in the Nicaragua Case for a discussion of the principle of non-intervention as a customary norm, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*. For information on locating the decisions of international courts consult the Research Guide “Researching International Case Law” at: [http://www.okcu.edu/law/library/guide\\_caselaw.pdf](http://www.okcu.edu/law/library/guide_caselaw.pdf)

### **Pre-Defined Custom - Periodicals**

Periodicals and indexes that may contain references to international custom include:

*Index to Foreign Legal Periodicals*, (1S) and available through the Westlaw database (IFLP).

Consult the following specific titles:

*ASIL Bulletin* (1S)

*International and Comparative Law Quarterly* (accessible electronically by searching the catalog)

*International Legal Materials* (1 South)

*The International Lawyer* (1 South)

*The George Washington Journal of International Law and Economics* (1 South)  
*The American Journal of International Law* (1 South)  
*The Columbia Journal of Transnational Law* (1 South)  
*Common Market Law Review* (1 South)  
*Public International Law* (1 South)  
*The Yale Journal of International Law* (1 South)  
*European Journal of International Law* (accessible from the eJournals page)  
*Global Jurist* series (accessible from the eJournals page)

Lexis- consult the most recent database directory under the international law library for a listing of periodicals.

Westlaw- *Index to Foreign Legal Periodicals* (IFLP), International Legal Materials Cumulative Index (ILM-INDX).

Search for the LegalTrac subject “Customary Law” or the Wilson’s Index thesaurus terms “Customary Law International Law.”

### **Pre-Defined Custom - Encyclopedias**

*Encyclopedia of Public International Law*, OCU Call # JZ 1160.E51 (1<sup>st</sup> Floor N).

### **Pre-Defined Custom - Scholarly Works on International Custom**

Danilenko, G.M., *Law-Making in the International Community* (Dordrecht: Nijhoff, 1993) OCU Call # JX 4165.D3 (3<sup>rd</sup> Floor N) see chapter 4.

Parry, Clive, *The Sources and Evidences of International Law* (Dobbs Ferry: Oceana, 1965) OCU Call # K 280.P73 (3<sup>rd</sup> Floor N).

Paust, Jordan J., *International Law as Law of the United States* (Durham: Carolina Academic Press, 2003) OCU Call # JZ 3160.P38. Contains a nice discussion of how custom operates in United States law.

Schaffer, Ellen G. and Randall J. Snyder. *Contemporary Practice of International Law* (Dobbs Ferry: Oceana, 1997) Covers research strategies in the following sections: custom and general principles pp. 38-44, Chapters 3, 4, and 5. Available in the reference office.

Wolfke, Karol, *Custom in Present International Law* (Dordrecht: Nijhoff, 1993) OCU Call # JX 3695.P7 (3<sup>rd</sup> Floor N).

### **Looking Directly for State Practice in Primary Sources**

After exhausting the sources of pre-defined custom, the researcher should look directly for evidence of state practice and attempt to establish that a custom exists. To qualify as a custom state practice must be *general* and *uniform*. A *general* state practice is one that is widespread in the international system but not necessarily adopted by every state.<sup>11</sup> A *uniform* state practice evidences behavior that follows a coherent, identifiable rule or principle. Uniform state practice

does not have to be identical with the actions of other states but an underlying rule or principle must exist.<sup>12</sup> The following are primary sources of state practice. See the next section to help locate evidence of state practice within these primary sources.

*Sources of State Practice in International Law*, Ralph Gaebler and Maria Smolka-Day, eds., OCU Call # JZ 64.S67. This looseleaf lists sources of state practice from 14 jurisdictions and multi-jurisdictional sources.

### **Primary Sources of State Practice - Treaties**

Treaties provide evidence of customary law when they codify existing custom. New legal customs can also arise from treaties because codification of a particular custom serves as evidence of state action regarding the custom. Consult the following research guides for help locating treaties:

Guide to Treaty Research (U.S. is a party)

[http://www.okcu.edu/law/lawlib/pdfs/guide\\_ustreaty.pdf](http://www.okcu.edu/law/lawlib/pdfs/guide_ustreaty.pdf)

Guide to Treaty Research (U.S. is not a party)

[http://www.okcu.edu/law/lawlib/pdfs/guide\\_nonustreaty.pdf](http://www.okcu.edu/law/lawlib/pdfs/guide_nonustreaty.pdf)

### **Primary Sources of State Practice - Domestic Legislation**

The legislation of a particular state is evidence of state practice. Domestic legislation is particularly important in establishing custom when the legislation deals with an area in which international law generally defers to state law. Legislation dealing with nationality and the treatment of aliens are examples.<sup>13</sup>

Consult the section in the Comparative Law Research Guide on locating gazettes, constitutions & statutes: [http://www.okcu.edu/law/lawlib/pdfs/guide\\_comparative.pdf](http://www.okcu.edu/law/lawlib/pdfs/guide_comparative.pdf)

Additional sources that OCU does not have are listed in “Conducting Research in Customary International Law” by Ralph F. Gaebler, *Contemporary Practice of Public International Law*, (Dobbs Ferry: Oceana, 1997) pp. 86-88.

### **Primary Sources of State Practice - Decisions of National and International Courts**

The decisions of national courts may provide evidence of international legal custom when the decision applies international law as incorporated into municipal law.<sup>14</sup> Consult the sources listed in the previous section for help locating these decisions.

### **Primary Sources of State Practice - Diplomatic Practices and Correspondence**

Diplomatic records provide evidence of a country's stance on a particular issue as well as indirect evidence of recognition of a custom of international law.

Diplomatic papers and publications are found in the Digests of United States practice discussed in the section below.

*A Decade of American Foreign Policy: Basic Documents 1941-1949* (Washington: Department of State, 1985) OCU Call # KF 4605.A15 and Microforms A10230.

*American Foreign Policy: Basic Documents* (Washington: G.P.O., 1983 - ) Microforms AA 249. Covers 1977-1980.

*American Foreign Policy: Current Documents* (Washington: Department of State, 1991 - ) OCU Call # E 876.A43.

*American State Papers: Documents, Legislative and Executive, of the Congress of the United States*, covers 1789-1838. Available at <http://memory.loc.gov/ammem/amlaw/lwsp.html> and in Microforms A 5478.

*Department of State Bulletin* (Washington: Department of State, 1939-1989). Microforms AA 190. Available electronically from Hein Online.

*Department of State Dispatch* (Washington: Department of State, 1990 - ). Dispatch is available online at: <http://www.state.gov/www/publications/dispatch/index.html> (historical only), from Lexis-Nexis (GENFED AND INTLAW, DSTATE file), from Westlaw (USDPTSDIS), and OCU has 1992-1999 on microform AA 417 (LLS) and 1996-1999 in periodicals (1<sup>st</sup> floor S).

*Encyclopedia of American Foreign Policy: Studies of the Principal Movements and Ideas* (New York: Scrivner, 1978) OCU Call # JX 1407. E53.

*Foreign Relations of the United States* (Washington: G.P.O., 1861 - ) Available in Microforms AA 333 from 1861 – 1939, in LLMC Digital from 1863 – 1976, in GPO Access from 1961 – 1976 at: <http://www.state.gov/r/pa/ho/frus/>, and from 1863 – 1960 from the University of Wisconsin at: <http://digicoll.library.wisc.edu/FRUS/>

*Papers Relating to the Foreign Relations of the United States* (Washington: G.P.O., 1861-1931). Microforms AA 333 and available electronically through LLMC Digital.

Yale Law School has digitized some of the historical foreign relations materials in the Avalon project: <http://www.yale.edu/lawweb/avalon/avalon.htm>.

The diplomatic papers of other countries are discussed in “Conducting Research in Customary International Law” by Ralph F. Gaebler pp. 93-94 and in “Consular and Diplomatic Affairs and Foreign State Immunity: The Bibliographic Collection Development Component,” by Jill McC.Watson pp. 97-104, both found in *Contemporary Practice of Public International Law*, (Dobbs Ferry: Oceana, 1997).

### **Primary Sources of State Practice - Actions of NGOs and IGOs**

The actions of NGOs and IGOs can be evidence of international custom. United Nations General Assembly Resolutions adopted by a significant majority are a possible source of custom.

Consult the Research Guides on NGOs and IGOs for tips on finding evidence of the actions of these organizations.

Research Guide to IGOs, NGOs & and the E.U.:  
[http://www.okcu.edu/law/lib/pdfs/guide\\_ngoigo.pdf](http://www.okcu.edu/law/lib/pdfs/guide_ngoigo.pdf)

United Nations Research Guide: [http://www.okcu.edu/law/lib/pdfs/guide\\_un.pdf](http://www.okcu.edu/law/lib/pdfs/guide_un.pdf)

### **Locating Evidence of Custom Within Primary Sources of State Practice**

There are several types of sources unique to international legal research that will enable the researcher to use the sources of state practice mentioned above more efficiently.

#### **Digests**

Digests provide a summary of the activities of a state in international law over a defined period of time and often include the text of relevant documents and cases. Official digests are a particularly credible source of state practice.

“Contemporary Practice of the United States Relating to International Law,” issued quarterly in the *American Journal of International Law* beginning in volume 53 (1959) (1S).

Nash, ed., *Cumulative Digest of United States Practice in International Law, 1981-88* (Washington: Department of State, 1993). OCU Call # JX 21.R618 (3<sup>rd</sup> Floor N) Contains a cumulative index by subject and a table of cases.

*Digest of United States Practice in International Law* (Washington: Department of State, 1973-1988, 2000 – 2003). OCU Call # JX 21 (3<sup>rd</sup> Floor N) Contains a cumulative index by subject and a table of cases. Look under the index entry “Customary International Law.” The State Department has placed portions of the 1989 – 2003 Digests online at:  
<http://www.state.gov/s/c8183.htm>

The HeinOnline FILRD (Foreign and International Law Resources Database) contains a number of these US digests.

Whitman, ed., *Digest of International Law* (Washington: Govt. Printing Office, 1963-1973). OCU Call # JX 237.W5 (3<sup>rd</sup> Floor N) Contains a two volume index.

Hackworth, ed., *Digest of International Law* (Washington: Govt. Printing Office, 1940-1944), OCU Call # JX 237.H3 (3<sup>rd</sup> Floor N) Contains a general subject index and a table of cases.

Moore, ed., *A Digest of International Law* (Washington: Govt. Printing Office, 1906), OCU Call # JX 237.M4 (3<sup>rd</sup> Floor N). Available electronically in the LexisNexis Serial Set.

Wharton, ed., *A Digest of the International Law of the United States* (Washington: Govt. Printing Office, 1887) OCU Call # JX 237.W49 (3<sup>rd</sup> Floor N). Available electronically in the LexisNexis Serial Set.

Cadwalader, ed., *Digest of the Published Opinions of the Attorney-General, and of the Leading Decisions of the Federal Courts, with Reference to International Law, Treaties and Kindred Subjects* (Washington: Govt. Printing Office, 1887) OCU Call # JX 237.D54 (3<sup>rd</sup> Floor N). Many of these historical digests are available electronically from Hein Online's FILRD.

### **Restatements**

*Restatement of the Law of Foreign Relations of the United States*, OCU Microforms A 822 (LLS). See also *Commentaries on the Restatement Third on the Law of Foreign Relations of the United States*, OCU Call # KF 395.A2 (3<sup>rd</sup> Floor N) and in the Westlaw database (RESTFOREL). Volume two contains a table of various authorities and a subject index. This work of the American Law Institute deals with international law as it applies to the United States and domestic law that has significance for the foreign relations of the United States. The "international law restated here derives largely from customary international law." (from the *Restatement* introduction). This publication is very useful for identifying customary international law that applies to the United States and for its' citations to cases and other authority.

### **Yearbooks**

Yearbooks provide information about their respective states or organizations by reprinting court decisions, summarizing new legislation or digesting state practice. Search for yearbooks in the library catalog or in the HeinOnline FILRD.

*African Yearbook of International Law* (Dordrecht: Nijhoff, 2002 - ) OCU Call # On Order.

*Australian Yearbook of International Law* (Sydney: Butterworths, 1965 – 2002) OCU Call # JX 21.A9 (3<sup>rd</sup> Floor N).

*Asian Yearbook of International Law* (Dordrecht: Nijhoff, 1991-1997) OCU Call # JX 21.A8 (3<sup>rd</sup> Floor N).

*British Yearbook of International Law* (London: Oxford University Press, 1921 - ) OCU Call # JX 21.B7 (3<sup>rd</sup> Floor N).

*Canadian Yearbook of International Law* (Vancouver: University of British Columbia Press, 1963 – 2000) OCU Call # JX 21.C3 (3<sup>rd</sup> Floor N).

*Chinese Yearbook of International Law and Affairs* (Baltimore: Chinese Society of International Law, 1981 – 2000) OCU Call # JX 21.C48 (3<sup>rd</sup> Floor N).

*Comparative Law Yearbook* (The Hague: Nijhoff, 1977 - ) OCU Call # K64.C6 (3<sup>rd</sup> Floor N).

*Comparative Law Yearbook of International Business* (Boston: Graham & Trotman/Martinus Nijhoff, 1990) OCU Call # K 64.C6 (3<sup>rd</sup> Floor N).

*German Yearbook of International Law* (Berlin: Duncker & Humbolt, 1948 - ) OCU Call # JX 21.G47 (3<sup>rd</sup> Floor N).

*Hague Yearbook of International Law* (Dordrecht: Nijhoff, 1988 - ) OCU Call # JX 21.H33 (3<sup>rd</sup> Floor N).

*Michigan Yearbook of International Legal Studies* (Ann Arbor: University of Michigan Press, 1989 - ) (1S).

*Netherlands Yearbook of International Law* (Leiden: Sijthoff, 1976-2000) OCU Call # JX 21.N45 (3<sup>rd</sup> Floor N).

*Ocean* (Yearbook of the International Ocean Institute) OCU Call # JX 4408 (3<sup>rd</sup> Floor N).

*Pace Yearbook of International Law* (White Plains: Pace Law School, 1989 - ) (1S).

*South African Year Book of International Law* (Pretoria, VerLoren Van Themaat Centre for International Law, 1975-1983) OCU Call # JX 21.S59 (3<sup>rd</sup> Floor N).

*Statesman's Yearbook* (London: MacMillan) OCU Call # JA 51.S7 (Reference).

*University of Miami Yearbook of International Law* (Coral Gables: International Law Society of the University of Miami School of Law, 1991-98) (1S).

*Yearbook of European Law* (New York: Oxford University Press, 1981 - ) OCU Call # KJC 158.Y36 (3<sup>rd</sup> Floor N).

*Yearbook of International Environmental Law* (London : Graham & Trotman ; Norwell, MA : Kluwer Academic Publishers Group, 1990 - ) OCU Call # K3581.2.Y43 (3<sup>rd</sup> Floor N).

#### **Yearbooks Covering Practices of UN-related Bodies:**

*Max Planck Yearbook of United Nations Law* (London : Kluwer, 1998 - ) OCU Call # JZ 4947.M39 (3<sup>rd</sup> Floor N).

*Yearbook of the United Nations* (Lake Success, N.Y.: United Nations, 1947 - ) OCU Call # JX 1977.A37 (Reference).

*Yearbook of the International Law Commission* OCU Call # JX 1977.A1 (3<sup>rd</sup> Floor N). The United Nations International Law Commission is charged with promoting the progressive development of international law and its codification. Many of the treaties sponsored by the Commission codify customary international law.

*UNCITRAL Year Book* (Yearbook of the UN Commission on International Trade Law, 1972-2000) OCU Call # JX 1977.A1 (3<sup>rd</sup> Floor N).

*Yearbook – International Court of Justice* (Hague : ICJ, 1947 - ) OCU Call # JX 1971.6 (3<sup>rd</sup> Floor N and some holdings in microform).

*United Nations Juridical Yearbook* (New York: United Nations, 1963-1996) OCU Call # JX 1977.A1 (3<sup>rd</sup> Floor N).

Topic-specific: *Yearbook: Commercial Arbitration* (Deventer, NL: Kluwer, 1976 - ) OCU Call # K 2400.A53 (3<sup>rd</sup> Floor N).

## **General Principles of International Law**

The “general principles of law recognized by civilized nations”<sup>15</sup> along with international custom are perhaps the most troubling types of international law to define and discover. General principles were historically important in the development of international law. Early general principles were often the only international laws and were based upon the theory that states were applying these principles in their domestic law and therefore were bound by them internationally.<sup>16</sup> As international law has developed the use of general principles has declined because many general principles have become codified into treaties or recognized as custom. The Restatement (Third) of Foreign Relations characterizes general principles as a “secondary source of international law.”<sup>17</sup> General principles are used as gap fillers only when authority cannot be found in treaties or in customary law. Examples of general principles include *res judicata*, good faith, and judicial impartiality.<sup>18</sup>

Oscar Schachter defines five categories of general principles that have been invoked and applied in international cases:

1. Principles of municipal law (law of a State) “recognized by civilized nations;”
2. General principles of law “derived from the specific nature of the international community;”
3. Principles “intrinsic to the idea of law and basic to all legal systems;”
4. Principles “valid through all kinds of societies in relationships of hierarchy and co-ordination;” and,
5. Principles of justice founded on “the very nature of man as a rational and social being.”<sup>19</sup>

There is no standardized source of general principles. The best places to begin looking for them are previous decisions of international courts and tribunals. If nothing relevant or applicable is discovered the researcher should take the next step and attempt to discover the general principles as articulated by the national court of the jurisdiction she is researching. Secondary sources like treatises and law review articles are generally helpful when searching for general principles. The federal digest system is another resource for locating general principles as international cases are frequently litigated in United States Federal Courts.<sup>20</sup>

The following resources provide an introduction to general principles:

Cheng, Beng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge : Grotius, 1987) OCU Call # JZ 1245.C45 (3<sup>rd</sup> Floor N). This work is the

authoritative text on the subject of general principles and includes references and a bibliography that will assist the researcher in locating general principles.

Bassiouni, M. Cherif, "A Functional Approach to General Principles of International Law," 11 *Mich. J. Int'l. L.* 786.

Fitzmaurice, Gerald, *The General Principles of International Law*, 92 Collected Courses, Academy of International Law, The Hague (1957, .II) OCU does not have.

Henkin, Louis. et. al. *International Law, Cases and Materials 3<sup>rd</sup> ed.* (St. Paul : West, 1993) pp.104-110.

Mosler, Hermann, "General Principles of Law," in 2 *Encyclopedia of Public International Law* 511 (1995) OCU Call # JZ 1160.E51 (1<sup>st</sup> Floor N).

Schaffer, Ellen G. and Randall J. Snyder. *Contemporary Practice of International Law* (Dobbs Ferry : Oceana, 1997) pp. 44, 105-6.

### **The Teachings of Highly Qualified Publicists**

The teachings of highly qualified publicists are used as a subsidiary means of establishing the existence of international legal rules. These "teachings" are generally defined as scholarly writing of acknowledged authorities on international law.<sup>21</sup> "Teachings" also refers to work produced by groups of scholars working collectively in organizations like the International Law Commission. Sources of these teachings include treatises and legal periodicals. Reynolds points out that beyond the accepted classics there will often be dispute over who is a highly qualified publicist. Reynolds' posits that the principle of customary international law will ultimately decide these disputes.<sup>22</sup> If you are trying to determine if a particular international tribunal considers an individual to be a highly qualified publicist a useful strategy may involving searching previous decisions of that tribunal for any references to the work of the individual in question.

The following are generally considered the teachings of highly qualified publicists:

Early classics of international law are reprinted in the series *Classics of International Law* (Washington D.C.: Carnegie Institution of Washington, 1911-1950). The collection was begun in 1906 at the suggestion of Dr. James Brown Scott, a solicitor for the Department of State. More information is available from: <http://www.lawbookexchange.com/carnegie.htm>. Many of these works are available electronically through the Hein Online Legal Classics library.

Brownlie, Ian, *Principles of Public International Law* (Oxford: Clarendon Press, 1979) OCU Call # JZ 3225.B76 (3<sup>rd</sup> Floor N) (mentioned as a classic by Thomas H. Reynolds in *Accidental Tourist*).<sup>23</sup>

Dixon, Martin, *Textbook on International Law* (London: Blackstone, 2000) OCU Call # JZ 1237.D59.

Higgins, Rosalyn, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) OCU Call # JX 3091.H54. Author sits on the International Court of Justice.

Schachter, Oscar, *International Law in Theory and Practice* (Dordrecht: Nijhoff, 1991) OCU Call # JX 3091.S264. Schachter is a former legal advisor to the United Nations.

Shaw, Malcolm, *International Law* 3<sup>rd</sup> ed. (Cambridge: Grotius, 1991) OCU Call # JX 3275.S4 (3<sup>rd</sup> Floor N).

Schwarzenberger, Georg *International Law* 3<sup>rd</sup> ed. (London: Stevens, 1957) OCU Call # JX 3275.S4 (3<sup>rd</sup> Floor N) (mentioned as a classic by Thomas H. Reynolds in *Accidental Tourist*).<sup>24</sup>

Janis, Mark W., *An Introduction to International Law* (Boston: Little, Brown, 1993) OCU Call # JZ3140.J36 (3rd Floor N).

Oppenheim, L. *Oppenheim's International Law* (Harlow: Longman, 1992) OCU Call # JX 3264.I6 (3<sup>rd</sup> Floor N) (mentioned as a classic by Thomas H. Reynolds in *Accidental Tourist*).<sup>25</sup>  
Search the library catalog for various works by the International Law Commission.

Obviously scholarly writing appears in places other than textbooks. Consult the periodicals, indexes, dictionaries, encyclopedias, and yearbooks mentioned *supra*.

### **Evaluating Print Resources**

A book or article may still be useful in international legal research even though not by a “Highly Qualified Publicist.” The following criteria are useful in evaluating print resources:

#### **Author's Reputation**

- Has the work been reviewed and if so was the review favorable?
- What else has this person written?
- Have their articles been published in selective journals?
- Are their books held by many libraries? (search Worldcat to see)
- Are they well respected or considered an expert in the field by others, not just themselves?
- Do they practice and if so in what areas and with what firm?
- Have they practiced before foreign or international tribunals or handled any well known cases?
- What degrees do they hold?
- If they are an academic where do they teach and what?

#### **Publisher's Reputation**

- Is the publisher well known in the field? (some well known international law publishers are: Most IGO's and NGO's, Ashgate, Aspen, Butterworths, Cameron May, Carswell,

Grotius, Hein, ICC, ISBS, Juris, Kluwer, Martinus Nijhoff, Oceana, Oxford, Routledge, Sweet and Maxwell, Thomson, Transnational, West and others)

- What else have they published in this area?
- Did the publisher add any useful features to the work?

### **Organization**

- Is the material organized in a way that makes sense?
- Does organization add to or detract from the material itself?

### **Style and Readability**

- Is the material scholarly (includes discussion of how the law has evolved over time, jurisprudential theories, public policy concerns with lots of citations to other treatises and law review articles) or is it more practice oriented? (includes plain English summary of the law, checklists, practice considerations, references to form books or the forms themselves)

### **Scholarly Attributes and Reference Features**

- Does the work include a table of contents, index, additional tables, lists, photographs or a bibliography?
- Does the work include proper and complete citations to works cited?

### **Availability Online**

- Is the work available online for free or through Lexis, Westlaw or another database vendor?
- Does the online version offer additional features or search options?
- Is the online version updated more frequently?

### **Comparison with Other Titles**

- How does the work compare with other titles on the subject? (find other titles by browsing subject headings in the library catalog, Worldcat or by browsing around the call number in the library)

### **Date of Publication**

- Have changes recently occurred in this area of the law that make currency important?
- Is the work considered a classic despite its age? (many works that are considered classics of international law are several hundred years old and still relevant)
- How is the work updated? (pocket part, looseleaf or not at all)
- Is there another title on the subject published more recently?

Electronic resources should be evaluated according to the following criteria:

- Identify the source
- Discover the source's expertise
- Determine the level of objectivity
- Establish the date of publication
- Verify what the information claims

For more detail see: [http://www.virtualchase.com/quality/checklist\\_print.html](http://www.virtualchase.com/quality/checklist_print.html)

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<sup>1</sup> Gaebler, Ralph, F., "Conducting Research in Customary International Law," in Schaffer, Ellen G. and Randall J. Snyder. *Contemporary Practice of International Law* (Dobbs Ferry : Oceana, 1997) pp. 76-77.

<sup>2</sup> Id.

<sup>3</sup> Brownlie, Ian, *Principles of Public International Law*, 4<sup>th</sup> ed. pp 5-7.

<sup>4</sup> Fidler, David P., "Dinosaur, Dynamo, or Dangerous? Customary International Law in the Contemporary International System" in Schaffer, Ellen G. and Randall J. Snyder. *Contemporary Practice of International Law* (Dobbs Ferry : Oceana, 1997) pp. 63.

<sup>5</sup> Fidler at 64-65.

<sup>6</sup> Id. at 66.

<sup>7</sup> Id. at 67.

<sup>8</sup> Janis, Mark W., *An Introduction to International Law*, 3<sup>rd</sup> ed. 47 (New York: Aspen, 1999).

<sup>9</sup> Gaebler at 92.

<sup>10</sup> Id 88.

<sup>11</sup> Brownlie at 6.

<sup>12</sup> Id.

<sup>13</sup> Wolfke, Karol, *Custom in Present International Law*, 2<sup>nd</sup> ed. at 149.

<sup>14</sup> Gaebler at 92.

<sup>15</sup> Article 38 of the Statute of the International Court of Justice.

<sup>16</sup> Buergethal, Thomas *Public International Law* (St. Paul: West, 1989).

<sup>17</sup> Id. citing to the Restatement (Third) of Foreign Relations.

<sup>18</sup> Thorpe, Susan, "A Guide to International Legal Bibliography," in Schaffer, Ellen G. and Randall J. Snyder. *Contemporary Practice of International Law* (Dobbs Ferry : Oceana, 1997) pp. 44.

<sup>19</sup> Henkin, Louis, et. al., *International Law: Cases and Materials 3<sup>rd</sup> Edition* (St. Paul: West, 1993) OCU Call # JX 68.I498 (3<sup>rd</sup> Floor N).

<sup>20</sup> University of Indianapolis Pathfinder on International Legal Research. retrieved from:

[http://216.239.39.100/search?q=cache:BN9NaA5\\_aa0C:www.iulaw.indy.indiana.edu/library/InternatlLaw2.htm+%22general+principles%22+international+law&hl=en&ie=UTF8](http://216.239.39.100/search?q=cache:BN9NaA5_aa0C:www.iulaw.indy.indiana.edu/library/InternatlLaw2.htm+%22general+principles%22+international+law&hl=en&ie=UTF8)

<sup>21</sup> Cohen, Berring and Olson. *How to Find the Law* (St. Paul : West, 1989) 492.

<sup>22</sup> Reynolds, Thomas H., "Introduction to International Law," in *Accidental Tourist on the New Frontier: An Introductory Guide to Global Legal Research* Jeanne Rehberg and Radu D. Popa eds. Pp 118.

<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> Id.