



Panel: What is International Law?

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Summary of Issues

- I. The principal sources of international law.
 - A. Treaties, which are usually written instruments negotiated between two or more states, signed at the end of the negotiations, and then ratified after receiving parliamentary/congressional approval.
 - B. Customary international law, which consists a relatively consistent and uniform practice of states over a period of time that is undertaken out of a sense of legal obligation.
 - C. General principles of law, which are usually regarded as principles of law that operate in all the major legal systems of the world (common law, civil law, etc.), and which therefore can be imported into the system of international law to assist in “ filling in the gaps.”
 - D. Judicial decisions/writings of scholars. Since the system of international law has no central legislative body, the views of courts (national and international) and scholars about the status of international law have been given a special position.
 - E. Acts of International Organizations. Although this is not one of the traditional sources of international law, contemporary international organizations in some situations have been granted the ability to

issue decisions that are binding upon states. As such, they can create international law.

II. Treaties as a part of U.S. law.

A. The process for ratifying a treaty.

1. Negotiation, adoption, signature by the president, then advice/consent of 2/3 of the Senate, and finally presidential ratification.
2. Reservations, understandings, and declarations may be imposed as a means of unilaterally altering or clarifying the treaty.

B. “ Self-executing” treaties versus “ non-self-executing” treaties.

1. John Marshall in *Foster v. Neilson* finds that some provisions of treaties have immediate effect in U.S. law, whereas others do not.
 - a. Look to the language of the treaty (is it vague? hortatory?).
 - b. Look to the intent of the U.S. political branches.
 - c. Look for conflicts with Constitutional rights or structure.

2. Example of a self-executing treaty: U.S.-Japan Commercial Treaty (Asakura case).
3. Example of implementing a non-self-executing treaty through a statute: U.S. implementation of the Convention Against Torture.

C. Can a treaty trump . . .

1. the Constitution (Reid v. Covert)?
2. a pre-existing federal statute (Whitney v. Robertson)?

D. What is an executive agreement?

1. The treaty device is not the exclusive means of binding the United States to an international agreement.
2. Types of accepted executive agreements:
 - a. Executive agreement in implementation of a treaty.
 - b. Congressional-executive agreement (e.g., NAFTA).
 - c. Sole executive agreement (e.g., Dames & Moore case)

III. Customary international law (CIL) as a part of U.S. law.

- A. Congress may adopt statutes that draw upon CIL.
- B. CIL is a part of U.S. law even without a statute: *The Paquete Habana*.
- C. CIL is a part of federal common law: *Sosa v. Alvarez-Machain*.
- D. An important current use of CIL in U.S. courts: The Alien Tort Statute.

IV. Federalism

- A. The Supremacy Clause speaks to the supremacy of treaties over state law.
- B. Preemption may occur by treaty, by statute, by foreign commerce clause.
- C. Preemption by general foreign affairs power (*Zschernig* & *Garamendi* cases).

V. The Role of the Courts in Adjudicating International Law Issues.

- A. U.S. Constitution Article III and International Law.
- B. Judicial Principles for Harmonizing U.S. and International Law (e.g., *Charming Betsy* principle).

- C. Judicial Doctrines for Abstaining on International Law Issues (e.g., political question doctrine, act of state doctrine).
- VI. Some Contemporary Problems.
- A. Delegation of U.S. Decision-Making to International Organizations.

Example: whether to rely on decisions of the International Court of Justice regarding the effects in U.S. law of U.S. obligations under the Vienna Convention on Consular Relations (I.C.J. Avena case).
 - B. Using International Law When Interpreting the U.S. Constitution

Example: *Roper v. Simmons* (declaration execution of juvenile offenders as unconstitutional).