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IT BEGAN AT BROOKLYN: EXPANDING BOUNDARIES FOR FIRST-YEAR LAW STUDENTS BY INTERNATIONALIZING THE LEGAL WRITING CURRICULUM

*Diane Penneys Edelman**

"[L]aw must be viewed today through a global lens, and . . . the way we think about and teach the law must embrace that perspective."¹

I. INTRODUCTION

Teach international law to first-year law students? Why?

There are several answers to this question. Perhaps the most practical reason is that international law is becoming so important to our lives as lawyers and educators (and, in fact, to our lives in general) that we can no longer dismiss this idea as

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1. Norman Dorsen, *Thinking and Teaching About Law in a Global Context as an Exercise in Common Enterprise*, Remarks at the Association of American Law Schools Annual Meeting (Jan. 8, 1998).

one that is controversial or impractical. By introducing students early on to concepts of international law, we teach them that law extends beyond the boundaries of traditional practice, and show them that the law is as diverse as the peoples who create it. The subject matter of such a course can be as far-reaching as the professor's imagination: international human rights, transboundary pollution, recognition of new states and outer space law are but examples of topics that can be covered.

Teachers of doctrinal first-year courses should be encouraged to incorporate international law into their curricula, and a first-year legal writing program provides an excellent and easily adaptable venue for doing so. An introductory level international law legal writing program should strengthen the school's international law moot court teams² and increase student interest in the school's international and comparative law curriculum. Most importantly, this alternative offers variety to the first-year law student who is, usually, relegated to the traditional first-year substantive offerings and a traditional legal writing program. First-year law students relish taking control of their academic program, and the availability of an innovative or alternative course that incorporates international law gives students what may be

2. Many law schools, both in the United States and abroad, participate in the Philip C. Jessup International Law Moot Court Competition, which was established in 1959 in honor of the scholar and former judge of the International Court of Justice. See International Law Students Association, *About the Philip C. Jessup International Law Moot Court Competition*, at <http://www.ilsa.org> (last visited Feb. 18, 2002). In recent years, additional international law moot court competitions, such as the Inter-American Human Rights Moot Court Competition (sponsored by Washington College of Law, American University), at <http://www.wcl.american.edu/humright/mcourt/>; Niagara International Law Moot Court Tournament (sponsored by Canada/United States Law Institute and Case Western University School of Law), at http://lawwww.cwru.edu/academic/moot_mock.htm; Manfred Lachs Space Law Moot Court Competition (sponsored by International Institute of Space Law of the International Astronautical Federation), at <http://www.iafastro.com/iisl/MootCourt2001.htm>; International Environmental Moot Court Competition (sponsored by Stetson University College of Law), at <http://www.law.stetson.edu/excellence/mootct/moot.htm>; Willem C. Vis International Commercial Arbitration Moot (sponsored by Pace University School of Law), at <http://www.cisg.law.pace.edu/vis.html>, have become popular at American law schools as well.

their only chance to elect a course in an otherwise prescribed curriculum.

Although a number of law schools offer three or four-semester legal writing programs, the majority of law schools only offer two-semester legal writing or legal research and writing programs.³ During the first semester of these programs, professors typically require students to prepare a variety of objective legal office memoranda, which students research and prepare for the purpose of advising a senior attorney regarding what decision to make or advice to provide in relation to a hypothetical legal problem.⁴ During the second semester, students move from objective to persuasive writing, and typically prepare one or more briefs to the court and present oral argument before a panel of moot court judges.⁵

Most commonly, and this is still by no means common, international law has been incorporated into the first-year curriculum by means of the typical first-year second semester moot court program.⁶ Brooklyn Law School has perhaps the first program of this kind, having introduced international law into the legal writing curriculum in the late 1970's.⁷ Several law schools, including Villanova University School of Law ("Villanova") and Syracuse University College of Law ("Syracuse"), have also pioneered first-year academic programs that include an international law moot court alternative to the traditional first-year legal writing curriculum.⁸

3. See ASS'N OF LEGAL WRITING DIR. LEGAL WRITING INST., 2001 SURVEY RESULTS, 4-5 (2001), available at http://www.alwd.org/resources/survey_results.htm#2001 (last visited Feb. 19, 2002).

4. See AMERICAN BAR ASS'N, SOURCEBOOK ON LEGAL WRITING PROGRAMS 13 (1997) [hereinafter SOURCEBOOK].

5. See *id.* at 14, 28.

6. See *infra* notes 7-8 and accompanying text.

7. E-mail from Marilyn R. Walter, Professor of Law and Director, Legal Writing Program, Brooklyn Law School, to Diane Penneys Edelman, Assistant Dean for Legal Writing, Villanova University School of Law (Nov. 20, 2001, 15:20 EST) (on file with author).

8. Syracuse offers an "International Law Firm" option for first-year legal writing students. Telephone Message from Richard S. Risman, Assistant Professor of Law and Director, Law Firm Program, Syracuse University College of Law, to Diane Penneys Edelman, Assistant Dean for Legal Writing, Villanova University School of Law (Nov. 5, 2001). Some law schools have added a substantive international law "perspectives" elective for first-year students, including Boston University School of Law, which offers a two-

Using the Villanova program as a model,⁹ this Article will focus on the fundamental concepts that must be taught in an international law moot court course, as well as the mechanics of offering and teaching international law moot court as an introductory level legal writing course. In addition, this Article will offer suggestions for integrating international law into the first semester legal writing program as well.

Specifically, Section II of this Article will introduce the sources of international law with which students in a first year "internationalized" legal writing program must become familiar. Section III describes how to select students, develop course materials and provide basic and supplemental instruction for the persuasive writing or moot court portion of the first-year legal writing program. Section IV addresses the relatively more simple task of introducing international law into a typical first semester, objective legal writing curriculum. Finally, Section V concludes that "internationalizing" the first-year legal writing curriculum is not only desirable, but is a necessary goal for preparing today's law students to be competent professionals in the new millennium.

II. THE SOURCES OF INTERNATIONAL LAW

Why is an international law moot court course so different from a traditional first-year moot court course? Simply put, it

semester course in International Legal Process, The University of Michigan Law School, which offers Transnational Law as a first-year elective and New England School of Law, which has "internationalized" many of its traditional domestic law courses by offering grants to professors to do so. See Tom Stabile, *The Innovators*, NAT'L JURIST, Mar. 2000, at 25, 27-28; Linda Goodspeed, *Stipend Boosts International Study at NE School of Law*, BOSTON BUS. J., Nov. 12-18, 1999, at 38. Law book publishers are beginning to publish textbooks that can be used to teach international law to first-year students. See, e.g., DANIEL G. PARTAN, *THE INTERNATIONAL LAW PROCESS: CASES AND MATERIALS* (1992); MICHAEL P. SCHARF & JOHN A. BARRETT, *INTERNATIONALIZING THE DOMESTIC CURRICULUM* (forthcoming 2002); FRANCISCO FORREST MARTIN & MARK TUSHNET, *THE RIGHTS INTERNATIONAL COMPANION TO CONSTITUTIONAL LAW: AN INTERNATIONAL LAW SUPPLEMENT* (1999); DIANE PENNEYS EDELMAN, *THE INTERNATIONAL LAW MOOT COURT HANDBOOK: A GUIDE TO PERSUASIVE WRITING AND ORAL ADVOCACY FOR STUDENTS IN INTERNATIONAL LAW MOOT COURT COURSES AND COMPETITIONS* (forthcoming) (on file with author).

9. Of the programs referred to in this Article, the courses at Villanova and Syracuse are the only ones taught by full-time legal writing faculty.

is primarily different because of the *type* of research involved; in other respects, students receive training in persuasive writing and oral advocacy similar to what they would receive in a traditional second or third-semester legal writing course.¹⁰ In addition, there are differences in the forum in which an international law moot court course is set. Rather than using a domestic appellate court, the international law moot court problem is set before a panel of the International Court of Justice (“ICJ”), which, in the real world, sits in The Hague, The Netherlands.¹¹

Consequently, the greatest challenge to a law student who elects to participate in an international law moot court program – whether by enrolling in a legal writing course or participating in the Philip C. Jessup International Law Moot Court Competition (“Jessup”) as an upper class student – is mastery of the sources of international law that are applied by the ICJ. Unlike domestic law, where the student must grapple with the constitution-statute-case law hierarchy, the student of international law must become comfortable with treaties as well as the more amorphous concepts of “customary international law” and “general principles of law.”¹² These are the primary sources of international law, just as constitutions, statutes and cases are the primary sources of both federal and state domestic law. When it comes to secondary means for determining rules of domestic law, students in a traditional

10. In fact, this course can be taught using a traditional legal writing textbook. See *infra* Part III.B. The only section of a traditional appellate brief that has no counterpart in an international law moot court brief is the standard of review, because the forum for this exercise is the International Court of Justice, which is a court of original jurisdiction that enters judgments from which there is no appeal. See Statute of the International Court of Justice, June 26, 1945, art. 60, 59 Stat. 1055, 1063, T.S. No. 993 [hereinafter ICJ Statute].

11. See International Court of Justice, at <http://www.icj-cij.org> (last visited Feb. 18, 2002). See also SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* (5th ed. 1995). Other international tribunals, before which a hypothetical moot court exercise could be presented, include the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the European Court of Human Rights, the Inter-American Court of Human Rights and a host of others. See The Project on International Courts and Tribunals, at <http://www.pict-pecti.org/home.html> (last visited Feb. 22, 2002).

12. ICJ Statute, *supra* note 10, art. 38(1)(b)-(c).

moot court class look to law reviews, treatises and digests. In contrast, the international law moot court student looks to both scholarly works *and case law*, both international and domestic, as *secondary* means for determining rules of international law.¹³ Thus, it is crucial for the international law moot court professor to spend sufficient time at the beginning of the semester making sure that students have a comfortable grasp of the following basic concepts before starting their research and writing project.

The sources of international law are defined in Article 38(1) of the Statute of the International Court of Justice ("ICJ Statute"), which lists the sources applied by the ICJ in deciding matters before the court.¹⁴ Although the ICJ Statute does not specifically address whether the sources have a hierarchic value as listed, scholars and the ICJ itself apply the sources in descending order.¹⁵ Students should be made aware that in international law there are both primary and secondary sources of law, just as there are in domestic law. The primary

13. *See id.* art. 38(1)(d); *infra* Part II.D.

14. *Id.* art. 38(1). Article 38 provides, 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;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Id. Article 59 states: "The decision of the Court has no binding force except between the parties and in respect of that particular case." *Id.* art. 59. Thus, there is no concept of *stare decisis* in cases before the ICJ.

15. Thus, international conventions are a more valuable source of international law than is international custom. *See* REBECCA M. M. WALLACE, *INTERNATIONAL LAW* 7-8 (1986); John W. Williams, *Research Tips in International Law*, 15 *J. INT'L L. & ECON.* 1, 7-10 (1981); MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 10-11 (3d ed. 1999).

sources include international conventions,¹⁶ international custom and the “general principles of law recognized by civilized nations.”¹⁷ The secondary means of determining international law include the “judicial decisions and the teachings of the most highly qualified publicists of the various nations.”¹⁸ It is also important to remind students that the ICJ does not follow the concept of *stare decisis* as do domestic courts, so that the ICJ does not regard its own prior case law as binding precedent.¹⁹

A. Conventions

International conventions or treaties²⁰ are the sources students most easily comprehend, as students have heard of

16. International conventions are also referred to as treaties, pacts, accords and protocols, among other titles. See JANIS, *supra* note 15, at 9.

17. ICJ Statute, *supra* note 10, art. 38(1)(c). The “civilized nations” language is *passé*. See JANIS, *supra* note 15, at 55; *infra* Part II.C.

18. ICJ Statute, *supra* note 10, art. 38(1)(d). The term “most highly qualified publicists” refers to legal scholars. See generally BASIC DOCUMENTS IN INTERNATIONAL LAW (Ian Brownlie ed., 4th ed. 1995); WALLACE, *supra* note 15, at 25-26.

19. Indeed, Article 59 of the Statute of the ICJ holds that “the decision of the Court has no binding force except between the parties and in respect of that particular case.” ICJ Statute, *supra* note 10, art. 59. However, although they are not binding according to a strict interpretation of Article 38(1)(d), the court may follow its prior decisions under the doctrine of *jurisprudence constante*, whereby the court strives to render decisions that are “sequentially consistent.” JANIS, *supra* note 15, at 83. Thus, prior decisions of the court are still very persuasive.

20. The best place to advise international law moot court students to begin a search for international conventions concluded since World War II is the *United Nations Treaty Series* (“U.N.T.S.”). This series is the successor to the *League of Nations Treaty Series* (“L.N.T.S.”), which contains a record of international conventions from 1920 to 1945. Although it is the most comprehensive collection of international conventions, the U.N.T.S. is far behind schedule in publishing the convention texts and indices. For information on how to properly use UNITED NATIONS, UNITED NATIONS DOCUMENTATION: RESEARCH GUIDE, at <http://www.un.org/depts/dhl/resguide/>, see BRENDA BRIMMER ET AL., A GUIDE TO THE USE OF UNITED NATIONS DOCUMENTS (1962); WILLIAM H. PATCH, THE USE OF UNITED NATIONS DOCUMENTS (1962); and PUBLICATIONS OF THE UNITED NATIONS SYSTEM: A REFERENCE GUIDE (Harry N. M. Winton ed., 1972). The American Society of International Law’s *International Legal Materials* (“I.L.M.”) is an excellent source of current international legal documents. Conventions are published bi-monthly in the I.L.M., and some are published before they have entered

treaties before, and they are most like a traditional domestic legal device – a contract.²¹ Just as a contract codifies the agreement of parties, a treaty memorializes the agreement between two or more states.²² International conventions bind both the states party to them, and those states that are not

into force. The U.S. government also publishes *United States Treaties and Other International Agreements* ("U.S.T."), which contains the bodies of conventions to which the United States is a party. Until 1950, U.S.-ratified treaties were also published in *Statutes at Large* and the I.L.M.

Other sources of current treaty information include *Treaties in Force: A List of Treaties and Other International Agreements of the United States*, which is published by the U.S. Department of State. This publication allows the researcher to determine quickly and efficiently what treaties the U.S. has entered into with other individual states. More current treaty information is published monthly by the Department of State in the *Dispatch. Multilateral Treaties Deposited with the Secretary-General*, which is published annually by the United Nations, allows the researcher to determine the parties to particular treaties, and the status of such treaties. Updated U.N. treaty information is published monthly in the *United Nations Chronicle*. Legal writing professors should encourage students to use these sources as they would use a digest to begin legal research in a domestic issue. Although they are not digests, these volumes contain similar subject indices which can help students to focus on the treaties that may be relevant to the particular issue they are researching.

21. In an attempt to help students understand the nature of treaties, it is useful to teach them that treaties are similar to two concepts with which they are familiar with – contracts and statutes. Simply put, treaties are contracts between or among nations, and can be "interpreted" if necessary, by reference to their negotiating texts or *travaux préparatoires*, just like contracts can be interpreted by using parol evidence. In addition, just as we use cases to interpret statutes, we use cases, scholarly articles and treatises to interpret treaties.

22. RESTATEMENT OF THE LAW (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (1987) (International conventions create international law "when such agreements are intended for adherence by states generally and are in fact widely accepted.") [hereinafter RESTATEMENT].

Some scholars make a distinction between law-making treaties and treaties that are simply contracts. In general, a law-making treaty is one in which universal rules or rules of general application are set forth, and treaty-contracts are agreements between states that deal with a particular matter exclusively concerning them. Usually, only law-making treaties are a direct source of international law, because treaty-contracts create law only among the signatories. For further discussion of the distinction between the two types of treaties, see J.G. STARKE, *STARKE'S INTERNATIONAL LAW* 37-41 (I.A. Shearer ed., 11th ed. 1994), and WALLACE, *supra* note 15, at 17.

parties, but which nonetheless accept their provisions as law.²³ Parties to a convention must abide by the terms of that instrument based on the principle of *pacta sunt servanda*, namely, that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”²⁴ According to Article 38(1) of the ICJ Statute, conventions may be “general or particular,” meaning that they can be bilateral or multilateral, specific or comprehensive.²⁵ And, although a convention provides the strongest evidence of international law, a convention which seems to contradict or modify established international custom should be interpreted so as to best conform to established custom, rather than deviate from it, unless the convention was intended to change the existing custom.²⁶ International conventions can also be evidence of established international custom.²⁷

B. Customary International Law

International custom, or customary international law, is one of the most widely cited, and yet most elusive concepts found in

23. Examples of such treaties include Vienna Convention on the Law of Treaties, May 23, 1969, 18 U.N.T.S. 232, 8 I.L.M. 679, U.N. Doc. A/CONF. 39/27 (1969); Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; and provisions of the U.N. CHARTER, June 26, 1945, 59 Stat. 1033.

24. Vienna Convention on the Law of Treaties, *supra* note 23, art. 26.

25. See Williams, *supra* note 15, at 7.

26. For further discussion on how to interpret conventions that conflict with generally accepted international custom, see WALLACE, *supra* note 15, at 18-19, and JANIS, *supra* note 15, at 11-40.

27. See PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 40 (7th rev. ed. 1997). Malanczuk further claims that a researcher must be cautious when using treaties to infer what the rules of customary law are. See *id.* He argues that “treaties dealing with a particular subject matter may habitually contain a certain provision,” but that provision is not necessarily representative of custom. *Id.* It is necessary to look to the intentions of the parties to the treaty and determine if they agreed upon that provision merely to codify the customary international law, or to distinguish it from customary law. See *id.* However, a treaty can be cited to as evidence of customary law “[i]f the treaty claims to be declaratory of customary law, or is intended to codify customary law.” *Id.* If such a treaty is cited as evidence of customary law, it can be used against a state that was not even a party to the treaty, and thus is quite a powerful source of international law. See *id.*

international law. International custom must be distinguished from what is thought to be a state's "customary behavior."²⁸ For a state's practice to become binding customary international law, the state must engage in the particular practice because it considers itself legally obligated to do so, rather than out of compassion, convenience or friendship. This sense of legal obligation is referred to as *opinio juris sive necessitatis* or simply, *opinio juris*.²⁹ Generally, a state must also engage in a particular practice for a significant period of time for that practice to be considered binding customary

28. Examples of practices followed by states include official governmental conduct such as statements, national court decisions and legislation on international matters. In *Research Tips in International Law*, Professor Williams states that customs are derived "from diplomatic practices between states, practices of international bodies where those practices are evidence of international attitudes, and the internationally accepted activities of domestic organs, such as the United States Supreme Court and various municipal legislatures." Williams, *supra* note 15, at 7-8.

29. Thus, the states must believe that non-compliance with the customary practice would produce legal consequences, such as sanctions. The term for such a feeling that a certain type of conduct is required by international law is *opinio juris sive necessitatis*. In discussing the doctrine of *opinio juris* in its *North Sea Continental Shelf* opinion, the ICJ stated:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.

North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20). It is unclear exactly how widely accepted a practice must be to meet the *opinio juris* requirement. In general, the custom must be such that it is accepted by the major world powers and the states affected by it, and not rejected by a large majority of states. See WALLACE, *supra* note 15, at 11-12.

Some states, such as the former Soviet Union, believed that only positive state action can be a source of international law, and thus, they argued that the only true primary source of international law is treaties. Williams, *supra* note 15, at 7. Williams says, "[t]he attitude of the Soviet Union toward international law is an example of positivism in practice. The Soviets have, in the past, consistently regarded treaties as the primary, if not the only source of international law." *Id.* For further discussion on this topic, see JANIS, *supra* note 15, at 42-43; WELSLEY L. GOULD, AN INTRODUCTION TO INTERNATIONAL LAW 31-64 (1957); and G.I. TUNKIN, THEORY OF INTERNATIONAL LAW 89-203 (William E. Butler trans., 1974).

international law.³⁰ Once a practice has become customary, and thus a recognized form of international law, all states that have not objected to the custom are bound by it.³¹

In addition to those practices recognized by states as customary international law, treaties between various states can also be evidence of international custom.³² Treaties often codify rules that states believe have become international custom through constant and uniform usage over a long period of time.³³ Evidence of international custom can thus be found by analyzing international conventions and other legal instruments, and determining how these instruments are interpreted and implemented by the various states.³⁴

C. General Principles of Law

The final primary source of international law is the “general principles of law recognized by civilized nations.”³⁵ Nowadays, the phrase “recognized by civilized nations” has virtually become obsolete, in recognition of the valuable contributions to international law by countries that may not, at some earlier time in history, have been considered “civilized” nations.³⁶ The

30. The United States Supreme Court held in *The Paquete Habana* that international law was created by “ancient usage among civilized nations . . . gradually ripening into a rule of international law.” 175 U.S. 677, 686 (1900). The Court later described the time required for “ripening” as time “sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law.” *Id.* at 694. In the *Asylum Case*, the ICJ similarly held that customary rules must be based on “a constant and uniform usage.” *Asylum Case (Colom. v. Peru)*, 1950 I.C.J. 266, 277 (Nov. 20). However, Wallace argues that even if a state engages in a practice for only a short period of time, it does not necessarily mean that the practice does not qualify as international custom. WALLACE, *supra* note 15, at 9. Wallace says, “[t]he fact that a practice has been engaged in only for a brief period of time will not in itself be a bar to the formation of a customary rule, provided that the other requirements of custom are met.” *Id.*

31. See JANIS, *supra* note 15, at 41-44.

32. See MALANCZUK, *supra* note 27, at 40.

33. See *supra* note 30 and accompanying text.

34. The researcher can determine how the various states interpret and implement legal instruments by reading secondary sources, such as scholarly articles and treatises written on the particular subject matter under study.

35. ICJ Statute, *supra* note 10, art. 38(1).

36. See JANIS, *supra* note 15, at 55.

general principles of law is yet another difficult source for students to grasp because of the lack of a clear scholarly definition. In general, a legal principle becomes a binding general principle of law if states independently apply similar legal principles in a domestic setting.³⁷ The theory is that if states independently apply these similar legal principles in settling domestic matters, they impliedly consent to be bound by those legal principles on an international level.³⁸ For example, one may argue that if many countries initially permit circumstantial evidence to be admitted in judicial proceedings, this practice has been accepted as a general principle of international law. General principles are generally used as "gap filler" when there is no applicable treaty or customary law on a given issue.³⁹ This source of law is analogous to a United States state court using judicial decisions from other states because those decisions are not binding as precedent on the court, but have some persuasive value.⁴⁰ The best documentation of the general principles of international law are scholarly writings, treatises and legal encyclopedias.⁴¹

D. Secondary Means of Determining International Law: Judicial Decisions and Teachings of the "Most Highly Qualified Publicists"

The final means for determining international law are the "judicial decisions and the teachings of the most highly

37. *See id.* at 55-59.

38. Williams has defined the general principles of law as "general principles of justice, natural law, analogies to private law, principles of comparative law or general conceptions of international law." Williams, *supra* note 15, at 8. Examples of such domestic legal principles include equity, estoppel, *pacta sunt servanda*, unjust enrichment and the use of circumstantial evidence.

39. "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." RESTATEMENT, *supra* note 22, § 102(4).

40. The general principles of law are generally used "to substantiate determinations of customary international law," or as "gap fillers" rather than as precedent. JANIS, *supra* note 15, at 5. *See also supra* Part II.B.

41. *See* Williams, *supra* note 15, at 8, 33-321 (providing examples of primary and secondary sources in bibliographic note).

qualified publicists of the various nations.”⁴² Just what is meant by *secondary means*, and how does this differ from conventions, custom and general principles, which are considered *sources* of international law?

In essence, the categorization of judicial decisions and scholarly writings as secondary means indicates that these two types of materials *do not, in and of themselves, constitute sources of international law*.⁴³ Rather, we can use decisions and scholarly writings to determine whether concepts of customary international law or general principles exist.⁴⁴ For example, suppose a student wishes to argue that a treaty requires a country to act in a certain manner. The student may use the treaty text and negotiating texts to develop his or her argument.

Suppose, however, that the student wishes to argue that an international custom or a general principle requires a country to act a certain way. Because there is no single source that lists all of the customary international concepts or general principles, must the student (or international lawyer) research the practice of every nation or examine the legal systems of numerous nations? This would be a daunting, if not impossible task. Instead, however, the student could look to the secondary means – judicial and scholarly opinions – as evidence of either customary or general principles of international law. The international law moot court student, in fact, will often cite judicial and scholarly materials to develop and support a customary or general principles argument.

The international law moot court student must become comfortable with another way in which judicial decisions perform a different function in the international legal arena than they do in the American legal system. Although American courts acknowledge the precedential and persuasive value of court decisions, the ICJ does not follow the principle of *stare decisis*.⁴⁵ The U.S. Supreme Court described the role of

42. *Id.* at 8 (“Judicial decisions include the decisions of both international and municipal courts.”).

43. STARKE, *supra* note 22, at 44.

44. *Id.*

45. *See supra* note 19 and accompanying text.

judges and scholars in creating international law in *The Paquete Habana*:

[We turn] to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.⁴⁶

Thus, the ICJ's function is to apply the law, not to make new law, and the works of publicists are a means of *ascertaining* the applicable law.⁴⁷ Researchers will use publicists' works and judicial decisions to interpret the various treaties and customs, and therefore define and argue points of relevant international law.⁴⁸

In short, because the sources of international law are usually unfamiliar to the first-year law student – who may at best be only somewhat confronted with American legal hierarchy – it is crucial to develop a curriculum that will introduce students to the basics of these concepts without overwhelming them with the complexities of international law that they would encounter in an upper level introductory public international law course.

46. 175 U.S. at 700.

47. According to Wallace, the works of publicists are “subsidiary means of determining what the law is on a particular issue at a particular point in time, and in the absence of any rule of *stare decisis* in international law, writings do not necessarily carry less weight than judicial decisions.” WALLACE, *supra* note 15, at 25.

48. Some general treatises on international law, written by highly qualified publicists, include J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* (Sir Humphrey Waldock ed., 6th ed. 1963); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (5th ed. 1998); JANIS, *supra* note 15; MALANCZUK, *supra* note 27; 1 OPPENHEIM'S *INTERNATIONAL LAW* (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992); and STARKE, *supra* note 22.

III. INSTITUTION AND ADMINISTRATION OF AN ACADEMIC INTERNATIONAL LAW MOOT COURT PROGRAM

A. The Student Selection Process

Just as there are many students who will jump at the opportunity to study international law in the context of first-year legal writing, there will be many first-year students who have no interest whatsoever in this area, or who would rather hone their domestic research and writing skills during their introductory legal writing course. A look at the Villanova program shows how a first-year international law moot court program can be designed to meet the needs of interested students without preventing uninterested students from learning in a traditional domestic law format.

During the 1994 spring term, Villanova first offered international law moot court to first-year students.⁴⁹ During the fall semester, after students had become accustomed to researching and writing traditional legal writing memoranda based on state or federal law, interested students attended a presentation on the international law moot court program. At that meeting, students were told about the basic differences between the traditional moot court class and the international law moot court option.⁵⁰ Because the course requires students to research sources of law substantially different from the traditional constitution-statute-case hierarchy covered during the first semester of law school, students were given the option to participate in the program or remain in a traditional moot court class that would address traditional domestic legal issues.⁵¹

Of course, if a law school happens to have an international law aficionado among the faculty members who teach first-year courses, the challenge of creating a first-year international law legal writing course might seem a natural outgrowth of that

49. See DIANE PENNEYS EDELMAN, *INTERNATIONAL LAW MOOT COURT COURSE SUPPLEMENT A-1* (2002) (on file with author).

50. For example, in addition to differences in terminology, the students were told about the significant differences between domestic and international legal research and that participation in the international law moot court class would require attendance at additional class sessions.

51. The program has been fully enrolled for every academic year.

faculty member's academic interests. For those schools where the creation of such a program is desirable but not a natural outgrowth of the first-year faculty, there are a number of suggestions for creating and administering this type of program.

Under this kind of system, students may have a different legal writing professor for the second semester. Despite initial concerns about continuity and consistency of instruction, overall, students who opted to participate in the international law moot court program did not feel disadvantaged by switching professors at mid-year, nor did those students who switched into domestic law moot court legal writing sections.⁵²

Selection of students for an optional international law moot court program can also work well at a school that operates, in whole or in part, on an adjunct system. In that situation, the school may hire one or more adjuncts who teach only during the semester when moot court is required.⁵³ Using a lottery system, the adjunct will "pull" interested students from the first-year class *without* sending students back into the other legal writing professors' class sections. Thus, the traditional legal writing professors and their students benefit because they have smaller moot court classes.

B. Course Materials

As mentioned previously, the field of international law is distinct from domestic law in its hierarchy of law, research materials and court procedures. Before those students enrolled in international law moot court can begin to research and draft

52. Syracuse, for example, divides its first-year students among several "law firms," including a "firm" that specializes in international law. See Telephone Message from Richard S. Risman, *supra* note 8. Syracuse solicits interest in the international law firm during the summer preceding the students' first-year, and selected students are exposed to international law throughout the entire first-year legal writing program. *Id.* During the first semester, students work on international law problems arising from federal law, and during the second semester, they work on problems arising from treaty law. *Id.*

53. Brooklyn Law School uses this system. Since 1984, Brooklyn Law School has hired one or more adjunct professors each spring to teach its international law moot court sections. See E-mail from Marilyn R. Walter, *supra* note 7.

writing assignments effectively, they must become familiar with the basic concepts and structures of international law. Toward that end, the professor should compile an international law supplement to the students' traditional legal writing test.⁵⁴ A useful supplement might include materials on practicing international law, structures of international courts and organizations and basic readings on the sources of international law. Additionally, the supplement would contain a list of web resources⁵⁵ and a variety of research and writing exercises.

Development of moot court problems is, of course, a crucial portion of designing a successful international law moot court course. One does not have to start from scratch, however. Since several law schools have instituted international law moot court programs, the opportunity to share problems makes problem development relatively painless. In addition, once a class of first-year moot court students graduates, a problem may be modified and "recycled." Once a professor develops a successful problem, he or she may also modify it as the law changes over the years, i.e., if a relevant treaty is terminated or enters into force, or a new area of law (such as cyberlaw) emerges.

On a cautionary note, the international law moot court professor should avoid using or modifying previous Jessup or other official international law moot court competition problems in class. Not only may this raise copyright issues, but several of these competitions publish their best briefs on-line or in print, thus subverting the professor's ability to have the students research their problems independently and tempting students to plagiarize.⁵⁶

C. Supplemental Instruction

Mastering the basics of international law also requires additional class sessions. Students will discover that these

54. See *infra* Appendix A.

55. See *infra* Appendix B.

56. See generally ASS'N OF STUDENT AM. INT'L LAW SOC'Y, PHILIP C. JESSUP INT'L LAW MOOT COURT COMPETITION COMPENDIUM (2001). Published competition briefs, however, may provide examples of excellent briefs upon which students can model their work.

sessions are valuable because they lay the informational foundation upon which they will build their working knowledge of international legal concepts and structures.

At the outset of the term, class discussions should focus on the nature of international law, including its sources, principle concepts and governing bodies. First, the professor should explain the sources of international law discussed above. Attention should focus on the hierarchical structure of the sources of international law and the weight placed on these sources by international institutions such as the ICJ.⁵⁷ Second, the professor should introduce students to the guiding principles of international law, such as *jus cogens*,⁵⁸ *opinio juris*,⁵⁹ and *pacta sunt servanda*.⁶⁰ Because these and other important international principles are unknown to new students of international law, they generally require a thorough explanation. Finally, it is important for students to understand the role played by international institutions such as the United Nations and the ICJ, two of the primary mechanisms for international dispute resolution. Once students begin to understand how these principles and institutions interact in the international arena, their research will progress much more effectively. There are numerous texts that can serve as a basis for discussing these and other international law concepts.⁶¹

57. One lesson to impress upon students is the difference between the precedential value of a U.S. Supreme Court decision in an American court as compared with a decision of an international court. In a domestic court, the existence of a Supreme Court decision would, of course, strongly influence the parties to a similar dispute in the state or federal courts. In an international court, however, a decision of the U.S. Supreme Court represents the viewpoint of only one country among many. *See supra* notes 14, 42-45 and accompanying text. *See also, e.g.,* LaGrand Case (F.R.G. v. U.S.), 40 I.L.M. 1069 (June 27), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> (last visited Feb. 19, 2002) (criticizing the United States Supreme Court's decision upholding the denial of the Vienna Convention on Consular Relations protections to foreign nationals convicted of a capital crime).

58. *See* Vienna Convention on the Law of Treaties, *supra* note 23, art. 53.

59. *See* JANIS, *supra* note 15, at 46-48.

60. *See id.* at 66.

61. *See generally* JANIS, *supra* note 15; WALLACE, *supra* note 15; William *supra* note 15.

Students exploring the field of international law for the first time are generally unfamiliar with the wide variety of resources available to the international law researcher. For most second-semester law students, familiarity with library resources is limited to domestic sources, such as case reporters, statutes, encyclopedias and digests. Although students may have been given a glimpse of international research materials during their first semester of law school, international research resources remain largely undiscovered to first-year students.

Before students delve into the research phase of their writing assignments, their legal writing professors should provide them with a general introduction to the variety of international law sources available both in print and electronically. Texts on legal research can provide students with the background necessary to begin a fruitful research process,⁶² and on-line resources abound.⁶³ After assigning these informational texts, professors should schedule a library tour so that the students can see first-hand the sources discussed in the texts. International and foreign law librarians can provide invaluable assistance conducting these tours and/or teaching the students how to perform international legal research.

A guided tour through the international sections of the school's law library will familiarize students with the wide variety of available international law resources. On a practical level, the tour acquaints students with the physical location of the resources and other tools, such as computerized databases, necessary to access the information. During the tour, a law librarian should briefly explain the type of information contained within each resource and how the students can effectively access the information. For general background information on international law, the law librarian should point out texts such as international treatises, encyclopedias and law journal articles.⁶⁴ Of particular importance to the students during the research phase of their writing

62. See MORRIS L. COHEN ET AL., *HOW TO FIND THE LAW* 451-95 (9th ed. 1989); *GUIDE TO INTERNATIONAL LEGAL RESEARCH* (Geo. Wash. J. Int'l L. & Econ. ed., 2d. ed. 1993).

63. See *infra* Appendix B.

64. Prior to the tour, the professor might consider which types of documents will be particularly important to the students' research and should make sure the students are aware of these resources.

assignments will be the international treaty collections, such as the *United Nations Treaty Series*, the *League of Nations Treaty Series*, the *Consolidated Treaty Series* and the *Treaties and Other International Agreements Series*. The law librarian should point out these and other valuable resources such as ICJ decisions, UN documents, and other organizational charters throughout the tour, and may introduce students to electronic resources as well.

The school's Jessup International Law Moot Court Team and any other international law moot court teams are other valuable resources that can provide students with additional background on the concepts and mechanics of international law. Mandatory attendance at an international law moot court team practice round, considered invaluable by Villanova students,⁶⁵ will assist students as they begin to formulate arguments for their writing assignment. Witnessing a practice round brings into focus elusive concepts such as customary international law and general principles of international law, which are often initially difficult for students to grasp. Actually hearing a participant explain customary international law to a judge during a practice round, for example, reinforces the information digested by students as they review introductory materials, begin their research and take part in classroom exercises. Finally, the team's practice round tends to quell feelings of anxiety experienced by students as they progress toward preparing for their own oral arguments. The practice introduces the students to the format of oral arguments and the types of questions they may be asked.

D. Classroom Exercises

While learning how to research international law, international law moot court students must also prepare to face

65. This has been reported anecdotally by Villanova students over the past nine years. When surveyed about the value of attending oral argument at the 2002 Atlantic Regional Rounds of the Jessup Competition, which was hosted by Villanova, students overwhelmingly reported that observation of the arguments helped them to better understand the concept of customary international law, use and argument of international legal sources and advocacy in general. See Questionnaire for Students of Legal Writing, Section G at Villanova University School of Law, Villanova, Pa. (Feb. 12, 2002) (on file with author).

the challenge of writing a formal, persuasive brief, which in international lingo is called a "memorial."⁶⁶ Persuasive writing may come more naturally to some students than the rigid objectivity required in traditional first-semester legal writing assignments. On the other hand, many students are unfamiliar with the subtleties of persuasive writing and may therefore need some instruction. Regardless of their background, classroom exercises on the techniques of writing persuasive briefs are a useful tool to sharpen the skills of all students.

Legal writing professors should design exercises that teach students the basics of constructing persuasive arguments. Again, the type and content of the exercises is limited only by the professor's imagination. In a typical exercise, the professor might provide the students with a packet of information that describes a hypothetical international legal dispute, a list of relevant international legal principles and sample memorial abstracts relating to the dispute. The professor should then divide the students into small collaboration groups, with each group representing a different country in the dispute, to help the students learn to identify international legal issues and the key facts and arguments that relate to them. The groups may meet outside of class to discuss how the facts and international principles can be effectively molded into persuasive arguments for their side of the dispute. Students should come to the next class prepared to discuss their group's findings.

Questions for the students to consider might include: what facts do we emphasize to make our arguments more persuasive; what facts should we de-emphasize; and what international principles support our country's position? In addition, the students can draft different parts of their memorials – facts, summary of argument, point headings and the like – before completing a full draft of their memorials.

In-class discussion of the arguments formulated during collaborative, out-of-class sessions can develop into a lively debate as the students set forth persuasive arguments to further the interests of their assigned country. Discussion of

66. Ted T. Amsden & Margaret A. Costello, *Arguing in the Hague*, 73 MICH. BAR J. 1094, 1094 (1994).

the issues can focus on how the different groups chose to shape the facts in favor of their countries.

E. Citation Methods

An additional challenge confronted by students who choose to study international law is how to cite international legal materials properly. To prepare a thorough memorial, students typically will have to cite treaties, UN documents, decisions of international courts and tribunals and law review articles. Generally, during their first semester of law school, students learn only the basic rules of proper citation for domestic materials such as cases, statutes and law reviews. Therefore, students enter into the international law moot court program with little, if any, knowledge of how to cite international materials. As mentioned previously, there is a large body of international materials available to researchers, many with unfamiliar and often complicated citations. Spending some time reviewing the most commonly cited international materials, such as treaties, constitutions, statutes and UN documents aids students in their research and improves the accuracy of their citations. Citation forms for these types of materials can be found in both *The ALWD Citation Manual: A Professional System of Citation*⁶⁷ and *The Bluebook: A Uniform System of Citation* (commonly known as the "Bluebook").⁶⁸ Either of these reference texts may be used to develop sets of legal citation problems to teach students how to cite previously unfamiliar international research materials.⁶⁹

67. DARBY DICKERSON & ASS'N OF LEGAL WRITING DIRS., *THE ALWD CITATION MANUAL: A PROFESSIONAL SYSTEM OF CITATION*, R. 21.0 (2000).

68. *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* R. 21, at 157 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000).

69. For example, professors should draft sample citations, which include a wide variety of sources, such as treaties, journals, arbitral awards, ICJ cases, treatises and UN documents, that are not in correct form. After the students complete the citations, provide them with the correct citation forms to ensure accuracy. These and similar exercises will make the task of citing international documents less daunting as students begin writing their research papers. While learning the new citation forms is challenging, students are generally pleased to broaden their knowledge with the variety of sources and the proper forms of citations.

IV. INTRODUCING INTERNATIONAL LAW INTO THE FIRST-SEMESTER LEGAL WRITING CURRICULUM

Granted, development and incorporation of a workable first-year international law moot court program into the law school curriculum may require a bit of planning and a willingness to innovate in the first-year curriculum, but as shown above, "Where there's a will, there's a way." Incorporating international law into the first semester of the legal writing curriculum, however, is relatively simple.

During the first semester of a first-year legal writing course, students typically prepare a series of office memoranda based on hypothetical legal problems. Initial problems may use a "closed universe," that is, students are given a statute and/or several cases with which to analyze their client's problem and may not perform additional research. Subsequent problems usually involve "open" research, for which the student's research is only limited by parameters set by the professor.⁷⁰

So, why not internationalize the memo writing process by assigning problems that raise issues of international law? Consider these examples:

(1) Rule 44.1 of the Federal Rules of Civil Procedure regulates the method by which a party to litigation may raise an issue of foreign law in a federal court proceeding. The student must advise whether a client who wants the court to apply foreign law concerning the propriety of a foreign adoption can do so under the Rules.

(2) The student represents a client that is a foreign corporation, which has been sued in federal district court. Under what circumstances can the client successfully move to dismiss the complaint based on *forum non conveniens*?

(3) The client is a foreign resident who believes that a foreign bank may have illegally obtained assets stolen from her family during the Holocaust. Can she file suit under the California Code of Civil Procedure?

(4) The client is party to a divorce proceeding pending in a foreign country. Can the foreign judge, magistrate or prosecutor obtain evidence from the client's U.S. bank to assist

70. See SOURCEBOOK, *supra* note 4, at 13.

a foreign court in adjudicating the foreign proceeding under 28 U.S.C. § 1782?

(5) The client was intentionally harmed by a national of a foreign country when the client was traveling abroad. If the tortfeasor travels to the U.S., can the court obtain jurisdiction over her under the Alien Tort Claims Statute?

(6) A foreign government is considered by the United States to be a "state sponsor of terrorism." Can a U.S. citizen sue the foreign government successfully under an exception to the Foreign Sovereign Immunities Act?

These examples demonstrate but a few of the ways that the legal writing professor can internationalize the first semester of legal writing without requiring the students to analyze treaties, custom or other sources of international law. In fact, these problems illustrate the importance and role of international and foreign law in the American legal system. Through exposure to these issues, students can begin to see the importance of the actions and laws of foreign individuals and countries within our own legal system. A legal writing professor need not be an international law aficionado to incorporate international law into the first semester of the first-year legal writing program. All that is needed is knowledge of relevant domestic statutes and common law.

V. CONCLUSION

In the modern world made smaller by the Internet and instantaneous media reporting of world events, one can only assume that the interests of law students in matters of international and foreign law will not only grow, but familiarity with these concepts will be essential to their practice of law. The suggestions offered by this Article present curricular options that are relatively easy to incorporate into the first-year legal writing program. The opportunity to broaden our students' horizons can start when they enter the door to the law school. Why not seize this opportunity?

Is this experiment really worth the trouble? So far at Villanova, experience has answered this question with a resounding "yes." Despite being forewarned that participation in this program would require more difficult research and

additional class hours, interest in the program has exceeded the number of class spaces available.⁷¹ Students who have completed the program have gone on to achieve membership on the *Villanova Law Review* and other law school organizations that base their selection criteria on either grades or completion of a substantial traditional legal writing project. In addition, students have found that their experiences have led to research assistantships involving international law, and have provided them with new conversation topics at job interviews.

In short, student experience has disproved the myth that a foray into a nontraditional subject during the first year of law school will somehow work to the students' detriment. Instead, the course has provided the students with a unique and challenging educational experience that broadens their world view while expanding the traditional first-year law school curriculum. Their experience should indeed prove that "[a] legal education that makes international norms an integral part of the program [should] enable us to view the world in a different way, and perhaps make us better able to function as lawyers and judges in a larger world."⁷²

71. During a majority of the nine years since the inception of the Villanova program, there has been a waiting list for enrollment in the course. As of Spring 2002, more than 300 students will have taken part in the Villanova program.

72. Jay M. Vogelsson, *A Practitioner Looks at Globalization: II*, 46 J. LEGAL EDUC. 315, 316 (1996).

APPENDIX A. SAMPLE TABLE OF CONTENTS FOR INTERNATIONAL LAW MOOT COURT SUPPLEMENT⁷³

- A. Introduction
- B. Comparison of Memorandum, Traditional Brief and International Law Memorial
- C. Articles on Practicing International Law
- D. Reading List and Other Resources (including Villanova and Cornell Law School international legal research web resources)
- E. General Information on the International Court of Justice (from ICJ web site)
- F. Statute of the International Court of Justice, United Nations Charter and Rules of the International Court of Justice (excerpts)
- G. Readings on the Sources of International Law
- H. Readings on International Legal Research
- I. Vienna Convention on the Law of Treaties
- J. Outer Space Treaty and Exercises
- K. Continental Shelf Exercises
- L. *Mandela/Kashvili* Problem – Sample *compromis*
- M. Memorial Preparation Schedule, Checklist and Sample Cover Sheets
- N. Readings on Brief Writing and Oral Argument
- O. 2001 Jessup Competition Problem and Clarifications (Erebus/Merapi)
- P. *Breard v. Greene*, 523 U.S. 371 (1998)
- Q. Case Concerning the Vienna Convention on Consular Relations, (*Paraguay v. United States*), Order dated April 9, 1998 and Declarations of President Schwebel, Judges Oda and Koroma

73. This is an annotated copy of the Table of Contents from the author's INTERNATIONAL LAW MOOT COURT COURSE SUPPLEMENT for the Spring 2001 term. DIANE PENNEYS EDELMAN, INTERNATIONAL LAW MOOT COURT COURSE SUPPLEMENT (2001) (on file with author). The problem used during that term involved the death penalty under international law, which is addressed in items P and Q on this table. Items A through D and J through M were prepared by the author. For more information, contact the author at edelman@law.villanova.edu.

APPENDIX B. INTERNATIONAL LAW WEB SITES

The list of international law web sites that are useful for research is virtually infinite. A sample follows:

- A. American Society of International Law Springboard
<http://www.asil.org/spgbd.htm>
- B. American Society of International Law Program –
“Researching International Law on the Internet”
<http://www.asil.org/research.htm>
- C. Cornell Law Library Legal Information Institute
<http://www.law.cornell.edu/world>
- D. Global Legal Information Network, Law Library
of Congress
<http://www.loc.gov/law/guide/multi.html>
- E. Hieros Gamos
<http://www.hg.org>
- F. International Law Students Association Legal Links
<http://www.ilsa.org>
- G. International Website Appendix, Professor William
Slomanson, Thomas Jefferson School of Law
<http://home.att.net/~slomansonb/intlweb.html>
- H. New England School of Law Center for International
Law and Policy
<http://www.nesl.edu/center>
- I. Syracuse University College of Law, Global Law &
Practice Links
[http://www.law.syr.edu/academics/academics.as
what=global_links](http://www.law.syr.edu/academics/academics.as?what=global_links)

J. Villanova University School of Law, International and Foreign Law Finder

<http://vls.law.vill.edu/compass/international/index.htm>