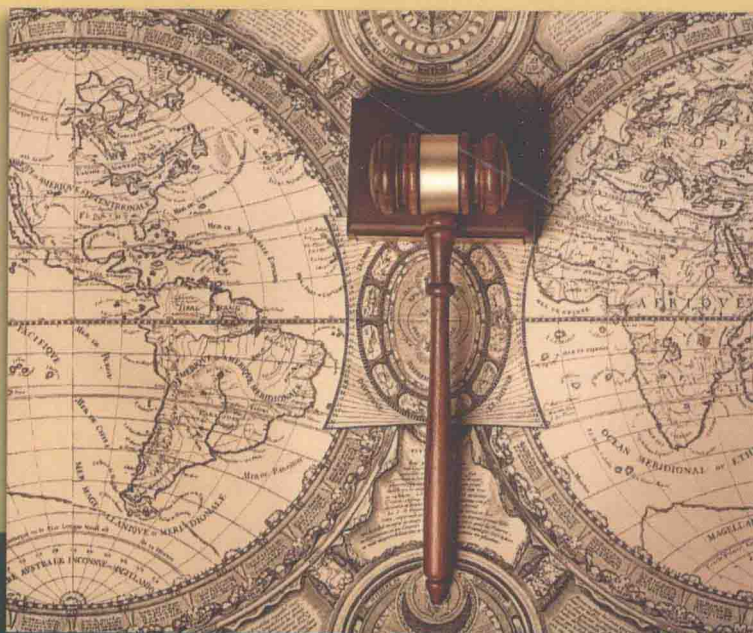


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INTERNATIONAL LAW

SEVENTH EDITION



Mark Weston Janis



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International Law

Seventh Edition

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To Janet and the boys

Preface

This book endeavors to introduce the discipline of international law in such a way as to clarify and order a dauntingly complex and variegated subject. It is written with J. L. Brierly's English classic, *The Law of Nations*, in mind. It is my aim to provide a book, as Brierly did first in 1928 and last in 1955, "not intended as a substitute for the standard text-books on the subject, but as an introduction either for students who are beginning their law courses, or, I hope, for laymen who wish to form some idea of the part that law plays, or that we may reasonably hope that it will play, in the relation of states." Two important distinctions, besides the obvious one of relative modernity, distinguish Brierly's book and mine. First, Brierly's book drew heavily, though far from exclusively, on British practice in international law; mine emphasizes the international practice of the United States. Second, this book's ambit is somewhat broader than Brierly's in that I introduce international law not only in its traditional public or interstate sense, but also in its increasingly important private and commercial aspects.

Between this seventh edition and the earlier editions (1988, 1993, 1999, 2003, 2008, 2012) more changes have been made to the substantive international law of the later chapters than to the early conceptual chapters that introduce international legal rules and process. Besides just keeping up-to-date, this new edition captures, I hope, the spirit of our transition to the post-Cold War era, the rise of such recent topics as the specter of international terrorism, the emergence of international organizations, the proliferation of international courts and tribunals, and the problems posed by American exceptionalism, both judicial and political, to international law. Brierly's *Law of Nations* faced similar transitional tasks: the first two editions of 1928 and 1936 were written amidst all the doubts about the viability of international law in the interwar period, the third edition of 1942 emerged in the carnage of World War II, and the fourth and fifth editions of 1949 and 1955 sought to capture the flavor of the Cold War and the new threat of nuclear annihilation. My book shares Brierly's view, expressed in his fourth edition, that international law "is neither a myth on the one hand, nor a panacea

on the other, but just one institution among others which we can use for the building of a saner international order."

Three questions more or less structure the text: What are international legal rules? What is international legal process? What role does international law play in international relations? Answering the questions in order yields an unremarkable organization for an international law book except that the law of treaties is discussed alongside the topic of treaties as a source of international law, public international arbitration and the International Court follow immediately after the role of international law in the municipal courts, and, as aforementioned, the "private" as well as the "public" part of international law is introduced. The book is meant to reflect international law generally and should prove a useful read either on its own or as a supplement to any of the standard American legal or political casebooks on the subject. Except for a fuller rendering of some sources normally abbreviated, the standard forms of American legal citation have been followed in the footnotes.

Although the book and its faults are mine, I know that its perspectives have been shaped and sharpened by the able scholars who taught me, especially Thomas Kuhn and Joseph Strayer at Princeton, Brian Simpson and Humphrey Waldock at Oxford, and Louis Sohn and Henry Steiner at Harvard; to them I am particularly grateful. Three years in the Navy, three more practicing international law with Sullivan & Cromwell in New York and Paris, and now thirty-five years teaching in the United States, England, and continental Europe have given me certain insights but denied me others. Let me thank friends and colleagues who have helped along the way: Dapo Akende, William Alford, Nicholas Bamforth, David Bederman, Rudolf Bernhardt, Phillip Blumberg, Fernand Boulan, Tony Bradley, John Bridge, Ian Brownlie, Thomas Buergenthal, George Bustin, William Butler, Dan Caldwell, David Caron, Dominique Carreau, Fred Chapman, Frederick Chen, Sarah Cox, Paul Craig, James Crawford, Donald Daniel, Yves Daudet, Ruth Deech, Jozef Deelen, Laura Dickinson, Carolyn Evans, François Ewald, Tim Fisher, Francesco Francioni, James Friedberg, Jochen Frowein, Albert Gastmann, Martin Glassner, Edward Gordon, Richard Graving, Christine Gray, Nicholas Grief, Keith Highet, Garfield Horn, James Hyde, Olimpiad Ioffe, Karel Jungwiert, Richard Kay, Benedict Kingsbury, Harold Koh, Hans Christian Krüger, Molly Land, Dominik Lasok, Herbert Lazerow, Detlef Leenen, Randall Lesaffer, Michel Lesage, Vaughan Lowe, Houston Lowry, Robert Lutz, Hugh Macgill,

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International Law

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CHAPTER 1

The Nature of International Law

A. THE HISTORY OF INTERNATIONAL LAW

The roots of international law run deep in history. In early religious and secular writings, there are many evidences of what we now know as international law; there are, for example, the detailed peace treaties and alliances concluded between the Jews and the Romans, Syrians, and Spartans.¹ The Romans knew of a *jus gentium*, a law of nations, which Gaius, in the second century, saw as a law “common to all men,”² a universal law that could be applied by Roman courts to foreigners when the specific law of their own nation was unknown and when Roman law was inapposite. In the seventeenth century, the Dutch jurist Hugo Grotius argued that the law of nations also established legal rules that bound the sovereign states of Europe, then just emerging from medieval society, in their relations with one another.³ Grotius’ classic of 1625, *The Law of War and Peace*, is widely acknowledged, more than any other work, as founding the modern discipline of the law of nations, a subject that, in 1789, the English philosopher Jeremy Bentham renamed and refashioned as “international law.”⁴

¹ 1 Maccabees 8:17-32, 11:28-37, 12:1-23.

² The Four Commentaries of Gaius on the Institutes of the Civil Law, 1 *The Civil Law* 81 (Scott ed. 1973).

³ H. Grotius, *De Jure Belli ac Pacis Libri Tres* (Kelsey trans. 1925).

⁴ J. Bentham, *An Introduction to the Principles of Morals and Legislation* 296 (Burns and Hart eds. 1970).