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国际法学

STEPHEN ALLEN

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国际法学

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著名法学家江平教授、许章润教授为

《西方法学经典教材系列》题词

教材所收皆为精品，精准阐释了英美法制的专门领域，而篇幅适中，书写畅达，值得一读。

——中国政法大学终身教授 江 平

采撷异域法意，以接济和光弘本土法律精神，助推中国转型，进而建政立制，本套教材正当时也！

——清华大学法学院教授 许章润

华中法学出版学术顾问

(按姓氏笔画为序)

方流芳 刘春田 张 军 郭寿康

《国际法学》导读

由英国 PEARSON 出版社授权华中科技大学出版社出版的《法学初阶——西方法学经典教材系列·影印双语注释本》已经与读者见面了。该系列涵盖了国内法学本科生必修的法学课程内容，是一套非常适合中国法学院校本科生系统了解与学习英美法系课程内容的经典教材，同时该教材兼顾法律英语的学习目的。

《法学初阶——西方法学经典教材系列·影印双语注释本》，通过中英文双语注释的方式，把原汁原味的英国各类部门法的内容介绍给读者，这是该系列教材与以往出版的影印版法学书籍最大的不同之处。注释者依据国内法学院校教授英美法系课程内容和法律英语教学的特点，在参考《布莱克法律字典》、《元照英美法词典》、《牛津法律大辞典》等多部权威字典基础上，采取中英文双语注释的方式，将教材中重要的法律词汇一一作出解释。这样，便于大家学习英美法系课程内容，同时也能够更快地掌握法律英语。

《法学初阶——西方法学经典教材系列·影印双语注释本》的出版，旨在将英美法系中（英国各部门法）的法律内容介绍给中国法学院校的老师与同学们，大家可以借助中英文注释这一桥梁，便捷、准确地了解英国法律。

出版者希望采用该系列教材的法学院校师生们，喜欢我们这样的编排方式，并从中受益，也期待师生们对其提出宝贵意见！

下面是对这套法学经典教材之一《国际法学》的介绍。

国际法，是法学本科生必修课程之一。在这本教材中，作者采用简明易懂的语言将其重点知识，如国际法的性质、国际法的渊源、条约、国际法与国内法的区别，使用武力，国家责任与外交保护等内容一一作了介绍与阐释。教材

每一章节之始，作者为其内容的重点知识词汇编制了知识网络图，这种最为直观的方式，可以使学生在学习前就对其有一个完整及初步的了解。同时，每一章节还配有相关的案例以及分析，这样可以帮助学生理解相关知识并熟悉司法实践过程，提高运用能力。再有，每一章节还附有部分内容的知识图表，便于学生对所学的知识能够得到及时的总结和梳理。

《国际法学》这本教材语言简明易懂，便于老师和学生在短时间内掌握国际法学的主要内容，并了解英国法是从怎样的角度和思路介绍国际法内容的。教材附录部分的重点词汇，可以使学生很快地理解重点词汇的含义，以扫清阅读和学习障碍。

为了保证本教材中英文注释的准确性，出版社邀请了武汉大学法学院教授法学博士杨泽伟担任专业审校，确保该教材注释内容的专业精准和学术权威。

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Stephen Allen
Queen Mary, University of London

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Our thanks go to all reviewers who contributed to the development of this text, including students who participated in research and focus groups which helped to shape the series format.

Introduction

International law is a popular subject which attracts large numbers of students. However, students often struggle with a number of its substantive topics. In part, this is because international law is very different to most other subjects that most students will have encountered. Many legal subjects (e.g. contract law) exist within a national law framework. Their rules are contained within recognised sources of law (e.g. in a statute), produced by established institutions whose authority to create law is unquestioned (e.g. Parliament). Such rules are liable to be enforced by the courts. In short, a national legal system is a hierarchical legal system. In sharp contrast, international law regulates relations between States and it recognises that all States are equal and sovereign. The international legal system does not have a central legislature nor a court endowed with compulsory jurisdiction to resolve legal disputes. In essence, it is a horizontal legal system. Consequently, international law is a very different kind of 'law' from national law and the fundamental differences between the discrete areas of national law and international law can prove to be quite challenging for students. These differences can impact on any analysis of the nature of the international legal system; they can make it difficult to identify when international law has been created or changed; and they can make it difficult to identify and interpret international legal rules.

As a result, students face significant challenges in answering assessment questions in this subject. Questions often focus on theoretical legal issues. This book helps you to answer such questions, first, by highlighting the abstract issues that have shaped the subject. Second, it identifies the subject's pervasive themes so that you can understand discrete topics in a wider context. Finally, the book uses a range of innovative devices to provide you with strategic advice on how to recognise problematic aspects of international law and how best to tackle them.

Another challenge that international law presents to students is the fact that its various topics are closely interrelated. An assessed question will often involve a number of discrete topics. Accordingly, you will need to acquire a sound knowledge of a wide range of topics and you will also need to understand how they relate to each other. This book advises you on the best way to enhance your technique of answering assessed problems and essay questions. It shows you how to identify the applicable law; how to construct relevant arguments

by reference to the most appropriate legal sources; and how to relate the discrete topics of international law to one another in a structured and coherent manner.

However, you should appreciate that the present book is no substitute for a good textbook. It enables you to consolidate and make sense of your learning. It offers you a concise account of the subject's key topics with the aim of providing you with targeted advice on how to improve your performance in assessed work by introducing you to a number of tried and tested revision methods and tips that will help you on the road to success.

**REVISION NOTE**

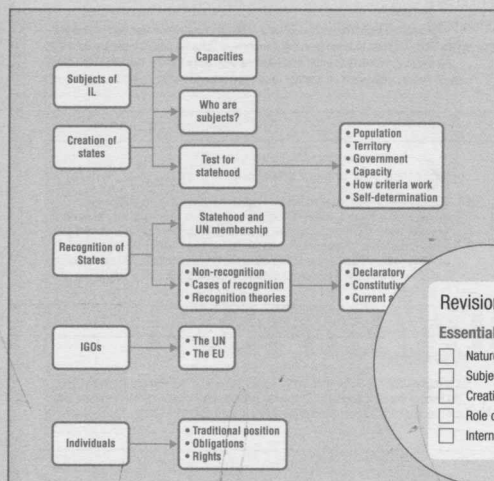
Use this book alongside your recommended textbook and the applicable primary sources (international instruments and cases).

International law topics are closely related and so it is important that you revise the whole syllabus of your international law module in order to give yourself the best opportunity of answering assessed questions well.

International law is quite different from any of the legal subjects that you have studied before. You should be sensitive to the unique challenges that it poses for international law as a form of 'law' and the implications that its unusual legal character has for assessed questions in this subject.

Before you begin, you can use the study plan available on the companion website to assess how well you know the material in this book and identify the areas where you may want to focus your revision.

Guided tour



Topic maps – Visual guides highlight key subject areas and facilitate easy navigation through the chapter. Download them from the companion website to pin on your wall or add to your own revision notes.

Revision checklists – How well do you know each topic? Use these to identify essential points you should know for your exams. But don't panic if you don't know them all - the chapters will help you revise each point to ensure you are fully prepared. Print the checklists off the companion website and track your revision progress!

Revision checklist

Essential points you should know

- ☐ Nature of international law
- ☐ Subjects of international law
- ☐ Creation of States in international law
- ☐ Role of recognition in international law
- ☐ International legal personality

Sample questions with Answer guidelines –

Practice makes perfect! Read the question at the start of each chapter and consider how you would answer it. Guidance on structuring strong answers is provided at the end of the chapter. Try out additional sample questions online.

Assessment advice – Not sure how best to tackle a problem or essay question?

Wondering what you may be asked? Use the assessment advice to identify the ways in which a subject may be examined and how to apply your knowledge effectively.

Key definitions – Make sure you understand essential legal terms. Use the flashcards online to test your recall!

Sample question

Could you answer this question? Below is a typical problem question that could arise on this topic. Guidelines on answering the question are included at the end of this chapter, whilst a sample essay question and guidance on tackling it can be found on the companion website.

ASSESSMENT ADVICE

Essay questions

Essay questions are popular in relation to particular issues such as the creation of States in international law or the doctrines concerning recognition. They often focus on the differences between legal theory and practice. They require students to have a good level of understanding of the relevant legal doctrines and the various case examples.

Problem questions

These questions typically provide a scenario in which a new State has been created. You need to understand the legal rules governing statehood and recognition. There are plenty of case examples in this area. However, the relationship between statehood and recognition is complicated and so you should take care not to confuse these doctrines with one another.

KEY DEFINITION: International legal personality

'A subject of the law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims.'
Reparations Case (1949) ICJ Rep. 174.

Key cases and Key instruments – Identify and review the important elements of the essential cases and legal instrument you will need to know for your exams.

KEY INSTRUMENT

Article 1, Montevideo C

The State as a person of
(a) permanent population
enter into relations with

KEY CASE

Austro-German Customs Union Case (1931) PCIJ Series A/B, No. 41
Concerning: whether a customs union would violate international law

PCIJ had to decide whether a planned customs union between Germany and Austria would compromise Austria's sovereign independence in contravention of the 1878 Treaty of Saint-Germain (1919) and a 1922 Protocol.

PCIJ decided that 'independence' as a criterion of statehood was only concerned with a State's formal independence. Accordingly, a State retains its independence if it has the legal capacity to enter into relations with other States. The fact that a State may be heavily dependent on another State does not undermine its legal independence.

Make your answer stand out – This feature illustrates sources of further thinking and debate where you can maximise your marks. Use them to really impress your examiners!

✓ Make your answer stand out

States which have recognised Kosovo have preferred not to express the legal basis for their decision. Is Kosovo a case of self-determination? Do you think that States are worried about the potential for the right of self-determination to be used as a means of dissolving federal States? Does the case of Kosovo demonstrate the overt political nature of recognition? Kosovo is not a UN member. Russia would use its veto in the UNSC if Kosovo made an application for admission. Can it be a State without this status? See Weller (2008).

Exam tips – Feeling the pressure? These boxes indicate how you can improve your exam performance when it really counts.

EXAM TIP

It is important to remember that, traditionally, international law was not concerned with the internal affairs of sovereign States. States were considered to be free to choose their own domestic institutional arrangements (e.g. see Art. 2(7) UN Charter). Consequently,

Revision notes – Get guidance for effective revision. These boxes highlight related points and areas of overlap in the subject, or areas where your course might adopt a particular approach that you should check with your course tutor.

REVISION NOTE

You should familiarise yourself with the international law relating to title to territory and self-determination (see Chapter 7).

Don't be tempted to . . . – This feature underlines areas where students most often trip up in exams. Use them to spot common pitfalls and avoid losing marks.

! Don't be tempted to . . .

Don't confuse the topic of recognition of States with recognition of governments. While these areas share certain concepts they are different in important respects.

Read to impress – Focus on these carefully selected sources to extend your knowledge, deepen your understanding, and earn better marks in coursework as well as in exams.

READ TO IMPRESS

- Brownlie, I. (1982) 'Recognition in Theory and Practice', 53 BYIL 197
Craven, M. (1995) 'The European Community Arbitration Commission on Yugoslavia', BYIL 66, 333
Crawford, J. R. (2006) *The Creation of States in International Law*, 2nd edn. Oxford University Press.
Schwarzenberger, G. (1976) *International Law*
Weller, M. (2008) *Contested Statehood: Kosovo's Struggle for Independence*. Oxford University Press.

Glossary – Forgotten the meaning of a word? This quick reference covers key definitions and other useful terms.

Glossary of terms

The glossary is divided into two parts: key definitions and other useful terms. The key definitions can be found within the chapter in which they occur as well as in the glossary below. These definitions are the essential terms that you must know and understand in order to prepare for an exam. The additional list of terms provides further definitions of useful terms and phrases which will also help you answer examination and coursework questions effectively. These terms are highlighted in the text as they occur but the definitions can only be found here.

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The nature of international law



Revision checklist

Essential points you should know:

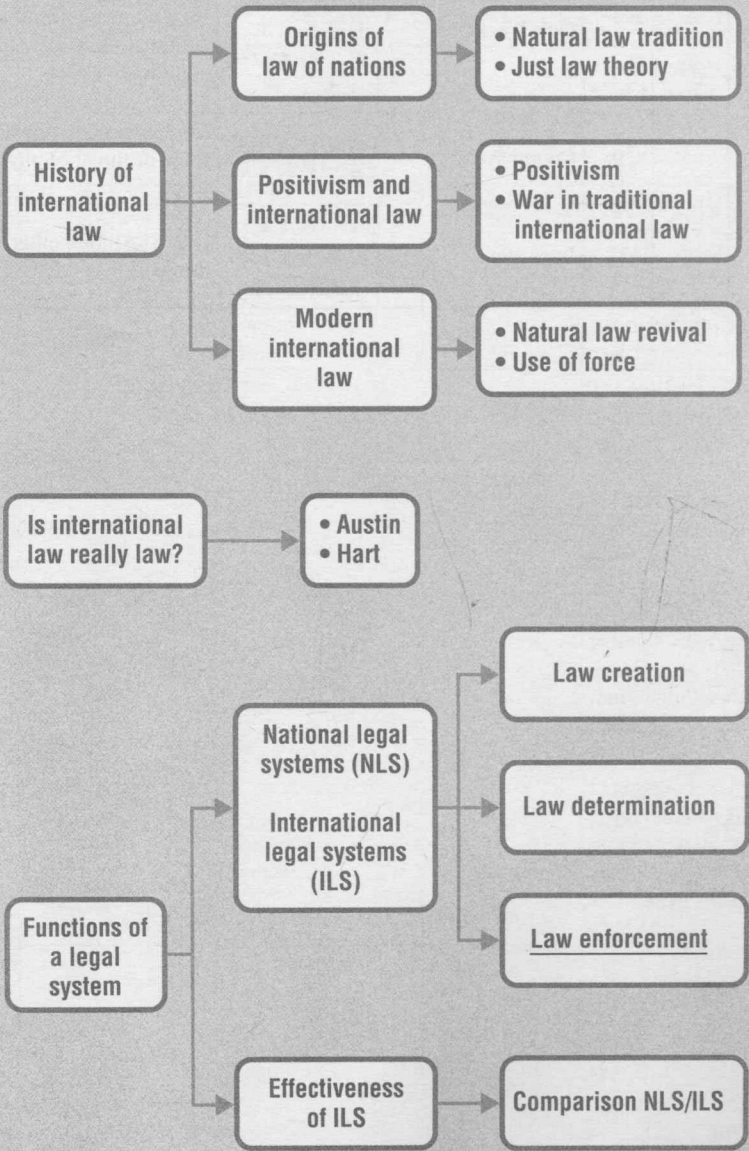
- ☐ Basic structure of the international legal system
- ☐ Foundational principles of international law
- ☐ Whether international law really is a form of 'law'
- ☐ Functions of a legal system
- ☐ Whether the international legal system is an effective legal system

第一章注释

序号	页	表格	行	词汇	中文注释	English
1	4	2		Law enforcement	法律的实施	The detection and punishment of violations of the law; criminal justice
2	5		11	Nature of Law	法律的性质	
3	6		8	Sovereignty	主权	Supreme dominion, authority or rule; the state itself
4			22	Consent	同意、合意、允许	Agreement, approval, or permission as to some act of purpose
5			26	Manslaughter	非预谋杀人罪	The unlawful killing of a human being without malice aforethought
6	7		5	Bind	使受（法律、判决、合同等的）约束；使承担法律义务	To impose one or more legal duties on (a person or institution)
7	9		7	Jus cogens	强行法	A mandatory norm of general international law from which no two or more nations may exempt themselves or release one another
8	10		12	Compulsory Jurisdiction		Compelled; a government's general power to exercise authority over all persons and things within its territory
9	12		2	Ratification	批准；追认；认可。国际上所称批准，是缔约双方统一受条约的约束而对条约或者协定的确认。	Confirmation and acceptance of a precious act, thereby making the act valid from the moment it was done; contracts

序号	页	表格	行	词汇	中文注释	English
10	13		2	Quasi-judicial	准司法的，指在实体上或者程序上具有与司法相类似的性质。	Of, relating to, or involving an executive or administrative official's adjudicative acts.
11			9	Coercion	强迫；高压政治；强制	Compulsion by physical force or threat of physical force.
12			21	Inter alia	[拉] 除了别的东西；特别(是)；其中	[Latin] Among other things.

■ Topic map



■ Introduction

International law exists to regulate international society. International society is very different from any national society. Consequently, it should come as no surprise to you that the legal systems which regulate these societies are different as well. This chapter discusses the implications of these differences for international law.

ASSESSMENT ADVICE

Questions on this topic often take the form of essay questions. This is a result of the unique characteristics of the international legal system, which have led some to question whether international law is really a form of law. These doubts have generated enquiries into the theoretical foundations of international law. Students need to acquire a good understanding of the nature of law. It is also helpful to appreciate how the international legal system works in practice and to identify appropriate cases which demonstrate international law's effectiveness.

■ Sample question

Could you answer this question? Below is a typical essay question that could arise on this topic. Guidelines on answering the question are included at the end of this chapter, whilst another sample essay question and guidance on tackling it can be found on the companion website.

ESSAY QUESTION

'A legal system grounded in the will of its subjects, that does not possess a centralised legislature or effective means for its enforcement cannot be a form of law at all.' Discuss.

■ International law and international society

Before the founding of the United Nations in 1945, **international law** was largely concerned with the rights and obligations of States. It worked on the assumption that States would look after the interests of their own citizens. Much has changed since this time but States still play a central role in the creation, interpretation and application of international law.