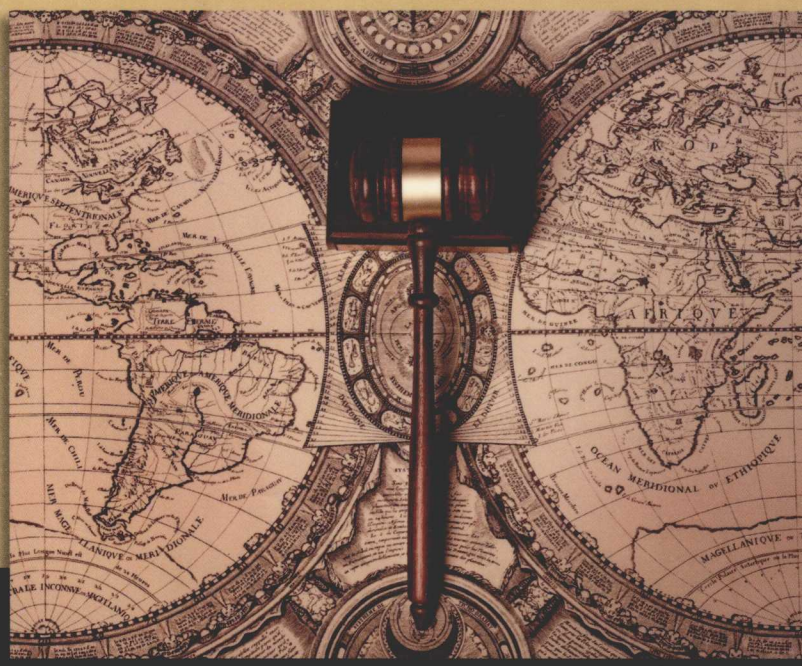
ASPEN STUDENT TREATISE SERIES

INTERNATIONAL LAW

SIXTH EDITION



Mark Weston Janis

Wolters Kluwer
Law & Business

ASPEN STUDENT TREATISE SERIES

Intern ational Law

Sixth Edition

MARK WESTON JANIS

William F. Starr Professor of Law
University of Connecticut

Visiting Fellow in Law, formerly Reader in Law
University of Oxford

Wolters Kluwer
Law & Business

Published by Wolters Kluwer Law & Business in New York.

Wolters Kluwer Law & Business serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.wolterskluwerlb.com)

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer Law & Business
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-1368-2

Library of Congress Cataloging-in-Publication Data

Janis, Mark W.
International law / Mark Weston Janis.—6th ed.
p. cm.—(Aspen student treatise series)
Includes index.
ISBN 978-1-4548-1368-2
1. International law. I. Title.
KZ3140.J36A35 2012
341—dc23

2012002744

About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading global provider of intelligent information and digital solutions for legal and business professionals in key specialty areas, and respected educational resources for professors and law students. Wolters Kluwer Law & Business connects legal and business professionals as well as those in the education market with timely, specialized authoritative content and information-enabled solutions to support success through productivity, accuracy and mobility.

Serving customers worldwide, Wolters Kluwer Law & Business products include those under the Aspen Publishers, CCH, Kluwer Law International, Loislaw, Best Case, ftwilliam.com and MediRegs family of products.

CCH products have been a trusted resource since 1913, and are highly regarded resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

Aspen Publishers products provide essential information to attorneys, business professionals and law students. Written by preeminent authorities, the product line offers analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

Kluwer Law International products provide the global business community with reliable international legal information in English. Legal practitioners, corporate counsel and business executives around the world rely on Kluwer Law journals, looseleafs, books, and electronic products for comprehensive information in many areas of international legal practice.

Loislaw is a comprehensive online legal research product providing legal content to law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

Best Case Solutions is the leading bankruptcy software product to the bankruptcy industry. It provides software and workflow tools to flawlessly streamline petition preparation and the electronic filing process, while timely incorporating ever-changing court requirements.

ftwilliam.com offers employee benefits professionals the highest quality plan documents (retirement, welfare and non-qualified) and government forms (5500/PBGC, 1099 and IRS) software at highly competitive prices.

MediRegs products provide integrated health care compliance content and software solutions for professionals in healthcare, higher education and life sciences, including professionals in accounting, law and consulting.

Wolters Kluwer Law & Business, a division of Wolters Kluwer, is headquartered in New York. Wolters Kluwer is a market-leading global information services company focused on professionals.

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 sixth edition and the earlier editions (1988, 1993, 1999, 2003, 2008) 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, including introductions to such recent topics as the specter of international terrorism, the emerging complexities 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 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-one 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: 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, Paul Craig, James Crawford, Donald Daniel, Yves Daudet, Ruth Deech, Jozef Deelen, Laura Dickinson, 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, David Kennedy, Benedict Kingsbury, Harold Koh, Hans Christian Krüger, Dominik Lasok, Herbert Lazerow, Detlef Leenen, Randall Lesaffer, Michel Lesage, Vaughan Lowe, Houston Lowry, Robert Lutz, Hugh Macgill,

Daniel Magraw, Aleth and Phillipe Manin, Geoffrey Marshall, Aileen McColgan, Myres McDougal, Willajeanne McLean, Thomas Morawetz, John Murphy, James Nafziger, Ved Nanda, Nell Newton, John Noyes, Daniel O'Connell, Mary Ellen O'Connell, William Park, Jeremy Paul, David Perrott, Ellen Peters, Istvan Pogany, David Pugsley, Michael Reisman, Eibe Riedel, Adam Roberts, Horace Robertson, Alfred Rubin, Dan Sarooshi, George Schatzki, Henry Schermers, Stephen Schwebel, David Seymour, Anne-Marie Slaughter, Ted Stein, Dennis Stone, Kurt Strasser, Robert Summers, Stefan Talmon, Nicholas Triffin, Jean Van den Eynde, Willem Van Genugten, Brian Walsh, Wang Tieya, Ruth Wedgwood, Christopher Weeramantry, Carol Weisbrod, Luzius Wildhaber, Ineta Ziemele, and Elizabeth Zoller, with special thanks to Sarah Cox for her excellent help revising the footnotes in Chapter 3.A.3 respecting research in international law. Thanks are also due to my students at Connecticut, Cornell, UCLA, Oxford, Paris, Strasbourg, Tilburg, and Riga; to my research assistants, James Streeto, Peter Morgan, John Fitzpatrick, Ricardo Sousa, Richard Wilde, Jennifer Glaudemans, Dora Ziamou, Woo Lee, Susanne Brose, Bridgett Sandusky, Michael Casey, Brent Houston, John Von Kohorn, Robert Menzel, Rytas Stankunas, Eric Hisey, Blake Ratcliff, Darcy Jones, Scott Schaeffer, Rebecca Ullman, Joanne Cossitt, Derek Ghan, Nancy Livak, and Joanna Taatjes; to my secretaries and typists, Kathe Kane, Sharon Lizak, Sandra Michalik, Delia Roy, Joan Wood, and Margaret Kent; to Richard Heuser, Carol McGeehan, David Bemelmans, Elizabeth Kenny, Richard Kravitz, Dan Mangan, Jessica Barmack, Anne Sloniker, Eric Holt and John Devins at Little, Brown and Aspen; and, of course, to Janet, Matthew, Robert, Philip, and Edward.

Hartford & Oxford
November 2011

Mark Weston Janis

Summary of Contents

Contents

CHAPTER 9

International Law and the International Economy 299

CHAPTER 10

International Conflict of Laws 331

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).

Nowadays, the terms the *law of nations* and *international law* are often used interchangeably.

At least since the end of the Thirty Years War in 1648, world politics has principally involved the relations of more or less independent sovereign states. An important part of international law has consequently had to do with the establishment of a set of mutually agreed-upon rules respecting the nature of these states and their fundamental rights and obligations *inter se* [see Chapter 6]. If there is a single international legal principle underlying the modern state system, it probably is the one neatly framed by Montesquieu in 1748[5] and offered to Napoleon in 1806 by Talleyrand: "that nations ought to do to one another in peace, the most good, and in war, the least evil possible."[6]

International law is sometimes conceived to be divided into public and private parts, the first concerning the legal relations of states, the second involving the law governing the foreign transactions of individuals and corporations. However, the public-private division of international law can be misleading. Many of the laws and processes traditionally within the ambit of public international law actually concern private, not public, parties, while much of the domain of private international law covers the transactions of public entities. Nonetheless, the terms *public* and *private* international law are highly popular and, in a rough kind of way, do compartmentalize legal rules addressing two problem areas: Public international law mostly concerns the political interactions of states [see Chapters 6 and 7]; private international law relates to legal aspects of the international economy and conflicts and cooperation among national legal systems [see Chapters 9 and 10].

Few deny that the rules of international law actually influence state behavior. Even international law's most famous jurisprudential critic, John Austin, acknowledged in 1832 that international legal rules were effective. At the same time, however, he argued that, because there was no international sovereign to enforce it, international law could not be the same sort of positive law as that enacted by sovereign states for internal application:

> [T]he law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of

[5] Montesquieu, L'esprit des lois, *Oeuvres complètes* 527, 531 (Editions du Seuil 1964).

[6] T. D. Woolsey, *International Law* 306 (1st ed. 1860).

> subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.[7]

Just a few years later, in 1836, the United States diplomat Henry Wheaton, in the first great English-language treatise on international law, was already grappling with Austin's characterization of the rules governing international politics as being a form of mere "morality."[8] Wheaton accepted Austin's view that international law's principal sanction was "the hazard of provoking the hostility of other communities," but contended that "[e]xperience shows that these motives, even in the worst times, do really afford a considerable security for the observance of justice between States, if they do not furnish the perfect sanction annexed by the lawgiver to the observance of the municipal code of any particular State."[9] Unlike Austin, Wheaton found international law sufficiently law-like to justify calling it "law,"[10] a definitional outcome reached by generations of subsequent international lawyers.[11]

Whether the international rules regulating interstate behavior are to be properly termed "legal" or "moral" is in truth a question that can only be answered after one has made more or less arbitrary definitions of what really constitutes "law" and "morality," a sometimes sterile exercise.[12] Suffice it to say at this early stage of our own discussion that there are a great many rules regulating international politics commonly referred to as "international law" and that these rules are usually, for one reason or another, observed in international practice. Moreover, there is no doubt that the norms of international law are

[7] J. Austin, *The Province of Jurisprudence Determined* 208 (1st ed. 1832).

[8] H. Wheaton, *Elements of International Law with a Sketch of the History of the Science* 47 (1st ed. 1836).

[9] Id. at *iii-iv.*

[10] Id. at 47-50; see M. W. Janis, *America and the Law of Nations: 1776-1939* 61-69 (2010).

[11] See, e.g., L. Oppenheim, 1 *International Law* 3-15 (8th ed. Lauterpacht 1955).

[12] "The only intelligent way to deal with a verbal question like that concerning the definition of the word 'law' is to give up thinking and arguing about it." Williams, International Law and the Controversy Concerning the Word "Law," 22 *Brit. Yearbook Int'l L.* 146, 163 (1945).

frequently applied as rules of decision by law courts, domestic [see Chapters 4 and 10] as well as international [see Chapters 5, 7, 8, and 9].

B. THE RULES OF INTERNATIONAL LAW

We know reasonably well how to identify rules of "municipal law" (the term used by international lawyers to denote the internal laws of national legal systems). Municipal rules of law generally are thought to emanate from national constitutions, municipal statutes, executive regulations, and the decisions of municipal courts. Oftentimes the possible sources of municipal law include not only formal legislatures, but also other political structures when these institutions are accepted to actually generate rules of law. Of course, municipal legal systems differ among themselves, and what may be a source of legislation in one country may not be so in another. For example, law courts are thought to be makers of legal rules in the United States, but not in France.

In international law, the identification of legal rules is quite different than it is in most municipal legal systems. The reason for this is directly linked to international law's very nature. Given the international political system of nation-states and the idea of state sovereignty, the sources of international law cannot be equivalent to those of most domestic laws. There are only occasional international imitations of national constitutions, parliaments, executives, and courts. For example, the United Nations system offers only skeletal international governmental bodies that have just begun to be fleshed out in practice [see Chapter 7]. This is not to say that some international organizations, especially regional ones such as the European Union, have not come close to creating municipal-like sources of international law [see Chapter 9.B]. It is only to note that, on the whole, we must abandon most municipal-like sources when we look for the rules of international law.

Given the rarity of effective formal international legislative, executive, and judicial organs, some have said quite simply that international law does not or cannot exist and that the only real rules of law are those generated by sovereign states for their own internal consumption. The trouble with such a simplistic assertion is that it contradicts centuries of practice during which governments, courts, and others have, for one reason or another, found and applied rules of international law.

B. The Rules of International Law

Traditionally, rules of international law have been identified by looking to the various forms of rulemaking conduct of two or more states. Although these different forms of conduct tend to blend one into another, it is helpful at the outset to think of each form as a discrete source of a certain sort of international law.

The first and plainest source of international law is the explicit, usually written, agreements that states make among themselves. These agreements are often labeled treaties or conventions. A municipal law analogy to this source of international law is, of course, the idea of contract. Like contracts, treaties are capable of creating voluntary, though legally binding, relations. These are sometimes known as "conventional international law" [see Chapter 2].

A second source of international law is the customary practice, other than the making of treaties, of states among themselves. Such international customary practice has municipal analogies in commercial law notions such as "the course of dealing" and "the usage of trade," where practice creates justifiable expectations of future observance. International practice is thought capable of creating binding rules of law known as "customary international law" [see Chapter 3.A].

Rather different in conception from the international practice of states as a source of international law is the general municipal practice of states. The idea is that if most or all states observe certain rules as part of their domestic laws, then it may be presumed that these rules are so fundamental as to be more or less automatically a part of international law. Such rules deriving from or reflecting the common municipal laws of states are known as "general principles of law" [see Chapter 3.B.1].

Note how at least the first two sources of international law may be said to emanate from the consent of states. With conventional international law, the states that are parties to a treaty explicitly agree to be bound by certain rules. With customary international law, their consent is implicit, to be found in their international practice.

The consensual notion is, however, not the only possible justification for believing that treaties and custom are proper sources of international law. Some have said that these forms of state conduct are simply manifestations of rules that are bound to exist regardless of state consent and that, beyond general principles of law, there are other sorts of nonconsensual rules of international law [see Chapter 3.B]. Behind such nonconsensual ideas lie notions of natural law that have been more or less fashionable over time [see Chapter 3.B.2]. A debate between natural lawyers and positive lawyers (as those who insist