

ELGAR ADVANCED INTRODUCTIONS

Advanced Introduction to

# INTERNATIONAL CONFLICT AND SECURITY LAW

Nigel D. White



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# International Conflict and Security Law

NIGEL D. WHITE

*Professor of Public International Law,  
University of Nottingham, UK*



Elgar Advanced Introductions

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## Preface

There are many general introductory texts on international law, though the subject is now so vast that they are impossibly thin (with certain exceptions, for example, Vaughan Lowe's *International Law*), or more compendious yet unwieldy (for example Malcolm Shaw's *International Law*). Within international law there are now developed legal regimes governing human rights, environmental law, trade law . . . and accompanying literature; but there are numerous ways of examining international law. One way would be to look at issues of jurisdiction or responsibility that are common to each area; another way would be to bring together substantive areas of international law that are intimately related but, because of their increasing complexity, have been subject to separate treatment in the literature. In this regard, there are separate, monograph or textbook, treatments of arms control, collective security, use of force, the law of armed conflict, post-conflict law or *jus post bellum* treatises, many of which are referenced in this work.

The idea behind this book is to bring together the legal regimes addressing the basic issue of regulating violence between states and increasingly within states, within a coherent and accessible introductory text. The intention, though, is not simply to provide readers with a set of 'rules' governing uses of force, armed conflicts and the various actors involved in collective security, since international law does not work in this way in such a highly politicised area of international relations. Instead, the normative frameworks that have been developed to shape political action are identified and analysed in terms of legitimacy and efficacy as well as legality. To quote Martti Koskenniemi: 'Legal argument is never deduction from self-evident rules. It always adds to our understanding of the law, and thus to the identity, objective, and principles of the community'.<sup>1</sup>

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1 M. Koskenniemi, 'The Place of Law in Collective Security' (1996) 17 *Michigan Journal of International Law* 456 at 480.

# Abbreviations

ABM	Anti-Ballistic Missile Treaty (1972)
<i>AJIL</i>	<i>American Journal of International Law</i>
AP	Additional Protocol 1977
ASEAN	Association of South Eastern Nations
<i>ASIL</i>	<i>American Society of International Law</i>
AU	African Union
BWC	Biological Weapons Convention (1972)
<i>BYBIL</i>	<i>British Yearbook of International Law</i>
CWC	Chemical Weapons Convention (1993)
DRC	Democratic Republic of Congo
ECtHR	European Court of Human Rights
ECR	European Court Reports
<i>EJIL</i>	<i>European Journal of International Law</i>
EU	European Union
GC	Geneva Convention 1949
IAEA	International Atomic Energy Agency
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHRR	International Human Rights Reports
ILC	International Law Commission
<i>JCSL</i>	<i>Journal of Conflict and Security Law</i>
MAD	Mutually Assured Destruction
<i>MJIL</i>	<i>Melbourne Journal of International Law</i>
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation
NNWS	Non-nuclear weapons state
NPT	Non-Proliferation Treaty (1968)
NWS	Nuclear weapons state
OAS	Organisation of American States

OAU	Organisation of African Union
ONUC	United Nations Operation in the Congo
OPCW	Organisation for the Prohibition of Chemical Weapons
OST	Outer Space Treaty (1967)
P5	Five permanent members of the Security Council
PMSC	Private Military and Security Company
PoW	Prisoner of War
PRIF	Peace Research Institute Frankfurt
R2P	Responsibility to protect
RIAA	Reports of International Arbitral Awards
START	Strategic Arms Reduction Treaty
UN	United Nations
UNDP	United Nations Development Programme
UNEF	United Nations Emergency Force
UNGA	United Nations General Assembly
WMD	Weapons of Mass Destruction

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# 1

## Basic conditions of peace and security

### 1.1 Introduction

Any number of facts could be given to show that we live in a very violent world. To pick a few – there are tens of thousands of weapons of mass destruction (WMD) currently in existence, there are hundreds of thousands of child soldiers engaged in conflicts around the globe, and trillions of dollars are spent annually by states on military establishments. Additional statistics on the numbers of soldiers, tanks, artillery, rockets, mines, warplanes, naval vessels, small arms and so on, would simply overwhelm the reader and would, in all likelihood, lead to a sober assessment of the state of humankind that it was intent on self-destruction. However, the instinct for survival, inherent in human nature, provides a powerful restraint on the use of these means of violence.

In order to ensure the survival of the planet, more specifically the system of international relations based on nation-states, states and other key actors naturally act to establish the basic conditions for the control of violence. Without controlling and containing violence in international relations it would not be possible to establish a viable international political and legal order. Overall, the aim of international law is to reduce the levels of violence between states, and increasingly within states and against civilian populations (the achievement of peace), by addressing existential threats to states, peoples and groups (the achievement of security).

Historically, peace has been equated to the absence of war; security was viewed as the security of states from aggression by other states; and international laws and structures, such as balances of power between states or alliances of states, have reflected this. However, as international laws and institutions have been strengthened in response to major ruptures of international peace, especially at the end of major conflicts, there has been a deepening of the international consensus on

what is meant by peace and security, to cover sustainable peace within and between states, and the security of groups and individuals as well as states. Having said that, it is true to say that international law remains based on state security, reflected in fundamental inter-state compacts, and has been reinforced by a continued state-based monopoly on the means of using force. However, changes in the understanding of state sovereignty mean that it is no longer absolute; rather it is qualified by a responsibility towards civilian populations. This chapter will consider the concepts of peace and security that underpin the rules of international law in this most important area of international law, as well as the notions of sovereignty and statehood, which are central to it.

## 1.2 Understanding peace

Intuitively, peace is the antithesis of war. Peace should be the normal human condition and war the exception if our basic premise about the survival instinct remains true. However, by the nineteenth century a condition of war was seen as a valid alternative (not an exception) to peace. International law reflected and, indeed, secured this position containing separate regimes for the law of peace governing peaceful relations between states, and the law of war governing the relations between warring as well as neutral states. As Stephen Neff explains: 'War and peace were therefore, in a manner of speaking, inverse legal worlds – moral and legal looking glass images of one another'.<sup>1</sup>

The same act of violence, if carried out in a time of war, would be seen as a 'deed of heroic patriotism',<sup>2</sup> while in times of peace it would be treated as an international crime. A private ship and its crew commissioned by a government to attack enemy shipping during a war would be seen as a legitimate privateer, but during times of peace would be seen as pirates and, as such, *hostes humani generis* (the enemies of mankind).<sup>3</sup> The division into war and peace in international law has broken down to a great extent in modern times, although its influence remains.

<sup>1</sup> S. Neff, *War and the Law of Nations* (Cambridge University Press, 2005) 177.

<sup>2</sup> *Ibid.*, 178.

<sup>3</sup> J.P. Grant and J.C. Barker, *Parry and Grant Encyclopaedic Dictionary of International Law* (3rd edn, Oxford University Press, 2009) 468; J.E. Thompson, *Mercenaries, Pirates and Sovereigns* (Princeton University Press, 1994) 43.

Sociological understandings of peace are probably more useful at this stage than legal definitions (which, in any case, tend to focus on 'war' or 'armed conflict'), as the aim of this chapter is to understand the purposes of the law – to understand peace and security as public goods, which the law is intended to help achieve.<sup>4</sup> The most influential approach in this respect is that of Johan Galtung, who defined peace as the absence of 'structural violence'. Structural violence is violence that is 'built into the structure' of society and 'shows up as unequal power and consequently as unequal life chances'.<sup>5</sup> It follows that in order to understand structural violence and the causes of war, issues of development, equality and, more broadly, social justice, have to be considered. This in turn leads to a broader definition of peace as consisting not only of the absence of war or other forms of structural violence but also having a positive aspect, defined by Galtung in terms of the 'integration of human society'.<sup>6</sup> Only the achievement of both negative and positive peace will ensure human survival and human flourishing.

Galtung's hugely influential work on peace is 'premised upon the identification of two global empirical tendencies that undermined the widespread image of an anarchical world order condemned to a perpetual condition of anticipating war'.<sup>7</sup> The first is that 'humans display a capacity for mutual empathy and solidarity' so that integration rather than disintegration is the natural state. The second is that humans show a capacity for restraint in the use of violence so they do not use the whole of their destructive capacity.<sup>8</sup> Both these tendencies are reflected in the often quite technical rules found in the law of armed conflict,<sup>9</sup> which limit the use of violence, both in terms of weapons used and targets chosen, both in international and, more recently, in internal armed conflicts. Although honoured more in the breach, the normativity of the law of armed conflict is not questioned (at least by states). Indeed, since the end of the Cold War in 1989, the first signs of more consistent enforcement of the law of armed conflict at the international level were the creation of *ad hoc* international criminal tribunals for Yugoslavia in 1993 and Rwanda in 1994, and the International Criminal Court

4 N. Tsagourias and N.D. White, *Collective Security: Theory, Law and Practice* (Cambridge University Press, 2013) chapter 2.

5 J. Galtung, 'Violence, Peace and Peace Research' (1969) 6 *Journal of Peace Research* 167 at 171.

6 J. Galtung, 'An Editorial' (1964) 1 *Journal of Peace Research* 1–4.

7 P. Lawler, 'Peace Studies' in P.D. Williams (ed.), *Security Studies: An Introduction* (Abingdon: Routledge, 2008) 73 at 82.

8 *Ibid.*, 82.

9 Reviewed in Chapter 6.

in 1998, with jurisdiction over war crimes, as well as crimes against humanity, genocide and (eventually) aggression.<sup>10</sup>

Galtung's premises accord with Herbert Hart's influential conceptualization of law as having a core content of natural law, which was endemic in the human condition, thereby preventing society from becoming a 'suicide club'.<sup>11</sup> Hart reasoned that 'without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other'.<sup>12</sup> Such laws reflect the basic human conditions of vulnerability, approximate equality, limited altruism ('men are not devils dominated by a wish to exterminate each other'), limited resources, limited understanding and strength of will.<sup>13</sup>

Of course this still leaves the issue of how to achieve peace. Galtung's view was that peace had to be achieved by peaceful means,<sup>14</sup> reflecting a profound commitment to non-violence. Galtung's underlying, and powerful, premise for this position was that it is impossible to break the cycle of structural violence that is found within society (whether national or international) by violent means; thus ruling out even humanitarian forms of intervention designed to stop egregious structural violence within a state. However, international conflict and security law does not (yet) reflect Galtung's concept of peace. Although international law has developed to prohibit the use of force in international relations (the *jus ad bellum*),<sup>15</sup> the *jus ad bellum* does allow for exceptions, which, arguably, have been extended by practice. Moreover, international law does recognise the reality of conflict by having extensive rules on the conduct of hostilities during an armed conflict (the *jus in bello* or the law of armed conflict).

### 1.3 Understanding security

Drawing on the work of the Copenhagen School, security is the absence of existential threats against states, other security actors,

10 R. Cryer, 'War Crimes' in N.D. White and C. Henderson (eds), *Research Handbook on International Conflict and Security Law* (Cheltenham: Edward Elgar Publishing, 2013) 467.

11 H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 1961) 188.

12 *Ibid.*, 189.

13 *Ibid.*, 190–93.

14 J. Galtung, *Peace by Peaceful Means: Peace, Conflict, Development and Civilisation* (London: Sage, 1996).

15 See Chapter 3.

peoples and individuals.<sup>16</sup> As with narrow conceptions of peace, the development of international relations to encompass collective security and human security has not meant that state security is no longer important. Realist visions of security focus on national security, in other words the safety of the nation-state, which necessitates placing national interests over collective interests, and thereby national security over collective security and human security.<sup>17</sup> Indeed, this vision of security is still strong, and has survived the Cold War confrontation between two heavily armed superpowers. Several explanatory factors can be pointed to. Firstly, states clearly still represent threats to other states, particularly those possessing nuclear weapons or other WMD. Secondly, what were once mainly domestic threats, such as terrorism, have become transnational, and, more generally, globalisation has led to internal security-focused politics becoming increasingly externalised.<sup>18</sup> Thus, national security issues are increasingly played out on a global scale, evidenced by the terrorist attack on the United States (US) of 11 September 2001, which led the US to wage a 'war on terror', more specifically a war against al-Qaeda, impacting around the globe.

Nonetheless, despite the continuing strength of national security, the concept of security has not only widened to include non-military threats such as those arising from food or environmental insecurity, but has also deepened to encompass human security.<sup>19</sup> Richard Falk defines 'security' as the 'negation of insecurity as it is specifically experienced by individuals and groups in concrete situations'.<sup>20</sup> The focus of international debate is increasingly on human security, which has been defined to include 'economic, environmental, social and other forms of harm to the overall livelihood and well-being of individuals'.<sup>21</sup> Clear evidence of the widening understanding of security is found in the pivotal post-Cold War United Nations (UN) Security Council summit held in January 1992. As an organ that is built on realist foundations, requiring agreement amongst its five permanent members (China, France, Russia, the United Kingdom (UK) and the US) for any substantive decision, the UN Security Council had previously almost

16 B. Buzan, O. Waever and J. de Wilde, *Security: A New Framework for Analysis* (Boulder: Lynne Rienner, 1998) 5.

17 H. Morgenthau, *Politics Among Nations* (New York: A. Knopf, 1972) 973.

18 P. Hough, *Understanding Global Security* (Abingdon: Routledge, 2008) 2.

19 *Ibid.*, 8.

20 R. Falk, *On Humane Governance: Toward a New Global Politics* (Cambridge: Polity, 1995) 147.

21 F.O. Hampson, 'Human Security' in P.D. Williams (ed.), *Security Studies: An Introduction* (Abingdon: Routledge, 2008) 229 at 231.

exclusively concerned itself with state and military security, but at its summit declared that the 'absence of war and military conflicts amongst States does not itself ensure international peace and security'; and that 'non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security'.<sup>22</sup>

As noted by Don Rothwell, the 'traditional view of security defines it in military terms with the primary focus on state protection from threats to national interests', but with the end of the Cold War 'security discourse has expanded beyond the traditional military domain with the proliferation of security agendas including economic security, environmental security, food security, bio-security, health security and human security'.<sup>23</sup> As recorded by Hitoshi Nasu, during the Cold War 'national security from external military attacks and threats was recognised as the ultimate *raison d'être* of sovereign states',<sup>24</sup> although the Security Council supplemented this with the concept of international security, especially in the post-Cold War period and its authorisation to coalitions of willing states to undertake military actions to deal with threats to international peace as well as acts of aggression.

Attempting to understand security as a fixed concept fails to reflect how security has become a central feature of daily life. Rather security should be understood, according to the Copenhagen School, as a 'shared understanding of what is considered a threat'.<sup>25</sup> As Ronald Dannreuther explains, this reflects the turn towards 'constructivism' in the theorisation of security, 'with its focus on subjective ideas and intersubjective understandings', which 'accords a greater weight of how ideas and perceptions influence and structure international reality'.<sup>26</sup> The constructivist approach of the Copenhagen School shifts 'attention away from an objectivist analysis of threat assessment to the multiple and complex ways in which security threats are internally

22 Security Council Summit Statement Concerning the Council's Responsibility in the Maintenance of International Peace and Security, 31 January 1992, UN Doc S/23500 (1992).

23 D.R. Rothwell, K.N. Scott, and A.D. Hemmings, 'The Search for Antarctic Security' in A.D. Hemmings, D.R. Rothwell and K.N. Scott (eds), *Antarctic Security in the Twenty-First Century: Legal and Policy Perspectives* (Abingdon: Routledge, 2012) 1 at 3.

24 H. Nasu, 'Law and Policy for Antarctic Security' in Hemmings et al, *supra* note 23, 18 at 19.

25 *Ibid.*, 25; Buzan, Waever and de Wilde, *supra* note 16, 23–6.

26 R. Dannreuther, *International Security: The Contemporary Agenda* (Cambridge: Polity, 2007) 40.