



Security and International Law

— STUDIES IN INTERNATIONAL LAW —

Edited by
Mary E Footer,
Julia Schmidt, Nigel D White
and Lydia Davies-Bright

B L O O M S B U R Y

Security and International Law

Edited by
Mary E Footer, Julia Schmidt,
Nigel D White
and
Lydia Davies-Bright



• H A R T •
PUBLISHING

OXFORD AND PORTLAND, OREGON
2016

Published in the United Kingdom by Hart Publishing Ltd
16C Worcester Place, Oxford, OX1 2JW
Telephone: +44 (0)1865 517530
Fax: +44 (0)1865 510710
E-mail: mail@hartpub.co.uk
Website: <http://www.hartpub.co.uk>

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190
Fax: +1 503 280 8832
E-mail: orders@isbs.com
Website: <http://www.isbs.com>

© The editors 2016

The editors have asserted their right under the Copyright, Designs and Patents Act 1988, to be identified as the authors of this work.

Hart Publishing is an imprint of Bloomsbury Publishing plc.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission of Hart Publishing, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Hart Publishing Ltd at the address above.

British Library Cataloguing in Publication Data
Data Available

ISBN: 978-1-84946-634-9

Library of Congress Cataloging-in-Publication Data

Names: Footer, Mary E., editor. | Schmidt, Julia Ruth, editor. | White, Nigel D., 1961–, editor. | Davies-Bright, Lydia, editor. | International Law Association. British Branch, sponsoring body.

Title: Security and international law / edited by Mary E Footer, Julia Schmidt, Nigel D White and Lydia Davies-Bright.

Description: Oxford ; Portland, Or. : Hart Publishing Ltd, 2016. | Series: Studies in international law ; volume 58 | Includes papers presented at the 2012 Spring Conference of the International Law Association's British Branch held at the University of Nottingham.—ECIP foreword. | Includes bibliographical references and index.

Identifiers: LCCN 2016005225 (print) | LCCN 2016005577 (ebook) | ISBN 9781849466349 (hardback : alk. paper) | ISBN 9781782255895 (Epub)

Subjects: LCSH: International law—Congresses. | Security, International—Congresses.

Classification: LCC KZ1240 .S43 2012 (print) | LCC KZ1240 (ebook) | DDC 341.7/2—dc23

LC record available at <http://lcn.loc.gov/2016005225>

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by
CPI Group (UK) Ltd, Croydon CR0 4YY

SECURITY AND INTERNATIONAL LAW

Of the many challenges that society faces today, possibly none is more acute than the security of ordinary citizens when faced with a variety of natural or man-made disasters arising from climate and geological catastrophes, including the depletion of natural resources, environmental degradation, food shortages, terrorism, breaches of personal security and human security, or even the global economic crisis. States continue to be faced with a range of security issues arising from contested territorial spaces, military and maritime security and security threats relating to energy, infrastructure and the delivery of essential services. The theme of the book encompasses issues of human, political, military, socio-economic, environmental and energy security and raises two main questions. To what extent can international law address the types of natural and man-made security risks and challenges that threaten our livelihood, or very existence, in the twenty-first century? Where does international law fall short in meeting the problems that arise in different situations of insecurity and how should such shortcomings be addressed?

Volume 58 in the series *Studies in International Law*

Studies in International Law

Recent titles in this series

Integration at the Border: The Dutch Act on Integration Abroad and
International Immigration Law
Karin de Vries

An Equitable Framework for Humanitarian Intervention
Ciarán Burke

Democratic Statehood in International Law: The Emergence of New
States in Post-Cold War Practice
Jure Vidmar

International Law and the Construction of the Liberal Peace
Russell Buchan

The OIC, the UN, and Counter-Terrorism Law-Making: Conflicting or
Cooperative Legal Orders?
Katja Samuel

Statelessness: The Enigma of the International Community
William E Conklin

The Reception of Asylum Seekers under International Law: Between
Sovereignty and Equality
Lieneke Slingenberg

International Law and Child Soldiers
Gus Waschefort

The Contractual Nature of the Optional Clause
Gunnar Törber

Non-State Actors in International Law
*Edited by Math Noortmann, August Reinisch and
Cedric Ryngaert*

The Rule of Law at the National and International Levels: Contestations
and Deference
Edited by Machiko Kanetake and André Nollkaemper

Human Rights Obligations of Non-State Armed Groups
Daragh Murray

**For the complete list of titles in this series, see 'Studies in International
Law' link at www.hartpub.co.uk/books/series.asp**

Foreword

Whenever essays based on papers delivered at a conference are published, there is a risk that they do not wear well with the inevitable passage of years or the different medium of their presentation. This is very definitely not the case with this excellent publication. The University of Nottingham offered to host the 2012 Spring Conference of the International Law Association's British Branch with the challenging theme of the inter-relationship between international law and 'security' in its latest and most diverse expression. The theme was explored by some outstanding speakers, generating lively and relevant discussion. It would have been disappointing if these had not found some more permanent record. This book amply fulfils that need.

The editors were closely involved in Nottingham's successful Conference, and have expertly brought these essays together to constitute an important body of work on one of the most troubling aspects of current affairs—both international and domestic. The basic dilemma between appraisal of actions by governments and international bodies to address—'defeat' is so often the phrase used—terrorism and insecurity in the light of established international law, and trying to fit international law into the ways in which states have responded to real or perceived threats to international peace and security, comes out starkly from these essays. International law's efficacy as a regime whereby states consent to constrain their actions has rarely, if ever, been under greater strain.

All those with relevant responsibility should read these essays, and consider whether the measures so far adopted (and often re-cycled) will lead to a safer world for its citizens, or merely serve the interests of increasing chaos. There is much too for scholars of international law and of international relations to ponder in this important work.

Jeremy P Carver CBE
President, British Branch
International Law Association
August 2015

Preface

Of the many challenges that society faces today, possibly none is more acute than the security of ordinary citizens when faced with a variety of natural or man-made disasters arising from climate and geological catastrophes, including the depletion of natural resources, environmental degradation, food shortages, terrorism, breaches of personal security and human security, or even the global economic crisis. States too continue to be faced with a range of security issues arising from contested territorial spaces, military and maritime security and security threats relating to energy, infrastructure and the delivery of essential services. The theme of the book encompasses issues of human, political, military, socio-economic, environmental and energy security and raises two main questions. To what extent can international law address the types of natural and man-made security risks and challenges that threaten our livelihood, or very existence, in the twenty-first century? Where does international law fall short in meeting the problems that arise in different situations of insecurity and how should such shortcomings be addressed?

This collection of essays, which arose out of the ILA British Branch Annual Spring Conference, held in Nottingham in April 2012, examines the concept of security in international law—how international law shapes security and how security shapes international law. The different aspects of this relationship will be outlined in the Introduction to the book, and aspects will be considered in each chapter. Different facets of security are considered in Part I, including how different international legal regimes such as international environmental law and international criminal justice intersect with what has been traditionally viewed as a concept or value protected by collective security law. Part II analyses in detail more specific threats and considers how both general international law and applicable specific regimes have responded.

Mary E Footer
Julia Schmidt
Nigel D White
Lydia Davies-Bright

Abbreviations

ACAP	Agreement on the Conservation of Albatrosses and Petrels
ACDA	US Arms Control and Disarmament Agency
AFISMA	African-led International Support Mission to Mali
AMIS	African Union Mission in Sudan
AOR	Area of Responsibility
AP	Additional Protocol
ASEAN	Association of Southeast Asian Nations
ASOC	Antarctic and Southern Ocean Coalition
ASP	Assembly of States Parties
AT	Arctic Treaty
ATCM	Antarctic Treaty Consultative Meetings
ATCP	Antarctic Treaty Consultative Parties
ATS	Antarctic Treaty System
AU	African Union
BASIC	Brazil, South Africa, India and China
BG	Board of Governors
BIMCO	Baltic and International Maritime Council
BIT	Bilateral Investment Treaty
BMP	Best Management Practices
BRIC	Brazil, Russia, India, China and South Africa
CAR	Central African Republic
CARICOM	Caribbean Community
CAT	Convention Against Torture
CBDR	Common But Differentiated Responsibilities
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources 1980
CCDCOE	Cooperative Cyber Defence Centre of Excellence
CDM	Clean Development Mechanism
CDS	Catch Documentation Scheme
CoE	Council of Europe

COMNAP	Council of Managers of Antarctic Programs
COP	Conference of the Parties
CRC	Convention on the Rights of the Child
CSA	Comprehensive Safeguards Agreement
CTBT	Comprehensive Test-Ban Treaty
CWC	Chemical Weapons Convention
DDOS	Distributed Denial of Service
DoD	Department of Defence
DPRK	North Korea (Democratic People's Republic of Korea)
DRC	Democratic Republic of the Congo
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOWAS	Economic Community of Western African States
ECtHR	European Court of Human Rights
EEZ	Exclusive Economic Zone
ENDC	Eighteen-Nation Committee for Disarmament
ESF	ECOWAS Standby Force
EU	European Union
FCN	Friendship Commerce and Navigation
FRY	Federal Republic of Yugoslavia
G77	Group of 77
GA	General Assembly
GATT	General Agreement on Tariffs and Trade
GCHQ	UK Government Communications Headquarters
HRC	Human Rights Committee
HRLC	Human Rights Law Centre
IAATO	International Association of Antarctica Tour Operators
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty

ICJ	International Court of Justice
ICRW	International Convention for the Regulation of Whaling
ICS	International Chamber of Shipping
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IDP	Internally displaced persons
IFOR/SFOR	NATO-led Stabilisation Force in Bosnia and Herzegovina
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILA	International Law Association
ILC	International Law Commission
IMB	International Maritime Bureau of the International Chamber of Commerce
IMF	International Monetary Fund
IMO	International Maritime Organisation
INFCIRC	Information Circular
INTERCARGO	International Association of Dry Cargo Shipowners
INTERTANKO	International Association of Independent Tanker Owners
IPCC	Intergovernmental Panel on Climate Change
IPCC	Independent Police Complaints Commission
ISO	International Organization for Standardization
ITU	International Telecommunication Union
MARPOL	International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978
MINUSCA	UN Multidimensional Integrated Stabilization Mission in the Central African Republic
MINUSMA	UN Multidimensional Integrated Stabilization Mission
MONUC	UN Mission in the Democratic Republic of Congo
MONUSCO	UN Organisation Stabilisation Mission in the Democratic Republic of the Congo
MoU	Memoranda of Understanding
MPS	Metropolitan Police Service
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
NNWS	Non-Nuclear Weapon States

NPM	Non Precluded Measures
NPT	Nuclear Non-proliferation Treaty
NSA	National Security Agency
NTC	National Transitional Council
NWS	Nuclear-Weapon States
OAS	Organisation of American States
OHCHR	Office of the High Commissioner for Human Rights
OPEC	Organisation of the Petroleum Exporting Countries
OSCE	Organisation for Security and Cooperation in Europe
PCASP	privately contracted armed security personnel
POW	Prisoner of War
PrepComs	Preparatory Committees
REEEP	Renewable Energy and Energy Efficiency Partnership
REIO	Regional Economic Integration Organisations
RMA	Revolution in Military Affairs
RtP	Responsibility to Protect
SAR	Search and Rescue
SC	Security Council
SCAR	Scientific Committee on Antarctic Research
SCSL	Special Court of Sierra Leone
SEA	Single European Act
SOLAS	International Convention for the Safety of Life at Sea 1974
SUA	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
TBS	Ticking Bomb Scenario
UAV	Unmanned Aerial Vehicle
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNAMID	African Union-United Nations Hybrid Operation in Darfur
UNC	UN Charter
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNEP	UN Environment Programme
UNESCO	UN Educational, Scientific and Cultural Organisation

UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNIDIR	UN Institute for Disarmament Research
UNMIL	UN Mission in Liberia
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
UNTS	United Nations Treaty Series
UNU-CRIS	United Nations University—Comparative Regional Integration Studies
US	United States
USA	United States of America
USSR	Union of Soviet Socialist Republics
UTA	Union de Transport Aériens
VCLT	Vienna Convention of the Law of Treaties
WFP	World Food Program
WHO	World Health Organisation
WMD	Weapons of Mass Destruction
WTO	World Trade Organisation
WWII	World War II

Contributors

Jill Barrett

Arthur Watts Senior Research Fellow in Public International Law, British Institute of International and Comparative Law. She leads the Watts research and events programme in public international law. She has developed research projects and published on a range of subjects including Treaty Law and Practice, Antarctic and Arctic governance, Law of the Sea, legal aspects of democratic participation in Hong Kong and British Contributions to International Law 1915–2015. Jill joined BIICL from the Legal Adviser's team at the Foreign and Commonwealth Office, where she was a Legal Counsellor. During her twenty-year FCO career, her responsibilities included advising on public international law, EU and UK law on a wide range of subjects and she served as First Secretary (Legal) at the United Kingdom Mission to the United Nations, New York. She was Deputy Agent for the United Kingdom in the *Ireland v UK Mox Plant* cases under UNCLOS and the OSPAR Convention and represented the UK at a variety of international conferences, such as the Antarctic Treaty Consultative Meeting, Commission on the Conservation of Antarctic Living Marine Resources, London Convention, International Whaling Commission, European Energy Charter, UN Commission on Environment and Development and the UN Framework Convention on Climate Change. She led the Government's work on creating a new statutory regime for parliamentary scrutiny of treaties. Before joining the FCO, she was Lecturer in Law at SOAS, London University, specialising in the law of the People's Republic of China, and Lecturer in Law at Durham University. She attended 12 Antarctic Treaty and two CCAMLR meetings during 2002–13; 10 as legal adviser to the United Kingdom delegation; and since leaving the FCO, one as a staff member of the Antarctic Treaty Secretariat, and three as legal adviser to the Antarctic and Southern Ocean Coalition delegation. The views expressed in her chapter are of course personal.

Olympia Bekou

Professor of Public International Law, University of Nottingham and Head of the International Criminal Justice Unit, Nottingham Human Rights Law Centre. A qualified lawyer, Olympia specialises in international criminal law. She has developed particular expertise in national implementing

legislation for the ICC as well as in developing new methodologies that aim to enhance the efficiency and effectiveness of international criminal justice processes. In recent years Olympia has been a fellow of the Max Planck Institute for Foreign and International Criminal Law in Freiburg, Germany, and she has also held visiting positions at the TC Beirne School of Law, University of Queensland, Australia, the University of Nantes, France and Istanbul Bilgi University, Turkey. Olympia has provided research and capacity building support for 63 States, through intensive training to more than 75 international government officials and drafting assistance to Samoa (with legislation enacted in November 2007), Fiji and Jamaica and has been involved in training the Thai Judiciary. She has also undertaken capacity building missions in post-conflict situations such as Uganda, the DRC and Sierra Leone. She is Deputy Director of the Case Matrix Network and a member of the Advisory Board and Editor of the Forum of International Criminal and Humanitarian Law. Olympia is responsible for the National Implementing Legislation Database (NILD) of the ICC Legal Tools Project and has researched and taught extensively worldwide. In 2014, she was awarded the University of Nottingham Knowledge Exchange and Innovation Award for Societal Impact in Social Sciences for her work 'Fighting Impunity through Technology: Strengthening the Capacity of National and International Criminal Justice Institutions to Investigate and Prosecute the Most Serious International Crimes'.

Alexandra Bohm

Teaching Fellow, University of Sheffield. A non-practising solicitor, Alexandra completed her PhD at the University of Sheffield in 2014, on the Responsibility to Protect. Alexandra has broader interests in theoretical and methodological issues in international law and international relations, and has published on this topic and on the use and regulation of private military and security contractors.

Russell Buchan

Dr Russell Buchan is a senior lecturer in international law at the University of Sheffield. Russell sits on the editorial board of the *Journal of the Use of Force in International Law* and the *International Community Law Review*. Russell's monograph was published by Hart Publishing in 2013 and is entitled *International Law and the Construction of the Liberal Peace*, and was the recipient of the American Society of International Law's Francis Lieber Prize for an outstanding monograph in the field of the law of armed conflict for 2014. Russell has co-edited, along with Professor Nicholas Tsagourias,

an edited collection entitled *A Research Handbook on International Law and Cyberspace*, published by Edward Elgar in 2015. Russell is Co-Rapporteur for the International Law Association's Study Group on Cybersecurity, Terrorism and International Law.

Tom Coppen

Researcher and PhD Candidate, Center for Conflict and Security Law (CCSL) Utrecht University. Tom received his LLM at Nijmegen University in the Netherlands, after which he studied International Relations at the University of Cape Town, South Africa. His main focus area is the legal nuclear non-proliferation regime, specifically the Non-Proliferation Treaty (NPT), International Atomic Energy Agency (IAEA), as well as export controls. He was a Special Advisor for the Netherlands at the 2010 NPT Review Conference and the 2012 and 2013 NPT Preparatory Commissions. Tom spent two months in Vienna, Austria, where he interviewed dozens of IAEA officials and national representatives in order to research the review and assessment of safeguards information in the context of IAEA non-compliance procedures. In addition to his non-proliferation research, he is an advisor for a project on nuclear security at the CCSL. He has participated as a panel member in several conferences on nuclear non-proliferation and security, and published articles in the *Journal of Conflict and Security Law*, the *Internationale Spectator* and the *Romanian Journal of Society and Politics*. Abstracts of the latter are used in this chapter.

Lydia Davies-Bright

PhD student, School of Law University of Nottingham. Lydia's thesis focuses on the relationship between human rights and security and examines the 'security concession' made in numerous human rights instruments. She is also researching and publishing in the inter-related areas of democracy, security, terrorism and international law, is a member of the Nottingham Centre for International and Security Law and is a student assistant for the *Journal of Conflict and Security Law* (Oxford University Press). Lydia also tutors in Understanding Law, Contract Law, Law of Torts and Democracy and the Rule of Law in Post-Conflict Situations.

Mary E Footer

Professor of International Economic Law, co-Director of the Nottingham International Law and Security Centre and Head of the Business, Trade

and Human Rights Unit in the Nottingham Human Rights Law Centre. Prior to joining the University of Nottingham in 2006, Mary was Deputy Director at the Amsterdam Centre for International Law and senior lecturer at the University of Amsterdam. She has previously held teaching posts in international law at the Erasmus University Rotterdam and University College London and was Senior Program Legal Counsel at the International Development Law Organisation, Rome from 1995–1999. She has been a Fernand Braudel Senior Visiting Fellow at the European University Institute, Florence in 2010, and the first Fellow in Public International Law at the British Institute of International and Comparative Law, London, 1992–1994. Mary is a member of the Executive Board of the European Society of International Law, Director of Studies for the British Branch of the International Law Association (ILA) and chair of the ILA Committee on Sustainable Development and the Green Economy in International Trade Law. She read European History and History of Art at the University of East Anglia (BA Hons) before embarking on her law studies, with a JD in Dutch civil law from the University of the Netherlands Antilles, followed by an LLM in Public International Law from UCL and a PhD *cum laude* from the Erasmus University Rotterdam. Mary has published widely on GATT/WTO matters, trade and investment, law and economic development, the international regulation of (agro)biotechnology, food security and business and human rights. She is author of *An Institutional and Normative Analysis of the World Trade Organization* (Nijhoff, 2006) and co-editor with Julio Faundez and Joseph J Norton of *Governance, Development and Globalization* (Blackstone, 2000).

Mattia Fosci

Formerly a visiting lecturer in International and EU law at University of Leicester, Mattia has recently founded, and is currently managing, an open-source think tank. Mattia is also consulting on a number of government-sponsored projects on open access research. He has published in top rated international environmental journals, as well as on legal and policy issues relating to research management and open access to academic research. Mattia holds a doctorate and LLM in International Law from the University of Nottingham, an MA in International Relations and a BA in Political Science from the University of Cagliari, Italy. His doctoral research focused on the multi-level governance of land and forests in the context of emerging international efforts to mitigate climate change. He has published on issues related to Reducing Emissions from Deforestation and Forest Degradation (REDD+), biodiversity law, and environmental governance in developing countries. In 2009–2010 he attended the UNFCCC negotiations on climate change as an accredited observer.

He has worked with civil society organisations and the IUCN, and as a consultant in the areas of climate change law, policy and economics.

Hitoshi Nasu

Senior Lecturer in Law and Co-Director of the Centre for Military and Security Law at the Australian National University. Hitoshi holds a Bachelor's and Master's degree in Political Science from Aoyama Gakuin University and a Master's degree and PhD in Law from the University of Sydney. He is the author of *International Law on Peacekeeping: A Study of Article 40 of the UN Charter* (Nijhoff, 2009) and co-editor of *Human Rights in the Asia-Pacific Region: Towards Institution Building* (Routledge, 2011), *Asia-Pacific Disaster Management: Comparative and Socio-legal Perspectives* (Springer, 2013), *New Technologies and the Law of Armed Conflict* (TMC Asser, 2014), and *Legal Perspectives on Security Institutions* (Cambridge University Press, 2015). This research was supported under Australian Research Council's Discovery Project funding scheme (Project Number: DP130103683).

Alexandros XM Ntovas

Lecturer in Shipping Law, Queen Mary University of London; Centre for Commercial Law Studies. Dr Ntovas has studied law and political sciences in Greece, England, Belgium, France and the Netherlands. His background amalgamates the disciplines of public international and European law with political analysis and international relations, as these finding a common expression in the context of oceanic policy and the law of the sea. He has practiced public and administrative law, and acted on numerous occasions as a policy advisor to governments, including the European Union, the public sector and the maritime industry. His expertise within the Centre for Commercial Law Studies lies in the navigational freedoms and practices, as well as in issues regarding the public aspects of piracy and other issues of contemporary safety and security of ships, and off-shore installations. He had previously held a law lectureship at the University of Southampton, where he was also a governing board member of the Institute of Maritime Law.

John Pearson

Lecturer, University of Manchester. John teaches in Property Law and Environmental Law. He studied at Bangor University where he received