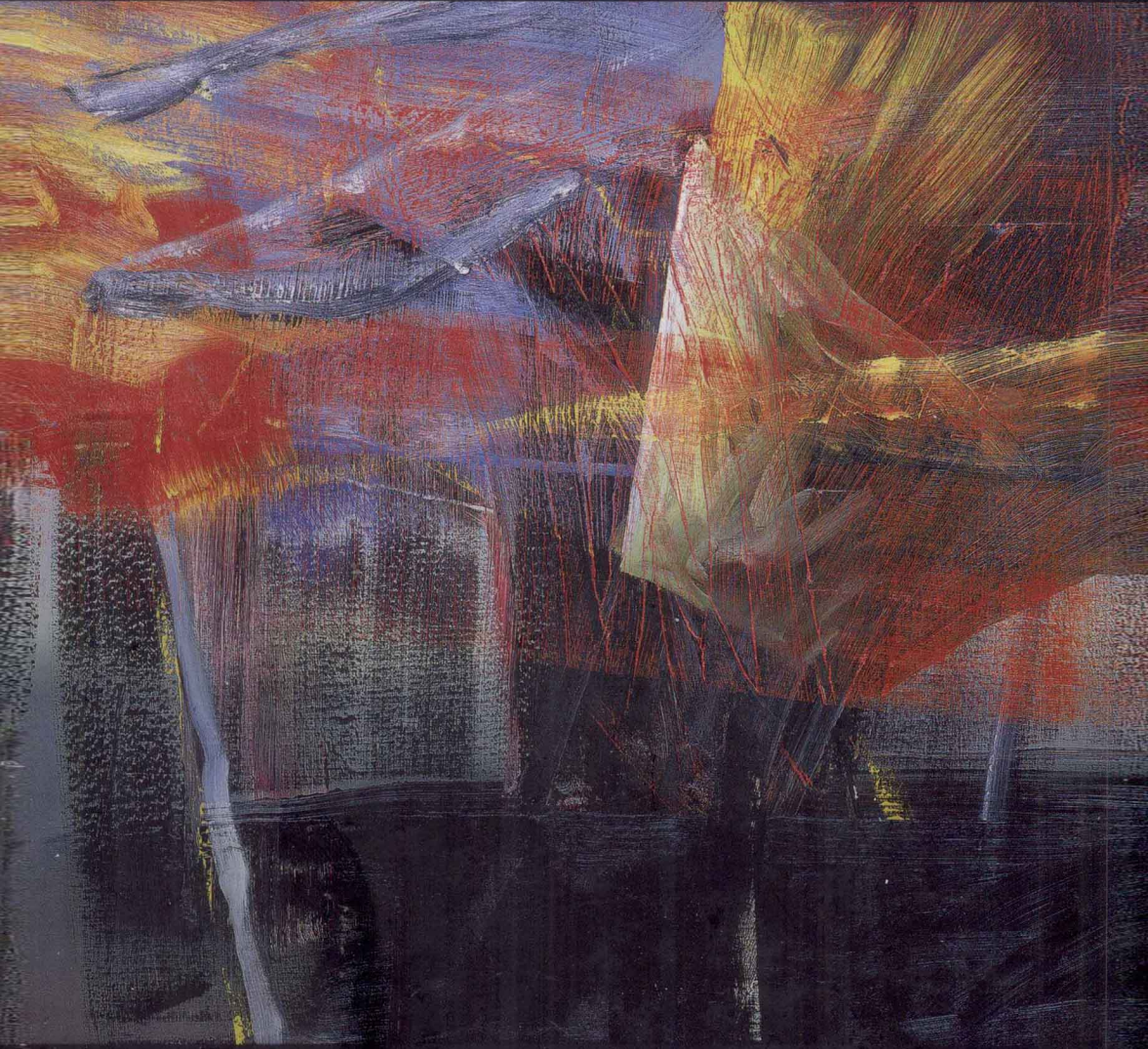




EVENTS: THE FORCE OF INTERNATIONAL LAW



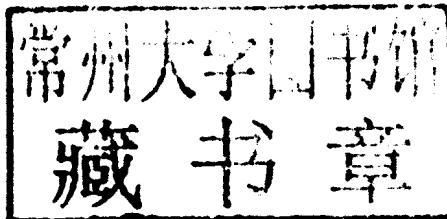
EDITED BY

**FLEUR JOHNS, RICHARD JOYCE
AND SUNDHYA PAHUJA**

a GlassHouse book

Events The Force of International Law

Edited by
Fleur Johns, Richard Joyce
and Sundhya Pahuja



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List of abbreviations

AES	actually existing socialism
ANC	African National Congress
CERD	1969 Convention on the Elimination of All Forms of Racial Discrimination
Charter	1945 Charter of the United Nations
CIA	Central Intelligence Agency
CLS	Critical legal studies
COSATU	Congress of South African Trade Unions
DAIG	Inspector General of the US Department of the Army
DAN	direct action network
ECJ	European Court of Justice
EU	European Union
FDI	foreign direct investment
FLN	Front de Libération Nationale (National Liberation Front, Algeria)
GA Res	United Nations General Assembly Resolution
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
IFIs	international financial institutions
IL/IR	International law and international relations
IMTFE	International Military Tribunal for the Far East
INGOs	International non-governmental organizations
ISAK	Isolera Sydafrika-Kommittén (Isolate South Africa Committee)
LN	League of Nations
NAFTA	North American Free Trade Agreement
NAIL	new approaches to international law
NATO	North Atlantic Treaty Organization

NGOs	non-governmental organizations
NIEO	new international economic order
OAU	Organization of African Unity
OED	<i>Oxford English Dictionary</i>
OPEC	Organization of the Petroleum Exporting Countries
OSCE	Organization for Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
PMC	Permanent Mandates Commission
POWs	prisoners of war
Torture Convention	1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
TRIPs Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
TWAIL	Third World approaches to international law
TWT	Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States of America
USSR	Union of Soviet Socialist Republics
VCLT	1969 Vienna Convention on the Law of Treaties
VOC	Verenigde Oost-Indische Compagnie (United East India Company)
WTO	World Trade Organization

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Foreword

One memory I retain vividly from work in the Foreign Ministry is that for the political decision-makers, every situation was always new, unprecedented and very often (and not least for that very reason) a crisis. It then became the legal adviser's task to calm down that decision-maker by explaining that situations of a similar type had arisen last year, five years ago, 30 years ago and that far from being singular or unprecedented, the situation (the 'event' in the language of this book) was in fact part of a recurrent pattern and could therefore be treated in the same way as 'we' had done with those previous cases. As the editors of this book observe, this type of reduction is a quintessentially legal activity. International lawyers do this constantly, not only to soothe the nerves of anxious decision-makers, but also to argue before courts and tribunals and to persuade the readers of law reviews and books of the moral or political power of whatever it is they wish to argue for. We routinely make points about precedent and custom, and dress our claims in terms of general principles and institutional practices. Indeed, the very act of qualifying something in legal terms – an action, a form of behaviour, an instrument – is to reduce it from its singularity by subsuming it under a rule. And there is no more lawyerly activity than rule-application.

Law is also a polemical activity. The reduction of an event into a pattern or a rule ('qualification') is meaningful to the extent it works as a prelude to action or decision. The advice in the Foreign Ministry, for example, contained the implicit (and sometimes quite explicit) suggestion: we *should* deal with this case like we did with *those*. To move from singularity to rule is surely a key part of the expertise of a legal counsel pleading for a client – a state explaining its action as 'self-defence' or a war crimes prosecutor claiming that the acts of the accused amounted to 'genocide'. And yet, it seems clear that the ability to make the reverse reduction must be equally important; one must often argue for the opposite case as well. To distinguish the precedent, to argue that the case ought to be appreciated in view of its singularity (and not only by reference to qualities that make it resemble something else) is to deny that it should be reduced to a pattern and thus be treated like those *other* cases. Typical techniques performing this include

arguing from the exception instead of the rule, from equity or for example from 'circumstances precluding wrongfulness' under Chapter V of the International Law Commission's 2001 Draft Articles on State Responsibility. With such points we highlight the event's 'eventness', the way it cannot properly and without injustice be treated by reducing it into a pattern.

The many cases discussed in this book show the stakes in either making the event stand out proudly on its own or having it slowly disappear as part of the background so that we can no longer distinguish anything remarkable in it. Neither reduction is 'innocent', of course. Each involves choice and interpretation that is inspired by the need to take a decision, to move from reflection to action. Should we think of this case in view of its singular properties, or by drawing attention to the way it resembles other cases? Should we apply the rule or the exception? Ought we to do like we did last year, or should we perhaps reconsider the position? Is Kosovo a *sui generis* situation or is it not?

The important lesson is this: a situation or a case is never an 'event' or 'part of a pattern' in itself but always appears as one or the other as a result of language and argument. Moreover, the legal argument is never disinterested. Although aesthetic judgement is crucially involved in both reductions, they are never just about aesthetics. The legal judgment seeks to intervene in the world so as to produce an effect on the distribution of material or spiritual resources. To see somewhere a singular 'event' is to claim that the routine of patterned choices ought not to be applied *now*. It appeals to the imagination and a sense of (informal) justice in the decision-maker that appreciates things in their individuality and events by their 'eventness' and suggests a decision on that basis. To view the thing as part of a pattern, by contrast, is to deny the decisive significance, here and now, of whatever it was that first struck us in the special character of the moment, and thus to call for a decision that is familiar and reassuring.

There are cultural and political assumptions involved in each reduction (event to pattern; pattern to event). The propensity of lawyers to reduce things to rules is at least in part responsible for the tendency to think of law as an intrinsically conservative profession. The reduction appears to deny – and *does* deny – the colourful multiplicity of the world. It makes everything appear grey and bureaucratic. To overlook the singularity of the event is to fall back on a routine that may support conservative biases – *plus ça change* ... Against this, pointing to the striking uniqueness of the event may appear as a liberating, profoundly anti-conservative move; it appeals to our sensitivity about what is out of the ordinary: thinking outside the box. The intuitive appeal of this surely results from the way it invites us to break the routine and freshen things up, to awaken from apathetic slumber and make us once again *feel* that life has unique things to offer.

But these cultural and political associations are never this stable. Each may be made to serve purposes not initially associated with it. Although much

recent political and legal philosophy, as the editors observe, has tended to stress the 'event' as a radical alternative against the monotonies of routine, the purposes of that philosophy may sometimes be better served by imaginative reduction in the opposite sense. Emphasising the speciality of 'terrorism' for example, may be a deeply conservative move against which it might seem useful to reduce it into another law-enforcement 'problem'. Even as 'eventness' and pattern, just like the exception and the rule, are effects of aesthetic imagination, they inform action we take in the world. A skilful lawyer moves in a field of aesthetic alternatives with awareness about the consequences of particular choices and readiness to choose the strategy that is most likely to bring about the right decision or the desired type of action. This involves sensitivity to the fact that in particular (legal, political) institutions, one type of reduction often predominates so that accomplishing that may be the right strategy to follow. Yet, it is always also possible to bring out the contrary effect. We stare at a wall, and what first appeared as a boring pattern of evenly painted surface slowly begins to yield some form that will finally end up striking us with its singularly expressive power – or we admire the imaginative uniqueness of an artwork until we learn that it reproduces the aesthetic canons of this or that 'school' and we learn to read it as a typical representative of its 'period'. The rule becomes the exception, the exception the rule, the foreground and the background change place in a subtle use of legal imagination. Neither reduction has a privileged moral or political status in law. Both involve cultural gestures and political associations that are important to recognize and then to appreciate in what they can be made to do. It is hard to think of a more powerful series of reflections and illustrations on this theme than the essays collected in this book.

Martti Koskenniemi
Helsinki
March 2010

Contents

<i>Acknowledgements</i>	x
<i>List of abbreviations</i>	xii
<i>Notes on the editors</i>	xiv
<i>Notes on contributors</i>	xv
<i>Foreword by Martti Koskenniemi</i>	xviii
Introduction	1
FLEUR JOHNS, RICHARD JOYCE AND SUNDHYA PAHUJA	
1 The international law in force: anachronistic ethics and divine violence	18
JENNIFER BEARD	
2 Absolute contingency and the prescriptive force of international law, Chiapas–Valladolid, ca. 1550	29
OSCAR GUARDIOLA-RIVERA	
3 Latin roots: the force of international law as event	43
PETER FITZPATRICK	
4 Westphalia: event, memory, myth	55
RICHARD JOYCE	
5 The force of a doctrine: art. 38 of the PCIJ Statute and the sources of international law	69
THOMAS SKOUTERIS	
6 Paris 1793 and 1871: <i>levée en masse</i> as event	81
GERRY SIMPSON	

7	Decolonization and the eventness of international law SUNDHYA PAHUJA	91
8	Post-war to new world order and post-socialist transition: 1989 as pseudo-event SCOTT NEWTON	106
9	The liberation of Nelson Mandela: anatomy of a 'happy event' in international law FRÉDÉRIC MÉGRET	117
10	Political trials as events EMILIOS CHRISTODOULIDIS	130
11	The Tokyo Women's Tribunal and the turn to fiction KAREN KNOP	145
12	Many hundred thousand bodies later: an analysis of the 'legacy' of the international criminal tribunal for Rwanda DENISE FERREIRA DA SILVA	165
13	From the state to the Union: international law and the appropriation of the new Europe PATRICIA TUITT	177
14	The emergence of the World Trade Organization: another triumph of corporate capitalism? FIONA MACMILLAN	191
15	The World Trade Organization and development: victory of 'rational choice'? DONATELLA ALESSANDRINI	207
16	Protesting the WTO in Seattle: transnational citizen action, international law and the event RUTH M. BUCHANAN	221
17	Globalism, memory and 9/11: a critical Third World perspective OBIOIRA CHINEDU OKAFOR	234

18 Provoking international law: war and regime change in Iraq	246
JOHN STRAWSON	
19 The torture memos	260
FLEUR JOHNS	
<i>Index</i>	279