

# INTERNATIONAL LAW

---

Edited by  
Joseph Weiler and Alan T. Nissel

CRITICAL CONCEPTS IN  
LAW

# INTERNATIONAL LAW

Critical Concepts in Law

*Edited by Joseph Weiler and  
Alan T. Nissel*

**Volume V  
International Law in and of War**



 **Routledge**  
Taylor & Francis Group  
LONDON AND NEW YORK

First published 2011  
by Routledge  
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada  
by Routledge  
711 Third Avenue, New York, NY 10017

*Routledge is an imprint of the Taylor & Francis Group, an informa business*

© 2011 Selection and editorial material Joseph Weiler and Alan T. Nissel;  
individual owners retain copyright in their own material

All rights reserved. No part of this book may be reprinted or reproduced or utilised in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system, without permission in writing from the publishers.

*Trademark notice:* Product or corporate names may be trademarks or registered trademarks, and are used only for identification and explanation without intent to infringe.

*British Library Cataloguing in Publication Data*

A catalogue record for this book is available from the British Library

*Library of Congress Cataloging in Publication Data*

International law : critical concepts in law / edited by Joseph Weiler and Alan T. Nissel.

p. cm.

Includes bibliographical references and index.

I. International law. I. Weiler, Joseph, 1951–II. Nissel, Alan T.

KZ3092.I5794 2011

341–dc22

2010051368

ISBN: 978-0-415-40027-5 (Set)

ISBN: 978-0-415-40035-0 (Volume V)

Typeset in Times New Roman  
by Wearset Ltd, Boldon, Tyne and Wear

#### **Publisher's Note**

References within each chapter are as they appear in the original complete work



Printed and bound in Great Britain by  
TJI Digital, Padstow, Cornwall

# ACKNOWLEDGEMENTS

The publishers would like to thank the following for permission to reprint their material:

Michigan Law Review Association for permission to reprint Oscar Schachter, "The Right of States to Use Armed Force," *Michigan Law Review* 82(5/6), 1984, pp. 1620–1646.

American Society of International Law for permission to reprint Thomas M. Franck, "Who Killed Article 2(4)?" *American Journal of International Law* 64(5), 1970, pp. 809–837.

Chatham House for permission to reprint Ian Brownlie, "The Use of Force in Self-Defence," *British Yearbook of International Law* (London: Royal Institute of International Affairs, 1961) 37: 183–268.

Oxford University Press for permission to reprint Alain Pellet, "Brief Remarks on the Unilateral Use of Force," *European Journal of International Law* 11(2), 2000, pp. 385–392.

American Society of International Law for permission to reprint W. Michael Reisman, "The Resistance in Afghanistan is Engaged in a War of National Liberation," *American Journal of International Law* 81, 1987, pp. 906–909.

American Society of International Law for permission to reprint Stephen M. Schwebel, "What Weight to Conquest?" *American Journal of International Law* 64, 1970, pp. 344–347.

American Society of International Law for permission to reprint Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories since 1967," *American Journal of International Law* 84, 1990, pp. 44–103.

Oxford University Press for permission to reprint Antonio Cassese, "Terrorism is also Disrupting some Crucial Legal Categories of International Law," *European Journal of International Law* 12, 2001, pp. 993–1001.

## ACKNOWLEDGEMENTS

Hart Publishing for permission to reprint Tal Becker, "Introduction" in *Terrorism and the State: Rethinking the Rules of State Responsibility* 1 (Portland: Hart, 2006), pp. 1–6.

Oscar M. Uhler et al., "Introduction," in *The Geneva Conventions of 12 August 1949: Commentary*, 9–16 (Jean S. Pictet ed., 1958), pp. 9–16 © International Committee of the Red Cross (ICRC).

Harvard University for permission to reprint Chris Jochnick & Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War," *Harvard International Law Journal* 35, 1994, pp. 49–95.

Brill for permission to reprint Yoram Dinstein, "The Distinctions Between War Crimes and Crimes Against Peace," *Israel Year Book on Human Rights* 24, 1994, pp. 1–17.

Oxford University Press for permission to reprint Jose E. Alvarez, "Nuremberg Revisited: The *Tadic* Case," *European Journal of International Law* 7(2), 1996, pp. 245–264.

Rubin Mass Ltd. for permission to reprint Hans Kelsen, "Collective and Individual Responsibility for Acts of State in International Law," *The Jewish Year Book of International Law* 26, 1948, pp. 226–239.

Cambridge University Press for permission to reprint Christopher Greenwood, "The Relationship Between *Ius ad Bellum* and *Ius in Bello*," *Review of International Studies* 9, 1983, pp. 221–234.

Chatham House for permission to reprint J.L. Brierly, "Do We Need An International Criminal Court?" *British Year Book of International Law*, (London: Royal Institute of International Affairs, 1927) 8: 81–88.

Indiana International & Comparative Law Review for permission to reprint M. Cherif Bassiouni, "The Time Has Come for an International Criminal Court," *Indiana International and Comparative Law Review* 1, 1991, pp. 1–43.

Cambridge University Press for permission to reprint Martti Koskeniemi, "Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons" *Leiden Journal of International Law* 10, 1997, pp. 137–162.

## Disclaimer

The publishers have made every effort to contact authors/copyright holders of works reprinted in *International Law (Critical Concepts in Law)*. This has not been possible in every case, however, and we would welcome correspondence from those individuals/companies whom we have been unable to trace.

# PREFACE

The identity, *raison d'être*, the very ontology of a collection dedicated to Critical Concepts in International Law is not self-evident and in some respects is even self-defeating. It cannot be an *ersatz* 'text book' or a 'manual'. Even the most careful selection of articles for inclusion would, necessarily and inevitably, leave gaps and lacunae and lack the systematic coherence of a well-executed manual. And, we are interested in a discussion that goes way beyond even the most sophisticated of text books. It cannot be the academic equivalent of an artistic 'retrospective' at the MOMA or the Beaubourg, where works are included not because of their intrinsic enduring importance, but because of their biographical importance. It cannot be the equivalent of the most ubiquitous of anthologies – poetry – which is purposefully shaped by the subjective artistic sensibility, even idiosyncrasies, of the anthologist. There must be some objective rationality which would have wide appeal and use.

This collection, part of a wide-ranging series on Critical Legal Concepts in Law published by Routledge can be none of the above, but in some ways, to be useful and meaningful, has to have a bit of all of them. Not an easy task – which is made more delicate by two other factors. English – the language of the publisher – is one such factor. *International law* – only English? Is that not, in and of itself, an oxymoron, or some other kind of moronic linguistic conceit? And, finally, there is the personal human element. Scholarship is but the reified expression of the toil, creativity and passion of individuals, flesh and blood. Choosing scholarship is inevitably choosing among individuals – a fraught and thankless task. So there is an inevitable apologia to any such enterprise; it is impossible that our selection will satisfy everyone. It is possible that it will satisfy no one. But we console ourselves that that would be the fate of anyone in our shoes – a structural risk.

In this short introduction, we want to explain how we went about navigating the impossible mission and addressing the various choices that had to be made.

## **What are the critical concepts of international law?**

Do we go the dictionary or encyclopedic way, starting with Abuse of Rights, visiting Good Faith, have a big chunk on *Pact Sunt Servanda* and ending in the

vicinity of Voluntarism? It has been done, it has been done well, and we did not think it would be helpful to do that again. We chose, in some respects, the Kings Way – trying to think of the table of contents of, yes, an international law teaching manual. Its principal headings and subheadings would in some way capture the critical concepts of international law. What *has* to be taught is critical. Critical are the concepts without which the overall picture would be incomplete. In some ways, this collection is organized around such an imaginary table of contents.

Surprisingly, or not so surprisingly, since the Second World War we have seen a homogenization of the tables of contents of the textbooks on international law. Typically, the table of contents begins with an introduction on the history and nature of international law. We then find a discussion on the sources, subjects, state responsibility and dispute resolution. The relationship between international law and municipal law is somewhere at the beginning or the end. In between, the table of contents continues with synopses of substantive fields such as the use of force, international humanitarian law, human rights, international economic law, etc. This generalization holds true for many English, French, Italian, German and other languages textbooks. It is classic and it constituted our starting point for defining the critical concepts we would examine. But only a starting point. In making determinations, we found ourselves employing pre-modern notions, modern as well as post-modern approaches to the textbook on international law. We will illustrate very briefly.

Volume I offers a systemic overview of the field and addresses the central questions *on* (rather than *of*) international law. The next two volumes concentrate on the *physiognomy* of international law – *how does international law work on a day-to-day basis?* In the choice of topics, the structure of these volumes resembles a traditional table of contents: historical introduction, institutional aspects and the substance of international law.

Volumes IV and V depart from the traditional structure by resurrecting the ‘pre-modern’ or classical categorization of the international law of peace and of war that has gone out of fashion but that we found strangely useful. This may look a bit outdated – retrogressive more than progressive. We believe that this classical perspective adds value by drawing our attention to the distinct (related but often conflicting) natures of international law. To be sure, there are not two international laws – one of peace and the other of war. But, similarly, there is no one international law. The nature and operations of some fields of international law are categorically distinct – such as the rules on alien protection as compared to self-defence. This is not to say that they are unrelated to each other (e.g. may a state use force to protect its nationals abroad?), only that there is a hermeneutical gain in adopting the classical distinction between peace and war. The former is the daily bread of international law – such that Volume IV, *International Law in and of Peace*, as mentioned above, is a study of the *physiognomy* of international life regulated by law; the latter, in contrast, pertains to those special events that test the ‘limits’ of the system – such that Volume V, *International Law in and of War*, can be described as pertaining to the *pathology* of international life regulated by law.

The case for resurrection also rests on the huge contemporary expansion of international legal norms and regimes to myriad areas of human endeavour, arguably eclipsing not only in volume but also in importance the law on the use of force, once the reigning queen of the subject.

Volume VI is where we take our cue from contemporary sensibilities, from the critical approach to science in general and from a healthy dose of epistemic scepticism. It is titled *International Law And*. It is here that the critical often becomes critical and thus, the final volume serves to unpack as much as to conclude this Critical Concepts series on International Law. In the introductions to the individual volumes and, especially, in the tables of contents of the individual volumes, these choices will become more transparent. Let us produce, now, the standard apologia – we are sure that others would make different selections, on the margin and even at the centre. But we do hope that we have achieved a certain systematic coherence which is both interesting and useful.

### **Dealing with critical concepts: methodology**

The choice of critical concept was informed by the traditional notion of the textbook table of contents. Our substantive methodology is equally traditional: a selection of scholarly articles, the reading of which we decided would be illuminating. As indicated, critical concepts cannot replace a textbook or manual, but for the very reason that it cannot – because of its diversity of approach, methodology and intellectual and moral sensibility – it can constitute a precious, even indispensable companion.

To reach that intended illumination, several choices were made. First, we decided not to opt for a contemporary photograph, but for an evolutionary cinematographic approach. We chose and organized articles generationally, in order to give a feel for the motion of international law over the past century or so. Articles, thus, were placed together not just for historical purposes but for their landmark value in an evolutionary or in a contrasting sense. Accordingly, we often chose articles in pairs, mixing classical and critical perspectives.

Second, the significance of our choices, successful or otherwise, will come by reading the entire selection pertaining to a topic – at time half a dozen articles – rather than dipping in for this or that selection. *Nota bene*: our list makes no effort at being a complete list of the ‘best’ articles ever written on international law; indeed, some of the articles included in this series are decidedly not. We looked for paradigms, paradigm breakers, paradigm shifters, etc. Because of this methodological approach, some of the articles chosen are not the best but the most interesting or most telling of a certain moment in the field, which is important for illumination of the present. And some of the best articles were not chosen because they did not fit with the holistic narrative we were trying to create. Likewise, we did not make choices based on ‘There has to be at least one Lauterpacht’ reasoning. It is precisely in this sense that we are not an anthology of poets. We made our choices based on a substantive decision as to which

selection of pieces taken together would be most illuminating to the concept in question. The ‘placing’ of articles was itself the subject of considerable reflection and was never haphazard. To illustrate: some readers may wonder why Eyal Benvenisti’s article on ‘Reclaiming Democracy’ was in the section on the relationship between domestic and international law rather than the section on democracy, legitimacy and pluralism. Some of the articles we have selected – such as Benvenisti’s ‘Reclaiming Democracy’ – could easily fit into several sections contained in this collection. We decided where to place such articles not just based on their subject-matter, but on their relationship to the other articles in that section. Accordingly, we chose to juxtapose Benvenisti’s article to Mattias Kumm’s ‘International Law in National Courts’ rather than to Susan Mark’s ‘International Law, Democracy and the End of History’. Similarly, Benedict Kingsbury, Nico Krisch and Richard B. Stewart’s ‘The Emergence of Global Administrative Law’ could have been included in Volume III’s section on globalization. However, in our view, the importance of Kingsbury *et al.*’s article to an overall understanding of international law merited its inclusion in the first volume of the series.

This, then, will become our Cato’s cry throughout these volumes: our own intellectual input has been mostly in the groupings of articles together. It is on this issue that we spent most time, consulted most widely and, consequently, advocate most passionately that the richest rewards will result from reading the groups as a whole rather than individual samples.

The best way to understand our roles is by analogy to that of a museum or exhibition curator: the works of art take, of course, pride of place. It will be the identity of the curator who explains why and how one museum or exhibition will differ from another even if concerned with the same subject matter. So back to the apologia: we cannot escape the shackles of situatedness. Naturally, our *weltanschauung*, our education, our cultural context, etc. will have shaped the sensibilities by which we made our final selections. We bothered many friends and colleagues with requests to review our lists as they evolved, and comment and make suggestions. It would be indelicate to mention names in this context. Ultimately responsibility for the final selection is ours.

### **Language, gender and other biases**

This is a project by an English-language publisher, and translation was essentially not an option. It inevitably colours the selection. There is no point being precious about this. English, more than ever, is the most commonly used *second* language by a huge margin, and it is not surprising how many international law journals are published in English, or accept English language articles even in jurisdictions in which English is not the spoken language. But still, the choice of English involves an important cultural and at times even political bias, and this troubled us. We tried to address this by carefully selecting articles from non-English-speaking jurisdictions – about 30 per cent of our selection falls under this rubric. We were

## PREFACE

troubled by what appears to be the low number of contributions from women that feature in our final selection – about 10 per cent. In some respects this is not surprising: the male voice dominates the major journals which were the source of our selections, and since we adopted a historical, evolutionary approach, this aggravated matters even more. But the situation is changing with an increased, though still minority, share in more recent years. Should an exercise like this be undertaken 20 years from now, the picture, we are confident would be very different. Though the nationality of an author can be a very poor proxy to academic and intellectual sensibility, the field from which we made our selection is still dominated by what once would be called a Euro-centric population, and that domination is reflected in the selections that found their way to these pages. In this respect we, and the readers, are certainly victims by the Anglophone bias – we believe a bigger voice to developing-country sensibilities would have, justifiably, been present if we could use French and Spanish literatures. Still, those voices are present in these volumes in some of the very finest pieces.

Let us dispense with the apologia – and wish our readers a rewarding, even exciting, intellectual, academic and professional treasure.

Joseph Weiler  
University Professor, New York University School

Alan Nissel  
Doctoral Candidate, University of Helsinki  
Registered In-House Counsel, Wilshire Skyline, Inc.

New York, 29 November 2010

# CONTENTS

## VOLUME V INTERNATIONAL LAW IN AND OF WAR

<i>Acknowledgements</i>	ix
<i>Preface</i>	xi
<b>Introduction</b>	1
<b>PART 26</b>	
<b>When States go to War</b>	3
<b>64 The right of states to use armed force</b>	5
OSCAR SCHACHTER	
<b>65 Who killed Article 2(4)?</b>	33
THOMAS M. FRANCK	
<b>66 The use of force in self-defence</b>	63
IAN BROWNLIE	
<b>67 Brief remarks on the unilateral use of force</b>	153
ALAIN PELLET	
<b>68 The resistance in Afghanistan is engaged in a war of national liberation: editorial statement</b>	161
W. MICHAEL REISMAN	

## CONTENTS

<b>PART 27</b>	
<b>Conquest and Occupation</b>	<b>167</b>
<b>69 What weight to conquest? Editorial statement</b>	<b>169</b>
STEPHEN M. SCHWEBEL	
<b>70 Prolonged military occupation: the Israeli-occupied territories since 1967</b>	<b>174</b>
ADAM ROBERTS	
<b>PART 28</b>	
<b>Proxy-wars, Terrorism and Non-state Actors</b>	<b>237</b>
<b>71 Terrorism is also disrupting some crucial legal categories of international law</b>	<b>239</b>
ANTONIO CASSESE	
<b>72 Introduction to <i>Terrorism and the State: Rethinking the Rules of State Responsibility</i></b>	<b>248</b>
TAL BECKER	
<b>PART 29</b>	
<b>International humanitarian and criminal law</b>	<b>255</b>
<b>73 Introduction to <i>The Geneva Conventions of 12 August 1949: Commentary</i></b>	<b>257</b>
OSCAR M. UHLER ET AL.	
<b>74 The legitimization of violence: a critical history of the laws of war</b>	<b>264</b>
CHRIS JOCHNICK AND ROGER NORMAND	
<b>75 The distinctions between war crimes and crimes against peace</b>	<b>311</b>
YORAM DINSTEIN	
<b>76 Nuremberg revisited: the <i>Tadic</i> case</b>	<b>326</b>
JOSE ALVAREZ	

## CONTENTS

<b>77</b>	<b>Collective and individual responsibility for acts of state in international law</b>	<b>347</b>
	HANS Kelsen	
<b>78</b>	<b>The relationship between <i>ius ad bellum</i> and <i>ius in bello</i></b>	<b>360</b>
	CHRISTOPHER GREENWOOD	
<b>79</b>	<b>Do we need an International Criminal Court?</b>	<b>377</b>
	J.L. BRIERLY	
<b>80</b>	<b>The time has come for an International Criminal Court</b>	<b>383</b>
	M. CHERIF BASSIOUNI	
<b>PART 30</b>		
	<b>Weapons of Mass Destruction</b>	<b>419</b>
<b>81</b>	<b>Faith, identity, and the killing of the innocent: international lawyers and nuclear weapons</b>	<b>421</b>
	MARTTI KOSKENNIEMI	

# INTRODUCTION

When lay people think about law, they think criminal law. When lay people think about international law, they think war and the law of war. It is a grisly area but, sadly, fundamental too.

The most dynamic fields of international law are those areas that are responding in unique ways to changing ‘realities’. As examples of changes in the ‘real’ world, in this field, one could cite the move to a world with a single (military) superpower, even if declining, and the challenges it creates for, say, multilateral institutions; or the use of terror with a level of force that, if used by state actors, might meet the traditional threshold of ‘armed attack’ and the challenges this creates for the normative framework of regulating the use of force and responses thereto; or the emergence of new international institutions such as the International Criminal Court. This volume tries to capture these historical shifts within this field. ‘When States Go to War’ covers the legality of force. The articles in this section are not arranged in chronological but in thematic order and were chosen for their complementarity:

- Oscar Schachter, ‘The Right of States to Use Armed Force’;
- Thomas M. Franck, ‘Who Killed Article 2(4)?’;
- Ian Brownlie, ‘The Use of Force in Self-Defence’;
- Alain Pellet, ‘Brief Remarks on the Unilateral Use of Force’;
- W. Michael Reisman, ‘The Resistance in Afghanistan is Engaged in a War of National Liberation’.

The following section examines the aftermath of force: occupation. Considering the number of wars fought around the world, it is noteworthy that this area of law seems to have become exclusive to one region (the Middle East). This is an area fraught with passionate positions; however, the two articles in this section apply nuanced legal argumentation regarding the complexity of international law regulating occupation:

- Stephen M. Schwebel, ‘What Weight to Conquest?’;
- Adam Roberts, ‘Prolonged Military Occupation: The Israeli-Occupied Territories since 1967’.

## INTRODUCTION

Does the private nature of terrorism, with its remoteness from Westphalian logic, justify a rethinking of the field or do the current concepts of international law adequately address this modern phenomenon? The pieces by Tal Becker and Antonio Cassese capture the conundrums.

The laws of war (in contrast to the use of force) today have come a long way from the early Hague rules. The trajectory has not been a linear one. We have included the topic of international criminal law in this volume rather than in Volume III because we believe that this body of law is distinctively more substantive in nature than is state responsibility. It was, thus, more appropriate to insert it into the context 'International Law in and of War' than the more conceptual 'Fundamentals of International Law'. The articles in this section are paired to provide a sense of the movement in this field:

- Oscar M. Uhler *et al.*, *The Geneva Conventions of 12 August 1949: Commentary*;
- Chris Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War';
- Yoram Dinstein, 'The Distinctions Between War Crimes and Crimes Against Peace';
- Jose Alvarez, 'Nuremberg Revisited: The Tadić Case';
- Hans Kelsen, 'Collective and Individual Responsibility for Acts of State in International Law';
- Christopher Greenwood, 'The Relationship Between *Ius ad Bellum* and *Ius in Bello*';
- J.L. Brierly, 'Do We Need An International Criminal Court?';
- M. Cherif Bassiouni, 'The Time Has Come for an International Criminal Court'.

The volume ends with a superbly written, sober article on the powerlessness of international law to address the most destabilizing aspect of war: weapons of mass destruction. Martti Koskenniemi provides his characteristically dense commentary on the World Court's Advisory Opinion on the legality of nuclear weapons.<sup>1</sup>

### Note

- <sup>1</sup> *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice Advisory Opinion of 8 July 1996, *I.C.J. Reports* 1996, at p. 226.

## Part 26

### WHEN STATES GO TO WAR

