INTERNATIONAL LAW

Edited by
Joseph Weiler and Alan T. Nissel

CRITICAL CONCEPTS IN LAW

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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

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.

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New York, 29 November 2010

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VOLUME IV INTERNATIONAL LAW IN AND OF PEACE

INTRODUCTION

In Volumes IV and V we have resurrected the classical distinction between the Law of Peace and the Law of War. We believe that this classical perspective adds value by drawing our attention to the distinct (related but often conflicting) natures of international law in the two domains – e.g. the relationship between the rules of state responsibility and those governing responses to the illicit use of force. It also helps privilege the vast increase in the substantive areas covered by international law not related to peace and security. Symbolically, it is the affirmation that there is much more to the UN than the Security Council.

Volume IV (*International Law in and of Peace*) covers a representative sample of that expansion. The focus of this volume, and to some degree the next, is the mapping out of the terrain of international law.

We have juxtaposed Brunno Simma's piece on the United Nations with that of Ari Afilalo and Dennis Patterson to give a sense of the 'two UNs' that seem to coexist in parallel universes. Today's multilateral institutions have rich non-security agendas and provide the general framework for international intercourse. Nowhere is this more evident than in relation to the planet's common spaces such as the oceans. We contrast Bernard Oxman's classical article to one of our personal favorites, 'Power Sharing in the Law of the Sea,' by Philip Allott. *International environmental law* is another expression of an international 'commons'. The two articles written by Günther Handl and Phllippe Sands provide a first-hand account of the challenges they face as premiere practitioners in this field.

International economic law, as reflected in international and regional organizations, is a non-spatial functional 'commons' and has become hugely important as measured not only by the 'volume of law' but also by its impact on states and humanity. We have captured this importance through the writings of Jean Monnet himself, and theorizing by Joseph Weiler and Robert Howse and Andrew Guzman on three of the most significant and thick international economic law regimes.

From the economic dimension, the volume turns to the social aspect of international law. We have reproduced as emblematic the debate between Philip Alston and Brian Langille regarding 'Core Labour Rights'. Jackie Peel's analysis on the 'democratization of risk' poignantly identifies the inherent ties linking

international economic law, international labour law and international human rights.

Concern for legal protection of human rights may be thought iconic in the second half of the twentieth century. A watershed moment for the history in this field is the passage of the Universal Declaration of Human Rights. Hersch Lauterpacht provides a sobering account of that moment. The next three articles were reproduced from the same issue of the *European Journal of International Law* and, together, provide a nuanced perspective on the lay of the land today.

- Jochen Von Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law';
- His Holiness Benedictus XVI Joseph Ratzinger, 'Address to the United Nations General Assembly of 18 April 2008'; and
- Mary Anne Glendon, 'Justice and Human Rights: Reflections on the Address of Pope Benedict to the UN'.

The volume ends with traditional and rethinking pieces on the relevance of the international law of neutrality:

- Pearce Higgins, 'The Law of Peace';
- Detlev F. Vagts, 'The Traditional Legal Concept of Neutrality in a Changing Environment'.

This is a topic that should arguably have been included in the next volume (*International Law in and of War*). We have included it as the final section here because the *law* of neutrality concerns peace and mundane daily international life. To be sure, its *enforcement* has not infrequently resulted in war; however, this fact does not *ipso jure* distinguish the law of neutrality from other fields of international law in and of peace.

Part 17

INTERNATIONAL INSTITUTIONAL LAW