

International Law

Written by one of the world's leading international lawyers, this is the new and updated edition of Jan Klabbers' landmark textbook. International law can be defined as 'the rules governing the legal relationship between nations and states', but in reality it is much more complex, with political, diplomatic, and socio-economic factors shaping the law and its application. This refreshingly clear, concise textbook encourages students to view international law as a dynamic system of organizing the world. Bringing international law back to its first principles, the book is organized around four questions: Where does it come from? To whom does it apply? How does it resolve conflict? And what does it say? Building on these questions with both academic rigour and clarity of expression, Professor Klabbers breathes life and energy into the subject. Footnotes point students to the wider academic debate while chapter introductions and final remarks reinforce learning. This fourth edition includes references to new case law and literature, features brief discussions on recent topics of general interest, including the invasion of Ukraine, and devotes some attention to energy law and health law.

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International Law

Fourth Edition

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University of Helsinki



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Contents

<i>Detailed Contents</i>	vii
<i>Preface to the Fourth Edition</i>	xiii
<i>Preface to the Third Edition</i>	xv
<i>Preface to the Second Edition</i>	xvii
<i>Preface to the First Edition</i>	xix
<i>Table of Cases</i>	xxii
<i>List of Abbreviations</i>	xxxv

PART I THE STRUCTURE OF INTERNATIONAL LAW

1	The Setting of International Law	3
2	The Making of International Law	22
3	The Law of Treaties	43
4	The Subjects of International Law	71
5	Jurisdiction, Powers, and Immunities	98
6	The Individual in International Law, Including Human Rights	117
7	The Law of Responsibility	136
8	International Courts and Tribunals	153
9	Sanctions, Countermeasures, and Collective Security	180

PART II THE SUBSTANCE OF INTERNATIONAL LAW

- 10 Use of Force** 201
- 11 The Law of Armed Conflict** 218
- 12 International Criminal Law** 235
- 13 The Seas, the Air, and Outer Space** 253
- 14 Protecting the Environment** 277
- 15 The Global Economy** 294

PART III THE SURROUNDINGS OF INTERNATIONAL LAW

- 16 Domestic Courts and Their Relationship with International Law** 317
- 17 The Politics and Ethics of International Law and Global Governance** 335
- 18 By Way of Conclusion** 347
- Index* 351

Detailed Contents

<i>Preface to the Fourth Edition</i>	xiii
<i>Preface to the Third Edition</i>	xv
<i>Preface to the Second Edition</i>	xvii
<i>Preface to the First Edition</i>	xix
<i>Table of Cases</i>	xxii
<i>List of Abbreviations</i>	xxxv

PART I THE STRUCTURE OF INTERNATIONAL LAW

1 The Setting of International Law	3
Introduction	3
The Seventeenth Century	4
Colonialism	6
International Law and the Global Economy	8
The International Legal System	10
International Legal Theories	12
International Law in International Relations Theory	15
Globalization, Global Governance, and International Law	17
Ethics and International Law	19
Final Remarks: A Critical Perspective	20
Further Reading	21
2 The Making of International Law	22
Introduction	22
Two Ships (or Perhaps Three): <i>Lotus</i> and <i>Wimbledon</i>	23
Article 38 ICJ Statute	25
Treaties	26
Customary Law	27
The Method of Custom: The <i>Paquete Habana</i>	30
Consent and the Persistent Objector	31
A Normative Problem, or towards Modern Custom	32
On Lawbreaking and Lawmaking	34
General Principles of Law	35

viii Detailed Contents

- Unilateral Declarations 37
- Other Possible Sources and the Renewal of Sources Doctrine 38
- Final Remarks 41
- Further Reading 42

- 3 The Law of Treaties 43**
 - Introduction 43
 - Two Basic Principles 45
 - The Concept of Treaty 45
 - The Conclusion of Treaties 47
 - Reservations 50
 - Interpretation 54
 - The Application of Treaties 57
 - Treaty Revision 59
 - Validity and Invalidity 61
 - Termination and Suspension 65
 - Final Remarks 69
 - Further Reading 70

- 4 The Subjects of International Law 71**
 - Introduction 71
 - States 73
 - Recognition of States (or Governments) 77
 - Acquisition of Territory 81
 - Internationalized Territory 84
 - Statehood: Continuity and Change 85
 - International Organizations 89
 - The United Nations 93
 - Other Subjects 95
 - Final Remarks 96
 - Further Reading 97

- 5 Jurisdiction, Powers, and Immunities 98**
 - Introduction 98
 - Five Principles 98
 - Extraterritorial Jurisdiction 104
 - Concurrent Jurisdiction 106
 - The Powers of International Organizations 107
 - Sovereign Immunities 110
 - Heads of State and Others 112
 - Diplomatic Privileges and Immunities 113
 - Final Remarks 115
 - Further Reading 116

- 6 The Individual in International Law, Including Human Rights 117**
 - Introduction 117
 - From Slavery to Human Rights 118

ix Detailed Contents

- The Institutionalization of Human Rights 121
- The Application of Human Rights 124
- Group Rights 127
- Self-Determination 128
- Nationality 130
- The Right to Have Rights? Stateless Persons, Refugees, and Migrants 131
- Final Remarks 134
- Further Reading 135

- 7 The Law of Responsibility 136**
 - Introduction 136
 - From Custom to Codification 137
 - State Responsibility: Two Basic Principles 138
 - Responsibility and Private Acts 140
 - Circumstances Precluding Wrongfulness 142
 - Consequences of Responsibility 143
 - Responsible to Whom? 144
 - Responsibility of International Organizations 146
 - Individual Responsibility 148
 - Shared Responsibility? 150
 - Final Remarks 151
 - Further Reading 152

- 8 International Courts and Tribunals 153**
 - Introduction 153
 - Settling Disputes 153
 - Arbitration 155
 - Adjudication and the ICJ 157
 - Jurisdiction 161
 - Admissibility 168
 - Interim Measures of Protection 171
 - Compensation 173
 - Miscellaneous Issues 174
 - Advisory Opinions 176
 - Judicial Review? 177
 - Final Remarks 178
 - Further Reading 179

- 9 Sanctions, Countermeasures, and Collective Security 180**
 - Introduction 180
 - Inadimplenti Non Est Adimplendum* 181
 - Retorsion 182
 - Reprisals and Countermeasures 183
 - Collective Security 185
 - Triggering Collective Action 189
 - The Role of the General Assembly 191
 - Individual Sanctions 194

x Detailed Contents

Limits to the Security Council?	196
Final Remarks	197
Further Reading	198

PART II THE SUBSTANCE OF INTERNATIONAL LAW

10 Use of Force	201
Introduction	201
Abolishing War	202
The UN Charter	203
Self-Defence	206
Humanitarian Intervention	211
Terrorism	213
The End of Armed Conflict	216
Final Remarks	216
Further Reading	217
11 The Law of Armed Conflict	218
Introduction	218
International Humanitarian Law	219
International and Non-international Conflicts	222
Proportionality and Military Necessity	224
Arms and Weapons	225
International Humanitarian Law and International Organizations	228
International Humanitarian Law and Privatization	229
Foreign Occupation	230
<i>Jus Post Bellum</i> and Post-Conflict Governance	231
Wars against 'Phenomena'	232
Final Remarks	233
Further Reading	234
12 International Criminal Law	235
Introduction	235
War Crimes Trials and the ICC	235
Core Crimes	242
Individual Responsibility	244
Transboundary Police Cooperation	246
Extradition	248
Deportation and Abduction	250
Final Remarks	251
Further Reading	252
13 The Seas, the Air, and Outer Space	253
Introduction	253
Outline of the Maritime Regime	254
Internal Waters	257
Territorial Sea and Contiguous Zone	258

xi Detailed Contents

Exclusive Economic Zone (EEZ)	259
Continental Shelf	261
High Seas	262
The Deep Seabed	263
Maritime Delimitation	265
Prompt Release, Provisional Measures	268
Air Law	270
Space Law	273
Final Remarks	275
Further Reading	276

14 Protecting the Environment 277

Introduction	277
Early Case Law	278
Pulp Mills	280
Specific Issues	283
The Antarctic	290
Proceduralization and Institutionalization	291
Compliance Procedures	292
Final Remarks	293
Further Reading	293

15 The Global Economy 294

Introduction	294
Private International Law	295
International Taxation	297
Financial Institutions	298
World Trade and the WTO	300
Investment Protection	303
Energy	306
Health	307
Economic 'Soft Law'	308
Development and a New International Economic Order	311
Debt Relief	313
Final Remarks	313
Further Reading	314

PART III THE SURROUNDINGS OF INTERNATIONAL LAW

16 Domestic Courts and Their Relationship with International Law 317

Introduction	317
Monism and Dualism	318
Direct Effect	321
Incorporating International Law	325
The Special Case of the European Union	327
Towards a New Dualism?	329
Avoidance Strategies	332

xii Detailed Contents

Final Remarks 333

Further Reading 334

17 The Politics and Ethics of International Law and Global Governance 335

Introduction 335

Global Governance 335

The Politics of International Law 339

Global Ethics 341

Towards Virtue? 343

Final Remarks 345

Further Reading 346

18 By Way of Conclusion 347*Index* 351

Preface to the Fourth Edition

The fourth edition of this textbook, aiming to describe the machinery of international law, is written against the background of Russia's brutal attack on Ukraine. The attack shows not only Russia at its worst, but also highlights the weak spot of international law. International law (like law generally) is not very good at handling crises – and yet that is precisely the moment we expect the law to be at its best. But much like criminal law has problems tackling the ruthless and smart serial killer, and tax law has problems when companies are determined to avoid being taxed, so too international law has a hard time dealing with aggressive states. This is the case time and again. It applies to the Horn of Africa; it applies between Azerbaijan and Armenia; it applies to Saudi Arabia's role in Yemen; to Syria and Libya; and it applied to the US/UK invasion of Iraq two decades ago. What makes Russia's attack special is not its aggression, but that it is an attack launched against a reasonably well-established European democracy. Russia's aggression is not just about territory and delusions of grandeur (although it is that too) but it is also an attack on the liberal global order, as many autocrats and wannabe autocrats on the far right have understood all too well. It is this consideration which sets Russia's aggression apart from the other examples mentioned.

This textbook is meant to discuss the way international law works, and that has two implications. First, international law does much much more than deal with aggression and military matters only – thus it would be a dereliction of duty (self-imposed duty, admittedly) for me to drastically change the book's structure and outlook in order to focus on Russia's aggression. Second, the book should not become a commentary on current events. Much as it may be convenient in the classroom to have timelines, political initiatives, and resolutions described in great detail, this book is not the place to do so, also because today's current events may be replaced by other events tomorrow.

And there is a third factor too: for all the tragedy Russia's actions are causing, the situation is legally speaking not particularly novel. It concerns one state invading another, raising questions of aggression and self-defence and proper behaviour during armed conflict, and sometimes new technologies will be used which require some reflection on existing legal concepts. But most of the legal questions relating to the attack (Putin calls it a 'special military operation' precisely so as to deflect attention away from aggression)

xiv Preface to the Fourth Edition

are fairly standard questions, which have been associated with warfare for centuries. That is not to say there is no room for academic discussion – one may wonder, e.g., whether the concept of neutrality still has a place, or whether the Security Council is now exposed (yet again?) as morally bankrupt, but those are not traditional legal questions, as they do not inquire into what is permitted and what is prohibited.

Like the previous editions, this fourth edition aims first and foremost to discuss the ‘structure and process’ of international law: how the machine works, before discussing what it produces. It does so on the basis of the thought that international law is not (as is often lazily assumed) constructed along the lines of some ‘criminal law model’, where all that matters is what states are allowed to do and prohibited from doing, but is rather a vocabulary, a language, a framework, for discussing international affairs. International law is not good at handling crises, but it does provide diplomats and political leaders with the language to discuss how to approach matters if a state becomes independent, or how to settle a maritime boundary, or how to address the situation when big balloons are spotted high up in the air. Moreover, international law makes it possible for states to conclude all sorts of arrangements with each other and set up all sorts of collaborative projects. The ‘criminal law model’ is actually of rather minor relevance for the day-to-day work of international law; far more relevant is the facilitative role of international law, allowing states and others to go about their business.

Of course, allowing states to go about their business also means that international law facilitates projects that are morally suspect, or downright immoral: colonialism is probably the most obvious example. But that drives home an important lesson in its own right; international law itself is neither particularly good (too often has it been romanticized) nor particularly evil (too often has it been castigated). It can be used for both good and bad purposes, and it is bordering on the nonsensical to claim that a state (or anyone, for that matter) is ‘for’ international law or ‘against’ international law. The point is to understand how it works and to grasp that it is not politically innocent, and it is this message that the book hopes to convey.

Naturally, this edition pays some attention to Russia’s attack, though without making it the centrepiece of the international legal order. I have economized some of the writing, deleted some references, and generally updated the text, while adding a few words on global health law (indispensable since Covid-19) and international energy law, of increasing importance in the global economic order.

I dedicate this edition to the next generation: to my wonderful children Johan and Gilda.

Preface to the Third Edition

This third edition is prepared when the world is the grip of the Covid-19 (corona) crisis, killing people in large numbers, turning entire cities into ghost towns, and threatening to cripple the global economy. The crisis presents in a nutshell much of what characterizes international law. On the one hand, the global economy being a strongly interdependent whole, based on a sophisticated legal framework, has made it ever so easy for the virus to spread. On the other hand, the only meaningful and sustainable way to combat the crisis is by concerted action, through agreements between states or through international organizations, in other words, through international law.

This third edition has left the structure of the first two editions intact, and consists mostly of an update of the relevant materials: court decisions, treaties, newly published literature. There is some attention for headline grabbing events such as Brexit, but no detailed discussion: the Brexit saga creates much more complications under EU law and the constitutional law of the United Kingdom than it does under international law. And generally, as in the previous editions, I have tried to resist the temptation to comment on current events. Such comments might be helpful but are equally often a distraction, and run the risk of painting a distorted picture. After all, there is far more to diplomatic and consular law than the murder of Saudi Arabian author Jamal Khashoggi in the Saudi consulate in Istanbul in 2018. There is far more to armed conflict law than the targeted killing of Iranian General Soleimani by an American air strike in 2020. And there is far more to international economic law than the imposition of a single tariff on a single product by a single state. This is not to belittle any of these incidents; but it is to say that the choice of possible current events to discuss is sheer inexhaustible.

I am indebted to Guilherme Vasconcelos Vilaça for sharing with me his experiences teaching from this book and for pointing out one or two infelicities; to my students for telling me when things do not make sense (or inadvertently making this clear during exams); to Marianne Nield and Caitlin Lisle at Cambridge University Press, and to Margareta, Johan, and Gilda for bringing joy to my life on an everyday basis. I dedicate this edition to my teachers, past, present, and future.

Preface to the Second Edition

One of the perks of writing a textbook is that one may get the chance to correct errors, clarify things that have remained obscure, and present the reader with new materials and understandings. The current edition has corrected a few errors and typos and has hopefully clarified a few things that were obscure. It has also been updated in a general way by including recent materials (such as court cases), updating information about the status of treaties, and adding some references to recent (and not so recent) literature as well as recent events, from the annexation of Crimea by Russia to the curious phenomenon of Brexit. In addition, I have added a few pages on topics that were not, or insufficiently, covered in the previous edition, including sovereign debt restructuring, environmental protection in the Antarctic, and prompt release of vessels under the UN Convention on the Law of the Sea. Finally, each chapter except the final one ends with a short list of suggestions for further reading – this too is new.

I owe a great deal of thanks to all of those who have provided comments and feedback. Quite a few colleagues expressed their appreciation of the book's approach, and urged me to keep it in place in future editions. Some anonymous reviewers have made suggestions on the basis of a request by the publisher – these invariably proved helpful, and those reviewers will notice that quite a few of their suggestions have found their way into the text. Some readers (Oliver Diggelman, Nikolaos Ioannides, John Palmer, and Winston Parker) took the trouble to contact me to tell me about typos, inaccuracies, and infelicities. The comments from students, in classrooms in Helsinki and elsewhere, proved extremely useful: if students don't get it, then it's time to rewrite. My wife Margareta read big chunks, and prevented me from making more errors than I would care to admit, while Gilda and Johan just make me happy. At the Press, I am indebted to my editors, in particular Marta Walkowiak and Valerie Appleby.

If there was one point coming out of the reviews commissioned by Cambridge University Press, it was the common observation that the text was not detailed enough. One reviewer felt that human rights remained under-illuminated; someone else thought that the acquisition of territory deserved a chapter of its own, and yet another reviewer thought that I should pay more attention to the work of the United Nations. All are right of course, and all will continue to think that the text could use more detail. Sadly, though, adding a lot

xviii Preface to the Second Edition

more detail would turn the book into something it was never meant to be. The trick is to combine the broad brush with an eye for detail; I have aimed to provide detailed information and analysis, but have also been mindful of the desire to keep the book readable.

It should perhaps also be borne in mind that a book such as this inevitably ends up compromising between two demands. On the one hand, it should explain how the law works. On the other hand, it should also state what the law says. The two sometimes come together, but sometimes also pull in opposite directions; at such moments, I have generally prioritized the explanatory dimension. Thus I sometimes provide classic case law if I think it is more illustrative than more recent decisions, and I sometimes devise hypothetical examples if real-life examples are too complicated to serve as useful illustrations.

A challenge faced by most parents of young children is how to combine the demands of work and family life. It is safe to say that this edition would not exist without the contribution made by my parents-in-law, Lea and Markus. It is to them that this edition is dedicated.

Preface to the First Edition

This book has been a long time in the making. While the actual writing started in 2009 and took place, intermittently, until May 2012, the book reflects more than twenty years of teaching international law. The basic premise underlying it is that international law should not be studied as a vast and ever-increasing collection of rules, but is better approached as a way of thinking about and organizing the world. With that in mind, like all legal systems the international legal order can profitably be studied by asking four questions. First, there is the question of where the law comes from: what are its sources? Second, to what entities or individuals does the law apply or, in other words, what are its subjects? Third, what does the law do in cases of conflict (i.e., settlement), and, finally, what does the law actually say? What is its substance?

This book is organized with those four questions in mind. The first three, together pointing to the basic structure of the system, make up Part I of this book (Chapters 1–9): sources, subjects, and settlement, broadly conceived. This is the stuff all international lawyers (probably even all lawyers, in these days of globalization) will sooner or later be confronted with; all lawyers need to have some idea of how international law is made, in what circumstances states can be held responsible, how international tribunals function, and whether or not specific entities are subject to international law.

The fourth question, asking about the substantive rules, makes up Part II (Chapters 10–15). It will be noticed that Part I is longer and more analytical than Part II. This is only natural: the most Part II can aspire to is to provide a basic description of the various branches of international law, without much detail. After all, international law spans, quite literally, the world, as well as most of the policy issues that one can think of. There is international law on topics as wide and diverse as international crime, international investment, international taxation, the movement of refugees, the protection of the environment and much, much more. Hence, a book such as this, limited in scope, can only cover the basics. Fortunately, though, there are wide bodies of literature available, as the footnotes testify, and for those who want more detailed generalist expositions there are at least three useful larger and more detailed general textbooks on the market.

xx Preface to the First Edition

The interested reader could do worse than to pick one of these to read alongside the present book.¹

While Parts I and II cover the four questions set out above (sources, subjects, settlement, and substance), the book does not stop after Part II. It also contains a, fairly brief, Part III (Chapters 16 and 17), addressing the context of international law. This addresses the circumstance that international law does not exist in a vacuum, but is closely related, on the one hand, to national legal systems (discussed in Chapter 16) and, on the other hand, to global governance, politics, and ethics (discussed in Chapter 17). As Joseph Weiler once suggested during a round-table discussion at New York University, present-day textbooks on international law should ideally reflect the circumstance that international law is part of a broader pattern of global governance, and not stick to describing a stilted world where all legally relevant rules are made by duly empowered diplomats, representing sovereign states. In Weiler's words, global governance 'is a coloring agent that suddenly illuminates phenomena that, under the normal spectacle of international law, you didn't see'.² This book hopes to reflect the two ideas that international law is of relevance to global governance, but sometimes struggles to come to terms with it. However, the format of this book does not allow for an in-depth discussion of the political context of international law: Part III remains necessarily brief. Readers with an interest in these matters may be well advised to read this book alongside a recent collection of articles edited by Crawford and Koskeniemi.³

This is a textbook on international law, and this simple fact has at least two important implications. First, since the aim is to outline the international legal order, the book is not set up as a commentary on current events. I accept that the reader may wish to see how the law is applied to specific events, and where possible this has been done, but without singling out specifically current events. Such comments on current events as there are serve purely illustrative purposes, if only because current events tend to have a limited shelf life; what is current today may be forgotten tomorrow.

Second, this is a book on international law, and while there is room for the argument that the European Union (EU) is part of international law, it does not address the EU separately, except where the practice of the EU is of relevance. Thus, there are fragments on the treaty practice of the EU, and a few paragraphs on the attitude of the EU to international law, but no detailed discussion of EU law, if only because others are far better qualified to discuss the EU than I am.⁴

¹ James Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford University Press, 2012); Malcolm Evans (ed.), *International Law*, 4th ed. (Oxford University Press, 2014); and Malcolm Shaw, *International Law*, 7th ed. (Cambridge University Press, 2014). Perhaps the most comprehensive single-volume treatise at the moment is in French: Patrick Daillier, Mathias Forteau, and Alain Pellet, *Droit International Public*, 8th ed. (Paris: LGDJ, 2009), while a useful methodology and guide on how to do research is also in French: Olivier Corten, *Methodologie du droit international public* (Brussels: Editions ULB, 2009).

² Jose E. Alvarez et al., 'The Shape of Global Governance', (2010) *NYU Law School Magazine*, 22–9, also available at <http://blogs.law.nyu.edu/magazine/2010/roundtable-global-governance/> (visited 25 May 2012).

³ James Crawford and Martti Koskeniemi (eds.), *The Cambridge Companion to International Law* (Cambridge University Press, 2012).

⁴ The best general overview available is Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials*, 5th ed. (Oxford University Press, 2011).

Finally, a note on sources. I have generally refrained from listing the specific places where treaties or other instruments can be found, for the solid reason that these instruments are easier to find these days by a quick Internet search than by going through the volumes of the United Nations Treaty Series (UNTS) or any domestic treaty series. However, most of the important treaties referred to in this book are available in a single collection.⁵ With court decisions, I have generally aimed at listing a material source. With International Court of Justice (ICJ) decisions, this has been the ICJ Reports; with other cases, this has often (if not invariably) been the invaluable *International Law Reports* or its predecessor, the *Annual Digest*. Decisions of the European Court of Human Rights (ECtHR), moreover, are far more easily accessible on the Court's website⁶ than in any published form.

Since this book is the product of more than twenty years of teaching, the number of people to whom I have become indebted is way too large to be listed. Still, a few need to be singled out. The late Bert Vierdag gave me my first official teaching job in 1990, at the University of Amsterdam. Martti Koskenniemi brought me to Helsinki six years later, and has been and remains a close friend and an immense influence. I have benefited from having some extremely good teachers, including Gerd Junne, Pieter Jan Kuijper, and Richard Lauwaars, and my approach to international law and the global order reflects their influences. Not only did they teach me properly about international law and international politics, they also taught by example about good teaching. And then there is the influence of more than twenty generations of students, at Amsterdam, Helsinki, and a variety of other places.

Many colleagues suggested things to read; I owe all of them a big 'thank you'. Antti Kivivuori and Alice Neffe provided me with specific materials. I am heavily indebted to Magda Kmak and Rain Liivoja, who read some of the draft chapters and provided useful comments, as did several anonymous reviewers for Cambridge University Press. Working with the Press has been, as always, a delight, thanks to the wonderful support offered by Finola O'Sullivan and Sinead Moloney. This book is dedicated to my wife Margareta and my children, Johan and Gilda.

⁵ Malcolm D. Evans (ed.), *Blackstone's International Law Documents*, 10th ed. (Oxford University Press, 2011); see also Jan Klabbers (ed.), *International Law Documents* (Cambridge University Press, 2016).

⁶ At www.echr.coe.int/echr/.