

# Foreword

**Giorgio Gaja**

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The present collection of essays intends to address both the impact of history on international law and the contribution that international law makes to history. The subject is clearly huge and may be considered only under some limited aspects. These are mainly from the areas of international human rights law and international humanitarian law, but, notwithstanding the absence of an essay devoted to methodology, the book offers reflections that cover a wider ground.

This is in particular true of the introductory study by Rolf Einar Fife. He examines some significant moments in the development of international law. The stress is on the influence played by certain international lawyers on the elaboration and consolidation of some significant concepts. His first example is taken from the principle of the stability of frontiers, as applied in Latin America and in Africa and more recently in Europe. He then examines the elaboration of the concept of the self-determination of peoples and finally the emergence of the concept of a supranational organ (High Authority) with regard to the European Communities and later the European Union. The references to these developments are meant to illustrate how concepts may influence the course of history.

Stefan Troebst's essay is dedicated to the impact that events and scholarly work in Eastern Europe had on the development of international law. He considers in particular the so-called 'Brezhnev Doctrine' on intervention and the evolution of practice through the application of the principle that intervention should not take place outside one state's sphere of influence. He further stresses the erosion of the *uti possidetis* principle over Kosovo and the development from a policy of exchanges of population to the configuration of ethnic cleansing as a crime against humanity.

The concepts taken as examples have certainly had great significance. Their elaboration was one of the main reasons for their impact. However, what contributed greatly to their influence is the fact that the political context provided a favourable ground to their reception when their application was sought. For instance, when the concept of self-determination was successfully applied in the 1960s to non-self-governing territories, several administering powers

found it expedient to replace colonialism with neo-colonialism, which implied the formal independence of the former colonial people.

Annalisa Ciampi's essay provides an ample survey of the development of international human rights law. The main focus is on the divide between civil and political rights, on the one hand, and economic, social and cultural rights, and later the right to development, on the other. One of her points is that, while human rights are often described as 'indivisible', their protection hardly follows a unitary approach. She stresses the need for a greater integration of human rights in development and economic activities.

The analysis emphasizes the gaps in the protection of human rights as they result from practice. Ratification of human rights treaties and adoption of instruments proclaiming rights rarely lead to a higher protection. Moreover, states are reluctant to pursue the settlement of international disputes in this field. While there is much truth in these propositions, one may suggest that the survey could have given greater weight to the role that human rights bodies play with regard to individual applications and in making general comments.

Sionaidh Douglas-Scott examines the development of the protection of human rights within the European Union. The analysis is centred on the relations between human rights and free market rights. The author notes that the pursuit of the objectives of progressing towards an ever closer Union and of defending the supremacy of European Union law do not provide an exhaustive explanation of the development of the protection of human rights within the Union. She underlines also the importance of discontinuities, giving weight to economic rights in a free and equal market society. One may agree with the author's remark that institutions of the European Union are reluctant to expand their role with regard to the protection of human rights in the Union. However, the institutional system would not be able to take on new tasks, such as providing a judicial remedy against violations of human rights, and would risk collapsing.

The next section consists of four contributions that concern specific issues of international humanitarian law or of international criminal law.

Gilad Ben-Nun makes an in-depth analysis of the preparatory work to common Article 3 of the 1949 Geneva Conventions, in particular the Fourth Convention on the Protection of Civilians. This study is based on some unpublished material relating to the discussions that took place at Stockholm before the Geneva Conference and that led to the scope of the protection of civilians being extended to include nationals targeted by the government of a state involved in a conflict not of an international character. In this regard, the author underlines the shift in the position of the International Committee of the Red Cross and the role played by the Soviet Union.

The following contributions address the repression of international crimes. Olympia Bekou examines how some historical events led to drafting the

repression of genocide, crimes against humanity and war crimes in the Statute of the International Criminal Court (ICC). She outlines how the definition of crimes against humanity has moved away from the requirement of a connection with war, which was implied in the Charter of the Nuremberg Tribunal, and has included apartheid. This is described as a 'regime of systematic oppression and domination by one racial group over any other racial group or groups' (Article 7(2)(h) of the ICC Statute), reflecting the situation prevailing in South Africa until 1994. The author then considers the developments in Rwanda and former Yugoslavia that led to the inclusion of 'forced pregnancy' among the crimes against humanity (Article 7(1)(g) and (2)(f) of the ICC Statute). She advocates that for both crimes, and also for genocide, a wider definition be adopted in order to take more recent events into account. She suggests that for that purpose the ICC Statute be considered a 'living instrument'. However, this approach conflicts with the need not to widen retroactively conduct that is punishable.

Katarina Ristić analyses the attitude taken in Bosnia, Croatia and Serbia towards the International Criminal Tribunal for the former Yugoslavia (ICTY). She recalls that victims' organizations in Bosnia criticized the leniency of certain sentences and the dismissal of charges of genocide for events other than those of Srebrenica. In Croatia there was an outright rejection of the view that Croat leaders, including President Tudman and General Gotovina, could be considered war criminals. There was also strong criticism of the ICTY's failure to recognize that genocide had been committed by Serbia in Vukovar. Serb public opinion considered the ICTY a politically biased entity and insisted on the symmetry between crimes committed by Serbs and Bosnians in what was defined a civil war; the genocide in Srebrenica was downgraded to a massacre. The impact of public opinion explains the failure of the prosecution of war crimes by national courts. Notwithstanding the predominant narratives, some non-governmental organizations and certain media argued in favour of justice for victims, including in the criticism of some questionable acquittals. With regard to the findings of the ICTY concerning genocide in Srebrenica, in other parts of Bosnia and in Vukovar, one may add that they have all been endorsed by the International Court of Justice.

Erika de Wet examines the criticism voiced by several African states about the International Criminal Court (ICC), which they had originally supported. The indictment of African leaders, especially President Bashir of Sudan and the future President of Kenya, Uhuru Kenyatta, have been considered as an expression of bias. Moreover, self-referrals by African states have led to unsatisfactory results. For the time being, the threat of some African states to withdraw from the ICC Statute has had very limited impact. The author advocates the strengthening of the prosecution of international crimes through national and regional courts, such as the African Criminal Chamber under the 2014

Malabo Protocol. However, financial considerations may well be an obstacle to regional developments, as shown by the events concerning the prosecution in Senegal of the former President of Tchad, Hissène Habré.

The variety of issues examined in the contributions to the present volume and the brevity of the considerations generally dedicated to the legal implications of political events do not point to specific conclusions, which are therefore not offered by the editor. However, the book offers several examples of interesting analysis which may be taken as paradigms and should stimulate further research.