

## BOOK REVIEWS

*International Legal Issues Arising Under The United Nations Decade of International Law* edited by Najeeb Al-Nauimi and Richard Meese (The Hague/London/Boston: Martinus Nijhoff Publishers, 1995) pages i-xxxii, 1-1338. ISBN 90 411 0107 1 (hardback).

As published legal proceedings and symposia continue to proliferate and make significant contributions to the academic enterprise, the necessity of some sort of indexing system of the various contents becomes more and more plain. At present, the search for gems contained in these texts is mostly a hit and miss affair. Often times, like this one, no index is included and the title provides little assistance in determining the precise contents. Thus, research into these yet little publicised volumes<sup>1</sup> remains a delight for those with an affinity for spending time in the stacks, a chore for those with an aversion to the library. Until an electronic search and retrieval system is devised, to discover the complete contents of collections like *International Legal Issues Arising Under the United Nations Decade of International Law* ('*Legal Issues Under the Decade*'), scholars and researchers will have to remain content with frequent trips to the library in order to scour the 'new arrivals' to determine whether any new compilations have arrived that may be of use. Indeed, that is precisely how this reviewer stumbled across *Legal Issues Under The Decade*.

This volume is an impressive text and I am glad I came across it sooner rather than later. It is nothing like Monsieur Arnaud's 'very funny little pamphlet on international law'.<sup>2</sup> Indeed, *Legal Issues Under the Decade* is a weighty tome extending over 1300 pages with 62 different contributions in English or French. Of course, in a compilation of this size the contributions are inevitably of variable quality. For the most part, however, the articles contained in *Legal Issues Under the Decade* do not disappoint. There is some repetitiveness and at times it appears that the editors have insufficiently imposed a coherent scheme on their contributions, but overall these matters are mere peccadillos that ought not to detract too much from a superb compilation and the large number of gems it contains.

<sup>1</sup> Many of us, of course, are on the mailing lists of numerous publishers, and that provides some additional assistance provided one has the time to read all the various flyers and brochures that find their way across one's desk.

<sup>2</sup> A reference to a very amusing line, at least for international lawyers, from the film, *Nelly & Mr. Arnaud* (Directed by C Sautet, Screenplay by C Sautet, J Fieschi and Y Ulmann. Co-produced by Films Alain Sarde-TF1 Films Production, Cecchi Gori Group Tiger Cinematografic and Prokino Filmproduktion GMBH, 1996). Only rarely does jocular international legal writing appear. See, eg, A D'Amato, 'It's a Bird, It's a Plane, It's *Jus Cogens!*' (1990) 6 *Connecticut Journal of International Law* 1.

The text grew out of the Qatar International Law Conference convened by Qatar and the Asian-African Legal Consultative Committee, which met in Doha from 22-25 March 1994 to examine the implementation of the first two terms of the Programme of the United Nations Decade of International Law.<sup>3</sup> The Qatar Conference papers in turn provided useful background material (for those, like the reviewer, who attended the March 1995 United Nations Congress on Public International Law convened to celebrate the 50th Anniversary of the organisation and review the progress of the Decade)<sup>4</sup> but, because of their volume, have until now remained unwieldy to use. It is thus a boon to find that those papers have been compiled into a book of the Proceedings of the Qatar Conference.

The list of contributors to this text for the most part reads like a who's who in international law. Included are the Secretary-General of the United Nations, a former and a current Judge of the International Court of Justice (ICJ), members of the International Law Commission, and a plethora of eminent international lawyers, scholars, diplomats and civil servants. As one might expect, given the large number of contributors, almost all contemporary jurisprudential perspectives are in some way covered. Clearly disappointing is the notable absence of any feminist analysis and indeed there are only six women contributors included in this volume. Still, a 'New Stream' scholar like Martti Koskenniemi makes trenchant observations about the use of advisory opinions in the prevention of actual disputes between states and in determining the legality of certain projected state behaviour (or actual behaviour by a limited number of states) under multilateral treaties. Professor B S Chimni makes insightful use of critical social theory to demonstrate how the development of 'safety zones' alongside the discourse about 'the right to remain' in refugee law has diluted the institution of asylum and undermined progressive attempts to expand the definition of a refugee contained in the 1951 Convention Relating to the Status of Refugees<sup>5</sup> and its Protocol.<sup>6</sup> Also included are more traditional liberal scholars like Tom Franck. Professor Franck offers a sapient conceptual groundwork for the role of the ICJ as a judicial reviewer of the actions of the politically powerful organs of the UN, including the Security Council.

The text, like the Conference, has been arranged into *des questions d'actualité*, all of which are important to the Decade of International Law and will remain so

<sup>3</sup> The Decade was established by the General Assembly in GA Res 44/23, 44 UN GAOR (Supp No 49), UN Doc A/44/49 (1989). For expansive accounts of the Decade generally, see 'Special Issue: United Nations Decade of International Law' (1990) 3 *Leiden Journal of International Law*, reprinted as Marcel Brus, Sam Muller and Serv Wiemers (eds), *The United Nations Decade of International Law: Reflections on International Dispute Settlement* (1991); R Macdonald, 'The United Nations Decade of International Law' (1990) 28 *Canadian Yearbook of International Law* 417; Jeremy Thomas, 'The United Nations Decade of International Law' (1991) 3 *African Journal of International & Comparative Law* 386; Jeremy Thomas, 'The United Nations Decade of International Law — Insights into an Asian Perspective of International Law' (1991) 14 *Dalhousie Law Journal* 266.

<sup>4</sup> For the proceedings of the Congress, see New York, *United Nations Congress on Public International Law: Proceedings of the Congress* (13-17 March 1995).

<sup>5</sup> Convention Relating to the Status of Refugees, 189 UNTS 137, opened for signature 28 July 1951 (entered into force 1954).

<sup>6</sup> Protocol Relating to the Status of Refugees, 606 UNTS 267, opened for signature 31 January 1967 (entered into force 1967).

beyond. Broadly, six major themes and eleven underlying subjects are canvassed in this volume. In order to do justice to this massive text in the instant review, the various themes and sub-topics are set out below and several of the more important or interesting contributions, in the reviewer's view, are discussed in more detail within consideration of the various themes.

The first theme encountered in the book is the Decade of International Law itself. The contributions here examine the ongoing work devoted to fulfilling the four major purposes of the Decade: the promotion of the acceptance of and the respect for international law, the development of means and methods for the peaceful settlement of disputes between states, the encouragement of the progressive development of international law and its codification, and the encouragement of the teaching, study and dissemination of international law. *Legal Issues Under the Decade* places major emphasis on peaceful settlement of disputes and respect for international law. Teaching and study of international law, unfortunately, are for the most part omitted from consideration in the present volume despite the considerable emphasis given to these subjects by the working group on the UN Decade of International Law.<sup>7</sup> Instead, the contributions focus on preventive and peacemaking diplomacy, the Hague Peace Initiative, the role of the Permanent Court of Arbitration in conflict resolution, and the work of the UN Secretariat on the Decade.

The contribution by Vladimir Petrovsky, Secretary-General of the Conference on Disarmament, on preventive and peacemaking diplomacy analyses how international law is engaged in a post-Cold War transition from the law of peaceful co-existence to a fledgling law of 'partnership' amongst states. Taking a leaf from Abdullahi An-Na'im,<sup>8</sup> Petrovsky notes the need to engage in interrogations of our own political and cultural heritage and intercultural dialogues so that humanity can develop interdependently, sharing its 'recipes for success'. It is through this process that conflict can be avoided in the first instance. Petrovsky then recounts the development of *An Agenda for Peace*<sup>9</sup> and describes various recent efforts of the United Nations in the areas of preventive and peacemaking diplomacy, including the first successful instance of preventive diplomacy effort in the former Yugoslavian Macedonia in 1992. Other contributions worthy of mention under the first theme include Carl-August Fleischhaur's elaboration of the work of the UN Secretariat in furthering the Decade of International Law and Professor Soons' discussion of the Hague Peace Initiative. Fleischhaur, then Legal Counsel and Under Secretary-General for Legal Affairs of the UN, provides the most current and detailed assessment of the Decade thus far and the work that is being undertaken not only by the Secretariat, but also by a number of organisations and institutions. It was originally envisioned by the Non-Aligned Movement, which first proposed the Decade of International Law, that it would

<sup>7</sup> See *United Nations Decade of International Law: Report of the Working Group on the United Nations Decade of International Law*, 47 UN GAOR 6th Comm, Agenda Item 128, 5, UN Doc A/C.6/47/L.12 (1992).

<sup>8</sup> See Abdullahi An-Na'im, 'What Do We Mean By Universal?' (1994) 23 *Index on Censorship* 120.

<sup>9</sup> UN Docs S/24111 and A/47/277 (1992); 33 ILM 953.

culminate in 1999 with a third Hague Peace Conference.<sup>10</sup> While such a conference has not yet been agreed upon by states, Professor Soons explains how the Hague Peace Initiative has provided a non-governmental impetus that is capable of generating input towards a preparatory process for an inter-governmental Peace Conference.

The second theme, which is broken down into three sub-topics, focuses on international law and the environment. Curiously, the global environment receives scant mention in connection with the General Assembly's work on the Decade and it is heartening to see such a thorough treatment of the subject in this text. Not only is the environment considered in theme two, but it also appears in theme six where consideration is given to the 1992 United Nations Conference on Environment and Development (UNCED). The three sub-topics of theme two contain contributions on, firstly, the protection of the environment in times of armed conflict, secondly, the vexing problem of legal protection of the global commons, and thirdly, the delicate problem of liability and compensation for environmental harm (in this case limited to the transboundary movement of hazardous wastes).

The contributions on the protection of the environment in times of war highlight that the development of the law of war is more and more inconsistent with modern international environmental law. Both Bola Ajibola, former Judge of the ICJ, and Professor Michael Bothe point out that the developing precautionary principle in international environmental law is alien to traditional military concepts of necessity and proportionality and the recent development of 'precautionary measures'.<sup>11</sup> Unlike the precautionary principle, these military norms would allow environmental harm to take place even if it could be reasonably avoided. Nevertheless, both authors view the development of environmental norms within the laws of war as salutary given the current political landscape. Indeed Judge Ajibola advocates the negotiation of a comprehensive treaty on the Protection of the Environment and the Survival of Mankind in Times of Armed Conflict as a way of promoting the development of contemporary environmental principles such as 'ecological sustainability' ahead of permissive rules of warfare.

The second sub-topic of the environmental law theme concerns protection of the global commons. Alexandre Timoshenko, with the United Nations Environment Programme (UNEP), takes inventory of the legal responses to global environmental challenges UNEP has provided in the nearly 25 years of its existence. Timoshenko specifically evaluates the catalytic role UNEP has played in the elaboration of environmental treaties to protect upper stratospheric ozone, to regulate hazardous wastes and toxic chemicals, to protect biological diversity on Earth, and to prevent anthropogenically induced climate change. He also

<sup>10</sup> Jeremy Thomas, 'The United Nations Decade of International Law' (1991) 3 *African Journal of International & Comparative Law* 386.

<sup>11</sup> See Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 December 1977, UN Doc A/32/144/Annexes (1977), arts 57 and 58 (entered into force 1978), 16 ILM 1391.

examines UNEP's role in the emerging environmental legal paradigm which revolves around the concept of the 'common concern of humankind' and its spatial and temporal components.

The two other contributions in this sub-topic come from Stanley Johnson and Tang Chengyuan. Using Brownlie's spatial description of the types of territory that international law recognises, Johnson perceptively undertakes a detailed analysis of how the international community has attempted to address the problems of providing environmental protection in the commons. One wishes, however, that some consideration had been given to how spatial arrangements might be modified, for instance by recognising a controversial presential sea,<sup>12</sup> to better protect the commons.<sup>13</sup> Chengyuan makes a valuable contribution by exploring the legal aspects behind the need to create a global environmental partnership between developed and developing states in order to surmount the conflict most recently and noticeably manifested in the negotiations of the Preparatory Commission leading up to UNCED.

The final sub-topic of the environmental law theme concerns liability and compensation for damages resulting from the transboundary movement of hazardous wastes. While I tend to incline toward Koskenniemi's view<sup>14</sup> that, *even as between states*, very little has been obtained (in the world of diplomatic realities of state responsibility for environmental harm) during the 24-year effort to give substance to the famous Principle 21 of the Stockholm Declaration, a number of contributions here on liability<sup>15</sup> are likely to prove valuable. Julio Barboza, the Chairman of the International Law Commission (ILC) and the current Special Rapporteur of the ILC topic on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, offers sapient insights into the draft Protocol on Liability and Compensation to the Basel Convention on the Transboundary Movement of Hazardous Wastes. Maria del Lujan Flores, Chairperson of the Sixth Committee (the legal committee) of the General Assembly, provides an extensive review of the scope of customary international law on the liability and compensation for environmental harm. Professor Schiavone and Roger Wilson both detail a number of general principles relating to liability and compensation in various contexts involving hazardous wastes.

<sup>12</sup> See, eg, Francisco Vicuña, 'Toward an Effective Management of High Seas Fisheries and the Settlement of the Pending Issues of the Law of the Sea' (1993) 24 *Ocean Development & International Law* 81; Thomas Clingan, 'Mar Presencial (The Presential Sea): Deja Vu All Over Again?' (1993) 24 *Ocean Development & International Law* 93.

<sup>13</sup> See, eg, the discussion in Bernard Oxman and Anatoly Kolodkin, 'Stability in the Law of the Sea' in Lori Damrosch, Gennady Danilenko and Rein Müllerson (eds), *Beyond Confrontation: International Law for the Post-Cold War Era* (1995) 165, 168-9.

<sup>14</sup> See Martti Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (1992) 3 *Yearbook of International Environmental Law* 123, 126-7.

<sup>15</sup> The cogency of the distinction between responsibility for breach of a primary obligation imposed by international law and liability for socially useful activities that cause harm has been criticised by a number of writers on various grounds. See, eg, Alan Boyle and Patricia Birnie, *International Law and the Environment* (1992) 140-1. The contributions in this volume attempt to address some of these criticisms.

The third theme of the book centres around the law of the sea. As the 1982 United Nations Convention on the Law of the Sea<sup>16</sup> entered into force in November 1994, one sub-topic of this theme focused on the problems arising at the time of the Convention's entry into force. The other sub-topic looked at the pressing problems associated with the unsustainable exploitation of highly migratory fish stocks and straddling stocks. In both sub-topics, discussion of environmental protection again surfaces. Unfortunately, given the limits of space it is not possible here to adequately canvass the eleven interventions made at the Qatar Conference. Suffice it to say that both sub-topics benefit from contributions by a number of well known diplomats and academics well acquainted with the law of the sea and the mirror it provides for international law as a whole. Accordingly the contributions contain illuminating discussions on territorial sovereignty, the impact of new concepts like common heritage and the politicisation of international law. There are two disappointments in the contributions under this theme but these have more to do with the timing of the Qatar Conference (early March 1994) than with anything else. First, the reader is left with no clear impression about the compromise reached over Part XI and the legal implications that it raises.<sup>17</sup> Secondly, while the Draft International Convention on Straddling and Highly Migratory Fish Stocks is analysed, no mention could be made (because of the date of publication) of the final 1995 Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.<sup>18</sup>

The fourth theme considered in the text takes up the peaceful settlement of disputes. Almost all the contributions to the theme explore the separation of powers in the UN between the Security Council and the ICJ in light of the *Lockerbie*<sup>19</sup> and the *Genocide*<sup>20</sup> cases. Also examined is the role of ICJ Advisory Opinions as instruments of preventive diplomacy. The valuable contributions of Koskenniemi and Franck on this theme have already been referred to above. Lucius Caflisch provides a detailed and fresh rehearsal of the arguments for and against judicial review by the ICJ. Santiago Torres Bernárdez offers insightful commentary on the respective roles of the Security Council and the ICJ in preventing the aggravation of disputes between states.

The fifth theme contained in the text is devoted to humanitarian law. It is divided into three sub-topics. The first is the role of international criminal law in relation to the peace and security of humankind. Insightful contributions include

<sup>16</sup> UN Doc A/CONF.62/122.

<sup>17</sup> See GA Res 48/263 (1994), 33 ILM 1309 approving the special agreement of the parties that modifies or postpones principle features of Part XI of the Convention on deep sea-bed mining.

<sup>18</sup> Opened for signature 4 December 1995, UN Doc. A/CONF.164/37 (1995), (not yet in force), 34 ILM 1542.

<sup>19</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v USA) (Libya v UK)*, (Orders on Provisional Measures) [1992] ICJ Rep 3.

<sup>20</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))*, (Orders on Provisional Measures) [1993] ICJ Rep 325.

analysis of the International Criminal Tribunal for the former Yugoslavia, the work of the Commission of Experts established by the Security Council to investigate violations of humanitarian law in the former Yugoslavia, and the ILC draft Statute for an International Criminal Court. The second topic under this theme considers the establishment of euphemistic 'safety zones' for displaced persons in their country of origin. The excellent contribution by Dr Chimni has already been referred to above. Also included under this sub-topic is a sapient analysis of the establishment of the 'safe haven' for the Kurds in Iraq and for non-combatants in the former Yugoslavia. The third topic is a perennial favourite of international lawyers — humanitarian intervention. While the contributions on this topic are of a high calibre, they add little (what more can be said?) to the literature of this well-travelled field.

The sixth and final theme covered by the text looks at the relationship of environment and development in light of the UNCED aftermath. Surprisingly, instead of structuring this theme around the concept of 'sustainable development' to which UNCED gave official imprimatur,<sup>21</sup> the text instead has one sub-topic devoted to UNCED and environmental law and a second sub-topic devoted to the (now old) New International Economic Order. It is here that the editors appear to lose coherency in their structure. While they are useful in isolation, the contributions here seem like a disparate collection of unrelated pieces. The articles range widely and include discussions on: the Biodiversity Convention; 'capacity building' within the context of Agenda 21; the relationship between sustainable development and economic, social and cultural rights; the ocean-related impact of Agenda 21; democratisation of international relations and a requiem for the New International Economic Order.

Overall, however, the appearance of *Legal Issues Under the Decade* is a cheerful event. The book serves as a signpost for many of the major legal issues involved (and even some which are not) in the Decade of International Law — issues that will remain topical well after the Decade ends. Almost across the board the quality of analysis is high and the reader will come away with new insights from many of the contributions.

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<sup>21</sup> See Philippe Sands, 'International Law in the Field of Sustainable Development' (1994) *British Yearbook of International Law* 303.

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