BOOK REVIEWS

Edited by

Hilary Charlesworth and Judith Gardam

Children, Rights and the Law

Edited by Philip Alston, Stephen Parker and John Seymour
(Clarendon Press, Oxford, 1992, i–xiv and 268 pp)

There has been much debate in Australia about the potential of the Convention on the Rights of the Child to bring about substantive change to the lives of Australian children. This debate has been mirrored elsewhere in the world and many observers of the United Nations are monitoring the work of the Committee on the Rights of the Child, established by the Convention, to determine what impact it will have on the actions of States parties as well as the "jurisprudence" of children's rights. The view taken by the editors of this volume and the contributors to it is that there is a need for some of the discussion on children's rights to focus on the philosophical assumptions that underpin any formulation or conception of rights in order "to develop a deeper appreciation of the normative content of the Convention" (p viii).

At one level the premise is sound. The normative content a person or a group such as the Committee on the Rights of the Child ascribe to a right must inevitably be affected by their philosophical leanings. And it is important that there be honesty in the debate so that the premise on which a government, an individual or a group acts (or refuses to act) is understood both by the actor and observers. However, there is something troubling about the willingness of the editors and contributors to accept that the debate they undertook was limited by "ethnocentricity". As noted by the editors: "All the participants were from affluent western countries.... [M]uch of the moral and political philosophy expressed ... with its style of analysis, its categories of rationality, agency and so on could not be said to be representative of all world-views, even in the West" (p xii).[1]

As the papers and commentaries were originally prepared for presentation at a Workshop on "Children, Rights and the Law" organised by the Centre for International and Public Law, Australian National University, for the purpose of contributing to both the general understanding of rights discourse in relation to children as well as the content of the Convention on the Rights of the Child, one wonders why a broader range of views were not taken into account.

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1 In the text the editors point out that in those "affluent western countries" there is "an appalling amount of child poverty, maltreatment, and failure to thrive".

Indeed, although the contributors were selected with the aim of expounding upon national experiences with respect to the acceptance and formulation of rights, the debates in the four countries represented, Australia, Canada, the United Kingdom and the United States, are broader than those reflected here.

By and large the authors take positions which can be described as adhering to one of three views about the function of rights: (1) the "will" theory, which focuses on the exercise of choice and gives precedence to autonomy; (2) the "interests" theory, which views rights in terms of claims for the protection of defined interests, and emphasises equality; (3) the "obligations" theory which accepts the underlying premise of the will theory that right-holders must be autonomous individuals and asserts that individuals who are not autonomous, such as children and the intellectually disabled, will benefit more from a system which creates moral obligations which are owed *to* them.[2]

None of the authors attempt to compare their theories[3] with those from continental Europe that are at odds with Kantian or Hohfeldian conceptions of rights or theories of rights articulated by African, Asian or Latin American scholars. No discussion of rights which ignores these points of view can hope to have a major impact on the international community. Other scholars who have attempted to wrestle with the concept of universality have suggested that the underlying assumption common across cultures is the importance of human dignity.[4] Contrasting the will, interest and obligation theories with this would have been a more difficult exercise but one that might have substantially assisted international debate and discussion in a way the present volume cannot.

Having noted the limits of the volume, it must also be said that the format adopted by the editors makes this an enjoyable read. Most of the contributors substantially revised their papers after the workshop in light of comments made to them directly and in response to materials presented by other scholars in the field. The final product gives readers the impression that they are partaking in the debate.

Although all papers and commentaries explore the theoretical underpinnings of children's rights, some, such as those by Tom Campbell, Onora O'Neill and John Eekelaar, concentrate almost exclusively on the theoretical construct of children's rights. Frances Olsen offers a feminist

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2 Some authors do diverge from these theories, see eg, Stephen Parker, "Child Support: Rights and Consequences".

3 In his paper entitled "Child Support: Rights and Consequences", Parker makes reference to a work by MacCormick which questions the "Anglo-centric" view of rights needing remedies, but does not fully explain the argument before dismissing it.

4 See Claude Welch, "Global Change and Human Rights: Asian Perspectives in a Comparative Context" in Welch and Leary, *Asian Perspectives on Human Rights* (1990, Westview Press). Michael Freeman refers to the connection between rights and dignity but does not pursue the idea in relation to cross-cultural perspectives on rights. See Freeman, pp 53–54.

critique of the Convention on the Rights of the Child. The other writers use particular issues to demonstrate the workings of their theoretical models. These include: Ngaire Naffine on juvenile justice, John Seymour on "uncontrollable" children, Margaret M Coady and CAJ Coady on child abuse, Stephen Parker on child support and Sheila McLean in respect of medical experimentation. Commentaries are offered by CAJ Coady, Catherine Lowy, Terry Carney, Bettina Cass and Rebecca Bailey-Harris.

Given the diversity of the papers and commentaries, it would be impossible to do justice to them all in a review. Therefore, I have chosen to give more detailed consideration to the papers presented by Onora O'Neill, Tom Campbell, Michael Freeman and Frances Olsen. This in no way impugns the importance of the other papers in the volume; all of them should be read by anyone with an interest in children's rights.

Perhaps the most controversial of the papers is that of Onora O'Neill who argues that rights discourse is inappropriate to children and develops a "constructivist" theory of "fundamental obligations". Within the framework she creates there are perfect and imperfect obligations. Perfect obligations can be either universal or non-universal. If owed to all children by all adults they are universal. If owed to specified children by specified adults they are non-universal. Perfect obligations have corresponding rights: we can identify the right-holder, therefore the right can be enforced. Imperfect obligations are those where it is not possible to identify a right-holder and implementation of the right depends on the circumstances. Under the "will" theory of rights, obligations must secure greater advantage for children because according to that theory imperfect obligations are nevertheless obligations. Although it is necessary to develop a theory of action to ensure that the obligations are carried out, this will not depend upon there being a right-holder. According to the author this approach is more satisfactory because it focuses on the person having the obligation - inevitably an adult or an institution. The author finds the concept of rights difficult in relation to children because of their dependency and the inability of very young children to assert their rights for themselves.

To a large extent one's willingness to accept the line of argument being put forward by the author depends on whether or not you adhere to the "will" theory of rights. For those who do not, the argument is less persuasive because other theories of rights can accommodate the idea that there need not be a specified right-holder. Furthermore, questions arise about the author's willingness to look at work being undertaken in other disciplines.[5] One of the most important rights contained in the Convention on the Rights of the Child is that in article 12 conferring on the child the right to be heard in all matters affecting the child. Much work has been done by psychologists and social

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5 The desirability of law looking to other disciplines to improve its knowledge base is cogently argued in the piece written by Ngaire Naffine on juvenile justice.

administrators on the cognitive abilities of children and efforts have been undertaken in many parts of the world to give children a voice thereby reducing their dependency on adults.[6] In addition, the theory relies too heavily on obligations pertaining to welfare and does not consider children in situations where they would want to assert their civil and political rights. During the debates on the Convention some government delegations attempted to have rights such as that to freedom of speech deleted arguing that these rights were not of importance to children. The subsequent debate was full of references to situations where children had spoken out and in many cases were persecuted for doing so. It is also troubling that the author makes no reference to the Convention itself. When O'Neill turns to a discussion of international documents she refers only to the Declaration on the Rights of the Child, an earlier document that does not have the same binding force as the Convention.

Tom Campbell, who espouses the "interest" theory of rights, takes issue with O'Neill arguing that "the exclusive stress on self-sufficiency and autonomy which is standardly deployed to call into question the attribution of rights to children is a woefully partial expression of why people count and why we matter to each other" (p 3). He maintains that the interest theory is better able to account for those rights which are unique to children. This theory does not depend on the capacity for choice and is also able to circumvent the positivist versus natural rights debate, because it conceives of "moral rights in terms of certain kinds of reasons which can be given for affirming that persons ought to have certain positive rights in actual societies, reasons which centre on the identification of interests which are important in and for themselves" (p 8). Campbell asserts that too often our conception of the rights of the child is coloured by our view of the child as a future adult (thus bringing into question the idea of retrospective or substituted judgment discussed by Eekelaar and Freeman), and contends that progress in understanding the distinctive rights of children is to be made "through further analysis of the concept of interests, which I believe ought to be ultimately related in some way or another to what human beings are interested *in* as opposed to what they as juveniles or adults will care about and experience" (p 22). This viewpoint focuses on the individual child and, if adopted, would force adults who may be called upon to make decisions for the child to actually consider the child as a situated human being. It would have been useful if the author had taken two or three of the rights in the Convention and demonstrated what normative content he would ascribe as opposed to someone espousing a "power" theory of rights.

Michael Freeman's paper "Taking Children's Rights More Seriously" is written from the perspective of someone who has a wealth of knowledge about the issues and problems confronting children from both the developing and developed countries. His premise is that the search for a better understanding of the moral basis of children's rights is crucial to the amelioration of the

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6 Malfid G Flekkoy, *A Voice for Children: Speaking Out as their Ombudsman* (Jessica Kingsley Publishers, London).

"condition of childhood" (p 53). His vision of rights is grounded on notions of equality and autonomy, two conditions he perceives as essential to respect and to dignity, and argues that children "have not been accorded either dignity or respect" (p 54). After rejecting the consequentialist view, he considers why those writers who accept the "moral importance" of rights in relation to adults have found it difficult to think of children as being rights-holders. Arguing that the reluctance to view children as rights-holders is tied to illusions of childhood, both as to the way in which children interact with adults (on the basis of love, care and altruism) and the actual condition of their lives (lived in innocence), he asserts that children's rights must be taken more seriously because of the reality of children's lives.

There is then an examination of Dworkin, Rawls and Kant, among others, in which Freeman argues that Dworkin did not adequately appreciate that the Kantian theory of rights is based on both equality and autonomy. This is followed by a consideration of the concept of autonomy in relation to children. Although arguing that children should be accorded greater autonomy than in the past, Freeman is unwilling to go so far as to suggest that children ought to have the same degree of autonomy in making choices about their lives as adults because "the exercising of autonomy by a child can have a deleterious impact on that child's life-chances" (p 65). Children's choices are to be limited by a "liberal paternalism" that protects them against irrational actions, described as "action or conduct [we would wish] as children, to be shielded against on the assumption that we would want to mature to a rationally autonomous adulthood and be capable of deciding on our own system of ends as free and rational beings" (p 67).

Although the arguments are put forward cogently and convincingly, there is little exploration of the rights set forward in the Convention in Freeman's paper. When considering the normative content of a right, how is it affected by an emphasis on equality and autonomy versus an over-emphasis on autonomy? How would the normative content of a right be different if one accepts this theory as opposed to utilitarianism? These are the questions which require much greater consideration by theorists. Also requiring further elaboration is the concept of an irrational choice. Is it irrational for children in South Africa or in the Occupied Territories to choose to demonstrate when there is a chance that they might be killed or seriously injured in the demonstration? Paternalism has often been used as a shield for oppression, and a government which chose to do so might use the concept of liberal paternalism to justify the stifling of dissent.

The paper presented by Frances Olsen raises some interesting issues about interpretation of language. Olsen utilises four feminist perceptions to critique the Convention. In doing so she demonstrates how language can be shaped by those in power in ways not envisaged by those who draft legal documents. The approaches she uses are: legal reformist, law as patriarchy, feminist critical legal theory and post-modern feminism. One of the underlying difficulties for feminists in this area is the tension between children's and women's rights

where a focus on children's rights results in the oppression of women. For many women "the birth of a child [is] the point at which they lose their freedom [and] legal protection of children can be and has been used as a basis for controlling women" (p 192). This situation is exacerbated when it comes to international human rights law which is still very much the province of men and which many feminists argue perpetuates the international subordination of women, *inter alia,* by its unwillingness to accept issues of importance to women as being within the framework of human rights.

In the section on feminist critical legal theory, Olsen surveys the gaps, conflicts and ambiguities which arise under the Convention. Conflicts arise between those rights which seek to protect children against their families (thus empowering the State), and those against the State (which empower their families), as well as those rights which promote substantive equality by focusing on the fact of childhood, and those of formal equality, which would not make a distinction between children and adults. One example is in the area of pornography. The Convention simultaneously gives a child the right to be protected from pornography and the right to "receive and impart information and ideas of all kinds". Although the Convention itself gives prominence to the idea of equality between the sexes, it could not be argued that the child's right to receive ideas and information should be limited to those promoted by the Convention. Pornography, however, may indicate to the child that women are inferior to men.

In her discussion of post-modern feminism, Olsen demonstrates how the language of the Convention can be used to protect interests and groups not thought of at the time the Convention was drafted. She argues that article 8, which protects the child's right to preserve his or her identity, could go beyond its original purpose of prohibiting the kind of adoption practices that developed in Argentina during the military dictatorship, to protecting the myriad facets of our identity, such as chosen sexual orientation. One of the most important aspects of the Convention is the ability to rethink the "basic concept of childhood".

This last idea could have usefully been developed further. As with a number of the other pieces in this book, the reviewer would have liked the author to express her vision of what could be done; and what ideas she would like to see explored by the international community with respect to children's rights.

The readings in this book are diverse and thought-provoking. It is a useful text both for those working with and for children as well as academics. The discourse about children's rights is beginning anew and it is important that we question our assumptions about the basis of rights and about childhood. This may ultimately cause us to question our views about the structure of society and assist in a creative reordering of our priorities.

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Nauru – Environmental Damage Under International Trusteeship

By Christopher Weeramantry
(Oxford University Press, Oxford, 1992, xx and 448 pp)

In 1986 the Government of Nauru appointed an Independent Commission of Enquiry to determine responsibility, together with the cost and feasibility for rehabilitation of the area, of phosphate land on the island of Nauru which was worked during the periods of the German administration, the League of Nations Mandate, the Japanese occupation and the United Nations Trust. Professor Weeramantry, now a member of the International Court of Justice, was Chairman of the Commission, and this book is presented as a synthesis of the 10-volume Report of the Commission in so far as it relates to the legal issues of responsibility for rehabilitation.

The book commences with an explanation of the phosphate industry and its importance to agricultural countries such as Australia who needed the phosphate to regenerate poor soil. The history of Nauru is very much a miniature of colonialism. Its subsequent legal status was due to the 1886 agreement between Imperial Germany and the United Kingdom, dividing their respective colonial interests in the Pacific. Nauru fell on the German side and Ocean Island, another rich source of phosphate, fell on the British side. Because of this somewhat arbitrary delimitation, Nauru subsequently fell under the Mandate and Trust systems respectively of the League of Nations and the United Nations, whereas Ocean Island became a British Crown Colony. Professor Weeramantry's book details the accidental discovery of Nauru's rich phosphate deposits by Albert Ellis, a young chemist working for the Pacific Islands Company. Ellis, who subsequently became New Zealand's Phosphate Commissioner on Nauru, had carried out a random test on a piece of Nauru rock that had been used as a door stop at the Company's Sydney office. Ellis subsequently wrote a book where he described with great enthusiasm his discovery and the later attempts to keep this great secret from the Germans.[1] The rock is pictured in Ellis' book resting on an ornate plinth.

Professor Weeramantry gives an interesting account of Australia's attempts after the First World War to annex Nauru in the face of United States' opposition. In this context, the book indirectly throws some light on South Africa's claims in South West Africa (Namibia), which suffered a similar fate to Nauru, both of which as a compromise were put under the C class Mandate of the League of Nations. Because Britain and New Zealand were also interested in Nauru's phosphates, the Mandate was granted to the British Empire and was to be administered jointly by the three governments. Their anxiety to secure their interests in Nauru's minerals, and thus preclude any other claimants, caused the three governments to sign the Nauru Island

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1 Ellis AF, *Ocean Island and Nauru: Their Story* (Angus & Robertson, Sydney, 1936).

Agreement with such unseeming haste that they did so before the Mandate was granted. This Agreement vested the phosphates in the British Phosphate Commissioners. The Commissioners then began to work the phosphate deposits as a going concern. After the Second World War, Nauru was placed under the trusteeship system of the United Nations Charter. The phosphate deposits continued to be worked under the trust as they were under the mandate. Any suggestion of impropriety of the system during the trust were scant and, by and large, a product of cold war politics. The extracts in Professor Weeramantry's book indicate that the USSR and India were the main instigators of questions concerning Nauru in the Trusteeship Council.

After the phosphate deposits of Ocean Island were worked out and the island left uninhabitable, the indigenous people, the Banaban people, agreed to be relocated to another island in the Fiji group. A similar proposal was made to the Nauruans who rejected the scheme. In 1967 Nauru gained independence. In doing so it signed a comprehensive phosphate agreement releasing Australia from any obligation to rehabilitate the worked out section of the island. After the Commission of Enquiry's Report was presented to the Australian Government in 1988, and a demand for reparations rejected, Nauru commenced an action in the International Court against Australia.

In its pleading before the International Court, Nauru has basically adopted Professor Weeramantry's argument as the basis of its claim. Nauru has argued responsibility on the basis of article 76 of the Charter; the right of peoples to self-determination; the permanent sovereignty of peoples over their natural resources; an obligation not to exercise powers of administration in such a way as to produce a denial of justice *latu sensu* or as to constitute an abuse of rights; and the principle of international law that a State which is responsible for administering a territory is under an obligation not to bring about changes in the condition of the territory which will cause irreparable damage to the legal interest of another State respecting that territory. Nauru also asked the court to declare that Nauru is entitled to the Australian allocation of the overseas assets of the British Phosphate Commissioners and to declare that Australia is obliged to make reparations for breaches of its legal obligation.

In the Judgment on Preliminary Objections[2] a majority of the court (Vice-President Oda dissenting) rejected Australia's contention that (a) Nauru had prior to independence waived all claims concerning rehabilitation of the phosphate lands; (b) that the termination of the trusteeship over Nauru by the United Nations had wiped the slate clean; and (c) that Nauru's claim was out of time. The court rejected Nauru's claim to the British Phosphate Commissioner's assets on the basis that it was essentially a new claim that would transform the original dispute submitted by the parties. A majority of the court (President Jennings, Vice-President Oda, Judges Ago and Schwebel

2 Certain Phosphate Lands in Nauru (*Nauru v Australia*), Judgment on Preliminary Objections, Communique No 92/18, 26 June 1992.

dissenting) also rejected Australia's contention that New Zealand and the United Kingdom should be joined in the proceedings.

Professor Weeramantry's book reflects its provenance. As the title indicates, the work is essentially an argument for Nauru against the Mandate powers – Australia, New Zealand and the United Kingdom. The work, as such, cannot of course, be criticised for its biased approach to the issue. It does, however, generate a certain sense of disquiet, akin somewhat to the uncertainty one has when reading the opinion of an ad hoc judge in the International Court. One wonders how much has been sacrificed to make the strongest possible case for the side that did the appointing. It is certainly true that Professor Weeramantry presses every conceivable argument, legal and moral, that can be made in Nauru's favour. If a legal argument falters, a moral one is found to bolster the point.

On the other hand, points that might be made for colonial administrators are not infrequently characterised as technical or not morally worthy. Professor Weeramantry does not like colonialism and is unwilling to give a point to the other side and in this sense the book, both from a legal perspective and from a historical account, seems wanting.

Legally the position does not seem as clear as Professor Weeramantry would have it. It is manifest from the materials in the book that throughout the Mandate and Trust periods the position of the parties was clear: they intended to work the phosphates for their mutual benefit. The practice of States under the Mandate and Trust systems was to exploit the territories for their own advantage. It was this understanding that caused the Mandate powers to forgo their claims to annexation. Nothing was done in the League or in the United Nations to prevent or even condemn this activity. As Vice-President Oda said in his dissent in the Preliminary Objections Phase of the Case, while the issue of rehabilitation was continually aired in the Trusteeship Council, no position was taken on the matter by the Council. Thus from the fact that the legal characterisation of the situation was one of trust, the intentions of the parties were manifest. Moreover, despite Professor Weeramantry's attempts to display a conspiracy of secrecy, the States involved appeared to have acted as openly as States do in such circumstances. And why indeed would they not? The text of Professor Weeramantry's book, as well as writing such as Ellis' book on Nauru, indicates that they did not consider that they were doing anything improper. This, unfortunately, was the nature of colonialism. Professor Weeramantry, however, leaves no stone unturned in his search for indication of guilt, in part to sustain the moral aspect of the argument but also in his search for the elusive *opinio juris* necessary for the formation of custom. Professor Weeramantry has been able to point to numerous statements by scholars and other writers condemning the exploitation of indigenous peoples by Western powers. Such condemnation can be found as early as the writings

of Franciscus Vitoria[3] and Grotius.[4] Whatever the rhetoric, the practices of States with regard to indigenous peoples has been one of exploitation. The forces of capitalism, which were ultimately behind the Nauruan operation, were quite prepared to destroy the environment at home as well as abroad in their search for lucrative profits. Indeed, they are currently engaged in depriving the indigenous peoples of Latin America, North America and elsewhere of their lands and cultures. As with the *Nicaragua* case we have the classical situation of some *opinio juris* on the one side with a clear contravening State practice on the other.

From a historical perspective, what is perplexing and somewhat troubling is the high moral tone that Professor Weeramantry adopts when describing and condemning the actions of the various colonial powers and their officials connected with exploitation of Nauru's phosphate resources. The argument appears as much concerned with generating guilt as it is with establishing culpability. Indeed, on occasions, the work seems to be an exercise in inter-temporal morality. We are to examine, with today's moral perspective, the actions of people who had no idea that they were acting improperly. To give one example, when describing the 1921–22 discriminatory laws of the Nauruan Administration (pp 109–10), the author indicates his moral disapproval of the use of the word "native" to describe the Nauruans and other regional inhabitants by putting the word in inverted commas. From the perspective of an administrator of the time this would have been puzzling to say the least, it being doubtful that the word had acquired any pejorative meaning at that time. It just seems too easy to criticise people with moral hindsight, and tends to warp the historical account of events.

It is relatively clear that those engaged in setting up the Mandate and the Phosphate Commission did not think that they were acting improperly. Indeed, if the account of Ellis, the New Zealand Commissioner, is anything to go by, they considered their action in securing the phosphates for their own States highly praiseworthy. Their focus was on their own perceived enemies, those other States that might be interested in securing the phosphates for themselves. When they thought about the Nauruans, they considered that they were acting with largesse, as indeed they probably were, when compared with the treatment of other indigenous peoples.

The environmental damage that is currently occuring is the work of developing as well as developed countries. Morally condemning our ancestors for what they thought was perfectly proper distracts us from the issue of what must be done now. In the case of Nauru, Professor Weeramantry has made a strong argument for reparation. He admits that the Nauruans have done well out of the Mandate and are relatively prosperous. They want more, however, and if more money is to be paid where will it come from and to what use will

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3 Vitoria F De, *De Indis at de Ivre Belli Releciones* (1964, J Bates trans. 1917), pp 127–28.

4 Grotius H, *De Jure Belli Ac Pacis Libri Tres* (F Kelsey trans. 1925), p 550.

it be put? Australia has limited resources and it may be that these funds should be used in areas where it is more urgently needed and where it may more profitably be employed to prevent the ongoing deterioration of the planet.

Professor Weeramantry's book is well written and, if one takes his position into account, it represents a comprehensive survey of colonial exploitation of the natural resources of other peoples. It remains to be seen whether Professor Weeramantry's reasoning will find favour in the World Court.

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Editor's note: The Nauru case was settled in August 1993.

The Rights of Peoples

Edited by James Crawford
(Clarendon Press, Oxford, 1988, x and 236 pp)

The legal setting for *The Rights of Peoples* is the debate over whether international law has recognised or should recognise a so-called "third generation" of human rights, or rights of peoples. While scholars recognise that the distinctions are not cut and dried, the first generation of human rights are the civil and political rights, corresponding largely with those in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. They are typically negative rights in that they protect individuals from State action. The second generation rights correspond largely with those in the International Covenant on Economic, Social and Cultural Rights. They are positive rights in the sense that they require positive action from the State. The traditional focus of human rights law has been the individual; the group has been protected either only derivatively[1] or very narrowly.[2] Further, the only other real player in the game has been the State. The third generation of peoples' rights challenges that conception and, by implication, necessarily challenges various other aspects of the traditional, Statist conception of human rights and even international law as a whole.

The rights typically referred to as third generation peoples' rights are the right to existence as a people (including, for example, the right of peoples, particularly indigenous peoples, to self-determination, to sovereignty over resources, and to cultural identity and heritage), to development, to a clean environment, and to peace and security. However, it is still not clear precisely what is encompassed by these rights which are at most *lex ferenda* nor how

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1 For example, the right of freedom of an individual to practise his or her religion or culture often depends on the minority as a group being guaranteed respect for their religion or culture. Similarly, freedom from discrimination on the basis of a group identity implies the right of the group to that identity.

2 For example, the rights of self-determination and freedom from genocide are only recognised in respect of a very narrow range of groups and circumstances.

the recipients of these rights should be defined, nor the relationship of these rights to the existing rights of either individuals or States. The essays in this book address these issues. While their authors do not all agree, they all contribute to the present international debate.

In the first essay, Ian Brownlie provides the viewpoint of a traditional, or positivist, international lawyer. In doing so, Brownlie make some ostensibly valid points. For example, he decries "the casual introduction [by proponents] of serious confusions of thought" (p 14) and calls for more clarity in the debate, particularly more careful analysis of the law. However, the extent to which he criticises the proponents of peoples' rights illustrates well how a strict adherence to the traditional view of international law produces a particular view of human rights. Many proponents of peoples' rights criticise precisely this view as preventing change that is much needed, at least in the interests of justice, if not for the survival of life on earth as we know it.

This is the view that Richard Falk takes in the second essay. Falk attacks the traditional view of international law as "Statist," showing how that view has produced injustices to those who do not fit within its framework, most notably indigenous peoples. He argues for alternative approaches that recognise the rights of peoples. While one reviewer has criticised Falk for perpetrating exactly the "vague and woolly headed"[3] thinking that Brownlie criticises, I disagree with this view. First, while it is true that the traditional conception of international law is inherently Statist, this is inevitable, as international law revolves around States as the primary actors whose actions determine what international law *is*. Second, it is clear that the Statist approach has produced injustice where a remedy has not fitted within this view, as in the case of indigenous peoples. Third, in order to provide the remedies that appear necessary, this Statist conception of international law and human rights will have to change. Falk puts these points well. His is not a close textual or legal analysis, but it is not intended to be; nor is that the only type of valid argument in this area. To suggest that a precise analysis of international law (based on State practice) is the only type of helpful contribution to the debate is to suggest that only international lawyers can contribute, and/or only insights from international law are relevant. I disagree, and suggest that Falk's essay forces one to step back from the close analyses and focus on the big picture. As such, especially combined with Brownlie's paper, it is a valuable scene-setter for the seven papers which follow, which take up various issues raised in the debate.

Eugene Kamenka, like Brownlie, is concerned with the level of the discussion of human rights (although, unlike Brownlie, he does not seem to share the same faith in positive international law). Kamenka argues that the many conflicts between the various generations of human rights are glossed over (often deliberately) in order to make political claims and to reach agreement on the creation of human rights norms. He thus argues that the

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3 Wilson, "Book Review" (1989) 83 *AJIL* 670 at 671.

fundamentals of human rights need to be more critically addressed if human rights are to be "more than a set of pious platitudes or cynical compromises wholeheartedly supported by no one". With respect to peoples' rights in particular, Kamenka argues that they are only valid in so far as they extend first generation rights and, moreover, that only a back-to-basics approach by all involved, not just the international lawyers, can achieve this.

James Crawford focuses on the recipients of the rights claimed. He notes that "[i]f the phrase 'rights of peoples' has any independent meaning, it must confer rights on peoples against their own governments" (p 56). He thus examines all the various types of rights claimed as peoples' rights and assesses to what extent they are rights of States or of individuals and to what extent they really are rights of peoples to make claims against their own governments. Crawford's analysis is sound and useful, if only to point out why it is so difficult for States to recognise the many rights claimed by peoples: he reinforces Falk's argument that such recognition conflicts with the position States presently enjoy under the traditional (Statist) conception of international law and human rights.

David Makinson approaches the debate from a different point of view: that of a logician concerned with indeterminacy and inconsistency "in the notion of a right held by all peoples" (p 69). In order to do this, Makinson, after identifying the general issues, examines the concepts and language used in specific examples and identifies several problems of indeterminacy and inconsistency.[4] Makinson's paper is an excellent example of the benefit to be gained from including contributions by non-lawyers, particularly philosophers, to the debate over the formulation of human rights norms.

Garth Nettheim looks at the claims being made by indigenous peoples in Australia, Canada and international fora in order to distill the areas of their concern. He takes the various classes of claims and assesses whether they are rights particular to indigenous peoples or applicable to peoples in general, and (very briefly) how far they are recognised in international instruments. Nettheim's paper provides a good introduction to the claims made by indigenous peoples and to the relationship between those claims and the rights claimed by peoples in general. My only caveat about its usefulness lies in relation to the developments that have occurred since it was written.

Gillian Triggs considers the relationship between individual rights and peoples' rights. In an excellent essay, Triggs rejects the argument that recognition of peoples' rights derogates from or threatens the established individual rights. Instead, she argues that peoples' rights and individual rights are interdependent.

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4 My favourite is his identification of the "semantic blockage" (ibid, p 75) used in relation to the right of self-determination, something that I have criticised in my discussion of indigenous peoples' claims to self-determination (see Iorns, "Indigenous Peoples and Self-Determination: Challenging State Sovereignty" (1992) 14 *Case Western Res J Int'l L* (forthcoming)).

The remaining two essays focus on particular rights claimed. Lyndel Prott considers the claims being made to cultural rights, assessing how the claims might be transformed into enforceable legal rights. She concludes that much more work needs to be done in order to reach this stage and that Western international lawyers need to pay considerably more attention to the issues of cultural protection.

Roland Rich discusses whether international law recognises a right to development. He looks at both State and other international practice in giving development assistance to developing countries, and UN statements on the right to development.[5] Rich concludes that, despite UN assertions of the existence of the right, State practice does not support this. However, it is clear that such a right is emerging; Rich argues that States must finally recognise development as a human rights obligation. He asserts that it encompasses a right to development assistance and that development must be undertaken in accordance with other human rights imperatives. Rich's paper provides a good introduction to the issues involved in recognition of a right to development.

The final chapter in the book is a conclusion by James Crawford. I note that one of his final comments is that this area shows a clear need for elimination of the distinction between "reality" and "idealism" (p 175) – in other words, for a meeting of minds between the positivists and the natural lawyers and, impliedly, a breakdown of the rigid distinction between *lex lata* and *lex ferenda*.

The book contains other documents. First, there is a list of relevant international documents (until December 1986); some are cited and commented on, and other more hard to find texts are provided in their entirety. Second, there is a Select Bibliography, divided into 12 topics. Both are extremely useful for the uninitiated.

This book contains some excellent material on the rights of peoples. While it covers too much ground to go into any one topic in enough detail to resolve the issues highlighted, its utility is as an introductory text and, as such, in identifying the many issues that need to be resolved before international law can recognise many of the rights claimed. Indeed, the debate among the authors over the nature of international law and human rights underlines one of the more fundamental matters that needs resolving.

Since this book was written much has happened in the international sphere, events that have altered the way the international system operates and the laws that it operates by. The areas of peoples' rights in which most has occurred and been written about have been in relation to the environment, development and indigenous peoples. For example, an interesting change in focus has been argued for by some writers in relation to the right to development, namely that the focus should switch from the articulation of an abstract right to

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5 I note also his disagreement with Brownlie over how to determine what international law is: ibid p 40.

development assistance, to a primary concern with ensuring that human rights are not violated by development being undertaken.[6] Rich's article clearly does not take any of these developments into account. Further, with the writing likely to emerge as a result of the 1992 United Nations Conference on Environment and Development (UNCED), it is likely that those interested in the state of the emerging right to development will need to go further afield than Rich's article. Rich still provides a good introduction to the many issues in the area so that, regarding the right to development as only a small part of a larger whole, those interested in such an introduction will still be well served by Rich's writing.

There have been similar developments, both national and international, in respect of indigenous peoples. Of most consequence to Nettheim's paper is the replacement of ILO Convention 107 by Convention 169 (which renders inaccurate some of his points about the state of international law). Of relevance to both Nettheim's and Falk's papers is the progress made by the UN Working Group on Indigenous Peoples toward a draft Declaration on the Rights of Indigenous Peoples. While the draft Declaration has not yet been finalised, it is expected to be finalised at the Working Group's Eleventh meeting in July 1993. This will then require more than a passing mention in papers on the state of international law in relation to indigenous peoples, particularly if the draft Declaration is later adopted by the UN General Assembly.

In addition to these specific events, the profile of indigenous peoples' claims in domestic and international fora is considerably higher than at the time this book was published. One of the consequences of this has been a large number of excellent articles on various aspects of their claims and the state of international law.[7] Anyone interested in the state of international law on indigenous peoples' rights would thus need to read more than this book. However, as it is still a good pointer to the basic issues needing resolution, it is worth reading as an introduction to the area.

Since 1988, writings have also addressed other claimed rights of peoples, most notably the rights to peace[8] and to language.[9] Further, an emerging

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6 See Alston, "Revitalising United Nations Work on Human Rights and Development" (1991) 18 *Melbourne U L Rev* 216; Paul, "The Human Right to Development: Its Meaning and Importance" (1992) 25 *John Marshall L Rev* 235.

7 There are too many to appropriately list here. Some recent articles, including references to many of the other writings in the area, include: volume 8(2), *Arizona J of Int'l & Comp L* (1991) (symposium issue); Iorns, n 4 above, n 14 (indigenous peoples and self-determination); Shutkin, "International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment" (1991) 31 *Virginia J of Int'l L* 479, n 25 (indigenous peoples and the environment).

8 See, eg, Przetacznik, "The Concept of Genuine and Just Peace as a Basic Collective Human Right" (1989) 6 *NYLSJ Hum Rts* 237.

9 See, eg, Gromacki, "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration on Linguistic Rights" (1992) 32 *Va*

peoples' right of political participation has been articulated.[10] Again, as *The Rights of Peoples* deals mostly with the fundamental nature of peoples' rights, these developments do not affect its utility as an introduction or pointer to the issues that need to be resolved. However, it is clear that such additional writings would need to be consulted to obtain a full picture of the state of peoples' rights in international law.

A further development of interest is the World Conference on Human Rights to be held in Vienna in June 1993. The issues of development, environment and indigenous peoples (and their human rights implications) will be of primary importance in the agenda adopted.[11] The difficulty in agreeing upon that agenda does not bode well for resolution of some of the harder issues concerning peoples' rights that the authors in this book identify. While the specific areas of development, environment and indigenous peoples' human rights may be affected by the World Conference, the issues identified in this book are likely to be glossed over in the name of obtaining consensus on the statement of human rights norms, and thus remain unresolved. Indeed, if the creation of international law in the future follows such precedents set in the past, if it continues to fail to meet the challenges posed by the authors in this book, then this book could continue for many years to be a fundamentally useful reminder of the complex issues that require resolution.

In conclusion, *The Rights of Peoples* is an extremely good statement of the issues that need to be addressed, at least a good introduction to this area, and even a useful reference book. Whether I can still say this in one or two years time remains to be seen. But for now, it is essential reading for anyone interested in human rights and is of particular importance to Australians interested in the resolution of the claims made by Aboriginal peoples.

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Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination

Edited by Sandra Coliver
(ARTICLE 19, International Centre Against Censorship, London, and Human Rights Centre, University of Essex, 1992, ix and 417 pp)

Shortly before Christmas 1992, there was a television news item from Cincinnati, USA. It showed a white cross erected in a public place by the Ku

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J Int'l L 515; Skutnabb-Kangas, *Language and Literacy Rights of Minorities* (1990).

10 See Franck, "The Emerging Right to Democratic Governance" (1992) 86 *AJIL* 46; Fox, "The Right to Political Participation in International Law" (1992) 17 *Yale J Int'l L* 539.

11 See *Report of the Preparatory Committee for the World Conference on Human Rights*, UN Doc A/Conf.157/PC/54 (8 October 1992), paras 31–61.

Klux Klan, and a black woman looked at it in silence, tears tumbling down her face. People who tried to remove the cross were arrested by the police, because it was protected by the constitutional guarantee of freedom of speech. Around the same time, in Australia, the Commonwealth Attorney-General introduced legislation which would be very likely to make unlawful an attempt by a domestic racist group to copy the Ku Klux Klan's behaviour. The Bill has been tabled, and public comment is being sought.

With respect to the general question whether Australia should have such legislation, the outcome of the consultation is entirely predictable: public opinion is strongly divided. When Western Australia and New South Wales passed laws on the subject, and when the Commonwealth (on an earlier occasion) and Victoria (in 1992) proposed doing so, the issue was hotly debated in the media. The fate of the present Commonwealth Bill is uncertain.

As the book under review demonstrates, the issue of legislation to proscribe racist speech has been very controversial throughout the world for many years. The book is based on papers presented at an international conference convened in 1991 by the organisation ARTICLE 19, International Centre Against Censorship, and the Human Rights Centre of the University of Essex. ARTICLE 19, the book explains, "takes its name and mandate from Article 19 of the Universal Declaration of Human Rights which proclaims the fundamental right to freedom of expression". This Organisation campaigns against restrictions on freedom of expression, and defends victims of censorship. The Human Rights Centre is an interdisciplinary centre undertaking research and teaching on international human rights.

The book's title indicates its content and approach, critically exploring to what extent, if any, freedom of expression should be restricted to curtail the promotion and expression of racial hatred. It contains general overviews and evaluations of legislation, and chapters on Australia, Canada, countries of the former Soviet Union, Denmark, France, Germany, India, Israel, Latin America, Netherlands, South Africa, the United Kingdom and the United States of America. A number of authors, for example, Nadine Strossen, Irwin Cotler and Michael Banton, are very well known internationally as writers, or activists, or both, in the fields of race relations and human rights.

Striking a Balance also contains the major international law standards relating to freedom of expression and the prohibition of racist speech, such as the Convention on the Elimination of All Forms of Racial Discrimination, and policy statements from a range of human rights organisations, such as the American Civil Liberties Union, the Board of Deputies of British Jews, and the Islamic Society for the Promotion of Religious Tolerance. As well, it has an extensive bibliography.

A great strength of the book is that while one of its sponsoring bodies, ARTICLE 19, is strongly opposed to legislation, the collection presents the case both for and against. A number of the contributors are in favour of legislation. An evaluation of how laws have worked by Sandra Coliver,

ARTICLE 19's legal officer and the book's editor, indicates circumstances in which legislation appears to have been effective, although she concludes that on balance the evidence indicates that legislation is both ineffective and undesirable.

The evidence and argument presented in *Striking a Balance* will not settle the debate about either the effectiveness or the desirability of legislation. As Frances D'Souza, the Director of ARTICLE 19, notes in the introduction, at the end of the conference "the view was expressed that the issues were too complex and the nexus between laws, protections and levels of hate speech too immeasurable to justify any definitive statement. There was also a consensus on the need for further study, especially of national experiences in trying to counter racial and religious hatred and violence; this volume is a first attempt."

The need for further study is apparent in the three chapters on Australia. Kate Eastman provides a general introduction entitled "Racial Vilification: The Australian Experience", which "investigates the various approaches for dealing with the problem of racial vilification in Australia by examining the anti-discrimination, civil and criminal laws" (p 75). But there is no discussion of the criminal laws that might apply, and why they have not been applied. This is a significant omission, because the ineffectiveness of the current criminal laws is relevant to understanding the Western Australian legislation, and recommendations of the National Inquiry into Racist Violence. Eastman warns that "Australia must be wary of adopting new criminal laws where it already has ones which will deal with the problem" (p 81), without detailing the laws, without defining "the problem", and without analysing why the laws have not dealt with the problem.

Kitty Eggerking's chapter on the Australian media argues that the media is a significant contributor to the perpetuation of racism, despite the express anti-racist policies of regulatory agencies such as the Australian Broadcasting Tribunal, the Australian Press Council and the Australian Journalists' Association. However, she does not explain why they have failed. She favours the establishment of a new "accounting body" for the press, "to deal with complaints quickly and effectively" (p 86). She says it does not have to be a statutory body, but does not indicate how it can be more effective than the Press Council without statutory powers.

The first Australian law prohibiting racial vilification was enacted by New South Wales in 1989, and is the subject of a chapter by Sharyn Ch'ang. She provides considerable information abut the nature of complaints, and is optimistic about the law's impact, although, as she clearly indicates, there is no hard evidence about its effectiveness. The law has recently been reviewed by a member of the New South Wales Parliament, but his report has yet to be released. Ch'ang's analysis of the data leaves something to be desired. She states that on the basis of the number of complaints about breaches of the law the media is "the principal category of offender". She points out that this data might be seriously misleading, for example, because on investigation complaints might not be substantiated, and because there may be multiple

complaints concerning the same publication or broadcast. Despite acknowledging these significant shortcomings, and without presenting contrary information, she concludes that the data does "indicate that the media are major perpetrators of racially vilifying public acts" (p 102).

Although I have certain reservations about some of the papers, I have none about highly recommending *Striking a Balance* to anyone who is interested in the issue of race hatred legislation. I do not know of any publication that provides a broader survey of race hatred laws, and of how they have been applied. The papers are written in plain English, and do not presume that the reader is an expert in the subject. *Striking a Balance* will undoubtedly achieve the aims of the sponsoring bodies – to contribute to informed debate, and to assist organisations and individuals to clarify their positions on one of the most important and difficult legal and social issues of our times.

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The Effectiveness of International Environmental Agreements: A Framework of Existing Legal Instruments

Edited by Peter H Sand
(Grotius Publications Ltd, Cambridge,[1] 1992, 539 pp)

The threat to the natural systems that sustain life on earth is now widely recognised as the major problem facing the world. Consequently, the development and implementation of effective policies to protect the environment from further degradation have become a significant preoccupation for most governments and the international community.

The increasing realisation that many of these environmental problems are of global dimensions and that such problems are not receptive to conventional domestic legal solutions has led to the development of international perspectives in environmental law and a gradual fusion of domestic and international regulation of the environment. Currently the following broad areas of the environment are the subject of international legal regulation: protection of the marine environment; prevention of air pollution; protection of species of fauna and flora and related issues; prevention of pollution of rivers and lakes; prevention of the environment from radiological emergencies arising from the peaceful uses of nuclear and toxic substances; and protection of the environment from military and related activities.

International law has played a dominant role in defining and shaping the content of most modern rules of environmental law. In particular, international law has:

(a) provided a forum for cooperation by States and international governmental and non-governmental organisations;

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(b) laid down broad guidelines for domestic legislation and policy development;

(c) provided financial resources to developing countries to participate in environmental management;

(d) facilitated the integration of developmental issues with traditional environmental issues; and

(e) broadened the concept of the environment to include wider economic and social issues especially in the developing world.

In the years ahead, international law will provide the catalyst for most domestic legislation to protect the environment. However, international efforts to regulate the environment face a number of constraints which have prevented the effective implementation of many prescriptions in international environmental law. Briefly, the modern international legal system is comprised of States which are accorded sovereignty over their territories and all the resources within, divided regionally and sometimes ideologically and in the final analysis, taking decisions on the basis of what is perceived as being in narrowly defined national interests. Of late, developmental issues between the rich North and the poor South have also become major obstacles to reaching global consensus on international environmental issues.

There is a general acknowledgment that the nature of contemporary environmental problems and the urgency with which these problems must be faced require innovative measures. A major challenge for international environmental law and lawyers is how to move away from the current human centred and economically driven approach to environmental issues to a strategy aimed at achieving a balance between environmental protection and economic development.

In an attempt to do this, the United Nations Conference on Environment and Development (UNCED) was convened in Rio de Janeiro from 3–14 June 1992. The outcome of this Conference was the opening for signature of two important Conventions: the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity together with the Rio Declaration on Environment and Development and Agenda 21.

The Effectiveness of International Environmental Agreements was part of the official background work by the UNCED Preparatory Committee which, in March and April 1991, established Working Group III charged with the task of preparing "an annotated list of existing international agreements and international legal instruments in the environmental field, describing their purpose and scope, evaluating their effectiveness, and examining possible areas for the further development of international environmental law, in the light of the need to integrate environment and development, especially taking into account the special needs and concerns of the developing countries".[2]

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2 Committee III, Decision 2/3, A/46/48, Part I, annex I, quoted from p 4 of book under review.

The Effectiveness of International Environmental Agreements attempts to provide a set of criteria against which the effectiveness of international environmental law instruments can be measured. The broad categorisations include: objectives and achievement; participation; implementation; information; operation; review and adjustment; and codification programming.

The framework provided is a very useful one although it is doubtful the extent to which the criteria are applicable to all or most international environmental agreements, particularly those negotiated before the 1980s. For example, the criterion of the extent to which an instrument addresses the issue of sustainable development may not be relevant to pre–1980 instruments. It is doubtful whether sustainable development became part of international environmental law discourse before the publication of the *World Conservation Strategy* and the *Report of the World Commission on Environment and Development (Our Common Future).* Furthermore, the question of the special circumstances of developing countries became relevant to the negotiation of international environmental instruments relatively recently. The universal application of the framework developed in the book is thus limited by history. The editor in fact notes this: "Some of the criteria listed may not be applicable to all agreements or instruments evaluated" (p 4).

These minor points should not detract from the value of *The Effectiveness of International Environmental Agreements* and the amount of work that has gone into its preparation. The book is a useful source book for any environmental lawyer. It provides a list of some of the major international environmental instruments in existence, together with the status of their ratification as of 1 January 1992.

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International Law and the Antarctic Treaty System

By Sir Arthur Watts
(Grotius Publications Ltd, Cambridge,[1] 1992, 483 pp)

In *International Law and the Antarctic Treaty System* Sir Arthur Watts provides a valuable study of the Antarctic Treaty system as it has evolved through the Antarctic Treaty and related agreements. The author is well qualified to do so. Sir Arthur was a member of the United Kingdom delegation to the first Antarctic Treaty Consultative Meeting in 1961 and was later the leader of the United Kingdom Delegation during the 1982–1988 negotiations for the Convention on the Regulation of Antarctic Mineral Resource Activities 1988. As a member of the Foreign and Commonwealth Office, Sir Arthur has observed and been actively involved in the evolution of the Antarctic Treaty system from the relatively simple agreement of 12 States under the Antarctic

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Treaty to the complex and interrelated Antarctic Treaty system to which approximately 40 States have become parties.

The book is an expanded version of lectures delivered in February 1992 at the Cambridge Research Centre for International Law. The narrative reflects a lecture style, providing an overview of legal and constitutional issues which is accessible to the general reader. The premise for this work is that not only is Antarctica of value as a unique and vast scientific laboratory but it is also of value to the science of international law. The work distills the laws and principles which now comprise the Antarctic Treaty system from the panorama of Consultative Party practices, differing juridicial perceptions of territorial claimants and non-claimants and scientific activities and heroic expeditions in Antarctica.

Issues such as dispute settlement, territorial sovereignty, the definition of Antarctic seas, jurisdiction, enforcement, liability and non-militarisation are examined separately by reference to each relevant agreement within the Antarctic Treaty system. These interlinked agreements are the Antarctic Treaty 1959 (and Recommendations made under it), the Convention for the Conservation of Antarctic Seals 1972, the Convention on the Conservation of Antarctic Marine Living Resources 1980, the Convention on the Regulation of Antarctic Mineral Resource Activities 1988 and the Protocol on Environmental Protection to the Antarctic Treaty 1991.

Analysis of this "legal architecture" of the Antarctic Treaty system demonstrates the complexity of the rules relating to participation in Antarctic affairs by original Consultative Parties, acceding Consultative Parties, Non-Consultative Parties and Observers. A portrait emerges of ritualistic, juridical procedures based on tortured provisions and "knowingly ambiguous phrases". Such provisions and phrases do, nonetheless, have the merit of defusing potential disputes relating to sovereignty claims in Antarctica and in this way, of enabling cooperation "in the interests of all mankind". Indeed, no aspect of the Antarctic Treaty system is comprehensible in the absence of an understanding of the underlying positions of States making claims in Antarctica and those which either make no claim or deny a right to do so. The cornerstone article IV, which provides that the Antarctic Treaty is not to be interpreted, *inter alia*, as prejudicing the respective juridicial positions of the Parties, is rightly identified by Sir Arthur as a good example of dispute management, which, while not solving legal issues, enables parties to cooperate in other aspects of Antarctic regulation and activity.

The opening chapters of this work, dealing with the evolving institutional procedures and powers, provide an explanation for the "commendable haste" in negotiating the Protocol on Environmental Protection in 1991, three years after the adoption by consensus of the Minerals Convention. A general reader might ask how it was that the Consultative Parties devoted so much effort to the negotiation of the Minerals Convention which was so rapidly to be undermined by a total prohibition on mining under the Protocol. Had participation in the Antarctic Treaty system been more accessible to the

international community and had its procedures been more transparent and outward looking, the Consultative Parties would have understood far earlier that a total ban on mining more accurately reflected public concerns about the protection of Antarctica than did the Minerals Convention which creates a procedure by which mining might, despite unprecedented and stringent environmental standards, have taken place.

While the Minerals Convention has now been overtaken by the Protocol, it remains questionable whether the Protocol itself will ever enter into force. This is because all States which were Consultative Parties on the date the Protocol was adopted must ratify, accept, approve or accede to it – a difficult standard to meet. In the absence of this Protocol, it is assumed that the voluntary restraint on Minerals Resource Activities agreed to in Recommendation XI–1 will continue.

It is in the area of resource management that the contribution of the Antarctic Treaty system to the science of international law is most clearly illustrated. Recommendations under the Antarctic Treaty protect all fauna and flora, a separate Convention protects seals, and internationalised regimes have been negotiated to regulate marine living resources and minerals. Sir Arthur also amply demonstrates that the Consultative Parties have reflected international concerns regarding the environment through special Treaty provisions and Recommendations. Examples include the prohibition of nuclear explosions, of the disposal of radioactive waste or of any military measures and Recommendations dealing with tourism, waste disposal and oil and marine pollution. These laws provide creative models for international or regional resource management elsewhere in the world. Importantly, the Antarctic Treaty system provides a guide for States in disputed boundary and maritime zones to go forward with effective management and regulatory regimes without jeopardising their respective legal claims.

The book includes, in appendixes, the Antarctic Treaty and all related agreements (though not the Recommendations), and a selected bibliography. It provides a valuable source of materials not only for international lawyers but also for those concerned with resource management and international institutional procedures.

Sir Arthur's review of the laws governing Antarctica demonstrates that, while these laws have grown like "topsy", the regime has a capacity to respond to international environmental concerns and now constitutes a coherent order which may accurately be described as the "Antarctic Treaty System".

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The Arab–Israeli Conflict and its Resolution: Selected Documents

Edited by Ruth Lapidoth and Moshe Hirsch
(Martinus Nijhoff Publishers, 1992, 387 pp)

Collections of documents on topics of interest are invaluable resource items – my personal library only has a few such volumes but all of them are used regularly and relied on heavily. Ruth Lapidoth and Moshe Hirsch, both from the Hebrew University of Jerusalem, have compiled an excellent resource with their volume of selected documents on the Arab–Israel Conflict – a book I have already scoured with interest and which will provide a constant and authoritative source of information.

Lapidoth and Hirsch's work is not the first volume of selected documents on the Arab–Israel Conflict. John Norton Moore produced an extensive three–volume set of documents and writings on the Arab–Israeli Conflict in the mid–1970s, and Yehuda Lukacs compiled a single volume of documents on the Israeli–Palestinian Conflict in the mid–1980s. Apart from the fact that both these works have been superseded by events, Moore's volumes contain much more than primary source documents and are very expensive and Lukacs' work is limited to the Palestinian issue without the broader context of Israel's relationships with Egypt, Syria and Lebanon. Lapidoth and Hirsch contribute significantly to the literature both by incorporating documents up to the end of 1991 and by including documents in one volume on the Arab–Israel Conflict in its broader sense.

However, the work is important for reasons additional to these two. The use of the phrase *"and its resolution"* in the title of the book says something of the current political reality in relation to the conflict and also to the emphasis of the editors in selecting particular documents. John Norton Moore did not have the benefit of the Camp David Accords between Egypt and Israel in 1975 let alone the Madrid Conference of 1991 and subsequent meetings between Israel and the Arab States. Although the current negotiations are not progressing quickly, the parties to the conflict are negotiating face to face and Egypt and Israel have been at peace for 14 years. The current situation was unthinkable 20 years ago. Now it is feasible to title a book *The Arab–Israel Conflict and its Resolution.* The editors could have chosen to focus exclusively on the history and reality of the conflict. However, they have not done so and have included many of the more positive, optimistic documents. The editors state in the preface that they have intentionally emphasised documents from recent decades which happily include more peaceful sentiments.

There is no suggestion that Lapidoth and Hirsch have overlooked important historical documents. Documents such as the Zionist Programme adopted at the First Zionist Congress in Basel 1897, the McMahon–Hussein correspondence from 1915–1916, the Balfour Declaration of 1917, article 22 of the Covenant of the League of Nations and the terms of the British Mandate for Palestine as confirmed by the League of Nations are all included.

The editors have also been careful to select documents as dispassionately as possible. They include many UN resolutions critical of Israel and its practices in the occupied territories such as, for example, Security Council Resolution 465 condemning Israeli settlements in the West Bank and Gaza; Israel's Basic law declaring Jerusalem the capital of Israel and Security Council Resolution 478 censuring that law; the legislation extending Israeli law to the Golan Heights and Security Council Resolution 497 condemning that law; and various resolutions condemning Israel's actions in Lebanon. The editors also include, for example, the Lebanese National Accord approved in Al Ta'if demanding the restoration of Lebanese sovereignty over the territory occupied by Israel in Southern Lebanon and the Venice Declaration by the EC which, *inter alia*, calls for Israel to withdraw from its occupation of land seized in 1967.

A helpful feature of the book is the inclusion of the recent "peace documents" not only because they are now together in one volume but also because they are not all readily accessible elsewhere. The editors have included documents on the resolution of the Taba border dispute between Egypt and Israel as well as the various peace initiatives – the Reagan initiative, the Shevardnadze letter to the UN Secretary-General proposing a Middle-East Peace Conference under the auspices of the permanent members of the Security Council, the Schultz plan, the Shamir plan and the documents to establish the Madrid Conference. Other recent documents which are also useful include the Jordanian announcement of its disengagement from the West Bank and the PLO's Declaration of the State of Palestine.

The editors have included a number of maps to illustrate areas referred to in particular documents and these are also particularly useful. Although there are specialist atlases on the Arab-Israel Conflict,[1] it is helpful in this volume not to have to rely on a second book for important geographical information.

The documents in the book are included in chronological order rather than on the basis of specified categories. At first this approach may appear odd or confusing. However, as the authors indicate in the preface to the book, the Arab-Israeli Conflict includes many questions of international law on a whole range of diverse issues. Many of the documents relate to two or more distinct issues and to categorise them on an issues basis would require either repetition or complex cross-referencing. As it is, the documents are easy to find because of a clear and detailed table of contents.

The documents in this book were carefully chosen and there are no glaring omissions. More documents could have been included on the PLO's attempts to gain membership of various UN bodies – the book contains General Assembly Resolution 3237 granting observer status to the PLO – but this is hardly a substantive criticism of the book. Some documents refer to particular Security Council or General Assembly Resolutions which are not reproduced in the book and for the sake of completeness the text of those resolutions may

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1 For example, Gilbert M (ed), *The Arab-Israel Conflict: Its History in Maps.*

have been helpful. From a personal perspective, inclusion of the voting records on various resolutions may also have been an advantage.

Professor Lapidoth and Mr Hirsch have produced a resource which is highly recommended for those with a teaching, research or general interest in the Middle East Conflict and its resolution. A colleague mentioned to me that the book must have been written especially for me! I am sure others will use it with the same appreciation.

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The Law of Evidence in Canada

By J Sopinka, SN Lederman and AW Bryant
(Butterworths, Toronto, 1992, 1068 pp)

The treatment of the law of evidence in a federation is never an easy matter. Since the 1970s the Canadians have attempted to achieve uniformity in the rules of evidence applied federally and in six of the provinces. Similarly, but more recently, reform has been attempted in Australia.[1] In Canada, a draft Uniform Evidence Act was introduced to parliament but has not proceeded. The apparent failure of the reform process has provided the impetus for this book, which is the successor to a more limited work by two of the authors, published in 1974, and entitled *The Law of Evidence in Civil Cases*.

The book provides a comprehensive treatment of the Canadian law of evidence in both civil and criminal cases.[2] It is a well-written and presented work. The authors have drawn largely upon Canadian cases and materials and the book is, in a very real sense, a Canadian text. They explain in the preface that the Canadian Charter of Rights and Freedoms has done much to transform the rules of evidence in criminal cases.[3] They point out that this renders the English cases less useful.

The authors see in the recent Canadian cases a move by the judiciary to make the rules of evidence more flexible. After all, the rules of evidence are simply a means to an end, the ascertainment of truth in legal cases. The Canadian approach, seen as a trend to reform by the authors, can be discerned

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1 See *Evidence and Procedure in a Federation*, papers presented at the Joint National Conference of the Australian Institute of Judicial Administration and the Federal Litigation Section of the Law Council of Australia, 9–10 April 1992.

2 In Australia the only comparable work is Byrne DM and Heydon JD (eds), *Cross on Evidence*, 4th Aust edn (Butterworths, 1991). This does, however, draw a great deal on English authorities.

3 In Australia, legislatures have been less active, leaving the courts in the exercise of judicial discretion to deal with questions of the admissibility of illegally or unfairly obtained evidence. The Victorian parliament has, however, enacted comprehensive legislation dealing with the reception of confessions and admissions and other matter affecting the accused in custody: see Crimes Act 1958 (Vic) Part III Div 30A.

in the Australian cases, particularly in the relaxation of the hearsay rule.[4] That approach might be compared to the completely inflexible and conservative stance of the English courts, illustrated most recently by the decision of the House of Lords in *R v Kearley*.[5]

By way of criticism, I found the chapter on examination of witnesses disappointing, particularly with regard to the examination of witnesses in trials for sexual offences. The legislatures in Australia, and particularly in Victoria (see ss 33–41 of the Evidence Act 1958), have shown great initiative in regulating cross-examination of victims in sexual offence cases, thus protecting witnesses from the excesses of questioning by counsel in respect of prior sexual conduct. Some treatment of the Canadian approach would be useful. Moreover, the index is difficult to follow, something which is not uncommon in texts on the law of evidence.

Finally, the work is likely to be of little use to practitioners outside Canada. It does, however, provide a useful comparative study for Australian lawyers.

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4 See *Walton v R* (1989) 166 CLR 283 at 293 per Mason CJ, and most recently in *Pollitt v R* (1992) 108 ALR 1.

5 [1992] 2 All ER 345; [1992] 2 WLR 656, albeit with Lord Griffiths and Lord Browne-Wilkinson dissenting.