BOOK REVIEWS

Edited by

Judith Gardam and Penelope Mathew

Problems and Process: International Law and How We Use It

By Rosalyn Higgins
(Clarendon Press, Oxford, 1993, xxvii and 274 pp)

Rosalyn Higgins' recent appointment to the International Court of Justice (ICJ) has added retrospective interest to this volume published in 1993.[1] Professor Higgins is one of the leading international lawyers of her generation and she has taught and practiced international law at the highest levels. Her appointment to the Court is therefore a welcome one and she can be expected to add considerable intellectual weight to future World Court decisions. Inevitably this book, drawn from her Hague Lecture Series of 1992, provides many clues as to the style of reasoning and mode of thinking we can anticipate from Judge Higgins.

This is not a comprehensive study of the rules of public international law in the late twentieth century—that was not the intention, and those requiring such guidance should instead consult Ian Brownlie's *Principles of Public International Law*. Nor is this a major theoretical contribution to the discipline. Indeed the theoretical introduction may be the book's weak link. Instead, we have a series of lectures that concentrate on exactly what the title promises: problems and process. Higgins directs her attention to the areas of law in which there is the greatest doctrinal confusion. For example, while there is little on territorial jurisdiction, there is a lengthy discussion of the more contentious bases of extra-territorial jurisdiction. In the section on self-defence, she dwells on the controversial topics of anticipatory self-defence and humanitarian intervention rather than the core and undisputed meanings of self-defence. Similarly, she declines to revisit antique debates about the creation of local custom or the effects of persistent objections. The formal requirements of treaty-making also receive short shrift, presumably because the Vienna Convention on the Law of Treaties has solved many of the problems in this area of law.

Nevertheless, as one can imagine, the problems are many and the processes often flawed. Higgins has a rare ability to identify the key conceptual difficulty and suggest a way forward. At her best she completely reconceptualises areas of concern forcing us to view them in a different light. Often, she approaches a

1 Also issued in paperback by Oxford University Press, 1995.

problem from many different fields of study. The doctrinal boundaries within international law need to be rethought and Higgins is not afraid to begin the task. At the same time she displays uncanny precision in defining just what a field of international law should include. Nowhere is this more true than in the discussion of State responsibility.

State responsibility is one of these topics in an undergraduate course which most teachers would prefer to avoid. Perhaps this is because simultaneously it appears to contain nothing and everything. Philip Allott argues for the former view. In a memorable phrase he explains his antipathy to the idea of State responsibility—"the wages of sin are death not responsibility for sin".[2] For Allott, State responsibility is an idea that separates States from their accountability for violations of international law. It does this by constructing a massive and unnecessary intellectual edifice between a State's delict and the punishment that must flow from this breach of law. In many international law courses State responsibility is a topic into which a potpourri of leftovers is poured. Sometimes it is home to environmental law, often it houses the doctrine of fault. At the extremes, State responsibility embraces all of international law. Reparations, use of force, torture, counter-measures, criminal law—each is colonised by State responsibility in its broadest and most ill-defined sense. Meanwhile, the International Law Commission (ILC) expends valuable intellectual resources on its endless Draft Articles on State Responsibility.

Predictably, Higgins has some firm views on the mess that is State responsibility. Hers is a call for coherence and rigour. It is a convincing one. For her the kernel of State responsibility is attributability. In what circumstances can a State be responsible for the actions of its officials or private citizens? Issues of redress, criminality and intention belong to the substantive law of obligations—a much wider field of study. On the topic of attributability Higgins considers State responsibility for the acts of private citizens as well as the *ultra vires* acts of government agents. In the latter case, there is no question that the State's responsibility is engaged (this was the position of the French agents in the Rainbow Warrior Affair).[3] However, the acts of private individuals are not "in principle" (p 153) attributable to the State. This will disappoint those who have argued that the failure by States to address the problem of violence against women (for example, domestic abuse) should give rise to international responsibility on the human rights level. On the other hand, Higgins reaffirms an important but often neglected principle that State responsibility for injury to one's own nationals is in effect the study of attributability as applied to human rights law.

The discussion of those old war-horses of State responsibility the *Trail Smelter* case and *Lac Lanoux* case is iconoclastic. According to Higgins, these cases raised questions of standard of care which will depend on the specific

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2 Allott P, "State Responsibility and the Unmaking of International Law" (1985) 29 *Harvard Journal of International Law* 1.

3 See eg, French-Mexican Claims Commission: Verzijl, Presiding Commissioner; Ayguesparsse, French Commissioner; Gonzalez Roa, Mexican Commissioner (*Caire* claim) (1929) 5 RIAA 516 (translation).

obligation at issue, for example, environmental degradation or ultra-hazardous activities. It is a mistake to derive general principles of State responsibility from these cases. The need to consider specific obligations takes the matter outside State responsibility. Higgins, therefore, seems to be drawing a broad distinction between the issue of whose behaviour engages State liability (State responsibility) and the content of that behaviour (the substantive law of obligations).

Higgins is equally sure-footed when discussing State responsibility for international crimes. She argues, convincingly, for a decoupling of Chapter VII determinations from the concept of international crime at the very point when both the Security Council and the ILC are endorsing this linkage (though her discussion of the various proposals for an International Criminal Court is cursory). She then goes on to tease out the relationship between *jus cogens*, *erga omnes*, universal jurisdiction and international crime at a time when these categories are being frequently rather carelessly lumped together.

The chapters on jurisdiction (Chapter 4), immunities (Chapter 5) and the role of national courts (Chapter 12) are likewise full of insight and scrupulous precision. Higgins has an original and provocative manner when characterising fields of international law. For instance, the law allocating competence to prescribe and enforce jurisdiction is described as something akin to anticipatory dispute resolution (p 56), immunities are "exceptions to jurisdictional competence" (p 78) and the attitude of national courts to international law is dependent on the intangible presence of the particular "legal culture" (p 206) in which the Court is operating. The chapters on the United Nations wisely focus on one aspect of the UN's work, that of peace-keeping (Chapter 10) and peace enforcement (Chapter 15). In these two chapters Higgins makes several worthwhile reform proposals. Most interesting here is her concern that the Security Council is adopting resolutions that make legal determinations without having undertaken the requisite legal analysis (p 183). This concern is prescient given the recent criticisms of the Security Council over the Lockerbie dispute and the quasi-judicial role assigned to the Council in the ILC's latest Draft Statute for an International Criminal Court.[4]

Issues of participation are considered in the chapters on personality (Chapter 3) and self-determination (Chapter 7). Chapter 7 rehearses the familiar (perhaps *over* familiar) story of the development of self-determination from a States' right to its association with decolonisation and independence and finally to its role as a more general human right. There are useful discussions of the rights of minorities and the restrictions imposed upon exercises of self-determination by the principle of *uti posseditis juris*. Higgins also defends the rather equivocal jurisprudence of the Human Rights Committee in this area. Ultimately, however, her conclusions are quite predictable. Self-determination is a right held both by minorities (rights to equality, non-discrimination, cultural

4 Report of the International Law Commission on Its Forty-Sixth session, UN Doc A/49/10 (1994). See McCormack T and Simpson G, "A New International Criminal Law Regime" (1995) 42 *Netherlands International Law Review* 177.

expression) and by majorities within States (democratic rights). Secession is neither legal nor illegal but should be viewed as a remedy of the last resort where minority rights are not respected. This is all fairly uncontentious. Unfortunately, in this chapter at least, Higgins has an irritating habit of constructing straw men for the purposes of some intellectual *legerdemain*. Many debates she presents as current have been long since resolved in favour of the Higgins view. We do not learn who has engaged in a "retrospective rewriting of history" (p 111) or the identity of "certain writers who assume that self-determination is only about independence" (p 117) (is anyone seriously suggesting this today?) or, finally, which writers erroneously believe that "the current problems of Hong Kong are problems of self-determination" (p 128).

The discussion of personality contains more that is original and thought-provoking. In particular, Higgins charts the development of international law from the classical position (States as the sole legal persons) to the contemporary position in which institutions and, most notably, individuals are said to have rights and obligations at international law. The interlocking rules of private and public international law as they apply to a variety of non-State actors are discussed with real verve and insight at the end of Chapter 3.

Higgins' comments on the International Court of Justice will be read with particular interest. Those on the nature of legal disputes bear re-reading in the light of the Australian arguments in the recently decided *Case Concerning East Timor*. Equally, the discussion of advisory opinions illuminates the debate about the recent World Health Organization request on the legality of nuclear weapons. She concludes by noting that the ICJ has an "authoritativeness which commands respect" (p 204). However, the Court is hardly immune from criticism. Indeed open season was declared on the institution after the *Nicaragua* judgment (the Court's stock fell with American academics but since *Nicaragua* it has been busier than ever before). Higgins, too, has criticisms to make, though these are often directed at those commentators who rely too heavily on ICJ judgments, rather than at her future colleagues. Thus, she remarks that the *Corfu Channel* decision has been unwisely "pored over in another exercise 'to find the law' in unclear pronouncements by the International Court of Justice" (p 160).

However, predictably, her discussion of the use of force includes some more direct if mild rebukes of the Court's reasoning in the *Nicaragua* case which she describes as "puzzling". She begins her analysis of use of force law with a discussion of anticipatory self-defence. Both law and policy support the existence of such a right according to Higgins. Custom predating the Charter allowed a right to pre-emptive self-defence and in the nuclear age its lawfulness is "the only realistic interpretation of the contemporary right of self-defence" (p 243). Meanwhile, there are some useful clarifications of the distinction between retaliation, reprisal and self-defence (p 244), while humanitarian intervention, too, receives support, since the liberal interpretation of Article 2(4) is the one that best serves community values.

The *Nicaragua* decision is criticised for its failure to properly condemn the indirect use of force by one State against another as an armed attack, thus giving

rise to a right to self-defence. Higgins approves of Stephen Schwebel's dissent and quotes from him directly when he states (p 251):

> The Court appears to offer—quite gratuitously—a prescription for overthrow of weaker governments by predatory governments while denying potential victims what in some cases may be their only hope of survival.

Community values demand that the definition of "armed attack" include such indirect assaults on other States.

There are problems with Higgins' analysis here. First, she does not explain why community values are inevitably better served by humanitarian intervention than they are by indirect use of force. Surely, given her concern for context and policy the legality of either type of action will be a matter of interpretation by "authoritative decision-makers". Secondly, she criticises the *Nicaragua* Court for refusing to characterise indirect use of force as "armed attack" but in the conclusion to the chapter she simply notes that "such force is prohibited by the relevant legal instruments, and the common good is best served by terming the indirect use of force unlawful, regardless of the objectives in the particular case" (p 253). The Court did not deny this latter claim nor did it suggest, *contra* Schwebel, that the State was unable to use force to resist indirect attacks. The Court did, however, say that this resistance was not self-defence in the Article 51 sense (that is, giving rise to collective self-defence). It is absurd to suppose, as Schwebel does, that the Court in *Nicaragua* denied El Salvador the right to take counter-measures in response to the Nicaraguan intervention.[5] To put the *Nicaragua* reasoning in another context, the Court was simply making the point that while the Angolan Government (in the 1980s) could use force to resist the indirect attacks on it sponsored by South Africa and the United States, this use of force was not self-defence to an armed attack. To characterise this action as self-defence would be to permit the Soviet Union to attack the United Sates in an act of collective self-defence on behalf of Angola, so that, to quote Schwebel, if action in collective self-defence by the Soviet Union on behalf of Angola against the United States was Angola's "only hope of survival" it would nevertheless be impermissible. Higgins (and Schwebel) seem to miss the very good policy grounds on which the Court based its decision.

The theoretical dilemmas raised in the introduction and in the human rights chapter are perhaps not the book's strongest suit. It is surprising, given Higgins' position on the Human Rights Committee, that the section on human rights is not more convincing. She begins by revisiting two somewhat overworked questions: where do human rights come from and are they qualified by cultural conditions? Higgins provides a contradictory answer to the first question, at once both humanistic and legalistic. In true New Haven style, human rights are said to be "rights held simply by virtue of being a human person" (p 96). Two

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5 See *Military and Paramilitary Activities in and against Nicaragua case: Merits Judgment,* ICJ Rep 1986, p 14 at para 249:

> The acts of which Nicaragua is accused, even assuming them to have been imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador.

sentences later Higgins states that "international human rights law is the source of the obligation [to respect human rights]". Can both these statements be true?

The discussion of rights as a universal concept begins inauspiciously with a remark that cultural relativism is "in my view...a point advanced mostly by states, and by liberal scholars anxious not to impose the Western view of things on others" (p 96) before going on to make the argument for universality. There is no real support adduced for this contention and a significant body of reflective and sophisticated scholarship is devalued by the statement. Yes, States do sometimes use cultural relativism to avoid human rights obligations, for example, Indonesia (sedition and free speech), the United States (the death penalty), the United Kingdom (contempt laws and free speech) but this does not mean that the painful and very real controversies over religious freedom, fair trial and a host of cultural practices does not exist among "the oppressed". It is facile to suggest that "individuals everywhere want the same essential things" (p 97). The content of the right "to speak freely" is almost entirely dependent on the existing institutions and cultural make-up of a country. The freedom to abstain from religious beliefs comes into direct conflict with certain collective rights, for example, to self-determination. It is one thing to say that everyone wants these rights, it is quite another to inject them with substantive content in the absence of any concern for existing cultural conditions.

Higgins' discussion of economic and social rights is more impressive. She is aware that the difference between these rights and civil rights cannot be explained on the basis of a distinction between government intervention and government forbearance. She is also aware of some of the real difficulties in articulating precise rights to health and food. While it is true that "many states are simply not in a position to deliver the right at the present time", it is surely the case that the community of States is in the position to implement a right to freedom from hunger. Perhaps Higgins is too ready to ascribe the failure of economic and social rights to a cultural relativism (decried elsewhere) whereby "different views are taken about the economic role of government and the place of the market" (p 103).

Higgins' philosophy of international law informs the whole text but is laid out most explicitly in the first two chapters on the nature and sources of international law. Higgins is probably the leading British exponent of the New Haven school of international law. This school is characterised by its anti-formalism, its concern with process rather than rules and its universalism seen in a commitment to an underlying ideal of human dignity. Higgins embraces these characteristics quite openly though her universal *grundnorm* is perhaps not human dignity but instead dispute resolution and avoidance. This makes her rather more conservative than the majority of New Haven scholars.[6] Indeed Higgins exhibits a concern for legality and exactitude which is at odds with the more teleological scholarship of the Yale School.

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6 Compare her work to that of, say, Burns Weston or Richard Falk. See eg Falk R, *Revitalizing International Law* (1989).

"International Law is not rules" (p 1). This stark opening gambit prefigures a critique of the classical formalist tradition in international law. This is quite effective but in the current intellectual climate it smacks of kicking an idea while it is down. It is perhaps a tribute to the New Haven critique that many of its assumptions now seem like verities. Few now dispute that international law adjudication is about "choice" or that this choice involves the "consideration of humanitarian, moral and social purposes of the law" or that there is an "essential relationship between law and politics" (p 5). It is really the meaning of these ideas that is currently contested in international law scholarship. What Higgins contends are the essentials of international law are merely the *premises* of an ongoing debate between the new liberals, the new stream and feminist scholars. Higgins is preaching to the converted. Most of her claims would be undisputed by the most radical of new stream scholars.

More interesting, then, are her comments on the critical legal studies (CLS) school represented here by the Finnish scholar, Martti Koskenniemi in his key text, *From Apology to Utopia: The Structure of International Legal Argument*. After listing the similarities between the New Haven (or policy science) approach and the critical "realist" approach (they share a taste for law in context, law as social theory, law as values), Higgins suggests that the major difference between the two schools is that where the CLS brigades see law as contradiction and indeterminacy, her own policy science approach believes legal norms to be complementary and competing. Rule conflict can be resolved simply through choice. So far, so good. Higgins argument is essentially that Koskenniemi's theory posits a false choice between positivism (the technical and unproblematic application of rules) and politics (law descending into mere politics and therefore lacking legitimacy) without considering the possibility of choices being made between rules by authorised decision-makers on the basis of "community values". This misunderstands Koskenniemi whose argument about contradiction and indeterminacy extends to and includes the community values themselves. Community values cannot therefore be used to resolve these contradictions inherent in rules or processes. Indeterminacy and contradiction infect the whole system. Equally, to rely on authorised decision-makers is to beg the question of the origination of authority posed by the CLS critique.

Higgins also criticises Koskenniemi for failing to recognise that law is the interaction of authority and power. Koskenniemi, according to Higgins, is guilty of presenting international law as a crude and unresolvable dialectic between apology (power without normativity) and utopia (law without power). Thus, Koskenniemi's is, "The initial faulty perspective of law as the vindication of authority over power". Sometimes, however, law must be the vindication of authority over power, even if it need not always be. It is unclear whether this can ever be the case in the present legal system for all the talk of reciprocity and community interests. In Higgins' policy science universe there is a suspiciously convenient coincidence of authority and power (exercised by those ubiquitous "authorized decision-makers" (p 15)). This works well enough where the nature of a legal obligation is certain—law and authority are indeed symbiotic in the area of civil aviation. However, as Koskenniemi has pointed out, where laws are

ambiguous or indeterminate then constraint through the choices of decision-makers becomes either arbitrary or politicised at best and non-existent at worst. Still, it is not fatal to Higgins' text that its theory is unconvincing. Few international law books escape this criticism and many do not even bother to address it. The elegant and informed appraisals of a broad array of international legal rules and processes amply compensate for any theoretical shortcomings.

Ultimately, Rosalyn Higgins has written an ideal primer for international law scholars eager and willing to (re)acquaint themselves with the central dilemmas of the discipline. I found this book intellectually engaging. It should be compulsory reading for those of us about to teach international law for another semester. As I read this book, I was struck most by the sheer authoritativeness of the author's voice. Higgins has the single-mindedness of someone building a road through a jungle. Judging by the quality of this book Professor/Judge Higgins has much to be authoritative about.

Gerry J Simpson
LAW SCHOOL
UNIVERSITY OF MELBOURNE

Self-Determination of Peoples: A Legal Reappraisal

By Antonio Cassese
(Cambridge University Press, Grotius Publication, Cambridge, 1995, 365 pp)

Once described as the "shibboleth that all must endorse in order to identify themselves with the virtuous"[1] the right of self-determination is currently in moral crisis. Gone are the heady days of the 1960s when the fledgling right of self-determination provided the legal ammunition in the highly laudable fight against colonialism. The period since decolonisation has been characterised by the quest for a legal definition and content which avoid the excesses of separatist agitation. The revival of ethno-nationalism under the banner of self-determination in its contemporary guise of ethnic cleansing underlines both the failure and the urgency of this project.

It is against this background of normative confusion and political manipulation that despite (or perhaps because of) the huge amount of existing literature on the subject, Cassese's legal reappraisal of the right of self-determination of peoples is to be welcomed as a timely contribution to the *Hersch Lauterpacht Memorial Lecture Series in International Law.* Cassese promises a comprehensive account. Adopting what he terms a "contextual approach" in which "history, politics and jurisprudence are all employed in the service of legal elucidation" he revisits and updates the various sites of self-determination discourse: historical and recent developments; external and internal aspects; treaty and custom; the relationship of self-determination to other, more traditional, principles of international law; and the recent "soft law"

1 Van Dyke P, *Human Rights, the United Nations and World Community* (1970).

attempts to transform the right of self-determination from anti-colonial imperative to democratic entitlement.

But for the thesis of this work, the reader must turn to the final chapter "Recapitulation and Conclusion" (pp 315–65 esp 341ff). Here, the various threads of the extensive preceding discussion are integrated and critically reviewed. The flaws of the present system of self-determination—both alleged and real—are exposed and assessed. The chapter concludes with a "plea for a four-pronged strategy" for revitalising the law of self-determination "so as to come to grips with some crucial problems besetting various areas of the world" (p 344). Unsurprisingly, given the ailing condition of the law of self-determination, the strategy involves proposals *lex lata* and *lex ferenda:* putting into effect the existing law with regard to the outstanding questions of self-determination (pp 344–46); promoting the crystallisation of rules which Cassese regards as *in statu nascendi* on the internal self-determination of the whole population of sovereign States (pp 346–48); developing new rules for the internal self-determination of ethnic groups and minorities (pp 348–59); allowing for the exceptional granting of external self-determination to ethnic groups and minorities subject to international consent and scrutiny (pp 359–63).

This blueprint for future action was not born of glorious academic isolation. On the contrary, it is the product of a systematic attempt to "explore the role that self-determination...actually plays in practice" (p 205). Relying on an impressive range of primary sources, such as digests of State practice and debates in international organisations, he sets out to establish whether self-determination has any real bearing on the outcome of what he terms "exceedingly complex cases" (p 209). Ironically, given the current trends in self-determination discourse—the emerging right to democratic governance; post-modern tribalism (both Thomas Franck); the advent of the much heralded global civil society (Richard Falk); or the feminist national liberation dilemma (Christine Chinkin)—these turn out to be very same "exceedingly complex" cases which have preoccupied self-determination enthusiasts since the 1960s: the Western Sahara; the Falklands/Malvinas; Gibraltar; East Timor; Eritrea; Quebec and—perhaps the oldest and hardest chestnut of all—Palestine (see Chapter 9: "Testing International Law—Some Particularly Controversial Issues").

It is unsurprising then, that the first prong of Cassese's strategy is to resolve these outstanding questions of external self-determination by putting into effect the existing law. In what amounts to an appeal to enlightened self-interest, he calls on States to engage in serious negotiations based on the fundamental principle that the free and genuine expression of the populations concerned "should always constitute the touchstone of any issue of self-determination" (p 345). While acknowledging that certain cases—East Timor, the Falklands/Malvinas, Gibraltar—"stand out as particularly intractable", he sees solutions to the questions of Western Sahara and Palestine as eventually "likely" (p 344).

According to Cassese, the existing law on external self-determination applies to only two classes of beneficiaries. He argues that by referring to both

colonialism and "the subjection of peoples to alien subjugation, domination and exploitation" as situations giving rise to the right of self-determination, the 1970 Declaration on Friendly Relations makes it clear that "alien subjugation, domination or exploitation" may exist outside the colonial system (p 90). However, in contrast to throngs of Declaration of Principles watchers before him, Cassese fails to detect the genesis of a right—or remedy—of secession for peoples trapped inside the borders of inhospitable States.[2] Indeed, curiously, discussion of the possibility of secession is postponed to a later chapter on internal self-determination. Instead, he argues that States have agreed to limit the concept of foreign domination in the Declaration of Principles to situations of "intervention by use of force and military occupation" (p 93). By way of authority, he cites State and United Nations practice in response to situations in Kampuchea, the Israeli-occupied territories, the Baltics, East Timor and Afghanistan. The term "alien subjugation and exploitation" in the Declaration on Friendly Relations thus covers those situations in which any one Power dominates the people of a foreign territory by recourse to force. Or to put it another way: "The right to external self-determination is thus, in a sense, the counterpart of the prohibition on the use of force in international relations. In many cases the breach of external self-determination is simply an unlawful use of force looked at from the perspective of the victimized *people* rather than from that of the besieged sovereign State or territory" (p 99).

Leaving aside for the moment the thorny question of secession, Cassese's argument that self-determination in the post-colonial context amounts to little more than the right of occupied peoples to be free of their occupiers is limiting. First, where the occupation is of a sovereign State, the role of self-determination of peoples is at best secondary. The governing legal principles in situations of invasion or intervention are those geared to the preservation of State—rather than people's—sovereignty. For example, despite much beating of the self-determination drum during the 1990/1991 Gulf conflict, those who orchestrated Kuwait's "liberation" failed to secure even the most basic democratic rights for its people, far less popular consultation on the external status of the territory. The human rights rhetoric of self-determination of peoples in occupied States is meaningful only to the extent that it is assumed to coincide with State sovereignty.

Secondly, where the occupation is of a non-State entity such as the West Bank and the Gaza Strip[3] or East Timor[4] it simply cannot be true that the legal basis of the right of self-determination flows from the fact of being occupied as Cassese claims. The very notion of "foreign" occupation logically presupposes

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2 See eg White R, "Self-determination: Time for a Reassessment" (1981) 28 *Netherlands International Law Review* 147.

3 Cassese argues (p 206) that "the legal basis for a Palestinian right to self-determination may only be foreign military occupation".

4 Cassese argues (p 206) that an important feature of East Timor is the "denial of self-determination at the time of decolonisation by virtue of the occupation of the territory by Indonesian troops". Thus: "We are therefore here confronted with a case in which the claim to self-determination is based on principles other than those applicable to rights of colonial peoples".

the existence of a separate territorial status or sovereign rights on the part of the occupied people: thus the occupation cannot of itself be the source of those rights or separate status. Cassese's argument is somewhat circular.

The point is amply demonstrated if we compare the situation of the West Bank and Gaza with that of the occupied Golan Heights or the Sinai Desert. There is no recognition of the right of the indigenous inhabitants of the Golan Heights (many of whom have served in the Israeli army) to determine the external political status of their territory despite the existence of a *de jure* state of occupation since 1967. On the contrary, the view of the international community is that the Golan Heights is an integral part of the State of Syria and should be returned forthwith. By contrast, even before King Hussein renounced his claims to sovereignty over the West Bank,[5] the right of the Palestinians (and not the population of Jordan) had been unequivocally recognised by the international community. While clearly, the claim of Jordan to the West Bank is distinguishable from that of Syria *vis-a-vis* the Golan Heights, the point remains that occupation *per se* does not automatically give rise to a right of self-determination on the part of the inhabitants of the occupied territory.

The alternative and more satisfactory basis for Palestinian rights lies in the pre–1967 attempts of the international community to assimilate the *sui generis* situation of the Palestinian and South African peoples (which did not fit the paradigm test of "salt water colonialism" expounded by the General Assembly) to that of colonial peoples. This is borne out by the reference to both peoples in the debates on the 1960 Declaration (that is seven years before the occupation of the West Bank and Gaza) and their subsequent inclusion in United Nations General Assembly resolutions on decolonisation.[6]

Ascertaining the proper legal basis for Palestinian self-determination is no academic exercise. For Cassese, it is a distinction with a practical difference. He argues that when it comes to implementing the right of self-determination of occupied peoples there is a gap in the existing law. Although the Declaration on Friendly Relations specifies various modes of exercising self-determination—the establishment of a sovereign State, the free association or integration with an independent State or the emergence into any other political status freely determined by the people—these, we learn, apply "mainly" to colonial rather than occupied peoples. According to Cassese, there exists no express international legal regulation of the self-determination choices offered to peoples under alien military occupation (pp 147–50 esp 150).

This view that there exists separate and yet-to-be-determined rules for implementing the right of self-determination of occupied peoples is highly significant. In effect, it leads Cassese to depart from his earlier injunction that

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5 See *Jordanian Statement Concerning Disengagement from the West Bank and Palestinian Self-Determination July 31 1988* (1988) 27 ILM 1637.

6 The Palestinians were expressly included in a resolution on decolonisation for the first time in GA Res 2728 (XXVI) 6 December 1971. See Wilson H, *International Law and the Use of Force by National Liberation Movements* (1988), p 73. See further, Pellet A, "The Destruction of Troy Will Not Take Place" in Playfair E, *International Law and the Administration of Occupied Territories* (1992), p 184

"free and genuine expression of the will of the populations concerned" should always be "the touchstone" of issues of self-determination. Thus although he acknowledges that the proper way to exercise self-determination in the West Bank and the Gaza Strip, *should* consist in the holding of a referendum or a plebiscite (p 241), he dismisses this as unworkable "given the host of non-legal problems which beset Arab–Israeli relations" (p 242). Instead, he goes on to endorse the historic September 1993 Israel–PLO Declaration of Principles on Interim Self-Government—which manifestly fails to provide for a free referendum or plebiscite—as nevertheless "clearly agreed upon in the perspective of self-determination" (p 243).

Cassese's claim that the Middle East peace process is a likely success story for the right of self-determination merits further scrutiny. Palestinian self-determination in the Declaration of Principles is conspicuous only by its absence. Although reference is made to the "legitimate" and "political" rights of the Palestinian people[7] and Article III provides for the holding of internal democratic elections in the territories, the Declaration of Principles stops short of expressly endorsing the international legal right of self-determination. Instead, Article 1 provides that negotiations on the final status of the West Bank and Gaza Strip are to lead to implementation—not of the numerous resolutions on Palestinian self-determination—but rather of Security Council resolutions 242 and 338.[8] Both are notorious for their failure to deal with Palestinian national rights.[9]

Cassese, however, argues that the Declaration of Principles does provide for Palestinian self-determination—albeit it "in an oblique and roundabout way" (p 244). He states that (p 245):

> the process of exercising external self-determination will constitute the natural outcome both of internal Palestinian self-determination, and of negotiations with the other Party concerned. Everything is left to the agreement of these two Parties.

In effect then, he equates Palestinian participation in the final status negotiations with the exercise of the right of self-determination under international law. But are the two truly synonymous? Can it be said that an Agreement concluded after hard bargaining between an Occupying Power and the elected representatives of a people subjected to nearly thirty years of occupation is likely to reflect the "free and genuine will of the population concerned"? Cassese's analysis is excessively formalistic.

This is particularly evident in his treatment of the Israeli settlements. For example, he points out (rightly) that the Declaration of Principles does not spell out the final options for a solution or whether there is to be a referendum or

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7 See Preamble and Article III(3) of the Declaration of Principles.

8 It will be recalled that the operative part of Security Council resolution 242 calls for "withdrawal of Israeli forces from territories occupied in the recent conflict" and refers to the "right of all countries to live in peace and security".

9 The resolution does not refer to the Palestinians except indirectly as refugees. Clause 2(b) refers only to the necessity of achieving "a just settlement of the refugee problem".

plebiscite. As one of a number of possible options he suggests independent Palestinian statehood subject to Israeli jurisdiction over Israeli settlements (p 245). But would not the continued presence of Israeli settlements—with the attendant consequences for territory, natural resources and the right of return of Palestinian displacees—strike at the very heart of Palestinian self-determination? The bantustanisation of a self-determination unit has been unequivocally condemned as a flagrant violation of self-determination in the context of South Africa. On what principled basis (other than that of the free and genuine consent of the Palestinian people) can it be argued that a political outcome which sanctions the bantustanisation of the Palestinian territories is in keeping with the minimum requirements of the right of external self-determination under international law?[10]

In short, Cassese's optimism is premature. While a solution of sorts may indeed be "in the offing" in the Middle East, it remains to be seen whether this will amount to an exercise of Palestinian self-determination. By conflating law with politics, Cassese's "let the parties decide" approach ignores the possibility that the negotiated political solution may fall short of realising Palestinian rights under international law.

A final question relating to external self-determination posed by Cassese is the extent to which the existing international legal norms have contributed to the fuelling of the new nationalisms or "tribalism" (p 339). He assesses whether the law of self-determination in its present form is capable of responding to the secessionist agitations of minority groups. On the one hand, he berates the UN for its hitherto "scant interest" in minority or ethnic groups suffering systematic human rights deprivation at the hands of authoritarian regimes (p 341). On the other hand, he recognises the need for international legal norms to provide constructive solutions that "reconcile full respect for group rights with a modicum of peace and stability and the maintenance of the present system of multinational States" (p 343).

At the root of Cassese's disaffection with the present arrangements is the minority/people dichotomy—a veritable rubicon in human rights/self-determination discourse. He points out that under the present law of self-determination any possible connection between these two groups has been "adamantly rejected as a dangerous muddling of two topics belonging to two different worlds" (p 348). This reluctance to grant minorities a right of self-determination, he argues, is directly attributable to its statist orientation and the fear that by invoking self-determination, minorities might claim a right of secession (p 349).

Cassese's response is to collapse the minority/people distinction altogether. He calls for a reconceptualisation of the right to self-determination which

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10 For more detailed analyses of the relationship between settlements and Palestinian self-determination see Drew C, "Self-Determination, Population Transfer and the Middle East Peace Accords: Synthesis or Confusion?" and Scobbie I, "Natural resources and belligerent occupation: mutation through permanent sovereignty" both in Bowen S (ed), *Protection Mechanisms and Political Change* (forthcoming).

transcends the current statist model and emphasises its internal dimension. Accordingly, he argues for an expansion of the scope of the right to include "ethnic groups or minorities" coupled with a broadening of the concept of self-determination itself to include alternatives to secession such as participatory rights, positive action and autonomy (pp 350–52).

But Cassese does not rule out secession altogether. Instead, he revisits the dictum of the *Aaland Island* case and argues for international law "to revitalise" the link between minority human rights protection and the right to self-determination "subject to a set of conditions designed to avoid dangerous repercussions for the international community" (p 360). He goes on to propose multilateral action in favour of secession under exceptional circumstances where internal self-determination of the minority group has proved unworkable either due to the outbreak of separatist conflict or the irredeemably oppressive nature of the governmental authorities.

Cassese thus appears to endorse a limited form of what Buchheit terms remedial secession:[11] a measure of last resort to be employed in response to gross or systematic human rights abuse of trapped ethnic groups. That he does so without recourse to the territorial integrity provision of the principle on self-determination in the Declaration on Friendly Relations is curious. This is widely relied upon by the secessionist lobby as providing the only existing legal basis for arguing that territorial integrity of States is no longer an absolute but rather is conditional on good human rights behaviour. Nor is it clear how Cassese's proposed remedy is to operate in practice. For example, he provides no clear criteria for determining the threshold for secession. Moreover, his assertion that in cases other than civil war, any multilateral intervention should consist of little more than attempts to promote "diplomatic" or "political" solutions is problematic on two counts. First, it puts a premium on separatist violence. Second, it means that, for many severely oppressed peoples, Cassese's secession option will remain "a remedy" without a remedy—a classic case for self-help. As such, Cassese leaves the international law on secession very much as he finds it.

The book closes with a vision of a global utopia where "States would increasingly become polities belonging to their citizens defined in 'civic' terms rather in 'ethno-national' terms" (p 365). To this end, Cassese calls on a new generation of younger scholars to rethink "the most fundamental, seemingly axiomatic" premises of the law of self-determination (p 365). This throwing down the gauntlet to the younger generation, although laudable, highlights a significant omission in Cassese's present work. Contemporary feminist literature has radically challenged the universalist pretensions of the various self-determination discourses.[12] That Cassese fails to discuss, dismiss, consider,

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11 Buchheit LC, *The Legitimacy of Secession* (1978).

12 See eg Jaywardena K, *Feminism and Nationalism in the Third World* (1986); Enloe C, *Bananas, Beaches and Bases, Making Feminist Sense of International Politics* (1989); Chinkin C, "A Gendered Perspective to the International Use of Force" (1992) 12 *Aust YBIL* 279; Otto D, "Challenging the New World Order: International Law, Global Democracy and the Possibilities for Women" (1993) 3 *Transnational Law and Contemporary Problems* 371. See further Chinkin C, "Self-Determination for Women: Potential and Pitfall" in Bowen, n 10 above.

critique—or even footnote—this body of scholarship is both mystifying and disappointing.

To end on an ethno-cultural—and inherently gendered—note: in the United Kingdom it is said that you can always pick out the Scots by the way they read their newspapers backwards (that is, the sports pages first). It is the Scottish (male) approach which is recommended to any international law student about to embark upon this thought-provoking work.

Catriona Drew
SCHOOL OF LAW
UNIVERSITY OF GLASGOW

Human Rights of Women: National and International Perspectives

Edited by Rebecca J Cook
(University of Pennsylvania Press, Philadelphia, 1994, xiv and 634 pp)

One of the first things that strikes me about work on "women" and "human rights" is the struggle to juxtapose the two concepts in a way that achieves a satisfactory representation of their problematic interrelationship. Projects concerned with "women and human rights" and "women's human rights" suggest a strategy that involves adding women's rights to the established corpus, from which they have been previously excluded. This leaves me with the uncomfortable feeling that, while the interrelationship of exclusion has been exposed, it has not been resisted. Rebecca Cook's title takes a more militant stand by asserting that human rights are possessed by women. This approach forms one of the unifying threads in the wide-ranging viewpoints that Cook has drawn together.

The problem of the exclusionary effects of the dominant human rights discourse is much deeper than semantics and requires much more than counter-assertions to address it. For example, in drafting the Platform for Action to be adopted by the 1995 World Conference on Women in Beijing, attempts have been made to limit the access of women to universal human rights by using the word "universal" as a modifier. Instead of reaffirming language that was used in the 1993 Vienna Declaration on Human Rights which certified that "all human rights are universal, indivisible, interdependent and interrelated",[1] the language in many parts of the draft document proposes that women's entitlements be limited to those "universally recognised" or "universally agreed" by all States.[2] Clearly, the idea that human rights include the rights of women remains hotly contested, and "Human Rights of Women: National and International Perspectives" makes an important and timely contribution to the struggle.

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1 UN Doc A/Conf. 157/24, 25 June 1993; ILM 1661 (1993) paras 1, 5 and 18.

2 United Nations, Draft of the Platform for Action—Following Consideration by the Commission on the Status of Women at its 39th Session—Advance Unedited Version, 17 April 1995, E/CN.6/1995/2/WG/Revs paras 2, 4, 8, 9, 11, 12, 14, 33, 113, 125(e), 132, 134, 149(o), I, 213, 216, 222, 223 and 326.

The authors included in Cook's anthology took part in a Consultation on Women's International Human Rights held in 1992 at the Faculty of Law, University of Toronto, Canada. Their writings traverse a diversity of cultural perspectives, covering South Asian, African, Latin American and Western experience, and are informed by a wide range of human rights activism. Besides several prominent academics, contributors include Radhika Coomaraswamy, the United Nations Special Rapporteur on Violence Against Women; Abdullahi Ahmed An-Na'im, Executive Director of Human Rights Watch/Africa Watch, and Florence Butegwa, Chief Executive of the pan-African network of women's rights groups, Women in Law and Development in Africa. Among the Western contributors is Australian feminist Hilary Charlesworth whose opening remarks provided the framework for the Consultation and help to structure Cook's collection.[3]

The anthology makes a real attempt to address the practical problems facing human rights advocates, with contributors repeatedly recognising that there is a huge difference between the formal existence of a legal right and its realisation in practice. To this end, the importance of connecting human rights discourse with the everyday lived experience of women in diverse cultural and socio-economic settings is seen as paramount. Coomaraswamy uses the case of Roop Kanwar, an 18-year-old university student who was burned alive on her husband's funeral pyre in Rajasthan, India, in 1987, to illustrate how the legal achievement of national legislation, in this case banning *sati* (widow-burning), can actually be counter-productive if it does not resonate with the ideological underpinning of women's realities. She writes:

> Though the feminist movement has scored a legal victory, the case exemplified the terrible gulf between human rights and women's rights activists, on the one hand, and those who see the status of women as an integral part of their ethnic identity, on the other.[4]

Thus the promotion of human rights by women's movements and groups in civil society is consistently identified as being at least as important as measures adopted by States.

In addition, many contributors reiterate that the primary focus for human rights activism must be at the national level, with the international system operating as a necessary, but not sufficient, "strategic resource".[5] To underline this point, one section of the book is devoted to national case studies. The section is introduced by Anne Bayefsky who provides an overview of the relationship between national and international legal systems highlighting the "hypocrisy" of States' expressions of commitment to human rights standards in the absence of implementation or enforcement mechanisms.[6] This view is

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3 Charlesworth H, "What are 'Women's International Human Rights'?", p 58.

4 Coomaraswamy R, "To Bellow like a Cow: Women, Ethnicity, and the Discourse of Rights", p 49.

5 Byrnes A, "Toward More Effective Enforcement of Women's Human Rights Through the Use of International Human Rights Law and Procedures", p 191.

6 Bayefsky A, "General Approaches to the Domestic Application of Women's International Human Rights Law", p 351.

confirmed by the other articles in the section which analyse obstacles to the realisation of women's rights in India, the Sudan, Ghana and Canada.[7] They indicate that, even in the presence of constitutional guarantees of equality, States at best pay lip service, and at worst are openly hostile, to the realisation of the human rights of women.

In keeping with its practical emphasis, the book contains a great deal of resource material for human rights advocates including a chart listing the ratifications of 13 key international and regional human rights instruments, a model Communication Form for the submission of complaints of human rights violations to international bodies and a list of international and regional government and non-governmental organisations (NGOs) associated with the human rights of women. Further, all contributors base their perspectives on the actual experience of women in specific cultural or economic contexts, in an effort to avoid unitary and essentialised constructions of women. As a result, the book is abounding in case studies and reports of women's human rights struggles from around the world.

The central inquiry, which all twenty-three contributors address in some way, is the question of the potential of human rights discourse to contribute to the emancipation of women. Overall, the responses are guardedly optimistic about this potential. Although a large number of barriers are identified, which currently operate to exclude women as subjects of international human rights law, confidence is expressed that these limitations can, to some extent at least, be overcome, circumvented or transformed.

Reference to a number of core gendered barriers recurs throughout the collection, despite the diversity of the experience of its contributors. The most important re-emerging themes are associated with obstacles inherent in the content or form of human rights law. The barriers canvassed include the tension between promoting universal standards while also acknowledging and respecting diversity,[8] the gendered effects of liberalism's distinction between "public" and "private" injuries,[9] the restrictiveness of the traditional legal

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7 Singh K, "Obstacles to Women's Rights in India", p 375; Halim AMA, "Challenges to the Application of Women's Human Rights in the Sudan", p 397; Kuenyehia A, "The Impact of Structural Adjustment Programs on Women's International Human Rights: The Example of Ghana", p 422; Mahoney K, "Canadian Approaches to Equality Rights and Gender Equity in the Courts", p 437.

8 See An-Na'im AA, "State Responsibility Under International Human Rights Law to Change Religious and Customary Laws", p 167; Beyani C, "Toward a More Effective Guarantee of the Enjoyment of Human Rights by Women in the Inter-American System", p 285.

9 See, for example, Romany C, "State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law", p 85. The problem of the public/private distinction is also raised by contributors from South Asia and Africa: see Coomaraswamy, n 4 above, pp 48, 55–56; Halim, n 7 above, p 408; Hossain S, "Equality in the Home: Women's Rights and Personal Laws in South Asia", p 473.

doctrine of State responsibility[10] and the ineffectiveness of the human rights regime associated with social, economic and cultural rights.

This last area is often overlooked in discussion of the human rights of women and it is pleasing to see it given prominence here. In particular, the African contributors pick up on this theme emphasising that human rights struggles have mostly been waged by relatively privileged women which has resulted in the neglect of social, economic and cultural rights.[11] They draw attention to the grossly disproportionate effects of UN-supported development and adjustment programs on women, whose workload has increased while their poverty has deepened. In this context, as Akua Kuenyehia points out, "it is questionable whether the whole discourse on rights and international human rights is at all relevant to African women".[12] It is critical, these writers argue, that the dominance of Western liberal thought in human rights discourse is recognised, challenged and overcome by ensuring broader participation in the formulation of standards and their application.

Cook's contributors suggest a range of strategies to tackle the barriers they identify. No single approach forecloses the importance of others. In fact, there seems to be implicit agreement that the range of possibilities needs to be expanded. Some strategies are concerned with transforming the form of human rights discourse, some suggest the need for recognition of new human rights standards, while others focus on utilising and improving the existing mechanisms of enforcement.

The contributors promoting change in the form of international human rights law point to the masculinist bias of a familiar array of human rights standards and argue for change which will result in the inclusion of the experience of women. Rhonda Copelon's discussion of the applicability of the Convention Against Torture to domestic violence is an excellent example of this approach.[13] The gendered effects of the Convention on the Elimination of Discrimination Against Women (CEDAW) are also critiqued. Maria Isabel Plata, for instance, makes a plea for the CEDAW Committee to spell out women's health and family planning rights more specifically to ensure that reproductive and sexual health strategies are pursued in order to empower women and "not as a means to limit population growth, save the environment, and speed economic development".[14]

Others propose the recognition of new human rights standards which are of particular significance to women. Readers are no doubt familiar with efforts to

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10 See, for example, Cook RJ, "State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women", p 228.

11 Ilumoko AO, "African Women's Economic, Social and Cultural Rights—Toward a Relevant Theory and Practice", p 307; Butegwa F, "Using the African Charter on Human and Peoples' Rights to Secure Women's Access to Land in Africa", p 495; Kuenyehia, n 7 above.

12 Kuenyehia, n 7 above, pp 422–23.

13 Copelon R, "Intimate Terror: Understanding Domestic Violence as Torture", p 116.

14 Plata MI, "Reproductive Rights as Human Rights: The Columbian Case", p 515.

have violence against women treated as a violation of fundamental human rights, which resulted in the adoption of the Declaration Against Violence Against Women by the General Assembly in 1993.[15] Joan Fitzpatrick makes a strong argument for the adoption of further "special treatment" approaches in response to the myriad of existing international norms which remain intransigently impervious to gendered violence, despite the Herculean efforts of many human rights activists to challenge this effect.[16]

A welcome emphasis in the anthology is its focus on the way in which the well-being of families is deferred to by human rights instruments, usually to the disadvantage of women. Often, discriminatory personal and religious laws are justified by reference to family values, thereby creating formidable obstacles to achievement of women's rights. This discursive manoeuvre has been repeated in the leadup to the Beijing Women's Conference through the enormous efforts of the Vatican, in particular, to ensure that the tenuous access of women to reproductive rights is further eroded by giving precedence to "family rights".

As an alternative to seeking to extend the formal protection of the human rights of women, several contributors argue that the best way to make progress is for women to utilise the extensive opportunities, already available under existing human rights regimes, more consistently and effectively. Andrew Byrnes devotes his chapter to outlining strategies for increased use of international mechanisms by women[17] and Cecilia Medina describes what women could do within the regional Inter-American system.[18]

Calls to increase the utilisation of existing complaints mechanisms lead directly to the strategy which is most consistently affirmed in this collection: to expand the expertise and activism of women's NGOs and, more broadly, to enhance the role of international civil society.[19] This is, perhaps, an obvious strategy to emerge from the anthology's emphasis on activism, but one that is too easily forgotten by many international lawyers whose vision is constrained by their uncritical acceptance of the State-centrism of the dominant paradigm.

Thus local human rights activism, within States, is identified as a critical foundation for the building of universal respect for human rights. An-Na'im, while acknowledging the importance of a global context of "cross-cultural dialogue" to such "internal discourse" and contestation of human rights norms, insists that the universal must be in a relationship of genuine reciprocity with the local so as not to undermine it.[20] He argues that human rights advocates need to understand and build local constituencies. Medina, making a related point, urges "careful consideration of the context surrounding women, before deciding on

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15 UN Doc E/CN.6/WG.2/1992/L.3.

16 Fitzpatrick J, "The Use of International Human Rights Norms to Combat Violence Against Women", p 532.

17 Byrnes, n 5 above, p 189.

18 Medina C, "Toward a More Effective Guarantee of the Enjoyment of Human Rights by Women in the Inter-American System", p 257.

19 Roth K, "Domestic Violence as a Human Rights Issue", p 326; Rishmawi M, "Approaches of the ICJ to Women's Human Rights", p 340.

20 An-Na'im, n 8 above, pp 173–74.

any action" mentioning the class differences and "machismo" as particularly significant in Latin-American cultures.[21] Further, Knopp argues that working through non-State entities enables women to directly represent their interests internationally and thereby avoid the mediating and silencing effects of representation through States.[22]

Cook does not claim that the Toronto Consultation canvassed all of the issues associated with the human rights of women. Sonia Picado Sotela, a judge of the Inter-American Court of Human Rights, who wrote the foreword to the book, notes some areas that, for her, were not covered: the human rights issues associated with refugee women and women and work, and the operation of the European human rights systems. To these exclusions I would add the issues of sexuality and class. I would also note the absence of post-structural analyses which may offer additional insights to the regimes of power that currently dominate, and how they might be resisted.

So, in summary, what can human rights discourse contribute to the emancipation of women? Is the cautious optimism of the contributors to Cook's collection warranted? That there is no definitive answer to these questions is itself an encouraging sign. The recognition that the human rights terrain is one of uncertainty and antipathy for women is an important strategic insight. It ensures that advocates of women's rights are not seduced by the promise of a powerful language with which to formulate gendered injuries, but look beyond the rhetoric to see that it has only ever delivered tenuous gains for women.

Equipped with this knowledge, advocates are better positioned to learn to speak cross-culturally, to forge reciprocal links between the local and the global and, perhaps most importantly, to work with grassroots women's rights movements which express the diversity of situated identities that the women of the world encompass. Rebecca Cook's collection makes an important contribution to these endeavours.

Dianne Otto
LAW SCHOOL
UNIVERSITY OF MELBOURNE

Justice in International Law: Selected Writings of Stephen M Schwebel Judge of the International Court of Justice

By Stephen M Schwebel
(Cambridge University Press, Cambridge, 1994, xiii and 630 pp)

Judge Schwebel was once asked the extent to which being a judge of the International Court was "a chair in international law, a platform to teach from?". He replied:

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21 Medina, n 18 above, pp 261–63.
22 Knopp K, "Why Rethinking the Sovereign State is Important for Women's International Human Rights Law", p 157.

> Some judges may use their seats on the court to some extent for that purpose. It is also a function, perhaps, of how busy the court is. There are periods when the court has not been busy and then it is, in a sense, the most splendidly endowed academic chair in international law (by academic standards) in the world, because one is well compensated and has at one's fingertips a magnificent library and a very capable staff of librarians. When the court is busy, that is much less possible.[1]

Justice in International Law contains 36 papers, roughly a third of the legal articles and commentaries which Stephen Schwebel has written since 1947. With the exception of an analysis of Article 19 of the United Nations Charter, prepared in his then capacity as Assistant Legal Adviser for United Nations Affairs in the US State Department, this book contains nothing written in an official capacity. Thus, unlike some recent anthologies of the writings of Judges of the International Court,[2] the reader is spared the repetition of reams of individual opinions. Approximately half the papers contained in this thick volume have been written since Judge Schwebel joined the bench of the International Court. When one bears in mind the frequency and extent to which he has appended individual opinions to the pronouncements of the Court during one of the most busy periods of its existence, and also that he has written a substantial book on international arbitration,[3] it is apparent that he has not been idle in the Hague and has availed himself well of both library and librarians. Had judicial business been in the doldrums, one can only wonder how much more would have been possible.

This collection is a solid and weighty tome. It is often difficult to assess a collection of previously published papers, but this collection not only reflects Schwebel's abiding scholarly concerns but also contains thematic elements which inter-link the diverse substantive questions examined. Moreover, almost without exception the papers selected for this volume are of continuing relevance; only a very few are inconsequential. As an example of the latter, it is puzzling why it was thought worth reprinting *The United Nations and the Challenge of a Changing International Law* (p 514) which was first published in the 1963 Proceedings of the American Society of International Law. This is a fairly facetious attack on Eastern *bloc* attitudes to and use of the United Nations. The tone of this piece is not consonant with the rest of the book, albeit that the paper alludes to matters addressed at length in other essays. Even so, it contains an illuminating point. Schwebel comments on a textbook on international law produced by the Soviet Academy of Sciences (p 519):

> If I may sum up the impression with which the book leaves me, I would say that it attempts to demonstrate that a great progressive international lawyer of the twentieth century was not Lauterpacht but Lenin.

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1 Interview with Judge Schwebel, in Sturgess G and Chubb P, *Judging the World: Law and Politics in the World's Leading Courts* (1988), p 474.

2 For instance, McWhinney E, *Judge Shigeru Oda and the Progressive Development of International Law: Opinions (Declarations, Separate Opinions, Dissents) on the International Court of Justice, 1976–1992* (1993).

3 Schwebel SM, *International Arbitration: Three Salient Problems* (1987).

Judge Schwebel's attachment to Lauterpacht is on record elsewhere:

> His attainments are unsurpassed by any international lawyer of this century...he taught and wrote with unmatched distinction.[4]

This provides a key to the style of the book. In general Schwebel's analysis is categorised by the submerged or covert theory which has been a characteristic of Cambridge international law. To an extent, this is a gross generalisation when one recalls the theoretical dimensions of the work of Lauterpacht himself and also, for instance, that of Philip Allott and of Judge Rosalyn Higgins (for whom Cambridge should take some of the credit). Nevertheless, it remains that Cambridge, in common with the general English approach to international law, eschews an articulated theoretical basis in favour of reliance on pragmatic or practice-oriented international law which in itself constitutes a covert theoretical position.[5] For instance, when I was a graduate student there, I asked a member of the academic staff about theoretical aspects of armed intervention—in mitigation I should plead that I was then still young and hotfoot from the depths of jurisprudential analysis at Edinburgh. In reply, an avuncular arm was thrown around my shoulder and I was told, "Well, it's like this, there are the good guys and the bad guys".

Although Schwebel himself points out that American lawyers on the whole tend to be more policy oriented than British, (p 613) the papers collected here demonstrate a careful and at times cautious analysis with a bias firmly towards black-letter law rather than underlying policy. To use Benthamite terms, this is a work of expository rather than censorial jurisprudence. The result is a solid scholarly analysis but it is a tad anonymous in tone. Further, some articles—for instance, *Human Rights in the World Court* (p 146)—veer towards a cut and paste of the relevant jurisprudence with little synthetic contribution. Although these articles are good enough in themselves because of Schwebel's meticulous scholarship and serve the function of laying the materials bare, I wanted more (being of an intractable Oliver Twist tendency).

Having said that, the shining virtue of this collection is the authoritativeness of Schwebel's exposition. Few could match the knowledge and expertise which he displays, for example, in a series of papers on the competence and powers of the UN Secretariat or his understanding of budgetary obligations under the Charter. Similarly, as one would expect, the papers on aspects of international arbitration are masterly, clear and concise. These focus on procedural matters, such as the applicability of the exhaustion of local remedies rule and the nature of a majority vote in the arbitral process. They are complemented by the papers gathered together in the section entitled "International Contracts and Expropriation" which examine substantive matters which not infrequently arise

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4 Schwebel, n 3 above, p xiii.

5 See Warbrick C, "The Theory of International Law: Is There an English Contribution?" in Allott PJ et al, *Theory and International Law: An Introduction* (1991) who notes that "there is little interest among contemporary English international lawyers in 'Grand' theory" (p 70) but underlines that this overt attitude simply masks a hidden theory. See further Carty A, "Why Theory?—The Implications for International Law Teaching" in Allott, ibid, p 73.

in arbitration, as well as arbitral jurisprudence itself. For instance, "Some Little-Known Cases on Concessions", (p 436) co-written by J Gillis Wetter, reports eleven previously unpublished awards. Although some of the articles in this section date from the late 1950s and 1960s, they remain valuable despite their vintage. Schwebel's views on topics such as compensation for expropriation and the protection of foreign investment undoubtedly reflects the outlook of capital-exporting States. This might not appeal to some tastes, but it appears that practice and authority support Schwebel.[6] Also included in this section is "The Story of the United Nations Declaration on Permanent Sovereignty over Natural Resources", (p 401) a detailed account of the drafting of General Assembly Resolution 1803(XVII)(14.12.1962).

This last article is illustrative of one of the recurring themes of this collection, namely Schwebel's views on the normative worth of General Assembly resolutions and other UN instruments. This theme is given extended treatment in "The Legal Effect of Resolutions and Codes of Conduct of the United Nations" (p 499). Schwebel expounds the traditional view in this relatively short paper, which adverts to the question of compensation for expropriation, (pp 506ff) but which nonetheless is wide-ranging and thorough. This concise article is, quite simply, one of the best treatments of the issue which I have read. I wish the same could be said of his "What weight to conquest?" (p 521) which some regard as a classic article on the acquisition of territory as a result of the use of force. Unfortunately, this piece proceeds on the basis of unargued premises. An argument which attempts to modify the established principle that territory cannot be acquired through force requires much much more than this. It also comes dangerously close to the discredited "missing reversioner" argument which has been used to deny the protection of Geneva Convention IV to the inhabitants of the Occupied Territories by Israel.[7]

Finally, and this is not surprising given his current job, *Justice in International Law* contains Judge Schwebel's most important writings on the International Court. It is surprising how very discreet these extra-judicial writings are, especially when compared with some of his more combative judicial statements such as his criticism of President Elias in the *Nicaragua* case.[8] In these articles, Judge Schwebel is extremely circumspect and he repeatedly states when discussing particular cases that he is adding nothing to what he said in his individual opinion. This is in accordance with his view that:

> I do not think that the judges are indiscreet...there is an effort to maintain judicial propriety and I think that is right. I think that if one assumes judicial

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6 See, for instance, The World Bank Group, *Legal Framework for the Treatment of Foreign Investment* (1992, 2 vols).

7 See Blum Y, "The Missing Reversioner: Reflections on the Status of Judea and Samaria" (1968) 4 *Israel Law Review* 279; and Shamgar M, "The Observance of International Law in the Occupied Territories" (1971) 1 *Israel Yearbook on Human Rights* 262 (1971).

8 *Military and Paramilitary Activities in and against Nicaragua case: Merits Judgment,* ICJ Rep 1986, p 14, dissenting opinion of Judge Schwebel, p 259 at pp 314–15, para 115.

> office there are constraints attached to it which are inevitable and it is best to observe them.[9]

This self-restraint must be compared to the approach taken by other judges in their extra-judicial writings—for instance, Zafrulla Khan's breach of Article 54(3) of the Statute and the weak self-defence of his recusation in the 1966 *South West Africa* cases in his autobiography;[10] the pseudonymous commentaries made by Krylov on decisions in which he had participated;[11] or, my current favourite, Jennings' excoriation of the Court's approach to maritime boundary delimitation.[12]

The most significant articles written by Schwebel on the International Court deal with questions of competence, in particular issues concerning its advisory competence. For instance, his comparison of the power of organisations to request advisory opinions in the League and UN periods is detailed and thought-provoking, (pp 27ff) while his "Authorising the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice" (p 72) again demonstrates his expertise in legal aspects of the Secretariat. The salient feature of Schwebel's papers on the International Court is that they deal with non-contentious issues unlike, for instance, the series of extra-judicial musings on intervention which can be seen to have continued this discussion beyond the confines of the Court's Council Chamber.[13] In imposing this self-restraint, Schwebel is, of course, adopting the same course as Lauterpacht himself:

> The manuscript of this book was almost complete when, at the end of 1954, I was elected one of the Judges of the Court. I have come to the conclusion that, notwithstanding that event, which imposes a clear obligation of restraint, I ought to proceed with the publication of this edition...In any case I have considered it proper not to comment upon or to refer to any of the Judgments or Opinions given by the Court since I became one of its members.[14]

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9 Schwebel interview in Sturgess and Chubb, n 1 above, p 474.

10 See Zafrulla Khan M, *Servant of God: A Personal Narrative* (1983) pp 228–30 and 274, and also Hussain I, "Sir Zafrulla Khan—the Silent Judge" (1985) 23 *Archiv des völkerrechts* 478 at 484 and 488–91.

11 See Zile ZL, "A Soviet Contribution to International Adjudication: Professor Krylov's Jurisprudential Legacy" (1964) 58 *American Journal of International Law* 359.

12 Jennings RY, "The Principles Governing Marine Boundaries" in Hailbronner K et al (eds), *Staat und Völkerrechtsordnung: Festschrift für Karl Doehring* (1989), p 397.

13 For example, Elias TO, "The Limits of the Right of Intervention in a Case before the International Court of Justice" in Bernhardt R et al (eds), *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrecht: Festschrift für Herman Mosler* (1983), p 159; Jiménez de Aréchaga E, "Intervention under Article 62 of the Statute of the International Court of Justice" ibid, p 453; and Oda S, "Intervention in the International Court of Justice: Articles 62 and 63 of the Statute" ibid, p 629.

14 Lauterpacht H, *The Development of International Law by the International Court* (1958), pp xiii–xiv.

This attitude is not unimportant given the change introduced into the Rules of Court in 1972 and retained in 1978 regarding the parties' influence in the composition of *ad hoc* chambers. As Schwebel notes in "Chambers of the International Court of Justice Formed for Particular Cases" (p 112):

> The most that could be said about the singularity of a chamber judgment is that...[it] may perhaps give more room for the play of influence of a single, influential judge than does a judgment of the full Court. In the Court, the particular perceptions of a single judge tend to be watered down by the cascade of comments of his fourteen or fifteen colleagues. In a five-judge chamber, less water flows and the flavor of individual views may be stronger.

States which might have a view to court-packing an *ad hoc* chamber with Judges whose expressed views accord with the substantive decision they desire will find slim pickings in this volume. Leaving to one side his analysis of the protection of foreign investment, Schwebel barely commits himself on substantive issues. On the other hand, if this book is any evidence, such States would be assured of a judge committed to the integrity of his role and possessed of an acute legal mind.

In sum, this is a fine collection of Judge Schwebel's writings, and a worthy addition to the bookshelves. Its scope is wide-ranging and its scholarship rigorous. The dust-jacket shows an aerial view of the Peace Palace. Only from this perspective can one appreciate the symmetry and balance of its gardens. Judge Schwebel's collected papers are as formal and exacting as these gardens. If I have any criticism of this book, it is that I wish Judge Schwebel had disclosed more of his own underlying perceptions and approach to international law, although this is perhaps beside the point because it boils down to a request for another book. Oliver Twist time again I suppose.

Iain Scobbie
SCHOOL OF LAW
UNIVERSITY OF GLASGOW

Equity and International Law: A Legal Realist Approach to International Decisionmaking

By Christopher R Rossi
Innovation in International Law Series
(Transnational Publishers Inc, Irvington, New York, 1993, xix and 309 pp)

Equity is a topic which is likely to engender mixed reactions amongst international lawyers. Initially there might be the sense of *déjà vu*, hostility to a rehearsal of familiar themes of equity *infra legem* or *praeter legem* and sources theory or to the practical unrealities of McDougal *et al* in their invocation of the universal order of human dignity represented at one level by the search for equity. Yet, even in that context, the concept of intergenerational equity is a plea that should not or cannot be ignored. On the other hand, equity might be the road to salvation from positivist rhetoric without accepting the deconstructionist inevitability of the critical legal movement. Rossi provides a survey of these and other perceptions of international law and equity in his first chapter, though the

present reviewer had (perhaps unwarranted) withdrawal symptoms of his own at reading the title of the chapter, "Equity and New World Orderism at Century's End"!

It is far from clear whether municipal law notions of equity (Chapter II) provide much guidance for its reception and application as part of international law. The origin of equity in England was as part of the jurisprudence of a distinct court system ameliorating the strict rules of the law itself. This was not so much different from the praetorian intervention in modifying other rules of the civil law. With the advent of the codes, the role of equity became hidden in the process of judicial application of the legislative text. What part can equity play, therefore, in the very different environment of international law?

Chapter III, "Equity, Internationalism, and the Return of Naturalism", is an attempt to date the resurgence of naturalist philosophies from the Wilsonian new world order that culminated after his death, in the Kellogg–Briand Pact for the Renunciation of War 1928. In particular, Rossi identifies the period from the beginning of the present century until the start of the Second World War as The Golden Age of Dispute Settlement (pp 56–58), and an essential backdrop to the emergence of equity as part of international law. Dispute settlement was important because of the role that equity played in various compromissory clauses, though it was not apparent (on pp 59–62) whether equity was to apply as part of the law, in addition to the law, or instead of it. In other words, the distinction between equity *infra legem*, *praeter legem* or *contra legem* was unresolved, an issue which is dealt with in the remainder of Chapter IV (pp 62–86).

The highlight of Rossi's book is Chapter V dealing with the emergence of what is now Article 38(1)(c) in the Statute of the Permanent Court. He places the debates over what are now sub-paragraphs (c) and (d) against the legal philosophies of the time. He also demonstrates that the fear of a *non liquet* on the part of continental jurists involved in the drafting was reflected in the views of Root and Phillimore who saw the solution to the absence of a conventional or customary rule either in the tribunal simply making a recommendation, or in the matter being referred to the League for legislation or resolution (see pp 105–06, n 98). Not that *non liquet* was such a problem for a common lawyer accustomed to the completeness of the legal order and to acceptance of the fiction that the judge could readily ascertain that which was the law already.

Although there seemed to be agreement (p 112) that general principles of law constituted a reference to principles of or drawn from municipal law, the relationship of these principles with equity was unclear from the records of the drafting process. The attempt to include a reference to equity alongside general principles was not successful, though this was at least in part due to the interpretation being placed upon equity (see pp 113–14).

By comparison, Chapter VI "An Interpretative Theory of Incorporation: Equity and the *Lex Judicia*" is less satisfying. The first section "Babies and Bathwater/Emperors and Clothes" (pp 121–24) appears to have as its substance the "bothersome tendency to deny obvious municipal linkages" (p 121). The dubious value of the section can perhaps be judged by its finale (p 124):

> Forwarding a unique and municipally disconnected conception of equity causes equity's link to these finer (that is, more technical) rules to evanesce due to the combined effects of positivism, publicists, and the principle of sovereign equality. At the same time, equity is turned into a hollow shell of a concept once its most expansive and potentially disruptive applicative principles, which are better described as "policies", are accentuated over the principles that inhere in the decisionmaking process. The proverbial baby gets tossed with the bathwater and the emperor is found not to have clothes.

This is followed by a brief reference to Dworkin in a section with the heading "Taking [Principles] Seriously" (pp 124–26) and by a survey of "Judicial Recourse to Technical Rules of Equity" (pp 126–28), including an uncritical acceptance of estoppel as part of the contribution of equity to international law. This may appear incompatible with Rossi's earlier demand for more account to be taken of municipal analogies. Certainly under Anglo–Australian law estoppel was in origins as much a feature of the common law as it later became of equity.

Part IV of Chapter VI deals with "Implied Powers and the Judicial Function" (pp 129–43). Although the reference is to implied powers in a constitutional sense, the doctrine is used by analogy to justify an international tribunal's power to employ principles of equity, "a power endemic to the process of judicial decision-making" (p 129). This section also has something of a collector's sense to it, because it even manages the "analogue...of the *lex mercatoria*" (p 129). While it may be logical enough to link the doctrine of implied powers to the International Court's capacity to exercise its advisory jurisdiction over disputed interpretations of the UN Charter (pp 136–41), it is less apparent how this coincides with the Court's authority to apply principles of equity.

The principal remaining section "The Positivists' Response" comprises two disparate segments, "The New Commonwealth Institute and its Attempt to Create an International Equity Tribunal" (pp 143–48) and "The Poverty of Positivism: The Trouble with Treaties" (pp 148–53). The latter is little more than a review of the various approaches to treaty interpretation which makes no convincing link to any theory of equity.

Chapter VII deals with what is referred to as "Equity and the Problem of Judicial Prevarication", the last term being defined as meaning "judicial or arbitral deviation from the law". Rossi distinguishes between the two as follows (p 6):

> In the context of arbitral awards, prevarication relates to an assessment of whether the arbitrator based the award on considerations outside the scope of the *compromis*, or the legal instrument concluded by the parties that details, *inter alia*, the rules that the arbitrator must apply. In relation to international adjudication, prevarication involves the consideration of whether the judge (or, as the case may be, the judgment of the Court), deviated from the sources of law that are mandated by Article 38 of the Statute of the Court.

This concept is used to test whether or not equity has been properly employed (in the *Diversion of Water from the River Meuse* case, particularly the opinion of Judge Hudson[1] (pp 155–67), and the *Abu Dhabi* arbitration[2] (pp 167–71)).

The author then embarks upon a survey of a number of decisions of the International Court where the significance or relevance of equity is less apparent. In relation to the *Barcelona Traction* case,[3] Rossi (pp 173–75) is accepting of the Court's reference to equity as a necessary justification for allowing claims by the State of nationality of shareholders in exceptional cases, such as when it is the State of nationality of the corporation which has been the State that has committed the wrongful acts against the corporation. It is not at all clear why reliance upon equity is such an essential ingredient in this situation, nor does Rossi attempt to provide an adequate explanation.

In *Barcelona Traction*, the reference to equity was made by the Court of its own volition. The *Guardianship* case,[4] even on Rossi's analysis (pp 176–80), seems to have little to do with the application of equity. Even if one accepts his proposition that the interpretation placed upon the Hague Convention on the Guardianship of Infants 1902 was in some way contrary to law, the limitation of the Convention to the status of a guardian which was a matter for Netherlands law as the law of nationality, leaving it to Swedish law as law of the place where the infant was resident to determine what protective measures could be taken for the child's welfare in modification of the rights of parents or a guardian, was hardly a denial or favouring of a role for equity. Even though Rossi's criticisms of the outcome in the *South-West Africa* cases[5] (pp 181–85), are more justified, they still do not add anything to the equity debate, and the same can be said of his views on the *Nicaragua* case[6] (pp 185–87), particularly his comments about the fact that the Nicaraguan declaration of 1929 had never been in force for Article 36(5) of the Statute to apply and the suggestion that "this finding indicated a fundamental bias on the part of the Court" (p 186).

Chapter VIII turns to the modern applications of equity under the title "External Pressures: Equity, the New Law of the Sea, and the Legislative Search for the Proper Distributive Criterion". The topics covered are wide-ranging. They start from the view of Hag[7] that the "quest for economic equity by the poor of the world has emerged as one of the pivotal issues of our times" (p 198) and then include "The New International Economic Order and the Challenge to Judicial Decisionmaking: Distributive Justice" (pp 199–204). The final parts of the chapter (pp 204–13) deal with what is termed "The Legislative Debate over Applicable Criteria", centring principally upon the conflicts between equity and

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1 (1937) PCIJ Ser A/B, No 70 at 76–78.
2 (1951) 18 ILR 144.
3 ICJ Rep 1970, p 3.
4 ICJ Rep 1958, p 55.
5 ICJ Rep 1966, p 6.
6 ICJ Rep 1984, p 392.
7 Hag I, "From Charity to Obligation: A Third World Perspective on Concessional Resource Transfers" (1979) 14 *Texas International Law Journal* 389 at 389.

equidistance and between exploitability and the common heritage principle in relation to continental shelf and sea bed resources.

The discussion of "International Adjudication and the Search for the Distributive Criterion: Equity and Maritime Boundary Delimitations" in Chapter IX could leave a reader with a sense of dissatisfaction. Is this not the one area where equity reigns supreme so that here at least it can be identified in its contemporary splendour? The problem for any writer is that the basic material, the Court's own judgments and what might be termed "associated" arbitrations, can be interpreted to suit a commentator's own particular theory. It is for Rossi, as it is for others, to find a theme which can curtail the almost limitless discretion contained in the words of the Court in the *North Sea Continental Shelf* cases[8] (p 242):

> In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.

It is hardly surprising that Rossi is not able to offer any very convincing conclusion (p 245):

> The rejection of a rule-oriented approach has not, however, resulted in a state of judicial confusion; nor has it resulted in the application of distributive justice. To the Court's credit, these counter-poising interests have been adroitly straddled. Judges have accomplished this balancing act by seeking recourse to equitable rules and principles. But because this recourse has been circumscribed within the generally geographical nature of the judicial review, the charge of discretionary abuse is not warranted, even if aspects of the judicial process do not admit to complete scrutiny. In this area of international law perhaps the most important conclusion is that delimitations would not be possible absent recourse to equity.

Rossi also continues on the theme of the need for the Court to "one day seriously examine the nature of customary international law and reject it as the basis of equity and equitable principles" in favour of "the general principles clause" in Article 38(1) of the Statute (pp 245–46). This may be misplaced in the context of maritime delimitation in relation to which there was every reason to suppose that Article 6 of the 1958 Continental Shelf Convention was developmental of customary law on the basis of special circumstances in modification of the median line or equidistance principle. It never did make much sense to argue, as did Denmark and the Netherlands, or indeed for some members of the Court (apparently) to accept, that Article 6 represented the articulation of an unalloyed median line or equidistance rule.

If a reader experiences unease at parts of this book, it will be reinforced by the final chapter on "Equity in the Age of Modernity" (pp 247–56). What does one make of the following passage, for example (p 247):

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8 ICJ Rep 1969, p 3 at 50.

> Equity has forever been associated with the pursuit of justice and this connection signals that it is one of the great features of human identity. But like the definition of justice itself, equity's full meaning remains sublimely elusive. These dual latencies inspire and confound scholars in this handicapped age of modernity.

Presumably the "dual latencies" is a reference to the contrast between equity as a plea for justice and equity as law. In this context, it would have been worth discussing the views of Martti Koskenniemi[9] or of David Kennedy[10] about the hard and soft versions of legal discourse.

In any case, the complaints about discretionary justice in relation to equity seem to be out of place. At the diplomatic level recourse to equity is primarily an overt plea for justice. At the adjudicative stage, if that is reached, the invocation of equity is an acknowledgment that submission to the tribunal has placed the law-making or law-declaring power in the hands of that tribunal in which equity can play a dual role. A demand for justice in the outcome is linked to a request for the identification of principles of international law (be they legal or equitable) which will accommodate that result. This is particularly important with regard to the allocation of territory the results of which are, by a human time scale, intended to be perpetual and therefore acceptable to the contestants. In the case of land territory, a desirable result is usually hidden by reference to matters of treaty interpretation or the way in which the rules as to territorial acquisition are applied.[11] With regard to maritime delimitations of areas of continental shelf, the role of equity in achieving the requisite degree of proportionality is openly acknowledged by Rossi (see pp 238–41).

Overall, as the earlier comments suggest, this book is likely to give rise to mixed reactions. Not that this is necessarily a negative factor. Debate and criticism are essential to discourse about any legal system and its rules, not least that of the international order. Perhaps the most adverse observation that can be made about Rossi's work is that it does not really identify nor provide a particularly modern approach to the role of equity in international decisionmaking. In this respect, if one were to take the titles of the first and last chapters as a guide, an erroneous impression would be created, if not as to the book's purpose, certainly as to its achievement. From this perspective at least it is impossible to avoid recording a sense of disappointment. Nevertheless, the role of equity is of such importance to an understanding of contemporary international law that the author is to be congratulated for attempting to provide a survey of a topic on which most readers will assuredly have their own very decided and varied views.

DW Greig
FACULTY OF LAW
AUSTRALIAN NATIONAL UNIVERSITY

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9 *From Apology to Utopia: The Structure of International Legal Argument* (1989); considered by Lowe V in "The Role of Equity in International Law" (1992) 12 *Aust YBIL* 54 at 66–67.

10 *International Legal Structures* (1987).

11 See Greig DW, "The Beagle Channel Arbitration" (1981) 7 *Aust YBIL* 332 at 381–83.

Towards an Australian Bill of Rights

Edited by Philip Alston
(Human Rights and Equal Opportunity Commission and Centre for International and Public Law, 1994, 364 pp)

Towards an Australian Bill of Rights is an eclectic collection of essays on the Bill of Rights debate in Australia. The pieces range from legalistic analyses of rights issues, to critical perspectives, to judicial perspectives on how a Bill of Rights would impact on the judicial role. Many of the authors go beyond the traditional aspects of the Australian Bill of Rights debate (which cover federalism, democracy, the judicial role) and so the collection is not as narrow as its title might suggest. In addition, there has been a clear attempt to consider alternative perspectives on rights—from feminist, Aboriginal and cultural diversity perspectives. This is commendable, although it is a pity that these perspectives are, on the whole, isolated into their own particular spaces and not integrated into the more general rights analyses. In addition, it must be noted that there is no contribution which directly and in detail assesses gay and lesbian (queer) perspectives on rights. This absence is particularly conspicuous given that the first communication to the United Nations Human Rights Committee from Australia concerned Tasmania's anti-gay laws, and lesbians and gay men remain one of the only groups in society not accorded even a basic level of formal legal equality (never mind substantive equality). I fear this absence is indicative of the level of protection lesbians and gay men would receive under an Australian Bill of Rights.

The book begins with Philip Alston's introductory piece, canvassing some of the current factors impacting on the Bill of Rights debate: the increasingly effective international human rights regime, the recent spate of judicial activism in Australia, the debate about constitutional amendment as the turn of the century approaches, "globalisation" and the "sovereignty" debate which is, in part, a reaction to the international human rights regime. Alston considers that Australia has a number of options: a Bill of Rights by default (either through judicial activism or through reliance on international human rights law) or a Bill of Rights by design—through legislative action or constitutional amendment. He concludes by listing a number of key issues which need to be resolved, including the role of economic and social rights, whether a Bill of Rights should be confined to the public sphere, how the rights of indigenous Australians can best be protected, the role of the judiciary and the need to combine a national Bill of Rights with respect for the federal-State balance. A number of these issues are taken up by other pieces in the book.

After the Alston piece, the book is divided into three parts: "Putting the Debate in Context", "A Bill of Rights?" and "International Dimensions". In her scene-setting piece "The Australian Reluctance About Rights", Hilary Charlesworth canvasses the various ways in which rights are or could be protected in Australia, largely from a historical perspective with limited analysis of more recent developments. We are provided with a brief history of attempts

to entrench a Bill of Rights in the Constitution and attempts to introduce a legislative Bill of Rights. In addition, the traditional common law approach to human rights is covered, as is legislative rights protection of the anti-discrimination kind and Australia's response to international human rights norms. Charlesworth also briefly discusses some theoretical perspectives on rights—liberal and critical. Next is the piece by Brian Galligan discussing Australia's political culture. This is an interesting assessment of Australian political ideology, in a fairly generalised way, which attempts to explain why Australia has had such an "impoverished rights debate". When these two are combined with Alston's piece, the three make a good introduction to the greater issues posed by the rights debate.

We then move to some of the "alternative perspectives" on rights. Bill Hollingsworth provides "An Aboriginal Perspective on Australia's Future in the Human Rights Field", a short piece written soon after the High Court's decision in *Mabo v Queensland [No 2]*. He views *Mabo* as a portent of change, and outlines the strategic plan of the Council for Aboriginal Reconciliation, which includes a particular focus on respect and recognition of Aboriginal and Torres Strait Islander culture, language and society. However, little in the way of concrete strategies for protection of indigenous rights is offered—this is clearly the future work of the Council. Elizabeth Evatt tackles the question of cultural diversity and human rights, a topic of particular importance in a society which claims to be multicultural. She focuses on the work of the Australian Law Reform Commission (ALRC) in two of its references: *Recognition of Aboriginal Customary Laws* and *Multiculturalism and the Law*. The piece is largely descriptive of the ALRC's work and is, for that reason, somewhat disappointing. While it is comprehensive in its coverage, it is somewhat superficial.

John Doyle, now Chief Justice of South Australia, and Belinda Wells consider common law protection of human rights in their piece "How Far Can the Common Law Go Towards Protecting Human Rights?" They expand on the more limited analysis of the common law provided earlier by Charlesworth, with greater attention to recent decisions. They also comment on the role of the courts in statutory interpretation and in constitutional development, taking a somewhat expanded approach to the notion of "the common law". Doyle and Wells note that the primary limitation on the ability of the common law to protect individual rights is the relationship between the courts and the Parliament in the Australian legal system, in which the doctrine of parliamentary supremacy remains firmly embedded. Outside the constitutional area, this doctrine will limit not so much the courts' ability to develop the common law in ways that are responsive to human rights, but the courts' ability to maintain those developments in the face of opposition from the Parliament. They note, however, that lawyers have a crucial role to play in common law protection of rights, as development of the common law is in the hands of the judges and the lawyers who argue cases, rather than in the hands of the Parliaments and lobby groups.

The final piece in Part I is the highlight of the book: Jenny Morgan's "Equality Rights in the Australian Context: A Feminist Assessment". This piece

speculates, drawing on past decisions, on how the courts might treat an entrenched equality right with a particular focus on gender. Morgan begins with an outline of various critiques of rights and of the "critique of the critique of rights". Once again, this builds on issues raised by Charlesworth in her introductory piece. Morgan's analysis contains useful comparative and critical material from both Canada and the United States. After the theoretical section, she turns to a detailed examination of Australian judicial and quasi-judicial practice in relation to equality, demonstrating the patchy, but not altogether negative, approach that courts and tribunals have taken to equality questions. Most interesting, perhaps, is the call in her conclusion to debate the possibility of a gendered equality right, a call that warrants future examination and discussion. Morgan also notes that Aboriginal women may have different needs and experiences when it comes to questions of equality. Unfortunately, apart from Morgan's comments there is no exploration in the book of intersections between oppressions—Aboriginal voices are largely left separate from feminist voices.

We then move to Part II—"A Bill of Rights?" This begins with Brian Burdekin's piece, "The Impact of a Bill of Rights on Those Who Need it Most". Burdekin covers a vast number of issues, from brief comments on New Zealand and the United Kingdom, references to the International Covenant on Civil and Political Rights (ICCPR) and the First Optional Protocol, a passing reference to the Tasmanian "anti-homosexual" laws ("homosexual" here being apparently synonymous with "gay men") to the common law and parliamentary sovereignty. Potentially more interesting, and distinct from other pieces in the book, is the section on the experience of the Human Rights and Equal Opportunity Commission, covering again a variety of issues. This section was disappointing in its brevity—the piece moves swiftly on again to the activities of the Parliament and the role of the judiciary. However, the concluding sections on detention of asylum seekers and the Western Australian juvenile justice legislation go some way towards fulfilling the promise of the title, addressing as they do two groups in Australian society which are in need of greater human rights protection than many (but not all) other groups. Again, a notable absence was any detailed discussion of gay men and lesbians and also of people with mental illness, although the latter receive a brief mention. Burdekin's piece attempts to cover too much ground, much of which is covered elsewhere.

Next, Colin Hughes discusses issues surrounding the protection of human rights raised by the Electoral and Administrative Review Commission in Queensland. He focuses on the Queensland situation, but also raises questions of broader significance: Should there be a parliamentary override clause? What enforcement mechanisms, in addition to litigation, might be adopted? What should be the position of economic and social rights? He then considers some specific substantive rights: freedom of movement, electoral rights and the right to bear arms, the latter two being perhaps of particular relevance to Queenslanders.

Sir Gerard Brennan, now Chief Justice of Australia, provides a judge's perspective on the impact of a Bill of Rights on the judiciary. His scepticism of

the traditional Diceyan theory of parliamentary supremacy is refreshing, although perhaps not surprising from a justice of the recent High Court. He notes, however, that the introduction of a Bill of Rights into the Australian Constitution would require judges to acquire new skills. Judges would need to consider political, sociological and ethical considerations as well as law, and to weigh the collective interest against that of the individual—although one must ask whether judges do not do these things to some extent already, at least at a level where judges actively develop the common law. Brennan acknowledges with remarkable frankness the subjective nature of the determination of rights issues and the political nature of the questions raised—although, again, this perhaps implies a perception on his part that subjectivity and politicisation are presently absent. He notes also some more practical issues—the cost of litigation and the effect of a Bill of Rights on court lists, often already overburdened. Who is to pay for the increased resources that will be required? He concludes, nevertheless, that a Bill of Rights enforceable by the courts would make the judiciary more relevant to the community.

Murray Wilcox provides an Australian viewpoint on the Canadian and US experiences with constitutionally protected rights. In relation to the United States, he focuses on the fourteenth and first amendments (equal protection and free speech) and considers also the gradual extension by the Supreme Court of the Bill of Rights to govern State, as well as federal, action. In relation to Canada, Wilcox begins with section 1 of the Canadian Charter of Rights and Freedoms, which permits reasonable limitations on rights that can be "demonstrably justified in a free and democratic society". This is a fitting starting point, as section 1 plays an important role in Charter jurisprudence—a significant number of the Supreme Court's decisions have turned on the impact of this section. Of all the sections in the Charter, section 1 gives the judiciary the greatest flexibility in the application of the Charter and has no counterpart in the United States. He then canvasses a number of specific rights: the fundamental freedoms of religion and conscience, belief and expression, assembly and association; democratic rights; the right to life, liberty and security of the person; rights associated with arrest, detention and the criminal process; and equality rights. The coverage is reasonably detailed, if largely descriptive. He also considers the override provision, which permits the legislature to override certain sections of the Charter for a five-year period, again a provision with no counterpart in the United States and one which is sometimes used to counter arguments that the Charter is undemocratic. Wilcox concludes with a discussion of the impact of the Charter on the courts and a comment on the popularity of the Charter. It is here that the piece is at its weakest, as there has been significant criticism of the Charter by feminist scholars in Canada and analyses have indicated that the Charter has tended to be used by already privileged groups (men use the equality right more than women, and many actions are brought by corporations). Indeed, the absence of a critical perspective on the Canadian Charter is a weakness of the book as a whole.

Continuing the comparative theme is Jerome Elkind's piece on the New Zealand experience with a non-entrenched Bill of Rights. This provides a useful

contrast with the Canadian and US material, which centred on constitutionally entrenched rights guarantees. It includes a thorough analysis of New Zealand case-law, and concludes with some advice for Australia. The book then moves into Part III—"International Dimensions". Although many of the previous pieces had a strong international flavour, the pieces in this Part are more clearly focusing on international human rights issues. Two pieces are by politicians: Gareth Evans writes on "Human Rights in Australian Foreign Policy: Where to From Here" and Michael Duffy writes about "The Internationalisation of Human Rights". Unsurprisingly, these pieces are congratulatory of the Labor government's human rights policies. Evans' piece is outward-looking, while Duffy looks inward at Commonwealth legislative regimes for human rights protection and at Australia's ratification of recent human rights instruments such as the First Optional Protocol to the ICCPR and the Protocols to the 1949 Geneva Conventions on humanitarian law.

Justice Kirby ranges broadly in his piece on "Implications of the Internationalisation of Human Rights Law". He deals with issues of privacy, AIDS and public health, labour laws, juvenile justice and the Tasmanian anti-gay laws before turning to an assessment of the domestic application of international human rights by judges. Here he comments in passing on the United States and Britain before mentioning a few key Australian decisions. Focusing in more detail on Australian judicial practice is Henry Burmester's piece, "Ascertaining International Human Rights Rules and Standards in Domestic Courts: War Crimes and Other Examples". In particular, Burmester focuses on customary international law, where issues of proof are notoriously difficult, and uses *Polyukhovich* as a case-study. The book concludes with a piece by Peter Thompson on "Human Rights Reporting from a State Party's Perspective", providing an interesting insight into reporting procedures.

I began by saying that this is a useful collection, and so it is—it contains a comprehensive coverage of most issues that arise concerning human rights protection in Australia and so is a good introduction to the issues or starting point for research. However, it is not without its draw-backs. *Towards an Australian Bill of Rights* cannot be more than a starting point, as much of the coverage is superficial and many pieces cover the same ground. Some judicious editing would have been appropriate, to achieve a sense of coherency—as it stands, the book reads as a collection of quite separate papers without any connection apart from the fact that each touches on human rights issues. This is, no doubt, a result of the source of the papers—on the whole, they are drawn from a conference on human rights held at the Australian National University, rather than being commissioned particularly for the book. However, this fact should not have prevented some attempt being made to reduce overlap and to ensure that authors covered their own areas of expertise in detail rather than covering the same general ground in quite a superficial way. Some cross-referencing would also have assisted the reader. In addition, I reiterate my concern about absences—of gay and lesbian perspectives, of perspectives which examine intersections of oppression, and of any detailed critical analysis of the Canadian Charter of Rights (though I note Morgan does incorporate criticisms

of the Charter in her piece). Perhaps the silences in this collection are more revealing about what we can expect from a Bill of Rights than what is said.

Kris Walker

LECTURER IN LAW
UNIVERSITY OF MELBOURNE

The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities

By Peter HF Bekker
(Martinus Nijhoff Publishers, Netherlands, 1994, xix and 265 pp)

Traditionally international law has been concerned with the regulation of relations between States. More recently, we have seen the emergence of intergovernmental organisations as subjects of international law. This development presents a substantial challenge for international law. What laws apply to these organisations, and to what extent can principles regulating the conduct of States be usefully adopted?

It seems that international law has so far failed to meet the challenge presented by intergovernmental organisations. The collapse of the International Tin Council (ITC) in 1985 and the ensuing litigation in the British Courts is a clear example. The *Maclaine Watson* case[1] was a recovery action brought by creditors suffering loss as a result of the ITC's demise. This presented an opportunity to consider various aspects of the legal position of intergovernmental organisations, and their responsibility. The case was heard by the Court of Appeal and subsequently by the House of Lords. On both occasions the creditors were found to be without a remedy. In the Court of Appeal, Kerr LJ lamented:

> For a long time I was persuaded, as I think we all were, that this [international law] would provide the answer which justice requires in these deplorable cases. But in the end, with reluctance and regret, I was driven to the conclusion that the edifice will not stand up.[2]

The need for a body of coherent international law in respect of intergovernmental organisations is even more crucial when regard is had to the volume and range of activities in which these organisations are presently engaged. The proliferation of United Nations (UN) activities such as peacekeeping is one example. Another is the relatively frequent occurrence of international commodity agreements, such as the International Tin Agreements under which the ITC was created.

Peter Bekker's work on the legal position of intergovernmental organisations is an important contribution to this area of the law. The author presents a framework for analysing the legal status, privileges and immunities of

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1 *Maclaine Watson & Co v Department of Trade and Industry* [1988] 3 All ER 257
2 Ibid, per Kerr LJ at 301.

intergovernmental organisations. He does this using the concept of functional necessity; the idea that privileges and immunities should be determined by reference to the purposes and functions of the organisation. The author points out that intergovernmental organisations are not sovereign entities, and in this way they differ fundamentally from States. Consequently, a different approach to privileges and immunities from that developed for States is warranted. The author's work does not extend to other areas of the law such as the responsibility of intergovernmental organisations.

The book is divided into three parts. Part One is introductory and primarily consists of a consideration of the International Law Commission's (ILC) work on relations between States and international organisations, particularly the second part of the topic relating to the status, privileges and immunities of international organisations and their agents. The author comments on the lack of enthusiasm and support for the topic, and the disappointing decision by the ILC to discontinue considering it.

In Part Two the author proposes a three-step functional necessity analysis. The first step is to determine the status of the intergovernmental organisation by reference to its functions and purposes. Within this discussion the author considers the concept of international legal personality as explained by the International Court of Justice (ICJ) in the *Reparations* case[3] of 1949, where the Court linked the notion of personality for intergovernmental organisations to functional necessity. The author argues the capacity of intergovernmental organisations must vary according to the peculiar character of each organisation. The conclusion is that there can be no capacity that is not related to functions and purpose, and these will vary depending upon the specific mandate of the international organisation. Treaties founding intergovernmental organisations are a useful starting point in this consideration, but regard must be had more generally to the "nature and needs" of the organisation. Bekker says "it is the existence and nature of the entity and not the instrument by which the entity was created that governs the determination of whether the entity has a certain capacity" (p 69).

This approach has much to commend it because it recognises the dynamic nature of international organisations and allows for maximum flexibility in its practical application. Founding instruments are permitted to be living documents, and are not unduly restricted to their original text.

In step two, functional necessity is used to select the types of privileges and immunities to be attributed to an intergovernmental organisation. The author rejects the view that privileges and immunities are attributes of legal personality, and argues that a more logical approach is to view privileges and immunities as indicative of legal personality. The discussion contains an analysis of why privileges and immunities are generally necessary for intergovernmental organisations, and then goes on to prescribe a formula for determining what immunities should be granted, by reference to functional necessity. The source of these privileges and immunities is argued to be primarily treaty law. Other

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3 *Reparations for Injuries Suffered in the Service of the United Nations* case, ICJ Rep 1949, p 174.

possible sources are customary international law and the domestic legislation of the participating States. However, it is recognised that customary law is not well developed, and is unlikely to have application to intergovernmental organisations other than the UN. The author concludes that functional necessity is generally recognised as the basis of organisational privileges and immunities. He supports the development of a customary principle that all privileges and immunities strictly necessary for the "unhampered execution of functions" in pursuit of the purposes for which it was created should be accorded to the organisation.

There is an obvious difficulty in developing principles of general application to all intergovernmental organisations, given the extent to which they vary. At one extreme, is the UN which has a wide sphere of operation. At the other extreme, an intergovernmental organisation may be created for only one activity with a finite life. This is in contrast to sovereign States who are legally competent in all areas of activity. Accordingly the functional necessity approach is a very appropriate one because it can be sensibly applied to any type of intergovernmental organisation, and its very basis is a recognition of the wide array of purposes and functions involved.

In step three a functional necessity analysis is used to determine the extent of organisational privileges and immunities. The author uses the concept of "official activities, strictly necessary" for the fulfilment of purposes and functions to limit privileges and immunities. He also addresses the difficult question of who should assess whether a given activity can be classified as an official activity or not. His conclusion is that it is for the organisation itself to conclusively determine this question. This proposition is problematic. The author relies on the general principle of good faith to impose a moral obligation upon the organisation to respect the domestic laws of its host State, and points out that immunity only means immunity from local jurisdiction, and not local laws. This leaves those dealing with the organisation in a very vulnerable position, as shown by the discussion of the *ITC* case below.

The author does go on to deal with the settlement of disputes regarding alleged abuse of immunities. This discussion includes the advisory jurisdiction of the ICJ, waiver and arbitration. He points out that suggestions for a claims court within an international organisation have yet to be implemented. The author considers the usual solution to this vexed question is the insertion of arbitration clauses in contracts between intergovernmental organisations and private individuals. While this is undoubtedly a logical and practical approach, the general lack of a judicial structure within the international legal system to assess legal issues relating to international organisations remains one of the biggest difficulties with this area of the law.

In Part Three the author uses the collapse of the ITC as a case study in which to apply the functional necessity theory developed throughout the book. There is discussion of the status of the ITC as an organisation and reference to its trading function. In contrast to State immunity law, this trading function qualifies, rather than disqualifies, the ITC for organisational immunities. He then looks at what immunities were granted to the ITC in its constituent documents, and the extent of those immunities.

For the reader who has spent time coming to grips with the basic principles of Bekker's theory, the *ITC* case study is somewhat disappointing. It is interrupted by lengthy references to other case studies which detracts from the impact of the consideration of the *ITC* case itself. The reader is not left with the feeling that Bekker's principles have been cemented in practical application. The *Maclaine Watson* case also demonstrates the peril of requiring individuals to rely on intergovernmental organisations to adhere to principles of good faith in exercising their privileges and immunities. The creditors did not have an arbitration clause in their loan agreements with the ITC, as recommended by the author. This no doubt was due in large part to the fact that creditors were entering into a transaction with an organisation created by sovereign States. They believed these sovereign States would act in accordance with principles of good faith, and ensure the organisation met its contractual obligations. It is unlikely that creditors dealing with intergovernmental organisations will take such an optimistic approach again.

The strength of this book is its laying out of a clear and flexible framework for the consideration of organisational immunity. It is a reasonably technical discussion, although it is also well illustrated by reference to practical examples, with particularly good use made of UN practice, and relevant work of the ILC. The author proposes several draft articles for inclusion in the founding documents of intergovernmental organisations, and in the documents regulating their relationship with third parties. In this way it is quite a practical guide for those creating and dealing with intergovernmental organisations.

The book does not propose anything essentially new, given that the ICJ has already clearly endorsed the functional necessity approach. Its real contribution is in developing and clarifying the principles. One of the book's weaknesses is acknowledged by the author. It does not provide any clear-cut answers, but rather it prescribes a formula. There will obviously be difficulties in its application in practice. A flexible body of rules is always accompanied by a degree of uncertainty. The theory will also be problematic in its application if it is not clear what the purposes and functions of the organisation are, or if they are so dynamic that they are impossible to define. While intergovernmental organisations are usually created for specific purposes, the UN is an example of a body that has been criticised for failing to have any clear direction or purpose.

The book is the seventeenth volume in a series of books on the legal aspects of international organisations and will be of considerable value to anyone interested in this topic. It is to be hoped that as a result of scholarly works such as this book by Peter Bekker, the "edifice" of international law (as referred to by Kerr LJ in the *Maclaine Watson* case), will be redeemed and in the future be able to provide the justice required in cases involving intergovernmental organisations.

Michelle Jarvis
LAW SCHOOL
UNIVERSITY OF ADELAIDE

Henry's Wars and Shakespeare's Laws: Perspectives on the Law of War in the Late Middle Ages

By Theodor Meron
(Clarendon Press, Oxford, 1993, 237 pp)

Professor Meron's book is not, as might be thought from its title, an exercise in antiquarianism or whimsy. On the contrary, it is a rigorous and scholarly examination of the principles and rules of the laws of war and of international humanitarian law, seen first through the prism of Shakespeare's *King Henry V,* then in contemporary relief, and finally measured against the present law. It is richly and meticulously researched and a great pleasure to read.

For the viewers of the Kenneth Branagh film version of Shakespeare's *King Henry V* a vivid sight is the soldier Bardolph hanging from the branch of a tree, executed by his own side for robbery from a church in occupied France, after the successful siege of Harfleur. The King ratifies the sentence in the following passage:

> We would have all such offenders so cut off:—and we give express charge that in our marches through the country there be nothing compelled from the villages, nothing taken but paid for, none of the French upbraided or abused in disdainful language; for when lenity and cruelty play for a kingdom the gentler gamester is the soonest winner. (Act III, scene 5).

A different side of Henry is seen at Agincourt when news is brought to him of the slaughter of the young English boys set to guard the baggage train in the rear, "expressly against the law of arms". Sighting the distant French cavalry, Henry exclaims:

> I was not angry since I came to France until this instant.—Take a trumpet, herald; ride thou unto the horsemen on yond hill: if they will fight with us, bid them come down, or void the field; they do offend our sight: if they do neither, we will come to them, and make them skirr away as swift as stones enforced from the old Assyrian slings: besides, we'll cut the throats of those we have; and not a man of them that we shall take shall taste our mercy. (Act IV, scene 7).

The first passage is the most eloquent and pungent justification for treating the civilian population of an enemy country with respect and fairness. The second is a grisly example of the power on the mind of atrocities and of the urge to avenge them by visiting equal or worse upon the heads of the wrongdoing side. For what Henry is proposing is not only that the English should put to death all their present prisoners, but also that they should give no quarter in the next battle.

King Henry V appears to have been first performed in 1599, although the definitive folio was not published until 1623. The play itself relates to Henry's expedition to France in 1415, and Shakespeare relied for his material on a number of accounts, including the chronicles of Holinshed and Edward Hall. The many references in the play, express or implied, to the laws of war and to the dictates of humanity are not ascribed to any particular authority but are based on Shakespeare's own understanding of the laws and usages of his time. This understanding may, however, have been drawn from the historians rather

than from contemporary lawyers. Meron doubts that Shakespeare was familiar with the writings on the law of war of Alberico Gentili (1552–1608), an Italian Protestant refugee who became Regius Professor of Civil Law in Oxford in 1587; or that he knew of the work on the laws of war by the Spaniard Balthasar Ayala, published in 1582. He was certainly not familiar with the writings of Grotius (1583–1645) whose great work *De Jure Belli ac Pacis* was first published nine years after Shakespeare's death.

International law plays a significant role in the play at a number of points. Meron's treatment skilfully identifies these points in the text, elaborates them in the light of the law and practice of the time, and then compares or contrasts them with the law of the present day.

The play is situated in the broader context of the Hundred Years War (1337–1453) between England and France in which the English kings claimed the throne of France by lawful succession. The arguments concerning that succession, on both sides, were detailed and protracted and nothing if not legalistic. This in turn raises the issue of the justness of the cause of war. Not only did the king carry the burden of conscience and ultimately of justifying himself before God for having taken his nation to war, but at that time soldiers were often denied the rights and privileges of combatant status if their cause (over which they had no control) were later held to be unjust. Henry V is shown in the first Act of the play seeking the unanimous advice of his counsellors and theologians that his cause was just. Nowadays the application of the laws of war and of international humanitarian law does not depend upon where right resides, but the law obliges and protects all combatants equally.

In his negotiations with France, Henry is shown to be conscious of the necessity of seeking a peaceful adjustment of their differences before resorting to war, or more exactly, of bringing to an end the truce then in force. The author explains the significance of negotiations, declarations of war, and of truces.

The incident of the siege of the French town of Harfleur by the English raises a number of issues relating to the treatment of enemy civilian populations of sharp present-day relevance. The town at first resisted capture, but later surrendered. The historians of the time recount the sack of the city and of deportations, although by the standards of the time these were not unduly severe. Shakespeare, however, puts Henry in a more favourable light, ascribing to him an order to his commanders to "use mercy to them all". (Act III, scene 2). Had the town resisted capture, sack, pillage and rape were to be expected and would be excused (by the opinion of the time). However, by Shakespeare's time legal opinion, including that of Shakespeare's contemporary Gentili, was already inclining very strongly in the direction of the modern law forbidding such acts against the civilian population and against civilian property and historic monuments.

An interesting chapter of Meron's book is devoted to the subject of medieval and Renaissance ordinances of war. These can be dated as far back as the 12th century and were issued by kings, princes, or commanders-in-chief in relation to particular campaigns. In most cases they restated the customary laws of war and the principles of chivalry, but may also have made stipulations particular to the

campaign. Although in many respects different from the laws of today, they have a two-fold significance. In the first place they represent a line of State practice and *opinio juris* constituting the material of which customary international law is made and developed. In the second place, they played a role similar to that of the rules of engagement of modern times, directing that the law be integrated with operational orders and providing for their enforcement. Many of these ordinances, for example, specifically prohibited the rape of women and prescribed death by hanging for offenders. In England a military court, presided over by the Lord High Constable and the Earl Marshal, had jurisdiction over offenders, although summary punishment was frequent in the field (as in the case of Bardolph in *King Henry V*). Ordinances also often prohibited the burning of crops, molestation of peasants and their animals, and depriving the civilian population of their means of sustenance. The Articles of War issued for the army of Scotland in 1643 contained recognition of a residual source of law, strikingly anticipatory of the Martens Clause of the preamble to the Hague Convention of 1899:

> Matters, that are clear by the light and law of nature, are presupposed; things unnecessary are passed over in silence; and other things may be judged by the common customs and constitutions of war; or may upon new emergents, be expressed afterward.

The situation of prisoners of war was rather different in Shakespeare's day. Prisoners were treated much like booty, and the richer and more aristocratic ones were ransomed for their release. Even though the actual captor had to split the proceeds with his captain and commander-in-chief, the monetary rewards of the ransom system usually ensured good treatment of prisoners. This makes all the more striking Henry's call for no quarter after the massacre of the boys at Agincourt, for his men were then deprived of their expectations. Later, in more extended wars, officers (but not ordinary soldiers) were offered parole by their captors. The historian Michael Glover, in his account of "the decline and fall of moderation in war" (*The Velvet Glove*), gives an amusing account of rich officers enjoying their parole in the salons of Paris with the wives of their enemies, and maintaining lavish apartments. Woe betide an officer who broke his parole and escaped home: more likely than not he would be sent back to captivity.

What impact did the *King Henry V* have at the time on the minds of the public, or on official opinion, so far as the laws of war were concerned? Professor Meron does not attempt to judge this. But it brings to mind the present urgent efforts of the Red Cross Movement, of military officers of enlightened countries, and of teachers of international humanitarian law, to disseminate the provisions of the Red Cross Conventions of 1949 and the Additional Protocols of 1977. Could one imagine today a popular play or film that could make these points as dramatically as Shakespeare's? Perhaps even a musical? "Ratko"?

Ivan Shearer
LAW SCHOOL
UNIVERSITY OF SYDNEY

The Iran-Iraq War (1980–1988) and the Law of Naval Warfare

Edited by Andrea de Guttry and Natalino Ronzitti
(Grotius Publications Ltd, Cambridge, 1993, xxiv and 573 pp)

This book is a fascinating documentary study of State practice during the Iran-Iraq war in so far as it related to naval activities in the Gulf of the belligerents and other States, and in particular those attempting to continue their normal maritime commerce in the region.

Most of the book is a collection of documents from Iran, Iraq, the United States, the United Kingdom, France, Italy, the Netherlands and Belgium. In the case of the non-belligerents, there are extensive collections of parliamentary papers, including minutes of debates, government declarations and orders, bilateral diplomatic notes and statements and letters to international and regional organisations. Documents from the belligerents are far more scanty and are predominantly letters to the United Nations, although the section on Iran also contains some national regulations and legislation. Towards the end of the book there is a section on documents relating to various international organisations, including the United Nations, NATO and the Western European Union. However, it should be pointed out that the collection of documents does not purport to be exhaustive, but concentrates on the most meaningful ones.

Although this is primarily a reference book, each section (including the documents from each country), is preceded by a commentary which assesses the practice of the State in question, in particular by reminding the reader of the political and commercial context in which the practice took place. Although each commentary is written by a different author, the styles do not differ too dramatically and therefore a fairly good overall view can be gained. In particular, most of the commentators refrain from making their own analysis as to the lawfulness of the activities or statements of the States and concentrate rather on describing the approach and views of the State in question. The only comment that could be made on the limits of the book is that most of the documentation relates to the practice of a few Western States and does not include, for example, any documentation from the USSR. However, this cannot be seen as a criticism in that the editors were inevitably limited by the possibilities open to them. Some of the views of other States can be seen in the section dealing with international organisations, in particular, the comments of the members of the United Nations Security Council, those of the Co-operation Council for the Arab States of the Gulf, and members of the European Community.

With regard to the legal issues that arose, these are well summarised in the general introduction to the book written by its editors. This introduction attempts to make an overall assessment of the reaffirmation or development of the law that can be seen from this State practice. However, this reviewer wonders whether the editors are not somewhat too positive in some of their assertions. For example, they indicate that practice confirms the belligerent right of visit and search as no one contested it and that mine-laying by belligerents

was accepted as long as it conformed with general principles of law, including notification. However, a perusal of the documentation indicates that the major concern of the Western nations was to ensure freedom of navigation and, in order to achieve this, they frequently escorted their merchant shipping and sent vessels to clear mines in international waters. Of course it is true that convoys were instituted not only to avoid visit and search but also to protect against attacks on merchant shipping which had become all too frequent. It is also the case that evidence points to mines being laid in contravention of the basic rules of international law. However, both the documentation and the commentaries stress throughout that the driving force behind the actions of the Western States was to protect their shipping and commerce, in particular their access to oil supplies. As far as the right to visit and search is concerned, it should also be pointed out that the United Kingdom particularly stressed that this was not an absolute right but was limited to the search for military supplies pursuant to the necessities of self-defence. Linked to this was the reaffirmation of these States of the illegality of closing straits to neutral traffic. With regard to the war zones (so-called "exclusion zones"), the editors point out that there were few protests made and that these protests concerned attacks outside these zones. Documentation on the zones is, however, relatively scanty. The same cannot be said for the practice of convoy for the protection of neutral shipping or the re-flagging practices which are extensively documented. There is also a certain amount of interesting material of States' view as to their neutrality and what this implied for their sales of weapons and for their attitude of impartiality.

Specialists of international humanitarian law will be disappointed to note a scarcity of any analysis of: the principle of distinction between protected vessels and others; whether certain vessels may be seen as military objectives or not; precautions in attack; the implementation of the Second Geneva Convention in relation to the shipwrecked or dead; or the treatment of captured persons, such as, for example, after the capture by the United States of the *Iran Ajr* for mine-laying (a letter by Iran denies that it was doing this). However, as one commentator remarked, this reflects the greater preoccupation of the States concerned with the protection of commerce than with humanitarian concerns. However, some documentation is included on the Iran Air Airbus which was shot down by the *Vincennes*, including part of the International Civil Aviation Organization report on the incident.

Both the editors and some of the commentators stress the importance of undertaking a clarification of the law of naval warfare, the editors suggesting a step-by-step approach, such as beginning with a treaty regulating the use of sea mines which they believe ought to be reasonably achievable. Since the completion of this book, a fairly thorough study has been completed by a group of international lawyers and naval experts in the form of a Manual with an accompanying commentary.[1] The Government of Sweden has proposed a new

1 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, and its accompanying "Explanation", published by Cambridge University Press, 1995. The experts were convened by the San Remo International Institute of Humanitarian Law, and the document was adopted in June 1994.

Protocol on naval mines to be added to the 1980 Convention on Certain Conventional Weapons[2] and they have asked for this to be considered at the Review Conference of this Convention to be held in Vienna in September-October 1995. However, it may well be that insufficient time will be given to this proposal as the Conference is expected to concentrate on amending the rules on the use of landmines.

In general, this reviewer considers this an excellent reference book for scholars wishing to explore State practice in order to help them make their own assessments as to applicable customary law. In this regard, the book is useful, not only for those interested in the law of naval warfare, but also for a study of other branches of international law, in particular, the law of the sea and neutrality law. It is also interesting for students of international law in that it will give them a practical look at the constituent parts of State practice, and in this regard many of the documents make fascinating and interesting reading.

*Louise Doswald-Beck**
SENIOR LEGAL ADVISER
INTERNATIONAL COMMITTEE OF THE RED CROSS

International Environmental Law

By Alexandre Kiss and Dinah Shelton
(Transnational Publishers Inc, New York, 1991, xxxiv and 541 pp)

Basic Documents of International Environmental Law

Edited by Harald Hohmann
International Environmental Law and Policy Series (Graham & Trotman/Martinus Nijhoff, London, 1992, 3 vols, xxxii, xxii, xiii and 1850 pp)

The introduction to Kiss and Shelton describes international environmental law as "the newest branch of international law" and as comprising "those international juridical norms whose purpose is to protect the environment" (p 1). In both Kiss and Shelton (p 2) and Handl's foreword to Hohmann's collection of documents (p xvii) reference is made to the complexity of the problems facing humankind, noting that it is only in the past 25 years that we have become aware of the urgency of the need to protect the biosphere from the degradation that human conduct is causing. Both books, in different ways, demonstrate the steps that have been taken to address these problems.

The point is made that the area is one of rapid expansion which has put it "into the forefront of the development of international law in general"

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2 Full title "Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects".

* The opinions expressed in this review are those of the author and do not engage the responsibility of the ICRC.

(Hohmann, p xvii), "ultimately...pushing towards a transformation of the fundamental basis of international law" (Kiss and Shelton, p 2). It is certainly true that many traditional views and approaches of international legal regulation are of limited value in the environmental area, but the same could be said of, for example, the field of economic activity. In both cases, the difficulties that have to be dealt with, although having causes and effects within national borders, arise primarily on a global scale, or at least require global solutions.

There is of course a closer link between economic factors and the environment than similarities of law creation (principally the "soft law" option). This connection is more difficult to make in a collection of texts, yet Hohmann makes the attempt in the valuable introductions he provides to the two Parts into which these three volumes are divided, prefacing the relevant passages in the Introduction to Part 1 with extracts from the ILA "Seoul Declaration"[1] (p 7). Economic issues are mentioned or addressed in various segments of Kiss and Shelton, particularly that on "Economic Development and the Environment" (pp 48–54), but they do not emerge as a major obstacle to environmental protection (which they undoubtedly are in many areas of attempted regulation).

One of the difficulties in teaching international environmental law is the fact that only some students will have studied international law. Those who have, will already have a sufficient knowledge of sources theory to cope with the range of texts forming part of the relevant building materials of the rules of international law. On the other hand, for students with no prior knowledge of such matters, some treatment of sources is necessary. How this topic is dealt with is very much open to personal inclination and so perhaps it would be unjust to be too critical of Chapter IV of Kiss and Shelton on "The Sources of International Environmental Law" (pp 95–113). Nevertheless, it would not be easy to work out the effects of isolated judicial decisions, various statements of principle or of rules, some non-binding, others obligatory at least for States party to the instrument in question, and so on, from the discussion in that chapter.

This problem appears in other contexts. For example, Chapter V, "International Common Law of the Environment", has much in it to appreciate: the section on "The Traditional Approach: Transfrontier Pollution" (pp 116–44) gets the chapter away to a good start, though it overemphasises *Trail Smelter* (pp 122–25) and also the litigation in the Netherlands involving the Alsace potassium mines (pp 126–29). Although *Trail Smelter* is described by Kiss and Shelton as affirming "the existence of a rule of international law forbidding transfrontier pollution" (p 125), they later refer to Stockholm Principle 21 as formulating "the fundamental principle" (p 129) and point out that, though "part of a nonbinding text", it is "today...generally recognised as having become a rule of customary international law" (p 130) on the basis of State practice and *opinio juris* (p 131).

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1 "Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order 1986" *ILA Report of the 62nd Conference*, Seoul 1986.

The second part of Chapter V, "Towards Global Norms" (pp 144–54) demonstrates one of the principal obstacles to a coherent statement of the law, the very uncertainty of the situation. What are the uninitiated to make of this passage (p 144)?:

> In a lesser amount and certainly at a less advanced stage than for transfrontier pollution, international legal principles for the protection of the environment are in the process of emerging. For the most part, these principles appear piecemeal but regularly in texts and in international practice. However, increasingly general legal formulations should apply, both within the territory of states, whether or not there are transfrontier effects and in zones outside national jurisdiction.

Whether one uses the epithet "soft" (or not, as with Kiss and Shelton who plump for "nonbinding"), there is a need to discriminate between various types of "soft" law and, where in the case of binding or "hard" instruments, to weight them according to the degree of acceptance amongst members of the international community. Perhaps the best method of dealing with the problem in any textbook is to state the relevant principle and then to indicate which States are bound to apply it by conventional obligation, which have no more than participated in a declaration as to its existence, and what overall is the evidence for its emergence as a customary norm. On a smaller scale, this could have been possible in Hohmann's *Basic Documents* but the introductory comments are often too dense to be helpful (see for example the reference to the Stockholm Declaration containing the "'basic rules' of modern international environmental law in a 'soft' manner" (p 2), and to "the development of the duty to early consultations and regular information...which today might be regarded as part of *jus cogens*" (p 3)).

The central chapter of Kiss and Shelton, "Regulation of Environmental Sectors" (pp 155–305), commences with a brief section on "Legal Techniques Common to Different Sectors" (pp 155–59), identified as licensing, lists and standard setting. The sectors dealt with are the marine environment (pp 159–202), inland waters (pp 202–27), the air (pp 227–39), and wildlife (pp 239–305). This part of the book is in many respects the most rewarding from the student's point of view as it includes a good deal of background information as well as references to relevant legal materials.

Chapter VII ("Transsectoral Problems"), is mainly concerned with toxic or dangerous products (pp 308–12), toxic or dangerous wastes (pp 313–28) and radioactive wastes (pp 337–39). These encompass some intractable problems, the seriousness of which is barely more than recognised by Kiss and Shelton. In relation to some substances there is no real safety, most notably the case of high level radioactive wastes from nuclear power plants which are accumulating in national containment areas with no solution to the problem available. Yet the authors skate over the issue by stating (p 337):

> It is therefore important to regulate the discharge of nuclear matter into the environment. In most cases the disposal of radioactive wastes is accomplished within a state's borders. Thus, the principal question posed on the international law level is the immersion of radioactive waste in the sea.

The final substantive chapter, "Breaches of International Environmental Law and Liability for Environmental Harm" (pp 347–75), deals with both State responsibility and private law liability, though the latter is somewhat disguised under the general heading of "The Problem of Compensating Victims". Kiss and Shelton do deal under separate headings with difficulties in implementing State responsibility (pp 350–60), though certain factors could perhaps be given greater emphasis. For example, there is a reference to the fact that "certain activities which cause or risk causing harm are not deemed illegal, because their benefits outweigh the risks of harm" (p 350). This point could better be illustrated by the work of the International Law Commission on international liability for injurious consequences arising out of acts not prohibited by international law, which is given only a passing reference (p 63). The debates in the Commission and external criticisms of this activity demonstrate the conflicting interests and also the extent to which the concept of "acts not prohibited" might detract from existing rules of State responsibility. In particular, objections have been voiced to the concentration on environmental matters and to the failure to appreciate the problems of developing countries in controlling the activities of transnational corporations operating in their territory.

Although Kiss and Shelton incorporate as appendices the texts of various international instruments, the range of such documents is now so extensive that any brief selection is bound to be of limited value. It is almost essential for any student as well as teacher to have access to a much larger number of treaties and declarations dealing with environmental matters. It is on this basis that Hohmann's choice provides an adequate and illuminating coverage of both the relevant conventions and soft law instruments.

The format of Hohmann's *Basic Documents* is to include the soft law instruments in Part I which is contained in Volume I. Part 2 incorporates what are referred to as "The Important Agreements", divided between various water regimes (seas, rivers and lakes) in Volume 2; with nature (including species), soils (including wastes), air and the atmosphere, and various Earth Summit documents in Volume 3. Although the present reviewer had the reaction that the introductions to Parts 1 and 2 could have been more substantial, though simpler, guides to the collected material, a vote of appreciation is recorded for the collection itself. The main conventions and other documents are all present and it is only in areas where the available documents are more extensive (for example, regional river or lake regimes) that selections have been necessary.

The real problem with international environmental law, which is described as expanding or growing rapidly (Hohmann p xvii; Kiss and Shelton p xxxi), is that a book within that field is likely to show signs of age even by the publication date. At least a textbook can be produced in a new edition, provided there is a sufficient market for the existing edition. In the case of Hohmann's collection, a Volume 4 is possible as long as there is sufficient new material of importance to justify such a step. Given the quality of both these products, one can reasonably look forward to both events with pleasure.

DW Greig
FACULTY OF LAW
AUSTRALIAN NATIONAL UNIVERSITY